BRIEF OF *AMICI CURIAE*
SIERRA CLUB AND EARTHRIGHTS INTERNATIONAL

INTRODUCTION

This case involves Appellee Freeport-McMoRan's (Freeport) pervasive human rights abuses and massive environmental degradation at its Grasberg mine in Indonesia. Appellant Tom Beanal, a leader of the Amungme people, filed suit in the US District Court for the Eastern District of Louisiana under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, alleging that Freeport committed human rights abuses and environmental torts against him and his people in violation of customary international law. The district court dismissed the case, concluding that environmental torts are not recognized violations of international law, *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 373, 382- 84 (E.D. La. 1997), and that Beanal's allegations were not sufficiently specific to state a claim. Order, March 3, 1998 at 7-8. Beanal has appealed these rulings. Amici only address the adequacy of the environmental claim.

Beanal alleged that Freeport has caused widespread, long-term and extremely severe damage to the natural environment of his homeland. This damage has threatened the lives and health of his entire tribe through exposure to toxic chemicals, pollution of their only sources of food and water, and destruction of their lands. *Beanal,* 969 F. Supp. at 362; Second Amended Complaint, paras. 23, 27. The scope of the harm is enormous. Freeport's mine is enormous, allegedly encompassing an area of 2,890 square kilometers. Third Amended Complaint, para. 12. Freeport allegedly dumps 160,000 tons of tailings into the local waterways each day. *Id.* para. 13. It has destroyed entire rivers and lakes; polluted ground and surface water with acid mine drainage and heavy metals toxic to humans; and contaminated surface water with huge amounts of

sediment. Freeport has devastated large tracts of forest and diverted rivers from their natural courses. It has also filled extensive portions of several valleys with as much as 3 billion tons of waste rock that will lead to even more extensive toxic runoff and is likely to create dangerous landslides. Complaint, paras. 24-40; Third Amended Complaint, paras. 13-15. As explained below, harms of this magnitude are actionable under the ATCA.[1]

SUMMARY OF ARGUMENT

The District Court erred in concluding that customary international law does not prohibit Freeport's alleged environmental practices. International law recognizes a right to a healthy environment, which is supported by the internationally-recognized rights to life and health. International law makes clear that the massive discharge of hazardous materials into the environment violates these rights.

Even during war, the right to a healthy environment prohibits causing long-term, widespread and severe harm to the environment. This minimum standard provides sufficient criteria by which a court can ascertain whether Freeport has violated Appellant's right to a healthy environment. The right is obligatory, universally accepted and definable, and is therefore actionable under the ATCA. In addition, environmental damage on the scale prohibited in war constitutes an inhumane act cognizable under the ATCA as a crime against humanity. Although many international claims require that the perpetrator be a state actor, claims for environmental torts do not because massive environmental damage is of international concern even if caused by a

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[1] Beanal's claims concerning Freeport's torts are not exaggerated. The US EPA has noted that mining activities typically cause the harms alleged by Beanal. *See EPA Office of Compliance Sector, Notebook Project, Profile of the Metal Mining Industry* 26-31 (US EPA Office of Enforcement and Compliance Assurance, Sept. 1995).

private party and because crimes against humanity do not require state action. In any event, Beanal has adequately alleged state action. Because Beanal has alleged long-term, widespread and severe harms, he should be allowed to proceed with his environmental claims.

ARGUMENT

THE DISTRICT COURT ERRED BY DISMISSING BEANAL'S CLAIM FOR ENVIRONMENTAL TORTS

I. STANDARD OF REVIEW

This Court reviews *de novo* dismissal of an action for failure to state a claim. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995). Dismissal is improper unless the plaintiff could not recover under any set of facts he could prove in support of his claims. *Id.*

II. THE DISTRICT COURT ERRED BY FAILING TO RECOGNIZE THAT FREEPORT'S ENVIRONMENTAL TORTS VIOLATE THE LAW OF NATIONS

The Alien Tort Claims Act, 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

To maintain a claim under the Alien Tort Claims Act, a plaintiff must show that (1) he is an alien, (2) suing for a tort, (3) committed in violation of international law. *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996). Beanal, a national of Indonesia, is an alien. His claims are clearly for torts. As the following discussion demonstrates, Freeport's actions violate international law.

A. <u>The Law of Nations Recognizes a Right to a Healthy Environment</u>

"[C]ourts ascertaining the content of the law of nations must interpret international law not as it was in 1789 [when the ATCA was enacted], but as it has evolved and exists among the nations of the world today." *Kadic*, 70 F.3d at 238 (quotation omitted). Courts find the norms of contemporary international law

> by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.

Kadic, 70 F.3d at 238 (quotation omitted). Courts have recognized that the formal expression of nations' understanding of international law -- as expressed in widely-ratified international agreements and declarations -- constitutes a persuasive source of international law. *See, e.g.*, *Filartiga v. Pena-Irala,*, 630 F.2d 876, 883 (2d Cir. 1980). As the district court correctly noted, *Beanal*, 969 F. Supp. at 370, a norm qualifies as customary international law actionable under the ATCA if it is universal, obligatory and definable. *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

Current sources of international law demonstrate that a universal, obligatory and definable norm prohibits causing widespread, long-term and severe harm to the environment. This prohibition arises out of the internationally recognized right to a healthy environment, and is derived from the rights to life and health.

1. The International Legal Protection of the Right to a Healthy Environment Is Universal[2]

In 1994, the United Nations Special Rapporteur on Human Rights and the Environment issued her final report. In consultation with seventeen other internationally-renowned jurists, and based on an exhaustive examination of "some 350 multilateral treaties, 1,000 bilateral treaties and a multitude of instruments of intergovernmental organizations" addressing environmental and human rights concerns, she concluded that, under current customary international law, "[a]ll

[2] To prevent repetition, this section does not refer to most of the evidence of international law cited in Section A.2 on the obligatory nature of these legal principles. Nevertheless, all of the agreements, judicial decisions and expert opinions cited there support the universal nature of the international law at issue in this case and, for the most part, *vice versa*.

persons have the right to a secure, healthy and ecologically sound environment." *Human Rights and the Environment: Final Report by Mrs. Fatma Zohra Ksentini, Special Rapporteur* at 8, 79-80, Annex I, princ. 2, U.N. ESCOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/Sub.2/1994/9 (1994) (hereafter *Ksentini Final Report*). There is substantial legal support for this right.

As early as 1972, the nations of the world recognized that the right to a healthy environment is a principle of customary international law. In that year, 114 nations, including the United States, declared their "common conviction" that humankind "has the fundamental right to . . . an environment of a quality that permits a life of dignity." United Nations Conference on the Human Environment, Stockholm Declaration on the Human Environment, June 16, 1972, princ. 21, U.N. Doc. A/Conf.48/14, *revised by* U.N. Doc. A/Conf.48/14/Corr.1 (1972), 11 I.L.M. 1416 (1972).

Early this decade, the international community reaffirmed its recognition of the right to a healthy environment when the UN General Assembly adopted by consensus a resolution recognizing that "all individuals are entitled to live in an environment adequate for their health and well-being." G.A. Res. 45/94, U.N. GAOR, U.N. Doc. A/45/749 (Dec. 14, 1990). Two years later, the right was again reaffirmed in the Rio Declaration on Environment and Development, which unanimously acclaimed that "[h]uman beings . . . are entitled to a healthy and productive life in harmony with nature." Rio Declaration on Environment and Development, princ. 1, June 13, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874 (1992) (hereafter Rio Declaration).

The Rio Convention was the largest gathering of nations ever held. More than 178 nations, including the United States, signed the Declaration, which 137 nations have since ratified.[3]

Regional international agreements also recognize the right to a healthy environment. For example, the Banjul [African] Charter on Human and Peoples' Rights provides that "[a]ll peoples shall have the right to a generally satisfactory environment favorable to their development." Banjul Charter on Human and Peoples' Rights, June 26, 1981, art. 24, 21 I.L.M. 58, 63 (1982) (50 nations have signed). In the Americas, the Protocol of San Salvador provides that "[e]veryone shall have the right to live in a healthy environment." Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, *opened for signature* Nov. 14, 1988, art. 11, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989). In the North American Agreement on Environmental Cooperation, Canada, Mexico and the United States explicitly reaffirmed their acceptance of the principles of the Stockholm and Rio Declarations. Sept. 13, 1993, U.S.-Can.-Mex., pmbl., 32 I.L.M. 1480 (1993).

The status of the right to a healthy environment as customary international law is also established by "judicial decisions recognizing and enforcing" the right. *Filartiga*, 630 F.2d at 880. Courts in numerous countries have recognized and enforced the right to a healthy environment. *See, e.g.*, *Minors Oposas v. Secretary of the Dep't of Env't and Nat. Resources*, 33 I.L.M. 173 (S. Ct. Philippines 1994) (timber licenses implicate right to healthy environment, which "belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation") *quoted in Ksentini Final Report* at 93; Constitutional Chamber of the Supreme Court

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[3] In 1994, 115 nations, including the United States, "[r]eaffirm[ed] the Rio Declaration." UN Convention To Combat Desertification In Countries Experiencing Serious Drought And/Or

(Costa Rica), Vote No. 3705, July 30, 1993 (placing dump in the plaintiffs' neighborhood violated right to healthy environment), *quoted in Ksentini Final Report* at 92.

The practice of nations is also indicative of customary international law. *Filartiga*, 630 F.2d at 880. More than 60 nations have adopted constitutional provisions recognizing the right to a healthy environment. *Ksentini Final Report*, Annex III, 81-89. In addition, the constitutions of 31 U.S. states and Puerto Rico make reference to the environment or natural resources; eight of these provide for environmental rights. Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 Stan. Envtl. L.J. 338, 355-56 (1996). Moreover, nearly all nations have enacted laws to protect the environment. Judicial decisions implementing these protections, such as those described in this brief, further demonstrate national practice recognizing the right to a healthy environment. The host of U.S. laws designed to protect the environment contributes to international practice underlying the right to a healthy environment. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995) (where U.S. law overlaps international norm, it is part of consensus supporting the norm).

The universal nature of the right to a healthy environment is further supported by international law's protection of the internationally-recognized rights to life and health, which are "at the basis of the *ratio legis* of international human rights law and environmental law." A. Cançado Trinidade (Judge, Inter-American Court of Human Rights), 13 *Revista del Instituto Interamericano de Derechos Humanos* 35, 36 (1991). These rights are universally recognized. *See, e.g.,* Universal Declaration of Human Rights, arts. 3, 25, G.A. Res. 2625 (XXV), 25 U.S. GAOR Supp. (No. 28), UN Doc. A/8028 (Oct. 24, 1970); International Covenant on Civil and

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Desertification, Particularly In Africa, June 14, 1994, pmbl., U.N. Doc. A/AC.241/15/Rev.7.

Political Rights (ICCPR), art. 3, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by 138 nations, including United States); International Covenant on Economic, Social and Cultural Rights, art. 12 (life), Dec. 16, 1996, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3 (135 nations are party) (health, noting relationship to environment). Moreover, the right to life is peremptory; derogation is prohibited even in national emergencies. ICCPR, *supra*, art. 4.2.

International agreements recognize that environmental degradation violates these rights. *See, e.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, U.N. Doc. UNEP/IG.80/3, 28 I.L.M. 657, (1989) (entered into force May 5, 1992) (113 nations party; United States has signed) (recognizing hazardous wastes as "growing threat" to human health and environment); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 6, 1987, S. Treaty Doc. No. 100-10, 26 I.L.M. 1541 (1987), *as amended* 30 I.L.M. 537 (1991) (entered into force Jan. 1, 1989) (112 parties, including United States) ("[W]orld-wide emissions of certain substances can . . . result in adverse effects to human health and the environment."). International and domestic courts have recognized the same. *See, e.g.*, *EHP* and *Yanomami* cases, Section II.A.2. *infra*; *Fundepúblico v. Mayor of Bugalagrande*, Constitutional Court of Colombia, Sentencia Junio de 1992, Expediente T-101 at 9, 13 (operation of plant posing significant risk to environment would violate right to life); *Subhash Kumar v. State of Bihar*, Supreme Court of India, 1991 A.I.R. 420 (The "right to life . . . includes the right of enjoyment of pollution-free water and air."); *Human Rights Case (Environment Pollution in Baluchistan),* 1994 P.L.D. 102 (Sup. Ct. of Pakistan) (dumping nuclear waste in coastal areas could violate right to clean environment, included in right to life).

As the preceding discussion (and the sources cited below) demonstrates, customary international law universally recognizes that massive environmental harm violates the right to a healthy environment, both *per se* and derivatively through the rights to life and health.

2. The International Legal Protection of the Right to a Healthy Environment Is Obligatory

The right to a healthy environment is a binding legal obligation; it is not merely hortatory. In the words of one respected jurist, "[s]tates and other responsible entities (corporations or individuals) may be criminally or civilly responsible under international law for causing serious environmental hazards posing grave risks to life." B.G. Ramcharan, *The Right to Life*, 30 Neth. Int'l L. Rev. 310-311 (1983). Numerous international agreements establish the obligation not to cause serious harm to the environment or human life or health through the discharge of toxic wastes. For example, the Basel Convention recognizes the obligation of hazardous waste managers to prevent or minimize the consequences of pollution due to hazardous wastes. *Supra,* art. 4.2(c). The International Convention on Civil Liability for Oil Pollution Damage provides that the "[o]wner of a ship . . . shall be liable for any pollution damage caused by oil." Nov. 29, 1969, pmbl., art. III, 1975 U.N.T.S. 4, 9 I.L.M. 45 (1970) (entered into force June 19, 1975) (92 states ratified; United States has signed). *See also*, Convention on the Prevention of Marine Pollution By Dumping Of Wastes And Other Matter, Dec. 29, 1972, art. 1, 1046 U.N.T.S. 120, 26 U.S.T. 2403, T.I.A.S. No. 8165, 11 I.L.M. 1294 (1973) (entered into force Aug. 30, 1975) (limiting introduction of matter "liable to create hazards to human health"). The UN Human Rights Commission considers the obligation sufficiently well established that it decided to identify annually the transnational corporations engaged in the "heinous act" of illicitly dumping toxic wastes." Res. 1995/81, U.N. Hum. Rts. Comm., U.N. Doc. E/CN.4/1995/1.47 (Feb. 15, 1997).

Regional agreements also establish that the right to a healthy environment is obligatory. In Europe, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, makes "the operator [of a polluting facility] liable for damage caused by the activity." Council of Europe, June 21, 1993, pmbl., arts. 2(2), 6(1), 32 I.L.M. 1228-33 (1993). In Africa, the Bamako Convention makes the illegal transboundary movement of hazardous waste a crime, and imposes joint and several liability on generators of hazardous wastes within states. Organization of African States, Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, *opened for signature* Jan. 30, 1990, arts. 4(1), 4(3)(b), 30 I.L.M. 773 (1991) (signed by 22 nations).

International tribunals have enforced the obligation not to cause serious environmental harm. The UN Human Rights Committee has recognized that such harm is a valid cause of action under the ICCPR. In *EHP v. Canada*, the Committee determined that an individual stated a *prima facie* claim of a violation of the right to life when she alleged large scale, life-threatening pollution resulting from the dumping of nuclear wastes. Communication No. 67/1980, *in* United Nations, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 20, U.N. Doc. CCPR/C/OP/2 (1990), *described in Human Rights and the Environment, Second Progress Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, July 26, 1993, para. 78, U.N. Doc. E/CN.4/Sub.2/1993/7. *See also Yanomami Indians v. Brazil*, Inter-American Commission on Human Rights (IACHR), IACHR Res. No. 12/85, Case 7615, Mar. 5, 1985, *reprinted in* Annual Report of the IACHR 1984-85, OEA/Ser.L/V/II.62, Doc. 10 rev. 1, Oct. 1, 1985 (harm arising from mining activities violates article I (right to life) and article XI (right to

health) of American Declaration of the Rights and Duties of Man, May 2, 1948, Res. XXX, O.A.S. Off. Rec. OEA/Ser.L/V/II.23/Doc.21 rev. 6 (1979)).

The obligation not to violate the right to a healthy environment has been recognized as applying even during wartime. The 1977 Protocol to the 1949 Geneva Conventions prohibits "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, art. 35(3), U.N. Doc. A/132/144, 16 I.L.M. 1391 (entered into force Dec. 7, 1978) (148 state parties; United States has signed but not ratified); *see also id.,* art. 55(2) ("Attacks against the natural environment by way of reprisals are prohibited."). The UN Security Council indicated its acceptance of these principles as norms of customary international law in 1991 when it imposed liability on Iraq "under international law for any . . . environmental damage and the depletion of natural resources" arising out of Iraq's conduct in Kuwait. U.N. Security Council Resolution 687, U.N. SCOR, Apr. 3, 1991, U.N. Doc. S/RES/687, 30 I.L.M. 846 (1991).

The preceding discussion demonstrates that the customary international legal prohibition against causing massive harm to the environment and human life and health is obligatory.

3. The International Legal Protection of the Right to a Healthy Environment Is Definable

To be actionable under the ATCA, an international norm must be definable. *Xuncax*, 886 F. Supp. at 184. This does not mean that every aspect of what might comprise the norm must be universally agreed upon before a cause of action is cognizable under the ATCA. *Id.* at 187.

Rather, there need only be universal agreement that the specific conduct alleged violates international law. *Id.* Thus, this Court need only consider whether environmental abuses of the magnitude Beanal alleged are prohibited by international law. Because such harms are clearly banned -- even under the strictest definition of the right -- the district court erred in concluding that Beanal's claim for environmental torts is not actionable.

International law recognizes that certain emergencies, such as war, may justify restricting some rights. *See* ICCPR, Art. 4 (parties may violate some Convention norms during public emergency). Even during the exigencies of war, however, international law bans extreme environmental abuses. The widely ratified Protocol Additional (I) to the Geneva Conventions of 1949 prohibits means of warfare that "may be expected to cause [widespread, long-term and severe damage] to the natural environment and thereby to prejudice the health or survival of the population." Art. 55(1), 35(3), 16 I.L.M. 1391. (signed by U.S., in force 7 December 1978). *See also* Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD Convention"), Dec. 10, 1976, 31 U.S.T. 333; 1108 U.N.T.S. 152, Art. I(1) (prohibiting environmental modification techniques having widespread, long-lasting or severe effects). Because the application of many international norms may be suspended in war, wartime protections can be considered the minimum that international law provides. Thus, the peacetime right to a healthy environment prohibits -- *at a minimum* -- environmental abuses that inflict widespread, long-term and severe environmental damage.

Beanal has stated a claim under any definition of "long-term, widespread and severe." For example, the U.S. Army counsels its judge advocates that "long-term" is best interpreted as decades, "widespread" as several hundred square kilometers, and "severe" as prejudicing the

health or survival of the population. International & Operational Law Dep't., U.S. Army, *Operational Law Handbook* 5-8 (1995), http://carlisle-www.army.mil/usacsl/org/pki/legal.htm. This definition is extraordinarily narrow. In comparison, the ENMOD Convention defines "long-term" as approximately a season, and "severe" as harm to human health or "significant disruption to natural or economic resources." *Understanding Related to Art. 1, Report of the Conf. of the Committee on Disarmament,* U.N. GAOR, 31st Sess., Supp. No. 27 at 91-92, U.N. Doc A/31/27 (1976).

Beanal has clearly alleged that Freeport knowingly caused widespread, long-term and severe damage to the environment, even under the Army's strict definitions. The Grasberg mine allegedly encompasses thousands of square kilometers. Third Amended Complaint, para. 12. It has damaged this area in numerous ways, including the destruction of 50 square kilometers of forest, Complaint at para. 31, the hollowing of entire mountains, and the poisoning and rerouting of rivers. *Beanal,* 969 F. Supp. at 382. Obviously, the devastation will last for decades. Moreover, Beanal has alleged that this damage is severe in that it has caused health problems and starvation. *Id.* at 383. Because Beanal has met even the strictest definition of violation of the right to a healthy environment, the district court erred in rejecting Beanal's environmental tort claim.

B. The Environmental Abuses Beanal Alleges Are Cognizable Under the ATCA as Crimes Against Humanity

Beanal's environmental claim is also actionable because the environmental abuses alleged constitute a crime against humanity. The Nuremburg Trials established beyond doubt that crimes against humanity are universal, obligatory and definable customary law. *See The Nurnberg Trial,*

6 F.R.D. 69, 107 (Int'l. Milit. Trib. 1946) (Nuremburg Charter prohibiting crimes against humanity is expression of international law existing at time of its creation); *In re Flick and Others*, 14 Int'l. L. Rep. 266, 268 (U.S. Milit. Trib. 1947) (Control Council Law No. 10 prohibiting crimes against humanity is statement of international law existing at time of Nazi atrocities). Moreover, crimes against humanity can be committed during peace as well as war. ILC Draft Code of Crimes Against the Peace and Security of Mankind ("ILC Draft Code"), Art. 18, Commentary (6); U.N. Doc. A/CN.4/L.532 (1996).

Crimes against humanity include "inhumane acts committed against any civilian population" and persecutions on racial grounds. Control Council Law No. 10, Art. II(1)(c), *reprinted in* M. Cherif Bassiouni, *Crimes Against Humanity in International Law* 590-91 (1992); Nuremberg Charter, Art. 6(c), *quoted in The Nurnberg Trial*, 6 F.R.D. at 130. It extends the norm prohibiting war crimes to acts committed against nationals of the same state as the perpetrators. Bassiouni, *Crimes Against Humanity in International Law*, *supra* at 179. Therefore, the laws of war are relevant in ascertaining the content of crimes against humanity. *See id.* at 320 (detailing "inhumane acts" constituting crimes against humanity by reference to war crimes). The Geneva Conventions' prohibition on massive environmental harms that prejudice the health or survival of the population demonstrates that such harms are prohibited in part because they are inhumane. *See* Protocol Additional (I), *supra*, art. 55(1). Beanal has therefore clearly alleged inhumane acts committed against a civilian population, the Amungme people. Moreover, "racial persecution" includes discrimination that violates fundamental rights and seriously disadvantages the group. ILC Draft Code, Art. 18. Beanal alleged that Freeport's environmental harms are purposefully directed at his ethnic group and threaten the very lives of

group members. Third Amended Complaint, para. 25. Thus, the environmental abuses alleged constitute crimes against humanity.

III. THE DISTRICT COURT ERRED BY DISMISSING BEANAL'S CLAIM FOR FAILURE TO DEMONSTRATE STATE ACTION

A. <u>Massive Environmental Harm Is Actionable Without Showing State Action</u>

Although many international torts require that the perpetrator be a state actor, certain acts violate the law of nations even when committed by a private actor. *Beanal*, 969 F. Supp. at 371 (*citing Kadic*, 70 F.3d at 239 (genocide)). Claims for massive environmental damage do not require state action. There is an international consensus that private individuals should be *criminally* punished for at least some conduct harmful to the environment. Stephen C. McCaffrey, "Crimes Against the Environment," *in* M. Cherif Bassiouni, ed., *International Criminal Law: Crimes*, 541, 560 (1986). Moreover, private actors are forbidden from causing the kinds of harm Beanal alleged even during war. Section II.A.2 *supra*; *Kadic*, 70 F.3d at 243 (war crimes do not require state action).

State action is typically not required where a private party's action is of international concern. Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress For Indigenous Victims of Multinational Corporations*, 20 Suffolk Transnat'l L. Rev. 335, 393 (1997). Numerous international agreements establish individual liability for harm to the environment. *See, e.g.*, Basel Convention, *supra*, art. 4.2(c) (focusing on responsibility of "persons" managing hazardous waste); International Convention on Civil Liability for Oil Pollution Damage, *supra,* art. III (owners of polluting ships liable); Convention on Civil [Environmental] Liability (Europe; operators of polluting facilities liable); Bamako Convention, *supra*, art. 4 (waste generators liable); UN Res. 1995/81, *supra* (requesting list of "transnational corporations" engaged in dumping dangerous wastes). International environmental instruments

also demonstrate that the environment is of universal concern to the international community, even when harms do not cross international borders. *See, e.g.*, Stockholm Declaration, *supra*, princ. 2 (requiring safeguarding of representative samples of ecosystems); Section II.A.1 *supra*, establishing right to a healthy environment. Because international concern focuses on the injury to the environment and not on the actor, it is clearly implicated regardless of whether state action is involved.

State action is also not required because the environmental harms alleged by Beanal constitute a crime against humanity. That abuse does not require state action. Control Council Law No. 10, Art. II(2), *reprinted in* Bassiouni, *Crimes Against Humanity in International Law*, *supra* at 591 (prohibition applies to "[a]ny person, without regard to. . . the capacity in which he acted."). *See also Kadic*, 70 F.3d at 240 (recognizing U.S. government's view that violations of humanitarian law do not require state action). Beanal's claims for environmental harms should proceed even if Freeport is not a state actor.

B. <u>Beanal Adequately Alleged that Freeport Is a State Actor</u>

Beanal's claims are actionable even if this Court were to determine that they require state action, because his Third Amended Complaint adequately alleges that Freeport is a state actor. In determining whether Freeport is a state actor, the district court was correct in applying the color of law jurisprudence applicable to 42 U.S.C. §1983. *Beanal*, 969 F. Supp. at 375. This Court must reverse the district court's dismissal unless there are no facts that Beanal could prove that would support his claim. *Crowe*, 43 F.3d at 203. Beanal's state action allegations easily meet this standard.

A private defendant, "jointly engaged with state officials in the challenged action, [is] acting under color of law." *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). In its April 10, 1997, Order, the district court rejected Beanal's "joint-action" allegation because it found that Beanal did not specifically allege that military personnel participated in Freeport's violations. *Beanal*, 969 F. Supp. at 378-80. Beanal's Third Amended Complaint alleged such participation. Third Amended Complaint, paras. 7, 33-36.[4] This is clearly sufficient to meet the joint action test. *See Doe v. Unocal Corp.*, 963 F. Supp. 880, 890-91 (C.D. Cal. 1997) (allegations that Unocal jointly engaged in human rights violations committed by state in furtherance of joint venture adequate to survive motion to dismiss).

Under the "nexus" test, a private party is a state actor if the state has provided such significant encouragement to the private party that its private decision was in fact the state's. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The court rejected Beanal's "nexus" argument, like his "joint-action" argument, for failing to allege involvement by the Indonesian military. *Beanal*, 969 F. Supp. at 378. In addition to the fact that Beanal has now alleged such participation, Third Amended Complaint, paras. 33-36, he has also alleged that Indonesia is a major shareholder in the mine. *Beanal*, 969 F. Supp. at 379. Indonesia's participation in abuses designed to suppress opposition to massive environmental damage clearly encourages Freeport to operate the mine in a manner causing such damage.

Beanal's allegations of state action are sufficient under either of these tests.

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[4] The District Court's March 3, 1998, Order dismissing Beanal's case for failure to provide sufficient detail about the alleged violations did not address whether Beanal's Third Amended Complaint adequately alleged state action. Rather it noted that the state action allegations did not provide the information it found lacking. Order at 4.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the district court dismissing Beanal's case for failure to state a claim.

Respectfully Submitted,

J. MARTIN WAGNER
EARTHJUSTICE LEGAL DEFENSE FUND
180 Montgomery Street, Suite 1725
San Francisco, CA 94104
Tel.: 415-627-6700

RICHARD HERZ
EARTHRIGHTS INTERNATIONAL
580 S.W. First Street, #9
Lake Oswego, OR 97034
Tel.: 503-697-9654

Counsel for Amici Curiae

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