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## Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act

Marisa A. Pagnattaro

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# Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act

*Marisa Anne Pagnattaro\**

## ABSTRACT

*Professor Pagnattaro argues that courts should allow claims under the Alien Tort Claims Act (ATCA) to enforce international labor rights for alien workers. She begins by reviewing the history of the ATCA and the developing jurisprudence in the international labor context, including recent and pending cases involving employee ATCA claims against U.S. multinational corporations. After outlining what is necessary to assert an ATCA claim, including what is required to satisfy jurisdictional requirements, to state a claim under the law of nations, and to hold employers liable for violations of the law of nations, she details international foundations which can be used to support employee claims under the ATCA; addresses common legal challenges to ATCA claims; and discusses the remedies and their potential shortcomings, under the ATCA. Ultimately, she concludes that there is sufficient international consensus about core labor rights, as evidenced by widely adopted international agreements, treaties, and conventions, to support ATCA claims, making this statute an important method of enforcing core labor rights. In general, U.S.-based multinational companies engaged in a global enterprise should be aware that treatment of workers in violation of the law of nations may subject them to ATCA liability in U.S. federal courts.*

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	205
II.	ATCA: DEVELOPING INTERNATIONAL LABOR JURISPRUDENCE .....	211
	A. <i>History</i> .....	211
	B. <i>The ATCA in International Labor Rights Contexts</i> .....	214
III.	ASSERTING AN ATCA LABOR-RELATED CASE.....	219
	A. <i>Federal Jurisdiction Over Multinational Corporate Employers</i> .....	219
	B. <i>Pleading the “Law of Nations”</i> .....	221
	C. <i>Liability of Employers for Violations of the Law of Nations</i> .....	226
	1. <i>Direct Liability</i> .....	226
	2. <i>Aiding and Abetting Liability</i> .....	228
	3. <i>Joint Venture, Agency, Negligence, Recklessness</i> .....	230
IV.	INTERNATIONAL FOUNDATIONS FOR LABOR CLAIMS UNDER THE ATCA .....	230
	A. <i>General Human/Labor Rights</i> .....	231
	B. <i>Extrajudicial Murder and Genocide</i> .....	236
	C. <i>Torture, Kidnapping, Unlawful Detention and Degrading Treatment</i> .....	237
	D. <i>Slavery and Forced or Compulsory Labor</i> .....	240
	E. <i>Freedom of Association and the Right of Collective Bargaining</i> .....	243
	F. <i>Child Labor</i> .....	246
	G. <i>Discrimination</i> .....	250
V.	LEGAL CHALLENGES TO ATCA CLAIMS.....	254
	A. <i>Forum Non Conveniens</i> .....	255
	B. <i>Indispensable Parties</i> .....	257
	C. <i>The Act of State Doctrine and the Foreign Sovereign Immunities Act</i> .....	258
	D. <i>Statute of Limitations</i> .....	260
VI.	REMEDIES .....	261
VII.	CONCLUSION.....	262

## I. INTRODUCTION

[T]he next hundred years will alter many of the formal and informal barriers that divide the nations of the world from one another. . . . To live together in a world with porous borders is the enormous challenge that we face in the future. It must be met with international legal systems that accommodate both our need to maintain internal authority and the obvious “gains from a closer union” that flow from participation in the global community.<sup>1</sup>

A crucial aspect of participating in the global community is effective enforcement of international agreements, treaties and conventions. Workers who are treated in violation of international law need an effective means to redress their grievances. The Alien Tort Claims Act (ATCA) offers that potential in the realm of international labor standards.<sup>2</sup> If U.S. multinational companies fail to comply with the terms of international agreements, they should be held accountable. The United States has the unique opportunity to take the high road by honoring its international commitments in the realm of labor rights. To do so, even in the face of opposition from those who fear that it might “dampen commerce,”<sup>3</sup> would give the United States a great deal of international credibility.<sup>4</sup>

As one commentator observed, “there is a groundswell of people demanding the benefits of globalization . . . propelled by millions of workers who have been knocked around by globalization, but who nonetheless get up, dust themselves off and knock again on globalization’s door, demanding to get into the system.”<sup>5</sup> At the

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1. SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 269, 271 (2003) (quoting JOHN KENNETH GALBRAITH, *A JOURNEY THROUGH ECONOMIC TIME* 242 (1994)).

2. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1989), 28 U.S.C. § 1350 (2002) [hereinafter ATCA]. Note that the Alien Tort Claims Act is sometimes referred to as the Alien Tort Statute (ATS) or the Alien Tort Act (ATA).

3. See, e.g., GARY CLYDE HULFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE* 1798 37 (2003).

4. See generally Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563, 586 (2003) (arguing that because preventing meritorious ATCA cases from being litigated in the United States would be a “major step back” in the effort to bring the rule of law to the world, “it is crucial for the United States government to show that no one is above the law”); see also Arlen Specter, *The Court of Last Resort*, N.Y. TIMES, Aug. 7, 2003 at A23 (“Our credibility in the war on terrorism is only advanced when our government enforces laws that protect innocent victims. We then send the right message to the world: the United States is serious about human rights.”). See generally Harold Hong Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997).

5. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 349 (2000). See generally <http://www.NoTortureForProfit.org> (describing EarthRights International’s “No Torture for Profit” campaign which aims at combating the most egregious

present time, there is limited recourse for these workers. One of the most logical places to “knock on globalization’s door” is at the World Trade Organization (WTO). Self-described as “the only global international organization dealing with the rules of trade” the WTO is in a position capable of influencing international labor standards.<sup>6</sup> Despite attempts during the Uruguay Round of negotiations (1986-94) to link labor standards with international trade, opposition from developing nations and business prevailed.<sup>7</sup> As evidenced by the most recent WTO talks in Cancún, there is merely a general “commitment to the observance of internationally recognized core labour standards” and a feeling that the International Labour Organization (ILO) is the “competent body to set and deal with these standards.”<sup>8</sup> In Cancún, the position taken at the WTO’s Ministerial Conference in Singapore in 1996 was reaffirmed: “WTO governments believe that economic growth and development, fostered by increased trade and further trade liberalization, contribute to the promotion of these standards.”<sup>9</sup> There is a striking lack of meaningful discussion about labor issues at the highest levels of international trade negotiation at the WTO. Indeed, the position of the WTO is succinctly stated on its official web site with the caption “Labour Standards: not on the agenda” and its statement that, “for the time being, there are no committees or working parties dealing with the issue.”<sup>10</sup> For critics of the current course of globalization, this position is a call to action.

The first time many Americans were squarely confronted with the issue of global labor standards was during the WTO meeting in Seattle in the fall of 1999.<sup>11</sup> Protesters made it clear that core labor standards should be on the WTO agenda. President Clinton gave momentum to this position at the WTO luncheon where he said that

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violations of human rights by corporations and fights against attempts by the U.S. Department of Justice to weaken or repeal the ATCA).

6. World Trade Organization, *What is the WTO?*, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm).

7. *See id.*

8. Supachai Panitchpakdi, Speech at the WTO Meeting in Cancún, Mexico (Sept. 9, 2003), at [http://www.wto.org/english/news\\_e/spsp\\_e/spsp15\\_e.htm](http://www.wto.org/english/news_e/spsp_e/spsp15_e.htm).

9. *Id.*

10. World Trade Organization, *Beyond the Agreements: Labour*, available at [http://www.wto.org/english/thewto\\_/whatis\\_e/bey7\\_e.htm](http://www.wto.org/english/thewto_/whatis_e/bey7_e.htm) (last visited Nov. 5, 2003); see Larry A. DiMatteo, *et al.*, *The Doha Declaration and Beyond: Giving Voice to Non-Trade Concerns Within the WTO Regime*, 36 VAND. J. TRANSNAT’L L. 95, 119-29 (2003) (discussing the WTO’s failure explicitly to protect workers’ rights, and offering an overview of GATT and labor standards). See generally Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HUM. RTS. & DEV. L.J. 1 (2002); Hilary K. Josephs, *Upstairs, Trade Law; Downstairs, Labor Law*, 33 GEO. WASH. INT’L L. REV. 849 (2001).

11. See, e.g., Helene Cooper, *Waves of Protests Disrupt WTO Meeting*, WALL ST. J., Dec. 1, 1999, at A2; Helene Cooper, *Clash in Seattle: Poorer Countries Are Demonstrators’ Strongest Critics*, WALL ST. J., Dec. 2, 1999.

[T]he WTO must make sure that open trade does indeed lift living standards—respects core labor standards that are essential not only to *worker rights but to human rights* . . . To deny the importance of these issues in a global economy is to deny the dignity of work.<sup>12</sup>

In accordance with this view, the United States proposed that the WTO create a committee or working group on trade and labor.<sup>13</sup>

The international movement for labor rights is consistently gaining a more visible presence, with protesters active at every major global trade discussion.<sup>14</sup> Although the United States tends to emphasize that its essential position is consistent only with “the primary goal of the WTO: to open access to markets and to spur growth and development,”<sup>15</sup> there is legislative support for globalization of labor rights. For instance, two of the overall negotiating objectives of the Trade Act of 2002, which included the Trade Promotion Authority (TPA), are

- to promote respect for worker rights and the rights of children consistent with the International Labour Organization (ILO) core labor standards;<sup>16</sup> and
- to promote universal ratification and full compliance with the ILO Declaration on Worst Forms of Child Labor.<sup>17</sup>

The TPA also sets forth priorities for President Bush, including seeking greater cooperation between the WTO and the ILO;

12. *Remarks by President Clinton to the Ministers Attending the WTO Meetings, December 1, 1999* [hereinafter Clinton WTO Remarks], available at <http://clinton4nara.gov/WH/News/WTO-Conf-1999/remarks/19991201-1505.html> (emphasis added).

13. *Id.*

14. See generally, e.g., Ginger Thompson & Elizabeth Becker, *Proposal at WTO Meeting Rejects Changes in Subsidies*, N.Y. TIMES, Sept. 14, 2003, at 14; Warren Veith, *National Globalization Activists Go to Charm School Advocacy: Experts Say the Movement in U.S. Has Matured, Gained Support and Had an Effect Since '99*, L.A. TIMES, Sept. 24, 2002, at 16; Geoff Winestock, *For the WTO, No Escape from Protesters*, WALL ST. J., Nov. 2, 2001, at A12; Pui-Wing Tam, *Turning Videocams into Weapons*, WALL ST. J., Sept. 11, 2001, at B1; Helene Cooper, *New Trade Representative Faces an Old Obstacle: Fast-Track Fight*, WALL ST. J., April 6, 2001, at A16; Helene Cooper, *A Far Cry From Seattle: Tiny Qatar is Picked as WTO Meeting Site*, WALL ST. J., Jan. 24, 2001, at A8; Helene Cooper & Michael M. Phillips, *IMF Protesters Prize Intensity Over Numbers*, WALL ST. J., April 14, 2000, at A20; see generally William B. Gould, IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, 80 NEB. L. REV. 715 (2001) (offering an overview of the development of international labor standards).

15. Robert Zoellick, *Unleashing the Trade Winds*, ECONOMIST, Dec. 7, 2002, at 28. Much of the U.S. free trade agenda revolves around opportunity through free trade zones. The global reforms that are sought pertain to transparency, opening markets, protecting private property rights and fostering competition. Robert Zoellick, *Free Trade, Free People*, WALL ST. J., Nov. 4, 2002, at A14.

16. See International Labour Organization, *Core Labor Standards*, available at <http://us.ilo.org/aboutilo/facts.html> (last visited Dec. 4, 2002); see also *infra* Part IV.

17. Committee on Ways and Means, *How Labor and Environment Provisions Are Included in Bipartisan Trade Promotion Authority Conference Agreement, Trade Act of 2002 Resource Kit*, available at <http://waysandmeans.house.gov>.

strengthening the capacity of U.S. trading partners to promote respect for core labor standards; and requiring a meaningful labor report for each country with whom the United States seeks negotiation.<sup>18</sup> In accordance with the labor objectives contained in the TPA, the U.S.-Chile Free Trade Agreement, reached in December 2002, included a reaffirmation by both parties, as members of the ILO, to “strive to ensure that their domestic laws provide for labor standards consistent with internationally recognized principles” and to “effectively enforce their own labor laws.”<sup>19</sup> This is an encouraging sign of support in the United States for core labor rights, and should signal the propriety of a similar judicial response to enforce such standards.

Likewise, in the private sector, many major U.S. companies have adopted codes of conduct, including participating in the United Nations’ Global Compact,<sup>20</sup> in response to calls for global responsibility in the labor context.<sup>21</sup> Inasmuch as these codes are voluntary, they have inherent shortcomings due to a lack of meaningful enforcement, and are often limited in scope. Moreover, the aspirational language in many such codes is just that, a goal to strive for, not the benchmark of law. Thus far, the measures have been voluntary, yet it has been suggested that the United States should enact legislation that would require multinational corporations “to adopt a code of conduct that aligns with globally accepted standards of workers’ rights” while providing companies with flexibility to adjust their “code of conduct to [their] unique business operation.”<sup>22</sup>

Despite current legislative and voluntary measures, however, improvement in working conditions for international workers is slow

18. *Id.*

19. U.S. Trade Representative, *Free Trade with Chile: Summary of the U.S.-Chile Free Trade Agreement*, available at <http://www.ustr.gov>.

20. See, e.g., *Nike Global Citizenship*, available at <http://www.nike.com>; Reebok, Human Rights Programs, at <http://www.reebok.com/Reebok/US/HumanRights/business>; Gap, Inc., *Company Info., Social Responsibility*, at <http://www.gap.com>; Levi Strauss & Co., *Social Responsibility*, available at <http://www.levistrauss.com/responsibility/conduct/guidelines.htm>; see also the Dept. of Labor, *Apparel Industry Partnership’s Agreement, Workplace Code of Conduct and Principles of Monitoring, No Sweat Initiative*, available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/apparell.htm>. The U.N. Global Compact is available at <http://www.unglobalcompact.org>.

21. Groups such as Sweat Shop Watch (<http://www.sweatshopwatch.org>), Global Exchange (<http://globalexchange.org>), UNITE! (<http://www.uniteunion.org>) and No Sweat Apparel (<http://nosweatapparel.com>) are active in exposing unfair labor conditions and promoting “sweat-free” goods.

22. Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT’L L. 1075, 1079 (2002). See generally Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431 (2002); Jane C. Hong, *Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers against MNCs for Labor Rights*, 19 WIS. INT’L L.J. 41 (2000).

in coming. The international catalog of oppressive labor practices is lengthy. Many articles and books lay bare the stark reality for workers especially in impoverished and volatile nations.<sup>23</sup>

Where then, can workers go for enforcement of international labor standards? With increasing frequency, some advocates for improved global labor standards are looking to federal courts in the United States.<sup>24</sup> The ATCA<sup>25</sup> has the potential to be a new weapon in the international movement for labor rights by offering workers the ability to enforce international rules against U.S.-based multinational companies. Although it is not a substitute for domestic law, the ATCA should be used as a way of giving force to international agreements pertaining to labor standards by holding companies responsible for their treatment of foreign workers.<sup>26</sup>

Ironically, the ATCA is not a new law; adopted by the first Congress in the Judiciary Act of 1789, it provides for a federal cause of action for claims brought by: 1) an alien, 2) alleging a tort, 3) committed in violation of the law of nations or a treaty of the United States.<sup>27</sup> For nearly 200 years, the law lapsed into obscurity. In the last twenty years, however, it has been revived in a number of human rights contexts, including claims for egregious employment and labor

23. See generally, e.g., ELLEN I. ROSEN, *MAKING SWEATSHOPS: THE GLOBALIZATION OF THE U.S. APPAREL INDUSTRY* (2002); THEODORE H. MORAN, *BEYOND SWEATSHOPS: FOREIGN DIRECT INVESTMENT AND GLOBALIZATION IN DEVELOPING COUNTRIES* (2002); LANCE A. COMPA & STEPHEN F. DIAMOND, *HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE* (1996); NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* (2000); KARL SCHOENBERGER, *LEVI'S CHILDREN: COMING TO TERMS WITH HUMAN RIGHTS IN THE GLOBAL MARKETPLACE* (2000); LeLena Ayoub, *Nike Just Does It—and Why the United States Shouldn't: The United States International Obligation to hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395 (1999).

24. Groups such as the International Labor Rights Fund (<http://www.laborrighs.org>) and the Asian Law Caucus (<http://www.asianlawcaucus.org>) are using U.S. law to challenge international labor practices. As one international writer stated:

Getting in front of a jury with evidence of a wealthy corporate defendant's abuse of poor, weak victims is a plaintiffs' lawyer's dream come true. That's why some labour rights advocates in the United States are supplementing new labour rights mechanisms and complaining in the old-fashioned Anglo-Saxon way. They "sue the bastards."

See Lance Compa, *Pursuing International Labor Rights in U.S. Courts*, INDUSTRIAL RELATIONS, Jan. 1, 2002, at 48. Compa explains the phrase is "not meant to give offense" . . . it is a "common expression in the United States referring to aggrieved parties bringing lawsuits." See generally *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025 n.1 (2001).

25. ATCA, *supra* note 2.

26. For discussions of the international responsibilities of corporations, see generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (positing a theory of corporate responsibility for human rights protection); Jordan J. Paust, *Human Rights and Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2001).

27. ATCA, *supra* note 2.



practices.<sup>28</sup> The ATCA has the potential to enforce human rights norms, including international labor standards.<sup>29</sup>

An essential aspect of a successful claim under the ATCA is the demonstration that the acts committed violate the law of nations. This prompts many unanswered legal questions in the international labor context. What constitutes the “law of nations” with regard to labor practices? What international labor standards rise to the requisite level? Should core labor standards set forth by the United Nations, treaties, international agreements, and conventions promulgated by groups such as the ILO be a part of the “law of nations”?

Widely adopted international agreements, treaties, and conventions indicate that the law of nations encompasses core labor rights.<sup>30</sup> Accordingly, this paper advocates the use of the ATCA as a way of raising international labor standards, while also acknowledging its limitations. Part II reviews the history of the ATCA and developing jurisprudence in the international labor context, including recent and pending cases of employee ATCA claims against multinational corporations in the United States. Part III outlines what is necessary to plead an ATCA claim with respect to jurisdictional requirements, to state a claim under the law of nations, and to hold corporations liable for violations of the law of nations. Part IV details international foundations which can be used to support employee claims under the ATCA for general labor rights; extrajudicial murder<sup>31</sup> and genocide; torture, kidnapping, unlawful detention and degrading treatment; slavery and forced labor; violations of freedom of association and collective bargaining; child labor; and discrimination, including treatment of women. Part V addresses common legal challenges to ATCA claims: forum non conveniens; indispensable parties; the Foreign Sovereign Immunities Act, the Act of State Doctrine; and statute of limitations issues. Part VI discusses remedies available under the ATCA, as well as their potential shortcomings.

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28. See *infra* Part II.

29. Terry Collingsworth, *Boundaries in the Field of Human Rights: The Key Human Rights Challenge, Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 188 (2002); see also Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1576 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 23, and noting that the “ATCA stands as a warning that fundamental labor violations will not be tolerated” and that the “ATCA can fill an important niche in underscoring the United States’s abhorrence for violations of those basic principles on this the global community can agree”). *Id.* at 1579.

30. See generally World Trade Organization Web Site, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10mis\\_e/10m00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m00_e.htm).

31. Extrajudicial murder is killing not founded upon any action by a court of law.

Ultimately, this article concludes that there is sufficient international consensus, evidenced by treaties, conventions, declarations, and resolutions, to support ATCA worker-related claims, making this statute an important method of enforcing existing core labor rights. Specifically, there is widespread agreement that the law of nations prohibits extrajudicial murder and genocide, torture, kidnapping, unlawful detention, and slavery and forced labor.<sup>32</sup> Moreover, based on a number of official documents, there is demonstrable international agreement that the law of nations also protects freedom of association and collective bargaining, prohibitions on child labor, and discrimination, including gender discrimination.<sup>33</sup>

Unfortunately, at this point in time, because of a lack of a clear international consensus, it is more difficult to make a case that general egregious working conditions violate international law. Even though oppressive work environments are common, the international documents supporting other ATCA labor-related claims currently lack the specificity to raise them to the level of law of nations violations. Inasmuch as the law of nations is an evolving concept, however, this is likely to change as international consensus develops. In general, multinational companies with contacts in the United States and engaged in a global enterprise, should be aware that there is a growing body of jurisprudence that threatens liability under the ATCA in U.S. federal courts for treatment of workers in violation of the law of nations.

## II. ATCA: DEVELOPING INTERNATIONAL LABOR JURISPRUDENCE

### A. History

Unlike most contemporary legislation with complicated provisions and voluminous legislative history, the ATCA is relatively simple, providing that federal "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 of a treaty of the United States."<sup>34</sup> The history of the ATCA "sheds no light on what the First Congress meant by the term 'law of nations.'"<sup>35</sup> Recognizing that this history is

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32. See generally Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

33. See, e.g., *id.*; ILO, *Right to Organise and Collective Bargaining Convention* c. 98 (1949), 96 U.N.T.S. 257, entered into force July 18, 1951, available at <http://www.ilo.org/iloe/english/convdisp1.htm>.

34. 28 U.S.C. § 1350 (2002).

35. Matthew R. Skolnik, *The Forum Nonconviens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self after Wiwa*, 16 EMORY INT'L L. REV. 187, 192

“obscure,” courts have endeavored to decide how it should be applied.<sup>36</sup> One court even went so far as to say that this “old but little used section is a kind of legal Lohengrin . . . no one seems to know from whence it came.”<sup>37</sup> Like Lohengrin, the knight of the swan of unknown origin who mysteriously appears in many German legends, the ATCA has the potential to come to the aid of non-citizens “for international human rights abuses occurring abroad.”<sup>38</sup> In a thoughtful analysis of the statute’s original purpose, District of Columbia Circuit Judge Edwards traced its historical roots, suggesting that the intent of Section 1350 “was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.”<sup>39</sup> Judge Edwards echoed the sentiment expressed in an earlier opinion that “[q]uestions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying implications of the courts of the fifty states.”<sup>40</sup> Whatever its origins and original rationale, the ATCA is now accepted as “simply opening the federal courts for adjudication of the rights already recognized by international law.”<sup>41</sup>

The first case to test the use of the ATCA in the context of human rights was *Filartiga v. Pena-Irala*, in which Paraguayan citizens brought an action against another citizen of Paraguay who was in the United States for wrongful death of their son by deliberate torture.<sup>42</sup> The Second Circuit held “that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”<sup>43</sup> Laying important groundwork for future ATCA cases, the court elaborated:

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(2002) (citing John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 544 (1997)).

36. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987). See generally William S. Dodge, *The Historical Origins of the Alien Tort Statute*, 19 HASTINGS INT’L & COMP. L. REV. 221 (1996); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445 (1995).

37. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

38. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 n.10 (2d Cir. 2000).

39. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985); see also M. O. Chibundu, *Making Customary International Law through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1097 (1999) (noting that forgoing a federal forum “was thought too high a price to pay not only because of the assumed parochialism of state courts—an assumption amply supported by contemporaneous events involving resident foreigners—but also because it had the potential to constrain federal control over relations with foreign nations”).

40. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

41. *Id.* at 887.

42. *Id.* at 878-79.

43. *Id.* at 878.

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free from torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. . . . In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.<sup>44</sup>

Because of its broad human rights stance, *Filartiga*, has been called the *Brown v. Board of Education* for the "transnational public law litigant,"<sup>45</sup> opening the door to a variety of claims.

The next major case to interpret the scope of the ATCA is *Tel-Oren v. Libyan Arab Republic*.<sup>46</sup> In this case, survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel brought an action for damages under the ATCA.<sup>47</sup> Although the D.C. Circuit affirmed the dismissal of the action for lack of subject matter jurisdiction and as barred by the statute of limitations, this case is important for the analysis contained in its three concurring opinions.<sup>48</sup> These opinions were considered at length in a subsequent case, *Forti v. Suarez-Mason*, wherein Argentine citizens living in the United States brought an action under the ATCA against a former Argentine general.<sup>49</sup>

In *Forti*, the court rejected the argument by Judge Bork in *Tel-Oren* that "[Section] 1350 constitutes no more than a grant of jurisdiction; that plaintiffs seeking to invoke it must establish a private right of action under either a treaty or the law of nations; and that in the latter category the state can support jurisdiction at most over only three international crimes recognized in 1789—violation of safe conducts, infringement of ambassadorial rights, and piracy."<sup>50</sup> The court likewise rejected the argument by Senior Judge Robb in *Tel-Oren* that "the dispute involved international political violence and so was 'nonjusticiable' within the meaning of the political question doctrine."<sup>51</sup> Importantly for the scope and viability of future litigation, the court in *Forti* instead decided to follow the

44. *Id.* at 890.

45. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

46. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 774-827 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

47. *Id.*

48. *Id.* at 775. Inasmuch as Judge Edwards, Judge Bork and Senior Judge Robb held "sharp differences of viewpoint" for the dismissal, each wrote a separate concurring opinion. *Id.*

49. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1531-36 (N.D. Cal. 1987).

50. *Id.* at 1539 (citing *Tel-Oren*, 726 F.2d at 798-823 (Bork, J., concurring)).

51. *Id.* (citing *Tel-Oren*, 726 F.2d at 823-27 (Robb, J., concurring)).

interpretation of Section 1350 advanced in *Filartiga*, which was largely adopted by Judge Edwards in his concurring opinion in *Tel-Oren*.<sup>52</sup> Specifically, the court stated that

[I]t is unnecessary that plaintiffs establish the existence of an independent, express right of action, since the law of nations clearly does not create or define civil actions, and to require such an explicit grant under international law would effectively nullify that portion of the statute which confers jurisdiction over tort suits involving the law of nations.<sup>53</sup>

Concerns raised about the potential limitation of ATCA cases by the Bork and Robb concurrences in *Tel-Oren* were laid to rest by the *Forti* case.<sup>54</sup>

### B. *The ATCA in International Labor Rights Contexts*

The use of the ATCA in international labor rights cases has been spearheaded by the International Labor Rights Fund (ILRF). The Executive Director of the ILRF, Terry Collingsworth, became involved with the first case through a serendipitous set of circumstances:

The General Secretary of the Federation of Trade Unions of Burma (FTUB), U Maung Maung, had escaped Burma and was living in Thailand following his participation in the pro-democracy uprising of 1988. He enjoyed reading *Reader's Digest* because his parents had exposed him to the magazine when he was a child as a way to learn English. In 1994, he read an article about a lawsuit filed in the United States filed by a couple whose dog died after being over anesthetized by a veterinarian. Apparently, the couple had been successful in their case . . . . U Maung Maung was both amused and angered that the United States legal system provided a remedy for the accidental death of a dog but inexplicably allowed [the U.S. company] Unocal to use forced labor to build a billion dollar pipeline in Burma.<sup>55</sup>

Through a series of connections, U Maung Maung sought legal advice, and Collingsworth was approached about being lead counsel.<sup>56</sup> He ultimately agreed, and in September 1996 the ILRF filed a complaint against Unocal.<sup>57</sup>

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52. *Id.*

53. *Id.*; see *infra* Part III (discussing pleading requirements under the ACTA).

54. See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 441-42 (D.N.J. 1999).

55. Collingsworth, *supra* note 29, at 187. The Unocal Corporation and Union Oil Company of California are collectively known as "Unocal" in Burma and are referred to as the same herein.

56. *Id.*

57. *Id.* In addition to this initial action, two other complaints have been filed against Unocal all based on the same nucleus of events. See generally *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). These lawsuits are referred to collectively herein as the Unocal litigation or Unocal cases.

In their complaints against Unocal, the plaintiffs alleged that Unocal directly or indirectly subjected villagers from the Tenasserim region in Myanmar to “forced labor, murder, rape, and torture” during Unocal’s construction of a gas pipeline through that region.<sup>58</sup> It is undisputed that the “Myanmar Military provided security and other services” for this project with Unocal’s knowledge.<sup>59</sup> The substance of the allegations against Unocal is grim. For example, when one plaintiff, who was forced to work on building roads leading to a pipeline construction area, attempted escape from the forced labor program, he was shot at by soldiers.<sup>60</sup> Thereafter, in acts of retaliation, his wife and her baby were “thrown into a fire, resulting in injuries to her and the death of the child.”<sup>61</sup> Other plaintiffs testified that “while conscripted to work on pipeline-related construction projects, they were raped at knife-point by Myanmar soldiers who were members of the battalion supervising the work.”<sup>62</sup> Plaintiffs seek to hold Unocal liable under the ATCA as well as through other causes of action for these alleged acts.<sup>63</sup> Despite motions to dismiss, the plaintiffs’ ATCA claims against Unocal remain an important part of the ongoing Unocal litigation.<sup>64</sup>

The ILRF also has three other labor-related ATCA cases pending in U.S. federal courts. The first case, *SINALTRAINAL v. Coca-Cola Company*, involves the alleged “systematic intimidation, kidnapping, detention, and murder of trade unionists in Colombia” and, in particular, the ongoing campaign of terror against trade unionists at Coca-Cola.<sup>65</sup> The defendants allegedly “hired, contracted with or

58. *Doe I v. Unocal*, 2002 U.S. App. LEXIS 19263, *reh’g granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003). The case was heard en banc on June 17, 2003. Note that the Department of Justice filed an amicus brief in this matter, asserting that the ATCA does not provide a cause of action and does not permit a court to infer a cause of action to enforce international norms. Brief for the United States of America, *Doe I. v. Unocal*, 2002 WL 31063976. See generally Justin Procriv, *Incorporating Specific International Standards into ATCA Jurisprudence: Why the Ninth Circuit Should Affirm Unocal*, 34 U. MIAMI INTER-AM. L. REV. 515 (2003) (arguing that courts should use universally specific international standards in ATCA jurisprudence, as opposed to domestic substantive law).

59. *Doe I*, 2002 U.S. App. LEXIS 19263, at \*6.

60. *Id.* at \*12.

61. *Id.*

62. *Id.*

63. *Id.* at \*2-3.

64. *Id.*; see also generally *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Nat’l Coalition Gov’t of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997).

65. Complaint, *SINALTRAINAL v. Coca-Cola Co.*, No. 01-03208-CIV, ¶ 1 (S.D. Fla. July 20, 2001), available at <http://www.laborrights.org> [hereinafter *SINALTRAINAL* Complaint]. The other defendants are: Coca-Cola de Colombia, S.A., Panamerican Beverages, Inc., Panamco, LLC, Panamco Industrial de Gaseosas, S.A., Richard I. Kirby, Richard Kirby Keiland and Bebidas y Alimentos de Uraba, S.A. On March 28, 2003, the court dismissed the ATCA claim against Coca-Cola USA and Coca-

otherwise directed paramilitary security forces that utilized extreme violence and murdered, tortured, unlawfully detained or otherwise silenced trade union leaders" who represented workers at defendants' facilities.<sup>66</sup> The ATCA claims are for murder, denial of fundamental rights to associate and organize, kidnapping, unlawful detention, torture, and crimes against humanity.<sup>67</sup>

In the second case, *Aldana v. Fresh Del Monte Produce, Inc.*, the allegations arise out of activities at a banana plantation (Bobos plantation) where workers were represented by SITRABI, a national trade union of plantation workers affiliated with the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers' Associations.<sup>68</sup> The complaint alleges, *inter alia*, that certain of the defendants "hired or otherwise created an agency relationship with an armed and organized security force . . . to use violence to intimidate the SITRABI leadership in order to affect the outcome of the ongoing collective bargaining negotiations and the labor disputes concerning the workforce at the Bobos plantation."<sup>69</sup> The complaint contains two ATCA causes of action: one for torture, kidnapping, unlawful detention and crimes against humanity; and a second claim for denial of fundamental rights to associate and organize.<sup>70</sup> At this time, a motion to dismiss is pending.<sup>71</sup>

Similar to the other two cases, the third case, *The Estate of Rodriguez v. Drummond Co., Inc.*, also deals with the treatment of union leaders.<sup>72</sup> This case involves the alleged "systematic intimidation and murder of trade unionists in Colombia, South America at the hands of paramilitaries working as agents" of the defendants.<sup>73</sup> The defendant companies allegedly "hired, contracted with or otherwise directed paramilitary security forces that utilized extreme violence and murdered, tortured, unlawfully detained or otherwise silenced trade union leaders of unions representing workers" at defendants' facilities.<sup>74</sup> The two ATCA causes of action

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Cola Colombia for lack of subject matter jurisdiction. *Sinaltrainal v. Coca-Cola Company*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

66. SINALTRAINAL Complaint ¶ 5.

67. *Id.* ¶¶ 85-86, 94-96, 101-06, 116-18.

68. SINALTRAINAL Complaint ¶¶ 20-22, *Aldana v. Fresh Del Monte Produce, Inc.*, No. 01-3399-CIV (S.D. Fla.), available at <http://www.laborrights.org>. The other named defendants are Del Monte Fresh Produce Co. and Compania De Desarrollo de Guatemala, S.A. (Bandegua). *Id.* ¶ 1.

69. *Id.* ¶ 26.

70. *Id.* ¶¶ 57-62, 66-69.

71. Telephone Interview with Terry Collingsworth, Executive Director, ILRF (Dec. 31, 2002).

72. Complaint, *The Estate of Rodriguez v. Drummond Co., Inc.*, ¶ 1 (N.D. Ala. 2002) available at <http://www.laborrights.org>. The other defendants are Drummond Ltd. and Garry N. Drummond. *Id.* ¶ 1.

73. *Id.* ¶ 2.

74. *Id.* ¶ 3.

are for the extrajudicial killing of three union leaders and for the denial of fundamental rights to associate and organize.<sup>75</sup> Both of these counts in the complaint have survived defendants' motions to dismiss.<sup>76</sup>

Another very high-profile case also involved labor issues and ATCA claims. Originally filed in January 1999, *Does I v. The Gap, Inc.*, was a class action suit brought on behalf of foreign "guest workers" from the Peoples Republic of China, the Philippines, Bangladesh, and Thailand working in the garment industry in the Commonwealth of the Northern Mariana Islands (CNMI).<sup>77</sup> The plaintiffs alleged egregious working conditions, including physical abuse, intimidation tactics, forced labor, involuntary servitude, peonage, and discrimination.<sup>78</sup> The ATCA claim was sweeping in nature, alleging violations of the law of nations through "forced labor, involuntary servitude, and peonage," and the forced relinquishment of

[U]niversally-recognized and protected rights of association, freedom, speech, and privacy; the right to be free from workplace discrimination on grounds of gender, pregnancy, national origin, and other proscribed grounds; the right to be free from corporal punishment in the workplace; the right to organize and join labor unions and to engage in concerted protected activity; the right to attend church and practice their religions; the right to get pregnant and bear children; the right not to engage in industrial homework; and the right to be free from cruel, inhuman or degrading treatment or punishment.<sup>79</sup>

As is discussed in more detail in Part IV, plaintiffs' ATCA claim for involuntary servitude was dismissed because the complaint did not "contain sufficient allegations to show or give rise to an inference that the plaintiffs were forced to work by the use or threat of physical restraint, physical injury or legal coercion and that they had no other choice but to work."<sup>80</sup> The case ultimately settled against all

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75. *Id.* ¶¶ 45-47, 51-54.

76. *Rodriguez v. Drummond*, 256 F. Supp. 2d 1250, 1269 (N.D. Ala. 2003).

77. *See* Albert H. Meyerhoff, Testimony Before the U.S. House of Representatives, (Sept. 16, 1999), available at <http://www.house.gov/resources/106cong/fullcomm/99sep16/meyerhoff.htm>.

78. Third Amended Complaint for Damages and Injunctive Relief, *Does I v. The Gap, Inc.*, No. CV-01-0031, ¶¶ 159-90 (D.N.M.I., July 25, 2002) [hereinafter *The GAP Litigation*]. In addition to *The Gap, Inc.* the complaint also named over fifty other defendants who are retailers and contractors involved with the manufacture of goods on the island of Saipan. *Id.*

79. *Id.* ¶¶ 270-71.

80. Order Re: Motion to Dismiss Plaintiffs' First Amended Complaint (Nov. 26, 2001), *The GAP Litigation*, *supra* note 78, ¶ 46. Note that a later order also dismissed the ATCA claims in Plaintiffs Second Amended Complaint as still being "insufficient." Order Granting in Part and Denying in Part Customer Defendants' Motion to Dismiss the Plaintiffs' Second Amended Complaint, *The GAP Litigation*, *supra* note 78, ¶ 35 (May 10, 2002); see discussion *infra* Part IV (regarding slavery and forced labor).



defendants except Levi Strauss & Co.<sup>81</sup> Settlement terms include a total settlement fund of more than \$20 million; the institution of a code of conduct of basic employment standards, including extra pay for overtime work, safe food and drinking water; factory monitoring; compensation for unpaid back wages; and repatriation—workers seeking to return to their home countries are eligible for up to \$3,000 in travel and relocation costs.<sup>82</sup> The settlement did not involve an admission of wrongdoing by the defendants.<sup>83</sup>

In addition to these labor-related cases, there are other significant ATCA cases also pending for violations of human rights by U.S. companies such as Occidental Petroleum,<sup>84</sup> Exxon Mobil,<sup>85</sup>

81. Press Release, Sweatshop Watch, U.S. Clothing Retailers on Saipan Settle Landmark Workers' Rights Lawsuit (Sept. 26, 2002), available at <http://www.sweatshopwatch.org/swatch/marianas/2002settlement.html> (As part of the agreement, one of the law firms representing the workers agreed to waive its attorneys' fees).

82. *Id.*

83. *Id.*

84. First Amended Complaint, *Mujica v. Occidental Petroleum*, No. CV03-2860-WJR, (C.D. Cal. Oct. 16, 2003). Allegations include the claim that Occidental Petroleum provided the Colombian military with logistical support, aerial surveillance and target coordinates in an attack that killed seventeen villagers, including six children.

85. Complaint, *John Doe v. Exxon Mobil*, No. 1:01CV01357 (D.D.C. June 20, 2001), available at <http://www.laborrights.org>. This controversial action is on behalf of eleven villagers from Aceh, Indonesia against Exxon Mobil Corporation, Exxon Mobil Oil Indonesia, Inc., Mobil Corporation, Mobil Oil Corporation and PT Arun Lng Co. (collectively "Exxon Mobil"). Plaintiffs allege that Exxon Mobil entered into an agreement with General Suharto's regime for "one or more military units of the national army, known as the Tentara Nasional Indonesia (TNI), to provide 'security'" for Exxon Mobil's gas liquefaction and extraction project in Aceh, which was known as the "Arun Project." From approximately 1989 until August 1998, Aceh was designated as a "military operational area" (or "DOM," the Indonesian acronym), where the Indonesian military "slaughtered, tortured, maimed, raped, and 'disappeared' thousands of Achenese civilian villagers." *Id.* ¶ 38. Exxon Mobile was allegedly no stranger to "the atrocities committed by the Indonesian military during the DOM period in Aceh" and it "knew or should have known that their logistical and material support was being used to effectuate the Indonesian military's commission of human rights atrocities." *Id.* ¶¶ 38-42. The ATCA claims are for murder, genocide, torture, kidnapping, crimes against humanity and violence against women. *Id.* ¶¶ 64-69, 74-76. The defendants' Motion to Dismiss is currently pending. Terry Collingsworth, *Summary of Current IILRF Cases to Enforce Human Rights under the ATCA* (pt. 16), 2003 ACLU International Civil Liberties Report, available at [www.sdshh.com/ICLR/ICLR\\_2003/ICLR2003.html](http://www.sdshh.com/ICLR/ICLR_2003/ICLR2003.html). In support of that motion, a letter from the U.S. Department of State was submitted detailing why the Department "believes that adjudication of this lawsuit at this time would risk a potentially serious adverse impact on significant interests in the United States." Letter from William H. Taft IV, Legal Advisor, U.S. Department of State, to the Honorable Louis F. Oberdorfer, U.S. District Court for the District of Columbia (July 29, 2002), available at [www.laborrights.org/projects/corporate/exxon/stateexxonmobile.pdf](http://www.laborrights.org/projects/corporate/exxon/stateexxonmobile.pdf). Attached to the letter is correspondence from an Indonesian ambassador outlining the country's opposition to the adjudication of this matter. *Id.*

ChevronTexaco Corporation,<sup>86</sup> and Dyncorp.<sup>87</sup> The progression and outcome of these cases will significantly shape the landscape for all future ATCA claims, including those brought in the international labor arena.<sup>88</sup> The following discussion is intended to give a sense of the current state of the law, as well as a road map for bringing ATCA cases on behalf of international workers.

### III. ASSERTING AN ATCA LABOR-RELATED CASE

#### *A. Federal Jurisdiction Over Multinational Corporate Employers*

International workers can seek redress in federal court in the United States. In accordance with *Filartiga*, a majority of courts have interpreted the ATCA as “providing both a private cause of action and a federal forum where aliens may seek redress for violations of international law.”<sup>89</sup> Section 1350 thus provides “both federal jurisdiction and a substantive right of action for certain violations of customary law.”<sup>90</sup> To maintain a claim, the worker must first

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86. Fourth Amended Complaint for Damages, *Bowoto v. ChevronTexaco Corp.*, No. C99-2506 SI (N.D. Cal. Aug. 30, 2002). The plaintiffs in this action are individuals who reside in the Niger Delta region of southern Nigeria. *Id.* ¶ 3. They allege that defendants ChevronTexaco Corporation and ChevronTexaco Overseas Petroleum, Inc. acted with Nigeria’s military and police in violation of plaintiffs’ human rights. *Id.* The allegations specifically include an incident in which shots were fired on protestors from helicopters. *Id.* ¶ 56. ATCA claims are based on allegations of summary execution, crimes against humanity, torture, cruel, inhuman or degrading treatment, arbitrary arrest and detention, violation of rights to life, liberty and security of person and peaceful assembly and association. *Id.* ¶ 80.

87. Complaint, *Andi v. Dyncorp* (D.D.C. filed Sept. 2001), available at <http://www.laborrights.org>. This case involves the use of fumigants designed to exterminate plantations of cocaine and/or heroin poppies that were sprayed from airplanes in large tracts of the Colombian rainforest which is owned by private citizens of Colombia. *Id.* ¶ 2. Plaintiffs allege that the fumigants caused severe physical and mental damage to themselves, their children, and other similarly situated lawful residents of Ecuador who are not involved with the production of drugs in Colombia. *Id.* The ATCA claims are for serious human rights abuses, including systematic damage to their persons and their property; torture; extra judicial killing and crimes against humanity. *Id.*

88. For a discussion about using the ATCA on behalf of immigrant workers in the United States, see Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 538-43 (2002).

89. *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (CA. N.Y. 1980); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996)). See generally Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT’L L.J. 53 (1981).

90. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1178 (N.D. Cal. 2001) (citing *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1474-76 (9th Cir. 1994)). For an overview of cases up to 1993,

demonstrate that he or she is an alien or non-citizen of the United States.<sup>91</sup> Second, a tort must be alleged.<sup>92</sup> With regard to this pleading requirement, “plaintiffs need not establish that every tort claim alleged constitutes an international tort within the meaning of Section 1350. Federal jurisdiction requires pleading only one such claim for each plaintiff.”<sup>93</sup> Lastly, the tort must be committed in violation of the law of nations.<sup>94</sup> With regard to this last requirement, which is discussed at greater length in Part IIIB, it should be noted that at least one court dismissed a claim for lack of jurisdiction because the plaintiff failed to demonstrate that a tort *in violation of the law of nations* was committed by the defendant.<sup>95</sup> The court took this action after acknowledging that ordinarily “when a Rule 12(b)(1) jurisdictional challenge attacks the merits of the underlying claim, the proper procedure is to find jurisdiction and then treat the challenge on the merits as a motion for summary judgment.”<sup>96</sup> The court cited a “narrow exception to this rule” that allows a court to dismiss a claim where it “clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial or frivolous.”<sup>97</sup>

Although the scope of the ATCA may sound expansive, one of the practical problems in international labor cases is that some potential defendants may not be subject to the jurisdiction of the federal courts. By virtue of the fact that they are incorporated in the United States or have a principal place of business here, many multinational corporations are subject to federal jurisdiction. If a U.S. company has the right, obligation, or duty to control the labor policies of another entity, it could be subject to ATCA liability.<sup>98</sup> Moreover, if a foreign company has an agent in the United States, it could subject the foreign company to personal jurisdiction in the United States in an

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see Russell G. Donaldson, *Construction and Application of Alien Tort Statute (28 U.S.C. § 1350), Providing for Federal Jurisdiction over Alien's Action for Tort Committed in Violation of the Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (1993).

91. 28 U.S.C. § 1350.

92. *Id.*

93. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

94. 28 U.S.C. § 1350.

95. *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 114 (5th Cir. 1988) (finding “no plausible foundation” for plaintiff’s claim against Price Waterhouse in connection with allegations of official acts of torture by Saudi Arabia).

96. *Id.*

97. *Id.*

98. *Sinaltrainal v. Coca-Cola*, 256 F. Supp. 2d 1345, 1352-55 (S.D. Fla. 2003) (dismissing ATCA claim against certain defendants for lack of subject matter jurisdiction where the a Bottler’s Agreement established that the defendants “did not have a duty to monitor, enforce or control labor policies” at a bottling plant where alleged ATCA violations occurred. ATCA claims against the bottler and managers, however, were allowed to proceed). *Id.* at 1356.

ATCA case.<sup>99</sup> However, often these companies have foreign partners over whom the federal courts cannot exercise personal jurisdiction under present legal standards.<sup>100</sup>

### B. Pleading the “Law<sup>101</sup> of Nations”

To maintain an ATCA claim, workers must show that the acts committed violate the law of nations.<sup>102</sup> At this point, there is growing authority on what actually constitutes the law of nations in the international labor context. In general, the alleged violation must be of an “international norm” that is “specific, universal and obligatory.”<sup>103</sup> If the conduct “contravenes ‘well-established, universally recognized norms of international law,’” it violates the law of nations.<sup>104</sup> In other words, “in order to state a claim under the ATCA, a plaintiff must allege either a violation of a U.S. treaty or of a rule of customary international law, as derived from those universally adopted customs and practices that States consider to be legally obligatory and of mutual concern.”<sup>105</sup> The phrases “law of nations” and “customary international law” are viewed as interchangeable.<sup>106</sup> According to Section 102 of the *Restatement (Third) of Foreign Relations Law (Restatement)*: “A rule of international law is one that has been accepted as such by the international community of states: (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.”<sup>107</sup> When considering this issue in 1900, the Supreme Court stated in *The Paquete Habana* that “international law is part of our law,” noting that

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99. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95-99 (2d Cir. 2000).

100. *See, e.g.*, *Collingsworth*, *supra* note 29, at 202 (in the *Unocal* case, that company’s joint venture partner, French oil company Total, was not subject to the jurisdiction of U.S. courts).

101. *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 159-60 (2d Cir. 2003).

102. *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88; *Bigio v. Coca-Cola, Co.*, 239 F.3d 440, 447 (2d Cir. 2000). *See generally* William J. Aceves, *Affirming the Law of Nations in U.S. Courts*, 49-JUN FED. LAW. 33 (2002).

103. *In re World War II Era Japanese Forced Labor*, 164 F. Supp. 1153, 1178 (N.D. Cal. 2001) (citing *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

104. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1260 (N.D. Ala. 2003) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)).

105. *Flores*, 343 F.3d at 153-54.

106. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 n.14 (D.N.J. 1999) (citing *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992)) (N.D. Cal. 2001) (stating that customary international law is the direct descendant of the law of nations); *see Ernest A. Young, Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 378-80 (2002).

107. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1986).

[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.<sup>108</sup>

The court further stated that “[s]uch works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”<sup>109</sup>

This approach continues to be accepted in the ATCA context.<sup>110</sup> In *Filartiga*, the court confirmed this approach by specifically citing Article 38 of the Statute of the International Court of Justice which provides

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:
  - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - (b) international custom, as evidence of a general practice accepted as law;
  - (c) the general principles of law recognized by civilized nations;
  - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.<sup>111</sup>

Under Article 59, the “decision of the Court has no binding force except between the parties and in respect to that particular case.”<sup>112</sup> This is not the case, however, for U.S. federal courts; as is the case for any other question of law, inferior federal courts are obligated to operate on the basis of *stare decisis* when deciding questions of international law.<sup>113</sup>

Importantly for ATCA plaintiffs, “courts must interpret international law not as it was in 1789, but as it has evolved and

108. *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Filartiga*, 630 F.2d at 880-81; *Siderman*, 965 F.2d at 714-15.

109. *Paquete Habana*, 175 U.S. at 700 (citing *Hilton v. Guyot*, 159 U.S. 113 (1895)).

110. *Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003); *Filartiga*, 630 F.2d at 881.

111. *Filartiga*, 630 F.3d at 881 n.8; Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055 (1945); *Talisman Energy*, 244 F. Supp. at 305 n.14. Note that the term “publicists” generally refers to legal scholars.

112. Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055 (1945).

113. *Talisman Energy*, 244 F. Supp. 2d at 305.

exists among nations of the world today.”<sup>114</sup> Thus, the law of nations “is not stagnant.”<sup>115</sup> Moreover, it is “only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.”<sup>116</sup> Overall, the ATCA is seen “not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”<sup>117</sup> For international workers, that means that the ATCA can be used to enforce rights that are currently afforded to them by international law. Moreover, it also means that as there is more international agreement about labor rights, the scope of the acts covered by ATCA will broaden.

For example, at this time, certain acts are considered to be so universally unacceptable that they are considered to be in violation of *jus cogens* norms under international law. As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* or “peremptory” norm is “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>118</sup> *Jus cogens* norms “enjoy the highest status within customary international law, are binding on all nations, and cannot be preempted by treaty.”<sup>119</sup> *Jus cogens* norms are binding on all nations even upon nations not in agreement with them.<sup>120</sup> According to the *Restatement*, a “state violates international law if, as a matter of state policy, it practices, encourages, or condones”:

- (a) genocide;
- (b) slave trade;
- (c) murder or causing the disappearance of individuals;
- (d) torture or other cruel, inhuman, or degrading punishment;
- (e) prolonged arbitrary detention;
- (f) systematic racial discrimination; or

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114. *Filartiga*, 630 F.2d at 881; *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

115. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984).

116. *Filartiga*, 630 F.2d at 888

117. *Id.* at 887.

118. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679, cited with approval in *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (N.D. Cal. 2001).

119. *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995).

120. *Siderman*, 965 F.2d at 714-15.

- (g) a consistent pattern of gross violations of internationally recognized human rights.<sup>121</sup>

The items listed in clauses (a) through (f) are considered to be *jus cogens* norms.<sup>122</sup> Consistent with the *Restatement*, case law recognizes torture, murder, and slavery as *jus cogens* violations of international law.<sup>123</sup> Rape has also been recognized as a form of torture and, implicitly, as a *jus cogens* violation.<sup>124</sup> As *jus cogens* violations, each of these categories of acts violates the law of nations. Although these all seem extreme acts, they are often a daily reality for global workers.<sup>125</sup>

The law of nations, however, is not limited to *jus cogens* violations.<sup>126</sup> Whereas a “*jus cogens* violation satisfies the ‘specific, universal and obligatory standard’ . . . a *jus cogens* violation is not required to meet the standard.”<sup>127</sup> Moreover, there is no legal basis for limiting ATCA claims to only “shockingly egregious” violations of universally recognized principles of international law.<sup>128</sup> This language appears to have originated in *Zapata v. Quinn*, a case brought by an aggrieved lottery winner who asserted, *inter alia*, an ATCA claim because she wanted her winnings to be paid in a lump sum instead of an annuity.<sup>129</sup> The court properly dismissed this frivolous case, but not without including the above controversial language.<sup>130</sup> This may be because the case was decided in 1983, very early in this development of ATCA jurisprudence, at which point the

121. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986).

122. *Id.* cmt. m. With regard to (g), the general provision on human rights, this includes systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); denial of fair trial in criminal cases; grossly disproportionate punishment; denial of freedom to leave a country; denial of the right to return to one’s country; mass uprooting of a country’s population; denial of freedom of conscience and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and invidious racial or religious discrimination. *Id.*

123. *Matta-Ballesteros*, 71 F.3d at 764 n.5.

124. See *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995). See generally Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L.J. 1913 (1996).

125. See, e.g., discussion *infra* Part II of allegations in *Unocal, Coca-Cola, Del Monte and Drummond*.

126. *Alvarez-Machain v. United States*, 331 F.3d 604, 612-13 (9th Cir. 2003). See Collingsworth, *supra* note 29, at 196-97 & n.100. In *John Doe III v. Unocal*, the defendants sought to limit the list of international law norms actionable under the ATCA to *jus cogens*, but they were not successful.

127. *Alvarez-Machain v. United States*, 266 F.3d 1045, 1050 (9th Cir. 2001) (citing *Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir. 1996)).

128. *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999); *Mendonca v. Tidewater, Inc.*, 159 F. Supp. 2d 299, 302 (E.D. La. 2001).

129. *Zapata*, 707 F.2d at 692.

130. *Id.*

most notable case was *Filartiga*, which was based on extreme circumstances.<sup>131</sup> There is no threshold of outrageousness inherent in the law of nations and no legislative history to support such a restrictive application of the ATCA. As stated by the Second Circuit, “the phrase ‘shockingly egregious’ is used descriptively, not prescriptively . . . *Zapata* does not establish ‘shockingly egregious’ as an independent standard for determining whether the alleged conduct violates international law.”<sup>132</sup>

The ATCA provides a cause of action as long as plaintiffs allege a violation of specific, universal, and obligatory international norms as part of their ATCA claims.<sup>133</sup> Plaintiffs “need not, however, cite a portion of a specific treaty or another U.S. statute in order to establish a cause of action.”<sup>134</sup> Plaintiffs merely need an “allegation of a violation of the law of nations in order to invoke section 1350.”<sup>135</sup> Despite this fact, plaintiffs tend to incorporate declarations, treaties, and conventions into their complaints to demonstrate that there is an international consensus that certain behavior violates the law of nations.<sup>136</sup> Because Section 1350 does not create a right to sue under treaties or make them self-executing,<sup>137</sup> the treaties cited by plaintiffs “do not per se provide a basis for suit under the ATCA. Rather, they are submitted for another purpose—to support a claim under the ‘law of nations’ or international law, which is also a basis for an ATCA action.”<sup>138</sup> The use of treaties, as well as conventions, declarations, and resolutions, sets forth how the defendants’ abuses “violated customary international law as informed by various international

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131. The court does cite *Filartiga* as the general basis for this assertion. *Id.*

132. *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 159 (2d Cir. 2003).

133. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (quoting *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

134. *Id.* at 1013.

135. *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir.1996); see, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

136. See, e.g., *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113 (5th Cir. 1988) (stating that treaties cited by the plaintiff “lend support to the conclusion that a consensus has been reached, at least among the countries that purport to uphold those treaties [that torture] violates the standards by which nations regulate their dealings with one another”).

137. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 n.2 (D.C. Cir. 1984) (Edwards, J., concurring); *Jama v. INS*, 22 F. Supp. 2d, 352, 363 (D.N.J. 1998). Cf. *Tel-Oren*, 726 F.2d 798-823 (Bork, J., concurring). Judge Bork’s concurring opinion has been heavily criticized. See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 442 n.20 (D.N.J. 1999) (“In his concurring, but highly criticized opinion in *Tel-Oren*, Judge Bork concluded that only those rules of international law that explicitly provide that an individual may sue to enforce them may be used to infer a cause of action in U.S. courts.”). Such a position would, in effect, render the ATCA useless. See Anthony D’Amato, *Judge Bork’s Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT’L L. 92, 98 (1985).

138. *Jama*, 22 F. Supp. 2d at 362.



human rights treaties and other international human rights instruments.”<sup>139</sup> For this reason, it is important for plaintiffs to cite such international documents in asserting the basis for an ATCA claim.

### C. Liability of Employers for Violations of the Law of Nations

Although corporate defendants have attempted to assert otherwise, corporations can violate the law of nations.<sup>140</sup> When the Supreme Court analyzed the ATCA in *Argentine Republic v. Amerada Hess Shipping Corp.*, it noted that the ATCA, “by its terms does not distinguish among classes of defendants.”<sup>141</sup> This is consistent with the “considerable body of United States and international precedent” indicating that “corporations may be liable for violations of international law.”<sup>142</sup> Thus, if a U.S. district court has personal jurisdiction over a company, that entity may be liable for treatment of its alien workers in violation of international law. Companies that violate the law of nations by participating in acts in violation of international law can be held liable under the ATCA.

#### 1. Direct Liability

For labor-related ATCA claims, plaintiffs have a vested interest in holding private parties liable. International workers potentially have a very effective remedy for labor-related violations of the law of nations if they can maintain claims against large U.S. multinational corporations. Attempting to circumscribe the scope of the ATCA, corporate defendants have tried to argue that only governments can be held liable under international law; at most, a private party can be held liable if there is state action.<sup>143</sup> In fact, one corporate defendant has made the argument “that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the [ATCA].”<sup>144</sup> There is, however, no statutory basis for so limiting the

139. *Id.* (quoting Plaintiffs’ Brief at ¶ 21).

140. *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003); see International Council on Human Rights, *Beyond Volunteerism: Human Rights and the Developing International Legal Obligations of Companies*, at <http://www.ichrp.org/ac/excerpts/41.pdf> (2002) (examining the extent to which international rules are binding on corporations); see also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 450 (2001) (noting that “[i]ssues arising under ATCA] are important evidence of the trend toward corporate accountability”).

141. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

142. *Talisman*, 244 F. Supp. 2d at 308.

143. Appellees’ Answering Brief at ¶¶ 11-21, *John Doe III v. Unocal Corp.*, No. 00-56628 (9th Cir. May 7, 2001).

144. *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

ATCA.<sup>145</sup> The bottom line of this issue is whether the alleged tort requires the private party to engage in state action and, if so, whether the private party in fact engaged in state action.

With regard to the first consideration, the “law of nations, as it is understood in the modern era, [does not] confine its reach to state action.”<sup>146</sup> There are “a handful of crimes to which the law of nations attributes individual responsibility.”<sup>147</sup> “[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”<sup>148</sup> State action is not required to support ATCA claims for acts that are of “universal concern” such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.<sup>149</sup>

Specifically with regard to slavery, “no logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law. . . private entities using slave labor are [plainly] liable under the law of nations.”<sup>150</sup> This rationale should be extended to forced labor because it is likewise so widely condemned that it has achieved the status of a *jus cogens* violation.<sup>151</sup> Forced labor is appropriately considered to be a modern variant of slavery; as such, state action is not a requirement for finding liability.<sup>152</sup> The law of nations attributes individual liability under

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145. *Id.* (“The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.”); see Collingsworth, *supra* note 29, at 197 (“The pragmatic and limiting construct has no bases in the statutory language of the ATCA, which creates a cause of action for violations of the ‘law of nations.’”).

146. *Kadic*, 70 F.3d at 239.

147. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring).

148. *Kadic*, 70 F.3d at 239.

149. *Id.* at 240; *Tel-Oren*, 726 F.2d at 781, 794-95 (Edwards, J., concurring); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1261-62 (N.D. Ala. 2003) (finding that the union sufficiently alleged that defendants acted in conjunction with paramilitaries to violate the law of war); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986).

150. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

151. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 58 Stat. 1544, 82 U.N.T.S. 280, 288 (making forced labor a war crime); *Universal Declaration of Human Rights*, G.A. Res. 217(A)(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

152. See *Kadic*, 70 F.3d at 243 (“The liability of private individuals for committing war crimes has [long] been recognized.”). The Second Circuit did not extend the *Kadic* rationale to a situation in which Coca-Cola acquired or leased property that had been previously expropriated on the basis of the owners’ religion. The court stated that

However reprehensible, neither racial or religious discrimination in general nor the discriminatory expropriation of property in particular is listed as an ‘act of

such circumstances.<sup>153</sup> Rape, torture, and summary execution are prescribed by international law when committed by state officials under color of law; under similar reasoning, to the extent that they are committed in isolation, these crimes should be actionable under the ATCA if they are committed in pursuit of genocide or war crimes.<sup>154</sup> If acts of murder, rape, and torture allegedly occur in furtherance of a forced labor program, they should also be actionable.

In other circumstances, private employers can also be held liable by proving that the corporation did, in fact, engage in state action. If a corporation is complicitly engaged with a foreign government in the violation of international law, it can be held liable under the ATCA for any acts deemed to be in violation of the law of nations.<sup>155</sup> For example, “anyone who conspires with state actors” to cause an “unlawful, arbitrary detention” is liable under the ATCA.<sup>156</sup> This would be the argument in those cases where corporate defendants rely on government officials to enforce workplace rules or otherwise to act on behalf of the corporation.

## 2. Aiding and Abetting Liability

Another way employers can be held liable under the ATCA is by aiding and abetting acts that violate the law of nations. Aiding and abetting liability is potentially an important way for plaintiffs to maintain their claims against private corporate defendants. As one plaintiffs’ attorney stated, managers and other decision-makers for multinational corporate defendants “almost never pull the trigger or wield the machete themselves. The dirty work is done by paid security forces . . . or by vigilante squads.”<sup>157</sup> Just how much assistance must a private defendant provide to be held legally liable for harm caused to its alien workers? Consistent with the *Restatement (Second) of Conflict of Laws*, the needs of the international system are better served by applying international, as

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universal concern’ in § 404 [of the Restatement (Third) of Foreign Relations] or is sufficiently similar to the listed acts for us to treat them as though they were incorporated into § 404 by analogy.

*Bigio v. Coca-Cola Co.*, 239 F.3d, 440, 448 (2d Cir. 2000).

153. See *Tel-Oren*, 726 F.2d at 794-95 (Edwards, J., concurring).

154. See *Kadic*, 70 F.3d at 243-44.

155. See e.g., *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1265 (N.D. Ala. 2003) (finding that defendant mining corporation could be liable under ATCA if it could be proven that paramilitaries that murdered union leaders were member of Colombian Military, thus satisfying “state action” requirement).

156. *Eastman Kodak Co. v. Calvin*, 978 F. Supp. 1078, 1090-92, 1094 (S.D. Fla. 1997).

157. Collingsworth, *supra* note 29, at 200.

opposed to national, law.<sup>158</sup> International law developed in decisions by international criminal tribunals provides assistance in establishing a standard.<sup>159</sup> One reasonable standard for ATCA cases can be derived from the Nuremberg Military Tribunals: *knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime* can result in liability.<sup>160</sup> This knowing, practical assistance standard was further developed in a 1998 decision by the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundzija*.<sup>161</sup>

Under *Furundzija*, actual or constructive (i.e. “reasonable”) knowledge of the accomplice’s actions that assists the perpetrator in the commission of the crime is necessary to establish the *mens rea* for aiding and abetting.<sup>162</sup> The question to ask is whether the acts of the accomplice made a “significant difference to the commission of the criminal act by the principal.”<sup>163</sup> In other words, if the accused “is

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158. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969) (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”).

159. Signaling the increasing importance of international law, note that in two important cases decided in 2003, the U.S. Supreme Court looked beyond U.S. law in reaching its decision. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (relying on a case decided by the European Court of Human Rights); *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring) (“The court’s observations that race-conscious programs ‘must have a logical end point’ . . . accords with the international understanding of the office of affirmative action.”).

160. Note that this standard rejects the “active participation” standard for liability from the Nuremberg Military Tribunals, which was used by the district court in *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000). The “active participation” standard is only appropriate to overcome a defendant’s “necessity defense;” that is, “when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil.” 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1436 (1950); See Beth Stevens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 40 (2002) (noting that international human rights law has its roots in the context of criminal prosecutions).

161. *Prosecutor v. Furundzija*, IT-95-17/1-T (Dec. 10, 1998), reprinted in 38 I.L.M. 317, 365 (1999). Relying on the tribunal in *Furundzija*, the Ninth Circuit noted that this standard was based on an “exhaustive analysis of international case law and international instruments,” consisting chiefly of decisions by U.S. and British military courts and tribunals dealing with Nazi war crimes, as well as German courts in the British and French occupied zones dealing with such crimes in the aftermath of World War II. *John Doe I v. Unocal Corp.*, 2002 WL 31063976, at \*36 n.26 (9th Cir. Dec. 3, 2001).

162. *Furundzija*, IT-95-17/I-T (Dec. 10, 1998), reprinted in 38 I.L.M. at 365 (1999).

163. *Id.* at ¶ 233. See also *Prosecutor v. Musema*, ICTR-96-13-T ¶ 183 (Jan. 27, 2000), available at <http://www.icty.org/>; *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm> (“[T]he substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime”).

aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”<sup>164</sup> Thus, to the extent that a corporation provides practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of a crime, it should be liable under the ATCA.<sup>165</sup>

### 3. Joint Venture, Agency, Negligence, Recklessness

In addition to aiding and abetting, corporate defendants may also be subject to liability under other theories of liability, including joint venture, agency, negligence, and recklessness.<sup>166</sup> Like aiding and abetting, these may be viable theories on the specific facts of a given ATCA case.

## IV. INTERNATIONAL FOUNDATIONS FOR LABOR CLAIMS UNDER THE ATCA

Inasmuch as treaties, conventions, declarations and resolutions have been deemed useful in determining the law of nations, this section is designed to provide a list—albeit in no way exhaustive—of such documents that can be used in connection with ATCA international labor violation claims. The ATCA is an appropriate vehicle for implementing these important international agreements. The following list provides overwhelming evidence of specific, universal, and obligatory international norms in the context of labor rights, which are properly viewed as human rights.<sup>167</sup> Indeed, the United States recognizes that “[l]abor issues fit into the human rights and democracy promotion paradigm.”<sup>168</sup> “For instance, one of the missions of the Bureau of Democracy, Human Rights, and Labor (DRL) is to work for labor standards in order to assure that globalization enhances, and does not detract from, democratic

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164. *Furundzija*, IT-95-17/I-T at ¶ 246, reprinted in 38 I.L.M. at 366.

165. Note that this standard is similar to the torts standard for aiding and abetting under domestic law. See RESTATEMENT (SECOND) OF TORTS § 876 (1979) (“knows that the other’s conduct constitutes a breach and gives substantial assistance or encouragement”).

166. This issue is currently under consideration in the 9th Circuit in *Doe I v. Unocal*, 2002 WL 31063976 (9th Cir. Dec. 3, 2001), *reh’g granted*, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

167. See COMPA & DIAMOND, *supra* note 23, at 13-95.

168. Lorne W. Craner, *Trade Unions are Key to Sustaining Democratic Gains, Remarks to Worldwide Labor Officers’ Conference*, July 18, 2002, available at <http://www.state.gov/g/drl/rls/rm/12272.htm>. Lorne Craner is Assistant Secretary for Democracy, Human Rights and Labor, Department of State.

transitions.”<sup>169</sup> Consistent with this goal, through the Office of International Labor Affairs, the United States seeks to “promote the rights of workers throughout the world . . . to ensure that all workers can exercise their rights in the workplace.”<sup>170</sup> To this end, the office promotes “universal recognition and implementation of internationally recognized core labor standards, including (a) freedom of association and the effective recognition of the right to organize and bargain collectively; (b) the elimination of all forms of forced labor or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.”<sup>171</sup> The ATCA provides the potential for effective enforcement of these norms to ensure that global working standards meet the minimum threshold of core labor standards.

### A. General Human/Labor Rights

A number of international agreements contain general provisions regarding labor conditions, which lay the ground work for the argument that the most basic of labor rights are also human rights.<sup>172</sup> One of the most fundamental is the U.N. Charter, which was signed on June 26, 1945 in San Francisco at the conclusion of the U.N. Conference on International Organization.<sup>173</sup> The Preamble to the U.N. Charter contains broad human rights language, including that the members of the United Nations are determined:

- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of all nations large and small;
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained; and

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169. *Id.*

170. U.S. Dep’t of State, Office of International Labor Affairs, Mission Statement, at <http://www.state.gov/drl/lbr/>.

171. *Id.*; accord U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, *Overview to Country Reports on Human Rights Practices for 1997*, Jan. 30, 1998, available at <http://www.usis.usemb.se/human/human97/overview.html>.

An international consensus exists, based on several key International Labor Organization (ILO) Conventions, that certain worker rights constitute core labor standards. These include freedom of association—which is the foundation on which workers can form trade unions and defend their interests; the right to organize and bargain collectively; freedom from gender and other discrimination in employment; and freedom from forced and child labor.

*Id.*

172. U.S. state statutes for wrongful death, negligence, recklessness, assault, battery, false imprisonment, kidnapping, intentional infliction of emotional distress, and negligent infliction of emotional distress all may also be used in connection with evidence of international law to show domestic support for ATCA tort claims.

173. See U.N. CHARTER. The U.N. Charter came into force on October 24, 1945.

- to promote social progress and better standards of life and larger freedom.<sup>174</sup>

To that end, the member states also agree "to employ international machinery for the promotion of the economic and social advancement of all peoples."<sup>175</sup> Chapter IX of the Charter, on "International Economic and Social Co-operation," states that "the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development . . . [and] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>176</sup>

The Charter has been utilized as evidence of binding principles of international law.<sup>177</sup> "Although there is no universal agreement as to the precise extent of the human rights and fundamental freedoms guaranteed to all by the Charter," it has been read along with other international agreements to set a threshold of basic human rights.<sup>178</sup> It has also "been adhered to by virtually all states . . . [e]ven the few remaining non-member states have acquiesced to the principles it establishes."<sup>179</sup>

A few years after the creation of the U.N. Charter, the United Nations drafted the Universal Declaration of Human Rights (Universal Declaration).<sup>180</sup> The "General Assembly has declared that the Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.'<sup>181</sup> This Universal Declaration and the other declarations discussed, *infra*, are particularly "significant because they specify with great precision the obligations of member nations under the Charter."<sup>182</sup> The Universal Declaration is considered to be "an authoritative statement of the international community."<sup>183</sup> Thus, "several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary, international law."<sup>184</sup> Importantly, through

174. *Id.* p.mbl.

175. *Id.*

176. *Id.* art. 55.

177. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 n.9 (2d Cir. 1980).

178. *Id.* at 882 ("[T]here is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture.").

179. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. h (2002).

180. *Universal Declaration*, *supra* note 32.

181. *Filartiga*, 630 F.2d at 882 (quoting G.A.Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970)).

182. *Id.* at 883.

183. *Id.* (quoting EGON SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964)).

184. *Id.* (citing Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 816-17 (1978)); Humphrey Waldlock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, INT'L & COMP. L.Q., Supp. 11, at 15 (1965).

the Department of State, the United States stated that it “believes workers rights are human rights, as explicitly stated in the Universal Declaration of Human Rights”<sup>185</sup> and that “a central goal of U.S. foreign policy [is] the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights.”<sup>186</sup> In addition to general language about fundamental human rights and the dignity of all people, the Universal Declaration states that “[e]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”<sup>187</sup> The Universal Declaration also contains specific articles relevant to international workers discussed in Parts IVC, D, E, and G, in the context of slavery and servitude; torture; cruel, inhuman or degrading treatment; assembly and association; and discrimination.<sup>188</sup>

Like the U.N. Charter and the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR)<sup>189</sup> has received wide international acceptance. “Many courts have looked to the Universal Declaration and the ICCPR to ascertain norms of international law in ATCA cases.”<sup>190</sup> As of November 2003, 151 member states had ratified the ICCPR,<sup>191</sup> which contains specific provisions pertaining to genocide; torture, cruel, inhuman or degrading treatment; slavery, servitude and compulsory labor; detention; freedom of association; and discrimination.<sup>192</sup> An important general aspect of this covenant is that it calls for each state party to undertake “to ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy.”<sup>193</sup> That right also includes the right to have a determination “by competent

185. U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, *Mission Statement for the Office of International Labor Affairs*, May 5, 2000, available at [http://www.state.gov/www/global/human\\_rights/drl\\_labor\\_mission.html](http://www.state.gov/www/global/human_rights/drl_labor_mission.html).

186. U.S. Dep’t. of State, Bureau of Democracy, Human Rights, and Labor, *Statement on Human Rights*, available at <http://www.state.gov/g/drl/hr>.

187. *Universal Declaration*, *supra* note 32, art. 23.

188. *See infra* Parts IVC, D, E and G and accompanying notes.

189. International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, No. 14,668, 999 U.N.T.S. 171 (1976). The United States became a party to the ICCPR in 1992.

190. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1262 (N.D. Ala. 2003) (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1345 n.24 (N.D. Ga. 2002); *see also* *Estate of Winston Cabello v. Armando Fernandez-Larios*, 157 F. Supp. 2d 1345, 1359-61 (S.D. Fla. 2001); *Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) (“the Eleventh Circuit . . . approve(s) tacitly the . . . use of the ICCPR as a means of construing violations of ‘the law of nations.’”).

191. Office of the U.N. High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (as of Nov. 2, 2003) at 12, available at <http://www.unhcr.ch/pdf/report.pdf> [hereinafter *Ratification Status*].

192. *See infra* Part IV.

193. ICCPR, *supra* note 189, art. 2(3)(a).



judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy" and "to ensure that competent authorities shall enforce such remedies when granted."<sup>194</sup> The ATCA ostensibly is an appropriate and effective vehicle for the enforcement of international labor-related human rights norms.

Another important agreement on overall labor rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>195</sup> As of November 2003, 148 member states had ratified this agreement.<sup>196</sup> Article 7 of the Convention is important because it sets forth standards for basic working conditions. In particular it provides for "fair wages and equal remuneration for work of equal value"; a "decent living for themselves and their families"; "safe and healthy working conditions"; "equal opportunity" for all workers; and "[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."<sup>197</sup>

Lending further support to these agreements is the Vienna Declaration and Programme of Action (Vienna Declaration), which was the result of international consensus at the World Conference on Human Rights in June 1993.<sup>198</sup> The Vienna Declaration reaffirms the commitment to take action for the realization of the purposes set out in its Article 55, including "universal respect for, and observance of, human rights and fundamental freedoms for all."<sup>199</sup> It also emphasizes that the Universal Declaration "has been the basis for the United Nations making advances in standard setting as contained in the existing international human rights instruments, in particular the [ICCPR] and [ICESCR]."<sup>200</sup>

Like the Vienna Convention, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights,<sup>201</sup> which entered into force in November 17, 1988, was designed to promote human rights in a number of

194. *Id.* art. 2(3)(b)-(c).

195. International Covenant on Economic, Social and Cultural Rights (ICESCR), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

196. *Ratification Status*, *supra* note 191, at 9. The United States became a signatory on October 5, 1977, but has not yet ratified the covenant.

197. ICESCR, *supra* note 195, at art. 7.

198. Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF. 157/24 (Part I) at 20 (1993) [hereinafter *Vienna Declaration*].

199. *Id.*

200. *Id.*

201. Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), O.A.S. Treaty Series 69 (1988), entered into force Nov. 17, 1988, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 Doc. 6 Rev. 1, at 67 (1992).

contexts, including labor.<sup>202</sup> Remuneration, safe working conditions, and reasonable working hours are all important aspects of this agreement.<sup>203</sup>

In addition to the foregoing international agreements, the International Labor Organization (ILO)<sup>204</sup> has a number of proposed conventions dedicated to improving the global workplace. The ILO is an independent agency of the United Nations with 175 member countries dedicated to the promotion of fundamental principles and rights at work.<sup>205</sup> It was founded in 1919 under the Treaty of Versailles and joined the U.N. system in 1946.<sup>206</sup> In accordance with the 1998 Declaration on Fundamental Principles and Rights at Work, the ILO seeks to promote four basic principles:

- Freedom of association and the right to bargain collectively;

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202. *Id.* art. 6.

203. *Id.* Article 6 contains a general statement that everyone “has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.” Article 7 further provides that the parties to the protocol shall recognize that the right to work in Article 6 “presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

- a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;
- b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations;
- c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;
- d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;
- e. Safety and hygiene at work;
- f. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;
- g. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work; and
- h. Rest, leisure and paid vacations as well as remuneration for national holidays.

204. *See generally* <http://www.ilo.org> (last visited Nov. 5, 2003).

205. *Id.* at <http://www.us.ilo.org/aboutilo/facts.html> (last visited Nov. 5, 2003).

206. *Id.*

- Abolition of forced labor;
- Equal opportunity and treatment in the workplace; and
- The elimination of child labor.<sup>207</sup>

All of the core conventions have been ratified by at least 120 of the 175 members, and the majority have been accepted by over 150 members.<sup>208</sup> In addition to the core standards, the ILO seeks to define “acceptable levels of working conditions and worker protection,” such as occupational health and safety, working time, as well as social security pensions and health insurance.<sup>209</sup> All of these documents, taken together, form a foundation for developing international labor rights and for determining what constitutes the law of nations for an ATCA claim.

### B. Extrajudicial Murder and Genocide

As has been previously discussed, extrajudicial murder and genocide are *jus cogens* violations of international law and, as such, can form the basis for ATCA labor-related claims.<sup>210</sup> The following agreements lend further support for this international designation. According to the U.N. Convention on the Prevention and Punishment of the Crime of Genocide,<sup>211</sup>

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.<sup>212</sup>

In addition to genocide being punishable, the following acts are also deemed punishable under the convention: conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.<sup>213</sup> Acknowledging that every “human being has the inherent right to life,” Article 6 of the ICCPR lends further support for this position, through its statement

207. ILO, *Declaration on Fundamental Principles and Rights at Work*, available at <http://www.ilo.org/public/english/standards/decl/declaration/text/> (last visited Nov. 9, 2003).

208. ILO, *Promoting the Declaration*, available at [http://echo.ilo.org/pls/declaris/DECLARATIONWEB.INDEXPAGE?var\\_language=EN](http://echo.ilo.org/pls/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN) (last visited Dec. 16, 2003).

209. ILO, *Mandate*, available at <http://www.ilo.org/public/english/about/index.htm>.

210. See, e.g., *Rodriguez v. Estate of Drummond*, 256 F.3d 1250, 1262 (N.D. Ala. 2003) (upholding ATCA claims for the extrajudicial killing of union leaders).

211. U.N. Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277, entered into force, Jan. 12, 1951.

212. *Id.* art. 2.

213. *Id.* art. 3.

that when the “deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.”<sup>214</sup> Article 6 of the ICCPR has been deemed “customary international law,” which, as discussed, may be remedied by suits filed under the ATCA.<sup>215</sup>

As described in the pending actions discussed in Part II, extrajudicial murder is a problem in international workplaces when deadly force is used to keep order and to subdue any kind of protest.<sup>216</sup> In particular, union activists and labor organizers are vulnerable to being murdered.<sup>217</sup>

### *C. Torture, Kidnapping, Unlawful Detention and Degrading Treatment*

Torture is also widely accepted as prohibited by *jus cogens* norms.<sup>218</sup> Likewise, prolonged arbitrary detention can form the basis for an ATCA claim.<sup>219</sup> Although one court has dismissed ATCA claims based on “causing disappearance” and “cruel, inhuman and degrading treatment,”<sup>220</sup> if evidence of universal consensus can be presented, such claims should also be cognizable. The provisions of the declarations and conventions cited herein should be indicative of universal consensus, just as those documents are used to demonstrate that torture is considered unacceptable to the international community.

One of the most fundamental documents is the Torture Victim Protection Act (TVPA),<sup>221</sup> which is viewed as codifying the holding in *Filartiga*.<sup>222</sup> Key features of the TVPA include an extension of remedies to any individual—not just aliens—and the creation of liability for both torture and extrajudicial killings.<sup>223</sup> The TVPA is

214. ICCPR, *supra* note 189, art. 6(1), (3).

215. *Estate of Winston Cabello v. Armando Fernandez-Larios*, 157 F. Supp. 2d 1345, 1359 (S.D. Fla. 2001).

216. *See supra* Part II.

217. Amnesty International, *Trade Unionists are at the Forefront of the Struggle for Human Rights*, available at <http://www.amnesty.org.uk/action/nw/tun/> (last visited Nov. 9, 2003).

218. *See Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 716 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

219. *Id.*

220. *Forti*, 672 F. Supp at 1543.

221. Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 (2002).

222. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 2000) (“United States courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation, and [carrying] it significantly further.”).

223. TVPA, 28 U.S.C. § 1350.

viewed as recognizing “explicitly what was perhaps implicit in the Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) ipso facto a violation of U.S. domestic law.”<sup>224</sup>

In connection with an ATCA claim, an issue could arise as to whether the alleged conduct constitutes torture. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>225</sup> defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>226</sup>

This definition is similar to the one found in the Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>227</sup> Moreover, under this Declaration, torture “constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”<sup>228</sup>

In addition to containing a prohibition against torture, other international agreements address kidnapping, unlawful detention and degrading treatment. For example, the Universal Declaration states that no one shall be subjected to “cruel, inhuman or degrading treatment or punishment” and no one shall be subject to “arbitrary arrest, detention or exile.”<sup>229</sup> Likewise, the ICCRP provides that “no one shall be subjected to torture or to cruel, inhuman or degrading

224. *Wiwa*, 226 F.3d at 105.

225. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N., GAOR, 39 Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), ratified Oct. 28, 1998.

226. *Id.* art. I(1); see *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 208 (3d Cir. 2003).

227. Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR 30 Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1976). Torture is defined in Art. 1(1) to mean “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.”

228. *Id.* art. 1(2).

229. *Universal Declaration*, *supra* note 32, arts. 5, 9.

treatment or punishment. . . . [E]veryone has the right to liberty and security of person; and no one shall be subjected to arbitrary arrest or detention.”<sup>230</sup> The Declaration on the Protection of all Persons from Enforced Disappearances states that:

Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.<sup>231</sup>

. . . [Moreover,] any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.<sup>232</sup>

The Vienna Declaration likewise contains provisions on freedom from torture, as well as enforced disappearances, which reference the Declaration on the Protection of all Persons from Enforced Disappearances.<sup>233</sup> These agreements all indicate that the law of nations prohibits torture, kidnapping, unlawful detention and degrading treatments. As a practical matter, however, at this point it is open for the courts to determine what actual acts constitute “degrading behavior” in the workplace.

It should also be noted that other international agreements specifically address violence against women. The U.N. Declaration on the Elimination of Violence Against Women is premised on the recognition that:

[V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.<sup>234</sup>

Under this Declaration, “violence against women” means “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women,

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230. ICCPR, *supra* note 189, arts. 7, 9.

231. Declaration on the Protection of all Persons from Enforced Disappearances, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (1992), adopted by General Assembly Resolution 47/133 Dec. 18, 1992; *see id.* art. 1(1).

232. *Id.* art. 1(2).

233. *Vienna Declaration*, *supra* note 198, art. 5, ¶¶ 54-62.

234. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49., at 217, U.N. Doc. A/48/49 (1993).

including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>235</sup> Acts of violence include rape, sexual abuse, and sexual harassment and intimidation at work.<sup>236</sup> Consistent with other agreements, women are entitled to the “right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.”<sup>237</sup> The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women contains provisions very similar to the Declaration on the Elimination of Violence Against Women.<sup>238</sup> This Convention lends additional support to the argument that specific kinds of violence directed against women should be actionable violations of the ATCA.

#### D. Slavery and Forced or Compulsory Labor

Slavery is considered so universally abhorrent that it constitutes a *jus cogens* violation of international law.<sup>239</sup> In addition, there is case law developing about the much more common contemporary issue of forced or compulsory labor. In *Iwanowa v. Ford Motor Company*, for example, the plaintiff alleged that the defendants’ use of forced labor under inhumane conditions during World War II violated the law of nations.<sup>240</sup> In support of her claim, the plaintiff pointed to the “Hague and Geneva Conventions as evidence of an emerging norm of customary international law.”<sup>241</sup> Persuaded by the plaintiff’s arguments, the U.S. District Court for the District of New Jersey found that the “use of unpaid, forced labor during World War II violated clearly established norms of customary international law.”<sup>242</sup> Similarly, in *In Re: World War II Era Japanese Forced Labor*, the District Court for the Northern District of California agreed with the *Iwanowa* “conclusion that forced labor violates the law of nations.”<sup>243</sup>

In *Does I v. The GAP, Inc.*, the District Court for the Northern Mariana Islands did not consider whether the plaintiffs’ claim of

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235. *Id.* art.1.

236. *Id.* art 2 (b).

237. *Id.* art. 3(h).

238. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, 1535 (1994), entered into force Mar. 5, 1995; see art. 1-6.

239. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 & cmt. n; *Matta-Ballesteros*, 71 F.3d at 764 n.5.

240. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 (D.N.J. 1999).

241. *Id.*

242. *Id.* at 440.

243. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d, 1160, 1179 (N.D. Cal. 2001).

forced or debt labor violated the law of nations.<sup>244</sup> Instead, this case focused on whether the alleged conduct gave rise to a claim for involuntary servitude. Specifically, plaintiffs made the following allegations:<sup>245</sup>

- Defendants and their agents “threaten and engage in physical beatings of plaintiffs and class members both as punishment and warnings, and threaten plaintiffs and class members that if they violate workplace rules or any requirement imposed by their employers or Recruiters, they will be suspended, terminated, or summarily deported to their home countries without regard to due process or their legal rights, and that they or their debt guarantors will thereupon be subject to imprisonment and other penalties.<sup>246</sup>
- Class members are informed by defendants and Recruiters and reasonably believe that if they violate the terms of their . . . employment contracts, or if they violate any workplace rules or complain about any workplace or living conditions, their CNMI employment will be terminated, they will be summarily deported to their home countries and they and their guarantors will be subject to arrest, prosecution, and imprisonment in their home countries.<sup>247</sup>
- Defendants and their agents indenture plaintiffs and class members and compel their labor under the menace and threat of penalties and physical, economic and legal harm to plaintiffs and Class members and their families. Defendants and their agents compel plaintiffs and Class members to work and to continue work by using and threatening to use physical and legal coercion . . . including but not limited to subjecting them to extremely poor working conditions, by prohibiting complaints, by threatening jail and imprisonment, by engaging in public acts of violence against Class members, by subjecting them to physical restraint, by locking them into factories and barracks, by taking their passports, and by making a public showing of summary suspensions, terminations, and deportations.<sup>248</sup>

The plaintiffs made the point that these facts led them to believe they were deprived of free will and that they had no choice but to work.<sup>249</sup> The defendants argued the plaintiffs did not allege facts showing that the threats or physical abuse prevented them from leaving or terminating their employment and that “plaintiffs had a choice about whether or not to continue their employment, as evidenced by the fact that several plaintiffs renewed their contracts and several plaintiffs

244. The GAP Litigation, *supra* note 78, Order Granting in Part and Denying in Part Customer Defendants’ Motion to Dismiss the Plaintiffs’ Second Amended Complaint, May 10, 2002, at 49 [hereinafter May 10, 2002 Order].

245. The GAP Litigation, *supra* note 78, Second Amended Complaint. Note that portions of plaintiffs’ initial complaint were dismissed and plaintiffs tried to cure those defects in the Second Amended Complaint.

246. *Id.* ¶ 12. “Recruiters” refers to individuals who solicit foreign workers to go to Saipan to work in the garment industry.

247. *Id.* ¶ 154.

248. *Id.* ¶ 170.

249. May 10, 2002 Order, *supra* note 244, at 35.



worked for more than one factory.”<sup>250</sup> Ultimately, the court concluded that the plaintiffs’ allegations were insufficient to support a claim for involuntary servitude, stating that even if it accepted as true “the well-pleaded factual allegations of the threats and use of physical restraint and abuse and the threats and use of physical and legal coercion, coupled with the plaintiffs’ alleged special vulnerabilities,” it could not reasonably conclude that the “plaintiffs’ free will and been overcome and that they had no choice but to work.”<sup>251</sup> The court found that “the plaintiffs made a ‘choice, however painful’ to work.”<sup>252</sup> Accordingly, the court granted the defendants’ motion to dismiss and gave the plaintiffs leave to amend, setting an arguably high standard for the evidence necessary to sustain a forced labor claim under the ATCA.<sup>253</sup>

Nevertheless, there are a number of international agreements that lend support to the conclusion that slavery and forced labor are universally condemned, though it is yet unclear how far the definition may be stretched. At the most fundamental level, the Universal Declaration provides that “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”<sup>254</sup> and everyone has the right “to free choice of employment.”<sup>255</sup> The ICCPR likewise provides that “[n]o one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited”<sup>256</sup> and that “[n]o one shall be required to perform forced or compulsory labour.”<sup>257</sup> Similar provisions are contained in the American Convention on Human Rights.<sup>258</sup> The Hague Convention<sup>259</sup> and the Geneva Convention<sup>260</sup> have also been cited in the context of

250. *Id.* at 34.

251. *Id.* at 35.

252. *Id.* (citing *United States v. Kozminski*, 487 U.S. 931, 950 (1988)).

253. *See supra* note 78 (describing how plaintiffs did file a Third Amended Complaint, but the case settled a few months later).

254. *Universal Declaration*, *supra* note 32, art. 4.

255. *Id.* art. 23.

256. ICCPR, *supra* note 189, art. 8(1).

257. *Id.* art. 8(3).

258. American Convention on Human Rights “Pact of San José, Costa Rica” Nov. 22, 1969, art. 6, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc. 6 rev. 1, at 25 (1992). The American Convention provides that “[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women,” and the “[n]o one shall be required to perform forced or compulsory labor.” *Id.* art. 6(1), (2).

259. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 6, 36 Stat. 2277, T.S. 539.

260. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

an ATCA action as evidence of “an emerging norm of customary international law” with regard to forced labor.<sup>261</sup>

As part of its core agenda, the ILO is seeking ratification of two conventions intended to eliminate forced and compulsory labor.<sup>262</sup> The first, Forced Labor Convention 29, which was proposed in 1930, has been ratified by 161 member states.<sup>263</sup> It provides that “the term “forced or compulsory labour” shall mean all work or service which is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily.”<sup>264</sup> The second, Abolition of Forced Labour Convention 105, is an outgrowth of a meeting of the ILO Governing Body in Geneva in 1957.<sup>265</sup> Ratified by 156 member states,<sup>266</sup> this convention provides for specific contexts in which forced or compulsory labor should not be used:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilising and using labour for purposes of economic development;
- (c) as a means of labour discipline;
- (d) as a punishment for having participated in strikes; or
- (e) as a means of racial, social, national or religious discrimination.<sup>267</sup>

These international agreements all support the growing jurisprudence that slavery and forced labor violate the law of nations.

#### *E. Freedom of Association and the Right of Collective Bargaining*

Freedom of association and the right of collective bargaining are also core labor rights. At least one court has held that inasmuch as “the rights to associate and organize are generally recognized as principles of international law,” these rights “support cognizable torts

261. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 (D.N.J. 1999) (concerning complaint alleging that defendant’s use of forced labor violated both the Hague Convention and the Geneva Convention).

262. ILO, *Forced Labor Convention*, C. 29 (1930) available at <http://www.ilo.org/ilolex/english/convdisp1.htm>; ILO, *Abolition of Forced Labor Convention*, c. 105 (1957), available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

263. ILO, *Ratifications of the Fundamental Human Rights Conventions by Country* (as of Dec. 27, 2002) [hereinafter *ILO Ratification Status*], available at <http://www.ilo.org/ilolex/english/docs/declworld.htm>. The United States has not ratified this Convention. Despite that fact, slavery and forced labor have been prohibited by Amendment XIII of the United States Constitution since 1865.

264. ILO C. 29, *supra* note 262, art. 2(1). The convention also provides specific exclusions for military service, and judicial convictions, and in cases of emergency. *Id.* art. 2(2).

265. ILO C. 105 *supra* note 262, pmb1.

266. ILO Ratification Status, *supra* note 263. The United States ratified C. 105 in 1991.

267. ILO C. 105 *supra* note 262, art. 1(a)-(e).

under the ATCA.”<sup>268</sup> Again, the list of international agreements so holding is worth highlighting as these agreements form an appropriate basis for concluding that freedom of association and the right of collective bargaining are included within the scope of the law of nations. As is the case for the labor rights already discussed, the Universal Declaration provides that: “[e]veryone has the right to freedom of peaceful assembly and association,”<sup>269</sup> and “[e]veryone has the right to form and to join trade unions for the protection of his interests.”<sup>270</sup> This position is consistent with the ILO’s core labor rights agenda, which includes two conventions on freedom of association and the right to collective bargaining.<sup>271</sup> The first, Freedom of Association and Protection of the Right to Organize Convention 87, has been ratified by 141 member states.<sup>272</sup> It provides for broad rights for workers and employers to “establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.”<sup>273</sup> Under this Convention, workers’ and employers’ organizations “shall have the right to draw up constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities to formulate their programmes.”<sup>274</sup> By ratifying this Convention, an ILO member also agrees to “take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.”<sup>275</sup> The second convention, Right to Organise and Collective Bargaining Convention 98, ratified by 152 member states, was adopted by the ILO in 1949.<sup>276</sup> It is intended to protect workers “against acts of anti-union discrimination in respect of their employment.”<sup>277</sup> The protection is particularly designed to address acts calculated to “make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union

268. *Rodriguez v. Estate of Drummond*, 256 F.3d 1250, 1264 (N.D. Ala. 2003).

269. *Universal Declaration*, *supra* note 32, art. 20(1).

270. *Id.* art. 23(4).

271. *Freedom of Association and Protection of the Right to Organize Convention*, C. 87 (1948), available at <http://www.ilo.org/ilotex/english/convdisp1.htm>; ILO, *Right to Organise and Collective Bargaining Convention*, *supra* note 33. Although the United States has not ratified these two conventions, “the ratification of these conventions is not necessary to make the rights to associate and organize norms of customary international law.” *Drummond*, 256 F. Supp. 2d. at 1263. Moreover, as evidenced by the First Amendment to the U.S. Constitution and numerous labor laws (including the Clayton Act, the Wagner Act and the Taft-Hartley Act), the United States has long recognized the right to freedom of association and the right to organize.

272. ILO, *Ratification Status*, *supra* note 263.

273. ILO, *Freedom of Association and Protection of the Right to Organize Convention*, *supra* note 271, art. 2.

274. *Id.* art. 3.

275. *Id.* art. 11.

276. ILO, *Ratification Status*, *supra* note 263.

277. ILO, *Right to Organize and Collective Bargaining Convention*, *supra* note 33, art. 1(1).

membership” or to “cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.”<sup>278</sup>

Support for freedom of association and the right of collective bargaining is also found in the ICCPR.<sup>279</sup> Similar to the Universal Declaration, the ICCPR provides that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>280</sup> With regard thereto “[n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”<sup>281</sup> In a show of support for the ILO, the ICCPR also states that nothing in the article on freedom of association shall authorize parties to ILO Convention 87 concerning the Freedom of Association and Protection of the Right to Organize “to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for” in that convention.<sup>282</sup> Further reinforcement for freedom of association and the right to collective bargaining can be found in the ICESCR<sup>283</sup> and in the Additional Protocol to the

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278. *Id.* art. 1(2).

279. ICCPR, *supra* note 189.

280. *Id.* art. 22(1).

281. *Id.* art. 22(2).

282. *Id.* art. 22(3).

283. ICESCR, *supra* note 195. Article 8 states that all parties to the Covenant will undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; and

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

*Id.* art. 8(1). The ICESCR also provides that nothing in Article 8 “shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative

American Convention on Human Rights in the area of Economic, Social and Cultural Rights<sup>284</sup>

## F. Child Labor

Unlike most of the other labor-related ATCA claims, to date no such claim has been filed for child labor violations. This is not to say that no such claim could or should be made. A compelling case could be made that prohibiting child labor is one of the most fundamental international core labor standards. Estimates are that more than 250 million children work in the global economy.<sup>285</sup> One commentator suggests that, considering “the defenseless nature of children, their lack of political clout, and their mental, emotional, and developmental vulnerabilities,” the prohibition of the “worst forms of child labor is an evolving international norm of the highest form: a peremptory norm *jus cogens*.”<sup>286</sup> Although poverty is often the immediate reason children are put “to work in lieu of education” this cycle “condemns them to a life of poverty.”<sup>287</sup> Simply put, there is little question that “child labor hinders a country’s social and economic growth, because economic growth cannot occur if the country’s human capital remains

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measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.” *Id.* art. 8(3).

284. Protocol of San Salvador, *supra* note 201. Article 8 of this Protocol states that the parties shall ensure:

The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely; and they have the right to strike.

*Id.* art. 8(1). Moreover, the

[E]xercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.

*Id.* art. 8(2).

285. Terry Collingsworth, *Foreign Policy in the Focus: Child Labor in the Global Economy*, WORKERS RTS NEWS 2:46 (Int’l Lab. Rts. Fund, Washington, D.C. Oct. 1997).

286. Madeleine Grey Bullard, *Child Labor Prohibitions are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 HOUS. J. INT’L L. 139, 158-59 (2001).

287. Collingsworth, *supra* note 285.

underdeveloped.”<sup>288</sup> The following international agreements evidence the broad protections envisioned for children, including the prohibition of child labor.

In 1959, the U.N. General Assembly passed the Declaration of the Rights of the Child (DRC) resolution,<sup>289</sup> which references the proclamations in the Universal Declaration of Human Rights and the need for special safeguards as stated in the Geneva Declaration of the Rights of the Child of 1924. This list of ten principles includes the provision that the “child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.”<sup>290</sup> On the thirtieth anniversary of the Declaration of the Rights of the Child, the United Nations passed the Convention on the Rights of the Child (CRC), greatly expanding the principles set forth in the original document.<sup>291</sup> Specifically with regard to labor, the CRC provides:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.<sup>292</sup>

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288. Anjali Garg, *A Child Labor Social Clause: Analysis and Proposal for Action*, 31 N.Y.U. J. INT'L L. & POL. 473, 479 (1999). See also Benjamin James Stevenson, *Pursuing an End to Foreign Child Labor through U.S. Trade Law: WTO Challenges and Doctrinal Solutions*, 7 UCLA J. INT'L L. & FOREIGN AFF. 129, 132 (2002) (arguing that a hypothetical law prohibiting the importation of child labor products would likely pass muster in the WTO as either a “fair response to social dumping” or be exempted by Article 20.b of the General Agreement on Trade and Tariffs as a measure necessary to protect human life.)

289. U.N. Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959) [hereinafter DRC].

290. *Id.* princ. 9.

291. U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES 44/736 (1989) [hereinafter CRC]. The only countries which have not ratified the CRC are the United States and Somalia. See *Ratification Status*, *supra* note 191. Despite this fact, the United States has restrictions on child labor as set forth in the Fair Labor Standards Act.

292. CRC, *supra* note 291, art 32.

Similarly to other human rights agreements, the CRC also contains specific provisions prohibiting torture or other cruel, inhuman or degrading treatment or punishment, as well as arbitrary detention.<sup>293</sup>

In recent years, other initiatives have specifically focused on the rights of children. At the World Summit for Children on September 30, 1990, the World Declaration on the Survival, Protection and Development of Children<sup>294</sup> was entered into "to undertake a joint commitment and to make an urgent universal appeal to give every child a better future."<sup>295</sup> Acknowledging that each day "40,000 children die from malnutrition and disease" the Declaration seeks to promote "respect for children's rights and welfare" by revitalizing economic growth and development, protecting the environment, preventing the spread of fatal and crippling diseases and to achieve greater social and economic justice."<sup>296</sup> With regard to working children, the Declaration states that it "will work for special protection of the working child and for the abolition of illegal child labour."<sup>297</sup> In one of the most comprehensive statements on the rights of children, the Vienna Declaration reiterates the essential aspects of previous agreements on children, again calling for the adoption of effective measures against "harmful child labour."<sup>298</sup> Article 10 of the ICESCR<sup>299</sup> likewise provides that

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.<sup>300</sup>

As part of its core goals, the ILO is also seeking ratification of two conventions addressing effective abolition of child labor.<sup>301</sup> The first, Minimum Age Convention 138, has been ratified by 120 member states.<sup>302</sup> It calls upon each member of the Convention to pursue a

293. *Id.* art. 37.

294. UNICEF, World Summit for Children 1990, World Declaration on the Survival, Protection and Development of Children, (Sept. 30, 1990) available at <http://www.unicef.org/wsc/declare.htm>.

295. *Id.* ¶ 1.

296. *Id.* ¶¶ 6-9.

297. *Id.* ¶ 20(7).

298. *Vienna Declaration*, *supra* note 198, at ¶ 48.

299. ICESCR, *supra* note 195.

300. *Id.* art. 10.

301. ILO, *Minimum Age Convention*, C. 138 (1973), available at <http://www.ilo.org/ilolex/english/convdisp1.htm>; ILO, *Worst Forms of Child Labour Convention*, C. 182 (1999), available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

302. ILO, *Ratification Status*, *supra* note 263.

national policy designed to ensure the effective abolition of child labour and progressively to raise the minimum age for admission of employment or work "to an age consistent with the fullest physical and mental development of young persons."<sup>303</sup> In general, the minimum age for child workers "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years."<sup>304</sup> There is an exception, however, for member states "whose economy and educational facilities are insufficiently developed;" they may initially specify a minimum age of 14 years.<sup>305</sup>

Pursuant to the second ILO core convention on child labor, the Worst Forms of Child Labour Convention 182, member states are required to "design and implement programmes of action to eliminate as a priority the worst forms of child labour."<sup>306</sup> The phrase "the worst forms of child labour" comprises slavery, forced labor, child prostitution and pornography, illicit activities, and harmful work.<sup>307</sup> Moreover, member states are required to take "into account the importance of education in eliminating child labour [and], take effective and time-bound measures to . . . prevent the engagement of children in the worst forms of child labour."<sup>308</sup> At the signing of ILO Convention 182, President Clinton stated:

The step we take today affirms fundamental human rights. Ultimately, that's what core labor standards are all about—not an instrument of protectionism, or a vehicle to impose one nation's values on another,

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303. ILO, *Minimum Age Convention*, *supra* note 301, art. 1.

304. *Id.* art. 1(3).

305. *Id.* art. 1(4).

306. ILO, Worst Forms of Child Labour Convention, *supra* note 301, art. 6. As of December 2002, 132 countries had ratified this Convention, including the United States. ILO, *Ratification Status*, *supra* note 263.

307. ILO, Worst Forms of Child Labour Convention, *supra* note 301, art. 3. This convention specifically defines the worst forms of child labor as including:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

*Id.*

308. *Id.* art. 7(2)(a).



but about our shared values: about the dignity of work, the decency of life, the fragility and importance of childhood.<sup>309</sup>

In accordance with its obligations under this convention, the United States provided \$92 million in funding in 2001 to help eliminate abusive child labor around the world, including \$45 million to the ILO's International Program for the Elimination of Child Labor and \$37 million in new funding for targeted bilateral education assistance to promote school rather than work in countries where exploitative child labor is prevalent.<sup>310</sup> President Clinton also issued an Executive Order prohibiting federal agencies from buying products made with forced or indentured child labor.<sup>311</sup>

Although some countries with child labor laws tend not to enforce those laws, based on case law to date it would not be surprising to see the prohibition on child labor formally included in the law of nations. As such, any U.S. corporations that use child labor, especially child labor that is prohibited by local law, should be advised that they may face liability under the ACTA.

### G. Discrimination

Just like all of the other labor-related issues, there are many international agreements addressing discrimination in employment, with additional agreements specifically dealing with issues related to women. Although it may intuitively seem that there is not an international consensus on what constitutes discrimination in employment, these agreements demonstrate that many nations agree with the proposition that discrimination in employment should not be permitted. At a minimum, people should receive equal pay for equal work regardless of their gender, race or any other immutable characteristic. Once again, the Universal Declaration establishes a foundation for many of the subsequent agreements regarding discrimination.<sup>312</sup> It generally provides that all persons "are equal before the law and are entitled without any discrimination to equal protection of the law"<sup>313</sup> and that "[e]veryone has the right to freedom of thought, conscience and religion."<sup>314</sup> Specifically with regard to

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309. President William J. Clinton, Remarks by the President at Signing of ILO Convention No. 182, the Convention Concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labor, Dec. 2, 1999, available at <http://clinton4.nara.gov/WH/New/html/19991292.html>.

310. *The Clinton-Gore Administration: New Efforts to Fight Sweatshops and Child Labor Around the World & Put a More Human Face on the Global Economy*, WHITE HOUSE NEWS, Jan. 16, 2001, available at [http://clinton5.nara.gov/WH/new/html/Tue\\_Jan\\_16\\_105706\\_2001.html](http://clinton5.nara.gov/WH/new/html/Tue_Jan_16_105706_2001.html).

311. Exec. Order No. 13,126, 64 Fed. Reg. 32,383 (1999).

312. *Universal Declaration*, *supra* note 32.

313. *Id.* art. 7.

314. *Id.* art. 18.

employment, the Universal Declaration provides that “[e]veryone, without discrimination, has the right to equal pay for equal work.”<sup>315</sup>

Again, consistent with the Universal Declaration, the final set of core labor rights sought by the ILO is the elimination of discrimination with respect to employment or occupation.<sup>316</sup> The Equal Remuneration Convention 100 provides that member states shall “ensure the application to all workers the principle of equal remuneration for men and women workers for work of equal value.”<sup>317</sup> For purposes of this Convention, the term remuneration “includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment,” and the phrase “equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.”<sup>318</sup> An overwhelming 160 member nations of the ILO ratified this convention.

Similarly, the Discrimination (Employment and Occupation) Convention 111 has been ratified by 158 states.<sup>319</sup> For the purpose of Convention 111, “the term ‘discrimination’ includes (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”<sup>320</sup> However, any “distinction, exclusion or preference in respect to a particular job based on inherent requirements thereof shall not be deemed to be discrimination.”<sup>321</sup>

Other agreements contain similar anti-discrimination provisions. The ICCPR contains the general anti-discrimination provision that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any

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315. *Id.* art. 23(2).

316. ILO, Equal Remuneration Convention, C. 100 (1951), available at <http://www.ilo.org/ilolex/english/convdisp1.htm>; ILO, Discrimination (Employment and Occupation) Convention, C. 111 (1958), available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

317. ILO, Equal Remuneration Convention, *supra* note 316, art. 2(1).

318. *Id.* art. 1.

319. ILO, *Ratification Status*, note 263. The United States has not yet ratified either of these two conventions, but the U.S. Office of International Labor Affairs currently is seeking ratification of Convention 111. See U.S. Department of State, Bureau of Democracy, *Human Rights and Labor Statement on Labor*, available at <http://www.state.gov/g/drl/lbr>. Domestic laws in the United States, such as the Equal Pay Act and Title VII, which address these issues are indicative of the United States’ general agreement on the issue.

320. ILO, Discrimination (Employment and Occupation) Convention, *supra* note 316, art. 1(1).

321. *Id.* art. 1(2).

ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>322</sup> The International Convention on the Elimination of All Forms of Racial Discrimination expands on the prohibition defining the term “racial discrimination” to mean “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>323</sup> The Convention also provides that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.<sup>324</sup>

To this end, parties to the Convention agree to “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.”<sup>325</sup>

The Vienna Declaration contains similar provisions designed to give all people equal opportunity.<sup>326</sup> It also contains a great deal of

322. ICCPR, *supra* note 189, art. 26.

323. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195, 5 I.L.M. 352, art 1(1). The United States ratified the convention and it entered into force in 1994.

324. *Id.* art. 1(4).

325. *Id.* art. 2. The Convention specifically lists the following: not undertaking or engaging in any “act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation”; not sponsoring, defending or supporting “racial discrimination by any persons or organizations”; taking “effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists”; prohibiting and bringing “to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”; and encouraging, “where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.” *Id.*

326. *Vienna Declaration*, *supra* note 198. The Vienna Declaration specifies that: (1) The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community; and (2) states should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental

general language about the promotion of human rights, which implicitly includes the abolition of discrimination to ensure freedom of opportunity. Specifically with regard to women, the Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>327</sup> elaborates on the substantive provisions of the Declaration on the Elimination of Discrimination Against Women. This Convention, which was proclaimed by the U.N. General Assembly in 1967,<sup>328</sup> acknowledges that despite numerous international instruments on the rights of women, "extensive discrimination against women continues to exist."<sup>329</sup> For purposes of CEDAW, "discrimination against women" means

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>330</sup>

The parties to CEDAW "condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women."<sup>331</sup>

freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organizations. *Id.* arts. 1(18), (20).

327. Convention on the Elimination of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1979) (*entered into force* Sept. 3, 1981) [hereinafter CEDAW]. CEDAW has been ratified by 174 countries; the United States is the only industrialized country not to have ratified CEDAW. *Ratification Status*, *supra* note 191. The United States was instrumental in drafting CEDAW which was signed by President Carter in 1980. Despite the support of many members in the U.S. Senate, ferocious opposition from conservatives, such as Jesse Helms, has prevented CEDAW from being ratified. In any event, U.S. women working at home and for U.S. companies abroad, enjoy protection against discrimination as provided for in Title VII. Other laws, such as the Pregnancy Discrimination Act and the Equal Pay Act also protect women from discrimination in the United States. *See* The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)); The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994).

328. Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263, U.N. GAOR, 22nd Sess., Supp. No. 16, at 35, U.N. Doc. A/6880 (1967).

329. CEDAW, *supra* note 327.

330. *Id.* art. 1.

331. *Id.* art. 2. Specifically, they agree:

To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women

Specifically with regard to employment, CEDAW provides that parties to the agreement shall take appropriate measures to eliminate discrimination against women.<sup>332</sup> In addition to the employment provisions, CEDAW also contains specific provisions addressing equality for women in public and political life, education, health care and marriage and family contexts.<sup>333</sup> Other documents, such as the Fourth World Conference on Women Platform for Action,<sup>334</sup> and the Declaration on the Elimination of Violence Against Women,<sup>335</sup> also support freedom from discrimination for women.

## V. LEGAL CHALLENGES TO ATCA CLAIMS

ATCA claims are vulnerable to a number of legal challenges due to the complicated logistical nature inherent in many of these cases. For example, when a worker in another country brings an ATCA claim against a U.S. company for acts that took place outside of the

against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.

*Id.*

332. *Id.* art. 11. In particular parties shall recognize:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

*Id.*

333. *Id.* arts. 7, 8, 10, 12, 14.

334. Fourth World Conference on Women Platform for Action (Beijing, 1994), available at <http://www.ilo.org/public/english/employment/gems/eec/inter/beijing.htm>.

335. *Declaration on the Elimination of Violence Against Women*, *supra* note 328, art. 3.

United States, it is likely that challenges will be presented based on forum non conveniens and that the matter cannot be properly adjudicated because indispensable parties are not included in the litigation. Additionally, if the claims are against state actors or based on state action, issues are likely to be raised about the propriety of litigating against another country in U.S. federal courts, which prompts issues under the act of state doctrine and the Foreign Sovereign Immunities Act. Moreover, challenges are also likely to be raised by private parties who will argue that the reach of the ATCA should be limited in the case of private action. Lastly, to the extent there has been any delay in filing, statutes of limitations may be raised as a way of dismissing the claims as untimely.

### A. *Forum Non Conveniens*

Before *Wiwa v. Royal Dutch Petroleum Co.*,<sup>336</sup> the doctrine of forum non conveniens presented a formidable hurdle for ATCA plaintiffs. With witnesses often in another country and alleged torts taking place somewhere other than the United States, ATCA cases were vulnerable to dismissal. In *Wiwa*, three Nigerian emigrants and a woman only known as Jane Doe (to protect her safety) claimed that they “suffered grave human rights abuses at the hands of Nigerian authorities” carried out under the direction of the defendants.<sup>337</sup> The defendants moved to dismiss the complaint, *inter alia*, based on the forum non conveniens doctrine. The district court granted the motion, determining that “England [where one of the defendants was headquartered and incorporated] was an ‘adequate alternative forum.’”<sup>338</sup> On appeal, the Second Circuit reversed, finding that “the district court did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest explicit in our federal statutory law in providing a forum for adjudication of claims in violation of the law of nations.”<sup>339</sup>

In so holding, the Second Circuit stated that the district court:

[F]ailed to give weight to three significant considerations that favor retaining jurisdiction for trial: (1) a United States resident plaintiff's choice of forum, (2) the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights, and (3) the factors that led the district court to dismiss in favor of a British forum were not particularly compelling.<sup>340</sup>

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336. See generally *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

337. *Id.* at 91-92.

338. *Id.* at 94.

339. *Id.* at 100.

340. *Id.* at 101, 103-06.

In reaching its conclusion, the court acknowledged the hurdles that would be presented to ATCA plaintiffs if they are forced to start anew in another jurisdiction.<sup>341</sup> Not only would they likely need to obtain new counsel and perhaps a new residence, a victim of torture may have enormous difficulty finding a court willing to entertain such claims.<sup>342</sup>

The *Wiwa* case “strongly tipped” the balance in favor of providing a U.S. forum for the adjudication of ATCA cases involving human rights abuses.<sup>343</sup> This was recently furthered by *Sudan v. Talisman Energy*.<sup>344</sup> Holding that the doctrine of forum non conveniens did not mandate dismissal, the Second Circuit noted several key factors.<sup>345</sup> First, the court found that the Sudan could not provide an adequate forum for the adjudication of the plaintiffs’ claims that the Sudanese government committed genocide and war crimes.<sup>346</sup> Next, even though the court recognized that Canada might be an alternative adequate forum, using a balancing test it gave deference to the choice of a U.S. forum by resident plaintiffs.<sup>347</sup> Finally, the court noted the “strong U.S. interest in vindicating international human rights violations.”<sup>348</sup> Consistent with *Wiwa*, *Talisman* reiterated the important role U.S. federal courts play in adjudicating ATCA cases to enforce international law in the case of human rights violations.

Crucial to these decisions was the lack of an adequate forum where the injuries occurred and the U.S. resident status of at least some of the plaintiffs. These factors make the decisions distinguishable from *Aguinda v. Texaco, Inc.* in which the Second Circuit dismissed an action for environmental damage in Ecuador by reason of forum non conveniens.<sup>349</sup> In so doing, the court engaged in a *Wiwa* two-step analysis. First, the court considered whether an alternative forum existed, determining that Ecuadoran courts have

341. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (observing that dismissal nonetheless requires the plaintiff to start over in the courts of another nation, which will generally at least require the plaintiff to obtain new consul, as well as perhaps a new residence).

342. *Id.*

343. Skolnik, *supra* note 35, at 190. Note that a case involving the pollution of rain forests and rivers by a U.S. company was dismissed based on the doctrine of forum non conveniens. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (finding that the courts of Ecuador provided an adequate alternative forum for plaintiffs’ claims and the balance of private and public interest factors weighed strongly in favor of the matter being heard in the Ecuadoran courts).

344. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

345. *Id.* at 335.

346. *Id.*

347. *Id.* at 336-39.

348. *Id.* at 43.

349. *Aguinda*, 303 F.3d at 473.

been receptive to similar tort claims.<sup>350</sup> Next, balancing private and public interest factors, the court found that the factors “weigh[ed] heavily” in favor of an Ecuadoran forum.<sup>351</sup> Significant considerations included the relative ease of access to sources of evidence in Ecuador, where most of the plaintiffs and their putative classes resided in Peru.<sup>352</sup> Moreover, it is questionable whether the ATCA claims based on environmental damage in *Aguinda* violate international law.<sup>353</sup> Thus, labor-related ATCA claims which would not have an adequate forum in the country where the alleged acts occurred, and particularly those asserted by plaintiffs who are not U.S. residents, should not be dismissed on forum non conveniens grounds.

### B. Indispensable Parties

Another problem confronting ATCA plaintiffs is the issue of indispensable parties. A indispensable party is deemed to be:

[N]ecessary to litigation [because] either in his absence complete relief cannot be accorded among the parties, or the person claims an interest in the subject of the action and either without being present his ability to protect that interest would be impaired, or by reason of that claimed interest the absent party would be subject to risk of multiple suits or inconsistent obligations.<sup>354</sup>

This rule is “designed to protect the absentee from prejudice, to protect the parties from harassment by successive suits, and to protect the courts from duplicative litigation.”<sup>355</sup> In the case of ATCA claims, defendants may contend that the litigation should not proceed in the absence of indispensable parties to the suit. If, however, plaintiffs can prove that an absent party is a “joint tortfeasor,” there is no reason that “complete compensatory relief may not be accorded among the remaining parties.”<sup>356</sup> A joint tortfeasor is not a “necessary” party within the meaning of the indispensable party rule.<sup>357</sup> Based on this rationale, courts have allowed ATCA claims to proceed absent “unnamed superior officers” in the military who the defendant contended gave orders for the alleged torts<sup>358</sup> and where a joint venture partner could not be joined due to sovereign

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350. *Id.* at 477.

351. *Id.* at 479.

352. *Id.*

353. *Talisman*, 244 F. Supp. 2d at 304.

354. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1551 (N.D. Cal. 1987) (citing FED. R. CIV. P. 19(a)).

355. *Id.* (citing *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 557 (9th Cir. 1983)).

356. *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 357 (C.D. Cal. 1997); *see also Forti*, 672 F. Supp. at 1552.

357. FED. R. CIV. P. 19 (Advisory Committee note).

358. *Forti*, 672 F. Supp. at 1551.



immunity.<sup>359</sup> Thus, at this point, courts are allowing ATCA claims to proceed where an argument can be made that the absent party is merely a joint tortfeasor.

### C. *The Act of State Doctrine and the Foreign Sovereign Immunities Act*

Although certainly not unique to ATCA claims, the act of state doctrine and the Foreign Sovereign Immunities Act (FSIA)<sup>360</sup> are often at issue when one or more of the defendants is a foreign state actor.<sup>361</sup> The act of state doctrine, which has jurisprudential roots in the eighteenth century, generally means that every "sovereign State is bound to respect the independence of every other foreign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory."<sup>362</sup> This doctrine has been consistently reaffirmed by U.S. courts.<sup>363</sup> Although the U.S. Supreme Court has held that the act of state doctrine applies even to violations of international law,<sup>364</sup> it is considered to be "a rare case in which the act of state doctrine" would preclude a suit under section 1350."<sup>365</sup> Courts are not inclined to extend the act of state doctrine to acts of a foreign government official that are wholly unauthorized and expressly forbidden by the foreign sovereignty.<sup>366</sup>

An ATCA plaintiff can properly assert jurisdiction over a foreign state defendant if it can demonstrate that the alleged grievous acts fall within one of the exceptions to this doctrine as provided for in the FSIA. The most recent opinion addressing this issue in the ATCA context is in *Unocal*. There, the Ninth Circuit held that under the FSIA two defendants (the Myanmar military and Myanmar Oil, collectively "Myanmar Defendants") were entitled to immunity.<sup>367</sup> Under the FSIA, a district court has jurisdiction over a foreign state only if one of several exceptions to foreign sovereign immunity applies:

[A] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based [1] upon a commercial activity carried on in the United States by a foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection

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359. *Unocal*, 176 F.R.D. at 357.

360. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 (2002).

361. See Chibundu, *supra* note 39, at 1113-20.

362. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

363. See *Forti*, 672 F. Supp. at 1545.

364. *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

365. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

366. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 889-90 (2d Cir. 1980).

367. *John Doe I v. Unocal Corp.*, 2002 WL 31063976, \*24 (9th Cir. Dec. 3, 2001).

with a commercial activity of the foreign state elsewhere and that act causes a direct effect on the United States.<sup>368</sup>

In *Unocal*, the claims against the Myanmar Defendants were based on alleged acts that took place outside of the United States.<sup>369</sup> Moreover, “any effects—such as Unocal’s profits—occurring in the United States were not ‘direct effects’ of the acts within the meaning” of the FSIA.<sup>370</sup> As such, the activities of the Myanmar Defendants did not fall within any of the arguably relevant exceptions to the FSIA, and the plaintiffs could not maintain their claims against those defendants.

On the other hand, at least one way to avoid the FSIA bar is to sue the individual perpetrators of the alleged torts, instead of attempting to litigate against a foreign government or entity.<sup>371</sup> In *Unocal*, in addition to the Myanmar Defendants, plaintiffs also brought their claims against corporate defendants (collectively Unocal).<sup>372</sup> Even so, Unocal attempted to argue that the plaintiffs’ claims against it were barred by the act of state doctrine.<sup>373</sup> Specifically, the company theorized that because a U.S. court is placed in the position of deciding “if the Myanmar Military violated international law in order to hold Unocal liable for aiding and abetting that conduct,” the relevant claims should be dismissed.<sup>374</sup> The Ninth Circuit disagreed, finding that the act of state doctrine should not apply.<sup>375</sup> In reaching its decision, the court used a four-factor test: 1) the degree of codification or consensus concerning a particular area of international law; 2) the implications for foreign relations; 3) the continued existence of the accused government; and 4) whether the foreign state was acting in the public interest.<sup>376</sup> Overall, the court rejected the challenge, concluding that there is “international consensus” that “murder, torture, and slavery are *ius cogens* violations,” that “coordinate branches of our government have already denounced Myanmar’s human rights abuses, and “it would be difficult to contend that [the Myanmar Defendants] alleged violations of international human rights were ‘in the public interest.’”<sup>377</sup> The

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368. 28 U.S.C. § 1605(a) (2003).

369. *Unocal*, 2002 WL 31063976 at \*1.

370. *Id.* at \*19.

371. Sarah J. Adams Lien, *Employer Beware? Enforcing Transnational Labor Standards in the United States Under the Alien Tort Claims Act*, 6 J. SMALL & EMERGING BUS. L. 311, 331 (2002).

372. *Unocal*, 2002 WL 31063976 at \*1.

373. *Id.* at \*20.

374. *Id.*

375. *Id.* at \*21.

376. *Id.* at \*20. The first three factors are rooted in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), and the fourth factor is taken from *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).

377. *Unocal*, 2002 WL 31063976 at \*21.

fact that the Myanmar Military is still in power was the only factor that weighed in favor of applying the act of state doctrine, but it was not of sufficient weight to invoke the act of state doctrine.<sup>378</sup> As such, plaintiffs' claims against Unocal were not barred under this doctrine and *Unocal* has laid important groundwork for future suits by ATCA plaintiffs attempting to maintain claims against companies who aid and abet conduct in violation of the law of nations.

#### D. Statute of Limitations

The ATCA does not contain a statute of limitations period. When a "cause of action under federal civil law does not have a directly applicable limitations period, the Supreme Court has instructed that the court should not assume that no time limit for the cause of action was intended."<sup>379</sup> As such, federal courts must "borrow" the limitations period from some other source.<sup>380</sup>

In such situations, courts apply the limitations period provided by the jurisdiction in which they sit unless 'a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for lawmaking.'<sup>381</sup>

In ATCA cases, courts have looked to the Torture Victim Protection Act (TVPA) as the closest federal statute to the ATCA.<sup>382</sup> Like the ATCA, the TVPA is designed to further the protection of human rights and helps "carry out the obligations of the United States under the U.N. Charter and other international agreements pertaining to the protection of human rights."<sup>383</sup> It is now well established that the ten-year statute of limitations period of the TVPA applies to ATCA.<sup>384</sup>

In ATCA cases, ten years can be a relatively short period, given workers' fear of intimidation or reprisal, which may delay them in making a claim and, thus, an important issue is the possibility of tolling the statute of limitations.<sup>385</sup> Equitable tolling occurs under

378. *Id.*

379. *In re World War II Era Japanese Forced Labor*, 164 F. Supp. 1153, 1179 (N.D. Cal. 2001) (citing *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983)).

380. *Id.*

381. *Papa v. United States*, 281 F.3d 1004, 1011-12 (9th Cir. 2002) (quoting *North Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995)).

382. *See Japanese Forced Labor*, 165 F. Supp. 2d at 1180; *Papa*, 281 F.3d at 1012; *Cabrini v. Assasie-Gyimah*, 921 F. Supp. 1189, 1194, 1196 (S.D.N.Y. 1996).

383. TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1991); *see Papa*, 281 F.3d at 1012 (additional information on the rationale on using the TVPA ten-year statute of limitations period).

384. *See, e.g., Deutsch v. Turner*, 317 F.3d 1005, 1020 (9th Cir. 2003).

385. *Nat'l Coalition Gov't of the Union of Burman v. Unocal, Inc.*, 176 F.R.D. 329, 360 (C.D. Cal. 1997).

federal law where the “defendant’s wrongful conduct prevented the plaintiff from timely asserting his claim,” or “where extraordinary circumstances outside of plaintiff’s control make it impossible for [a] plaintiff to timely assert his claim.”<sup>386</sup> Where a plaintiff is unable to assert his claims in the United States or another jurisdiction, the claims may be tolled.<sup>387</sup> This tolling of the statute of limitations allows a plaintiff time to flee oppressive circumstances or a hostile jurisdiction and still be able to maintain ATCA claims.

## VI. REMEDIES

Assuming that an ATCA plaintiff can prevail through the minefield of legal challenges, that plaintiff may be granted relief falling generally into the following categories: compensatory and punitive damages; equitable relief such as permanently enjoining defendants from engaging in further behavior in violation of the law of nations; and costs, including attorneys’ fees. U.S. companies faced with ATCA claims need carefully to evaluate their potential exposure, including their exposure to punitive damages, especially in cases where a class is certified. If a judgment is obtained, one advantage ATCA plaintiffs have in maintaining claims against U.S. companies is that they will have a reasonable chance of actually collecting a judgment. If the defendant—particularly a foreign one—does not have adequate assets in the United States, however, plaintiffs may face difficulty in collecting. Executing the judgment in another country can be difficult, if not impossible in a situation where another jurisdiction refuses to acknowledge the validity of the judgment. To guard against this problem, ATCA plaintiffs may want to seek a preliminary injunction to prevent a defendant from moving any assets that could potentially be used to satisfy a judgment. In at least one pending ATCA case, the court preliminarily enjoined the defendant from transferring, secreting, or dissipating the assets while the claims were pending.<sup>388</sup> Overall, even though ATCA plaintiffs face a long haul from filing a claim to actually collecting on a judgment, this law has the potential to change to face of the global workplace.

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386. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987) (citing FED. R. CIV. P. 19(a)).

387. *See id.* at 1550; *Unocal*, 176 F.R.D. at 360.

388. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, at 1467 (9th Cir. 1994) (holding that the district court did not abuse its discretion in preliminarily enjoining the estate of Ferdinand Marcos from transferring, secreting, or dissipating the estate’s assets while claims were pending).

## VII. CONCLUSION

There is certain to be opposition to U.S. courts adjudicating ATCA claims brought by workers who were employed or subject to forced labor outside of the United States.<sup>389</sup> Yet, to the extent that companies under the jurisdiction of U.S. courts treat their international workers with impunity or are knowingly complicit in acts that violate international law, they should be held accountable. They should not be able to hide behind assertions that international treaties, conventions and resolutions are merely “soft” law that does not warrant enforcement.

When heads of state gathered at the U.N. Headquarters in New York in September 2000, they formally reaffirmed their faith in that organization and the U.N. Charter “as indispensable foundations of a more peaceful, prosperous, and just world.”<sup>390</sup> Included in that U.N. Millennium Declaration (Millennium Declaration) is the statement that these world leaders “believe that the central challenge [they] face today is to ensure that globalization becomes a positive force for all the world’s people.”<sup>391</sup> The Millennium Declaration is a rededication, *inter alia*, to “respect for human rights and fundamental freedoms, respect for equal rights of all without distinction to race, sex, language or religion and international cooperation in solving international problems of an economic, social, cultural or humanitarian character.”<sup>392</sup>

These words resonate with the basic principles implicit in core labor rights. In a speech to the Inter-American Development Bank, President Bush declared that U.S. support for the “international development goals in the U.N. Millennium Declaration” and his belief that “these goals are a shared responsibility of developed and developing countries.”<sup>393</sup> Significantly, he continued, stating that to “make progress, we must encourage nations and leaders to walk the

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389. The International Chamber of Commerce (ICC), for example, is taking the position that suing companies in the United States for alleged events outside of the United States is unacceptable. For an elaboration on their position in opposition to the ATCA, see [http://www.iccwbo.org/home/news.archives/2002/stories/appl-natl\\_law.asp](http://www.iccwbo.org/home/news.archives/2002/stories/appl-natl_law.asp). The ICC fears that ATCA actions will create a chill in foreign investment. See also The United States Chamber of Commerce, *Alien Torts: The Risks of Allowing Foreign Citizens to Sue U.S. Companies* (Sept. 16, 2003), available at <http://www.uschamber.com/viewevent.asp?eventid=165>; Hufbauer & Mitrookostas, *supra* note 3.

390. *U.N. Millennium Declaration*, 55/2 (Sept. 18, 2000), available at <http://www.un.org/millennium/declaration/ares552e.pdf>.

391. *Id.* part I(5).

392. *Id.* part I(4).

393. President George W. Bush, Remarks to Inter-American Development Bank (Washington, D.C., Mar. 14, 2002), available at <http://usembassy.state.gov/tokyo/wwwhec0480.html>.

hard road of political, legal and economic reform, so all their people can benefit.”<sup>394</sup>

That “hard road” of reform includes labor rights and that will not happen merely through free trade. As 2001 Nobel Prize winner Joseph Stiglitz stated in *Globalization and its Discontents*,

The developed world needs to do its part to reform the international institutions that govern globalization. . . . If we are to address the legitimate concerns of those who have expressed a discontent with globalization, if we are to make globalization work for the billions of people for whom it has not, if we are to make globalization with a human face succeed, then our voices must be raised. We cannot idly stand by.<sup>395</sup>

Sharing that global responsibility means that U.S. courts must also do their part by effectively enforcing the laws of this country and international law. One very fundamental place to begin that task is in connection with the ATCA. The law of nations rightfully encompasses global core labor rights; the agreements that articulate these standards are no less important than other international agreements that are given full force and effect.

All of the international agreements discussed in this article should be heeded by U.S. courts as supporting a labor-related claim under the law of nations. While it is admirable that the law of nations has, thus far, been interpreted to include extrajudicial murder, genocide, torture, kidnapping, unlawful detention, slavery, and forced labor, courts should also recognize that it includes torts committed in connection with freedom of association, the right to collective bargaining, prohibitions on child labor, and discrimination. International agreement on these matters will not flow merely from well-meaning academic measures; such agreement should be given more than lip service. These documents represent a large-scale commitment to improving global labor rights. Moreover, as a wider swath of labor rights is judicially recognized, it seems only natural that the evolutionary path will be for other issues, such as a living wage, minimum health and safety standards, and maximum hours eventually to be incorporated into the global workplace. Holding U.S. based multinational companies liable under the ATCA for violations of international labor rights will go a long way toward ending corporate impunity. By enforcing the ATCA, the judicial system will give true meaning to the many agreements entered into by the world’s nations which contribute to the law of nations. In this way, the raised voices of international labor rights supporters will begin to be heard.

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394. *Id.*

395. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 252 (2002).

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