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## Employer Beware? Enforcing Transnational Labor Standards in the United States Under the Alien Tort Claims Act

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# COMMENTS

## EMPLOYER BEWARE? ENFORCING TRANSNATIONAL LABOR STANDARDS IN THE UNITED STATES UNDER THE ALIEN TORT CLAIMS ACT

by  
Sarah J. Adams Lien\*

*The Alien Tort Claims Act (ATCA) arguably allows non-U.S. citizens to bring claims for violations of customary international law (CIL). Although CIL litigation typically embraces only egregious human rights violations, the scope of CIL actually encompasses all universally recognized rights, including some labor rights. This Comment explores the possibility that the ATCA may be used to litigate claims by non-U.S. citizens alleging violations of international labor rights. It concludes that the Act likely provides a vehicle for aggrieved employees to bring suit in U.S. court for violations of international labor standards. Finally, this Comment recognizes that the impact of ATCA litigation may be more beneficial than detrimental to owners of small businesses. By holding U.S. and other employers operating in developing nations to an international labor standard, the ATCA may act to level the playing field between domestic companies and companies operating abroad.*

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## I. INTRODUCTION

The Alien Tort Claims Act<sup>1</sup> (ATCA) likely provides a vehicle for aggrieved employees to bring suit in U.S. federal district court for violations of transnational labor standards. The ATCA allows actions to be brought by non-U.S. residents alleging violations of customary international law. The Act creates a cause of action and vests jurisdiction in federal district courts to hear claims arising under it. Although customary international law includes all universally recognized rights—which includes any universally recognized labor rights—the prohibition against forced labor is the only labor right yet to be litigated under the ATCA. So far, the scope of cases brought under the Act remains limited to the arena of flagrant human rights abuses such as torture and genocide. The line between human rights and labor rights, however, is often blurred. Many of the principles that underlie human rights claims successfully brought under the ATCA apply to labor rights. For example, claims alleging slave trading overlap with recognized international labor standards prohibiting forced labor, which in turn implicates sweat shop practices in the United States and abroad.

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<sup>1</sup> Alien Tort Claims Act, 28 U.S.C. § 1350 (1994).

Application of the Act in the labor-rights arena is constrained, however, by a number of variables. Among them is the current state-centric focus of customary international law, which tends to preclude claims against individual defendants. Because labor-standards violators are typically private actors, any promise the Act provides for enforcing labor standards may be severely hampered if courts continue to adhere strictly to modern state-actor requirements.

Existing doctrines of customary international law nevertheless include specific exceptions to the state-actor requirement. For example, individual defendants acting jointly with the state may be held accountable for those actions. Furthermore, the state-actor requirement, like all aspects of customary international law, is fluid.

Even with all its attendant uncertainty, claims brought under the ATCA have resulted in large settlements that include both compensatory damages and agreements by defendants to abide by stricter labor standards in the future. Such litigation may resolve many of the compliance problems plaguing international and regional labor rights instruments.<sup>2</sup>

Even a limited construction of the trend toward litigating customary international labor law in the United States should send cautionary signals to U.S. employers, especially those conducting business abroad. In light of recent cases brought under the Act, U.S. employers need, at the very least, to foster a heightened sensitivity to possible claims by non-U.S. nationals alleging violations of certain international labor rights, including the right to freely associate, the prohibition against forced labor, and the prohibition against systematic discrimination on the basis of race, gender, and religion. Although courts and commentators are hesitant to expand ATCA actions beyond the bounds of traditional international human rights law, certain labor rights violations, which are themselves encompassed under the heading of "human rights" (such as violation of the prohibition against forced labor), are finding an audience in U.S. district courts.

Interestingly, the impact of ATCA litigation may be more beneficial than detrimental to owners of small businesses in the United States. Domestic businesses that do not employ non-U.S. nationals presently have nothing to fear from the ATCA. Businesses that do employ non-U.S. nationals need to be aware that such employees may bring suit to enforce international standards not necessarily found in any U.S. code or regulation. Although the potential for such actions exists, ATCA litigation to date has focused almost entirely on wrongs committed outside the United States.

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<sup>2</sup> See, e.g., International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work, International Labour Conference (ILC), 86th Sess., June 19, 1998, 37 I.L.M. 1233, <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> [hereinafter ILO Declaration on Fundamental Principles]; North American Free Trade Act Agreement on Labor Cooperation, Sept. 8–14, 1993, 32 I.L.M. 1499 (1993).

The significance of this trend for businesses operating solely in the United States may be enormous. By holding U.S. and other employers operating in developing nations to an international labor standard, the ATCA may act to level the playing field between domestic companies, which are bound by U.S. labor laws, and companies operating abroad, which are able to maximize a wide profit margin between the low cost of manufacturing in the developing world and the affluent U.S. market.

## II. SCOPE OF THE ATCA

The ATCA provides both federal subject matter jurisdiction in the United States and a cause of action for an alien alleging a tort in violation of a U.S. treaty or international law. Specifically, the Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>3</sup> Thus, federal jurisdiction and a private right of action are established for claims brought (1) by a non-U.S. national, (2) alleging a tort, (3) in violation of a U.S. treaty or customary international law.<sup>4</sup> In other words, the ATCA opens U.S. courthouses to foreign plaintiffs suing for personal injuries that involve some breach of international law.<sup>5</sup>

Academics and judges alike hotly debate the scope of international law as it is referred to in the Act.<sup>6</sup> The "law of nations" element defines both the nature of the claims that may be raised and by whom and against whom claims may be made. The following two sections address these issues.

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<sup>3</sup> 28 U.S.C. § 1350.

<sup>4</sup> Section 1350 actions are subject to other doctrinal hurdles such as personal jurisdiction, *forum non conveniens*, and justiciability. See discussion *infra* Part II.C.

<sup>5</sup> In modern usage, the terms "law of nations" and international law are interchangeable. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 2, introductory note at 41 (1987) (discussing "the law of nations, later referred to as international law").

<sup>6</sup> See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 n.10 (2d Cir. 2000) (discussing ongoing controversy over purpose of ATCA), *cert. denied*, 121 S. Ct. 1402 (2001); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 n.6 (N.D. Cal. 1987) (recognizing that Congress intended the ATCA to facilitate federal oversight of matters related to international law); see also William R. Castro, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 500 (1986) (asserting that the ATCA may have been enacted to provide for "all foreseeable and unforeseeable violations by individuals of the law of nations"); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475 (1989) (asserting that the First Congress understood and intended "the law of nations" language to evoke evolving customary international law); but c.f. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 814-15 (D.C. Cir. 1984) (Bork, J., concurring) (asserting a limiting interpretation of the statute); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (asserting that improperly broad interpretation of section 1350 disturbs the fabric of federal jurisdiction).

### A. *Alleging and Proving Violations of "the law of nations"*

Although courts and commentators continue to debate the meaning and scope of the law of nations as referred to in the Act, the majority of commentators and all federal courts of appeals interpret the statute as evoking contemporary norms of international law.<sup>7</sup> A minority of judges and commentators argue that the law of nations as referred to in the Act should be interpreted in a manner consistent with Congressional intent in 1789.<sup>8</sup> The following two sections discuss the fluid nature of customary international law as it relates to interpretation of the ATCA, and the elements necessary to allege and prove rules of customary international law.

#### 1. *Evolving Standards of Customary International Law Determine the Bounds of the ATCA's Jurisdictional Grant*

The U.S. Congress, a majority of the U.S. courts of appeals that have published opinions addressing the ATCA, and the brunt of scholarly opinion indicate that the ATCA reaches claims brought under customary international law as that law exists at the time of the claim.<sup>9</sup> Other scholars, as well as some circuit courts of appeals judges, however, argue that this interpretation is improperly broad.<sup>10</sup>

The ATCA dates back to the First Congress and section nine of the Judiciary Act of 1789.<sup>11</sup> The legislative genesis of the Act is uncertain.<sup>12</sup> Competing theories identify the ATCA as having arisen out of an overall scheme to protect national security and provide federal oversight in cases

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<sup>7</sup> See, e.g., *Forti*, 672 F. Supp. at 1540 n.6 (recognizing contemporary nature of customary international law); *Castro*, *supra* note 6, at 500 (same); *Burley*, *supra* note 6, at 475 (same).

<sup>8</sup> See, e.g., *Bradley & Goldsmith*, *supra* note 6 (asserting a limiting interpretation of the statute).

<sup>9</sup> See Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1994); H.R. Rep. No. 102-367, at 3-4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (stating that the ATCA "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law"); see also, e.g., *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) (rejecting construction of statute limiting scope to maritime prize law), *rehearing denied*, 74 F.3d 377; *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987) ("evolving standards of international law govern who is within the [ATCA's] jurisdictional grant"), *rev'd on other grounds*, 488 U.S. 428 (1989); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980) (recognizing wide scope of Act); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (same) [hereinafter *Ferdinand Marcos*].

<sup>10</sup> See, e.g., *Tel-Oren*, 726 F.2d at 814-15 (Bork, J., concurring) (asserting a limiting interpretation of the statute); *Bradley & Goldsmith*, *supra* note 6 (same); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 451 (1995) ("The word 'tort,' . . . referred to wrongs under the law of prize.").

<sup>11</sup> The First Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350 (2000)).

<sup>12</sup> See generally *Wiwa*, 226 F.3d at 104, n.10 (discussing ongoing controversy over purpose of ATCA).

involving the mistreatment of aliens by U.S. citizens, as a limited reference to prize law, and as a reference to customary international law as it existed in 1789.<sup>13</sup> In contrast, others suggest a much broader interpretation, asserting that the language of the Act reflects congressional recognition of the nation's obligation to promote and enforce customary international law.<sup>14</sup>

The dispute over Congressional intent and the history of the statute implicate directly the kinds of violations actionable under the ATCA. Rarely invoked in the 150 years after enactment,<sup>15</sup> the Second Circuit revived the statute in its seminal 1980 decision, *Filartiga v. Americo Norberto Pena-Irala*.<sup>16</sup> In *Filartiga*, the father and sister of Joelito Filartiga, a Paraguayan teenager tortured to death in Paraguay by a local police inspector, sued the officer in federal court in New York.<sup>17</sup> At the time the plaintiffs brought the suit, they and the defendant, who were all citizens of Paraguay, lived in Brooklyn, New York.<sup>18</sup> The district court dismissed the case for lack of subject matter jurisdiction.<sup>19</sup>

Although the Second Circuit acknowledged that torture was not recognized as a violation of the law of nations in 1789,<sup>20</sup> the court nevertheless concluded that the prohibition against torture had since ripened into a rule of customary international law.<sup>21</sup> The *Filartiga* court declared that international law must be interpreted "not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>22</sup> Consequently, official torture was within the scope of the court's jurisdiction as defined by the ATCA. *Filartiga* is generally credited for the proposition that the law of nations in § 1350 refers to contemporary customary international law.<sup>23</sup>

The Second Circuit's position continues to be that the Act grants jurisdictional authority to federal courts to hear claims brought under

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<sup>13</sup> See Castro, *supra* note 6, at 500 (asserting that the ATCA may have been enacted to provide for the protection of foreign diplomats); *Tel-Oren*, 726 F.2d at 814-15 (Bork, J., concurring) (same). *But cf. Forti*, 672 F. Supp. at 1540 n.6 (asserting that Congress intended the ATCA to facilitate federal oversight of matters related to international law); Sweeney, *supra* note 10 (arguing that scope is limited to prize law).

<sup>14</sup> See, e.g., Burley, *supra* note 6; Castro, *supra* note 6.

<sup>15</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.21 (2d Cir. 1980) (identifying only two cases that relied on the ATCA for jurisdiction prior to *Filartiga*).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 878.

<sup>18</sup> More accurately, the defendant was awaiting extradition to Nicaragua. *Id.*

<sup>19</sup> *Id.* at 880.

<sup>20</sup> *Id.* at 881.

<sup>21</sup> *Id.* at 880-81.

<sup>22</sup> *Id.* at 881.

<sup>23</sup> See, e.g., *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) (following *Filartiga*), *rehearing denied*, 74 F.3d 377; *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425-26 (2d Cir. 1987) (same), *rev'd on other grounds*, 488 U.S. 428 (1989).

contemporary customary international law.<sup>24</sup> Tacitly approving the Second Circuit's approach to law of nations analysis, the Ninth and Eleventh Circuits have affirmed subject matter jurisdiction under the ATCA over claims that would not have constituted violations of the law of nations in 1789, but do constitute violations of modern customary international law.<sup>25</sup>

In passing the Torture Victim Protection Act of 1991,<sup>26</sup> the U.S. Congress explicitly endorsed the Second Circuit's interpretation of the ATCA.<sup>27</sup> There, Congress declared that:

The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.' (28 U.S.C. sec. 1350). Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing. . . .

*[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [sic] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.*<sup>28</sup>

This passage clearly contemplates that courts must examine *contemporary* international law in order to determine whether a particular tort is a violation of the law of nations.

Despite scholarly argument that Congressional intent demands a narrow interpretation of the ATCA's reference to the law of nations,<sup>29</sup> the courts and Congress have declared that the law of nations means international law "not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>30</sup> A narrow interpretation would foreclose use of the statute to litigate violations of international labor standards on the basis that such norms were unrecognized in 1789.

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<sup>24</sup> See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (adopting *Filartiga* approach).

<sup>25</sup> See, e.g., *Ferdinand Marcos*, 25 F.3d 1467, 1468 (9th Cir. 1994) (torture and genocide); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (torture).

<sup>26</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2000)). The Torture Victim Protection Act (TVPA) provides a federal cause of action against any individual, who under actual or apparent authority, or under color of law of any foreign nation, subjects any other individual to torture or extra-judicial killing. *Id.*

<sup>27</sup> See H.R. Rep. No. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (noting that purposes of TVPA are to codify *Filartiga*, to alleviate separation of powers concerns, and to expand the remedy to include U.S. citizens).

<sup>28</sup> *Id.* at 3-4 (emphasis added).

<sup>29</sup> See *supra* notes 8 and 10.

<sup>30</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).



## 2. What Constitutes a Violation of "the law of nations"?

To satisfy the ATCA's jurisdictional requirements, plaintiffs must allege facts sufficient to show a violation of international law. Courts look to "the works of jurists, writing professedly on public law; . . . the general usage and practice of nations; [and] judicial decisions recognising and enforcing that law"<sup>31</sup> to determine the material of customary international law.<sup>32</sup> Courts deciding claims arising under the ATCA typically adopt the approach that customary international law results from general and consistent state practices followed from a sense of legal obligation—and proof of customary international law comes from judicial opinions, scholarly work, and other evidence of state practices and their obligatory nature.<sup>33</sup>

Parties may present treaties and other international agreements as evidence of customary international law even if those agreements are not self-executing.<sup>34</sup> According to the Restatement of Foreign Relations Law (Restatement), parties can prove state practice by reference to official documents like multilateral agreements.<sup>35</sup> For example, adherence to the human rights provisions of the United Nations Charter would indicate state practice embracing the norms articulated in that instrument.<sup>36</sup> In a 1998 case against the U.S. Immigration and Naturalization Service, the plaintiffs alleged cruel and inhuman treatment in violation of customary international law.<sup>37</sup> As evidence of customary international law prohibiting such treatment, the plaintiffs submitted treaties, charters, and conventions on human rights.<sup>38</sup> The district court recognized that, although none of the international instruments plaintiffs submitted were self-executing, they supported a claim alleging violation of customary international law "*as informed by various international human rights treaties and other international human rights instruments.*"<sup>39</sup>

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<sup>31</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820).

<sup>32</sup> *See id.*; *The Paquete Habana*, 175 U.S. 677, 700 (1900) (seminal U.S. Supreme Court decision interpreting customary international law) (reiterating *Smith* standard).

<sup>33</sup> *See, e.g., Filartiga*, 630 F.2d at 880–81 (stating that rules must command the "general assent of civilized nations"); *Kadic v. Karadzic*, 70 F.3d 232, 238–39 (2d Cir. 1995) (concluding that violations of the law of nations occur only when conduct violates "well-established, universally recognized norms of international law," as opposed to "idiosyncratic legal rules" of individual nations), *rehearing denied*, 74 F.3d 377.

<sup>34</sup> *Hawa Abdi Jama v. U.S. Immigration & Naturalization Serv.*, 22 F. Supp. 2d 353, 358 (N.J. Dist. 1998); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 note 1 (1987).

<sup>35</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 note 1 (1987).

<sup>36</sup> *Id.*

<sup>37</sup> *Hawa Abdi Jama*, 22 F. Supp. 2d at 357.

<sup>38</sup> *Id.* at 362.

<sup>39</sup> *Id.*

The International Court of Justice (ICJ) distinguishes between state practice and the *opinio juris* of states.<sup>40</sup> The ICJ interprets states' agreements—as opposed to actions—to incorporate a particular rule in a treaty as providing evidence of the *opinio juris* of those states.<sup>41</sup> Agreement between states as to the content of legal rules—without corresponding state practice—does not on its own, however, support the existence of a rule of customary international law.<sup>42</sup> Further evidence of state practice exists if states participate in the preparation of such agreements, incorporate the principles of international instruments in their own national laws, condemn other states for breaches of those principles,<sup>43</sup> or respond to allegations of breaches of the rules with justifications rather than denouncements.<sup>44</sup>

Absolute agreement and adherence to a norm is not necessary. To demonstrate that a norm is universal, the ICJ states that it is “sufficient that the conduct of States should, in general, be consistent with [the] rules, and that instances of State conduct inconsistent with a given rule should generally [be] treated as breaches of that rule, not as indications of the recognition of a new rule.”<sup>45</sup>

The Restatement, which is the written opinion of the American Law Institute, is the kind of scholarly writing courts regard as evidence of customary international law.<sup>46</sup> The Restatement recognizes the following as violations of customary international law: genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights.<sup>47</sup> Because the Restatement acknowledges that its list is not exhaustive,<sup>48</sup> it provides per-

<sup>40</sup> See *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 97 (June 27) (stating that rules of customary international law are derived from actual practices and *opinio juris* of states).

<sup>41</sup> See *id.* at 97–98 (stating that, because the rules in the United Nations Charter are legal rules, membership in the United Nations provides evidence of agreement with those rules).

<sup>42</sup> *Id.*

<sup>43</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 note 2 (1987).

<sup>44</sup> See discussion of China and Chile's defensive responses to ILO accusations that the countries have violated the right to freedom of association *infra* text accompanying notes 183–87.

<sup>45</sup> *Military and Paramilitary Activities*, 1986 I.C.J. at 98.

<sup>46</sup> See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (looking to Restatement to determine content of customary international law); *Beanal v. Freeport McMoran, Inc.*, 969 F. Supp. 362, 373, 383 (E.D. La. 1997) (same), *aff'd*, 203 F.3d 835 (5th Cir. 1999); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (same), *reconsideration granted in part by*, 694 F. Supp. 707 (N.D. Cal. 1988).

<sup>47</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 note 36 (1987).

<sup>48</sup> *Id.* at cmt. a.

suasive authority to argue that a norm is included in the realm of customary international law, while providing weak authority of the converse proposition.

To date, U.S. courts construing the ATCA have recognized the customary international law status of a number of norms. These include torture,<sup>49</sup> crimes against humanity,<sup>50</sup> war crimes,<sup>51</sup> genocide,<sup>52</sup> disappearance,<sup>53</sup> summary execution,<sup>54</sup> arbitrary detention,<sup>55</sup> forced labor,<sup>56</sup> and cruel, inhuman, and degrading treatment.<sup>57</sup>

*B. The Generally State-Centric Reach of Customary International Law Tends to Limit Who Can Sue Whom*

Recently, an ATCA case against corporate defendant Coca-Cola was dismissed not because of the nature of the violation, but because of the nature of the defendant.<sup>58</sup> In order for jurisdiction to attach under § 1350, a plaintiff must properly allege a violation of international law.<sup>59</sup> Such violations are limited in both the scope of substantive rights protected and obligations imposed. Modern international law generally limits its reach to states' treatment of citizens as opposed to private individuals' treatment of one another, or corporations' treatment of individuals.<sup>60</sup> It was precisely on this basis that the Second Circuit dismissed the case against Coca-Cola for lack of subject matter jurisdiction. In that case, the private-party defendant, Coca-Cola, had no obligations under

<sup>49</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

<sup>50</sup> See, e.g., *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986).

<sup>51</sup> See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995), *rehearing denied*, 74 F.3d 377.

<sup>52</sup> See, e.g., *id.* at 241-42.

<sup>53</sup> See, e.g., *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988).

<sup>54</sup> See, e.g., *Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994).

<sup>55</sup> See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995).

<sup>56</sup> See, e.g., *Doe v. Unocal*, 963 F. Supp. 880, 892 (C.D. Cal. 1997), *rev'd on other grounds*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

<sup>57</sup> See, e.g., *Xuncax*, 886 F. Supp. at 187.

<sup>58</sup> *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); see also *Beanal v. Freeport McMoran, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997) (stating that murder and torture without state action are not actionable under the Act), *aff'd*, 203 F.3d 835 (5th Cir. 1999).

<sup>59</sup> Because the Alien Tort Act requires that plaintiffs plead a 'violation of the law of nations' at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible 'arising under' formula of section 1331. Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States). *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (citation omitted), *rehearing denied*, 74 F.3d 377.

<sup>60</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 792 (D.C. Cir. 1984) (Edwards, J., concurring).

customary international law, and thus could not violate customary international law.<sup>61</sup>

The notion that only states and colorable state actors are duty bound by customary international law is consistent with late-nineteenth and mid-twentieth century conceptions of international law as premised on state consent. Throughout this period, rules of customary international law stemmed from widespread and consistent practices of states, and a state could opt out of a rule by persistently objecting to it.<sup>62</sup> These rules were deemed only to bind those who consented to them (*i.e.*, states).<sup>63</sup> Following the Nuremberg trials, however, the determination of which actors have rights and responsibilities under the rules of customary international law shifted from the nation-state to the individual level.<sup>64</sup> Nevertheless, as the next section illustrates, most courts interpreting the ATCA have found that customary international law binds only state actors and colorable state actors.

*1. The General Rule: Customary International Law Binds Only State Actors and Colorable State Actors*

The paradigm ATCA case includes a foreign plaintiff, usually living in the United States, suing a foreign defendant who, acting as a foreign official, committed a tortious act in violation of customary international law.<sup>65</sup> With increasing frequency, however, foreign plaintiffs seek to invoke the ATCA to sue private corporations.<sup>66</sup> In some instances, courts have found corporate defendants liable under the ATCA when those defendants acted jointly with a state.<sup>67</sup> Alternatively, in at least one instance, the norm violated was found to be universally obligatory, such

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<sup>61</sup> Bigio, 239 F.3d 440, 448.

<sup>62</sup> See generally, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1987).

<sup>63</sup> *Id.* During the mid-nineteenth century, because of the notion that one sovereign should not judge another sovereign's treatment of its own citizens, rights under customary international law were also limited to states and state actors. *Id.* This section focuses on the trend toward individual accountability, as opposed to individual rights, under customary international law. This is because it is now generally accepted that individuals have rights under customary international law, *id.*, and because the concept of whether labor rights are actionable under customary international law depends, at least in part, on holding corporations accountable.

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

<sup>66</sup> See, e.g., *Bigio*, 239 F.3d 440; *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Doe v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

<sup>67</sup> See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

that state action was not required.<sup>68</sup> Typically, however, courts find that corporate actions lie outside the realm of customary international law.<sup>69</sup>

In *Tel-Oren v. Libyan Arab Republic*,<sup>70</sup> as in *Filartiga*, alien plaintiffs alleged torture.<sup>71</sup> In *Tel-Oren*, survivors and representatives of persons killed in an armed attack on a civilian bus in Israel brought suit under the ATCA against the Libyan Arab Republic and various organizations, including the Palestine Liberation Organization (PLO).<sup>72</sup> The plaintiffs alleged that the defendants were responsible for the attack and other tortious acts in violation of customary international law.<sup>73</sup> The district court dismissed the claims against the Libyan Arab Republic on the basis of sovereign immunity and against the remaining defendants on the basis of the state-actor requirement.<sup>74</sup> The only issue on appeal was whether the dismissal of the claims against the PLO and the other nonstate defendants was proper. In three separate opinions, a panel of the Circuit Court of Appeals for the District of Columbia affirmed the lower court's order of dismissal.<sup>75</sup> Of the three judges on the panel, only Judge Edwards addressed the state-actor issue.<sup>76</sup>

In his concurrence in *Tel-Oren*, Judge Edwards discussed at length the fluidity of the state-actor requirement. According to Judge Edwards, the question before the court was whether *Filartiga*'s reasoning should be stretched to incorporate torture perpetrated by private actors.<sup>77</sup> Reviewing the case law and literature, he found that the status of individuals in international law has been in flux since before the ATCA was drafted in 1789.<sup>78</sup> The view that states alone are subjects of international law emerged in the nineteenth century.<sup>79</sup> Judge Edwards noted in *Tel-Oren* that legal scholars are again embracing the view that both the rights and obligations of international law should apply to private parties.<sup>80</sup>

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<sup>68</sup> *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), *rehearing denied*, 74 F.3d 377. See discussion of peremptory norms *infra* Part II.B.3.

<sup>69</sup> See, e.g., *Bigio*, 239 F.3d 440, 448.

<sup>70</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

<sup>71</sup> *Id.* at 776, 791 (Edwards, J., concurring).

<sup>72</sup> *Id.* at 775.

<sup>73</sup> *Id.*

<sup>74</sup> See *id.* (discussing lower court opinion).

<sup>75</sup> *Id.* at 775.

<sup>76</sup> Judge Bork, disagreeing with *Filartiga*, concluded that separation of powers principles prevented most violations of the law of nations from being actionable under the ATCA. *Id.* at 798. Judge Robb affirmed the dismissal on the basis that the question was nonjusticiable. *Id.* at 823.

<sup>77</sup> *Id.* at 792 (Edwards, J., concurring).

<sup>78</sup> *Id.* Jurists in the eighteenth century believed that individuals were bound by the rules of international law. See, e.g., *Respublica v. DeLongchamps*, 1 U.S. (1 Dall.) 111 (1784) (holding an individual liable for assault on French consul-general in violation of law of nations). In early piracy cases, the U.S. Supreme Court observed that pirates were liable under international law as *hostis humani generis* (enemies of all mankind). The *Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844).

<sup>79</sup> See *Tel-Oren*, 726 F.2d at 794 (Edwards, J., concurring).

<sup>80</sup> See *id.*

Although courts and commentators since *Tel-Oren* have considered the outcome in that case to be the result of an overly constrictive reading of *Filartiga*,<sup>81</sup> the state-actor requirement remains a substantial hurdle for plaintiffs bringing claims under the ATCA. Furthermore, because sovereigns themselves, like the Libyan Arab Republic in *Tel-Oren*, are typically immune,<sup>82</sup> a plaintiff's success often hinges on whether the defendant acted under the color of law. The *Filartiga* plaintiffs satisfied the state-actor requirement because the defendant, Pena-Irala, tortured his victim while acting in his official capacity as Police Inspector.<sup>83</sup>

The state-actor requirement, like all elements of customary international law, is fluid. Courts must interpret the nature and extent of the requirement as it is at the time of the alleged act and not as it was at some other point in history. In the first half of the twentieth century, customary international law was thought only to regulate interactions between states; interactions between a state and its citizens, for example, were off-limits. The district court in *Filartiga* followed this approach to the state-actor requirement, holding that international law does not regulate a state's treatment of its own citizens.<sup>84</sup> On appeal, however, the Second Circuit reversed, holding that customary international law as it existed at the time of the alleged violation prohibited state-perpetrated torture of individual citizens.<sup>85</sup> Whether the trend toward recognition of individuals as having rights under international law will carry over to recognition of individual obligations remains to be seen.

## 2. Determining Whether a Party is Acting Under Color of Law

The *Filartiga* approach to the state-actor requirement is consistent with modern international law jurisprudence, which holds individuals acting under the color of law to the obligations of the state.<sup>86</sup> In construing the term "color of law," Congress instructs courts to look to principles of 42 U.S.C. § 1983 jurisprudence.<sup>87</sup> Section 1983 authorizes suits against

<sup>81</sup> See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (stating that the TVPA was necessary to shore up *Filartiga* in light of Judge Bork's constrictive reading), rehearing denied, 74 F.3d 377; Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 521 n.306 (2000) (stating that the only judicial voice disagreeing with the Second Circuit's interpretation of the law of nations reference in § 1350 came from Judge Bork in his concurrence in *Tel-Oren*).

<sup>82</sup> *Tel-Oren*, 726 F.2d 774. See discussion of sovereign immunity *infra* text accompanying notes 144–50.

<sup>83</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>84</sup> *Id.* at 880.

<sup>85</sup> *Id.* at 878.

<sup>86</sup> See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

<sup>87</sup> H.R. Rep. No. 102-367, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87; see also *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000) ("'[C]olor of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.").

state actors for violations of U.S. constitutional or statutory rights.<sup>88</sup> The crux of the § 1983 state-actor analysis hinges on whether the conduct alleged is fairly attributable to the state.

Under the § 1983 state-actor analysis, courts apply a number of tests to determine whether state involvement in private actions or private involvement in state actions is sufficient to hold the private party to the obligations of the state. The U.S. Supreme Court has taken a flexible (or inconsistent, according to the Court's own critique<sup>89</sup>) approach to the color of law question. The Court has applied four tests to determine whether a private individual acted under the color of law: (1) the public function test, (2) the symbiotic relationship test, (3) the nexus test, and (4) the joint action test.<sup>90</sup>

The public function test looks at whether a private entity performs a function that is traditionally the exclusive prerogative of the state.<sup>91</sup> The symbiotic relationship test looks at whether the state "has so far insinuated itself into a position of interdependence" with a private party that "it must be recognized as a joint participant in the challenged activity."<sup>92</sup> Under the symbiotic relationship test, the Supreme Court held in *Burton v. Wilmington Parking Authority* that a private restaurant located in a government-owned building was a colorable state actor because of the indispensability of the restaurant's lease to the government's operation of the building, and because the government profited from the restaurant's acts of discrimination.<sup>93</sup>

The nexus test is met when there is a sufficiently close connection between the government and the challenged conduct. A sufficient nexus is established when there is significant state involvement in the alleged conduct such that the conduct may fairly be treated as that of the state itself.<sup>94</sup>

The joint action test hinges on whether the private actors willfully participated in joint action with the state or agents of the state.<sup>95</sup> The joint action test is distinguished from the symbiotic relationship test by the discreteness of the concerted action. The symbiotic relationship test looks for long-term interdependence between the state and private entity,

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<sup>88</sup> 42 U.S.C. § 1983 (1994 & Supp. IV 1998).

<sup>89</sup> *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995).

<sup>90</sup> *See, e.g., Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (applying the public function test); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (applying the symbiotic relationship test); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995) (applying the nexus test); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (applying the joint action test).

<sup>91</sup> *Jackson*, 419 U.S. at 352.

<sup>92</sup> *Burton*, 365 U.S. at 725. This exception to the traditional state action requirement requires that the state and private entity be "physically and financially integral." *Id.* at 723.

<sup>93</sup> *See id.* at 723-24.

<sup>94</sup> *Gallagher*, 49 F.3d at 1448.

<sup>95</sup> *Dennis*, 449 U.S. at 27.

whereas the joint action test looks for concerted action in effecting a particular deprivation of rights.<sup>96</sup>

The Second Circuit recently concluded in *Bigio v. Coca-Cola Co.*<sup>97</sup> that the court lacked jurisdiction over the defendants because they were neither state actors nor colorable state actors. In that case, the defendants were the Coca-Cola Company (Coca-Cola), incorporated in Delaware, and a subsidiary of Coca-Cola, the Coca-Cola Export Company; the plaintiffs were three citizens of Canada, and a company organized under Egyptian law.<sup>98</sup> The plaintiffs' claim centered around property located in Egypt.<sup>99</sup> The plaintiffs alleged that Coca-Cola acquired the plaintiffs' property from the Egyptian government with full knowledge that the government improperly deprived the plaintiffs of the property on the basis of their religious faith.<sup>100</sup> The plaintiffs argued that the court had jurisdiction over their claims under § 1350 because the government seized the property as part of a program of religious persecution that violated international human rights law.<sup>101</sup>

According to the court, the plaintiffs failed to sufficiently allege that Coca-Cola was acting under color of law when it acquired the property because it did not acquire the property with significant state aid, nor was Coca-Cola's ability to purchase the property enhanced by the government's expropriation of the property.<sup>102</sup> The Second Circuit opined that a private party does not act under color of law by merely purchasing property from a government, nor does it act under color of law by receiving an indirect economic benefit from state action.<sup>103</sup> The court found that the economic benefit accruing to Coca-Cola from the Egyptian government's acts of religious discrimination was indirect because the plaintiffs failed to articulate the causal chain from action to benefit.<sup>104</sup>

A recent federal district court holding may indicate a stronger trend toward private accountability for violations of international norms. In *Bodner v. Banque Paribas*,<sup>105</sup> the plaintiffs alleged that the defendants looted and converted the plaintiffs' assets during World War II, and continued withholding those assets through the time of the complaint.<sup>106</sup> The defendants were private banking institutions in France during World War II; the plaintiffs were Jewish persons and descendants of Jewish per-

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<sup>96</sup> *Gallagher*, 49 F.3d at 1453.

<sup>97</sup> *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000).

<sup>98</sup> *Id.* at 444.

<sup>99</sup> *Id.* at 444-45.

<sup>100</sup> *Id.* at 446.

<sup>101</sup> *Id.* at 447.

<sup>102</sup> *Id.* at 448.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 449.

<sup>105</sup> *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

<sup>106</sup> *Id.* at 121.



sons who lived in France during the war.<sup>107</sup> The district court concluded that the plaintiffs' allegations, if true, proved "clear violations of international law."<sup>108</sup> Consequently, the court held that it had § 1350 subject matter jurisdiction over the claims.<sup>109</sup> In determining that § 1350 jurisdiction was proper, the court did not discuss whether the defendants were state actors or colorable state actors.<sup>110</sup> This absence likely indicates that the court's holding does not, however, signify a shift from the state-centric approach to customary international law because it is unlikely the court would take such an activist stance without providing reasoning to support its divergence from contemporary ATCA analysis.

In light of the apparent consensus at the circuit courts of appeals level, a litigant seeking to hold a private party accountable for violation of an international norm faces an uphill, if not insurmountable, battle, if the private party did not act under color of law. Although some of the courts of appeals have discussed the possibility of private accountability,<sup>111</sup> none have created precedent supporting the shift. As a result, a private party's liability for violations of international norms, with one exception, is limited to those instances where the private party's actions are sufficiently connected to a state actor. Norms of "universal concern," also referred to as *jus cogens*, are distinct in that no derogation is permitted, whether by private or public parties. This exception to the state-actor requirement is discussed in the next section.

### 3. The Exception: *Jus Cogens*

An exception to the state-actor requirement is provided for violations of international norms that rise to the level of universal concern. Violations of universal concern are actionable against both state and non-state actors.<sup>112</sup> As defined in Article 53 of the Vienna Convention on the Law of Treaties (Article 53):

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<sup>107</sup> *Id.* Note that the plaintiffs in *Bodner* consisted of two classes, one comprised entirely of aliens (the Benisti class), the other comprised entirely of U.S. citizens (the Bodner class). *Id.* The court found that the claims of the Bodner class fell under federal question jurisdiction. *Id.* at 127.

<sup>108</sup> *Id.* at 127.

<sup>109</sup> *Id.* at 128.

<sup>110</sup> *Id.* The facts discussed by the court indicate that the defendants were colorable state actors because the tortious acts were alleged to have been committed while aiding and abetting the Vichy and Nazi regimes. *Id.*

<sup>111</sup> See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 792 (D.C. Cir. 1984) (Edwards, J., concurring).

<sup>112</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, and pt. II, introductory note (1987) ("Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide."); see also *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (holding *Karadzic* liable in an individual capacity or as a colorable state actor for genocide and war crimes), *rehearing denied*, 74 F.3d 377; *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997) (holding murder and torture not actionable under the ATCA because of the lack of state action), *aff'd*, 203 F.3d 835 (5th Cir. 1999).

[A *jus cogens* 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>113</sup> Piracy, slave trade, genocide, war crimes, and hijacking of aircraft are undisputed violations of universal concern.<sup>114</sup>

Historically, as a principle of natural law, *jus cogens* preempted positive international law.<sup>115</sup> As reflected in Article 53, the supremacy of *jus cogens* has endured. Under Article 53, a treaty is void if it conflicts with a *jus cogens* principle.<sup>116</sup> It is less clear, but likely, that a *jus cogens* norm is valid against other laws as well.<sup>117</sup>

Consequently, the ATCA provides jurisdiction over some violations of customary international law even when committed by purely private actors. For the most part, however, liability for violations of customary international law is limited to state actors and colorable state actors. What remains unclear is the level of involvement required to satisfy the color of law analysis, and which violations are among those that do not require state action.

### C. *Litigants Properly Alleging the Elements of an ATCA Claim Face Substantial Practical Hurdles*

Not every alien plaintiff properly alleging a violation of an international norm committed by a state actor or colorable state actor will find access to U.S. federal courts through the ATCA. The Act provides subject matter jurisdiction and a federal cause of action; personal jurisdiction and venue doctrines must still be satisfied. Even when personal jurisdiction, venue, and pleadings requirements are satisfied, courts may nevertheless resort to abstention doctrines.

Section 1350 is not exempt from the Supreme Court's holding in *International Shoe Co. v. Washington*.<sup>118</sup> The personal jurisdiction analysis in ATCA cases is not unusual.<sup>119</sup> As a consequence of the minimum con-

<sup>113</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 334, S. TREATY DOC. NO. 92-1 (not ratified in the United States) [hereinafter Vienna Convention] (emphasis added).

<sup>114</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). Section 404 provides in part that "certain offenses [are] recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, [and] war crimes . . ." *Id.*

<sup>115</sup> See *id.*

<sup>116</sup> Vienna Convention, art. 53, 1155 U.N.T.S. 331.

<sup>117</sup> *Id.*

<sup>118</sup> *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

<sup>119</sup> Personal jurisdiction attaches if contacts come within the scope of a forum state's long-arm statute, the state statute meets constitutional due process requirements, and jurisdiction is reasonable in light of the interests of all parties and the forum state. FED. R. CIV. P. 4(k)(1)(A); *Int'l Shoe*, 326 U.S. at 316; *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987).

tacts requirement, jurisdiction over claims by aliens against aliens for acts occurring abroad is often tenuous. Such claims may nevertheless satisfy personal jurisdiction hurdles. In *Filartiga*, although the parties were foreign nationals and the tortious acts occurred abroad, the parties resided in Brooklyn, New York at the time of the action.<sup>120</sup> Minimum contacts were established by physical presence and the forum state's interest in a conflict between its residents.<sup>121</sup>

Suit against foreign corporations, even those with American subsidiaries, may be precluded by personal jurisdiction requirements unless the domestic subsidiary's contacts are attributable to the foreign parent corporation. This was the case in *Wiwa v. Royal Dutch Petroleum Co.*, in which the New York court concluded that because an individual did business for them as their agent in New York, personal jurisdiction attached to the British corporation, Shell Transport and Trading Company, and the Netherlands corporation, Royal Dutch Petroleum Company.<sup>122</sup>

Facts supporting dismissal on *forum non conveniens*<sup>123</sup> bases abound in ATCA cases in which the tortious acts usually occur abroad.<sup>124</sup> Although trial courts should afford deference to the plaintiff's choice of forum,<sup>125</sup> courts have wide latitude in determinations of *forum non conveniens* because the standard of review for such orders is abuse of discretion. In such cases, factors such as ease of access to sources of proof and cost of producing witnesses tend to favor dismissal. Consequently, because appellate courts typically defer to lower courts' determinations of fact, a lower court's reluctance to hear the merits of an ATCA claim, if founded in the record on facts disfavoring the forum, will likely end the matter.

In *Wiwa v. Royal Dutch Petroleum Company*, however, the Second Circuit reversed an order dismissing an ATCA claim on *forum non conveniens* grounds.<sup>126</sup> In that case, the plaintiffs were three Nigerians who had immigrated to the United States, two of which, at the time of the case,

<sup>120</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).

<sup>121</sup> *Id.*

<sup>122</sup> *Wiwa*, Order, No. 96 Civ. 8386 (KMW), at 9–10 (S.D.N.Y. Sept. 25, 1998), cited in Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 568 n.142 (2000).

<sup>123</sup> *Forum non conveniens* is a discretionary device permitting courts to dismiss claims even if personal jurisdiction is proper. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

<sup>124</sup> In assessing whether *forum non conveniens* dismissal is appropriate, courts engage in a two-step analysis. First, the court determines if an adequate alternative forum exists. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). Then, if an adequate alternative forum exists, the court balances the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake. See, e.g., *Gulf Oil*, 330 U.S. at 508–09. The defendant has the burden to establish that an adequate alternative forum exists and to show that the balance of interests "tilts strongly in favor of trial in the foreign forum." *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991).

<sup>125</sup> *Gulf Oil*, 330 U.S. at 508.

<sup>126</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000).

were residents of the United States.<sup>127</sup> The defendants were Royal Dutch Petroleum Company (Royal Dutch), incorporated in the Netherlands, and Shell Transport and Trading Company (Shell), incorporated in the United Kingdom.<sup>128</sup> The complaint alleged that the Nigerian government, at the instigation of the defendants, imprisoned, tortured, and killed the plaintiffs and their next of kin.<sup>129</sup> The situs of the alleged injury was Nigeria.<sup>130</sup> The district court found that an adequate alternative forum existed in England, and that the balance of interests supported resolution of the dispute in that forum.<sup>131</sup>

On appeal, the Second Circuit concluded that the lower court in *Wiwa* misapplied the *forum non conveniens* legal standards.<sup>132</sup> The district court properly found that an adequate alternative forum existed. The district court failed, however, to properly balance the private interests, specifically neglecting the substantial deference owed to a U.S. resident plaintiff's choice of forum<sup>133</sup> and the policy interests of the United States in providing a forum to litigate alleged violations of the international prohibition against torture.<sup>134</sup> The *Wiwa* court concluded that the Torture Victim Protection Act (TVPA)<sup>135</sup> and its legislative history communicate a strong federal policy interest favoring adjudication of claimed violations of the international law of human rights in U.S. courts. In the legislative history of the TVPA, Congress noted that universal condemnation of human rights abuse "provide[s] scant comfort" to victims of gross human rights violations if they are without a forum to remedy the wrong.<sup>136</sup> Arguably, the *forum non conveniens* doctrine impinges on the ATCA's purpose of providing a U.S. forum for aliens suing for international torts.<sup>137</sup>

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<sup>127</sup> *Id.* at 91, 94.

<sup>128</sup> *Id.* at 92.

<sup>129</sup> *Id.* (describing the allegations in the complaint). Specifically, the complaint alleged that the defendants instituted, orchestrated, and facilitated the tortious acts by providing money, weapons, and logistical support to the Nigerian government to assist in raids on villages, the fabrication of murder charges, and bribing witnesses. *Id.* at 92-93.

<sup>130</sup> *Id.* at 92.

<sup>131</sup> *Id.* at 94 (describing lower court's conclusions).

<sup>132</sup> *Id.* at 106.

<sup>133</sup> *Id.* The court reasoned as follows: the greater the plaintiff's ties to a forum, the more deference should be afforded the plaintiff's choice; because a U.S. resident usually has greater ties to a U.S. forum, significant deference should be afforded a U.S. resident plaintiff's choice of forum. *Id.* at 101-03.

<sup>134</sup> *Id.* at 106.

<sup>135</sup> Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1994).

<sup>136</sup> H.R. REP. NO. 102-367, at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85.

<sup>137</sup> *See Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998) (recognizing argument that dismissal would frustrate Congress' intent to provide a federal forum for aliens suing for violation of customary international law); *see generally* Herz, *supra* note 122, at 570 n.159 (posing question of the propriety of dismissal on *forum non conveniens* grounds in ATCA cases), *citing Wiwa*, Order, No. 98 Civ. 8386 (KMW) (HBP), at 5-6 (S.D.N.Y. Jan. 20, 1999).

On the other hand, perhaps it is appropriate for both policy and practical reasons that ATCA cases are subject to *forum non conveniens* scrutiny. Such scrutiny ensures that claimants have a strong tie to the United States (for example, claims arising out of torts committed in the United States, and cases where the defendant or plaintiff is a resident or citizen of the United States) or that an adequate alternative forum does not exist (for example, where the situs of the injury and the parties' residence is a foreign state with notoriously ineffective judicial processes).

In *Bigio v. Coca-Cola Co.*, the Second Circuit indicated in dicta that international comity<sup>138</sup> may justify abstention when the only connection a suit has to the United States is the fact that the defendant is an American-based corporation.<sup>139</sup> In that case, Raphael Bigio and other members of the Bigio family brought an action against the Coca-Cola Company and one of its subsidiaries to recover damages for the illegal seizure of their assets in Egypt in 1962.<sup>140</sup> The Coca-Cola Company did not itself seize the plaintiffs' assets, but took possession of the seized property thirty years after its illegal seizure.<sup>141</sup> The plaintiffs alleged that the defendants knew about the seizure when they took possession of the property. Although the Second Circuit reversed the district court's order granting the defendants' motion to dismiss for lack of subject matter jurisdiction, the court nevertheless concluded that the questions presented by the case (*i.e.*, whether the property was wrongly seized and whether the plaintiffs have rights to the property) created an "undeniably strong" link to Egypt.<sup>142</sup> Thus, the court reasoned, deference to the foreign state justified abstention.<sup>143</sup>

The Foreign Sovereign Immunities Act of 1976<sup>144</sup> provides immunity from jurisdiction, subject to enumerated exceptions. In *Argentine Republic v. Amerada Hess Shipping Corp.*,<sup>145</sup> one of the few cases arising under the ATCA to reach the Supreme Court, the Court declined to draw an exception to the rule of sovereign immunity for alleged violations of international law.<sup>146</sup> The Court has since strengthened this stance by refusing to

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<sup>138</sup> The doctrine of international comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

<sup>139</sup> *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 454 (2d Cir. 2000).

<sup>140</sup> *Id.* at 444-45.

<sup>141</sup> *Id.* at 444.

<sup>142</sup> *Id.* at 454.

<sup>143</sup> *Id.*

<sup>144</sup> Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1603-11 (Supp. V 1994).

<sup>145</sup> *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (holding that the claim against the Argentine Republic was properly dismissed because the alleged destruction of plaintiff's property did not fall within one of the enumerated exceptions of the Foreign Sovereign Immunities Act).

<sup>146</sup> *Id.* at 434.

draw an exception for "monstrous" abuse of police powers.<sup>147</sup> Following the Supreme Court's decisional law, the Ninth Circuit refused to find an exception to the rule of foreign sovereign immunity for violations of *jus cogens*.<sup>148</sup>

Plaintiffs in ATCA actions have typically avoided the sovereign immunity bar by suing individual perpetrators rather than the state itself. This tactic was successful in *Filartiga*, in which the defendant was the Inspector General of Police in Paraguay, and in *In re Estate of Ferdinand Marcos*,<sup>149</sup> in which the plaintiffs sued the estate of the former president of the Philippines. In that case, the Ninth Circuit found that the alleged acts of torture and wrongful death were not official acts because they were perpetrated outside the scope of Marcos's authority as President.<sup>150</sup> Thus, the foreign sovereign immunity hurdle was avoided, while the state actor requirement of substantive customary international law was satisfied by finding that Marcos nevertheless acted under the color of his official authority.

Because the norms of customary international law are reflected in international instruments, current writings on public law, the general practices of nations, and judicial decisions recognizing and enforcing international law, customary international law evolves as new relationships and obligations are developed and discovered. Consequently, the ATCA is more constricted by judicial interpretations of customary international law generally, and by well-established doctrines like personal jurisdiction and *forum non conveniens*, than by, for example, the consensus requirement of customary international law.

### III. LABOR STANDARDS ACTIONABLE UNDER THE ATCA

According to Professor Leary, "the human rights movement and the labor movement run on tracks that are sometimes parallel and rarely meet."<sup>151</sup> Typically, rights considered labor rights<sup>152</sup> are not regarded as

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<sup>147</sup> See, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (affirming dismissal of a claim against Saudi Arabia because alleged torture and unlawful detention do not fall within one of the enumerated exceptions of the Foreign Sovereign Immunities Act).

<sup>148</sup> See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

<sup>149</sup> *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994).

<sup>150</sup> *Id.* at 1472.

<sup>151</sup> Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in *HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE* 22, 22 (Lance A. Compa & Stephen F. Diamond, eds., 1996). Exceptions include Amnesty International, which regularly attends the ILO conference, the Lawyers' Committee for Human Rights, which has published studies on workers' rights, and the International Labor Rights Fund, which includes members from other human rights groups on its board. *Id.* at 24-26.

<sup>152</sup> *Id.* (advancing examples like the right to organize trade unions, a safe and healthy work environment, free choice of employment, equal remuneration for work of equal value, and the prohibition against forced labor, child labor, and discrimination in employment).

human rights.<sup>153</sup> Considering the relative dearth of nongovernmental organizations (NGOs) pursuing labor rights agendas,<sup>154</sup> labor rights campaigns could benefit from the support of the many active human rights NGOs. On the other hand, human rights scholars and activists would benefit from the advantage of more clearly defined workers' rights.<sup>155</sup>

Nevertheless, the right to freedom of association, and the prohibitions against forced labor and discrimination are emerging as norms of customary international law. The following sections discuss emerging labor-rights norms and the cases arising under these new international rules.

#### A. *The Emerging Law of International Labor Rights*

##### 1. *International Recognition of Core Labor Standards*

The existence of a set of core labor rights is beyond dispute. At least this is what International Labour Organisation (ILO) Director-General Michel Hansenne recently announced in his 1997 report to the International Labour Conference.<sup>156</sup> Both the Copenhagen World Summit for Social Development in 1995 and the World Trade Organization (WTO) Singapore Declaration in 1996 referenced internationally recognized core labor standards,<sup>157</sup> providing the backdrop for the Director-General's sweeping statement.<sup>158</sup> What rights are included in this core list, and whether these rights are in fact rules of customary international law remains debatable.

In its 1998 Declaration on the Fundamental Rights of Workers,<sup>159</sup> the ILO Governing Body declared that the following labor rights are uni-

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<sup>153</sup> *Id.* (advancing examples like the prohibition against arbitrary killing and detention, torture, genocide, and slave labor).

<sup>154</sup> *See id.* at 24.

<sup>155</sup> *See id.* at 24–26.

<sup>156</sup> Mr. Michel Hansenne, *Statement Before the International Labour Conference*, ILO, 85th Sess., June 3, 1997, <http://www.ilo.org/public/english/standards/relm/ilc/ilc85/dg.htm> [hereinafter *Hansenne Statement*] (copy on file with The Journal of Small and Emerging Business Law).

<sup>157</sup> WTO, *Singapore Ministerial Declaration*, WT/MIM/W (Dec. 13, 1996), 36 I.L.M. 220, 221 (1997), available at <http://www.wto.org>; see Brian A. Langille, *The ILO and the New Economy: Recent Developments*, 15/3 INT'L J. COMP. LAB. L. & INDUS. REL. 229, 240–41 (Autumn 1999) (stating that Copenhagen World Summit for Social Development in 1995, OECD Report of 1996, and WTO Singapore Declaration explicitly referred to "core labour standards").

<sup>158</sup> *Hansenne Statement*, *supra* note 156 (stating that the 1997 report was influenced by the 1995 Copenhagen World Summit and WTO Singapore Declaration).

<sup>159</sup> ILO standards take the form of international labor conventions and recommendations. The conventions are international treaties subject to ratification by ILO member states, whereas the recommendations are nonbinding guidelines. The ILO also issues codes of conduct, resolutions, and declarations (which are not themselves referred to as part of the ILO's system of international labor standards); see ILO, WHAT ARE INTERNATIONAL LABOUR STANDARDS?, at <http://www.ilo.org/>

versally recognized as fundamental: (1) the right to bargain collectively and freely associate, (2) the obligation to eliminate "all forms of forced or compulsory" labor, (3) the obligation to effectively abolish child labor, and (4) the obligation to eliminate discrimination in employment.<sup>160</sup> These rights are enshrined in eight ILO conventions, referred to in the 1998 Declaration as the Fundamental Conventions.<sup>161</sup>

The 1998 Declaration further found that, in freely joining the ILO, members endorsed the principles and rights in its constitution, which are expressed and developed in the ILO conventions.<sup>162</sup> As a result, all member states, even those that have not ratified the Fundamental Conventions, have an obligation arising from membership "to respect, to promote and to realize . . . fundamental rights which are the subject of those Conventions. . . ."<sup>163</sup>

The following table shows the number of member states that have ratified each of the Fundamental Conventions as of February 26, 2002:<sup>164</sup>

<u>Conventions</u>	<u>Ratifications</u>
Freedom of Association No. 87	139
Freedom of Association No. 98	151
Forced Labor No. 29	160
Forced Labor No. 105	157
Discrimination No. 100	156
Discrimination No. 111	154
Child Labor No. 138	116
Child Labor No. 182	116

At that time, 175 states were members of the ILO<sup>165</sup>—leaving a mere 16 nonmember states.<sup>166</sup>

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights include the following "fundamental rights": the right to work, the right to just working conditions including fair wages, the right to safe and healthy working conditions, the right to equal pay for equal work, the right to form trade unions, the right to

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public/english/standards/ norm/whatare/index.htm (last visited Feb. 26, 2002) [hereinafter WHAT ARE INTERNATIONAL LABOUR STANDARDS?].

<sup>160</sup> ILO Declaration on Fundamental Principles, *supra* note 2, at 1237–38.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1237.

<sup>163</sup> *Id.*

<sup>164</sup> ILO, INTERNATIONAL LABOUR STANDARDS, at <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang> (last visited Feb. 26, 2002) [hereinafter INTERNATIONAL LABOUR STANDARDS].

<sup>165</sup> *Id.*

<sup>166</sup> CIA, THE WORLD FACTBOOK xi (2001) (reporting a total of 191 independent states).



reasonable working hours, and the right not to be subjected to forced labor.<sup>167</sup>

In a 1996 study, the OECD identified the following as "core" labor standards: freedom of association and the right to bargain collectively, prohibition of forced labor, prohibition of discrimination in employment, and prohibition of exploitative forms of child labor.<sup>168</sup> The study described these standards as expressing "well-established elements of international jurisprudence concerning human rights."<sup>169</sup>

The U.S. State Department also recognizes that:

An international consensus exists, based on several key [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.<sup>170</sup>

The preface to the State Department's 1999 report states that: [All persons have the right to] enjoy basic freedoms, such as freedom of expression, association, assembly, movement, and religion, without discrimination on the basis of race, religion, national origin, or sex. The right to join a free trade union is a necessary condition of a free society and economy. Thus the reports assess *key internationally recognized worker rights, including the right of association; the right to organize and bargain collectively; prohibition of forced or compulsory labor; the status of child labor practices and the minimum age for employment of children; and acceptable work conditions.*<sup>171</sup>

Other examples of U.S. federal policy indicate institutional recognition of fundamental labor standards. For example, in 1984 Congress amended the U.S. Generalized System of Preferences (GSP) to require

<sup>167</sup> Universal Declaration of Human Rights, G.A. Res. 217(A)III (1948), *reprinted in* 1 HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS (1994) [hereinafter UDHR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976, adopted by the U.S. Sept. 8, 1992) [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. At the time this Comment was written, approximately 144 states had adopted the ICCPR. Parties to the covenant are required to establish measures necessary to give effect to the rights enumerated in the treaty. ICCPR, *supra* art. 2(2), 999 U.N.T.S. at 173–74.

<sup>168</sup> Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1541 (1998), *citing* OECD, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (1996).

<sup>169</sup> Cleveland, *supra* note 168, at 1540.

<sup>170</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, OVERVIEW TO COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997 (1998), [http://www.state.gov/www/global/human\\_rights/1997\\_hrp\\_report/overview.html](http://www.state.gov/www/global/human_rights/1997_hrp_report/overview.html).

<sup>171</sup> U.S. DEP'T OF STATE, *Preface to the 1999 Country Reports on Human Rights Practices* (2000) (emphasis added), <http://www.state.gov/g/drl/rls/hrrpt/1999/64.htm>.

the President to withhold GSP trading privileges from any country not "taking steps to afford [its workers] internationally recognized worker rights."<sup>172</sup> The GSP defines internationally recognized labor rights as freedom of association, the right to organize and bargain effectively, freedom from forced labor, freedom from child labor, and minimum employment conditions (wages, hours, occupational safety and health).<sup>173</sup>

## 2. *Freedom of Association*

A strong argument can be made that the right to freedom of association is a customary international norm binding on all consenting states.<sup>174</sup> As discussed above, the right to freedom of association is enshrined in numerous international instruments, including the Universal Declaration of Human Rights, the ICCPR, and the ICESCR.<sup>175</sup>

The right to freedom of association is readily definable. The basic elements of the norm are defined in two ILO Conventions, which provide in part that:

Workers and employers, without distinction whatsoever [except police and armed forces], shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.<sup>176</sup>

Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.<sup>177</sup>

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organize . . . .<sup>178</sup>

The commitment to freedom of association is explicit in the ILO Constitution and the 1998 Declaration. Thus, the obligatory elements of

<sup>172</sup> 19 U.S.C. § 2462(c)(7) (2000).

<sup>173</sup> *Id.* § 2467(4) (2000).

<sup>174</sup> A consenting state is a nation-state that has not persistently objected to the formation of the norm. See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). The best way to show that a defendant state consents to a rule is to show that it recognizes the rule in its own state practice, which can be shown by failure to protest when other states have imposed the rule in cases affecting the defendant state's interests. See generally Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 76 (Henry J. Steiner & Philip Alston eds. 2000). But, parties can also show the rule is binding on a state by showing that the rule is accepted by other states. *Id.*

<sup>175</sup> See, e.g., ICCPR, *supra* note 167, art. 22; ICESCR, *supra* note 167, art. 8.

<sup>176</sup> Convention Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, ILO Doc. 87, art. 2, 68 U.N.T.S. 17.

<sup>177</sup> Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, ILO Doc. 98, art. 1, *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982 (1983), available at <http://untreaty.un.org>.

<sup>178</sup> *Id.* at art. 3.

the norm are substantially the same for all members of the ILO because membership itself implies a commitment to freedom of association.<sup>179</sup>

As of February 2002, nearly 150 ILO member states have ratified the conventions on freedom of association.<sup>180</sup> Further, the few member states that have not ratified the ILO conventions on freedom of association<sup>181</sup> (including the United States) have nevertheless affirmatively consented to the norm by their own state practices. Rather than objecting to the obligatory nature of the right to freedom of association, these states routinely respond to allegations of violations of the right brought before the ILO Governing Body Committee on Freedom of Association.<sup>182</sup> In response, the Committee consistently concludes that ILO member states are bound to protect the right to freedom of association even if they have not ratified the relevant conventions.<sup>183</sup> For example, a commission established to investigate allegations of violations in Chile regarding the right to organize found that, although Chile had not ratified the relevant convention, "Chile is bound to respect a certain number of general rules which have been established for the common good of the peoples of the twentieth century. Among these principles, freedom of association has become a customary rule above the Conventions."<sup>184</sup>

Absolute agreement and adherence to a norm is not necessary. To demonstrate that a norm is universal, the International Court of Justice states that it is "sufficient that the conduct of States should, in general, be consistent with [the] rules, and that instances of State conduct inconsistent with a given rule should generally [be] treated as breaches of that rule, not as indications of the recognition of a new rule."<sup>185</sup> Even when a state's actions clearly violate a norm, the state's response to criticism may confirm rather than weaken the rule. Defensive responses based on exceptions or justifications, however unfounded, provide evidence that the state views the norm as obligatory, regardless of its delinquent con-

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<sup>179</sup> See generally Leary, *supra* note 151, at 29–34 (arguing that all member states of the ILO recognize the right to freedom of association by the fact of their membership).

<sup>180</sup> INTERNATIONAL LABOUR STANDARDS, *supra* note 164.

<sup>181</sup> See *supra* table accompanying note 164 (showing number of states ratifying each of the eight Fundamental Conventions).

<sup>182</sup> See generally Leary, *supra* note 151, at 29 (citing ILO *Official Bulletins*).

<sup>183</sup> See, e.g., *Fact-Finding and Conciliation Commission on Chile*, ILO Committee on Freedom of Association, Geneva, para. 466 (1975), *quoted in* Leary, *supra* note 151, at 29; see also ILO, FORCED LABOUR IN MYANMAR (BURMA): REPORT OF THE COMMISSION OF INQUIRY APPOINTED UNDER ARTICLE 26 OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION TO EXAMINE THE OBSERVANCE BY MYANMAR OF THE FORCED LABOUR CONVENTION, 1930 (No. 129), pt. IV.9.A para. 198 (July 2, 1998), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm> [hereinafter FORCED LABOR IN BURMA].

<sup>184</sup> *Fact-Finding and Conciliation Commission on Chile*, ILO Committee on Freedom of Association, Geneva, para. 466 (1975), *quoted in* Leary, *supra* note 151, at 29.

<sup>185</sup> Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 98 (June 27).

duct.<sup>186</sup> For example, China, another ILO member state that has not ratified the conventions on freedom of association and that is widely condemned for breaches of the rule, nevertheless confirmed its commitment to be bound by the rule when it defended its conduct within the context of the rule. In response to allegations following the Tiananmen Square massacre (arguably providing direct evidence that the norm is not embraced by state practices), the Chinese government stated that it “has at all times upheld the principle of freedom of association . . . .”<sup>187</sup> Because the state consensus requirement of customary international law looks at both state actions and state words, China’s pronouncement evinced consent to be bound by the rule.

The difference in obligation between the approximately 150 states that have ratified the relevant conventions and the 20 states that have not is a procedural difference. By ratifying a convention, a state commits itself to a regular system of supervision.<sup>188</sup> Ratification obligates states to regularly report to an ILO monitoring body and to take that body’s comments into consideration.<sup>189</sup> Member states that have not ratified the conventions are not required to report information on their compliance with the norm unless a complaint is brought before the Governing Body on Freedom of Association.<sup>190</sup>

### 3. *The Prohibition Against Forced Labor*

The prohibition against forced labor, like the right to freely associate, is enshrined in the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights, and the ILO Constitution and 1998 Declaration.<sup>191</sup> United States courts recognize the prohibition against forced labor as a rule of customary international law.<sup>192</sup> Forced labor cases, although characterized by the courts as human rights cases, are equally accurately characterized as labor rights cases.<sup>193</sup>

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<sup>186</sup> *Id.* (“[T]he significance of [a state’s defensive] attitude is to confirm rather than to weaken the rule.”).

<sup>187</sup> Leary, *supra* note 151, at 30 (quoting *Report of the Committee on Freedom of Association* (275th and 276th Reports), ILO OFFICIAL BULLETINS, 73 ser. B, no. 3 para. 344 (1990)).

<sup>188</sup> *See id.* at 25.

<sup>189</sup> *See id.* at 30–31.

<sup>190</sup> *See id.* at 29, 31.

<sup>191</sup> UDHR, *supra* note 167, at 71; ICCPR, *supra* note 167, art. 22, 999 U.N.T.S. at 173–74; ICESCR, *supra* note 167, art. 8, 993 U.N.T.S. at 4.

<sup>192</sup> *See, e.g., Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439–41 (D.N.J. 1999).

<sup>193</sup> *See, e.g., id.* (alleging forced labor violations); *see also Doe v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), discussed *infra* Part III.B.2 (same).

In a 1998 report addressing the situation in Myanmar, the ILO announced that the term "slavery" encompasses forced labor.<sup>194</sup> The ILO report declared that "the prohibition of slavery must now be understood as covering all contemporary manifestations of this practice."<sup>195</sup> As of February 2002, more than 150 ILO member states have ratified the conventions prohibiting forced labor.<sup>196</sup>

#### 4. *The Prohibition Against Gender, Racial, and Religious Discrimination*

Relying in large part on the Restatement, the Second Circuit recently stated that the prohibitions against religious and racial discrimination are customary international norms.<sup>197</sup> In *Bigio v. Coca-Cola Co.*, the plaintiffs alleged violation of the international prohibition against religious discrimination.<sup>198</sup> The court recognized in dicta that racial and religious discrimination violate customary international law when undertaken by state or colorable state actors.<sup>199</sup> As judicial pronouncements weigh heavily in determinations of international norms, the Second Circuit's assertion indicates at least a trend toward recognition of the international prohibitions against racial and religious discrimination.

#### B. *Making the Leap from "Human Rights" to "Labor Rights"*

U.S. courts are reluctant to make the leap from human rights to labor rights. Since the Second Circuit's 1980 *Filartiga* decision, courts have found § 1350 jurisdiction for human rights violations like torture, genocide, and slavery in a number of cases.<sup>200</sup> Over the same period, the only international labor right successfully enforced through ATCA litigation has been the prohibition against forced labor. The Second Circuit has recognized, albeit in nonbinding dicta, the international prohibitions against racial and religious discrimination.<sup>201</sup> The federal courts have yet to recognize the international right to freedom of association.

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<sup>194</sup> *Unocal*, 110 F. Supp. 2d at 1308 (citing FORCED LABOUR IN BURMA, *supra* note 183).

<sup>195</sup> *Id.*

<sup>196</sup> See *supra* table accompanying note 164 (showing number of states ratifying each of the eight Fundamental Conventions).

<sup>197</sup> *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000).

<sup>198</sup> See *id.* at 446 (discussing plaintiffs' allegations).

<sup>199</sup> *Id.* at 447-48.

<sup>200</sup> Successful human rights suits in the United States after *Filartiga* include: *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (torture and killing); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (torture); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (torture, rape, and other human rights abuses), *rehearing denied*, 74 F.3d 377; *Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) (torture and other human rights abuses).

<sup>201</sup> See *Bigio*, 239 F.3d at 448.

### 1. *Alleging Violations of "International Labor Rights"*

On December 5, 2000, four Nicaraguan union leaders filed a lawsuit under the ATCA in federal district court in Los Angeles against their former employer, Chentex Garments (Chentex), a garment factory in Nicaragua, and Chentex's Taiwan-based parent company, Nien Hsing Textile.<sup>202</sup> The plaintiffs alleged that Chentex denied them and other workers the right to organize and bargain collectively and that Chentex worked in concert with the Nicaraguan government to deny the union leaders internationally recognized labor rights.<sup>203</sup> In a telephone interview with Stephen Greenhouse of the New York Times, Carlos Lim, the manager of Chentex's plant in Nicaragua, said the company fired the union leaders because the union leaders held an illegal strike, and the other workers voluntarily quit in sympathy with the union leaders.<sup>204</sup> U.S.-based chains Kohl's, Wal-Mart, and JC Penney buy jeans from Chentex.<sup>205</sup> Jeans made at Chentex are also sold through U.S. military sales outlets.<sup>206</sup>

Response in the national and international press to the *Chentex* litigation is mixed. According to The Financial Times of London, Francisco Aguirre-Sacasa, a former World Bank economist, said the campaign against Chentex could lead to huge job losses in the already impoverished country; that the plaintiffs' groups "are not trying to help [the] workers; by causing firms to leave they are going to leave our workers in the lurch. They have a hidden agenda. They don't want to clean up our

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<sup>202</sup> Docket Report, *Tercero v. C&Y Sportswear, Inc.*, CV00-12715-MN (CTx) (C.D. Cal. filed Dec. 5, 2000) (copy on file with The Journal of Small & Emerging Business Law).

<sup>203</sup> See Andrew Bounds, *Nicaraguan "Sweatshop" Workers Want Lawsuit Dropped*, FIN. TIMES (London), Feb. 5, 2001, at 12 [hereinafter Bounds, *Workers Want Lawsuit Dropped*] (plaintiffs allege union busting, arbitrary firings, beatings, intimidation, forced overtime, and low pay); Rick Romell, *Stakes Are Raised in Kohl's Protest: Inquiry Finds Problems at Nicaraguan Factory*, MILWAUKEE J. SENTINEL, Sept. 27, 2000, 2000 WL 26086571 (plaintiffs allege Chentex fired workers because of union activities); Doris Hajewski, *Unionists Sue Supplier of Kohl's: Nicaraguan Jeans Plant Denied Rights, They Say*, MILWAUKEE J. SENTINEL, Dec. 6, 2000, at 02D (plaintiffs allege violation of right to bargain collectively); Nancy Dunne, *US Lawsuit Backs Nicaraguans' Rights*, FIN. TIMES (London), Dec. 6, 2000, at 14 (plaintiffs charge Chentex with suppressing the union and unjustly firing workers).

<sup>204</sup> See Steven Greenhouse, *Critics Calling U.S. Supplier in Nicaragua a "Sweatshop,"* N.Y. TIMES, Dec. 3, 2000, at 9; Andrew Bounds, *Nicaragua Hits Back at "Sweatshop" Charges*, FIN. TIMES (London), Dec. 9, 2000, at 7 [hereinafter Bounds, *Nicaragua Hits Back*]. The workers who lost their jobs after the strike in April were demanding an 8-cent per hour wage increase. See *id.*; Dunne, *supra* note 203.

<sup>205</sup> See Andrew Bounds, *Nicaragua's Textile Workers Turn Free-Trade Zone to Battle Zone: Andrew Bounds Reports on Local Labour's Grievances Against Taiwanese Employers*, FIN. TIMES (London), U.S.A. ed. 2, Nov. 29, 2000, at 4 [hereinafter Bounds, *Battle Zone*].

<sup>206</sup> See Greenhouse, *supra* note 204; Dunne, *supra* note 203.

industry; they want to shut it down.'"<sup>207</sup> Apparently echoing some of Mr. Aguirre-Sacasa's concerns, more than one thousand workers from the Chentex factory recently protested at the U.S. embassy in Nicaragua, demanding the suit be dropped.<sup>208</sup> The demonstrators delivered a letter addressed to President Clinton denouncing the activities of the National Labor Committee,<sup>209</sup> a nongovernmental organization behind the lawsuit. According to newspaper reports, the protesting workers claim that the attention brought by the litigation will result in job losses and other economic hardships.<sup>210</sup> Casting some doubt on the significance of the protest, at least one source reported that Chentex itself encouraged and supported the protest.<sup>211</sup>

According to *The Financial Times* of London, a manager at the Chentex factory said the factory had lost more than a third of its orders since the plaintiffs filed the complaint in December.<sup>212</sup> Another Taiwanese company with factories in Nicaragua recently announced it is pulling out of the country.<sup>213</sup> With the Chentex plant alone employing nearly two thousand workers (two-thirds of whom earn above minimum wage),<sup>214</sup> such responses to the lawsuit pose significant threats to the Nicaraguan textile export economy generally.

The suit will, however, boost the visibility of workers' rights and increase pressure on trade negotiators to include the issue in multilateral talks. Nevertheless, some commentators point to the Chentex situation as evidence that the goal of enforcing labor rights in developing countries is itself suspect.<sup>215</sup> One of the most widespread and salient criticisms of efforts to enforce global labor standards is that the companies under attack tend to be garment manufacturers, and that workers in the export

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<sup>207</sup> See Bounds, *Nicaragua Hits Back*, *supra* note 204 (quoting Francisco Aguirre-Sacasa, former World Bank economist).

<sup>208</sup> See Charlotte Denny, *Cheap Labour, Ruined Lives: Attempts to Enforce Better Working Conditions on Manufacturers in Developing Countries Can Backfire on the People They Were Meant to Help*, *GUARDIAN* (London), Feb. 16, 2001, at 21; Bounds, *Workers Want Lawsuit Dropped*, *supra* note 203; *Marchers in Managua Protest U.S. Group*, *MILWAUKEE J. SENTINEL*, Jan. 17, 2001, at 02D (estimating 2,000 demonstrators).

<sup>209</sup> See *Marchers in Managua Protest U.S. Group*, *supra* note 208.

<sup>210</sup> See Denny, *supra* note 208; Bounds, *Workers Want Lawsuit Dropped*, *supra* note 203.

<sup>211</sup> *Workers Want Lawsuit Dropped*, *supra* note 203 (reporting that Pedro Ortega, coordinator of the Sandinista textile unions, said Chentex paid for busses and a day off for the protest march).

<sup>212</sup> *Id.*

<sup>213</sup> See Bounds, *Battle Zone*, *supra* note 205 (reporting that Jem III announced that it was shutting down its factory and firing 400 workers because of the impact on orders from the negative press of the lawsuit and U.S. boycotts).

<sup>214</sup> See Romell, *supra* note 203 (reporting that NLC director Kernaghan estimates average wages at Chentex to be 45 to 50 cents per hour; stating that the Nicaraguan minimum wage is 30 cents per hour); Bounds, *Nicaragua Hits Back*, *supra* note 204 (reporting that wages at the textile factories are comparable to those of teachers and doctors).

<sup>215</sup> See, e.g., Bounds, *Nicaragua Hits Back*, *supra* note 204; Denny, *supra* note 208.

sector usually enjoy better conditions than other third-world workers who earn their livelihoods in the informal sector where there are no labor rights.

Reflecting a free market approach to the apparent conundrum, economist Jagdish Bhagwati argues that “‘labour standards, unlike human rights, cannot be universalised. Instead[,] they should reflect economic and cultural circumstances.’”<sup>216</sup> Citing Bhagwati, *The Guardian*, a traditionally left-leaning daily paper in the United Kingdom, reported that campaigns against sweatshop conditions “may do more harm than good” by jeopardizing export-industry workers’ job stability.<sup>217</sup> In fact, Charlene Barshefsky, the U.S. trade representative, recently warned that if Nicaragua does not enforce its labor laws she might withdraw free-trade privileges from Nicaragua<sup>218</sup>—a move that would certainly threaten Nicaragua’s thirty-five thousand garment sector jobs.

## 2. *Resistance Manifested (The Unocal Case)*

The following attributes combined to dictate the recent district court dismissal in *Doe v. Unocal Corporation*:<sup>219</sup> reluctance to extend the protective umbrella of customary international law from human rights to labor rights, judicial reluctance to decide international law issues generally, and reluctance to hold private corporations accountable for breaches of international law. In that case, the plaintiffs were Burmese villagers who lived along the route of the Yadana natural gas pipeline project in Burma’s rural Tenasserim region.<sup>220</sup> The Yadana natural gas pipeline project is a joint venture of Unocal, a private, California-based corporation, another private company, and the Myanmar Oil and Gas Enterprise, which holds the interests of Burma’s military government, the State Law and Order Restoration Council (SLORC).<sup>221</sup> According to the parties’ joint agreement, the joint venturers contracted with the SLORC military for project security.<sup>222</sup> The plaintiffs alleged that, because the defendant participated in this joint venture with the military government of Burma, the defendant acted under color of law.<sup>223</sup>

<sup>216</sup> See Denny, *supra* note 208 (quoting economist Jagdish Bhagwati).

<sup>217</sup> *Id.*

<sup>218</sup> See Greenhouse, *supra* note 204 (reporting that Barshefsky warned Nicaragua in October that the United States might rescind trade benefits unless Nicaragua ensured that Chentex complied with labor laws); Bounds, *Battle Zone*, *supra* note 205 (same); Dunne, *supra* note 203 (same).

<sup>219</sup> *Doe v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

<sup>220</sup> *Id.* at 1297–98. In 1988, the State Law and Order Restoration Council (SLORC) imposed martial law on Burma and renamed the country Myanmar. *Id.*

<sup>221</sup> *Id.* at 1296–97 (discussing history of SLORC and SLORC’s interest in the pipeline project).

<sup>222</sup> See *id.* at 1303 (describing the agreement). Specifically, the court found that Unocal utilized the services of the military to protect and facilitate the pipeline project. *Id.*

<sup>223</sup> See *id.* at 1305 (describing allegations in plaintiffs’ complaint, however, the pleadings themselves are under seal of the court).



The plaintiffs alleged that Unocal, as a joint actor with the SLORC military, is liable for torts committed by the military for the benefit of the project.<sup>224</sup> Specifically, the plaintiffs alleged that the SLORC military used threats of torture and death to force villagers living in the area of the pipeline project to work on the project. They also allege that, to facilitate the pipeline project, the SLORC military forcefully relocated entire villages and committed other violations of customary international law, including torture, rape, and murder of villagers refusing to relocate or work on the project.<sup>225</sup> Because the actions of the military clearly violated international norms prohibiting forced labor, official torture, forced relocation, rape, and killing, the issue before the *Unocal* court was whether Unocal could be held liable for the actions of the SLORC military.<sup>226</sup>

The *Unocal* court eventually concluded that the plaintiffs failed to offer sufficient proof of Unocal's complicity or participation in the allegedly tortious actions of the Myanmar government.<sup>227</sup> The court found that Unocal knew the military forced villagers to work on the project, and that Unocal and SLORC shared the common goal of a profitable project.<sup>228</sup> The court concluded, however, that the plaintiffs nevertheless presented "no evidence that Unocal 'participated in or influenced' the military's unlawful conduct; nor do Plaintiffs present evidence that Unocal 'conspired' with the military to commit the challenged conduct."<sup>229</sup> On this basis, the court determined that the defendant did not act under of the color of law.

In reaching its conclusion that Unocal neither participated in nor influenced its contractor's conduct, the federal district court determined that the color of law analysis requires a showing that the defendant exercise control over the government actor's decision to commit the violations of international law.<sup>230</sup> The court found that Unocal knowingly used forced labor, but that Unocal did not itself commit the act of forcing the laborers, and that Unocal did not control SLORC's decision to force the villagers to work on the project.<sup>231</sup>

Amazingly, the *Unocal* court found that, while forced labor constituted a *jus cogens* violation, use of forced labor did not constitute a violation of international law at all.<sup>232</sup> Although a *jus cogens* determination would generally relieve the plaintiff of the burden of proving a link between a private-party defendant and a state actor, according to the district court, the *jus cogens* violation was not the defendant's use of forced

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1298.

<sup>226</sup> *Id.* at 1303-04.

<sup>227</sup> *Id.* at 1296.

<sup>228</sup> *Id.* at 1306-07.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1310.

<sup>232</sup> *Id.* at 1308. See *supra* text accompanying notes 112-17 (discussing *jus cogens*).

labor, but rather the military government's *acts* of force. Thus, liability for the tortious conduct depended on proof of the defendant's legal responsibility for SLORC's conduct.<sup>233</sup>

The plaintiffs argued that under three analogous Nazi war tribunal cases, Unocal's knowledge and approval of SLORC's acts are sufficient for liability to attach to Unocal.<sup>234</sup> In those cases,<sup>235</sup> the defendant German manufacturing firms utilized slave labor provided by the Third Reich Labor Office during World War II.<sup>236</sup> The defendants in these cases all plead necessity, arguing that failure to use the slave labor would have been futile and dangerous.<sup>237</sup> The tribunal distinguished between those defendants who were coerced and those that "were not moved by a lack of moral choice, but, on the contrary, embraced the opportunity to take full advantage of the slave-labor program."<sup>238</sup> Interpreting the war tribunal cases, the *Unocal* court concluded that legal responsibility for the government's violations of the international prohibition required knowledge of the criminal conduct, approval of the conduct, and active participation in the conduct.<sup>239</sup> Thus, the court determined, Unocal was not legally responsible for SLORC's conduct because, although Unocal had knowledge and approval, the company did not actively participate in the criminal enterprise.<sup>240</sup>

Significantly, the *Unocal* court failed to acknowledge that the war crimes cases required that the prosecution prove that each defendant acted with criminal intent. In those cases, the prosecution sought to prove active participation to rebut the defendants' claims of necessity.<sup>241</sup>

<sup>233</sup> *Id.* at 1308–09.

<sup>234</sup> *Id.* at 1309.

<sup>235</sup> See UN War Crimes Commission, Case No. 48, The Flick Trial (trial of Friedrich Flick and five others), 9 L. REPORTS OF TRIALS OF WAR CRIMINALS 1, 19 (1949), reprinted in 6–10 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (William S. Hein & Co. 1997) [hereinafter *The Flick Trial*]; United States v. Carl Krauch, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952) [hereinafter *The I.G. Farben Trial*]; UN War Crimes Commission, Case No. 48, The Krupp Trial (trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach), 10 L. REPORTS OF TRIALS OF WAR CRIMINALS 69 (1949), reprinted in 6–10 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (William S. Hein & Co. 1997) [hereinafter *The Krupp Trial*]. See also *Unocal*, 110 F. Supp. at 1309–10 (discussing the three war crimes cases).

<sup>236</sup> See *The Flick Trial*, *supra* note 235, at 1; *The I.G. Farben Trial*, *supra* note 235, at 1174; *The Krupp Trial*, *supra* note 235, at 70. See also Doe v. *Unocal*, 110 F. Supp. 2d 1294, 1309 (C.D. Cal. 2000) (summarizing the three cases).

<sup>237</sup> See *The Flick Trial*, *supra* note 235, at 18; *The I.G. Farben Trial*, *supra* note 235, at 1174; *The Krupp Trial*, *supra* note 235, at 146. See also *Unocal*, 110 F. Supp. 2d at 1309 (summarizing the three cases).

<sup>238</sup> *The I.G. Farben Trial*, *supra* note 235, at 1179.

<sup>239</sup> Doe v. *Unocal*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).

<sup>240</sup> *Id.*

<sup>241</sup> See *The Flick Trial*, *supra* note 235, at 20–21; *The I.G. Farben Trial*, *supra* note 235, at 1174.

Active participation was not a distinct element in the prosecution's case needed to link the private defendants to the government actors, but rather evidence of the defendants' intent to commit the criminal conduct in light of the defense of necessity. The *Unocal* court concluded that "[t]he Tribunal's guilty verdict[s] rested not on the defendants' knowledge and acceptance of benefits of the forced labor, but on their active participation in the unlawful conduct."<sup>242</sup> On this basis, the court determined that, without evidence that Unocal "sought to employ forced or slave labor," evidence that Unocal had knowledge of, and benefited from the forced labor was "insufficient to establish liability under international law, [and thus] Plaintiffs' claim against Unocal for forced labor under the Alien Tort Claims Act fails as a matter of law."<sup>243</sup>

The *Unocal* court's conclusion demands critical scrutiny on a number of grounds. The court failed to construe the evidence in the light most favorable to the plaintiffs (the nonmoving party), as it must do in ruling on a summary judgment motion. It failed to recognize that summary judgment was precluded by the existence of issues of fact relevant to the issue of Unocal's legal responsibility for SLORC's actions. By looking to the Nuremberg trials for the applicable standard of liability, the court failed to recognize that it was required to determine the applicable international law principles as they exist today, not as they existed in 1789 or 1949. In any event, the court misapplied the Nuremberg standards. Specifically, the court incorrectly interpreted the meaning and significance of "active participation," and the court erroneously applied criminal law standards to a civil case.

Unlike the suits against the German industrialists, the suit against Unocal does not require evidence of criminal intent. Even so, Unocal's use of forced labor is analogous to the acts of those defendants in the war crimes cases who were found guilty; that is, those who "were not moved by a lack of moral choice . . . ."<sup>244</sup> Unocal did not fear repercussions from SLORC as a consequence of discontinuing use of forced laborers. Unocal worked in partnership with the SLORC military, paying for its services, which, throughout the project, included the provision of forced laborers.

During early contract negotiations with project partners in 1992, Unocal acknowledged that a potential "hazard" of employing the SLORC military for project security was SLORC's tendency to commit gross human rights violations.<sup>245</sup> In 1995, a consultant to Unocal reported to the company that:

[E]gregious human rights violations have occurred, and are occurring now in Southern Burma. The most common are forced reloca-

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<sup>242</sup> *Unocal*, 110 F. Supp. 2d at 1310.

<sup>243</sup> *Id.*

<sup>244</sup> *The I.G. Farben Trial*, *supra* note 235, at 1179; *see also id.* at 1178-79 (describing the extent of the guilty parties' acceptance of the slave labor practices).

<sup>245</sup> *See Unocal*, 110 F. Supp. 2d at 1298 (discussing negotiations between project partners).

tion without compensation of families from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline . . . and imprisonment and/or execution by the army of those opposing such actions.<sup>246</sup>

In response to accusations that the project was fostering human rights violations, Unocal president John Imle, stated:

What I'm saying is that if you threaten the pipeline there's gonna be more military. If forced labor goes hand and glove with the military yes there will be more forced labor. For every threat to the pipeline there will be a reaction.<sup>247</sup>

Later in 1995, Unocal CEO Roger Beach wrote a letter to Unocal Chairman Richard Stegemeier, assuring him that the company plans to complete the project, despite recent reports of workers' deaths, "once we are assured of adequate security."<sup>248</sup> This letter and others indicate that Unocal executives, with knowledge of SLORC's practices, nevertheless increased SLORC's presence on the project. These correspondences, all before the district court, far from evincing necessity, indicate that Unocal had control over SLORC's conduct.

Other documents entered into evidence indicate that the company recognized a causal link between its needs and SLORC's actions. For example, Joel Robinson, another Unocal executive, wrote to Unocal President Imle, stating that "[Unocal's] assertion that SLORC has not expanded and amplified its usual methods around the pipeline *on our behalf* may not withstand much scrutiny."<sup>249</sup> In May 1995, the U.S. State Department indicated in a cable from the U.S. Embassy in Rangoon that Unocal's relationship with the SLORC military was deliberate and tight. The cable stated that:

On the general issue of *the close working relationship* between . . . Unocal and the Burmese Military, Robinson had no apologies to make. He stated forthrightly that the companies have hired the Burmese military to provide security for the Project. . . . He said [project partner] Total's security officials meet with military counterparts to inform them of the next day's activities . . . .<sup>250</sup>

These statements indicate that, not only did Unocal knowingly cooperate with SLORC's forced labor practices, "it might be said that they

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<sup>246</sup> See Appellants' Brief, *Doe v. Unocal Corp.*, Docket No. 00-56603, at 13 (9th Cir. filed Sept. 27, 2000) (quoting letter from consultant to Unocal) (copy on file with The Journal of Small and Emerging Business Law).

<sup>247</sup> *Unocal*, 110 F. Supp. 2d at 1300 (quoting exchange between Pamela Wellner of Greenpeace and John Imle). Imle's reference to threats to the pipeline refers to local opposition to the project, including threatened physical damage to the pipeline. *Id.*

<sup>248</sup> *Id.* (quoting Mar. 8, 1995, letter from Unocal CEO to Unocal Chairman).

<sup>249</sup> *Id.* (quoting Mar. 16, 1995, letter from Joel Robinson to Imle) (emphasis added).

<sup>250</sup> *Id.* at 1301 (quoting May 1995 cable) (emphasis added).

were, to a very substantial degree, responsible for broadening the scope of that reprehensible system."<sup>251</sup>

In the Nuremberg cases, criminal liability required only that the defendants knowingly and voluntarily ordered, abetted, used, or took a consenting part in the use of slave labor.<sup>252</sup> If the defendants could show, however, that they acted without moral choice, the necessity defense would negate criminal liability. Active participation provided evidence of voluntariness. According to the United Nations War Crimes Commission, *voluntarily using* slave labor provided by the Reich was the same thing as *participating in* the Reich slave labor program. The War Commission wrote that:

[A]n examination of the evidence as summarised by the Tribunal shows that the offences found by the latter to have been proved was that of voluntarily employing forced civilian labourer . . . [I]t was possible for an accused to set up a successful plea of necessity if he employed such labour only because it was supplied to him by the State authorities and if refusal to use it would have resulted in sufficiently serious consequences to himself. The accused . . . were found guilty . . . because instances had been proved of their having *voluntarily* participated in the Reich slave-labour programme.<sup>253</sup>

It is difficult to discern how the *Unocal* court concluded there was no evidence that Unocal actively participated in SLORC's tortious conduct. Unocal's involvement with SLORC was easily greater than the German industrialists' involvement with the Nazi regime. In contrast to the German industrialists, Unocal deliberately chose to ally with SLORC despite Unocal's knowledge of SLORC's practice of using forced laborers,<sup>254</sup> Unocal voluntarily continued its alliance with SLORC after it became aware of SLORC's use of forced labor on the pipeline project, and Unocal paid SLORC for its services.<sup>255</sup> Evidence of ongoing and voluntary use of the services provided by SLORC, with knowledge that those services

<sup>251</sup> *The I.G. Farben Trial*, *supra* note 235, at 1179.

<sup>252</sup> See *The Flick Trial*, *supra* note 235, at 19. Council Law No. 10 states that "[a]ny person . . . is deemed to have committed a crime as defined in paragraph 1 of this Article, if he . . . ordered or abetted [the commission of any such crime] or . . . took a consenting part therein or . . . was connected with plans or enterprises involving its commission . . . ." *Id.* (quoting Council Law No. 10, Art. II, para. 2).

<sup>253</sup> *The Flick Trial*, *supra* note 235, at 53-54 (footnote omitted).

<sup>254</sup> In early 1992, before joining the project, Unocal commissioned a firm to analyze Unocal's security risks associated with constructing a pipeline across Burma. The firm's report warned Unocal that "[t]hroughout Burma the government habitually makes use of forced labour to construct roads. . . . [T]he potential profits will need to be unusually high to justify the high political risks involved in expanding the company's operations, particularly in [Burma]." Appellants' Brief, *Doe v. Unocal Corp.*, Docket No. 00-56603, at 13 (9th Cir. filed Sept. 27, 2000) (quoting report) (copy on file with The Journal of Small and Emerging Business Law).

<sup>255</sup> See *Unocal*, 110 F. Supp. 2d at 1297 (finding that Unocal commissioned a report on the conditions of Burma and the practices of SLORC before entering the joint agreement).

included the provision of forced laborers, easily meets the standards articulated in the Nuremberg cases cited by the district court.

General international law principles of both direct and vicarious liability apply to Unocal's involvement with SLORC. Private parties acting "in concert with" or "as an agent of" a state are legally responsible for the actions of their government partner.<sup>256</sup> International law also imposes liability for aiding and abetting human rights abuses.<sup>257</sup> Congress codified this principle in the 1992 Torture Victim Protection Act, noting that the act governed "lawsuits against persons who ordered, abetted, or assisted in the torture."<sup>258</sup> Unocal's alleged involvement also meets the standard of an intentional tortfeasor because Unocal was substantially certain SLORC would use forced labor in its capacity as Unocal's contractor. Unocal could also be liable under a negligence theory because SLORC's conduct was foreseeable. Unocal's direction and control over SLORC establishes Unocal as an unattenuated proximate cause of SLORC's tortious conduct. Nevertheless, on August 31, 2000, the district court granted Unocal's motion for summary judgment, dismissing all claims against the company.<sup>259</sup>

Perhaps the district court feared the potentially broad implications of holding Unocal accountable for SLORC's conduct. By recognizing a U.S. company's liability for a foreign actor's conduct based primarily on a contractual relationship, all corporations that benefit from state failure to enforce international labor standards could face liability—thus opening the floodgate. Of course, plaintiffs must nevertheless prove that the state actor committed an actionable tort, and that the private defendant had knowledge of the tortious conduct and benefited from that conduct. The district court could have avoided any apparent *lowering* of the standard for liability by focusing on the joint action or nexus tests already in place.<sup>260</sup>

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<sup>256</sup> See *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (concluding that Karadzic acted under color of law when acting in concert with Yugoslav officials), *rehearing denied*, 74 F.3d 377; *The Amiable Nancy*, 16 U.S. 546, 559 (1818) (holding ship owners liable for piracy by their employee captains).

<sup>257</sup> See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR (No 51), at 197, U.N. Doc. A/39/51 (1984), Arts. 1, 4 (liability for aiding and abetting torture); Supplementary Convention on the Abolition of Slavery, Art. 6, Sept. 7, 1956, 266 U.N.T.S. 3 (liability for slavery including incitement, attempt, accessories, and conspirators).

<sup>258</sup> S. Rep. No. 1, 249 102d Cong., 1st Sess. at 5 (1991), *reprinted in* 1992 U.S.C.A.N. 84, 87.

<sup>259</sup> *Unocal*, 110 F. Supp. 2d at 1294.

<sup>260</sup> Both tests require a substantial degree of connection between the state and private actors and the tortious conduct.

## IV. CONCLUSION

Although scholars tend to agree that the ATCA is an appropriate and important tool for protecting human rights,<sup>261</sup> scholarly work promoting the Act as a mechanism for protecting labor rights is scant. Because labor rights (*e.g.*, the right to be free from discrimination in employment and the prohibition against child labor) directly implicate the behavior of employers, which are most often private actors, a shift from the current focus on the international law of human rights to an approach that recognizes labor rights would likely require a concomitant shift toward recognition of individual responsibility under international law.

Nevertheless, some litigation of labor standards violations will be adjudged by standards defined by international consensus as opposed to congressional action, resulting in some instances in the availability of a cause of action unavailable under domestic labor law. As a result, employers in the United States who do not find themselves obligated under U.S. federal law to respect certain rights (for example, agriculture exceptions to Sherman Act requirements protecting the right to bargain collectively), may find themselves liable under customary international law for abridgement of these rights.

Small businesses in the United States, especially those in the manufacturing and agriculture sectors, may soon find themselves on more equal footing with multinational corporations, which typically have the advantage of cost savings associated with low or unenforced labor standards in the developing nations in which they operate.

Although courts and commentators are hesitant to expand ATCA actions beyond the bounds of traditional international human rights law, certain labor rights claims (like violation of the prohibition against forced labor) are finding an audience in U.S. district courts. Even a limited construction of the trend toward litigating customary international labor law in the United States should send cautionary signals to U.S. employers, especially those conducting business abroad. In light of recent cases brought under the ATCA, U.S. employers need, at the very least, to foster heightened sensitivity to possible claims under the ATCA by non-U.S. nationals alleging violations of certain international labor rights, including the right to freely associate and the prohibition against forced labor, and perhaps even the prohibition against discrimination on the basis of race, gender, and religion. The ATCA clearly provides a mechanism for addressing international labor standards in U.S. courts—albeit limited in scope and applicability.

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<sup>261</sup> See Burley, *supra* note 6, at 493; Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463 (1997).