ESTABLISHING LIABILITY FOR THE ENSLAVEMENT AND FORCED LABOR OF CHILDREN UNDER THE ALIEN TORT STATUTE

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I. INTRODUCTION

According to the International Labor Organization (ILO) there are approximately 168 million child laborers in the world.[1] Despite the overall decline in child labor, the ILO estimates that the decline in child labor has been slowing.[2] Many of these children are victims of modern slavery.[3] Modern slavery takes many different forms, including forced labor.[4] In 2012, the ILO estimated that 20.9 million people were victims of forced labor globally.[5] Of these, twenty-six percent, or 5.5 million, fell under the age of 18.[6]

The Alien Tort Statute ("ATS"), a federal statute of the United States, has emerged as a potentially powerful tool in the effort to combat child labor globally. The statute grants federal courts subject matter jurisdiction over claims arising from torts committed against non-U.S. nationals in violation of international law.[7] Since the 1980s, human rights activists and victims of human rights violations have brought ATS claims in the U.S. against the perpetrators of human rights violations.[8] Recently, a number of such claims have been brought on behalf of children who argue that international law has been violated by virtue of their subjection to labor constituting slavery or forced labor.

This paper argues that both the enslavement and forced labor of children constitute violations of customary international law, for which the ATS provides a civil remedy. The paper first introduces the ATS. It then explores how U.S. federal courts have treated slavery, forced labor, and child labor claims under the statute. Thereafter, it reviews the practice of States and the relevant sources of international law and argues that there is a norm of international law prohibiting slavery and forced labor generally, as well as the enslavement and forced labor of children. Lastly, it argues that the unique status of children within the

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1. ILO, *ILO Says Global Number of Child Labourers Down by a Third since 2000*, INTERNATIONAL LABOR ORGANIZATION (Sept. 23, 2013), *available at* http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_221568/lang--en/index.htm (last visited Jan. 22, 2014).

2. *Id.*

3. ILO, SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOR, ILO GLOBAL ESTIMATE OF FORCED LABOR 14 (2012), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf (last visited Jan. 24, 2013).

4. ILO, *Forced Labor*, *available at* http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm (last visited Jan. 23, 2014).

5. PROGRAMME TO COMBAT FORCED LABOR, *supra* note 3, at 13.

6. *Id.* at 14.

7. 28 U.S.C.A. § 1350 (West 2012).

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

law of nations merits a special analysis of the elements of forced labor, specifically because of children's status within the international community as persons in need of protection. Under international law, not only is children's ability to assert their rights different from that of their adult counterparts, but also children possess limited capacity to consent to certain types of labor, dependent largely on their age and the conditions of labor.

II. THE ALIEN TORT STATUTE

The Alien Tort Statute provides federal courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."[9] While the First Congress passed the statute within the Judiciary Act of 1789, it was invoked as the basis for a court's jurisdiction in only one case in over 170 years.[10] This changed in 1980 when the Second Circuit Court of Appeals decided *Filartiga v. Peña-Irala*.[11] Reversing the district court's determination that it lacked subject matter jurisdiction, the Second Circuit held that the Alien Tort Statute provided the district court with jurisdiction over the plaintiff's wrongful death claim. The Court held that the Paraguayan plaintiffs successfully alleged conduct that violated a norm of international law, namely the Paraguayan defendant's torture of their relative.[12] There, the Court determined that "[a]mong the rights universally proclaimed by all nations. . . is the right to be free of physical torture."[13]

Following *Filartiga*, the Supreme Court held that while the ATS is a jurisdictional statute,[14] the substantive law governing ATS claims should be derived from the law of nations because "international law is a part of our [federal] law."[15] Further, in *Sosa v. Alvarez-Machain*, the Court held that federal courts possess limited discretion to recognize norms of international law.[16] However the Court emphasized that lower courts should restrain their discretion in identifying previously unrecognized violations of the law of nations. Nevertheless, since *Filartiga*, the ATS has become an important tool for human rights law, and federal courts now entertain suits by non-nationals against civil

9. 28 U.S.C.A. § 1350 (West 2012).
10. Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004).
11. *See generally Filartiga*, 630 F.2d at 876.
12. *Id.* at 890.
13. *Id.*
14. *Sosa*, 542 U.S. at 694.
15. *Id.* at 730 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).
16. *Id.* at 731.

rights abusers for certain violations of human rights.[17]

Significantly, in *Filartiga* the Court recognized the potential for the change and evolution of customary international law over time.[18] In fact, it identified human rights law as a primary example of this: "In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest."[19] Federal courts have been fairly uniform in finding that the law of nations evolves over time.[20] Furthermore, in *Sosa v. Alvarez-Machain*, the Supreme Court endorsed this interpretation by recognizing claims brought for violations of the "*present-day* law of nations."[21]

Last year, in *Kiobel v. Royal Dutch Petroleum Company*, the Supreme Court limited the applicability of the ATS over certain claims.[22] After noting that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms," the Court held that the presumption against extraterritoriality applies to ATS claims.[23]

Yet *Kiobel's* effect on ATS litigation is far from clear, and the decision "[wa]s careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]."[24] Clearly, *Kiobel* restricts ATS's applicability to so-called "F-cubed [ATS] actions," actions involving non-U.S. foreigners suing a foreign defendant based

17. Virginia Monken Gomez, *The Sosa Standard: What Does It Mean for Future ATS Litigation?*, 33 PEPP. L. REV. 469, 470 (2006).

18. *Filartiga*, 630 F.2d at 890.

19. *Id.*; *but see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 822 (D.C. Cir. 1984) (Bork, J. concurring).

20. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir. 1999); *Filartiga*, 630 F.2d at 889; Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

21. *Sosa*, 542 U.S. at 725 (emphasis added).

22. *See* Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659, 1669 (2013). The presumption against extraterritoriality "is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)). Therefore, "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, '[the Court] must presume it is primarily concerned with domestic conditions.'" Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 248 (2010) (quoting *Arabian Am. Oil Co.*, 449 U.S. at 248).

23. *Kiobel*, 133 U.S. at 1669.

24. *Id.* at 1669 (Kennedy, J. concurring). Similarly, in a separate concurrence, Judge Alito suggested that the decision "obviously leaves much unanswered, and perhaps there is wisdom in the Court's preference for this narrow approach." *Id.* at 1669-70.

on conduct that occurred outside of the U.S. [25] Yet where the plaintiff or defendant is a U.S. citizen or where the conduct that gave rise to the claim occurred within the U.S., *Kiobel* will not affect ATS's applicability.[26] Further, ATS will apply to a claim even when "all the relevant conduct took place outside the United States . . . [where] the claims touch and concern the territory of the United States with sufficient force to displace the presumption."[27]

A. Identifying Norms of Customary International Law

In *Sosa v. Alvarez-Machain*, the Supreme Court established the standard used to identify a norm of customary international law, the violation of which gives rise to an actionable claim under the ATS. The standard requires "any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world."[28] Further, the norm must be "defined with a specificity comparable to the features of the 18th-century paradigms [the Supreme Court has] recognized."[29] Elaborating on this latter requirement, claims cannot rely on "violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted [in 1789]."[30] In considering whether a particular norm is sufficiently definite to give rise to a cause of action, a court determination "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants."[31]

Despite the Supreme Court's enunciation of a standard by which to identify norms of customary international law, lower courts' interpretation of the standard lack uniformity. They have produced a number of discrete tests regarding the identification of international norms. The most frequently-utilized standard requires norms to be sufficiently specific, universal, and obligatory. Additionally, the Second Circuit requires that norms constitute "rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[32]

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25. Matteo M. Winkler, *What Remains of the Alien Tort Statute After* Kiobel?, 39 N.C. J. INT'L L. & COM. REG. 171, 178 (2013).

26. *Id.* at 186.

27. *Kiobel*, 133 U.S. at 1669; *see also* Winkler, *supra* note 25, at 188.

28. *Sosa*, 542 U.S. at 725.

29. *Id.*

30. *Id.* at 732.

31. *Id.* at 732-33.

32. Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003).

The interpretation of the sufficiently specific, universal, and obligatory standard varies widely among circuits. For instance, the Seventh Circuit interprets the standard broadly, arguing that the standard "like so many statements of legal doctrine . . . is suggestive rather than precise; taken literally it could easily be refuted. No norms are truly 'universal'; 'universal' is inconsistent with 'accepted by the *civilized* world'; 'obligatory' is the conclusion not the premise; and some of the most widely accepted international norms are vague, such as 'genocide' and 'torture.'"[33] Despite its broad interpretation, which on its face undercuts the standard's effectiveness in limiting the number of norms giving rise to actionable ATS claims, the Seventh Circuit purports to employ this standard.

By contrast, at the extreme, some courts have incorporated a "lowest common denominator approach" into the specific, universal, and obligatory standard.[34] In *Doe v. Nestle*, the District Court applied the standard, suggesting, "where there are a variety of formulations [for an international norm], the court should look to the formulation that is agreed upon by all—a lowest common denominator or common 'core definition' of the norm."[35] This is probably the highest standard applied in determining whether a norm under the law of nations exists[36] and a misinterpretation of *Sosa*.

B. Sources of International Law

To determine whether a plaintiff properly alleged a violation of the law of nations, courts must review sources of international law. The United Nations enumerated the sources of international law in Article

33. Flomo v. Firestone Natural Rubber, Co., 643 F.3d 1013, 1016 (7th Cir. 2011); *see also* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 860 F. Supp. 2d 1216, 1229 (W.D. Wash. 2012), for a different interpretation of this standard.

34. *See* Doe v. Nestle, 748 F. Supp. 2d 1057, 1080 (C.D. Cal. 2010); *see also* In re S. African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009). Another reason for mentioning this standard is that *Doe* is one of the four cases reviewed about domestic courts' treatment of forced child labor claims under the ATS. *Id.*

35. *Nestle*, 748 F. Supp. 2d at 1080; *see also* In re S. African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009). These cases both cite to Justice Katzmann's concurrence in Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 264 (2d Cir. 2007), in which he interpreted *Sosa* to require a "discernable core definition that commands the same level of consensus as the 18th-century crimes identified by the Supreme Court." Interestingly, Justice Katzmann in applying this standard held that a norm of aiding and abetting liability under the law of nations exists. *Khulumani*, 504 F.3d at 264 (J. Katzmann, concurring). In *Doe*, the majority came to the opposite conclusion by applying its lowest common denominator standard.

36. *See Khulumani*, 504 F.3d at 264 (J. Katzmann, concurring); *Nestle*, 748 F. Supp. 2d at 1080.

38 of the Statute of the International Court of Justice: (1) general and particular international conventions; (2) international custom; (3) general principles of law recognized by civilized nations; and, as a subsidiary source, (4) the works of the most qualified publicists.[37] Domestic courts in the U.S. have made reference to Article 38 in determining the sources of international law to which they should refer.[38] They have also cited the Restatement (Third) of Foreign Relations Law §102,[39] which defines customary international law as law "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation."[40]

In *The Paquete Habana*, the Supreme Court enumerated the sources to which courts should refer to identify a norm under the law of nations:

> For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[41]

Specifically, the Court in *The Paquete Habana*, reviewed States' historical practice,[42] States' contemporary practice, historical treaties, opinion of international tribunals, and the works of jurists regarding the wartime capture of unarmed fishing vessels from ancient to contemporary times.[43]

Although all international treaties provide some evidence of the custom and practice of nations, "a treaty will only constitute sufficient proof of a norm of customary international law if an overwhelming

37. Statute of the International Court of Justice, June 26, 1945, art. 38(1) 33 U.N.T.S. 993. While the ICJ refers to customary international law as just one source of international law, readers of U.S. court opinions should be wary because some have used the term "customary international law" as a synonym for the "law of nations" in ATS cases. *See, e.g. Filartiga*, 630 F. 2d at 876.

38. *See, e.g.*, Aziz v. Alcolac, Inc., 658 F.3d 388, 399 (4th Cir. 2011); *Kiobel*, 621 F.3d at 132; *see also Filartiga*, 630 F. 2d at 876.

39. *See, e.g.*, Karadžić v. Karadžić, 70 F.3d 232, 240 (2d Cir. 1995).

40. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

41. *Paquete Habana*, 175 U.S. at 700.

42. *See id.* at 697 (considering evidence not only of affirmative State practice, but also the practice's historical condemnation).

43. *Id.* at 686-700.

majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles."[44] The U.S.' failure to ratify conventions does not preclude their use as evidence of the law of nations.[45] Indeed, in certain circumstances conventions not ratified by the U.S. may not only be used as evidence of the law of nations, but also may be evidence of a norm binding upon the U.S.[46]

Material sources of international law are afforded different weight depending upon the degree to which they evidence the existence of a consensus among States.[47] Thus, a treaty may be afforded greater weight depending on the number of States that have ratified it.[48] Further, certain weight is afforded to non-binding material sources of international law, such as unratified treaties or Declarations because, although they lack binding force, they evidence the existence of a consensus among States. [49]

The analysis to determine whether a custom exists under international law, as exemplified by *The Paquete Habana*, must be a fact-specific, as well as a historically and legally intensive, process. Despite the practical difficulties that such an application poses for courts, *Filartiga* and its successors continually re-engaged the federal courts in the task of recognizing norms of customary international law grounded in human rights law.[50]

III. DOMESTIC COURTS' APPLICATION OF THE *SOSA* STANDARD TO ATS LABOR CLAIMS

This section will review the variety of treatments that domestic courts have afforded to plaintiffs who argue that defendants violated the law of nations by engaging in slavery, forced labor, and child labor. Courts seem more willing to identify a norm of customary international law prohibiting slavery or forced labor, than a norm prohibiting child labor generally.[51] Despite reluctance to identify a norm of international

44. *Kiobel*, 621 F.3d at 137.

45. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 180 (2d Cir. 2009).

46. *See, e.g. id.* at 180-81. In *Abdullahi v. Pfizer*, the court found that conducting medical experimentation on humans without their consent violated a norm of international law, despite the United States' failure to ratify a relevant convention. *Id.*

47. JAMES CRAWFORD, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (8th ed. 2012).

48. *Id.*

49. *Id.*

50. Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395, 1400 (1999).

51. *Compare Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1023 (7th Cir. 2011) (refusing to recognize that a norm exists prohibiting the employing of children in

law with regard to all child labor, after applying the *Sosa* standard to child labor, two courts have indicated that under certain facts, especially where an employer subjected children to slavery or forced labor, plaintiffs' claims should be actionable under the ATS.[52]

Therefore, domestic courts seem receptive to recognizing a norm of international law prohibiting the enslavement and forced labor of children under the appropriate facts. Yet in practice, primarily because of procedural obstacles and secondarily due to the reluctance of courts to recognize norms of the law of nations, plaintiffs bringing ATS claims based on child labor have largely been unsuccessful.[53]

While this should not deter prospective plaintiffs, their arguments should be structured to demonstrate that their claims are based on conduct that rises to the level of either traditional notions of slavery or more modern conceptions of forced labor. Yet this does not mean that child laborers' causes of action based on slavery or forced labor should be treated as equal to those claims brought by their adult counterparts. Instead, courts must consider claims in conjunction with children's unique status within the international community, specifically as persons in need of protection. In particular, courts should pay special attention to how this status affects children's ability to consent and assert their rights within various forms and conditions of labor.

This section first reviews domestic courts' treatment of ATS claims based on slavery and forced labor and continues by reviewing the treatment of child labor claims. It then argues that a norm of customary international law exists prohibiting child labor that is tantamount to slavery and forced labor, and that such conduct is therefore actionable under the ATS.

A. Treatment of ATS Claims Based on Slavery and Forced Labor

Domestic courts generally recognize that slavery violates the law of nations. Even in cases where slavery is not directly at issue, courts routinely refer to slavery as one of the few norms that clearly violates

work that is harmful to their health, safety, or morals), *and* Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) *on reh'g en banc sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (holding that forced labor is so widely condemned that it has surpassed being merely a norm of customary law and has attained the status of a *jus cogens* violation); *see also infra* sections *A* and *B*. While *Unocal*'s decision was vacated, it was only vacated after the plaintiffs and Unocal settled the case for an undisclosed amount. Ron A. Ghatan, *Note: The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1276 (2011).

52. *Nestle*, 748 F. Supp. 2d at 1075; *Flomo*, 643 F.3d at 1023.

53. *See infra Treatment of ATS Claims Based on Child Labor*, at section B.

customary international law.[54] Further, some courts have also recognized that forced labor may be actionable as a violation of customary international law under the ATS.[55]

While ultimately rejecting a plaintiff's claim, in *Velez v. Sanchez*, the Second Circuit, noted that slavery "in which one human being purports to own another" violates the law of nations.[56] There, it asserted that of the norms of customary international law, the prohibition of slavery is "one of the most well-established."[57] The Court opined that over time the norm prohibiting slavery has evolved to include a variety of its modern forms, including forced labor and servitude.[58] Other courts have similarly found that forced labor constitutes a violation of customary international law.[59]

In fact, in *Unocal* the Ninth Circuit went further and held both that slavery and forced labor were *jus cogens* violations.[60] Additionally, while the Ninth Circuit strictly limits the norms of international law that may be asserted against private individuals, in *Unocal* it opined that "forced labor, like traditional variants of slave trading, is among the 'handful of crimes . . . to which the law of nations attributes *individual liability*,' such that state action is not required."[61]

B. Treatment of ATS Claims Based on Child Labor

This author found four cases in which plaintiffs alleged a violation of the law of nations based on the defendant's employment of children.[62] Of them, two were dismissed on procedural grounds.[63] In this section, an analysis of these cases is presented to demonstrate some of the procedural difficulties that ATS plaintiffs face, as well as to acquaint the reader with the wide variety of factual scenarios that have

54. *See, e.g.*, Doe v. Unocal Corp., 963 F.Supp. 880, 891-92 (C.D. Cal. 1997) (citing Kadic v. Karadzic, 70 F. 3d 232, 239 (2d Cir. 1995)).

55. *See, e.g.*, *Unocal Corp.*, 395 F.3d at 946.

56. Velez v. Sanchez, 693 F.3d 308, 319 (2d Cir. 2012).

57. *Velez*, 693 F.3d at 319 (citing Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 310 (1999)).

58. *Velez*, 693 F.3d at 319.

59. *See Adhikari*, 697 F. Supp. 2d at 685; Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355, 1358 (S.D. Fla. 2008); *Unocal Corp.*, 963 F.Supp. at 891-92.

60. *Unocal Corp.*, 395 F.3d at 946.

61. *Id.* at 946.

62. Specifically, these are: Mother Doe I v. Al Maktoum, 632 F. Supp. 2d 1130, 1132-34 (S.D. Fla. 2007); Ellul v. Congregation of Christian Bros., 2011 WL 1085325 (S.D.N.Y. 2011); *Flomo*, 643 F.3d at 1023; *Nestle*, 748 F. Supp. 2d at 1075.

63. *Al Maktoum*, 632 F. Supp. 2d at 1134; *Ellul*, 2011 WL 1085325.

given rise to ATS claims. In the remaining two cases, the court reached a substantive analysis of whether plaintiffs properly alleged a violation of the law of nations under *Sosa*.[64]

1. Child Labor Claims Dismissed on Procedural Grounds

This section briefly recounts some of the procedural difficulties faced by plaintiffs who have sought to recover under the ATS based on a theory that child labor violates the law of nations. It suggests that meeting the *Sosa* standard is but one obstacle for plaintiffs bringing such claims.

In *Ellul v. Christian Brothers*, plaintiffs brought a claim under the ATS in which they alleged a number of violations of customary international law, including the forced labor of children.[65] There claimants alleged that beginning in the 1940s and continuing for decades, a program created by the Australian government took children from the United Kingdom and Malta and moved them to orphanages and work camps in Australia.[66] Thereafter, the children "were treated shamelessly, abused, and neglected, subjected to forced labor, and denied education."[67] In 2011, three of the children, then adults, brought suit under the ATS.[68]

The Court dismissed their claims on a number of procedural grounds, including the tolling of the statute of limitations.[69] Firstly, the Court dismissed the claim because it lacked jurisdiction over both defendants.[70] The plaintiffs' complaint named the wrong association of Christian Brothers and failed to complete service on the correct association.[71] Further, the plaintiffs named the Christian Brothers of Rome, but failed to provide evidence that the Christian Brothers Oceania, against whom they alleged violations of customary international law, was acting under the control or authority of the Christian Brothers of Rome.[72] The plaintiffs also sued the Order of the Sisters of Mercy.[73] The court dismissed the allegations against this defendant because it found that "it is not an organization with a

64. *Flomo*, 643 F.3d at 1023; *Unocal Corp.*, 395 F.3d at 946.
65. *Ellul*, 2011 WL 1085325 at *1.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Ellul*, 2011 WL 1085325 at *1, 3-4.
71. *Id.* at *2.
72. *Id.*
73. *Id.* at *3.

structure and purpose to act as an entity. . . [and] the common purpose to which Plaintiffs point—charity—is too vague to unify these regional organizations into a single legal entity."[74]

The dismissal of these two defendants exemplifies one of the difficulties faced by ATS plaintiffs, namely a failure to obtain personal jurisdiction over defendants, a difficulty which presumably was the reason that suit was not brought directly against Christian Brothers Oceania. Further, in rare circumstances, plaintiffs may seek to recover from organizations such as the Order of the Sisters of Mercy that are not legally cognizable in the U.S.

Secondly, the Court dismissed the claim for the expiration of the statute of limitations. The ATS has no express statute of limitations, but courts have borrowed a ten-year statute of limitations from the Torture Victim Protection Act.[75] Despite this, for certain claims, courts apply equitable tolling.[76] Yet, in *Ellul*, the court noted that equitable tolling "is appropriate only in rare and exceptional cases, in which a party is 'prevented in some *extraordinary* way from exercising [its] rights.'"[77] Further, the court held that because plaintiffs were aware of the factual basis for their cause of action equitable tolling was inappropriate.

In *Doe v. Al Maktoum*, the Court dismissed a claim brought against the Finance Minister of the United Arab Emirates and other unnamed defendants for lack of personal jurisdiction.[78] There, plaintiffs alleged that defendants engaged in a number of violations of customary international law, including forced child labor.[79] The plaintiffs, former child jockeys, alleged that defendants kidnapped, trafficked, and enslaved young boys from South Asia and Africa.[80] Further, they alleged that at various times the children were "starved, deprived of sleep, injected with hormones to [halt] grow[th], and sexually abused" by the defendants.[81]

The Court held that the plaintiffs failed to establish that it had personal jurisdiction over the defendant because plaintiffs relied on the affidavit of a researcher who relied on hearsay websites and newspaper stories about the defendant's ownership of personal property in the U.S.,

74. *Id.*
75. *Ellul*, 2011 WL 1085325 at *3.
76. *See, e.g.*, Chavez v. Carranza, 559 F.3d 486, 491 (6th Cir. 2009).
77. *Ellul*, 2011 WL 1085325 at *3.
78. *Al Maktoum*, 632 F. Supp. 2d at 1134.
79. *Id.*
80. *Id.* at 1133.
81. *Id.* at 1133-34.

his purchase of race horses in Kentucky, and infrequent visits.[82] The court held that his contacts were not sufficient under the Kentucky long-arm statute because of an absence of substantial, continuous, and systematic contacts with the forum.[83]

2. *Child Labor Claims Dismissed for Failure to Allege a Violation of the Law of Nations*

Two courts have analyzed the question of whether child labor constitutes a violation of the law of nations.[84] Yet in only one case, *Flomo v. Firestone*, has a court engaged in a detailed and substantive analysis of the question. This section explores those cases.

In *Doe v. Nestle*, the Court opined that "it is clear that in some instances 'child labor' constitute[s] a violation of an international norm that is specific, universal, and well-defined."[85] Yet it dismissed the claim on other grounds[86] and exerted little effort to backup this claim. Citing to *John Roe I v. Bridgestone*,[87] the Court noted it would be difficult to distinguish between instances of child labor that violate customary international law and those that do not.

In *Flomo v. Firestone*, the Seventh Circuit Court of Appeals addressed whether child labor constitutes a violation of customary international law and, affirming the District Court's holding, found that it did not. *Flomo,* a procedurally complicated case,[88] exemplified not only the procedural difficulties facing ATS claimants, but also the difficulty of establishing a violation under *Sosa*.[89]

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82. *Id.* at 1141-43.

83. *Al Maktoum*, 632 F. Supp. 2d at 1142.

84. *Flomo*, 643 F.3d at 1023; *Nestle*, 748 F. Supp. 2d at 1075.

85. *Nestle*, 748 F. Supp. 2d at 1075.

86. There, the court ultimately held that the plaintiffs failed to demonstrate that an international norm existed for aiding and abetting liability. To establish their claim against Nestle, the plaintiffs relied on an aiding and abetting theory. *Nestle*, 748 F. Supp. 2d at 1057. Yet not all courts reject such claims. In *Unocal*, the Ninth Circuit held that ATS claims could rely on such a theory. *Unocal Corp.*, 395 F.3d at 947-53. In *Nestle*, plaintiffs alleged that the defendants knew or should have known of the child labor because of their first hand knowledge and by the "numerous, well-documented reports of child labor" by governmental and non-governmental actors. Their argument followed that despite their knowledge, defendants not only purchased the cocoa from the farms, but also provided the farms with resources "knowing that their assistance would necessarily facilitate child labor." FAC ¶ 52; *Nestle*, 748 F. Supp. 2d at 1066, 1075.

87. John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1020 (S.D. Ind. 2007).

88. *See* Jessica Bergman, *The Alien Tort Statute and Flomo v. Firestone Natural Rubber Company: The Key to Change in Global Child Labor Practices?*, 18 IND. J. GLOBAL LEGAL STUD. 455, 479 n.8 (2011).

89. *Id.*

In *Flomo*, the plaintiffs alleged that the defendants violated customary international law when they employed children in circumstances constituting "the worst forms of child labor."[90] By the time their claim was analyzed by the Circuit Court, the plaintiffs' allegations of slavery and forced labor had been dismissed.[91] The plaintiffs, who worked on rubber plantations in Liberia, alleged that the defendant economically coerced children into working full time by setting their fathers' daily quota of trees to tap so high that the fathers had to recruit their children to work with them in order to retain their jobs. Further, plaintiffs alleged that defendants imposed the quota knowing it could be met only "if children join[ed] their fathers . . . and work[ed] from dawn to dusk."[92]

The complaint detailed the alleged work in which children engaged. These allegations included that plaintiffs began working at 4:30 a.m. by cleaning 1,500 tapper cups; that they tapped trees with sharp tools facing the risk of blinding from raw latex; applied dangerous chemical fertilizers to the rubber trees; and carried two 75-pound buckets of latex at a time in order to be paid with their family's daily food allotment.[93]

It should be noted that, for the purposes of litigation under the ATS, the facts presented do not make this an ideal test case. First, Firestone did not directly employ the children. Instead, plaintiffs claimed Firestone coerced children into working and "actively encouraged [child labor]."[94] Secondly, this is not a case of direct liability, but instead relies on a theory of agency liability. The fathers' direct employer, Firestone Liberia, was a subsidiary of the defendant in this case, Firestone National Rubber Company (FNRC).[95] After several challenges early in the litigation, plaintiffs limited their theory of

90. *Flomo*, 643 F.3d at 1023.

91. *Id.*

92. Brief for Petitioner at ¶4, *John Roe I, et al. v. Bridgestone Corp.*, 2005 CV05-8168JFW, *available at* http://iradvocates.mayfirst.org/sites/default/files/11.17.05%20Complaint.pdf (last visited Feb. 4, 2014).

93. *Id.* One of the organizations that brought the suit on behalf of the plaintiffs, International Rights Advocates, provides videos of the children and of the Firestone Plantation. StopFirestone, *Firestone & Child Labor in Liberia*, YOUTUBE (May 29, 2008), *available at* http://www.youtube.com/watch?v=FfzvdWqVIGk (last visited Jan. 28, 2014). For images, *see Stop Firestone*, INTERNATIONAL LABOR RIGHTS FORUM, *available at* http://www.laborrights.org/stop-child-labor/stop-firestone (last visited Jan. 28, 2014).

94. Brief for Petitioners, *supra* note 92, at 4.

95. Bergman, *supra* note 88.

liability to FNRC.[96]

Despite these legal obstacles, the attorneys were probably influenced to bring the case by the great flurry of international attention directed at the situation of Liberian workers on rubber plantations in Liberia.[97] Following months of national and international scrutiny directed toward the status of human rights on Liberian rubber plantations, the Human Rights and Protection Section of the United Nations Missions in Liberia (UNMIL) released a report detailing the situation.[98] This report set rubber plantations as a priority for United Nations Missions in Liberia because "[i]n the context of Liberia's post-conflict rehabilitation, the situation . . . [they] presented significant security, political, economic and human rights challenges for the Government which have not yet been resolved."[99] Further, the report noted that "working conditions on the plantations violate fundamental human rights standards. The situation is particular [*sic*] poor in relation to child [*sic*]; child labor is indirectly encouraged by work practices and lack of access to education."[100]

In *Flomo*, the Seventh Circuit affirmed the District Court's grant of defendant's motion for summary judgment, but the Court conducted its own *Sosa* analysis to determine that no norm of customary international law prohibited child labor.[101] Yet prior to announcing its holding, the Seventh Circuit expressed disquiet over the use of customary international law as a means to recover under the ATS.[102]

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96. *Id.*

97. *See* U.N. Mission in Liberia, HUMAN RIGHTS IN LIBERIA'S RUBBER PLANTATIONS: TAPPING INTO THE FUTURE (2006), *available at* http://www.unhcr.org/refworld/docid/473dade10.html (last visited Jan. 28, 2014) [hereinafter UNMIL]. Firestone's Liberian plantation is huge, and its website stated that it has more than 6,500 employees in Liberia. *Resources, FAQs*, FIRESTONE NATURAL RUBBER COMPANY, *available at* http://www.firestonenaturalrubber.com/faqs.htm#1 (last visited Jan. 28, 2014).

98. UNMIL, *supra* note 97, at 5.

99. *Id.*

100. *Id.*

101. *Flomo*, 643 F.3d at 1016.

102. *Id.* Its argument was as follows: Its reluctance originated from problems with notice and legitimacy. In particular, the court opined that notice was a problem because norms created by custom cannot be identified as clearly as those specifically identified by a legal text. Further, customary international law's legitimacy and, in democratic countries, democratic legitimacy, was a problem because through the use of custom, the international community imposes legal duties on the independent sovereign in the form of mandatory norms. The Court reasoned that while international law is ideally created by consensus, in practice it rarely is. Yet it seemed to suggest that some of its concerns were mitigated because Congress maintained the ability to limit the scope of the ATS, and therefore "the statute. . . is not a blanket delegation of lawmaking to the democratically unaccountable

In applying *Sosa*, the Seventh Circuit examined the language of the UN Convention on the Rights of the Child, Article 32(1); Minimum Age Convention; and the Worst Forms of Child Labour Convention, Article 3(d) individually to determine whether each gave rise to a norm of customary international law. The Court concluded that child labor, with regard to all of the Conventions, was too vague and encompassing a category to give rise to a norm of customary international law.[103]

Firstly, it rejected the argument that the UN Convention on the Rights of the Child (1989), specifically Article 32 (1) gave rise to a norm of customary international law.[104] The Article provides that children have a right not to perform certain work, in particular that which is hazardous, interferes with education, or is harmful to the child's health.[105] The Court held that the language was too "vague and encompassing" to establish a norm of international law.[106] Secondly, the Court similarly rejected the Minimum Age Convention as a source of customary international law.[107] This Convention forbids children under fourteen from doing any work other than "light work."[108] The court opined that the Convention created no norm because of the vagueness of the term "light work."[109] Lastly, in evaluating the Worst Forms of Child Labour Convention, the Court noted that while it was "more promising" than the other Conventions, it found that Article 3(d) was "still pretty vague."[110] In particular, it enumerated three reasons for its vagueness, namely: (1) its failure to specify a threshold of actionable harm; (2) the "inherent vagueness of the words 'safety' and 'morals;'" and (3) its provision that the domestic law of nations determines which

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international community of custom creators." *Id.* Yet the Court noted concern that "[i]f [a democratic country] has consistently rejected the international custom, it is possible for the custom to apply to it." *Id.* Despite the court's concern, this last concern should be almost completely mitigated by the persistent objector rule, in which a country that consistently rejects an international norm will be considered a persistent objector, and therefore exempted from the rule. *See* Joel P. Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 221 (2010). However, this is not the case for States that come into existence after the norm because the persistent objector rule will generally not apply to them. *Id.*

103. *Flomo*, 643 F.3d at 1022.

104. *Id.*

105. United Nations Convention on the Rights of the Child, art. 32(1), Nov. 20, 1989 [hereinafter UNCRC].

106. *Flomo*, 643 F.3d at 1022.

107. *Id.*

108. ILO Minimum Age Convention, art. 7, June 26, 1973.

109. *Flomo*, 643 F.3d at 1022.

110. *Id.*

types of work fall into Article 3(d).[111]

The Court referred to the Convention's Recommendation 190 for more detail on Article 3(d), but ultimately dismissed its importance because a Recommendation "create[s] no enforceable obligation."[112] Here, the Court failed to consider whether the Recommendation, while not binding on States, could help the Court to discern whether a custom of international law exists, and if so, its scope. The Court also held that the plaintiffs failed to provide the Court with sufficient evidence of the practices and customs of nations as to demonstrate that States perceive that they have a legal obligation to follow the norm.[113]

After this discussion, the Court found that "[g]iven the diversity of economic conditions in the world, it's impossible to distill a crisp rule from the three conventions."[114] Yet during this discussion, it was not clear whether the Court based this opinion on a cumulative consideration of all of the conventions, or whether it was based on its analysis of them individually. A proper evaluation of the plaintiffs' ATS claim would entail an explicit analysis of all of the sources taken together, which would ensure that the Court addressed whether the sources of international law give rise to a norm.

The Court concluded by enumerating a number of deficiencies in the plaintiff's factual allegations. Specifically, the Court noted that it was unaware of how frequently employees employed children to help them fill their quotas; whether Firestone took effective measures to stop children from working; how many children worked on the plantation; the ages of those children who worked on the plantation other than those who brought suit; how much work the average child did; and the difficulty of the work.[115]

The application of the *Sosa* standard aside, the Court's concluding discussion was problematic. The Court noted that its "biggest objection" to the lawsuit was that it was unaware of "the situation of Liberian children who don't live on the Firestone plantation." It reasoned that the children who work on the Firestone plantation may be

111. ILO, Worst Forms of Child Labor Convention, art. 3(d), Nov. 19, 2000, ILO No. 182 [hereinafter WFCLC].

112. *Flomo*, 643 F.3d at 1023.

113. *Id.*

114. *Id.*

115. *Id.* at 1024. It was not clear why the Court required some of this information as the Court did not fully explain its relevance. For instance, presumably had the Court found that the employment of the children violated international customary law, it would not matter how many children worked there. This is because the children who brought the claim should be entitled to recover for the torts committed against them in violation of the law of nations without reference to any other child employees of Firestone.

better off than other Liberian children because their fathers are well paid by Liberian standards. It continued by suggesting that they "would be worse off if their fathers, unable to fill their daily quotas, lost their jobs or had to pay adult helpers, thus reducing the family's income;" thus the Court did not "know the net effect on their welfare of working on the plantation."

This argument is paternalistic; completely undermines the plaintiff's autonomy and freedom to decide what is or is not better for them; and is a social, not legal, argument. While the argument may not be wholly without merit,[116] any strain put on families is irrelevant in an analysis of whether child labor constitutes a norm of international law.[117] Further, if an employer violates customary international law, it is logically perverse for a court to justify that human rights violation by suggesting that the plaintiffs would be worse off if their human rights were upheld. The Court's role here was to determine whether a norm of customary international law existed, not whether enforcing such a norm would benefit the very plaintiffs who presumably, having consented to the suit, believed that suing the defendant was in their best interests.

3. Concluding Note on Prior ATS Cases Asserting Child Labor Claims

While no plaintiff has successfully pled a child labor ATS claim that has survived a motion for summary judgment, domestic courts seem receptive to recognizing a norm of international law prohibiting the forced labor and slavery of children under certain facts. In *Nestle*, while dismissing the claim on other grounds, the court noted that it was "clear that in some instances 'child labor' constitutes a violation of . . . international law."[118] Further, in *Flomo*, while the court found no international norm proscribing "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health,

116. For instance, after plaintiffs served their complaint, Firestone adopted a "zero tolerance" policy with regard to child labor whereby it would fire any employee found to be employing the labor of a child. It is plausible that some workers or their families were negatively affected by this policy. Flomo v. Firestone Natural Rubber Company, 2010 WL 4174583 (S.D. Ind. 2010).

117. The best argument for its relevance is that courts have noted that when considering whether a norm of international law exists, the court must consider the practical consequences of identifying a norm. Yet the practical consequences factor is limited to a judgment about the "practical consequence of making that cause available to litigants in federal court," and not the practical consequences to present litigants. *See Sosa*, 542 U.S. at 732.

118. *Doe v. Nestle*, 748 F. Supp. 2d at 1075.

safety or morals of children;"[119] it recognized that other forms of child labor might be actionable. Specifically, it opined that evidence "that [S]tates feel themselves under a legal obligation to impose liability on employers of child labor. . . is readily available for the other types of child labor listed in ILO Convention 182, such as. . . forced child labor." Therefore, where plaintiffs overcome the procedural obstacles posed by ATS claims and furnish sufficient evidence to demonstrate that their employer engaged in slavery or forced labor, courts may be receptive to their claim.

IV. A NORM OF CUSTOMARY INTERNATIONAL LAW PROHIBITS SLAVERY AND FORCED LABOR SUCH THAT ATS CLAIMS BASED ON SLAVERY AND FORCED LABOR SHOULD BE ACTIONABLE UNDER THE ATS

This section will argue that a norm of customary international law prohibiting both slavery and forced labor has evolved within the international community.[120] Taken together, the numerous treaties and the practices of States demonstrate that the prohibition of slavery and forced labor of children satisfy the ATS's requisite elements, namely that a norm be specific, universal, obligatory, and of mutual concern.

Further, this section will argue that children's status within international law differs from that of adults, and therefore plaintiffs' pleadings asserting ATS claims based on the forced labor of children should address their unique status. In particular, plaintiffs should note their conditions of labor. In doing so, they should direct special attention to children's potential lack of capacity to consent to both employment contracts and labor that will cause long-term mental or physical harm. Also, pleadings should address children's potential difficulty in asserting their own interests over that of an adult supervisor. Further, these factors should be included in a court's analysis of whether the conditions of the labor violated a norm prohibiting child labor that is tantamount to slavery or forced labor.

119. *Flomo*, 643 F.3d at 1023.

120. *See* Federico Lenzerini, *Suppressing Slavery Under Customary Law*, 10 ITALIAN Y.B. INT'L L. 146 (2000) (providing a comprehensive history of slavery in international law, as well as the contemporary state of customary international law regarding slavery, and argument for the recognition of a norm of customary international law prohibiting slavery and forced labor). Lenzerini argues that slavery has attained *jus cogens* status. *Id.* at 156.

A. Specificity: Defining Slavery and Forced Labor Under Customary International Law

Slavery and forced labor are specific norms whose definition can be readily determined through reference to the relevant sources of international law. The international community defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[121] This definition originated in the 1926 Slavery Convention and has not been subject to great change.[122] The international community has reaffirmed this definition in a number of main instruments dealing with slavery.[123]

International sources, [124] as well as at least one domestic court in an ATS claim,[125] define forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[126] While the treaty excepts certain forms of labor from the definition,[127] the exceptions are explicitly enumerated in the treaty and should not bar a court from finding the specificity element satisfied.

In evaluating ATS claims, courts should treat forced labor as a form of slavery.[128] Courts should distinguish between and evaluate claims of traditional slavery and forced labor using these definitions. Yet while distinguishable, these definitions are related, and courts should recognize both as violations of customary international law.

B. Universal and Obligatory: The Prohibition of the Slavery and Forced Labor of Children is a Norm Universally Practiced to which States Accede out of a Sense of Legal Obligation

Identification of a norm of customary international law requires a finding that the norm is universally practiced and acceded to out of a sense of legal obligation.[129] One element looks objectively to States'

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121. *Id.* at 158-59.

122. *Id.* at 159.

123. *Id.* (citing to United Nations, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 7, April 30, 1957, 226 U.N.T.S.3 [hereinafter Supplementary Convention]; Rome Statute of the International Criminal Court art. 7, Nov. 10, 1998, U.N. Doc. A/Conf./183/9 (1998)).

124. *See* ILO, Forced Labour Convention, art. 2(1), June 10, 1930, ILO No. 29 [hereinafter ILOFLC].

125. *Velez*, 693 F.3d at 320.

126. *See* WFCLC, *supra* note 111.

127. *See id.* art. 2(2)(a)-(e).

128. *See* Lenzerini, *supra* note 120, at 165 (treating force labor as a modern variant of slavery).

129. *Kiobel*, 621 F.3d at 131 (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233,

practice, while the other evaluates States' subjective reasons for engaging in that practice. The latter element requires that States subjectively feel that they are legally obligated to practice the norm. Yet the objective and subjective elements may be interrelated. Specifically, a State may practice a norm as a result of a sense of legal obligation to abide by it, or in the alternative, a sense of legal obligation to engage in a practice may result from a State's preexisting practice thereof. Because of this interconnection, this section will consider the objective and subjective elements together.

C. State Practice: Evidence of the Universal Adherence to the Proscription of Slavery and Forced Labor

State practice demonstrates that States universally prohibit slavery.[130] The first national prohibition of slavery dates to 1794 in France.[131] Many States followed. By 1957, States had ratified at least 300 international treaties suppressing slavery and the slave trade.[132] Following World War II, global condemnation of slavery and forced labor continued and was expressed in the UN's human rights treaties entered into after the War.[133] Today States universally prohibit slavery, and slavery has been abolished in every nation of the world.[134] The long history of the global prohibition of slavery left a lasting legacy in the way that States and people understand slavery, "[R]eviving slavery has remained beyond the bounds of any contemporary movement's dreams or any [S]tate's ambition. Slavery rhetorically remains the evil of choice for any movement or government that seeks to mobilize sentiment against exploitative practices and coercive domination anywhere in the world."[135]

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248 (2d Cir. 2003)).

130. This section is meant to demonstrate that today slavery is universally prohibited. Therefore, the history provided is only meant to provide the reader with the most minimal reference as to the antislavery movement's timeline.

131. Lenzerini, *supra* note 120, at 149.

132. *Id.*

133. *Id.* at 150.

134. John D. Sutter, *Slavery's Last Stronghold*, CNN, *available at* http://www.cnn.com/interactive/2012/03/world/mauritania.slaverys.last.stronghold/index.html (last visited Feb. 14, 2014) (noting that Mauritania was the last country to abolish slavery, doing so in 1981; yet the practice was not criminalized until 2007).

135. SEYMOUR DRESCHER, ABOLITION: A HISTORY OF SLAVERY AND ANTISLAVERY 461-62 (2009).

D. Treaties: Evidence that the Proscription of Slavery and Forced Labor is Universal and Obligatory

The ratification of treaties serves as evidence of both objective State practice and the subjective State belief in the obligatory nature of a norm. Ratification serves as evidence of State practice in that States are required to comply with the treaty norm. Further, by ratifying a treaty States understand that they are legally bound by the treaty, which satisfies the subjective element. The main treaties regarding slavery, forced labor, and child labor have been ratified almost universally, suggesting that almost all States subjectively feel that they are binding. Further, their nearly universal ratification, in conjunction with the ILO's status treating them as "core" treaties, demonstrates the development of a norm of international law proscribing the slavery and forced labor of children.

1. Treaties and Declarations Addressing Slavery and Forced Labor

International treaties and declarations serve as evidence of the objective practice and subjective belief of States with regard to the prohibition of slavery and forced labor. In particular, the number of ratifications of the main treaties involving slavery and forced labor evidences States' universal subscription to the norm. Meanwhile, the number of ratifications as well as the international community's treatment of these treaties as "core" treaties evidence that States accede to the norm out of a sense of legal obligation.

Sources of international law consistently demonstrate a universal proscription of slavery in its traditional form.[136] The Universal Declaration on Human Rights and International Covenant on Civil and Political Rights recognize an affirmative right that "[n]o one should be held in slavery."[137] The International Covenant on Civil and Political

136. *See* Maria Fernanda Perez Solla, *Slavery and Human Trafficking: International Law and the Role of the World Bank*, 6 (Apr. 2009), *available at* http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0904.pdf (last visited Jan. 29, 2014) (citing United Nations, The Universal Declaration of Human Rights, art. 4, Dec. 10, 1948 [hereinafter UDHR]; United Nations, International Covenant on Civil and Political Rights, art. 8.1, Mar. 23, 1976 [hereinafter ICCPR]; European Court of Human Rights, The European Convention on Human Rights and Fundamental Freedoms, art. 4.1, Mar. 3, 1953 [hereinafter ECHR]; Organization of American States, American Convention on Human Rights art. 6.1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; United Nations, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 11.1, July 1, 2003 [hereinafter ICPRMW]).

137. UDHR, *supra* note 136, at art. 4; ICCPR, *supra* note 136, at art. 8.1.

Rights[138] reiterates the right of individuals not to be held in slavery and asserts a prohibition of slavery "in all of [its] forms."[139] It also goes further and recognizes the right of individuals not to be subjected to forced or compulsory labor.[140]

Treaties proscribing forced labor have been widely ratified. Of the most important treaties on this subject, the Forced Labour Convention (1930), has been ratified by 177 States, [141] and the Abolition of Forced Labour Convention (1957) has been ratified by 174 States.[142]

The Forced Labour Convention defines forced or compulsory labor as, "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[143] The Convention provides that ratifying States must "undertake[] to suppress the use of forced or compulsory labour in all its forms within the shortest possible period." Further, the Convention requires States to criminalize forced or compulsory labor for private actors.[144]

The Abolition of Forced Labor Convention provides that ratifying States "undertake[] to suppress and not to make use of any form of forced or compulsory labour" under a number of circumstances including when it is used for political coercion, education, economic development, and labour discipline.[145] Further, States are required to "take effective measures to secure the immediate and complete abolition

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138. The United States, as well as 166 other States, has ratified the Covenant. ICCPR: Chapter IV: Human Rights, UNITED NATIONS (Dec. 16, 1966), *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Jan. 29, 2014).

139. ICCPR, *supra* note 136, at art. 8(1).

140. *Id.* at art. 8(3)(a), (c)(i) (providing exceptions to the definition of compulsory labor).

141. Only eight States have not ratified the Convention. *See* ILO, Forced Labour Convention, May 1, 1932, ILO No. 29, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312174:NO (last visited Feb. 14, 2014).

142. Only eleven States have not ratified this Convention. *See* ILO, Abolition of Forced Labour Convention, Jan. 17, 1959, ILO No. 105, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:11310:0::NO::P11310_INSTRUMENT_ID:312250 (last visited Feb. 14, 2014).

143. WFCLC, *supra* note 111, at art. 2(2)(1). *But see,* WFCLC, *supra* note 111, at art. 2(2)(a)-(e). (enumerating exceptions to the convention).

144. *See* Report III (Part 1B): General Survey Concerning the Forced Labor Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), International Labour Conference 5 (2007), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_089199.pdf (last visited Jan. 29, 2014).

145. Abolition of Forced Labour Convention art. 1, Jan. 17, 1959.

of forced or compulsory labour."[146]

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery explicitly deals with an expanded notion of the conducts that constitute slavery.[147] The U.S., along with 122 other States, has ratified the Convention.[148] While fewer States are party to the Convention, it is still widely supported and is useful as a vehicle to explore those practices that States consider similar to slavery. It includes, but is not limited to debt bondage, serfdom, and "any institution or practice whereby a . . . young person under . . . 18 years, is delivered by either or both of his natural parents or by his guardian to another person. . . with a view to the exploitation of the . . . young person of his labor."[149]

2. Treaties and Declarations Addressing Child Labor

In recognition of the unique circumstances facing children, the ILO specifically addressed the slavery or forced labor of children in the Worst Forms of Child Labour Convention (1999). Since 1999, 174 States have ratified the Convention.[150] The U.S. was one of the first to do so.[151] "[A]ll forms of slavery or practices similar to slavery, such as . . . forced or compulsory labour" are included within the Convention's definition of the worst forms of child labor. The worst forms of child labor also include "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."[152]

To demonstrate the emergence of a norm prohibiting child labor

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146. *Id.* art. 2.

147. United Nations, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 7, April 30, 1957, 226 U.N.T.S. 3.

148. *Id.*

149. *Id.*

150. *List of Ratifications of International Labour Conventions*, ILO, *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-2.pdf (last visited Feb. 5, 2014). This includes some of the most populous countries that failed to ratify the Forced Labour Convention. *Compare id. with ILO Countries that Have not Ratified this Convention*, ILO, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:11310:0::NO::P11310_INSTRUMENT_ID:312174 (last visited Feb. 5, 2014). Specifically, the United States, China, Afghanistan, the Republic of Korea, and Brunei Darussalam. *See id.* The only States to neither ratify the Forced Labour Convention nor the Worst Forms of Child Labour Convention are the Marshall Islands, Palau, and Tuvalu. *See id.* This suggests that only those latter States are not bound by the prohibition of child labor proscribed by each treaty individually.

151. *List of Ratifications of International Labour Conventions*, *supra* note 150.

152. WFCLC, *supra* note 111, at art. 3.

that is tantamount to slavery or forced labor, reference can be made to a number of other sources of international law.[153] While they have lesser force, because either they are not binding or because the U.S. has been a persistent objector, they should be consulted in conjunction with binding sources of international law to demonstrate the emergence of a norm of international law forbidding child labor that is tantamount to slavery or forced labor.

These sources demonstrate a consistent concern about children's participation in the workforce. The International Covenant on Economic, Social and Cultural Rights provides that employment that is "harmful to [children's] morals or health or dangerous to their life or likely to hamper their normal development" should be criminalized.[154] The Declaration of the Rights of the Child explicitly forbids not only child labor before "an appropriate minimum age," but also forbids "caus[ing] or permit[ing] [the child] to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development."[155] The Convention on the Rights of the Child also requires that States take affirmative measures to implement Article 32.[156] Specifically, it requires that they provide a minimum age of employment, regulate employees' hours and conditions of work, and establish sanctions for violations and effectively enforce the laws regarding child labor.[157]

In 1990, more world leaders gathered at the United Nations than ever before to attend the World Summit for Children.[158] There, they adopted a Declaration on the Survival, Protection and Development of Children, as well as a Plan of Action, detailing the implementation of the Declaration.[159] While the Declaration addressed a myriad of concerns, in part it committed to "work for special protection of the

153. Solla, *supra* note 136, at 10 (citing ICCPR, *supra* note 136, at art. 8(3); ECHR, *supra* note 136, at art. 4(2); ACHR, *supra* note 136, at art. 6(2); ICPRMW, *supra* note 136, at art. 11(2)).

154. International Covenant on Economic, Social and Cultural Rights, G.A. Res 2200 (XXI), U.N. GOAR, 21st Sess., U.N. Doc. A/RES/2200 (XXI), at 10 (Dec. 16, 1966). The United States is not a party.

155. Declaration of the Rights of the Child [hereinafter DRC], G.A. Res 1386 (XIV), U.N. GOAR, 14th Sess., U.N. Doc. A/RES/1386 (XIV), at 9 (Dec. 10, 1959). The United States is not a party.

156. UNCRC, *supra* note 105, at art. 32.

157. *Id.*

158. A *promise to children*, UNICEF, *available at* http://www.unicef.org/wsc/ (last visited Jan. 29, 2013).

159. *Id.*

working child and for the abolition of illegal child labor."[160] The Plan of Action reaffirmed a number of obligations of the CRC and suggested that all States should take steps to eliminate employment that is hazardous, interferes with education, or is harmful to the health and full development of children. Further, it suggested that States should seek to protect children engaging in "legitimate employment" by ensuring that they have the opportunity for a healthy and full development.[161] The Plan of Action urged specific contributions from States at the national level as well as contributions from international development agencies, regional institutions, all relevant United Nations agencies, as well as others at the international level.[162]

E. ILO's Designation of Slavery, Forced Labor, and Child Labor Conventions as "Core" Conventions

While the universal practice of the prohibition of slavery and forced labor is evidence of State's perception that the norm is obligatory, its obligatory character is also evidenced by the importance afforded to the conventions by the ILO and its member States by the conventions' designation as "core" conventions. That designation suggests that the conventions have attained a status beyond merely binding upon the parties and explains in part why states accede to them out of a sense of legal obligation, namely because they protect fundamental human rights.[163]

The ILO regards the Forced Labour Convention, Abolition of Forced Labour Convention, Worst Forms of Child Labour, and the Minimum Age Conventions as 'core' conventions.[164] Core conventions

160. *World Declaration on the Survival, Protection and Development of Children*, UNICEF ¶ 7 (Sept. 30, 1990), *available at* http://www.unicef.org/wsc/declare.htm (last visited Jan. 29, 2014).

161. *Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s*, UNICEF ¶ 23, *available at* http://www.unicef.org/wsc/plan.htm (last visited Jan. 29, 2014) [hereinafter PAIWD].

162. *Id.* at ¶¶34-35.

163. In 2000, the ILO's Director-General, Mr. Juan Somavia, commenting on the ILO having reached 1,000 ratifications of its core Conventions, said, "[T]hese ratifications move the world's workers closer to the day when the principles of these core labour standards, which we consider as fundamental human rights, are enshrined both in international law and in the domestic labour codes of all ILO member States." Press Release, ILO, ILO 'Core' Conventions Ratifications Surge Past 1,000 Mark, ILO Press Release ILO/00/36 (Sept. 22, 2000), *available at* http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_007909/lang---en/index.htm (last visited Jan. 29, 2013).

164. In fact, with only a total of eight Conventions designated as such, these Conventions represent half of the ILO's core conventions. *InFocus Programme on Promoting the Declaration*, INTERNATIONAL LABOUR ORGANIZATION'S FUNDAMENTAL

are those "fundamental to the rights of human beings at work. . . [t]hese rights are a precondition for all the others in that they provide a necessary framework from which to strive freely for the improvement of individual and collective conditions of work."[165]

Distinguishing these conventions from others, the ILO seeks to achieve global "basic human rights" and "decent work."[166] Accomplishing this goal requires the abolition of both forced labor and child labor. Describing its inclusion of child labor within the core conventions, the ILO recognized that children not only possess the same human rights as their adult counterparts, but also a right to certain measures of protection because of their age, inability to assert their own interests, and lack of experience.[167]

F. Mutual Concern: The Prohibition of Slavery and Forced Labor is a Norm of "Mutual Concern" among States

Beyond proving that a norm is specific, universal, and obligatory, the Second Circuit also requires that States abide by the norm "out of a sense. . . mutual concern."[168] The slavery and forced labor of children satisfies this element. Firstly, the international attention directed at slavery, forced labor, and child labor through treaties and declarations demonstrates that States are indeed mutually concerned about these forms of labor. In *Filartiga*, the Second Cirucit held that States' entrance into "express international accords" demonstrated that the matter was of mutual concern to States.[169] Secondly, within our global economy, labor frequently is a matter of mutual concern. While labor of a strictly domestic nature continues to exists,[170] a great deal of labor is international in nature, frequently dealing in products and services within the international stream of commerce.

CONVENTIONS 8 (2002), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf (last visited Jan. 29, 2013).

165. *Id.* at 7.

166. Press Release, *supra* note 163.

167. WFCLC, *supra* note 111, at 43. "Children enjoy the same human rights accorded to all people. But, lacking the knowledge, experience or physical development of adults and the power to defend their own interests in an adult world, children also have distinct rights to protection by virtue of their age. One of these protections is from economic exploitation and from work that is dangerous to the health and morals of children or hampers the child's development." *Id.*

168. *Flores*, 414 F.3d at 248.

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

170. Interestingly, some of the exceptions to the Minimum Age Convention, discussed below, are intranational, such as those who work in the home.

In fact, the factual allegations of each ATS child labor claim to date entails the mutual concern of States. In *Ellul*, plaintiffs alleged that defendants engaged in child trafficking and then, among other allegations, kept the children in circumstances constituting forced labor.[171] These activities are international in character because they involve the trafficking of children across nations' borders. Similarly, in *Doe v. Al Maktoum*, the plaintiffs alleged that defendants trafficked them to the United Arab Emirates as well as other Persian Gulf countries from Africa.[172] Further, they alleged that defendants enslaved them as child jockeys in Dubai and other areas, where forced labor was exacted from them.[173] This conduct was international in nature because defendants not only trafficked children to multiple countries,[174] but also compelled them to work against their will.[175] While no detailed facts are given about the camel races, it is not unlikely that they involved patrons from all over the world, especially when they took place in a city that attracts international business people and tourists, like Dubai, suggesting that the children provided a service to patrons from all over the world.

Firestone and *Nestle* involved multi-national corporations who harvested and exported the ingredients for their products, rubber and chocolate respectively, from the plantations on which plaintiffs worked. Where multi-national corporations, which send their products to numerous countries around the world, violate international law, their conduct necessarily implicates the mutual concern of States. For instance, the cost of labor in one country affects the cost of products in another. In addition, the conduct of multi-national corporations may affect international relations between States. Relations may be strained if a corporation based out of one country does business in another, exacts forced labor from its residents, and passes on the benefit from such forced, and presumably cheaper, labor in the cost of its products abroad.

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171. *Ellul*, 2011 WL 1085325.

172. *Id.* Further evidence of its connection the mutual concern that this case posed is that the defendants hold high political offices in the United Arab Emerates. *Id.* at 1133. One of the defendants was both the Vice President and Prime minister of the United Arab Emirates. *Id.* Another was its Finance Minister. *Id.*

173. *Al Maktoum*, 632 F. Supp. 2d 1130, at 1133.

174. An allegation that requires that defendant was involved in an international child trafficking ring.

175. *Al Maktoum*, 632 F. Supp. 2d at 1134.

G. Application of the Elements of Forced Labor to Children's Claims Warrants Special Consideration

Forced labor claims[176] merit special analysis in the context of claims by children in light of the principles codified in international agreements concerning child labor. Ensuring that employers do not violate children's fundamental human rights poses unique challenges which the U.N. has addressed in a number of treaties and covenants previously reviewed. In particular, these international agreements provide a framework within which to evaluate the last two of the three elements of forced labor, specifically labor "for which the said person has not offered himself voluntarily" and labor that "is exacted from any person under the menace of any penalty."[177]

1. Labor Not Offered Voluntarily and Children's Incapacity to Consent to Employment Contracts and Work that Causes Harm

Whether workers enter labor agreements voluntarily merits special consideration within the context of the child laborer. Plaintiffs may contest children's capacity to consent to employment contracts, as well as their ability to consent to work that causes mental or physical harm.[178] International agreements recognize the right of children, as a class, to certain forms of protection in part because the scope of their ability to consent in certain situations is questionable.

2. Lack of Capacity to Consent to Employment Contracts

Minimum age laws are one way of determining the age at which States recognize the capacity of the child to enter employment contracts. To determine whether an international norm exists setting the permissible minimum age at which a child may consent to an employment contract, plaintiffs and courts should consult international treaties requiring the adoption of a minimum age for employment, in particular the Minimum Age Convention.[179]

Since its founding, the ILO sought to regulate the minimum age of employment. In fact, its agenda for its first General Assembly meeting

176. As previously noted, forced labor is "(1) all work or service (2) which is exacted from any person under the menace of any penalty and (3) for which the said person has not offered himself voluntarily." ILOFLC, *supra* note 111, at art. 2(1).

177. WFCLC, *supra* note 111, at art. 2(1).

178. This may occur either directly, through harm directly caused by the labor; or indirectly, through lost opportunities when the child forfeits other opportunities, in particular education, to participate in the labor force.

179. Minimum Age Convention, *supra* note 108.

in 1919 included the topic.[180] In 1959, the Declaration of the Rights of the Child explicitly prohibited child labor before "an appropriate minimum age." The International Covenant on Economic, Social, and Cultural Rights suggested States should adopt regulations setting a minimum age and violations of such laws should be punished.[181] The Convention on the Rights of the Child reaffirmed this concern and required that State parties adopt a minimum age of employment.[182]

In 1973, the ILO reviewed the issue of the minimum age of employment and expressed a renewed concern for it in the Minimum Age Convention.[183] Since then, of the 183 members of the ILO, 165 have ratified the Convention.[184] The U.S. has not ratified the Convention; nevertheless, its minimum age laws are fairly consistent with the Convention.[185]

The Convention requires ratifying Members to establish national policies designed to eradicate child labor and over time to increase the minimum age of employment "to a level consistent with the fullest physical and mental development of young persons." The Convention forbids the minimum age set by the State to be either lower than the age of completion of compulsory education or lower than the age of fifteen.[186] Yet, in recognition of the child's economic role and lack of available schooling, it recognizes an exception whereby "a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organizations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years."[187]

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180. PHILIP E. VEERMAN, THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD 311 (1992). It also included the topic of employment that threatened children's health. *Id.*

181. International Covenant on Economic, Social, and Cultural Rights, *supra* note 154.

182. UNCRC, *supra* note 105.

183. VEERMAN, *supra* note 180, at 314-15.

184. *Ratificaitons of C138--Minimum Age Convention, 1973 (No. 138)*, ILO, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283 (last visited Jan. 28, 2014).

185. *Id.* While the U.S. allows work at fourteen, which is inconsistent with the provisions of the Convention, for the purposes of this paper what is relevant is that the minimum age laws in the U.S. do not deviate from the laws set by other States by much. The Fair Labor Standards Act sets the minimum age of employment at fourteen years of age and limits the number of hours that children under sixteen may work. *Youth & Labor*, DEP'T OF LABOR, *available at* http://www.dol.gov/dol/topic/youthlabor/agerequirements.htm (last visited Jan. 28, 2014).

186. Minimum Age Convention, *supra* note 108, at art. 2(3).

187. *Id.* art. 2(4).

The Convention also distinguishes between types of employment. For work "which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons," the minimum age is set at eighteen.[188] However, where protections are in place for children under eighteen, children may be employed in such occupations at the age of sixteen.[189]

Certain types of work are excluded from the minimum age requirements set in place by the Convention. The Convention exempts work done by children "in schools for general, vocational or technical education" and work done by children who are at least fourteen "in undertakings, where such work. . . is an integral part of" their education, a training program, or program designed to help the child choose their future occupation.[190] Further, members may choose to exclude limited categories of employment from their minimum age requirements. Despite this, the Convention forbids members from excluding work that jeopardizes children's health, safety, or morals.[191]

Child plaintiffs arguing that they did not enter into work voluntarily should refer to the Minimum Age Convention and the domestic laws of States to determine whether a norm of international law exists recognizing their lack of capacity to consent to their employment contracts. Because the Minimum Age Convention requires ratifying Members to enact minimum age laws, plaintiffs would strengthen their claims by demonstrating that States related to their claim ratified the treaty. In so doing, they would demonstrate the existence of a norm invalidating their consent to the employment contract.

Specifically, reference to the Convention and to the domestic laws of States provides greater insight into a norm concerning the minimum age of labor. An ILO Report, *Targeting the Intolerable*, presented a survey on the minimum age laws of 155 of the ILO member States.[192] It reported that while most States conformed to the minimum ages of

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

189. *Id.* art. 3(3).

190. *Id.* art. 6.

191. Minimum Age Convention, *supra* note 185, at art. 4(3).

192. International Labour Conference, 1998, Report VI(1) Child Labour: Targeting the Intolerable, 86th Sess. at 24, *available at* http://www.ilo.org/public/libdoc/ilo/1996/96B09_344_engl.pdf (last visited Jan. 29, 2014). Please note that it is not clear whether its review of the domestic legislation included only of members who have ratified the Convention or all members. Also, this source is dated, and therefore those making claims under the ATS may need to conduct an investigation to ensure its information is up to date.

labor imposed by the Minimum Age Convention, some fell below.[193] In particular, thirty States permit children under fourteen to work, and six of these States permit the employment of children as young as twelve.[194] This suggests that a norm of customary international law may have arisen which would invalidate an employment contract between an employer and employee below the age of twelve, at least for certain types of labor. Because some States exclude certain sectors from their minimum age requirements all together, this is not the end of the inquiry.[195]

To identify a norm, plaintiffs must be attentive not only to the minimum ages set by the legislation of States, but also to the sector and circumstances of their work or employment. The Minimum Age Convention and many of its ratifying States distinguish between or exclude certain types of work or employment from their minimum age laws.[196] While this makes identifying a specific norm more difficult, diligent plaintiffs may be able to identify a norm. For instance, while States create exceptions for certain employment sectors, no state excludes "industry."[197] Therefore, a thorough analysis of minimum age laws and their exceptions suggests that at the very least a norm of international law has arisen prohibiting a child under twelve from consenting to an employment contract in the industry sector.[198]

3. *Lack of Capacity to Consent to Work That Causes Mental or Physical Harm*

Numerous international agreements recognize that children have a right to be protected from exploitation; a right that should make it impossible for child laborers to consent to exploitative work. Various treaties, including the ILO's core conventions, emphasize children's rights to development and protection from exploitation and harm. Furthermore, the treaties not only require the recognition of this right, but also a related right, a right to their own development. These issues

193. *Id.*

194. *Id.* In fact only thirty-three States have set a basic minimum age for admission to any kind of employment or work, as required by the Convention. *Id.*

195. *Id.* (reporting that the most common exclusions include family undertakings (60 States); domestic service; employment in undertaking with a limited number of employees (frequently 10); apprentices; the self employed; and in most States where a competent authority exempts an employer (135 States)).

196. Report VI(1) Child Labour: Targeting the Intolerable, *supra* note 192, at 24.

197. *Id.*

198. It is also possible that a more thorough analysis would actually put this age higher if the States that permit 12 year olds to consent to an employment contract require a higher minimum age for those children working in the industry sector.

are related because frequently exploitation necessarily occurs at the expense of development. Thus, within the discourse on the subject of child labor, critics often cite the interruption of the child's education and intellectual growth generally as short- and long-term consequences[199] of such practices.

International agreements pay a great deal of attention to these concerns. The Geneva Declaration of the Rights of Children emphasizes that children must be protected from all exploitation and provided with the means for spiritual and physical development.[200] The Declaration of the Rights of the Child provides that "[t]he child shall enjoy special protection, and shall be given opportunities and facilities. . . to enable him to develop physically, mentally, morally, spiritually and socially. . . in conditions of freedom and dignity."[201] The International Covenant on Economic, Social, and Cultural Rights[202] (1966) reiterates this concern for the exploitation of children: "Children and young persons should be protected from economic and social exploitation."[203] The Convention on the Rights of the Child[204] forbids:

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199. While the child and the child's family suffer the primary consequences, the State also suffers consequences from having its citizens' education and intellectual growth artificially stunted.

200. Geneva Declaration of the Rights of the Child, Sept. 26, 1924.

201. DRC, *supra* note 155, at art. 2.

202. There are 160 States party to the Covenant. UNITED NATIONS TREATY COLLECTION, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Jan. 28, 2014). The United States is a signatory, but has not ratified it. *Id.*

203. International Covenant on Economic, Social, and Cultural Rights, *supra* note 154, at art. 10.

204. Ratified by 192 countries, more than any other convention. UNICEF, Convention on the Rights of the Child: Frequently Asked Questions, *available at* http://www.unicef.org/crc/index_30229.html (last visited Feb. 5, 2014). It has been ratified by all states except for the United States and Somalia. *Id.* While the U.S. has not ratified it, at least one source reports that the Obama administration had, at least at one time, sought to reignite efforts to ratify the Convention. John Helprin, *Obama Administration Seeks to Join U.N. Rights of the Child Convention*, HUFFINGTON POST (June 22, 2009), *available at* http://www.huffingtonpost.com/2009/06/23/obama-administration-seek_n_219511.html (last visited Feb. 5, 2014). More importantly, it is most likely that the U.S.'s refusal to ratify the convention is fueled by a fear that it will interfere with parental rights, and not its position on child labor. Lawrece J. Cohen & Anthony T. DeBenedet, M.D., *Why is the U.S. Against Children's Rights?*, TIME (Jan. 24, 2012), *available at* http://ideas.time.com/2012/01/24/why-is-the-us-against-childrens-rights/ (last visited Feb. 5, 2014). The Convention has gained such widespread recognition, that even non-state entities have adopted it, such as the Sudan People's Liberation Army. *Id.* Yet because the U.S. has refused to ratify it, the U.S. is characterized as a persistent objector to the treaty. *Id.* Therefore, while it should be used as supplementary evidence that a norm of international law has arisen regarding children and their right to be free of forced labor, a U.S. court is

(1) the economic exploitation of children; (2) children from performing work likely to interfere or be hazardous to their education; (3) and work that is likely to be "harmful to the child's health or physical, mental, spiritual moral or social development."[205]

The concerns enumerated in these Conventions should be considered when plaintiffs claim that they did not voluntarily enter into work. Children's ability to consent to work that harms them mentally or physically is far more limited than their ability to consent to work that is not harmful to their health. For evidence of this, plaintiffs should refer back to the Minimum Age Convention to determine whether there is a higher minimum age in place for the kind of work that they performed. Upon a thorough analysis of these sources of international law, plaintiffs may be able to identify norms of international law that limit a child's capacity to consent to employment where the work is mentally or physical harmful. While the specific articulation of such a norm is beyond the scope of this paper, plaintiffs should carefully analyze the conditions of their labor to determine whether the child possessed the capacity to consent to the specific labor in which they engaged. Absent consent, such labor can only be tantamount to forced labor.

4. Labor Exacted Under the Threat of A Penalty and Children's Difficulty Asserting Their Own Interests

The question of whether labor is exacted under the threat of a penalty necessitates special considerations within the context of child labor claims. Children, as a class and as individuals, may experience difficulty asserting their interests over that of authority figures, specifically adults. Without the ability to assert one's interest over that of an adult supervisor, the child may engage in labor under the menace of penalty in a wider variety of situations than would an adult.

International agreements recognize this potential danger and affirm the child's right to protection from coercion and exploitation.[206] While evaluating the factual context of forced labor claims by children under the ATS, federal courts should be mindful of these two affirmative human rights bestowed upon a child. They should recognize that employers acting contrary to these rights are in violation of the child's affirmative rights under international law. Courts will need to determine whether the employer exacted labor under the threat of a

unlikely to give it much weight in its analysis of whether such a norm exists.

205. UNCRC, *supra* note 105.

206. *See* discussion *supra* Section IV(C)(a)(i)(2) (titled Lack of Capacity to Consent to Work That Causes Mental or Physical Harm).

penalty, but claims should be actionable when a court does indeed so determine, so long as the other elements of forced labor are satisfied.

Lastly, the elements of forced labor may be intertwined such that it is unclear whether a child's labor was exacted under the menace of penalty or not offered voluntarily. Under certain circumstances, plaintiffs should dispute the validity of an employment contract on the basis of the child's lack of capacity to consent to the labor. Yet the definition of forced labor requires both that the labor is under the menace of a penalty and not entered into voluntarily, so plaintiffs should be sure to plead both elements clearly.

V. CONCLUSION

In conclusion, child labor tantamount to slavery or forced labor violates international law, and therefore plaintiffs bringing claims alleging such conduct are entitled to recovery under the ATS. Because of the procedural and pleading obstacles, claimants will continue to have difficulty recovering under the ATS. Nevertheless, claimants are more likely to succeed if they carefully plead the elements of a forced labor claim, rather than if they rely strictly on the theory that child labor violates the law of nations.

The elements of forced labor merit special analysis with respect to the child claimant. Where possible, pleadings should specifically address how the child's conditions of labor and lack of consent to labor violate international law. Yet courts must also be careful to consider the question of whether a norm of international law exists for a particular claim, taking into consideration all relevant sources of international law cited by the plaintiff.

Whether the risk of liability from an ATS claim currently deters defendants from violating international law is a question outside of the scope of this paper. If the frequency of ATS claims increases, a deterrent effect may become noticeable.[207] Yet, this effect will be limited to those persons who foresee the possibility of a U.S. federal court maintaining personal jurisdiction over them.

While courts continue to shape the contours and scope of ATS jurisprudence,[208] it remains a powerful strategy for human rights

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207. At least one author believes that potential defendants should be aware of the possibility of ATS liability. *See* Anna A. Kornikova, *International Child Labor Regulation 101: What Corporations Need to Know About Treaties Pertaining to Working Youth*, 34 BROOK. J. INT'L L. 207, 208 (2008).

208. For instance, just last year the Supreme Court held that where the conduct underlying an ATS claim occurred outside of the U.S., the presumption against extraterritoriality applies and claims must "touch and concern the territory of the United

activists to ensure compliance with international law, and therefore a possible remedy for at least some children who are victims of slavery or forced labor.

States . . . with sufficient force." *Kiobel*, 133 U.S. at 1669. Yet the parameters of *Kiobel* and what constitutes sufficient force is far from clear.