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Charles Szymanski

The Window Closes: *Nestle, Inc. v. Doe* and the Lost Promise of the U.S. Alien Tort Statute as a Means of Enforcing International Labor Law

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1. *Introduction*

A structural problem exists within labor law that makes it difficult to evolve and adjust to the realities of globalization. The general rule is that the labor law of the country in which a person works is the law that applies to her or him[1]. As corporate supply chains become more and more stretched, and businesses look to move production and services to locations with the lowest wages and labor standards, an unfortunate scenario emerges. Corporations from high wage countries, with high union density and strong national labor laws, relocate operations to places where such standards are non-existent and the old rules no longer apply. Even if by chance these states nominally have labor laws on the books, corruption and/or inefficient courts

[1] See, *e.g.*, MUNDLAK, *De-territorializing Labor Law*, in *Law & Ethics Hum. Rts.*, 2009, 3 (2), p. 188 and 189.

prevent employees from enforcing whatever protections may exist. In this way the paradox is created whereby a European Union or American multinational, subject to rather stringent labor law rules at home, need not follow them abroad where their workforces are in an even more vulnerable situation[2].

To be sure, policy makers and scholars have not ignored this problem. A number of soft law and hard law proposals have been enacted and are in the process of being developed to protect such workers. In the category of soft law are the International Labor Organization's (ILO) focus on its four core standards in its Declaration on Fundamental Principles and Rights at Work (no discrimination, the right to organize and collectively bargain, no forced labor, and no child labor)[3], the United Nations (UN) Global Compact (repeating the four ILO core standards among its 10 principles)[4], as well as voluntary efforts to link business and labor rights through Corporate Social Responsibility (CSR) programs[5]. They are soft law in the sense that they cannot normally be directly enforced when they are ignored or violated, and rely on the goodwill of states and corporations to be effective[6]. More hard law solutions have been the introduction of social clauses (with labor protections) in free trade agreements which are subject to mandatory arbitration[7], and proposals to require companies to perform

[2] Ellinikos, *American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?*, in *Colum. J.L. & Soc. Probs.*, 2001, 35, pp. 1, 2; Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, in *BJIL*, 2002, 20, pp. 91, 92-93; Raigrodski, *Creative Capitalism and Human Trafficking: A Business Approach to Eliminate Forced Labor and Human Trafficking from Global Supply Chains*, in *Wm. & Mary Bus. L. Rev.*, 2016, 8, pp. 71, 72-76.

[3] ILO Declaration on Fundamental Principles and Rights at Work, https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm (last accessed October 14, 2021).

[4] UN Global Compact, Principles 3-6, https://www.unglobalcompact.org/what-is-gc/mission/principles (last accessed October 14, 2021); O'Konek, *Corporations and Human Rights Law: The Emerging Consensus and its Effects on Women's Employment Rights*, in *Cardozo J.L. & Gender*, 2011, 17, pp. 261, 278-279 (describing the four core ILO principles and the Global Compact, among other instruments, as forms of soft law).

[5] Raigrodski, *op. cit.*, n.3, pp. 88-94.

[6] O'Konek, *op. cit.*, n.4, p. 267.

[7] Szymanski, *Le Clausole Sociali e la Tutela dei Diritti dei Lavoratori Negli Accordi di Libero Scambio: Il Modello Statunitense*, in Baylos Grau, Zoppoli L. (eds.), *La Libertà Sindacale nel*

due diligence in ensuring that their transactions and supply chains are not rife with labor or other human rights abuses[8]. Time will tell as to whether these mechanisms will be effective, although early signs suggest that they may require complex, fact intensive and time consuming inquiries to establish a violation[9].

The U.S. Alien Tort Statute (ATS)[10], in contrast, offered – at least in theory – a simpler solution. This one sentence statute, adopted in 1789 in the aftermath of the American Revolutionary War, gives federal courts in the U.S. jurisdiction to hear claims brought by aliens for torts committed in violation of international law[11]. Tort claims in the U.S. may be remedied by an award of punitive and compensatory damages, which, depending on the case, can reach many millions of dollars[12]. Moreover, under the American contingency fee system – where lawyers, by agreement with the client, may be paid a percentage of the amount recovered rather than an hourly fee – tort claims may be pursued without little or no up front cost to the client. In this context, foreigners subject to forced labor, or possibly violations of

Mondo: Nuovi Profili e Vecchi Problemi, EditorialeScientifica, 2019, pp. 113-145, (examining labor clauses in U.S. free trade agreements, which contain arbitration provisions).

[8] Chambers, Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, in *CJIL*, 2021, 21, pp. 323, 327-28 (reviewing the main international due diligence and disclosure laws applicable to corporate labor practices, including "the E.U. Non-Financial Reporting Directive (enacted 2014); the French Law on the Corporate Duty of Vigilance of 2017; the California Transparency in Supply Chains Act of 2010 (CTSCA); the U.K. Modern Slavery Act 2015 (MSA); the Australian Modern Slavery Act 2018 (AMSA); the U.S. Dodd-Frank Act of 2010 § 1502; the E.U. Conflict Minerals Regulation (enacted 2017); and the Dutch Child Labor Law (enacted 2019)"; see also *European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability*, at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html, last accessed October 14, 2021.

[9] Szymanski, *op. cit.*, n. 7, pp. 125-127 (giving the example of a labor arbitration case arising out of the Central American Free Trade Agreement (CAFTA) which took many years to litigate and where the arbitrator ultimately did not find any violation of CAFTA).

[10] 28 U.S.C. § 1350 (also sometimes known as the Alien Tort Claims Act (ACTA), but most recently definitively described as the Alien Tort Statute (ATS) by the U.S. Supreme Court in *Nestle USA Inc. v. Doe*, 593 U. S. ____ (2021)).

[11] Torres, *Labor Rights and the ATCA: Can the ILO's Fundamental Rights be Supported through ATCA Litigation?*, in *Colum. J.L. & Soc. Probs.*, 2004, 37, pp. 447, 449-450.

[12] Einbinder, *Mass Torts: Dispute Resolution in France and the United States - The Vioxx and Mediator Cases Compared*, in *Wash. Int'l L.J.*, 2020, 29, pp. 575, 609 (providing the example of multi-billion dollar mass tort recoveries, in comparison to more modest French civil remedies).

the other ILO core principles – i.e., a violation of international law – could sue in tort to recover damages in an American court under the ATS. The possibility of a large punitive damage award would be an incentive for lawyers to take the case on a contingency fee basis, and if the case was successful, any large monetary award or settlement would act as deterrent to multinational corporations committing violations of international labor law in the future[13].

Despite some initial promise with using the ATS to enforce international labor law, in the past 20 years the U.S. Supreme Court has in a series of decisions severely limited its application. This process culminated with its June, 2021 decision in *Nestle, Inc. v. Doe*, involving a claim of forced labor by workers in the Ivory Coast, which all but foreclosed the use of the ATS except in the most narrow of circumstances. This article will examine the ATS and its initial application to labor cases; review the *Nestle* decision and its scope and impact; and offer prospects for similar laws that may be able to curtail employers from violating international labor law. While *Nestle* may have almost closed the window on the use of the ATS, the concept of using something like the ATS to fight labor abuses still has merit and should be explored in the future.

2. *The use of the ATS as a means to combat violations of international labor law. The scope and context of the ATS*

The ATS is one of the older American statutes, having been enacted in 1789. Its text is straightforward and concise: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"[14]. The statute is purely jurisdictional, and does not create any new substantive legal rights[15]. In the American legal system the "district courts" referred to in the ATS are federal trial courts, and if the requirements of the statute are met, these courts have jurisdiction to hear such claims.

[13] Rosen-Zvi, *Just Fee-Shifting*, in *Fla.St.U.L.Rev.*, 2010, 37, p. 717 (generally noting the American contingency fee system does increase access to justice for poorer clients, but argues more needs to be done to increase access further).

[14] 28 U.S.C. § 1350.

[15] *Nestle USA*, 141 S.Ct. at 1935.

There are three prerequisites for bringing an ATS claim under the language of the statute. The plaintiff must be an "alien"; the claim itself must be a tort; and allege a violation of "the law of nations" or a treaty of the U.S. The first two requirements are relatively clear. An alien is a foreign citizen, and a tort is a civil injury or wrong. The third requirement, the necessity of a violation of the law of nations or a U.S. treaty, has been subject to interpretation. In particular, the phrase "law of nations" contains some ambiguity[16].

At the time the statute was enacted, Congress had in mind three aspects of the law of nations: the prohibition against 1) interference with safe conduct in transit, 2) violations of the rights of Ambassadors, and 3) piracy. The concern was that, for example, an ambassador who was assaulted in the U.S., or a foreigner who was the victim of an American pirate attack, should have a means to vindicate his or her rights in the federal court system. Otherwise, the risk was that if such victims did not have an effective means of judicial redress in the U.S., their respective countries might take action (including military action) against the fledgling American republic. However, the meaning of the law of nations was not necessarily restricted to only the three examples contemplated by Congress in 1789. While the ATS was sparsely used over the next 190 years, claims involving prizes of war and admiralty fraud were also found to be within its ambit during that period[17].

The 1980 decision of the Federal Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*[18] was a watershed moment in the expansion of the use of the ATS and the scope of the term "law of nations"[19]. In *Filartiga*, a Paraguayan physician, Joel Filartiga, had been opposed to the dictatorship of Paraguayan President Stroessner. His daughter, Dolly Filartiga, traveled and then lived in the U.S. by the late 1970s. Before her move, an agent of the government, Mr. Pena-Irala, tortured and executed her brother in retaliation for Dr. Filartiga's support of the opposition. Subsequently, Pena also moved to the U.S. Ms. Filargita discovered his presence in the U.S. and

[16] Torres, *op. cit.* , pp. 449-450.

[17] Wilkinson, *Piercing the Chocolate Veil: Ninth Circuit Allows Child Cocoa Slaves to Sue under the Alien Tort Statute in Doe I v. Nestle USA*, in *Vill. L. Rev.*, 2018, Vol. 63, Tolle Lege 20, pp. 24-27.

[18] 630 F.2d 876 (2nd Cir. 1980).

[19] Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, in *U.C. Davis J. Int'l L. &Pol'y*, 2007, 13, pp. 119, 124 (describing *Filartiga*as a watershed decision).

together with her father sued him for torture under the ATS[20]. The court ruled that her claim under the ATS could go forward, since the Filartigas were aliens, bringing a tort claim in violation of the law of nations. Specifically, the court defined the law of nations as customary international law[21]. Citing the numerous international treaties, declarations and national law prohibiting torture, and finding that they had been universally accepted by the international community, the court ruled that torture violated customary international law[22]. The *Filartiga* decision therefore brought new life into the ATS, expanding its reach beyond relatively archaic claims by ambassadors or victims of piracy, and opened the gates for foreign plaintiffs seeking redress for broader violations of customary international law[23].

In the wake of *Filartiga*, courts interpreting the ATS likewise held that the term "law of nations" meant contemporary customary international law[24]. However, since public international law (which encompasses customary international law) traditionally applied to the relations between states, courts also added a state-action requirement to ATS claims. That is, drawing parallels to aspects of American civil rights law, ATS plaintiffs would normally have to show that the person or entity that they were suing for a violation of the law of nations was acting on behalf of a state or otherwise was conspiring with a state in order for the claim to go forward. An exception to this rule existed when the customary international law at issue was not only applicable to states. This would be the case with certain wartime violations of international law, such as genocide and torture, or more broadly to the preemptory norms known as *jus cogens* (including genocide and torture but also encompassing piracy and slavery among other conduct), where both states and non-state actors are equally subject to these prohibitions[25].

In 2004 the U.S. Supreme Court in *Sosa v. Alverez-Machain*[26] essentially

[20] *Filartiga*, 630 F.2d at 878-879.

[21] *Id*. at 880-881, citing *The Paquette Habana*, 175 U.S. 677, p. 700 (1900).

[22] *Id*. at 883-884.

[23] Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, in *Ariz. L. Rev.*, 2005, 47, pp. 805, 815-816.

[24] *Balintulo v. Ford Motor Co.*, 796 F.3d 160, at 163 n.3 (2nd Cir. 2015) (collecting cases noting the equivalence of the terms "law of nations" as used in the ATS and "customary international law").

[25] Torres, *op. cit.*, pp. 453-454.

[26] 542 U.S. 692 (2004).

confirmed that the ATS could encompass other torts in violation of customary international law, beyond safe conduct, the rights of ambassadors and piracy, but stressed that courts should tread cautiously in this area[27]. To be covered by the ATS, the international law alleged to have been violated must be "a norm that is specific, universal, and obligatory'"[28]. Even if this standard is met, the court must consider whether adding the "new" tort is a proper exercise of judicial discretion, keeping in mind any potential adverse foreign policy considerations that may result[29].

Notwithstanding these limitations, ATS litigation increased exponentially (relative to the amount of pre-1980 cases) and had particular promise in the area of prosecuting violations of international labor law.

2.1. Enforcing international labor law through the ATS

The extent to which international labor law may be enforced through the ATS first depends on what kind of labor law qualifies as customary international law, and relatedly, under the *Sosa* standard, whether it is "a norm that is specific, universal and obligatory." The initial, obvious candidates would be the 4 core ILO standards: no forced labor, no child labor, no discrimination, and the right to organize and collectively bargain[30]. These standards have been ratified by an overwhelming majority of the world's nations: 168 have ratified the convention on the right to organize and collectively bargain[31], 175 the convention on discrimination in employment[32], 187 the worse forms of child labor convention[33], and 176 the abolition of forced labor convention[34]. These

[27] *Id.* at 725.

[28] *Id.* at 733.

[29] *Id.* at 727-728.

[30] Torres, *op. cit.*, pp. 456-457.

[31] Ratifications of C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98), at https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243, last accessed at October 15, 2021.

[32] Ratifications of C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111), at https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256, last accessed October 15, 2021.

[33] Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No. 182), at https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327, last accessed October 15, 2021.

[34] Ratifications of C105 - Abolition of Forced Labour Convention, 1957 (No. 105), at

conventions therefore appear to meet the basic two-part test for customary international law, namely that a near-universal practice among the states exists recognizing these rights, as does *opinio juris*, in that these conventions represent a legal obligation for the states to follow their terms[35].

Some questions, however, may arise due to the fact that several large states, representing a good portion of the world's population and economic output, *have not* ratified all of these conventions. China and Japan have not ratified the abolition of forced labor convention[36]; China, the U.S. and India have not ratified the convention on the right to organize and collectively bargain[37]; and Japan and the U.S. have not ratified the convention on discrimination and employment[38]. Since the ATS is an American statute, courts have appeared to be at least superficially troubled recognizing as customary international law a convention which the U.S. has not ratified[39]. At the same time, the U.S. (or any one country) does not hold a veto power over what is or is not customary international law; this is determined by the practice of states in general[40].

More problematic than the number of ratifications is the alleged lack of specificity contained in the ILO core conventions. In *Flomo v. Firestone*

https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250, last accessed October 16, 2021.

[35] See *U.S. v. Bellaizac-Hurtado*, 700 F.3d 1245, at 1253 (11th Cir. 2012) (restating this two part test); Torres, *op. cit.*, p. 457 (noting that the high number of ratifications of the ILO conventions that form the basis of the 4 core labor standards suggest "a near universal acceptance that could possibly establish them as norms of customary international law").

[36] Ratifications of C105, *supra*, at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312250:NO, last accessed October 16, 2021 (listing countries which have not ratified the convention).

[37] Ratifications of C098, *supra*, at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312243:NO, last accessed October 16, 2021 (listing countries which have not ratified the convention).

[38] Ratifications of C111, *supra*, at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312256:NO, last accessed October 16, 2021 (listing countries which have not ratified the convention).

[39] *Flomo v. Firestone Nat. Rubber Co.*, LLC, 643 F.3d 1013, at 1022 (7th Cir. 2011) (most helpful for plaintiffs in ATS case was the child labor convention ratified by the U.S.); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F.Supp.2d 1285, 1297 n.7 (S.D. Fl. 2003) (observing that the U.S. has not ratified the ILO conventions relating to the right to organize and bargain, which were relied upon by the plaintiffs).

[40] *Flomo*, *supra*, 643 F.3d at 1021-1022.

Rubber Co.[41], child laborers from Liberia worked on a rubber plantation, often to help their parents fulfill unreasonable production quotas set by the company for tapping rubber from trees. They brought suit under the ATS, relying in particular upon the ILO's Worst Forms of Child Labor convention, which the U.S. had ratified. In pertinent part that convention prohibited work for child under 13 that could endanger their health, morals or safety. The convention also indicated that the specific types of prohibited work should be determined by national laws. The court found that this language was vague and did not clearly indicate what type of work was banned, particularly whether the conduct in this case was illegal. Here, the company paid the adult workers well above the average Liberian wage, and there was no evidence that the work performed by the children helping their parents was especially onerous. Consequently, the court found that no customary international law existed that prohibited this type of child labor. However, in contrast, the court indicated that other provisions of the convention dealing with the sexual exploitation of children at work, and child forced labor, *were* specific enough to be considered customary international law within the meaning of the ATS[42].

There has been a split of opinion on whether the right to organize and bargain is actionable under the ATS, mostly because of doubts on the lack of specificity of the scope of this right in the relevant ILO conventions and international treaties. In *Villeda Aldana v. Fresh Del Monte Produce*[43], the court found that the right to organize and bargain set forth in the applicable ILO conventions as well as the freedom of association in the International Convention on Civil and Political Rights (ICCPR) did not contain enough specificity to amount to customary international law that is enforceable through the ATS. The court distinguished between aspirational rights and concrete, defined and enforceable rights, and found that the right to join a trade union was more on the amorphous side. More specifically, under the facts of this case, there was no clear international guidance on whether the detention and abuse of union activists for a day by a private security service violated the right to organize[44]. On the other hand, in *Estate of Lacarno*

[41] 643 F.3d 1013 (7th Cir. 2011).

[42] *Id.* at 1022–1024.

[43] 305 F.Supp.2d 1285(S.D. Fl. 2003)*aff'd* in pertinent part, 416 F.3d 1242, at 1246–1247 (11th Cir. 2005).

[44] 305 F.Supp.2d at 1297–1299.

Rodriquez v. Drummond[45], another district court did find that claims for violation of the right to organize and freedom of association could be pursued under the ATS, although it came to this conclusion "reluctantly"[46].

Whether or not the right to organize and bargain is actionable under the ATS, claims for torture or arbitrary detention of union activists in violation of international law may still be independently pursued under that statute. Unfortunately, in some parts of the world governments or government supported paramilitary forces have resorted to kidnapping and torturing union leaders and other members in order to suppress the labor movement in their respective countries. The prohibition of torture has been recognized as customary international law and so these types of claims can proceed under the ATS so long as the state action requirement (discussed below) is satisfied[47].

The prohibition on discrimination in employment may arise to the level of an enforceable international law right within the meaning of the ATS in certain extreme circumstances. Where the allegations involved systemic discrimination – for example, the kind of state sponsored racial discrimination against blacks that existed under the apartheid system – the courts have allowed ATS claims to go forward. The prohibition against systemic discrimination could even arise to the level of *jus cogens*, in which case it would automatically be actionable under the ATS. However, other types of general or individual claims of discrimination in employment would not rise to the level of specificity required by the Court in *Sosa*[48]. Consequently, the pool of potential employment discrimination claims actionable under the ATS are actually quite limited.

Forced labor is the outlier of the four core ILO labor standards, in

[45] 256 F.Supp.2d 1250 (N.D.Ala.2003).

[46] *Id*. at 1264.

[47] See *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338 (11th Cir. 2011) (murder of union leaders by paramilitary group which had a symbiotic relationship with the Columbian state actionable as extrajudicial murder and torture under the ATS); *Villeda Aldana, supra*, 416 F.3d at 1247-1253 (brutal detention of union activists, which included credible threats of death and bodily harm, amounted to a viable claim of torture under the ATS; the involvement of a town's mayor in the torture satisfied the state action requirement).

[48] See *Sarei v. Rio Tinto*, PLC, 671 F.3d 736, at 768-770 (9th Cir. 2011) (though dealing with a claim based on the Convention on the Elimination of All Forms of Racial Discrimination Convention, and not with ILO Convention No. 111 regarding discrimination in employment).

that the prohibition on slavery has long been recognized to be a peremptory norm under *jus cogens.* Consequently, courts have regularly concluded that allegations of forced labor fall within the ambit of the ATS. While the question of what specific conduct may fall under the definition of forced labor may be at issue in particular cases, severe cases are clearly actionable[49].

In sum, of the four core ILO labor standards, the prohibitions against forced labor, some types of child labor, severe systemic discrimination, and possibly the right to organize and bargain (but normally the ban on torture as applied to trade unionists), may be theoretically enforceable through the ATS. However, even in these cases, plaintiffs may be required to prove satisfy a state action requirement for their claims to proceed. As public international law traditionally has been applied to the relations between states, most claims for violations of international law likewise must involve the conduct of states or those acting on their behalf (under the color of state law). In labor cases, this requirement can be problematic when a private employer or other person or entity has caused the harm in question to an employee.

Thus, in *Sinaltrainal v. Coca Cola Bottling Co.*[50], union leaders at bottling plants in Columbia were systematically tortured and executed by right-wing paramilitary death squads. The families of the deceased union leaders brought suit against Coca Cola under the ATS, arguing among other points that the death squads were connected to the Columbian government, the local bottling plants and ultimately Coca Cola in the United States under conspiracy and *alter ego* theories[51]. The court found that a claim for torture was cognizable under the ATS, but it required either 1) state action or 2) to

[49] TORRES, *op. cit.*, pp. 457-458; DOWNEY, *Modern-Day Pirates: Why Domestic Parent Corporations Should Be Liable Under the Alien Tort Statute for Violations of Workers' Rights within Global Supply Chains*, in *Am. U. L. Rev.*, 2019, Vol. 68, 5, pp. 1933, 1969; see, *e.g.*, *Adhikari v. Daoud & Partners*, 697 F.Supp.2d 674, at 687 (S.D. Tex. 2009) ("[T]rafficking and forced labor alleged in this [complaint] qualify as universal international norms under *Sosa*, such that they are actionable under ATS"); *Doe I v. Unocal Corp.*, 395 F.3d 932, at 945 (9th Cir. 2002) (forced labor is a *jus cogens* violation and as a result is a *per se* violation of international law subject to the ATS); *Aragon v. Che Ku*, 277 F.Supp.3d 1055, at 1067 (D.Minn. 2017) (international norm against the use of forced labor is specific enough to be encompassed by ATS); *Velez v. Sanchez*, 693 F.3d 308, at 321-322 (2d Cir. 2012) (not every claim of poor working conditions and inadequate wages amounts to forced labor withing the meaning of international law).

[50] 578 F.3d 1252 (11th Cir. 2009).

[51] *Id.* at 1258-1259.

the extent the torture was committed by private entities, that it was carried out in the context of a war or civil conflict, or 3) a conspiracy existed between state officials and the private actors to carry out the torture[52]. Here, there was no evidence that the Columbian state either controlled or directed the actions of the paramilitary groups. As a result, there was no state action[53]. Further, there likewise was no evidence that the torture committed by these groups was connected with the ongoing civil war in Columbia, even though it occurred during a time of civil unrest in the country[54]. Finally, while some plaintiffs alleged that local police were involved in the plan to detain and harm the union leaders, they did not show that a conspiracy existed between the police and the private defendants[55]. Consequently, the plaintiffs' claims under the ATS were dismissed[56]. This decision illustrates the difficulties the state action requirement poses for the victims of international labor law violations.

However, as even the court in *Sinaltrainal* recognized, there are some limited exceptions to the state action requirement, where international law itself is directly applicable to private actors (in that case, if private individuals carried out torture during wartime)[57]. Most relevant for labor issues, under international law the prohibition on forced labor is not predicated on a state action requirement; it applies to both states and non-state actors alike[58]. Therefore private employers and individuals potentially may be liable for forced labor under the ATS. With respect to other international labor law violations, the associated rape, murder, and torture of workers or union members committed by private actors connected to a *jus cogens* violation such a forced labor or genocide, or otherwise in the course of a conflict, may also be subject to the ATS.

This is illustrated in what may have been the high-water mark of labor-related ATS litigation, *Doe I v. Unocal, Inc.*[59]. In *Unocal*, workers subject to forced labor on a multinational oil pipeline project in Myanmar filed an ATS suit against an American corporation (Unocal) involved in

[52] *Id.* at 1266.
[53] *Id.*
[54] *Id.* at 1266-1267.
[55] *Id.* at 1267-1269.
[56] *Id.* at 1270.
[57] *Id.* at 1266-1267.
[58] See TORRES, *op. cit.*, p. 458.
[59] 395 F.3d 932(9th Cir. 2002).

that project[60]. Myanmar, which had a long-standing, atrocious record in using forced labor as documented by the ILO, supplied security and related work to the consortium of oil companies building a pipeline on Myanmar's territory. The security forces openly used forced labor and Unocal allegedly was aware of and aided and abetted this practice[61]. The court ruled that since forced labor was considered *jus cogens*, claims alleging the use of forced labor *per se* alleged a violation of international law within the meaning of the ATS[62]. Moreover, since international law recognized that private actors as well as states were subject to the prohibition on forced labor, the workers' claims against Unocal could proceed and a theory that it had aided and abetted Myanmar's use of forced labor on the project. Likewise, associated claims of murder and rape connected to the state's forced labor program, to the extent they were aided and abetted by Unocal, were also permitted to go forward[63]. The case was ultimately settled after the court rendered its opinion, with the workers receiving monetary compensation[64].

2.2. The Window begins to close: the U.S. Supreme Court restricts most ATS litigation

While ATS claims have been difficult to prosecute, in the post-*Filartiga* era, a framework did exist to enforce some types of international labor law through that statute. In the most severe cases, for example in *Unocal*, workers victimized by violations of international labor law were able to recover a favorable financial settlement through ATS litigation in U.S. courts, which would have been otherwise impossible in their home countries[65]. Unfortunately, in two decisions in the past decade, *Kiobel v. Royal Dutch Petroleum Co.*[66] and *Jesner v. Arab Bank, PLC*[67], the U.S. Supreme Court grossly limited the scope of the ATS.

[60] *Id.* at 937-943.

[61] *Id.*

[62] *Id.* at 945 & n. 15.

[63] *Id.* at 946-956.

[64] KNOTT, *Unocal Revisited: On the Difference between Slavery and Forced Labor in International Law*, in *Wis. Int'l L.J.*, 2010, 28, p. 201.

[65] *Id.*

[66] 569 U.S. 108 (2013).

[67] 138 S.Ct. 1386 (2018).

In *Kiobel*, the Court ruled that the ATS could not be applied extraterritorially. A presumption exists in American law that federal statutes should not be applied extraterritorially unless there is a clear indication from the text that Congress intended to do so. Such an intention was not present in the ATA, according to the Court[68]. Therefore, in the wake of *Kiobel*, only ATS claims which involved wrongful conduct in the U.S. were permissible. This decision was justly criticized since the historical context of the ATS suggested a different result. As recited by the Court in its earlier decision in *Sosa*, one of the original violations of the "law of nations" that the ATS was designed to address (and provide a remedy for) was piracy. Acts of piracy occur on the high seas and, relevant to the U.S. in 1789, off of the barbary coast in the Mediterranean Sea, far from the territory of the U.S.[69].

Later, in 2018, in *Jesner* the Court went even further and decided that suits against foreign corporations were not permitted under the ATS. In that case, victims of terrorist attacks in the Middle East sued a Jordanian bank for its role in financing the groups that carried out these attacks. Some of that financing was routed to the bank electronically through its U.S. accounts[70]. The Court avoided the question of whether these U.S. financial transactions were enough not to make this an impermissible "extraterritorial" case, and instead ruled that the ATS simply did not apply to foreign corporations such as the defendant Jordanian bank[71]. A major concern was the policy issue of making foreign corporations generally subject to human rights and other litigation in the U.S., which could disturb relations with other states and ultimately cause such states to take comparable jurisdiction over American corporations in retaliation[72].

Under these two decisions, much labor law litigation brought under the ATS was placed in jeopardy. The use of forced labor and torture against union officials that has been the subject of most ATS lawsuits has occurred outside the U.S., in countries with poor labor rights records and unreliable legal systems. Likewise, the defendants in these cases have often been directed against or at least included foreign corporations. In the age of globalization

[68] *Kiobel*, 569 U.S. at 124-125.
[69] *Id.* at 130-131 (concurring opinion of Justice Breyer).
[70] *Jesner*, 138 S.Ct. at 1394-1395.
[71] *Id.* at 1407-1408.
[72] *Id.*

even if an American corporation were involved in a supply chain with questionable labor practices, it could argue that these practices were the responsibility of the foreign contractor, which is not subject to the ATS[73]. The window for bringing any labor related ATS claims was not completely closed by these decisions, however. Important questions still remained over whether a U.S. corporation was still subject to the ATS, as there was some language in the *Jesner* decision suggesting that corporations in general were not subject to liability under international law[74]. Assuming U.S. corporations were still covered by the statute, the other debatable issue was if they could be held liable for aiding and abetting foreign actors for violating international law, via corporate decisions made in the U.S[75]. In 2021 the Supreme Court grappled with these issues in *Nestle USA, Inc. v. Doe*[76].

3. *The window closes*: Nestle USA, Inc. v. Doe *and the* de facto *end of the promise of using the ATS to redress violations of international labor law*

Ivory Coast is the center of the world's cocoa industry, producing 70% of the global supply of cocoa beans used to make chocolate. Unfortunately, its cocoa plantations have poor working conditions, rife with the use of child labor[77]. Some of these children brought a claim against the primary European and American chocolate manufacturers under the ATS (including Europe-based Nestle SA and its American subsidiary, Nestle USA Inc.), alleging they worked as forced laborers on the plantations that supplied these companies in violation of international law. While the corporations did not own these plantations, they did fund them and also supplied equipment and training, with allegedly full knowledge of the abusive labor practices taking place. In

[73] See HAYS, *My Brother's Keeper: A Framework for a Legal Obligation to Respect Human Rights in Global Supply Chains*, in *Geo. Wash. L. Rev.*, 2020, 88, pp. 454, 465.

[74] *Alien Tort Statute – Domestic Corporate Liability – Ninth Circuit Denies Rehearing En Banc of Case Permitting Domestic Corporate Liability Claim. – Doe I V. Nestle, S.A., 929 F.3d 623 (9th Cir. 2019)*, in *HLR*, 2020, Vol. 133, p. 2643 (observing that in *Jesner* "some Justices suggested that corporate liability generally is not the kind of universal norm required by the ATS.").

[75] UDOBONG, *Post-Kiobel: What Remedies Exist for Foreign Victims of Corporate Human Rights Violations?*, in *Liberty U. L. Rev.*, 2016, 1, pp. 559, 582-601 (outlining perspectives for the liability of corporations under the ATS after *Kiobel* using an aiding and abetting theory).

[76] 141 S.Ct. 1931 (2021).

[77] WILKINSON, *op. cit.*, p. 36 (describing the background of the *Nestle USA* case).

this manner, the children argued that the companies "aided and abetted" the plantation owners use of forced labor[78].

The procedural history of the case was somewhat drawn-out and complicated[79]. Initially, the Ninth Circuit Court of Appeals found that the claims could go forward, as forced labor was within the ambit of the ATS and corporate liability was possible under an aiding and abetting theory. On remand to the trial court, the claims were dismissed, however, based on the Supreme Court's intervening decisions in *RJR Nabisco v. European Community*[80]. (which followed *Kiobel*holding that generally U.S. statutes should not be applied on an extraterritorial basis) and *Jesner.* The plaintiffs again appealed to the Ninth Circuit.These Supreme Court decisions created serious roadblocks for the children's claims, but the Court of Appeals did not find them to be insurmountable. *Jesner* did require the dismissal of the foreign corporate defendants, but their claims against the remaining American corporations could proceed[81]. These claims arguably did not violate *Kiobel*'s holding that the ATS did not apply extraterritorially, since the children alleged that the unlawful conduct of which they complained was the general corporate decision-making process, all of which took place in the U.S.These decisions involved the continued funding, training and sale of equipment to the Ivory Coast plantations that used forced child labor, which arguably amounted to aiding and abetting the practice of forced labor on those plantations. Ultimately, the Court of Appeals decided that the case could proceed on this basis[82]. However, the corporate defendants sought review of this decision by the Supreme Court, and Court agreed to hear the case[83].

The primary issue on appeal was whether lawsuits against domestic (U.S.) corporations were permissible under the ATS[84].This was a question left open by *Jesner*; while that decision only precluded ATS claims against foreign corporations, there was a suggestion that any type of private corporations were

[78] *Id.* at 39-41.

[79] See generally, *Alien Tort Statute*, *supra*, n.74 (outlining the procedural history of the case before the Federal Court of Appeals for the Ninth Circuit).

[80] 579 U.S. 325, 337(2016).

[81] *Doe v. Nestle, SA*, 906 F.3d 1120, 1126 (9th Cir. 2018).

[82] *Id.* at 1124-1126.

[83] *Nestle USA*, 141 S.Ct. at 1936.

[84] *Id.* at 1950 (Justice Alito, dissenting).

not proper subjects of international law[85]. Curiously, however, the Court elected not to decide the case on this issue, but instead focused on whether the claims violated the prohibition on the extraterritorial application of the ATS. Admittedly the forced child labor activities took place abroad, in the Ivory Coast, but the plaintiffs' claim was based on the argument that the companies violated the ATS by aiding and abetting these activities through corporate operational decision-making which took place in the U.S.[86].

However, the Court concluded that this argument was not sufficient to transform the case from an extraterritorial one to a domestic one. As an initial matter, there were doubts about whether an "aiding and abetting" claim was even cognizable under the ATS. Arguably it was beyond the authority of the Court to create such a "new" secondary tort under the ATS, and moreover even if it could do so, the tort still occurred outside the territory of the U.S. since the direct injury (forced labor) happened in the Ivory Coast[87]. Assuming *arguendo* that aiding and abetting was a proper ATS tort claim, the plaintiffs' allegations that the aiding and abetting occurred through the corporations' general conduct in the U.S. were not sufficient to show that it was a domestic claim. As the Court explained: "Nearly all the conduct that they say aided and abetted forced labor – providing training, fertilizer, tools, and cash to overseas farms – occurred in Ivory Coast… Because making "operational decisions" is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek – aiding and abetting forced labor overseas – and domestic conduct…To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity"[88].

While not part of the majority opinion, three justices (Thomas, Gorsuch and Kavanaugh) wrote separately to present their view that the only claims that could ever be cognizable under the ATS were the original three torts contemplated by Congress in 1789 – violation of safe conduct, interference with ambassadors and piracy. Since forced labor was not among these torts, any international law claim based upon it should be dismissed *per se*[89]. Three

[85] See *Jesner*, 138 S.Ct. at 1400-1401; *Alien Tort Statute*, *supra*, at 623.
[86] *Nestle USA*, 141 S.Ct. at 1936-1937.
[87] *Id*. at 1936.
[88] *Id*. at 1937.
[89] *Id*. at 1940 (Justice Thomas), 1942-1943 (Justices Gorsuch and Kavanaugh).

additional justices (the so-called liberal bloc of Sotomayor, Kagan and Breyer) made the point of rejecting this analysis in their own separate opinion[90]. Finally, two justices (Gorsuch and Alito) actually tried to answer what was supposed to be the main issue before the court, indicating that a U.S. corporation should be covered within the scope of the ATS[91]. Since the aforementioned "liberal bloc" disagreed with the majority in *Jesner* and would have found that foreign corporations could be within the reach of the ATS, they likewise would have agreed with Gorsuch and Alito on this point giving a 5 justice majority for this proposition[92].

Still, taken together with the Court's earlier decisions in *Kiobel* and *Jesner*, the decision in *Nestle USA* has further narrowed the potential use of the ATS to remedy violations of international labor law to almost the point of nonexistence. Foreign corporations are not covered, extraterritorial conduct is not covered, and now, with *Nestle USA*, "general" corporate decision making (including financing and other decisions) that might aid and abet forced labor in foreign countries are likewise not covered. Moreover, it is not at all clear whether "aiding and abetting" may be an actionable tort under the ATS, which is one of the few remaining conceivable theories to hold American corporations liable for primary international labor law violations occurring abroad. Assuming that aiding and abetting is found to be actionable under the ATS, plaintiffs would still have to plead specific, particular actions taken by corporations beyond general corporate activity. This would likely have to be close to the proverbial "smoking gun", *i.e.*, specific (and explicit) corporate decisions to encourage or support existing forced labor carried out by suppliers abroad. Simply buying products from suppliers using forced labor or selling them equipment, without more, would not be enough.

A second, smaller category of ATS claims may also have survived, involving claims for violations of international labor law against foreigners working *in* the U.S. This might involve extreme cases using foreigners for forced labor in U.S. sweatshops[93]. However, while any additional means to

[90] *Id.* at 1943-1950.

[91] *Id.* at 1941-1942 (Justice Gorsuch); 1950 (Justice Alito).

[92] *Id.* at 1947 n. 4 (Justice Sotomayor) (making this point).

[93] See *Aragon*, *supra*, 277 F.Supp.3d at 1064-1069 (allowing ATS suit against U.S. corporate and individual defendants to proceed, in which foreign plaintiffs working in U.S. grocery stores made allegations of forced labor); see also FREE THE SLAVES, WASHINGTON, D.C., AND THE

combat labor abuses in the U.S. would be welcome, existing American tort, anti-discrimination and wage and hour laws might also provide remedies for these victims. The promise of the ATS was to help workers in foreign countries who have no laws or judicial means to protect themselves.

In this sense, the window for using the ATS, may not be completely shut, but remains open only by a literal millimeter. The hope ushered in with the *Filartiga* decision has been just about extinguished.

4. *Giving life to the idea of the ATS: using federal law against torture and human trafficking to the same effect and the development of state law ATS equivalents*

4.1. The Torture Victims Protection Act and the Trafficking Victims Protection Reauthorization Act

At the same time the U.S. Supreme Court was drastically limiting the scope of the ATS, various justices mentioned that Congress itself passed two statutes that would continue to give plaintiffs the right to challenge unlawful torture and forced labor[94]. These are the Torture Victims Protection Act (TVPA)[95] and the Trafficking Victims Protection Reauthorization Act (TVPRA)[96]. Justice Thomas, for example, emphasized the existence of this

HUMAN RIGHTS CENTER OF THE UNIVERSITY OF CALIFORNIA, BERKELEY, *Hidden Slaves Forced Labor in the United States*, in *Berkeley J. Int'l L.*, 2005, 23, 47 (providing an early report on the problem within the U.S.).

[94] *Nestle USA*, 141 S.Ct. 1939-140 (opinion of Justice Thomas, referencing the Trafficking Victims Protection Reauthorization Act (TVPRA)); *Jesner*, 138 S.Ct. at 1398, 1403-1404 (pointing to Torture Victims Protection Act (TVPA)); *Kiobel*, 569 U.S. at 120 (concurring opinion of Justice Kennedy, citing TVPA).

[95] 28 U.S.C. § 1350 note.

[96] Originally passed as the Trafficking Victims Protection Act in 2000, a criminal law statute, which was then amended as the Trafficking Victims Protection Reauthorization Act in 2003 (as amended in 2008) to add civil causes of action for plaintiffs. 114 Stat. 1464 (original act); 117 Stat. 2878 (TVPRA of 2003); and 122 Stat. 5067–5068 (creating present civil cause of action), codified in various sections of the U.S. Code, including Sections 18 and 22 (see *e.g.* 22 U.S.C. § 7101 (purposes); 22 U.S.C. § 7102(11)(B) (general prohibitions); 18 U.S.C. § 1589 (definition of forced labor); 18 U.S.C. § 1595(a) (right to bring private civil action); 18U.S.C. § 1589(b) (extending liability to those who benefit or receive anything of value from forced labor); 18 U.S.C. § 1596 (making law applicable extraterritorially)).

legislation to buttress his argument that it was the job of the legislature to create new causes of action for forced labor, and not the judiciary to invent them through a creative reinterpretation of the ATS[97]. Whatever the merits of this contention, as a practical matter by making this point the Court raised the profile of these two statutes, which do present an alternative option for pursuing certain violations of international labor law in the post-*Nestle USA* era. While the TVPA and TVPRA only deal with torture and human trafficking, and thus are not as potentially broad as the ATS, they do fulfill at least some of the ATS's initial promise[98]. That is, they provide a means for workers from economically less developed countries to seek redress for forced labor and torture (due to their union affiliation, for example) in a reliable legal system (the U.S.), with the possibility of receiving large monetary damages. Such damage awards may also finally act as a deterrent for corporations with poor international labor practices.

The TVPA prohibits torture and extrajudicial killings, and creates a civil cause of action for both American citizens and foreigners subject to such action[99]. This law was enacted in response to the torture litigation brought under the ATS, but is distinct from the ATS. It contains its own definition of torture rather than exactly copying the usage of that term under international law[100]. The TVPA also expressly has a state action requirement, and thus requires plaintiffs to show that a state actor or a private individual acting under color of state law carried out or was involved with the alleged torture[101]. Other key distinctions with the ATS are that

[97] *Nestle USA*, 141 S.Ct. 1939-140 (opinion of Justice Thomas).

[98] Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, in *Case W. Res. J. Int'l L.*, 2018, 50, pp. 17, 29-30 (while "the TVPA cannot reach the wide range of cases that were brought under the ATS prior to the Supreme Court's limiting decisions…" it can reach at least some of conduct that formed the basis of a number of these cases).

[99] 28 U.S.C. § 1350 Note; *Penaloza v. Drummond Company, Inc.*, 384 F.Supp.3d 1328, at 1340 (N.D. Ala. 2019) ("The TVPA authorizes a cause of action against "[a]n individual" for acts of extrajudicial killing and torture committed under authority of color or law of any foreign nation.""); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, at 51 n.8 (2nd Cir. 2014) (both aliens and U.S. citizens may bring claims under the TVPA).

[100] *Del Monte*, 416 F.3d at 1250; *Sinaltrainal*, 578 F.3d at 1269; *Adhikari*, *supra*, 697 F.Supp.2d at 687-688; *cf. Jesner*, 138 S.Ct. 1404 (relying upon the TVPA to determine "the proper structure for a right of action under the ATS.").

[101] *Jane W v. Thomas*, 2021 WL 4206665, *14-15 (E.D. Pa. 2021); *Sinaltrainal*, 578 F.3d at 1270.

only individuals – and not corporations – are liable for TVPA violations[102], and that the statute does apply extraterritorially[103]. For the most part the TVPA has been used to prosecute torture claims in the general, human rights context, but in limited circumstances it has been also used by union members who have been tortured or killed in order to discourage employees from unionizing. In *Sinaltrainal*, the union members' claims were dismissed because the torture was committed by private "death squads" which were not controlled by or in a symbiotic relationship with the state[104]. However, in *Del Monte*, the claims were allowed to proceed since the Mayor of a town was alleged to have been involved in the torture of the unionists, and there was an allegation of conspiracy and coordination between the state actors and private defendants[105]. It must be stressed that even where state action is present, union members can only bring claims against individuals under the TVPA, and not corporate employers[106], limiting the statute's usefulness in many respects.

More broadly relevant to the enforcement of international labor law rights is the TVPRA, which prohibits human trafficking. Originally a criminal statute, the act was amended in 2003 to permit civil claims and again in 2008 to extend its reach to defendants indirectly involved with forced labor and to extraterritorial conduct[107]. It was designed to especially

[102] *Mohamad v. Palestinian Authority*, 566 U.S. 449, 453–456 (2012).

[103] *Chowdhury*, *supra*, 746 F.3d at 51; *Garcia v. Chapman*, 2014 WL 11822750, *7 (S.D.Fl. 2014); *Penaloza*, *supra*, 384 F.Supp.3d at 1340 n.6 ("Jurisdiction over TVPA claims under § 1331 is not constrained by the presumption against extraterritoriality"); *Hernandez v. Mesa*, 140 S.Ct. 735, at 748-749 n.11 (2020) (noting that TVPA claims are often brought "to seek redress for acts committed abroad.").

[104] *Sinaltrainal*, 578 F.3d at 1270.

[105] *Del Monte*, 416 F.3d 1251-1252.

[106] *Mohamad*, 566 U.S. at 453-456, overruling the Eleventh Circuit's finding in *Sinaltrainal*and *Del Monte* that corporate liability existed under the TVPA; *see also Penaloza*, *supra* (claims for extrajudicial murder of trade unionists under TVPA made against natural persons allowed to proceed).

[107] *Nestle USA*, 141 S.Ct. at 1939 (opinion of Justice Thomas); *Ratha v. Phatthana Seafood Co., Ltd*. 2016 WL 11020222, *5-6 (C.D. Ca. 2016) (civil provisions of TVPRA apply to extraterritorial corporate conduct) (collecting cases)); *Abafita v. Aldukhan*, 2019 WL 6735148, *5 (S.D.N.Y. 2019). However, the amendments covering extraterritorial conduct only apply to U.S. persons or permanent residents or to anyone who is present in the U.S. irrespective of nationality. 18 U.S.C. § 1596(a). Thus a TVPRA claim against Thai company with no presence in the U.S. for enslaving workers in Thailand was properly dismissed. *Ratha v. Phatthana Seafood Co., Ltd*., 2017 WL 8292391 (C.D. Ca. 2017).

protect child and women who were predominantly the victims of trafficking, including sex trafficking[108]. However it applies generally to forced labor claims as well. "To establish a claim of forced labor under TVP[R]A § 1589(a), plaintiff must show that defendants knowingly provided or obtained her labor or services by means of 'serious harm or threats of serious harm,' 'the abuse or threatened abuse of law or legal process,' or 'any scheme, plan or pattern intended to cause [her] to believe that, if [she] did not perform such labor or services, that [she] or another person would suffer serious harm or physical restraint.'" … "The 'threat of financial harm constitutes serious harm within the meaning of the TVP[R]A'"[109]. Serious harm may also include withholding workers' passports and threatening them with deportation if they do perform the labor demanded of them[110]. Unlike the TVPA, corporations are subject to the TVPRA[111], and the statutory language appears to directly encompass corporate aiding and abetting claims. Pursuant to Section 1595(a) of the TVPRA, "…whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter"[112]. Therefore, a corporation aware (or which should have been aware) of a "venture" using forced labor in its supply chain, and received benefits from forced labor (through cheaper supplies or products), could theoretically be liable for forced labor under the TVPRA[113]. There is also an exceptionally long 10 year statute of limitations in the TVPRA, giving

[108] Ocen, *(E)Racing Childhood: Examining The Racialized Construction Of Childhood And Innocence In The Treatment Of Sexually Exploited Minors*, in *UCLA L. Rev.*, 2015, 62, 6, p. 1617.

[109] *New York State Nurses Association v. Albany Medical Center*, 473 F.Supp.3d 63, at 67 (N.D.N.Y.2020) (internal citations and quotation marks omitted).

[110] Beltran, *The Hidden "Benefits" of the Trafficking VictimsProtection Act's Expanded Provisions for TemporaryForeign Workers*, in *Berkeley J. Emp. & Lab. L.*, 2020, 41, 2, pp. 229 and 253; *Aragon*, 277 F.Supp.3d at 1069-1070.

[111] Boutilier, *Statutory Analogy and Liability of American Corporations under the Alien Tort Statute*, in *N.Y.U.J.L.&Lib.*, 2020, 264 ("the TraffickingVictims Protection Reauthorization Act allows corporate liability"); Beale, *op. cit.*, pp. 37-40 (though raising potential arguments that corporations may not be subject to civil liability for extraterritorial conduct).

[112] 18 U.S.C. § 1595(a).

[113] Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, in *Vand.L.Rev.*, 2016, 69, 2, pp. 499 and 527-530.

workers extensive time to bring their claims[114]. Finally, a wide range of damages, including punitive damages, are available pursuant to the provisions of the statute[115].

Commentators have noted that, given the favorable provisions of the TVPRA, it is something of a mystery why more forced labor claims have not been brought under that that statute[116]. The child laborers from the Ivory Coast in the *Nestle USA* case did not use the TVPRA since their claims predated the 2008 amendments to that law[117], but one would have expected more claims involving foreign workers since that time. There are several possible explanations. First, the act has mainly been used in sex trafficking cases, and not "traditional" forced labor at factories, plantations or sweatshops[118]. Therefore there may be a perception that the law should only be used to stop prostitution amounting to sexual slavery, rather than other types of forced labor[119]. Second, no matter how favorable the TVPRA is, it is still difficult for the victims of forced labor – who often lack basic education – to be both aware of the law and then find competent legal help who could bring a claim on their behalf thousands of kilometers away in a U.S. court. While NGOs focusing on labor rights and unions may ultimately fulfill the role of both informing exploited workers of their rights and connected them with competent and sympathetic legal help in the U.S., this is an ongoing, developing process. One obstacle may be the disconnect between unions and labor rights activists and more general human rights organizations[120]; the

[114] PRICE, *Better Together? The Peril and Promise of Aggregate Litigation for Trafficked Workers*, in *YaleL.J.*, 129, pp. 1214 and 1248.

[115] *Id.* at 1247-1248 (noting the courts have shown a willingness to grant significant damages to the victims of human trafficking, given the inhumane conditions they have often endured); BELTRAN, *op. cit.*, p. 269 ("A recentreport has highlighted that both compensatory and punitive damage awards in civil trafficking cases have been quite high.").

[116] PRICE, *op. cit.*, p. 1226; BEALE, *op. cit.*, pp. 46-47.

[117] *Nestle USA*, 141 S.Ct. at 1940.

[118] SMITH, *The Underprosecution of Labor Trafficking*, in *S.C.L.Rev.*, 2020, 72, 477, pp. 495-496 (94-96% of federal human trafficking prosecutions were for sex trafficking, while approximately 5% were for labor trafficking).

[119] BELTRAN, *op. cit.*, p. 246 ("With the assumption that real trafficking victims were female or child victims of sex trafficking, it was all too common for victims of labor trafficking to be overlooked.").

[120] KOLBEN, *Labor Rights as Human Rights?*, in *VJIL*, 2010, 50, 2, pp. 449-450 (describing the disconnect).

recognition of labor rights *as* human rights may go a long way towards alleviating this problem. Third, a climate of fear and desperation may discourage workers from pursuing TVPRA claims even if they were aware of the statute's protection. These workers are often in desperate situations where work means survival, and it would be unreasonable for them to risk their life for the uncertain possibility of winning a lawsuit many years in the future[121].

More recently, however, the TVPRA has seen more use in traditional forced labor cases. Perhaps counterintuitively, to this point these have often involved foreign workers *in* the U.S. who have been exploited as forced laborers. Examples include foreigners employed under the U.S. H-1b visa program for skilled workers, foreign nurses, and even grocery store workers[122]. This may be due to increased awareness of this law in the U.S. and also the absence of a geographical barrier in bringing the suit, as the plaintiffs are still living in the U.S. Still, forced labor claims of foreigners working abroad are also emerging, such as the case of Nepali and Indian contract workers hired by a Jordanian intermediary to work for various U.S. contractors at U.S. military installations in Iraq[123]. It is likely that these latter types of claims under the TVPRA will continue to increase as lawyers and NGOs become more aware of the statute and its potential for combatting the use of forced labor at the international level.

4.2. The adoption of state law equivalents to the ATS

With the U.S. Supreme Court making the ATS more and more impotent with each passing decision, and Congress only taking limited action to correct this problem (through the adoption of the TVPA and the TVPRA), it has been suggested that individual states should take matters into their own hands and enact parallel legislation akin to the ATS[124].

[121] See generally PRICE, *op. cit.*, p. 1226; BEALE, *op. cit.*, pp. 46-47.

[122] BELTRAN, *op. cit.*, pp. 268-282 (reciting TVPRA cases involving foreign temporary workers in the U.S.).

[123] *Adhikari*, 697 F.Supp.2d 674; *Adhikari v. KBR Inc. (Adhikari II)*2017 WL 4237923 (S.D. Tex. 2017). Ultimately the plaintiffs' claims under the TVPRA were dismissed, because the court concluded that they occurred prior to the 2008 amendments to the TVPRA making extraterritorial conduct actionable. *Adhikari II*, at *2-5; *Adkhikari v. Kellogg, Brown & Root, Inc.*, 845 F.3d 184, at 191 (5th Cir. 2017).

[124] SALDIVAR, *An Oasis in the Human Rights Litigation Desert? A Roadmap to Using California*

California, in fact, has already done so, passing a statute that would enable foreign victims to sue in California courts for torture, extrajudicial killings, genocide, war crimes and other crimes against humanity, among other claims[125]. The term "crimes against humanity" expressly includes "enslavement"[126].This is consistent with California's other efforts to enforce international labor standards, including a mandatory transparency law requiring corporations doing business in the state to disclose whether or not they use forced labor in their supply chains or at least whether or not they have checked whether or not this is the case. Given California's size and economic power (the world's 5th largest economy, if California were a separate country), these efforts appear to carry some weight[127].

While at least one scholar was enthusiastic about the potential of the California "ATS", it is worth noting that there are few reported cases interpreting this statute since its passage[128]. This suggests its potential has not been utilized, perhaps due to the lack of awareness of its existence. Indeed, it is actually entitled as a statute of limitations provision, providing a 10 year limitations period for bring ATS-like claims, rather than a stand-alone tort or jurisdictional statute[129]. Its apparent limited use thus far as a means to vindicate international labor law (and other international law) violations does not provide a great incentive for other states to adopt similar laws.

Moreover, individual states may lack an incentive to pass a law giving foreigners essentially a forum to litigate international labor and human rights claims. Perhaps particularly progressive states, such as California, may feel it is simply the right thing to do and will not weigh the economic value of adopting this type of law. If the California law is finally discovered and utilized, and other states follow this lead, certainly state ATS laws may eventually become a viable vehicle to pursue certain labor related torture as well as forced labor claims.

Code of Civil Procedure Section 354.8 as a Means of Breaking out of the Alien Tort Statute Straitjacket, in *Colum. Hum. Rts. L. Rev*, 2020, 51, 2, p. 507; DAVIS, WHYTOCK, *State Remedies for Human Rights*, in *B.U. L. Rev.*, 2018, 98, pp. 397-398.

[125] SALDIVAR, *op. cit.*, pp. 543-544.

[126] Cal. Civ. Proc. Code § 354.8(a)(1)E(ii)(III).

[127] SALDIVAR, *op. cit.*, pp. 560-563.

[128] *Id.* at 512 (noting the invisibility of the law during the four years since its passage).

[129] *Id.* at 513.

5. *Conclusions*

The promise of the ATS to enforce international labor law was largely based on the use of the American courts as a venue to vindicate recognized, basic rights that were unenforced in the workers' home countries. Highly economically developed countries, such as the U.S., over time had developed advanced legal protections for workers that were largely enforced. With the advent of globalization, American and European corporations relocated production overseas to countries with minimal labor protections. While international trade and investment law protected the rights of these corporations, a large gap developed for the commensurate enforcement of the rights of foreign workers employed by those same companies. The ATS, in the post-*Filartiga* era, had the potential to close that gap. As the statute allowed foreigners to sue in tort (and therefore recover compensatory and even punitive damages) for violations of customary international law, workers could bring actions against multinational corporations for breaches of international labor law (to the extent such labor law rose to the level of customary international law). High damage awards would provide further incentive for workers to protect their rights and at the same time could act as incentive for companies to terminate particularly bad labor practices that violated international norms.

Unfortunately, through the decisions of the U.S. Supreme Court, up to and including its decision in *Nestle USA*, the promise of the ATS was not kept. Claims beyond the original three torts contemplated by Congress when drafting the ATS – safe passage, the rights of ambassadors and piracy – are exceedingly difficult to bring. In any case they cannot be brought if they are based on extraterritorial conduct or are against a foreign corporation. To the extent they are brought against an American corporation, the claims must allege specific acts made by the corporation in the U.S. that violated customary international law, beyond general corporate decision-making[130]. This is almost an impossibly high standard.

In the wake of *Nestle USA*, a shift is necessary to bring claims that implicate core international labor law rights – namely torture and forced labor – through different, more specific federal statutes, namely the TVPA and the TVPRA. The TVPRA, which prohibits human trafficking (and thus

[130] *Nestle USA*, 141 S.Ct. at 1935-37.

forced labor), has particularly strong provisions but has been underutilized. State law analogs to the ATS could also hold some potential, but the one such state law that does exist, in California, has been nearly invisible. The key, then, seems to be to increase labor rights (and human rights) activists' awareness of these laws and ultimately bring more actions based upon them.

Abstract

Globalization has had an extraordinary impact on both businesses and workers. While various international treaties and contracts have in large part evolved in response to globalization, and offer a high degree of protection to corporations doing business internationally, workers still lack commensurate protections. A key problem is that in many parts of the world, there is no way for ordinary employees to enforce any international labor rights that may exist. The federal Alien Tort Statute (ATS) in the United States offered a straightforward way around this enforcement problem. It gave jurisdiction to U.S. federal courts over claims by foreigners suing in tort for a violation of recognized international law. Consequently, the ATS could be utilized by workers around the world who have been denied the basic protections of international labor law, for example, victims of forced labor. Since plaintiffs may receive punitive and compensatory damages for tort claims in the U.S., large damage awards could serve to both deter multinationals from violating international labor law and make the claims economically feasible for workers to bring them. While there were some effective efforts to use the ATS in this fashion, the U.S. Supreme Court essentially closed the door to the vast majority of such claims in its recent decision in *Nestle, Inc. v. Doe*. This article examines the scope and implications of the *Nestle* decision and the prospect of using similar laws to continue the unfulfilled promise of the ATS.

Keywords

International labor law, forced labor, trafficking, Alien Tort Claims, extraterritoriality.