ASPIRATIONS NOT OBLIGATIONS: *JUS COGENS* AND LABOR RIGHTS PURSUANT TO THE ALIEN TORT CLAIMS ACT

by

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INTRODUCTION

On June 29, 2004, the United States Supreme Court issued its long-awaited decision in *Sosa v. Alvarez Machain.*[1] The Court's opinion addressed for the first time in substantive detail Section 1350 of Title 28 of the U.S. Code, the so-called "Alien Tort Claims Act" (ATCA). Largely dormant from the time of its inclusion by the U.S. Congress in the Judiciary Act of 1789, the ATCA has proven contentious since its reinvigoration as a tool by which alien plaintiffs sought to hold foreign government officials liable in the United States for human rights violations. Its more recent utilization against transnational corporations for complicity in abuses associated with their foreign investment activities has created controversy between human rights advocates and business interests.[2]

In an opinion authored by Justice Souter, the Court unanimously rejected Alvarez's claim that his arrest and overnight detention by Mexican nationals acting at the request of the U.S. Drug Enforcement Administration (DEA) was a tort in violation of the law of nations within the purview of the ATCA. As such, the Court dismissed his ATCA claim against his captors. However, the Court refused to adopt Sosa's contention that the ATCA was merely jurisdictional but rather inferred that Congress intended the ATCA provide jurisdiction for "a relatively modest set of actions alleging violations of the law of nations."[3] Although Congress only intended the ATCA to reach three torts actionable in the late eighteenth century, specifically, violation of safe conduct, infringement of the rights of ambassadors and piracy, Justice Souter nevertheless concluded modern federal courts could recognize additional torts based on the law of nations as long as they rested on "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [these] 18th-century paradigms."[4]

Justice Souter's opinion came as a relief to human rights organizations which have relied upon the ATCA in initiating litigation against transnational corporations alleging "core violations" including genocide, war crimes, torture, slavery, prolonged arbitrary detention and crimes against humanity.[5] In this regard, Justice Souter's opinion was viewed as "a green light [to lower courts and academics] to keep trying to bring [ATCA] claims for all sorts of alleged international injustices."[6] Indeed, several human rights advocates expressed their intent to continue to bring ATCA claims against transnational corporations based upon the Court's holding in *Sosa.*[7]

This article examines the implications of the U.S. Supreme Court's opinion in *Sosa v. Alvarez-Machain* for presently pending and future ATCA cases alleging violation of labor rights deemed to be *jus cogens*. The article commences with overviews of *jus cogens*, the ATCA and current labor rights litigation against transnational corporations. This litigation is analyzed in the context of the *Sosa* opinion. The focus of this analysis is on the bases of these claims in treaties, conventions and covenants rather than declarations and resolutions of the United Nations and Inter-American human rights systems. The article concludes that, despite the optimism of human rights advocates, most claims alleging *jus cogens* violations will not survive application of the *Sosa* criteria by the lower federal courts.

THE HISTORICAL BACKGROUND TO *SOSA V. ALVAREZ-MACHAIN*

Jus Cogens and Human Rights

States are generally free to vary or disregard most principles of international law within the bounds of agreements existing between them.[8] However, there are a small number of principles that are binding on states regardless of their consent and which they are not permitted to ignore. These principles are deemed to be statements of the "compelling law" and are otherwise designated as peremptory norms or *jus cogens.*[9] The Vienna Convention on the Law of Treaties defines *jus cogens* as a norm "accepted and recognized by the international community of states as a whole . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[10] Norms identified as *jus cogens* enjoy "a higher rank in the international hierarchy" than treaties or customary rules.[11] This status obligates states to punish or extradite persons violating such norms and may serve as the basis for the exercise of universal jurisdiction.[12]

The vast majority of international law principles lack *jus cogens* status. However, there is no general agreement on those principles constituting *jus cogens* or criteria for their identification. Rather, as noted by one commentator, "[t]he full content of the category of *jus cogens* remains to be worked out in the practice of states and in the jurisprudence of international tribunals."[13] This same uncertainty exists in the field of international human rights law. There is no universal agreement on those norms that have reached the status of *jus cogens*, the methodology for identifying such norms or the consequences associated with attaining such status.[14] For example, the *Restatement of Foreign Relations Law* has identified eight human

rights protections as *jus cogens*. These protections are freedom from genocide, slavery, summary or extrajudicial killing, disappearance, torture or other cruel, inhuman or degrading treatment, prolonged arbitrary detention and systematic racial discrimination.[15] By contrast, other commentators have designated war crimes and crimes against humanity as additional *jus cogens* norms.[16] In any event, the element common to these disparate offenses is the threat they pose to "the security, peace or essential values of society as a whole . . . [which requires their] redress by the international community as a matter of urgency."[17] For purposes of this article, the most comprehensive definition of *jus cogens* will be utilized encompassing the eight protections identified in the *Restatement of Foreign Relations Law* as well as the additional offenses of war crimes and crimes against humanity.

The Alien Tort Claims Act

The ATCA provides "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[18] Judicial interpretation has been complicated by the complete absence of legislative history as well as judicial elaboration in opinions prior to the 1980s. The ATCA is not mentioned in the debates surrounding the adoption of the first Judiciary Act,[19] and there is no evidence of what its drafters intended by its inclusion.[20]

This lack of formal legislative history has served as a significant source of frustration for courts called upon to interpret its provisions in a contemporary context.[21] Judicial speculation as to Congressional intent included the suggestion the ATCA was intended to ensure a federal forum for claims asserted by aliens against U.S. citizens or arising from events occurring in the United States.[22] According to this interpretation, the ATCA was necessary in order to prevent state courts from mishandling such cases and resultant embarrassment to the United States.[23] Courts also attempted to delineate the specific torts intended by the First Congress to fall within the parameters of the ATCA.[24]

Equally missing as a source of modern interpretation was an established body of judicial precedent. The ATCA was an infrequent subject of judicial opinions prior to the 1980s. The first recorded judicial reference occurred in 1795 when a federal court in South Carolina concluded the ATCA granted jurisdiction with respect to a dispute concerning title to slaves seized on a captured enemy vessel.[25] Subsequent reference did not occur until 1908 when the U.S. Supreme Court suggested in passing the ATCA may be applicable to a claim that a U.S. officer illegally seized alien property in a foreign state.[26] The third judicial reference came in 1961 in *Adra v. Clift.*[27] In this child custody case between two aliens, the U.S. District Court for the District of Maryland held wrongful withholding of custody constituted an actionable tort and the misuse of a passport to gain the child's entry into the United States was a violation of international law.[28] The final significant reference to the ATCA prior to its reemergence in the 1980s was in the opinion of the U.S. Court of Appeals for the Ninth Circuit in *Nguyen Da Yen v. Kissinger*.[29] This case arose from the alleged illegal evacuation of children from Vietnam by the U.S. Immigration and Naturalization Service. In dicta, the court noted injuries accruing as a result of the evacuation could be addressed pursuant to the ATCA.[30] The court also noted participating private adoption agencies could be deemed joint tortfeasors.[31] In addition to these judicial opinions, the ATCA has been the subject of two opinions of the U.S. Attorney General dating from 1795 and 1907 respectively.[32] However, other sources of interpretation were absent prior to the watershed opinions of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala* [33]and *Kadic v. Karadzic.*[34]

Current ATCA Labor Rights Cases Alleging Violations of Jus Cogens by Transnational Corporations

Labor rights attaining *jus cogens* status have been the subject of six ATCA claims.[35] The majority of these claims against transnational corporations have been rejected. For example, in *Doe v.Unocal Corp.*, although the district court equated the plaintiffs' allegations of forced labor with participation in slave trading,[36] the court rejected the contention that application of the holdings of the Nuremberg Military Tribunals required it to render mere knowledge of such practices actionable in the absence of participation or cooperation.[37] The court noted each of the German industrialists found liable for war crimes or crimes against humanity were actively complicit in the alleged violations.[38] By contrast, Unocal did not participate or cooperate in the utilization of forced labor by the Burmese military but instead expressed concern that the military was engaging in this practice on its behalf.[39] The court also noted the military actively concealed the extent of its utilization of forced labor from Unocal, and the company received insufficient benefits from the practice to establish liability pursuant to international law.[40]

By contrast, the district court in *Iwanowa v. Ford Motor Co.* found claims of forced labor allegedly perpetrated by Ford's German subsidiary during World War II to be actionable pursuant to the ATCA.[41] The plaintiffs in *Iwanowa* contended they had been coerced to perform forced labor in inhuman conditions and without compensation on behalf of Ford Motor Company's German subsidiary in violation of the law of nations. The court concluded the plaintiffs' allegation that they had been "purchased" by a Ford representative supported the claim of slave trading.[42] Furthermore, the court concluded enslavement of civilian populations during World War II constituted a crime against humanity as determined by the Nuremberg Tribunals.[43] These claims were actionable even without express congressional action based upon existing precedent, Congress' failure to amend the ATCA to prevent the assertion of private rights of action and the language of the ATCA itself which suggested that separate enabling legislation was not a precondition to relief.[44]

The court also rejected the defendants' claim that the law of nations applied only to states and not private enterprises. Rather, the court noted the modern trend to hold private enterprises liable for the commission of a "handful of crimes to which the law of nations attributes individual responsibility."[45] This "handful of crimes" included slave trading, the utilization of forced labor and the commission of war crimes, which, according to the Nuremberg Charter, included the deportation of civilian populations to slave labor.[46] The court distinguished earlier holdings that found only state actors liable for violations of international law on the basis of opinions in more recent cases and the extreme nature of the allegations at issue.[47] As a result, the court concluded "[n]o logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."[48] In the alternative, the court concluded the defendants were de facto state actors to the extent they bid on workers upon the encouragement of the Nazi Plenipotentiary General for the Allocation of Labor in order to meet production quotas and increase profits.[49] This "close cooperation" with Nazi officials in compelling labor from civilian populations served to confer the status of de facto state actors upon the defendants.[50] Nevertheless, the plaintiffs' claims were barred by the applicable ten-year statute of limitations which the court adopted from the Torture Victim Protection Act, the closest federal statute analogous to the ATCA.[51]

Labor-related claims were also rejected by the district courts in *Sinaltrainal v. Coca-Cola Co.* and *Estate of Rodriquez v. Drummond Co.* In *Sinaltrainal*, the court rejected the plaintiffs' contention that the murder of a labor activist by paramilitaries at the Coca-Cola Company bottling facility in Carepa, Colombia was a war crime as it was not committed in the course of hostilities related to the ongoing conflict between the Colombian military and paramilitary and guerilla forces.[52] Rather, the murder was motivated by the private business interests of the defendants with respect to labor unrest at the facility.[53] The court also held summary execution as alleged by the plaintiff violated international law as it was committed by private paramilitaries acting under color of law through the receipt of significant assistance from officials of the Colombian government.[54] However, the complaint failed to adequately allege Coca-Cola's participation in the murder through joint action with the paramilitaries.[55]

Similarly, in *Rodriquez*, the district court dismissed the plaintiffs' claim of genocide arising from the murder of civilian labor leaders by paramilitaries at Drummond Company's coal mine in Colombia on the basis the plaintiffs failed to allege that the murders were the result of "an intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[56] However, the court held that, to the extent the murders involved paramilitary forces engaged in a civil war in Colombia, they violated the laws of war as set forth in the Geneva Conventions and were thus actionable war crimes.[57] The court further noted the plaintiffs' claim of extrajudicial killing was a violation of international law subject to remediation pursuant to the ATCA.[58]

Most recently, the district court in *Aldana v. Fresh Del Monte Produce, Inc.* rejected claims that the kidnapping, detention and alleged torture of officers of Sindicato de Trabajadores del Banano de Izabla (SITRABI), the labor union representing workers at the Del Monte banana plantation in Bobos, Guatemala, violated the law of nations as to give rise to a cause of action pursuant to the ATCA.[59] Although acknowledging that the plaintiffs were detained at gunpoint and repeatedly threatened with death, the court concluded the plaintiffs' claim of torture paled in comparison to other instances deemed actionable pursuant to the ATCA.[60] Although the defendants' acts reflected "a streak of cruelty and were most certainly frightening," the court concluded the episode constituted "an eight-hour aggravated assault" and lacked the "extreme, deliberate and unusually cruel practices" exemplary of torture.[61]

The court also rejected the plaintiffs' claims alleging arbitrary detention and crimes against humanity. The court found the claim of arbitrary detention did not adequately state a violation of the law of nations as it lacked "some egregious quality" recognized in other detention cases.[62] The plaintiffs' claim of crimes against humanity failed due to their unsettled definition. Even assuming the court utilized the definition set forth in the Charter of the International Military Tribunal at Nuremberg, the plaintiffs failed to demonstrate that the mistreatment to which they were subjected was sufficiently egregious, heinous and associated with widespread and systematic attacks directed at a civilian population.[63]

THE PROCEDURAL HISTORY OF *SOSA v. ALVAREZ-MACHAIN*

The Factual Background to Sosa v. Alvarez-Machain

Humberto Alvarez-Machain (Alvarez), a citizen of Mexico, was indicted by a federal grand jury in Los Angeles, California in 1990 for alleged complicity in the kidnapping, torture and murder of DEA agent Enrique Camarena-Salazar and his Mexican pilot Alfredo Zavala-Avelar in Guadalajara, Mexico in February 1985. Although the United States negotiated with Mexican officials to obtain custody of Alvarez, no formal request for extradition was made. Rather, DEA officials approved a plan to use Mexican nationals not affiliated with the governments of the United States or Mexico to arrest Alvarez and bring him to the United States for trial. Hector Berellez, the DEA agent in charge of the Camarena murder investigation, retained Antonio Garate-Bustamante (Garate), a Mexican citizen and DEA operative, to contact Mexican nationals willing to participate in the arrest. Through operatives, Garate retained Jose Francisco Sosa, a former Mexican police officer, to participate in Alvarez's arrest. This operation occurred on April 2, 1990, when Sosa and others abducted Alvarez from his

office in Guadalajara, held him overnight in a motel in Mexico and subsequently transported him to El Paso, Texas where he was arrested by U.S. federal agents. Alvarez was arraigned and transported to Los Angeles, California for trial.

Alvarez moved to dismiss the indictment on the basis that the federal court lacked jurisdiction because his arrest was in violation of the extradition treaty between the United States and Mexico.[64] While rejecting the claim that the government engaged in outrageous conduct, the district court nevertheless held it lacked jurisdiction to try Alvarez as his abduction violated the U.S.-Mexico Extradition Treaty.[65] The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the indictment and ordered Alvarez's repatriation.[66] The U.S. Supreme Court reversed and remanded the case for trial.[67] The Court held Alvarez's forcible abduction did not violate the Extradition Treaty, and federal courts retain the power to try persons for crimes even when their presence has been forcibly procured.[68] The Court did note however that Alvarez's abduction "may be in violation of general international law principles," thereby permitting him to pursue civil remedies at a later date.[69]

Alvarez was tried for Camarena's kidnapping, torture and murder in 1992. After the presentation of the government's case, the district court judge granted Alvarez's motion for judgment of acquittal on the ground of insufficient evidence to support a guilty verdict.[70] As a result, Alvarez was repatriated to Mexico.

In 1993, Alvarez initiated a civil action in the United States District Court for the Central District of California alleging numerous constitutional and tort claims arising from his abduction, detention and trial.[71] Sosa, Garate, five unnamed Mexican nationals, the United States and four DEA agents were listed as defendants.[72] On motions by Sosa and Alvarez for summary judgment, the district court held kidnapping and arbitrary detention to be "specific, universal and obligatory" as to be actionable pursuant to the ATCA.[73] The district court entered judgment against Sosa in the amount of $25,000.[74] The court also held that there was no "universal consensus" regarding the definition of cruel, inhuman and degrading treatment at the time of the events in this case and granted summary judgment in favor of Sosa with respect to this claim.[75]

The U.S. Court of Appeals for the Ninth Circuit affirmed Sosa's liability pursuant to the ATCA although on different grounds than those provided by the district court. The Ninth Circuit did adopt the district court's "specific, universal and obligatory" standard to determine whether a violation of the law of nations is actionable pursuant to the ATCA.[76] However, the court rejected Alvarez's claim that he could assert an ATCA claim based upon the breach of Mexican sovereignty occurring during his arrest.[77] In addition, the Ninth Circuit refused to recognize transborder abduction as a violation of customary international law.[78] The court did conclude there was a specific, universal and obligatory norm prohibiting arbitrary arrest and detention.[79] As such, applying federal choice of law principles,[80] the Ninth Circuit concluded Alvarez was entitled to damages incurred as a result of his arrest and detention in Mexico.[81]

The U.S. Supreme Court Opinion

The U.S. Supreme Court granted certiorari on December 1, 2003 to determine the issue of whether Alvarez was entitled to remedy pursuant to the ATCA.[82] In an opinion dated June 29, 2004, the Court unanimously agreed that Alvarez could not pursue a remedy in federal court pursuant to the ATCA. However, Justice Souter's majority opinion refused to interpret the ATCA in such a manner as to deny relief to all victims of human rights abuses.

The Court initially addressed Alvarez's contention that the ATCA is not merely a jurisdictional statute but rather acts as authority for the creation of a new cause of action for torts in violation of international law. The Court dismissed this interpretation as "implausible" given the placement of the ATCA in the Judiciary Act, "a statute otherwise exclusively concerned with federal-court jurisdiction."[83] However, this interpretation did not lead to the conclusion that the ATCA was stillborn upon its creation due to the absence of concomitant legislation creating a list of actionable torts. Instead, the Court endorsed the conclusion that federal courts were entitled to entertain claims upon the adoption of the jurisdictional grant contained within the ATCA as torts in violation of the law of nations were recognized in common law existing at the time.[84] The Court particularly noted the United States received the law of nations as it existed upon its independence.[85] This law of nations consisted of "general norms governing the behavior of national states with each other" and "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."[86] These bodies of law overlapped where violations of the law of nations gave rise to a judicial remedy as well as threatened serious consequences for the United States in the conduct of international affairs.[87] This overlap was limited to three offenses, specifically, violation of safe conduct, infringement of the rights of ambassadors and piracy.[88] The Court concluded that "this narrow set of violations . . . was probably on the minds of the men who drafted the [ATCA] with its reference to tort."[89]

Justice Souter readily conceded there was no legislative record expressly supporting this conclusion.[90] Nevertheless, the Court concluded the ATCA was intended to have practical effect upon its adoption.[91] The Court specifically noted the principal draftsman of the ATCA, Oliver Ellsworth of Connecticut, served in the Continental Congress that, in 1781, adopted a resolution calling upon state legislatures to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports . . . of hostility against such as are in amity . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party."[92] Furthermore, the First Congress recognized the importance of the law of nations in legislation to punish certain offenses in violation thereof as criminal offenses.[93] Based upon this background, the Court concluded "[i]t would have

been passing strange for Ellsworth and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action."[94]

The historical record existing immediately after the adoption of the ATCA also supported this conclusion. Early federal cases addressing the ATCA gave no intimation that further implementing legislation was necessary.[95] The 1795 opinion of Attorney General William Bradford with respect to the criminal prosecution of U.S. citizens participating in a French raid upon a British slave colony in Sierra Leone recognized the possibility of a civil remedy for the aggrieved without specific reference to the need for implementing legislation.[96] The reasonable inference from these precedents was that the ATCA had immediate effect upon its adoption. As a result, the Court held "[t]here is too much in the historical record to believe that Congress would have enacted the [ATCA] only to leave it lying fallow indefinitely."[97]

This history also led the Court to conclude the ATCA conferred jurisdiction upon federal courts for "a relatively modest set of actions alleging violations of the law of nations."[98] This "modest set of actions" was torts arising from the violation of safe conducts, infringement of the rights of ambassadors and piracy. However, the Court found there were no congressional developments in the intervening 191 years from the adoption of the ATCA to its modern expression in *Filartiga v. Peña-Irala* that precluded courts from "recognizing a claim under the law of nations as an element of common law."[99]

Nevertheless, the absence of amendments to or abolition of the ATCA did not lead Justice Souter to adopt an unrestrained view of the causes of action over which courts could exercise jurisdiction. Rather, claims based upon the present-day law of nations were required to "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized."[100] This restraint was justified as the "prevailing conception" of the common law had changed since 1789 from one of discovery of governing principles to wholesale judicial creation.[101] The perception of federal common law also changed with the Court's opinion in *Erie Railway Co. v. Tompkins.*[102] The legacy of *Erie* militated in favor of a policy of "legislative guidance before exercising innovative authority over substantive law."[103]

However, the holding in *Erie* did not preclude "further independent judicial recognition of actionable international norms."[104] Rather, Justice Souter concluded "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[105] According to the Court, *Erie* did not bar judicial recognition of all new substantive rules of federal common law but rather permitted such recognition in "identified limited enclaves."[106] For over two centuries, one of these enclaves included the law of nations. The Court was unwilling to instruct federal courts to "avert their gaze entirely" from such norms, including those intended to protect individuals.[107] Such aversion was not within the understanding of the First Congress, which also would not have, according to the Court, "expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[108] Rather, the legitimacy of limited recognition of international norms by federal courts had been assumed since *Filartiga*, and such legitimacy had not been contravened by the U.S. Congress.[109] Absent congressional guidance, there was no evidence Congress had "shut the door to [consideration of] the law of nations entirely" in federal courts.[110]

The Court determined the decision to create private rights of action was best left to the legislative branch in the absence of an express provision within existing statutes.[111] This deference to the U.S. Congress, was prudent due to the "possible collateral consequences of making international rules privately actionable."[112] Judicial recognition of causes of action and the fashioning of remedies to address violations should thus proceed, if at all, with "great caution."[113] Finally, there is no congressional mandate to U.S. courts to define new violations of international law actionable pursuant to the ATCA. Although the Torture Victim Protection Act provides such a mandate through the establishment of "an unambiguous and modern basis for federal claims of torture and extrajudicial killing,"[114] the mandate was limited to this narrow range of claims. More common is the expression by Congress of its intent to limit judicial interpretation of human rights norms through declarations that ratified instruments are not self-executing.[115]

As a result, Justice Souter placed limitations on claims recognizable pursuant to the ATCA's grant of jurisdiction. The Court concluded international law norms were not recognizable under federal common law if they have "less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted."[116] The Court cited piracy and torture as two offenses consisting of definite conduct and having acceptance among civilized nations.[117] These offenses were examples of "a handful of heinous actions" that were specific, universal and obligatory as to be actionable pursuant to the ATCA.[118] Claims of violation of such norms were thus to be gauged against the current state of international law utilizing sources recognized by the Court dating back to the decision in *The Paquete Habana*.[119]

The Court then examined the two human rights instruments by which Alvarez claimed the existence of an international norm prohibiting arbitrary arrest. The Court dismissed the first of these instruments, the Universal Declaration of Human Rights, on the basis that it was a statement of aspirations only and does not impose binding obligations upon national governments by its own force and effect.[120] More importantly, the Court rejected the creation of such a norm on the basis of a prohibition contained within the International Covenant on Civil and Political Rights. Although binding as a matter of international law, the Covenant was ratified by the United States on the express understanding that it was not self-executing and thus did not create obligations enforceable in federal courts.[121]

Applying these standards to Alvarez's claims, the Court concluded there was no specific, universal and obligatory international norm sanctioning arbitrary detention occurring entirely within the borders of one state. The Court described the implications of Alvarez's claim as "breathtaking" in that it would "support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment."[122] Such a result was inconsistent with applicable statutory and case law.[123] Any inability to demonstrate Sosa was acting on behalf of the U.S. Government at the time of Alvarez's detention would require a further broadening of these principles to include conduct by private parties.[124] In addition, Alvarez's claim lacked the necessary "state policy" and "prolonged" nature to qualify as a violation of a specific and universal norm.[125] Although the exact meaning of these terms remained an open question, the Court held that they clearly required "a factual basis beyond relatively brief detention in excess of positive authority."[126] Even assuming Alvarez's detention was "prolonged" and the result of "state policy," it remained impossible to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of the offenses of piracy, interference with ambassadors and violation of safe conduct.[127] As such, the Court concluded the principle advanced by Alvarez in his claim remained, "in the present, imperfect world . . . an aspiration that exceeds any binding customary rule having the specificity [the Court] requires."[128] The creation of a private cause of action under such circumstances would, in the Court's judgment, exceed the bounds of exercisable residual common law discretion possessed by the federal judiciary.

THE TRANSNATIONAL CORPORATION UNBOUND: THE IMPLICATIONS OF *SOSA* FOR FUTURE LABOR RIGHTS LITIGATION ALLEGING *JUS COGENS* VIOLATIONS

Human Rights Associated with Personal Welfare: Freedom from Summary or Extrajudicial Execution, Torture and Cruel, Inhuman or Degrading Treatment

The most universal recognition of the right to be free from summary or extrajudicial execution is in Geneva Convention IV and the International Covenant on Civil and Political Rights. Article 6(1) of the Civil and Political Rights Covenant states that "[n]o one shall be arbitrarily deprived of his life."[129] The Covenant fails to define the circumstances constituting such a deprivation from which states are to abstain. Although the Civil and Political Rights Covenant is clearly universal given its ratification by 152 states, its universality is insufficient to overcome this lack of specificity.[130] Furthermore, Article 6 is not obligatory as it has been designated as non-self-executing by the United States, and no implementing legislation is currently in force and effect.[131]

The prohibition upon summary execution in Geneva Convention IV presents a more difficult issue. Article 3(1)(a) prohibits "murder of all kinds."[132] This prohibition is further elaborated upon in Article 3(1)(d), which bars the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized people."[133] Although the definitions of "regularly constituted court" and "indispensable judicial guarantees" may be subject to interpretation, Section 3(1)(d) is a classic restatement of the widely accepted definition of summary or extrajudicial execution.[134] Furthermore, the universality of Geneva Convention IV is indisputable.[135] Thus, Geneva Convention IV meets the specific and universal portions of Justice Souter's standard.

However, Geneva Convention IV is not obligatory upon the United States such as to create a cause of action pursuant to the ATCA. Despite its ratification by the United States, there is no indication that Geneva Convention IV manifests an intention to be self-executing without the enactment of enabling legislation nor that the United States intended such result at the time of ratification.[136] Furthermore, the creation of a private remedy actionable in U.S. courts as a result of such violation is inconsistent with the general rule that affected individuals do not have direct remedies against human rights violators except where expressly provided by international agreement.[137] In any event, Geneva Convention IV has very limited applicability, specifically, the protection of civilian populations in the event of war. This limitation makes its application to transnational corporations unlikely.

A similar conclusion is reached through application of regional human rights instruments. The right to be free from summary execution as defined in the American Convention on Human Rights suffers from the same problem as the Civil and Political Rights Covenant. Article 4(1) prohibits arbitrary deprivations of life without defining conduct constituting such deprivation.[138] Furthermore, the American Convention is not universal or obligatory.[139]

The designation as *jus cogens* does not necessarily render the prohibition upon summary or extrajudicial execution actionable pursuant to Justice Souter's opinion in *Sosa*. Justice Souter refused to recognize Alvarez's detention as an actionable violation of international human rights law even though arbitrary detention has been defined as *jus cogens*.[140] Although he attempted to distinguish Alvarez's detention from *jus cogens* by holding that it was not "prolonged," Justice Souter further opined that, even assuming the detention to be prolonged, it remained impossible for the Court to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of traditional offenses within the meaning of the ATCA such as piracy, interference with ambassadors and violation of safe conduct.[141]

Justice Souter's reasoning is not directly applicable to the peremptory norm existing with respect to summary or extrajudicial execution for two reasons. Initially, the violations vary so widely as to render Justice Souter's holding

inapplicable. Justice Souter may be correct that the determination of when a detention becomes prolonged as to violate international law renders it uncertain for purposes of creating a private cause of action. Such shades of gray are not present in a case of summary execution, which consists of the absence or disregard of judicial procedures and protections, including due process of law, followed by the killing of a human being. Violations of this norm are far easier to determine than the circumstances that render a detention prolonged.

More importantly, unlike arbitrary detention, extrajudicial killings are actionable pursuant to U.S. law.[142] The Torture Victim Protection Act provides civil liability for a person who "under actual or apparent authority, or color of law, of any foreign nation subjects an individual to extrajudicial killing."[143] This statute empowers U.S. courts to adjudicate such claims by U.S. citizens and aliens. The Torture Victim Protection Act has created "an unambiguous and modern basis for federal claims of . . . extrajudicial killing."[144] This express statutory basis differentiates claims of extrajudicial killing from arbitrary detention. Not only do claims of arbitrary detention lack an express statutory basis, but they also lack specificity. By contrast, extrajudicial killing is defined within the Torture Victim Protection Act as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[145] As previously noted with respect to Geneva Convention IV, although the definitions of "regularly constituted court" and "indispensable judicial guarantees" may be subject to interpretation, the definition of extrajudicial killing in the Torture Victim Protection Act is identical to the internationally accepted definition.[146] Furthermore, the recognition of a federal cause of action for extrajudicial killing gives this human rights violation an obligatory nature absent from prolonged detention. Thus, the right to be free from summary or extrajudicial killings is specific, universal and obligatory as to be actionable pursuant to the ATCA.

The initial category of instruments relating to the right to be free from torture and other cruel, inhuman or degrading treatment consists of four international conventions pertaining primarily to other topics. The International Covenant on Civil and Political Rights provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[147] Article 37(a) of the Convention on the Rights of the Child contains an identical prohibition with respect to children.[148] Geneva Convention IV contains two prohibitions upon such treatment. Article 3(1)(a) prohibits acts of torture and cruel treatment committed against persons taking no part in hostilities by state parties during armed conflicts not of an international character.[149] Article 32 further prohibits torture by state parties of such persons in their custody.[150] Protocol II to Geneva Convention IV prohibits torture and cruel treatment of civilian populations during non-international armed conflicts.[151]

The universal nature of these conventions is beyond question.[152] However, none of these conventions are actionable pursuant to the ATCA for identical reasons. First, each of these conventions lacks the requisite degree of specificity. Although each of these conventions expressly prohibits torture and other cruel, inhuman or degrading treatment, none of the conventions defines the prohibited behaviors. Furthermore, none of these instruments are obligatory upon the United States. The prohibitions contained in the Convention on the Rights of the Child and Protocol II are not legally binding due to the absence of ratification by the United States.[153] The prohibition contained within the Civil and Political Rights Covenant is equally nonobligatory as Article 7 has been declared to be non-self-executing by the United States.[154] Despite its ratification by the United States, Geneva Convention IV is not obligatory as there is no evidence it is self-executing or that such result was intended at the time of ratification or is consistent with general principles of international human rights law.[155] The limited possibility of application of Geneva Convention IV to the activities of transnational corporations further minimizes its importance.

Three conventions within the Inter-American system of human rights constitute the second category of instruments relating to torture and cruel, inhuman or degrading treatment. Article 5(2) of the American Convention on Human Rights grants every person the right to be free from torture and cruel, inhuman or degrading punishment or treatment.[156] Similarly, Article 4(d) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women grants every woman the right to be free from torture.[157] The Inter-American human rights system also contains a convention focused exclusively on torture. The Inter-American Convention to Prevent and Punish Torture obligates states to take "effective measures" to prohibit and punish torture occurring within their jurisdiction.[158]

None of these conventions may serve as the basis for jurisdiction pursuant to the ATCA. The American Conventions on Human Rights and the Prevention, Punishment and Eradication of Violence Against Women suffer from three shortcomings. Initially, these conventions merely prohibit torture and cruel, inhuman or degrading treatment without defining the prohibited practices. Second, neither of these conventions is universal.[159] The absence of U.S. ratification of these instruments renders their prohibitions nonobligatory.

By contrast, the Inter-American Convention to Prevent and Punish Torture does not suffer from a lack of specificity. The Convention defines torture as "any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose."[160] This definition includes methods utilized to "obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."[161] Such conduct is prohibited, and states are required to undertake "effective measures" to prevent their occurrence, including criminalization of such conduct in their national law.[162] Further specificity is found in provisions identifying those persons to whom these prohibitions are applicable[163] and eliminating circumstances under which such conduct may be justified.[164]

However, despite this high degree of specificity, the Inter-American Convention to Prevent and Punish Torture is incapable of serving as a basis for private civil litigation in the United States. The universal nature of the Inter-American Torture Convention may be challenged due to the absence of ratification by the United States and Canada.[165] The absence of U.S. ratification or accession also renders the Convention's prohibitions upon torture nonobligatory.

The final instrument relating to the right to be free from torture is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.[166] This instrument is the most widely-recognized human rights convention relating to torture and cruel, inhuman or degrading treatment and punishment having been ratified or acceded to by 136 states.[167] The Convention sets forth a detailed definition of torture. [168] States are required to undertake "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction."[169] In this regard, each state is to ensure torture is an offense punishable pursuant to its criminal laws.[170] National laws must further provide for civil redress for torture victims, including "an enforceable right to fair and adequate compensation" and "means for as full rehabilitation as possible."[171] No exceptions to these prohibitions are permitted.[172] The Convention does not define cruel, inhuman or degrading treatment or punishment. Nevertheless, states are obligated to undertake measures to prevent such conduct when it is "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[173] It may be concluded from this language that the Torture Convention is specific, universal and obligatory at least with respect to practices constituting torture. However, the Convention is rendered nonobligatory as a result of its ratification by the United States. Although the United States ratified the Torture Convention effective October 1994, the substantive provisions of the Convention were declared to be non-self-executing.[174] As such, the Torture Convention on its face is not actionable pursuant to the ATCA.

As previously noted with respect to summary execution, the designation of a customary standard of international human rights as a peremptory norm does not necessarily render it actionable pursuant to the ATCA. However, Justice Souter's reasoning in *Sosa* is not applicable as torture is actionable pursuant to U.S. law. The Torture Victim Protection Act provides civil liability for a person who "under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture."[175] In a manner identical to summary execution, this express statutory basis differentiates claims of torture from arbitrary detention. Torture is defined within the Act as the intentional infliction of severe pain or suffering, whether physical or mental, against a person in the offender's custody or physical control for the purpose of obtaining information or a confession from the victim or a third person, inflicting punishment for an act committed or allegedly committed by the victim or third person, intimidating or coercing the victim or a third person or for any discriminatory reason not otherwise provided.[176] "Mental pain or suffering" is defined in the Act as prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering, the administration or application or threatened administration or application of mind altering substances or other procedures calculated to profoundly disrupt the senses or personality, threats of imminent death or similar threats directed at a third person.[177] Although the meaning of some terms within the Act, such as "severe" and "prolonged" pain and suffering, are subject to disagreement, the definition of torture in the Torture Victim Protection Act is identical to the definition contained within the U.S. reservations, declarations and understandings with respect to the Torture Convention.[178] Additionally, the recognition of a federal cause of action for torture gives this human rights violation an obligatory nature absent from other violations such as prolonged detention. Thus, the right to be free from torture is specific, universal and obligatory as to be actionable pursuant to the ATCA.

Justice Souter's reasoning also is not directly applicable to the peremptory norm existing with respect to cruel, inhuman or degrading treatment or punishment. In its statement of reservations, declarations and understandings with respect to the Torture Convention, the United States noted cruel, inhuman or degrading treatment or punishment as utilized in the Convention means such punishment as is prohibited by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.[179] As a result, the absence of a definition of cruel, inhuman or degrading treatment or punishment in the Torture Convention is of minimal importance. Although offending conduct is subject to disagreement, its meaning is nevertheless ascertainable from judicial opinions defining cruel, unusual and inhumane treatment pursuant to the U.S. Constitution. Given the equivalence between these definitions, it is tempting to conclude instances of cruel, inhuman or degrading treatment or punishment are actionable pursuant to Title 42 of the U.S. Code, which provides for civil liability for every person who, under color of law, deprives another person of any rights, privileges or immunities secured by the Constitution.[180] However, the civil liability provided by Title 42 is limited to U.S. citizens or other persons within the jurisdiction of the United States. Aliens outside the jurisdictional reach of the U.S. legal system are excluded from this group of potential plaintiffs. This lack of an express statutory basis for claims available to all persons differentiates cruel, inhuman or degrading treatment or punishment from torture. Thus, the right to be free from cruel, inhuman or degrading treatment or punishment is specific and universal but not obligatory as to be actionable pursuant to the ATCA.

Human Rights Associated with Personal Freedom: Enforced Disappearance and Arbitrary Detention

The right to be free from enforced disappearance is set forth in the Inter-American Convention on Forced Disappearance of Persons.[181] This Convention requires states to "undertake not to practice, permit or tolerate the forced disappearance of persons" and provide for the punishment of such acts in their national criminal codes.[182] Article VIII prohibits public authorities and their agents from ordering disappearances, and Article X of the Convention provides that no circumstances

may be used as justification for disappearances.[183] States are required to hold detainees in an "officially recognized place of detention" and account for all such persons to family.[184]

Most importantly, the Convention provides a context within which these rights and duties attach by defining enforced disappearances.[185] This definition is very specific, identifying the required acts and perpetrators and describing the injury caused as a result thereof. Enforced disappearance consists of four elements. There are two required acts, the deprivation of a person's freedom and the absence of information or refusal to acknowledge such deprivation. The perpetrators must be agents of the state or persons or groups of persons acting with the authorization, support, or acquiescence of the state. Finally, these acts must result in impediment of recourse to applicable procedural protections and legal remedies.

However, the Inter-American Convention on Forced Disappearance of Persons lacks universal support as evidenced by its ratification by less than half of the members of the Inter-American human rights system.[186] The Convention also is not obligatory given the absence of ratification by the United States.[187] Furthermore, although U.S. law recognizes the liability of federal investigative and law enforcement officers for false imprisonment, there is no recognized cause of action in the United States for enforced disappearance.[188] The most similar proceeding to enforced disappearance is the habeas corpus proceeding in which an individual challenges his or her detention.[189] However, habeas corpus only determines the lawfulness of the detention. The very filing of the habeas corpus petition may belie the element of enforced disappearance requiring the refusal to provide information to the detainee. The filing of such petition also prevents the occurrence of the required element of injury, specifically, the impediment of recourse to applicable procedural protections and legal remedies. Thus, although specific, the right to be free from enforced disappearance is not actionable pursuant to the ATCA.

The right to be free from arbitrary or unlawful arrest is recognized in the International Covenant on Civil and Political Rights.[190] The Civil and Political Rights Covenant defines this right and places specific duties upon states. Arrests and detentions must be in accordance with national law.[191] This requires states to adopt procedural protections for detainees, including notice of the grounds for detention at the time of arrest and prompt notice of charges thereafter.[192] Detainees are required to be brought before a magistrate in a prompt manner and are further entitled to a trial within a reasonable time.[193] Such persons are generally subject to release pending trial, although release may be contingent on guarantees for appearance at subsequent proceedings.[194] Detainees are entitled to challenge the lawfulness of their detention,[195] and victims of detentions deemed unlawful are to be provided with "an enforceable right to compensation."[196] Although the implementation of these obligations is left to the discretion of national governments, their parameters are definite enough to be considered specific for purposes of the ATCA. However, the Civil and Political Rights Covenant is not actionable due to the U.S. reservation that Article 9 is not self-executing.[197]

The right to be free from arbitrary or unlawful arrest is extended to children by the Convention on the Rights of the Child, which requires any arrest, detention or imprisonment of a child "be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[198] The rights extended to children with respect to their detention are not as specific as those set forth in the Civil and Political Rights Covenant. Undoubtedly, the right of detained children to "prompt access" to legal assistance, the right to challenge their detention before an appropriate court or other "independent and impartial authority" and receive a "prompt decision" create readily definable duties for states.[199] However, other rights granted to detained children are vague and defy universal meaning. For example, it is unclear what is required in order to treat children "with humanity and respect for the inherent dignity of the human person" or in a manner taking into account "the needs of persons of his or her age."[200] Equally vague is the state's discretion to sever contact between the child and his or her family if such contact is not in the child's "best interest" or for other "exceptional circumstances."[201] The Convention offers no elaboration on the meaning of these terms or how states may satisfy their obligations. As a result, only a portion of the rights accruing to detained children pursuant to the Convention on the Rights of the Child are specific enough as to be enforceable in a court of law. In any event, the Convention on the Rights of the Child is not actionable pursuant to the ATCA due to the absence of U.S. ratification.[202]

The American Convention on Human Rights casts little new light on the rights of detainees. The American Convention prohibits detentions other than as occur pursuant to national constitutions or laws.[203] In a manner similar to the Civil and Political Rights Covenant, the American Convention requires arrestees to be advised of the basis for their detention as well as prompt notice of charges if filed.[204] Detainees are further entitled to challenge the legality of their detention and proceed to trial without unreasonable delay.[205] The American Convention also adopts language within the Civil and Political Rights Covenant with respect to pretrial release upon the provision of security.[206] These rights are specific to the extent they are similar or identical to those set forth in the Civil and Political Rights Covenant and Convention on the Rights of the Child. However, the American Convention is not universal or obligatory.[207]

The right to be free from prolonged arbitrary detention has been identified as part of the customary international law of human rights and *jus cogens*.[208] However, Justice Souter refused to recognize Alvarez's detention as an actionable violation of international human rights law despite this status.[209]Although he attempted to distinguish Alvarez's detention on the basis it was not "prolonged," Justice Souter also held that, even assuming the detention to be prolonged, it remained impossible for the Court to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of offenses traditionally within the meaning of the ATCA.[210] As a result, Justice Souter refused to create a private cause of action pursuant to the ATCA for the violation of a norm considered peremptory by the international

community. Given this holding and the absence of recognition of such claims pursuant to applicable statutory law, arbitrary detention, regardless of its prolonged nature, is not actionable pursuant to the ATCA.[211]

Human Rights Associated with Perceived Status: Genocide

Article 6 of the elements of crimes as established by the International Criminal Court defines genocide as consisting of one of six specific acts. These acts include killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures to prevent births and forcibly transferring children.[212] There are three common elements to these acts. First, the victim must be a member of "a particular national, ethnical, racial or religious group."[213] Second, the perpetrator's intent in engaging in the conduct must be to "destroy, in whole or in part" a particular group.[214] Finally, the conduct must occur in the context of "a manifest pattern of similar conduct directed against that group or that could itself effect such destruction."[215]

The prohibition upon genocide to be enforced by the International Criminal Court establish the necessary conduct, the intent of the perpetrator, the identity of the victim and the context in which such conduct occurs. This prohibition is among the most well-defined in international human rights law. Such specificity is essential given the intended purpose of the definitions to serve as the basis for criminal prosecution. As these definitions meet the requirements of due process with respect to providing notice of criminal conduct, they also possess the necessary degree of specificity in order to be actionable pursuant to the ATCA.

However, the universal and obligatory nature of the documents establishing the International Criminal Court is subject to question. The instrument establishing the International Criminal Court, the Rome Statute, currently has 139 signatories.[216] However, only 97 states, approximately one-half of the international community, has ratified or acceded to the Statute.[217] Although significant, the ratification or accession by only half of the global community raises serious questions with respect to the universal recognition of the Court as well as the principles for which it stands. This includes the definition of various crimes subject to the Court's jurisdiction, including genocide. Even assuming the Rome Statute and International Criminal Court have been universally recognized, the Statute is not obligatory on the United States due to the absence of ratification.[218]

The Convention on the Prevention and Punishment of the Crime of Genocide presents a more viable basis for a civil action pursuant to the ATCA. The Convention provides that genocide, whether occurring in time of peace or war, is a crime under international law.[219] Conduct associated with genocide also is punishable as a crime, including conspiracy or direct and public incitement to commit genocide and attempts to commit or complicity in genocide.[220] The Convention defines genocide as consisting of three specific elements. The perpetrator must first engage in a specific act. For purposes of the Convention, this act consists of killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction of a particular group of people, measures designed to prevent births or the forcible transfer of children.[221] The second element is the perpetrator's intent in committing these acts, specifically, the "intent to destroy, in whole or in part" a particular group of people.[222] The final element of the offense is the identity of the victims. In order to constitute genocide, the perpetrator's conduct must be directed at "a national, ethnical, racial or religious group."[223] Persons committing such acts are subject to punishment regardless of their status as "constitutionally responsible rulers, public officials or private individuals."[224] States are required to adopt necessary legislation to implement the Convention with specific emphasis upon providing "effective penalties" for persons found guilty of genocide or genocide-related conduct.[225] These penalties are to be assessed after a trial by a tribunal in the state where the offense was committed or an international tribunal.[226]

In a manner identical to the Statute of the International Criminal Court, the definitions of genocide set forth in the Convention establish the necessary conduct, the intent of the perpetrator, the identity of the victim and the context in which such conduct occurs. To the extent these definitions are identical to those in the Statute of the International Criminal Court, they possess the necessary degree of specificity in order to be actionable pursuant to the ATCA. However, unlike the Rome Statute, the Genocide Convention is universal given its ratification or accession by 136 states.[227] The United States is one of these parties, having ratified the Convention in November 1988.[228]

The more significant issue is whether the Genocide Convention is obligatory as to serve as the basis for a private civil action pursuant to the ATCA. It bears to note the prohibition upon genocide is defined as *jus cogens.*[229] Despite this recognition, genocide cannot serve as the basis for a private cause of action pursuant to the ATCA.

The specificity of genocide renders Justice Souter's holding in *Sosa* with respect to the lack of definiteness of prohibited conduct inapplicable. However, there is no recognized private cause of action for genocide pursuant to applicable U.S. law. The Genocide Convention only requires states to adopt legislation defining genocide and genocide-related acts and procedures by which perpetrators may be charged, tried and punished.[230] The definitions of genocide contained in the Convention have their origin in criminal law. This includes the terms "conspiracy," "incitement," "attempt" and "complicity."[231] Other phraseology of the Convention is criminal in its intent and scope with utilization of such terms as "charges" and procedures for assessing and punishing persons adjudicated "guilty" of genocide.[232] It may be concluded that the Genocide Convention only requires states to criminalize acts of genocide. The express language of the Convention does not require states to provide for civil liability for such acts in their national law.

The United States recognized this distinction in legislation implementing the Genocide Convention. The Genocide Convention Implementation Act was placed in Title 18 relating to federal criminal offenses.[233] Genocide, attempts to commit genocide and direct and public incitement to commit genocide are described as "basic offenses."[234] These basic offenses are subject to criminal punishment, including imprisonment and fines.[235] Jurisdiction of U.S. courts is limited to "offenses" committed within the United States or in instances when the "alleged offender" is a U.S. national.[236] Most importantly, the Act's provisions are not to "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding."[237] The implication from this language is that the scope of the Genocide Convention Implementation Act is limited to the Convention's express requirements, the criminalization of genocide and genocide-related conduct and its effective prosecution and punishment.

Genocide is also an offense which states possess universal jurisdiction to define and punish.[238] Other offenses included on this list are aircraft hijacking, slave trading, war crimes and, most importantly, piracy.[239] As Justice Souter deemed piracy to be one of the offenses originally intended to be within the scope of the ATCA, it is tempting to conclude its equation to genocide as an offense of universal concern renders genocide equally actionable pursuant to the ATCA. This leap of logic fails however as, despite its universal status, there must still be a basis for the initiation and prosecution of a private civil action through appropriate provisions within national law. Universal jurisdiction has been traditionally exercised in the form of criminal prosecution.[240] Although universal jurisdiction and its traditional exercise do not preclude the application of civil law, the state must nonetheless "provide a remedy in tort or restitution for victims."[241] With its provisions limited to the definition, prosecution and punishment of the criminal offenses of genocide and genocide-related acts, the Genocide Convention Implementation Act does not provide such a civil remedy for victims. The Genocide Convention is thus not obligatory upon the United States in such a manner as to provide a basis for a private cause of action pursuant to the ATCA.

Human Rights Associated with Armed Conflict: War Crimes and Crimes Against Humanity

Prohibitions upon the commission of war crimes and crimes against humanity are set forth in the greatest detail in one human rights instrument.[242] The Elements of Crimes as established by the International Criminal Court contains the most definitive description of war crimes ever enunciated by an international body. War crimes are defined to include willful killing, torture and cruel treatment, the infliction of great suffering, mutilation, rape and other sexual violence, forced pregnancy, enforced prostitution and sterilization, biological, medical and scientific experimentation, destruction, pillaging and appropriation of property, compelling military service in hostile forces, denial of due process, deportation and displacement of civilians, confinement, hostage taking, attacks upon civilian populations, improper uses of flags and insignia, attacking protected objects and the use of poison and poisoned weapons.[243]

Crimes against humanity are defined in similar detail. The International Criminal Court has defined crimes against humanity to include murder, extermination, enslavement, forcible transfer of civilian populations, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution, enforced disappearance, apartheid and other inhumane acts.[244] Each of these definitions establishes the three fundamental elements of any offense, specifically, the prohibited act, the identity of the victim and the requisite intent of the perpetrator.[245] Although isolated elements of some of the defined crimes are subject to interpretation, these difficulties are rare and have limited impact upon the otherwise overwhelmingly specificity of the code.[246] Instead, this elaboration of crimes was deemed specific enough by the ninety-seven ratifying states to serve as the basis for the abdication of national sovereignty in favor of international criminal prosecution. As such, it would undoubtedly be specific enough to serve as the basis for tort claims alleged as part of a civil lawsuit.

Nevertheless, as previously discussed with respect to the right to be free from genocide, the universal and obligatory nature of the documents establishing the International Criminal Court are subject to question. Approximately one-half of the international community, has ratified or acceded to the Statute, thereby raising serious doubts with respect to the universality of the definitions of war crimes and crimes against humanity contained therein.[247] Furthermore, the Rome Statute is not obligatory on the United States due to the absence of ratification.[248] Assuming the universality of the Statute and the definitions set forth therein and their acceptance by the United States, there is no reason to believe the U.S. Senate would manifest an intention for it to serve as the basis for civil litigation pursuant to the ATCA. With its provisions limited to the definition, prosecution and punishment of the war crimes, the Rome Statute does not provide such a civil remedy for genocide victims.

In a manner similar to piracy, war crimes are also offenses which states possess universal jurisdiction to define and punish.[249] As piracy has been determined to be one of the offenses originally intended to be within the scope of the ATCA, it may be concluded war crimes are also actionable. However, despite its universal status, there must still be a basis for the initiation and prosecution of a private civil action through appropriate provisions within national law. Universal jurisdiction has been traditionally exercised in the form of criminal prosecution.[250] Although universal jurisdiction does not preclude the application of civil law to such offenses, the state must nonetheless provide a private remedy.[251] U.S. law provides no such civil remedy for war crime victims.[252] This failure is further evidence the responsibilities arising from the International Criminal Court are not obligatory on the United States as to provide a basis for a private cause of action pursuant to the ATCA.

Human Rights Associated with Working Conditions: Slavery

The oldest international instrument prohibiting slavery is the Slavery Convention. Effective in 1927, the Slavery Convention urges states to undertake to "prevent and suppress the slave trade [and] . . . bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms."[253] The Convention defines the "slave trade" as all activities relating to the capture, transport, acquisition and disposal of a person with the intent to reduce such person to slavery.[254] Slavery is defined as the status or condition by which one person is subjected to the exercise of the right of ownership by another person.[255] This condition includes debt bondage, serfdom and certain practices relating to married women.[256]

These prohibitions are applicable to children pursuant to the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (Child Labor Convention).[257] This Convention defines the worst forms of child labor to include "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom."[258] States are required to take "immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency."[259] These measures are to include programs to eliminate such labor, including penal sanctions or other sanctions as appropriate.[260]

These definitions render the Slavery Convention and the Child Labor Convention specific for human rights purposes. Any aspect of a relationship resembling ownership of a person may constitute slavery. Similarly, all aspects of reducing a person to slavery from capture through ultimate disposition are within the prohibitions of the slave trade. These definitions remove any doubt whether a particular relationship or activity falls within the Conventions' prohibitions. Furthermore, the universal nature of the prohibition upon slavery cannot be doubted given the ratification of the Slavery Convention by 88 states, the Supplementary Convention by 123 states and the Child Labor Convention by 150 states as well as its abolition in the constitutions or laws of virtually every state in the world.[261]

The question remains however whether these Conventions are obligatory such as to serve as a basis for the initiation of civil litigation pursuant to the ATCA. Article 1 of the Slavery Convention may be characterized as nonobligatory to the extent states are only required to "undertake" efforts to suppress the slave trade and abolish slavery. This language implies states may satisfy their obligations as long as such efforts are underway regardless of their ultimate success. This conclusion is erroneous to the extent it ignores the mandatory implications of such words as "prevent," "suppress" and "complete abolition." Efforts in this regard are thus not sufficient. Rather, states must succeed in their efforts to prevent and suppress the slave trade and completely abolish slavery. Furthermore, unlike other human rights instruments, these efforts must result in the cessation of these practices "as soon as possible."[262]

A similar argument may not be successfully advanced with respect to the Child Labor Convention. Numerous provisions within this Convention require states to take "effective" measures with respect to the prohibition and elimination of the worst forms of child labor.[263] States may not satisfy their obligations by merely undertaking efforts but rather must succeed in eliminating child labor. Furthermore, these efforts are to be addressed as a priority as a result of the Convention's requirement that states adopt effective measures immediately.[264] If the Slavery Convention and the Child Labor Convention are to be deemed nonobligatory, it must be on other grounds.

The Slavery Convention does not require states to empower private parties to initiate civil litigation against their alleged oppressors, especially when both the victim and the oppressor are otherwise alien to the forum. Rather, the Slavery Convention only requires states to undertake steps to "prevent," "suppress" and "abolish" slavery and the slave trade.[265] The clear implication of these terms is that states are to prevent, prosecute and punish slavery and the slave trade through applicable criminal procedures.

The United States recognized this distinction in legislation relating to slavery and the slave trade. Initially, the Slavery Convention and the Child Labor Convention are non-self-executing, and the United States has not adopted implementing legislation. Rather, U.S. law has addressed slavery and the slave trade in two distinct ways. First, participation in the slave trade and causing others to be placed in a state of slavery are federal criminal offenses.[266] Second, the president is empowered to sanction states failing to undertake significant efforts to comply with prohibitions upon slavery, including the withholding of nonhumanitarian, non-trade related assistance.[267] The president is also authorized to sanction those deemed to be "significant traffickers" of persons as well as those providing material assistance, financial or technological support or otherwise acting on behalf of such traffickers.[268] None of these statutes or other relevant provisions recognizes a private cause of action for slavery or engaging in the slave trade. Neither does such recognition exist in more general civil rights laws. For example, Title 42 of the U.S. Code providing for civil liability for every person who, under color of law, deprives another of any rights, privileges or immunities secured by the Constitution is limited to U.S. citizens or other persons within the jurisdiction of the United States.[269]

Engaging in the slave trade is also an offense which states possess universal jurisdiction to define and punish.[270] As previously noted, although such designation does not preclude the application of civil law to such offenses, the state must nonetheless provide for such a remedy in national law.[271] With its provisions limited to the sanctioning of those engaging in the slave trade and slavery, U.S. law does not provide such a civil remedy. The Slavery Convention and the Child Labor Convention are thus not obligatory upon the United States in such a manner as to provide a basis for a private cause of action pursuant to the ATCA.

Prohibitions upon slavery are also set forth in the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. The Civil and Political Rights Covenant provides that no one be held in slavery and specifically prohibits slavery, the slave trade and servitude.[272] Although these terms are not defined, their meaning may nevertheless be determined from the Slavery Convention adopted thirty-nine years earlier.[273] This prohibition is applicable to all individuals, and no derogation is permitted.[274] However, despite its universal acceptance, the Covenant's prohibitions are not obligatory due to its non-self-executing nature.[275]

The provisions regarding slavery in the Economic, Social and Cultural Rights Covenant are not enforceable for different reasons. Initially, the applicable provision does not specifically reference slavery or similar practices but only grants workers the right to gain their living by work which is freely chosen and accepted.[276] It is uncertain from this reference whether Article 6 was thus intended to prohibit slavery or in fact relates to slavery at all. If such reference was intended, the language selected by the drafters was obtuse at best given the explicit reference to slavery in the Civil and Political Rights Covenant as well as its definition in the Slavery Convention and the Supplementary Convention. The absence of this explicit reference also renders Article 6 nonobligatory with respect to requiring an absolute prohibition upon slavery and similar practices. Even if the reference is deemed specific enough to include slavery, Article 6 merely requires the recognition of the right of workers to freely choose their occupation. This right is to be safeguarded through "appropriate steps," but these steps are not set forth with any degree of specificity as to be obligatory upon states.[277]

Furthermore, Article 2(2) provides states are to "undertake to guarantee" these rights without discrimination. States may satisfy their obligations as long as they undertake efforts with the belief that they will ultimately prove successful. In addition, Article 2(1) conditions achievement of the goals set forth in the Covenant on availability of state resources.[278] Further evidence of the nonobligatory nature of the Covenant exists in Article 4 which permits states to limit the enjoyment of such rights as is compatible with "the general welfare in a democratic society."[279] These qualifications cast doubt on the applicability of Article 6 to slavery and slave trading given the absolute prohibitions contained in earlier instruments. To the extent Article 6 is applicable to slavery, these qualifications render it nonobligatory. The provision is further nonobligatory due to the absence of U.S. ratification.[280]

The prohibition upon slavery is also part of the Geneva Conventions. Protocol II prohibits "at any time and in any place" slavery and the slave trade in all their forms.[281] Although undefined, the meaning of slavery may nevertheless be determined from the Slavery Convention. Furthermore, Protocol II prohibits slavery in all its forms thereby encompassing debt bondage, serfdom and practices relating to the status of women as prohibited by the Supplementary Convention. The definiteness of this prohibition is further advanced by the express prohibition upon derogation and excuses for noncompliance.[282] However, despite its universal nature, Protocol II is does not create legally binding obligations due to the absence of ratification by the United States and is further minimized in importance by the limited circumstances to which it is applicable.[283]

Two conventions in the Inter-American human rights system relate to slavery. In a manner similar to the Civil and Political Rights Covenant and Protocol II, the American Convention on Human Rights provides that no one shall be held in slavery or involuntary servitude.[284] These practices are specifically prohibited in all their forms as is the slave trade.[285] Once again, although undefined, the meaning of slavery may nevertheless be determined from the Slavery Convention. As this prohibition prohibits slavery in all of its forms, it encompasses practices prohibited by the Supplementary Convention. This prohibition is applicable to all individuals, and no derogation is permitted.[286] However, the American Convention may not be universal and is not obligatory given the absence of ratification by the United States.[287]

Slavery may also be referenced in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. However, in a manner similar to the Economic, Social and Cultural Rights Covenant, the applicable provision of the Additional Protocol does not specifically reference slavery but only grants workers the right to gain their living through "freely elected or accepted lawful activity."[288] It is thus uncertain whether Article 6 was intended to prohibit slavery or in fact relates to slavery at all. The absence of an explicit reference renders Article 6 nonobligatory with respect to requiring an absolute prohibition upon slavery and similar practices. Even if Article 6 includes slavery, states are merely instructed to undertake "fully effective" measures without any degree of specificity as to render them obligatory.[289] Article 6 also lacks the required universal nature and U.S. ratification to be actionable pursuant to the ATCA.[290]

CONCLUSION

The optimism with which labor rights advocates greeted the U.S. Supreme Court's decision in *Sosa* with respect to "core violations" is unwarranted. The only *jus cogens* claims able to satisfy the "universal, specific and obligatory" standard are those alleging summary and extrajudicial execution and torture. The transnational corporation has been unbound from the restraints imposed upon its behavior by the ATCA and holdings of federal courts in the twenty-five years since the groundbreaking decision in *Filartiga v. Peña-Irala*.[291] As a result, accountability for compliance with international labor rights standards will be increasingly dependent upon efforts independent of litigation in U.S. federal courts. These efforts will include socially responsible investing and initiatives designed to establish, preserve and protect labor rights, adopted by national governments and international and non-governmental organizations. However, the primary burden for ensuring compliance with labor standards will be placed upon transnational corporations themselves. This burden may be met by the adoption of codes of conduct, statements of corporate principles, ethical guidelines, social accountability standards, voluntary

reporting efforts and similar initiatives. A critique of the effectiveness of these efforts is beyond the scope of this article. Nevertheless, the entrustment of labor protections to transnational corporations should give all impacted parties, including workers and non-governmental organizations, cause for concern.

FOOTNOTES

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[1] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761-62 (2004).
[2] For purposes of this article, a "transnational corporation" is defined as "an economic entity operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." U.N. ESCOR, 55th Sess., 22d mtg. at 52, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2/2003, ¶ 20 (2003).
[3] *Sosa*, 124 S. Ct. at 2759.
[4] *Id.* at 2761-62.
[5] Linda Greenhouse, *Human Rights Abuses Worldwide are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 30, 2004, at A21.
[6] Jonathan H. Adler, *Sosa Justice*, NAT'L REV. (July 21, 2004), *available at* http://www.nationalreview.com/adler/adler200407210842.asp.
[7] Bob Egelko, *Supreme Court Rejects Suit Over U.S.-Hired Kidnap But Majority Backs Foreigners' Right to Sue for Grave Abuses*, WASH. POST, June 30, 2004, at A13 (quoting Rick Herz, counsel for EarthRights International, that the organization was "going to continue to seek to hold abusers, and the corporations that assist them, accountable"); *see also* Press Release, International Labor Rights Fund, Leading Human Rights Lawyer Hails Supreme Court Decision Upholding Alien Tort Claims Act (June 29, 2004) (on file with author) (quoting Natacha Thys, assistant general counsel for the International Labor Rights Fund, that "*Alvarez* allows all of our ATCA suits to go forward: Unocal, ExxonMobil, Coca Cola, Drummond, Occidental, Del Monte and Daimler/Chrysler").
[8] L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW, § 2, at 7-8 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). For a history of the development of *jus cogens* norms, *see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (5th ed. 1998).
[9] CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 9 (2003).
[10] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679.
[11] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, ¶ 153 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber, Dec. 10, 1998).
[12] Universal jurisdiction is defined as the authority of a state "to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW].
[13] OPPENHEIM, *supra* note 8, § 2, at 7-8; *see also* BROWNLIE, *supra* note 8, at 516-17 (noting "more authority exists for the category of *jus cogens* than exists for its particular content").
[14] DE THAN & SHORTS, *supra* note 9, at 10.
[15] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 702(a-f).
[16] DE THAN & SHORTS, *supra* note 9, at 10.
[17] *Id.*
[18] 28 U.S.C. § 1350 (2000).
[19] *See* 1 ANNALS OF CONG. 782-833 (J. Gales ed., 1789).
[20] *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (wherein Judge Bork noted "[t]he debates over the Judiciary Act in the House - the Senate debates were not recorded - nowhere mention the provision, not even, so far as we are aware, indirectly").
[21] *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 n.10 (2d Cir. 2000) (noting "[t]he original purpose of the ATCA remains the subject of some controversy . . . . [as] [t]he Act has no formal legislative history" and that the intent of the drafters was "a matter forever hidden from our view by the scarcity of relevant evidence"); Trajano v. Marcos, 978 F.2d 493, 498 (9th Cir. 1992) (noting "[t]he debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended to accomplish"); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp.2d 289, 304 (S.D.N.Y. 2003) (noting "[d]espite the fact that the ATCA has existed for over two hundred years, little is known of the framers' intentions in adopting it - the legislative history of the Judiciary Act does not refer to Section 1350").
[22] *Tel-Oren*, 726 F.2d at 782-83 (Edwards, J., concurring).
[23] *Id.* This school of interpretation is based upon two incidents in early U.S. history. The first incident involved an assault by Chevalier De Longchamps, a French citizen, upon the French Consul General Marbois in Philadelphia in 1784. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784). The second incident involved a forcible entry into the home of

the Dutch Ambassador Van Berckel by a New York City constable for the purpose of effectuating an arrest of a servant. *See Report of John Jay, Secretary of Foreign Affairs, on Complaint of Minister of the United Netherlands*, 34 J. CONT. CONG. 109, 111 (1788). Although both perpetrators were ultimately convicted of violating the law of nations, such convictions were procured in state courts due to the absence of a federal statutory remedy. *See* Letter from Edmund Randolph, Governor of Virginia, to the Speaker of the House of Delegates (Oct. 10, 1787) (stating that "if the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender"), *quoted in* Flores v. S. Peru Copper Corp., 343 F.3d 140, 149 n.13 (2d Cir. 2003); *see also* 3 ELLIOT'S DEBATES 583 (1888), *quoted in Tel-Oren*, 726 F.2d at 783 n.12 (Edwards, J., concurring) (quoting James Madison's statement to the Virginia Convention that "[w]e well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us"); *But see* Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 816 (2002) (citing remarks made by President Thomas Jefferson during his Sixth Annual Message to Congress in 1806 wherein he recognized a private duty to refrain from engaging in the slave trade based upon human rights considerations). Similar statements were made by John Quincy Adams in oral arguments before the U.S. Supreme Court in *The Schooner Amistad* case. *See* The Schooner Amistad, 40 U.S. 518 (15 Pet.) (1841).

[24] *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring) (listing violations of safe conduct, infringement on the rights of ambassadors and piracy as the torts intended by the First Congress to be within the scope of the ATCA).

[25] Bolchos v. Darrel, 3 F. Cas. 810 (C.C.D.S.C. 1795) (No. 1607).

[26] O'Reilly de Camara v. Brooke, 209 U.S. 45, 51 (1908).

[27] 195 F. Supp. 857 (D. Md. 1961).

[28] *Id.* at 863-64.

[29] 528 F.2d 1194 (9th Cir. 1975).

[30] *Id.* at 1201-02 n.13.

[31] *Id.* at 1201 n.13.

[32] *See* 26 Op. Att'y Gen. 250, 253 (1907) (wherein the attorney general concluded the ATCA "provides a forum and a right of action" to Mexican nationals injured as a result of the diversion of the Rio Grande by a U.S. irrigation company if such act was deemed to be a tort in violation of the law of nations); *see also* 1 Op. Att'y Gen. 57, 59 (1795) (wherein the attorney general concluded the ATCA provided a remedy for aliens injured as a result of the participation of U.S. citizens in the plundering of British property off the coast of Sierra Leone by French naval forces in violation of principles of neutrality).

[33] 630 F.2d 876 (2d Cir. 1980) (holding torture perpetrated by a Paraguayan police official upon a private citizen of Paraguay violated the law of nations and was actionable by the victim's survivors pursuant to the ATCA).

[34] 70 F.3d 232 (2d Cir. 1995) (holding offenses of universal concern such as genocide, war crimes, torture and summary execution perpetrated by a private individual against other private individuals violates the law of nations and is actionable pursuant to the ATCA).

[35] In addition to the five opinions discussed below, there was one case pending at the time of the preparation of this article. *See* Bauman v. DaimlerChrysler Corp., No. 04-0194 (N.D. Cal. filed Jan. 14, 2004) (claims alleging extrajudicial killing, disappearance and torture of labor activists by Argentina's military in the 1970s and 1980s).

[36] Doe v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997) (involving claims of forced labor, extrajudicial killings and torture in the construction of a natural gas pipeline in which Unocal Corporation maintained an investment in Burma).

[37] Doe v. Unocal Corp., 110 F. Supp.2d 1294, 1310 (C.D. Cal. 2000).

[38] *Id.* (citing U.S. v. Flick, 6 TR. WAR CRIM. 1202 (1952) (wherein the convicted defendants sought an increase in their factory's allotment of forced laborers in order to meet their production quota of railroad cars); U.S. v. Krauch, 8 TR. WAR CRIM. 1179 (1952) (wherein the convicted defendants "embraced the opportunity to take advantage of the slave-labor program"); U.S. v. Krupp, 9 TR. WAR CRIM. 1439 (1952) (wherein the tribunal held that the will of the convicted defendants was not overcome by compulsion from Nazi government officials "but instead coincided with the will of those from whom the alleged compulsion emanated")).

[39] *Id.*

[40] *Id.*

[41] 67 F. Supp.2d 424 (D. N.J. 1999).

[42] *Id.* at 440 (citing Doe v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997)).

[43] *Id.* The court specifically referred to Principle IV(b) of the Nuremberg Charter, which provides, in part, that "the deportation to slave labor . . . of civilian populations of or in occupied territory [constitutes a] war crime and crime against humanity." Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279.

[44] *Iwanowa*, 67 F. Supp.2d at 441-43 (citing Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995); *In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); JAMA v. Immigration and Naturalization Serv., 22 F. Supp.2d 353, 362-63 (D.N.J. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993)).

[45] *Id.* at 443.

[46] *Id.* at 444 (citing the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, *supra* note 43, art. 6).
[47] *Id.* at 444-45 (citing *Kadic*, 70 F.3d at 238; Hamid v. Price Waterhouse, 51 F.3d 1411, 1417 n.26 (9th Cir. 1995); *Unocal Corp.*, 963 F. Supp. at 891).
[48] *Id.* at 445.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 461-68. The Alien Tort Claims Act does not contain a statute of limitations. As a result, federal courts have utilized the statute of limitation contained within the Torture Victim Protection Act for purposes of determining the timeliness of the institution of litigation. *See* Torture Victim Protection Act, 28 U.S.C. § 1350 (2000); *see also* Cabriri v. Assasie-Gyimah, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 176-78 (D. Mass. 1995). The district court also held the plaintiffs' claims to be barred by the political question doctrine and international comity. *Iwanowa*, 67 F. Supp.2d at 485-90.
[52] Sinaltrainal v. Coca-Cola Co., 256 F. Supp.2d 1345, 1352 (S.D. Fla. 2003).
[53] *Id.*
[54] *Id.* at 1353.
[55] *Id.* at 1354-55. The bottling agreement between Coca-Cola and its Colombian bottler did not impose a duty upon Coca-Cola "to monitor, enforce or control labor policies at . . . [the] bottling plant, the failure of which constitutes a conspiracy or joint action with the paramilitary." *Id.* at 1354. In addition, the agreement did not give Coca-Cola the duty or right to control security operations at its Colombian plant. *Id.*
[56] Estate of Rodriquez v. Drummond Co., 256 F. Supp.2d 1250, 1260-61 (N.D. Ala. 2003) (quoting the Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, art. 2, 102 Stat. 3045, 78 U.N.T.S. 277) [hereinafter Genocide Convention].
[57] *Id.* at 1261(citing Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, art. 3(1)(a), 6 U.S.T. 3113, 75 U.N.T.S. 31 (Geneva Convention I) protecting persons taking no active part in hostilities from violence, including murder, mutilation, cruel treatment and torture). The Geneva Conventions consist of three separate documents in addition to Geneva Convention I. *See* Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Geneva Convention II); Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III); Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Geneva Convention IV).
[58] *Rodriquez*, 256 F. Supp.2d.at 1262.
[59] 305 F. Supp.2d 1285 (S.D. Fla. 2003). The plaintiffs alleged their kidnapping and detention were at the behest of Del Monte, Inc. and its wholly-owned subsidiaries responsible for the operation of the plantation in order to deter SITRABI from calling a general strike. *Id.* at 1288.
[60] *Id.* at 1294 (citing Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (imprisonment for three to ten months characterized by severe beatings); Filartiga v. Peña-Irala, 630 F.2d 876, 877 (2d Cir. 1980) (torture resulting in death of the victim); Eastman Kodak v. Kavlin, 978 F. Supp. 1078, 1093-94 (S.D. Fla. 1997) (detention for ten days under conditions "horrendous by any contemporary standard of human decency")).
[61] *Id.* (citing S. EXEC. REP. NO. 101-30, at 14 (1990)).
[62] *Id.* at 1296 (citing *Kavlin*, 978 F. Supp. at 1078 (physically harrowing conditions accompanying ten-day imprisonment); Xuncax v. Gramajo, 886 F. Supp. 162, 174-75 (D. Mass. 1995) (one-day detention accompanied by in excess of one hundred cigarette burns); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (ten-hour detention accompanied by administration of electric shocks)).
[63] *Id.* at 1300. The Nuremberg Charter defines "crimes against humanity" as:

> [M]urder, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, *supra* note 43, art. 6(c).
The requirement of "widespread attack" against a civilian population has been defined as "frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims." Prosecutor v. Akayesu, No. ICTR-96-4-T, at p. 580 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998). The "systematic attack" requirement has been defined as "thoroughly organized action, following a regular pattern of the basis of a common policy and involving substantial public or private resources." *Id.* The plaintiffs' complaint also failed due to the lack of state and joint action under color of law. The plaintiffs' complaint failed to allege the existence of a conspiracy between the private defendants, civic and business leaders and local politicians to disrupt labor activism at the Del Monte facility with sufficient specificity and demonstrate the actions

of the security forces responsible for their detention were condoned by the Guatemalan government or its agents. *Aldana*, 305 F. Supp.2d at 1302-03. Even assuming the existence of state action, the plaintiffs failed to demonstrate that the defendants directed the security forces to violate the plaintiffs' human rights or that the presence of agents of the defendants at the events in question caused the violations to occur. *Id.* at 1303-05. These failures led the court to conclude the plaintiffs had not demonstrated "formalized relations between state entities and private corporations" necessary to find joint action under color of law. *Id.* at 1305.

[64] *See* Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

[65] United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

[66] United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991).

[67] United States v. Alvarez-Machain, 504 U.S. 655 (1992).

[68] *Id.* at 670 (citing Ker v. Illinois, 119 U.S. 436 (1886)).

[69] *Id.*at 669.

[70] The district court concluded the government's case was based on "suspicion and . . . hunches but . . . no proof," and the theory of the prosecution's case was "whole cloth, the wildest speculation." Alvarez-Machain v. United States, 331 F.3d 604, 610 (9th Cir. 2003).

[71] Alvarez's complaint, as amended, alleged claims sounding in: (1) kidnapping; (2) torture; (3) cruel, inhuman and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery: (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment; (10) negligent infliction of emotional distress; and (11) violations of the Fourth, Fifth and Eighth Amendments to the U.S. Constitution. *Alvarez-Machain*, 331 F.3d at 610 n.1.

[72] *Id.* at 610. The district court substituted the United States for the DEA agents, except Sosa and Garate, on all non constitutional claims. The United States was substituted for Garate by later stipulation of the parties.

[73] Alvarez-Machain v. United States, 1999 U.S. Dist. LEXIS 23304, at *60-71 (C.D. Cal. Mar. 18, 1999). The district court also denied Sosa's motion to substitute the United States, granted the motion of the four DEA agents and Garate for summary judgment and granted in part and denied in part the United States' motion for summary judgment.

[74] *Id.* at *78.

[75] *Id.* at *68.

[76] *Alvarez-Machain*, 331 F.3d at 613-14.

[77] *Id.* at 615-16 (concluding Alvarez was not the proper party to vindicate Mexico's interest in its sovereignty).

[78] *Id.* at 617-20 (noting the absence of specific prohibitions upon transborder abduction in applicable international instruments and the United States-Mexico Extradition Treaty in force at the time of the events in question). Transborder abduction was not prohibited until 1994. *See* Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., *reprinted in* MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES, at A-287, A-303 (2002). However, this agreement has yet to be submitted by the president to the Senate for ratification.

[79] *Alvarez-Machain*, 331 F.3d at 620-21 (citing prohibitions upon arbitrary arrest and detention in every major human rights instrument as well as 119 national constitutions). Alvarez's arrest and detention in Mexico were arbitrary as they violated Mexican sovereignty and attempted to illegally enforce a U.S. arrest warrant in a foreign state. *Id.* at 623.

[80] *Id.* at 633-35 (applying federal choice of law principles based upon the significant relationship of the United States to the events at issue, the status of the United States as a party to the litigation, the origin of the case from a federal criminal prosecution, the policy of the United States to provide a civil remedy for victims of human rights violations as expressed in the ATCA and the presence of international law principles of universal concern).

[81] *Id.* at 636-37 (noting Sosa's participation in Alvarez's arrest and detention occurred almost exclusively within Mexico and the breaking of the chain of causation set in motion by Sosa's initial misconduct in Mexico by the subsequent delivery of Alvarez to U.S. law enforcement personnel in El Paso, Texas).

[82] *See* Sosa v. Alvarez-Machain, 540 U.S. 1045 (2003) (order granting petition for certiorari).

[83] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2755 (2004).

[84] *Id.*

[85] *Id.* (citing Ware v. Hylton, 3 Dall. 199, 281 (1796) (Wilson, J.)).

[86] *Id.* at 2756.

[87] *Id.*

[88] *Id*.

[89] *Id.*

[90] Justice Souter admitted that "despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive." *Id.* at 2758

[91] In reaching this conclusion, Justice Souter specifically noted:

> [T]here is every reason to suppose that the First Congress did not pass the [ATCA] as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.

Id.

[92] *Id.* at 2756-57(citing 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37 (G. Hunt, ed., 1912)).
[93] *See* An Act for the Punishment of Certain Crimes Against the United States §§ 8, 28, 1 Stat. 113-14, 118 (1790) (recognizing as criminal offenses murder, robbery or other capital crimes committed on the high seas, violations of safe conduct and assaults against ambassadors).
[94] *Sosa*, 124 S. Ct. at 2758.
[95] *See, e.g.*, Bolchos v. Darrel, 3 F. Cas. 810 (C.C.D.S.C. 1795) (No. 1607) (holding the ATCA served as the jurisdictional basis for the exercise of admiralty jurisdiction over a claim brought by a French privateer against the mortgagee of a British slave trading vessel); Moxon v. The Fanny, 17 F. Cas. 942 (Pa. 1793) (No. 9895) (holding the ATCA could not serve as the basis for federal jurisdiction for a damages claim arising from the seizure of a British ship by a French privateer in U.S. waters).
[96] *See* 1 Op. Att'y Gen, *supra* note 32, at 59. While expressing reservations about criminal prosecution of the perpetrators, Attorney General Bradford was far more certain of the likelihood of tort liability pursuant to the ATCA. In this regard, Attorney General Bradford stated:

> But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

Id.
[97] *Sosa*, 124 S. Ct. 2758-59.
[98] *Id.* at 2759.
[99] *Id.* at 2761. In his concurring opinion, Justice Scalia concluded the Framers would be "quite terrified" by the expansion of federal jurisdiction beyond piracy, violations of safe conduct, interference with ambassadors and foreign sovereign immunity. *Id.* at 2775 (Scalia, J., concurring). This expansion was "a 20th-century invention of internationalist law professors and human-rights advocates." *Id.* at 2776.
[100] *Id.* at 2761-62.
[101] The Court noted, in 1789, the common law was accepted as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Id.* at 2762 (citing Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). However, the formulation of common law principles in the modern era has increasingly relied on the exercise of judicial discretion. As noted by Justice Oliver Wendell Holmes, Jr. in 1881, the "the secret root from which the law draws all the juices of life . . . [is] considerations of what is expedient for the community concerned." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 31-32 (Mark DeWolfe Howe, ed., 1963).
[102] 304 U.S. 64 (1938) (abolishing federal common law and approving its withdrawal to specialized fields or where necessary in interstitial areas of federal interest).
[103] *Sosa*, 124 S. Ct. at 2762. With respect to the ATCA, the Court specifically noted it "would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Id.*
[104] *Id.* at 2764.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 2764-65.
[108] *Id.* at 2765.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 2762-63.
[112] *Id.* at 2763.
[113] *Id.* at 2764. In Justice Scalia's view, such consequences were not reasons for courts to exercise "great caution" in adjudicating such claims but rather were reasons why courts were not granted nor could be thought to possess federal common-law-making powers with respect to the recognition of private causes of action arising from the violation of customary international law. *Id.* at 2774-75 (Scalia, J., concurring).
[114] H.R. Rep. No. 102-367, at 3 (1991).
[115] *See, e.g.*, Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1092 (2000) (providing U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide does not create a substantive or procedural right of private enforcement).
[116] *Sosa*, 124 S. Ct. at 2765.
[117] *Id.* (citing United States v. Smith, 5 Wheat. 153, 163-80 (1820) (piracy); Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (torture)).
[118] *Id.* at 2766 (citing *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) (providing that "[a]ctionable violations of international law must be of a norm that is specific, universal and obligatory"); Tel-Oren v. Libyan

Arab Republic, 726 F.2d 774, 781 (Edwards, J., concurring) (concluding the limits of the ATCA's jurisdictional grant are defined by violations of "definable, universal and obligatory norms")).

[119] 175 U.S. 677, 700 (1900) (providing "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 . . . for trustworthy evidence of what the law really is"). In his concurring opinion, Justice Scalia doubted federal courts would limit themselves in such a manner. Justice Scalia noted "[f]or over two decades now, unelected federal judges have been usurping [Congress and the Executive's] lawmaking power by converting what they regard as norms of international law into American law." *Sosa*, 124 S. Ct. at 2776 (Scalia, J., concurring). The majority's failure to condemn this trend was evidence that the Court was "incapable of admitting that some matters - *any* matters - are none of its business." *Id.* (emphasis in original). According to Justice Scalia, the majority's opinion was an example of "Never Say Never Jurisprudence" in which the Court "ignores its own conclusion that the [ATCA] provides only jurisdiction, wags a finger at the lower courts for going too far, and then - repeating the same formula the ambitious lower courts *themselves* have used - invites them to try again." *Id.* (emphasis in original).

[120] *Sosa*, 124 S. Ct. at 2767. The Court specifically noted Eleanor Roosevelt, one of the primary forces behind the adoption of the Universal Declaration, characterized it as "'a statement of principles . . . setting up a common standard of achievement for all peoples and all nations . . . [and] not a treaty or international agreement . . . impos[ing] legal obligations." EVAN LUARD, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 39, 50 (1967).

[121] *Sosa*, 124 S. Ct. at 2767.

[122] *Id.* at 2768.

[123] *Id.* (citing 42 U.S.C. § 1983 (2000); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (creating damages remedies in federal courts for activities of law enforcement personnel in violation of the Fourth Amendment)).

[124] *Id.*

[125] *Id.* (citing RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 702).

[126] *Id.* at 2769.

[127] *Id.*

[128] *Id.*

[129] International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 6(1), at 52, U.N. Doc. A/6316 (1966) [hereinafter Civil and Political Rights Covenant].

[130] OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (June 2004). The United States signed the Covenant on October 5, 1977 and ratified it effective September 8, 1992.

[131] U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01, art. III(1) (daily ed. Apr. 2, 1992) (declaring Article 6 of the Covenant to be non-self-executing).

[132] Geneva Convention IV, *supra* note 57, art. 3(1)(a).

[133] *Id.* art. 3(1)(d).

[134] *See, e.g.*, RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 702 cmt. f (defining summary execution as the killing of an individual "other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances").

[135] Geneva Convention IV has been ratified or acceded to by 192 states, including the United States which signed it on August 12, 1949 and ratified it on August 2, 1955. *See* INT'L COMM. OF THE RED CROSS, STATES PARTIES AND SIGNATORIES TO GENEVA CONVENTION IV 1-8 (2004).

[136] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 111(a-c) (providing an international agreement is non-self-executing "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or if implementing legislation is constitutionally required").

[137] *Id.* § 703 cmt. c.

[138] American Convention on Human Rights, OAS Treaty Series No. 36, at 1, OAS Off. Rec. OEA/Ser4v/II 23, doc. 21, rev. 2, art. 4(1) (1975) (providing "[n]o one shall be arbitrarily deprived of his life").

[139] The American Convention is not universal to the extent it has been ratified by twenty-five of the thirty-four states within the Inter-American human rights system. Of the nine states failing to ratify the American convention, two are of primary importance, specifically, Canada and the United States. *See* ORG. OF AM. STATES, STATUS OF RATIFICATION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS 1-2 (2004).

[140] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766-69 (2004).

[141] *Sosa*, 124 S. Ct. at 2769.

[142] U.S. law does not recognize a cause of action specifically enumerated as arbitrary detention. *See* 28 U.S.C. § 2680(h) (2000) (lifting tort immunity for federal investigative or law enforcement officers only if a detention constitutes false imprisonment); *see also* 28 U.S.C. §§ 2241-55 (establishing procedures for the issuance of writs of habeas corpus for persons in the custody of the United States in violation of the U.S. Constitution).

[143] 28 U.S.C. § 1350.
[144] H.R. REP. NO. 102-367, *supra* note 114, at 3.
[145] 28 U.S.C. § 1350.
[146] *See supra* note 134 and accompanying text.
[147] International Covenant on Civil and Political Rights, *supra* note 129, art. 7.
[148] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37(a), at 167, U.N. Doc. A/44/25 (1989).
[149] Geneva Convention IV, *supra* note 57, art. 3(1)(a), (c).
[150] *Id.* art. 32.
[151] Protocol Additional to the Geneva Convention Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, art. 4(2)(a), (e) (1978).
[152] The Convention on the Rights of the Child has been ratified by 192 states. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, *supra* note 130, at 11. Protocol II has been ratified or acceded to by 157 states. INT'L COMM. OF THE RED CROSS, STATES PARTIES AND SIGNATORIES TO GENEVA CONVENTION PROTOCOL II 1-7 (2004); *see also supra* notes 130, 135 and accompanying text.
[153] The only two states that have not ratified the Convention on the Rights of the Child are the United States and Somalia. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, *supra* note 130, at 9. The United States is one of thirty-five states that has not ratified or acceded to Protocol II. *See* INT'L COMM. OF THE RED CROSS, STATES PARTIES AND SIGNATORIES TO GENEVA CONVENTION PROTOCOL II, *supra* note 152, at 1-7.
[154] U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, *supra* note 131, art. III(1).
[155] *See supra* notes 136-37 and accompanying text.
[156] American Convention on Human Rights, *supra* note 138, art. 5(2) (stating "[n]o one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment").
[157] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534, art. 4(d) (1994) (stating "[e]very woman has the right . . . not to be subjected to torture").
[158] Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67 (1987), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1, art. 6, at 83.
[159] The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women has been ratified by thirty-one states but has not been ratified by Canada or the United States. ORG. OF AM. STATES, STATUS OF RATIFICATION OF THE INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN 1-2 (2004); *see also supra* note 139 and accompanying text.
[160] Inter-American Convention to Prevent and Punish Torture, *supra* note 158, art. 2.
[161] *Id.*
[162] *Id.* art. 6.
[163] *Id.* art. 3(a-b) (prohibiting torture conducted by public servants or employees or those acting at their instigation).
[164] *Id.* art. 5 (prohibiting justification for torture due to the existence of a state of war, siege, emergency, domestic disturbance or strife, suspension of constitutional guarantees, political instability or other disasters).
[165] The Inter-American Convention to Prevent and Punish Torture has been ratified or acceded to by thirty-one states. ORG. OF AM. STATES, STATUS OF RATIFICATION OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE 1-2 (2004). In addition to the United States and Canada, the Convention was not in force and effect in Jamaica. *Id.*; *see also supra* notes 139, 159 and accompanying text (discussing the universality of instruments in the Inter-American human rights system in the absence of ratification by Canada and the United States).
[166] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 108 Stat. 463, 23 I.L.M. 1027 [hereinafter Torture Convention].
[167] OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, *supra* note 130, at 11.
[168] Torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Torture Convention, *supra* note 166, art. 1.
[169] *Id.* art. 2(1).
[170] *Id.* art. 4(1).
[171] *Id.* art. 14(1).

[172] *Id.* art. 2(3) (prohibiting exceptions for war or the threat thereof, political instability or other public emergency).
[173] *Id.* art. 16(1).
[174] U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486-01, art. III(1) (daily ed. Oct. 27, 1990).
[175] 28 U.S.C. § 1350 (2000).
[176] *Id.*
[177] *Id.*
[178] The U.S. Reservations, Declarations and Understandings with respect to the Torture Convention define torture as an act:

> specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 174, art. II(1)(a).
This definition is qualified by the requirement the acts be directed against persons in the offender's custody or physical control. *Id.* art. II(1)(b).
[179] *Id.* art. I(1).
[180] 42 U.S.C. § 1983 (2000).
[181] Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429, art. I(a-d) (1994) (imposing a duty upon states to prohibit forced disappearance of persons and punish such acts occurring within their jurisdiction). This convention closely tracks a previous U.N. instrument with respect to enforced disappearance. *See* Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, art. 2(1), at 207, U.N. Doc. A/47/49 (1992) (prohibiting states from practicing, permitting or tolerating acts of enforced disappearance).
[182] Inter-American Convention on Forced Disappearance of Persons, *supra* note 181, art. I(a-b).
[183] *Id.* art. X (prohibiting war or the threat thereof, political instability or other public emergency as justifications for enforced disappearance).
[184] *Id.* art. XI.
[185] Forced disappearance is defined as:

> the act of depriving a person or persons of their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

Id. art. II.
[186] ORG. OF AM. STATES, STATUS OF RATIFICATION OF THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS 1-2 (2004). The Inter-American Convention on Forced Disappearance has been ratified by Argentina, Bolivia, Costa Rica, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. *Id.*
[187] *Id.*
[188] 28 U.S.C. § 2680(h) (2000).
[189] 28 U.S.C. §§ 2241-55.
[190] Civil and Political Rights Covenant, *supra* note 129, art. 9(1) (providing "[n]o one shall be subjected to arbitrary arrest or detention").
[191] *Id.*
[192] *Id.* art. 9(2).
[193] *Id.* art. 9(3).
[194] *Id.*
[195] *Id.* art. 9(4).
[196] *Id.* art. 9(5).
[197] U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, *supra* note 131, art. III(1).
[198] Convention on the Rights of the Child, *supra* note 148, art. 37(b).
[199] *Id.* art. 37(d).
[200] *Id.* art. 37(c).
[201] *Id.*
[202] *See supra* note 153 and accompanying text.

[203] American Convention on Human Rights, *supra* note 138, art. 7(2) (providing "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto"). Detentions in contravention of national constitutions and laws are deemed "arbitrary." *Id.* art. 7(3).
[204] *Id.* art. 7(4).
[205] *Id.* art. 7(5).
[206] American Convention on Human Rights, *supra* note 138, art. 7(5).
[207] *See supra* note 139 and accompanying text.
[208] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 702(e), cmt. n.
[209] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766-69 (2004).
[210] *Id.* at 2769.
[211] U.S. law does not recognize a cause of action specifically enumerated as arbitrary detention. *See* 28 U.S.C. § 2680(h) (2000) (lifting tort immunity for federal investigative or law enforcement officers only if the detention constitutes false imprisonment); *see also* 28 U.S.C. §§ 2241-55 (establishing procedures for the issuance of writs of habeas corpus for persons in the custody of the United States in violation of the U.S. Constitution).
[212] International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2, art. 6(a-e) (2000).
[213] *Id.* art. 6(a)(2), (b)(2), (c)(2), (d)(2), (e)(2).
[214] *Id.* art. 6(a)(3), (b)(3), (c)(3), (d)(3), (e)(3).
[215] *Id.* art. 6(a)(4), (b)(4), (c)(5), (d)(5), (e)(7).
[216] U.N., RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1 (2004). The Rome Statute of the International Criminal Court was adopted on July 17, 1998 by the U.N. Diplomatic Conference on the Establishment of an International Criminal Court.
[217] *Id.* at 1.
[218] *Id.* at 6. The United States signed the Rome Statute on December 31, 2000 but has not ratified its obligations or acceded to its terms.
[219] Genocide Convention, *supra* note 56, art. 1.
[220] *Id.* art. 3(a-e).
[221] *Id.* art. 2(a-e).
[222] *Id.* art. 2.
[223] *Id.*
[224] *Id.* art. 4.
[225] *Id.* art. 5.
[226] *Id.* art. 6.
[227] U.N., RATIFICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE 1 (2004).
[228] *Id.* at 5.
[229] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 702(a), cmt. n.
[230] Genocide Convention, *supra* note 56, art. 5.
[231] *Id.* art. 3(a-e).
[232] *Id.* arts. 5, 6.
[233] 18 U.S.C. §§ 1091-1093 (2000).
[234] Genocide and attempt to commit genocide are defined as:

> Whoever, whether in time of peace or in time of war . . . with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such –
>
> (1) kills members of that group;
> (2) causes serious bodily injury to members of that group;
> (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
> (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
> (5) imposes measures intended to prevent births within the group;
> (6) transfers by force children of the group to another group;
>
> or attempts to do so, shall be punished.

Id. § 1091(a)(1-6).
The term "national group" is defined as "a set of individuals whose identity as such is distinctive in terms of nationality or national origins." *Id.* § 1093(5). "Ethnic groups" are defined as "a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage." *Id.* § 1093(2). "Racial groups" and "religious groups" are similarly defined to include sets of individuals distinctive in terms of "physical characteristics or biological descent" in the case of race and "common religious creed, beliefs, doctrines, practices or rituals" in the case of religion. *Id.* § 1093(6), (7). "Substantial part"

is defined as "a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part." *Id.* § 1093(8). Incitement is defined as "urg[ing] another to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct." *Id.* § 1093(3).

[235] Punishment for an act of genocide involving the killing of members of a group is death or imprisonment for life and a fine of not more than $ 1 million or both. *Id.* § 1091(b)(1). All other offenses except incitement are punishable by a fine of not more than $1 million or imprisonment for twenty years or both. *Id.* § 1091(b)(2). Incitement is punishable by a fine of no more than $500,000 or imprisonment for no more than five years or both. *Id.* § 1091(c).

[236] *Id.* § 1091(d)(1-2).

[237] *Id.* § 1092.

[238] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 404 (providing "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern").

[239] *Id.*

[240] *Id.* § 404 cmt. b.

[241] *Id.*

[242] Although war crimes and crimes against humanity are defined and subject to prosecution and punishment by other human rights instruments, these documents are limited to specific conflicts rather than operating without geographic or chronological restraint. *See, e.g.*, Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR 48th Sess., 3217 mtg. at 1, U.N. Doc. S/RES/827 (1993)).

[243] International Criminal Court, Elements of Crimes, *supra* note 212, art. 8(2)(a-e).

[244] *Id.* art. 7(1)(a-k).

[245] For example, the war crime of willful killing is defined as the killing of one or more persons, the membership of such persons in a protected class as established by the Geneva Conventions and awareness on the part of the perpetrator of the factual circumstances establishing the victim's protected status. *Id.* art. (8)(2)(a)(i). By contrast, willful killing is defined as a crime against humanity if the perpetrator killed one or more persons as part of "a widespread or systematic attack directed against a civilian population" and the perpetrator knew or intended the conduct to be part of such an attack. *Id.* art. 7(1)(a).

[246] Examples in this regard include the terms "severe" or "great" physical or mental pain in defining the war crime of inhuman treatment and humiliating or degrading treatment utilized in establishing the war crime of outrages upon personal dignity. *Id.* art. 8(2)(a)(ii)(2), (2)(a)(iii), (2)(b)(xxi), (2)(c)(i)-3-4, (2)(c)(ii). Similar difficulties may arise from the terms "great suffering" and "serious injury to body or to mental or physical health" used in the definition of inhumane acts within the article relating to crimes against humanity. *Id.* art. (7)(1)(k).

[247] U.N., RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 216, at 1.

[248] *See supra* note 218 and accompanying text.

[249] *See supra* note 239 and accompanying text.

[250] *See supra* note 240 and accompanying text.

[251] *See supra* note 241 and accompanying text.

[252] U.S. law only provides for criminal liability for perpetrators of war crimes. 18 U.S.C. § 2441(a) (2000) (providing for fine, imprisonment and potential death sentence for persons convicted of committing war crimes inside or outside of the United States).

[253] Slavery Convention, Mar. 9, 1927, art. 2(a-b), 60 L.N.T.S. 253.

[254] *Id.* art. 1(2).

[255] *Id.* art. 1(1).

[256] Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Apr. 30, 1957, 226 U.N.T.S. 3. Article 1(a) defines debt bondage as:

> the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Id. art. (a).

Serfdom is defined as "the condition or status of a tenant who is by law, custom or agreement bound to live and labor on land belonging to another person and render some determinate service to such other person, whether for reward or not, and is not free to change his status." *Id.* art. 1(b). Prohibited practices relating to marriage include arranged marriages of women without their right to refuse in exchange for payment of consideration, the transfer of a married woman to another by her husband or his family in exchange for consideration and the transfer by inheritance of a woman upon the death of her husband. *Id.* art. I(c)(i-iii). The definitions of the slave trade and slavery are identical to those set forth in the Slavery Convention. *Id.* art. 3(1)(a), (c).

[257] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), Nov, 19, 2000, 38 I.L.M. 1207, art. 1 (1999) [hereinafter Child Labor Convention].
[258] *Id.* art. 3(a).
[259] *Id.* art. 1.
[260] *Id.* arts. 6(1), 7(1).
[261] U.N. RATIFICATION OF THE SLAVERY CONVENTION 1-6 (2004); *see also* U.N., RATIFICATION OF THE SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY, THE SLAVE TRADE AND INSTITUTIONS AND PRACTICES SIMILAR TO SLAVERY 1-8 (2004); ILO, RATIFICATION OF THE CONVENTION CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR 1-6 (2004); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 702 rptr. n. 4.
[262] Slavery Convention, *supra* note 253, art. 2(a-b).
[263] Child Labor Convention, *supra* note 257, arts. 1, 7(1).
[264] *Id.*
[265] Slavery Convention, *supra* note 253, art. 2(a-b).
[266] 18 U.S.C. §§ 1581-94 (2000) (prohibiting acts relating to utilizing vessels for the slave trade, enticing persons into slavery, seizures, detentions, transportation and sales of slaves, possession of slaves and trafficking in slaves).
[267] 22 U.S.C. § 7107(d)(1)(A-B) (2000).
[268] *Id.* § 7108(a)(1)(A-C). Penalties include investigation, regulation or prohibition upon foreign exchange transactions, transfers of credits and payments or the importation or exportation of currency or securities as well as actions directed at property within the jurisdiction of the United States in which such trafficker may maintain an interest. 50 U.S.C. § 1702(a)(1)(A-B). Violations of such restrictions are punishable by fines ranging from $10,000 to $50,000 and ten years imprisonment for willful violations. *Id.* § 1705.
[269] 42 U.S.C. § 1983 (2000).
[270] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 12, § 404.
[271] *See supra* note 241 and accompanying text.
[272] Civil and Political Rights Covenant, *supra* note 129, art. 8(1-2).
[273] Uncertainty may exist to the extent the Civil and Political Rights Covenant does not expressly reference debt bondage, serfdom and practices relating to the status of women as prohibited by the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. This uncertainty is eliminated to the extent slavery is defined to include all variations set forth in the Slavery Convention and the Supplementary Convention.
[274] Civil and Political Rights Covenant, *supra* note 129, art. 8(1).
[275] U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, *supra* note 131, art. III(1).
[276] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 6(1), at 97, U.N. Doc. A/6316 (1966) (providing "[t]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses").
[277] *Id.*
[278] *Id.* art. 2(1).
[279] *Id.* art. 4.
[280] OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, *supra* note 130, at 11. The Economic, Social and Cultural Rights Covenant has been ratified or acceded to by 149 states, including all members of the developed world, other than the United States, and the most populous states in the developing world, other than Indonesia and Pakistan.
[281] Protocol Additional to the Geneva Convention Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II), *supra* note 151, art. 4(2)(f).
[282] *Id.* art. 2.
[283] *See supra* note 152 and accompanying text.
[284] American Convention on Human Rights, *supra* note 138, art. 6(1).
[285] *Id.*
[286] *Id.*
[287] *See supra* note 139 and accompanying text.
[288] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S. Treaty Series No. 69 (1988), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc. 6 rev. 1, art. 6(1), at 67 (1992).
[289] *Id.* art. 6(2).
[290] Only sixteen of the thirty-four states constituting the membership of the Inter-American human rights system have signed the Additional Protocol and, of these sixteen, only thirteen have ratified or acceded to its provisions. ORG. OF AM. STATES, STATUS OF RATIFICATION OF THE ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA

OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1-2 (2004). Neither the United States nor Canada has signed the Additional Protocol. *Id.*

[291] 630 F.2d 876 (2d Cir. 1980).