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Book Review

Global Labor Rights and the Alien Tort Claims Act


Reviewed By Sarah H. Cleveland*

Are labor rights human rights? Are some worker rights so fundamental that they must be respected by all nations, and all corporations, under all circumstances? If so, who has authority to define such rights, and how should they be enforced? What is the effect on the global economy of enforcing international worker rights? These are some of the questions confronted by the authors of Human Rights, Labor Rights, and International Trade, a compilation of essays by an international group of scholars, labor rights activists, and corporate executives addressing contemporary topics in the dialectic among labor, trade, and human rights.1

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Workers, advocates, and governments have long pressed for international cooperation in developing a global worker-rights regime. The idea of international collaboration was urged at the Congress of Vienna in 1815;\(^2\) Kaiser Wilhelm convened the first international labor standards conference in Berlin in 1890;\(^3\) and the International Labour Organization (ILO) was organized in 1919 to develop international standards and promote international cooperation in labor rights. Proposals for "linkage"—or conditioning trade privileges on compliance with international labor standards—also are not new. The United States banned importation of convict-made goods as early as 1890;\(^4\) the British Board of Trade proposed an international treaty forbidding trade in prison-made products in 1895, and a similar bar was proposed for inclusion in the Treaty of Versailles at the close of World War I.\(^5\) The possibility of linkage between worker rights and trade was raised at the 1927 World Economic Conference,\(^6\) and the 1948 Charter of the International Trade Organization included a commitment to fair labor standards.\(^7\) Although the world community has proven increasingly effective over this period at

2. See C.K. Webster, THE CONGRESS OF VIENNA, 1814-1815, at 76 (1918) (noting that a report issued by the Congress's Conference on the Slave Trade resulted in "a formal declaration on the subject"). The earliest advocates of the internationalization of worker rights were European industrialists, politicians, doctors, and prison wardens, all of whom felt that market forces prevented improvements from being effective at the national level. See Lammy Betten, INTERNATIONAL LABOUR LAW 2-3 (1993).


5. See Chamovitz, Trade, Employment, and Labour Standards, supra note 1, at 162 (citing 2 THE ORIGINS OF INTERNATIONAL ORGANIZATION 328 (James T. Shotwell ed., 1934)).

6. LEAGUE OF NATIONS, REPORT AND PROCEEDINGS OF THE WORLD ECONOMIC CONFERENCE 232 (1927) (Containing a proposal by the British Labour Party and Trades Union Congress for an international agreement boycotting goods produced in conditions that failed to satisfy ILO standards).

7. See OECD STUDY, supra note 1, at 169; Havana Charter for an International Trade Organization, Mar. 24, 1948, art. 7(1), U.S. DEP'T OF STATE, COMMERCIAL POLICY SERIES, PUB. NO. 3206, at 32 (providing that "[t]he Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade").
promulgating labor standards, it has often proven equally ineffective at enforcing them.  

Since 1984, however, international labor rights have gained increasing credence and attention, and efforts to define the scope of international obligations toward workers have penetrated all levels of the international community, from multilateral treaties overseen by U.N. agencies to voluntary codes of corporate conduct designed to avert labor violations at the shop floor level. These events reflect the culmination of three important developments over the past several decades, which have raised the dialogue regarding international human rights, labor rights, and trade to new importance. First, the globalization of trade and investment, and the concomitant diversification of private and national economic interests, have created both the impetus and the need to focus attention on international worker rights. Corporations no longer produce or sell within national borders, with the result that working conditions abroad have gained significance both from a human rights and a trading privileges perspective.

Second, this period has seen the development and legitimization of comprehensive international norms regarding both trade and human rights—whether in the form of global treaties such as the General Agreement on Tariffs and Trade (GATT) and the International Covenant on Civil and Political Rights (ICCPR), regional agreements such as the North American Free Trade Agreement (NAFTA) and the European Union (EU), or the “soft law” rulings of international agencies such as the ILO.

Finally, the world has developed a variety of new methods for enforcing these norms: through international and regional courts and agencies such as the World Trade Organization (WTO), the European Court of Human Rights, and the Yugoslavian and Rwandan War Crimes Tribunals; through domestic regulatory agencies and private corporations; and through “transnational public law litigation,” in which private litigants seek the articulation and vindication of international rights in domestic courts.  

Around the world today, while states bring complaints against states for trade violations before the WTO, torturers and perpetrators of genocide are being indicted and held accountable in international criminal tribunals in

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8. As Steve Charnovitz has noted, this tension is starkly reflected in the ongoing debates over the ILO’s effectiveness. See Charnovitz, Trade, Employment, and Labour Standards, supra note 1, at 160-63. Compare Thomas J. Schoenbaum, Remarks at the Meeting of the Section on International Law of the American Association of Law Schools, International Trade and Social Welfare: The New Agenda, in 17 COMP. LAB. L.J. 338, 351 (1996) (arguing that few nations have complied with ILO conventions and that the organization’s impact on international law has been minimal), with Nicolas Valticos, The ILO: A Retrospective and Future View, 135 INT’L LAB. REV. 473, 475 (1996) (arguing that ILO conventions have had an important impact on international labor law and have received approximately 6,300 ratifications).

the Hague and Tanzania, are facing criminal charges in domestic fora in Italy, France, and Spain, and are being sued for civil damages in the United States. As Harold Koh has described, this process is helping to create a fluid system of transnational legal accountability, in which norms are articulated and enforced in a variety of fora, both domestic and international, by and against a variety of parties, be they states, multinational corporations, or private individuals. In short, as the definition and enforcement of both trade and human rights have become internationalized, it is hardly surprising that activists, policy makers, business interests, and jurists increasingly have looked to places where these two streams have met.

Although many governments and corporations continue to oppose any linkage between trade and labor rights, there is a growing recognition that the international economy and the international labor rights movement share a common goal: workers who earn a living wage, who labor with autonomy in conditions that respect basic health and safety, in turn become consumers who can purchase what they want. As such, they contribute both to the expansion of the global economy and to the elimination of the extreme conditions of poverty where labor violations flourish.

10. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 158 (1997) (describing recent prosecutions in France, Spain, and Italy of perpetrators of Argentina's "dirty war").


12. See Koh, supra note 9, at 2371; see also Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599, 2645-58 (1997); Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181, 183-94 (1996) (both describing the present transnational legal system as one in which norms no longer are distinguishable as public-private or domestic-international, but form a monistic system of overlapping national and international institutions and rules).

13. See Denis MacShane, Asia: The Next Frontier for Trade Unions, 5 PAC. REV. 1, 3 (1992). Former United States Secretary of Labor and labor economist Ray Marshall and others have written extensively on the relationship between labor standards, high-skill forms of work organization, and increased productivity. See, e.g., RAY MARSHALL & MARC TUCKER, THINKING FOR A LIVING (1992); Ray Marshall, The Role of Management and Competitiveness Strategies in Occupational Safety and Health Standards, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 499, 505-08 (Bruce E. Kaufman ed., 1997); R. Michael Gadbaw & Michael T. Medwig, Multinational Enterprises and International Labor Standards: Which Way for Development and Jobs?, in P. 141; Stephen Herzenberg, In from the Margins: Morality, Economics, and International Labor Rights, in P. 99; Michael J. Piore, Labor Standards and Business Strategies, in LABOR STANDARDS AND DEVELOPMENT IN THE GLOBAL ECONOMY 35 (Stephen A. Herzenberg & Jorge F. Perez-Lopez eds., 1990). For these commentators, rather than being primarily a moral issue, respect for basic labor rights such as freedom of association, occupational health and safety, and skills development makes good business sense. From their perspective, the labor rights problem is not simply the failure of certain corporations and countries to respect a laundry list of discrete labor rights, but a structural problem created by forms of work organization which emphasize sweatshop strategies of low-skill, low-wage production over high-skill, high value-added forms of production. See NATIONAL CENTER ON EDUCATION AND THE ECONOMY, AMERICA'S CHOICE, HIGH SKILLS OR LOW WAGES! (1990). Such forms of production are predominant in cottage and light manufacturing industries in the Caribbean, in Mexico's maquiladora.
Moreover, although states wearing their international trade hats may oppose linkage between labor rights and trade, such linkage exists de facto, because most member states of the GATT and the WTO also have acceded to international conventions obligating them to respect and enforce basic labor rights.

Nevertheless, the status of many labor rights remains controversial and ambiguous, and definitions of some recognized rights remain so vague as to be nearly unenforceable. Consideration of labor rights in international trade agreements, and particularly in GATT negotiations for the WTO, remains highly controversial—so controversial, indeed, that last fall a dispute over the presence, or absence, of labor rights provisions in a new regional trade agreement contributed to the most important foreign trade defeat of the Clinton administration.  

*Human Rights, Labor Rights, and International Trade* presents a groundbreaking analysis of many aspects of this debate. The articles collected in the volume grew out of a March 1992 symposium entitled “Human Rights and Labor Rights: A New Look at Workers in the Global Economy,” sponsored by Yale Law School’s Orville H. Schell Center for International Human Rights. The collection is divided into three segments, respectively addressing Labor Rights and Human Rights, Labor Rights and Trade, and Litigating International Labor Rights. The book opens with an article by Yale University labor historian David Montgomery, who places the current debates in historical context and discusses the ongoing need for international labor solidarity in pressing for enforceable worker rights. Virginia Leary grapples with the question of what, if any, labor rights can be considered fundamental human rights, focusing primarily on the right to freedom of association as reflected in ILO conventions and international human rights instruments.

A number of the authors consider regional or domestic efforts to define and enforce international labor rights. Denis MacShane, for example, offers a European perspective on the human rights, labor rights, and trade linkage debate, and points to current developments in the EU as an example of regional efforts to address the issue. Steven F. Diamond takes an early look at NAFTA and the labor side agreement, placing NAFTA in the context of the transnational economy and the weakened plants, and in the export processing zones of many developing countries. Minimum labor standards help eliminate this low-wage option by forcing employers to focus on increasing productivity rather than suppressing wages. This high-wage, high-skill strategy has been pursued successfully by European companies, with governmental encouragement, for many years. See, e.g., Sarah H. Cleveland, *U.S.A. and UK Government Policy in Youth Training for the New International Economy: Lessons from Abroad*, 2 OXFORD STUD. COMP. EDUC. 107, 119-25 (1992).

U.S. labor movement. Philip Alston offers a penetrating critique of efforts to condition U.S. foreign trade laws on compliance with international human rights, and he condemns the United States's "aggressive unilateralism" as undermining ILO efforts to build a global consensus in this area.

Steven Herzenberg, R. Michael Gadbaw, and Michael T. Medwig place the international labor rights movement in the context of the global economy, examining the relationship between the goals of international labor standards and global economic development, and discussing the extent to which linkage of trade and labor standards can help, or hinder, such development. Cecilia Green, in turn, considers this problem from the ground-level perspective of low-wage workers in the light manufacturing sectors of the Caribbean. Daniel Ehrenberg proposes an innovative solution for cooperative enforcement of labor rights, combining the trade sanction authority of the WTO with the labor standards expertise of the ILO. Lance Compa and Tashia Hinchliffe Darricarrère turn to private corporate efforts to respect worker rights, examining the development of voluntary "codes of conduct" for the activities of multinational corporations abroad.

Finally, labor rights litigators Terry Collingsworth, Frank Deale, and Emily Yozell explore the possibilities offered by domestic litigation for promoting international worker rights. Through their explication of three sample cases, the authors consider the doctrinal, and in particular, the practical, economic, ethical, and strategic obstacles to representing the interests of workers in distant fora.

*Human Rights, Labor Rights, and International Trade* provides valuable insights into the labor rights and trade debate. As a collection of expert perspectives, its weakness, if any, is the lack of a comprehensive perspective on the issues discussed. This Review accordingly attempts to provide the overview that the book lacks, in light of recent developments in the fields of trade and labor rights. Part I examines the transnational labor-rights regime, including the doctrinal framework and the variety of global, regional, domestic, and private enforcement mechanisms that have proliferated at the intersection of labor, trade, and human rights. Part II argues that although impressive inroads have been made in many areas, the global community continues to disagree fundamentally about two important questions in labor rights: the possibility of a universal definition of "relative" labor rights such as wages and work place conditions; and the appropriateness of direct linkage between trade sanctions and labor practices. Finally, Part III argues that the Alien Tort Claims Act, which has experienced a burgeoning importance in transnational human rights litigation in the United States, also has an important, if narrowly confined,
role to play in the enforcement of the prohibition against forced labor and other universally recognized worker rights.

I. The Transnational Labor Rights Regime: Defining and Enforcing Fundamental Worker Rights

This Part describes the transnational labor rights regime, a loose but interlocking network of structures for the definition and enforcement of fundamental labor rights. At the global level, the ILO's conventions and recommendations, and multilateral human rights instruments, play a crucial role in delineating and defining worker rights but provide few options for enforcement. At the regional level, the EU and NAFTA provide two examples of multilateral efforts at labor rights protection, with the EU enjoying the strongest definitional and enforcement mechanisms. Domestically, the United States has contributed to the possibility of labor rights enforcement by conditioning various trade and foreign assistance benefits on compliance with fundamental rights. Corporate "codes of conduct" and social labeling efforts have brought labor rights enforcement to the shop floor, and domestic litigation offers creative and largely unexplored possibilities for refining and enforcing international labor rights.

A. The Global Regime: The ILO and Multilateral Instruments

International agencies and instruments have played a foundational role in identifying and refining fundamental worker rights. Since its instigation nearly eighty years ago, the ILO has promulgated 177 conventions regarding a wide range of worker rights. The ILO identifies seven of these conventions as setting forth "fundamental human rights," which must be respected by all nations under all circumstances. These include various conventions protecting freedom of association and the right to organize and bargain collectively, the forced labor conventions, and the

16. Uniquely among United Nations organizations, ILO standards are developed and implemented on a tripartite basis, through cooperation among representatives of governments, labor, and employer organizations.


19. See Convention Concerning Forced or Compulsory Labour (No. 29), June 28, 1930, 39 U.N.T.S. 55, reprinted in 1 LABOUR CONVENTIONS, supra note 18, at 115 (entered into force May 1,
conventions protecting equal pay and prohibiting discrimination in employment.20 With the notable exception of the United States, which has ratified only one of the core ILO conventions (No. 105),21 the core conventions are nearly universally embraced. To date, at least 119 nations have formally agreed to adhere to each of these conventions.22 The ILO also lists as “fundamental” the child labor convention, although only 51 states have ratified that instrument.23

The basic labor rights have been incorporated into foundational international human rights instruments such as the Universal Declaration of Human Rights (Declaration),24 the International Covenant on Civil and Political Rights (ICCPR),25 and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).26 All three of these instruments guarantee the right to freedom of association, including the right to form and join trade unions,27 and the right to freedom from discrimination.28

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22. See ILO, Human Rights, supra note 17. Specifically, the ILO reports the following total ratifications for these Conventions:
   - Convention No. 29: 143 ratifications
   - Convention No. 87: 119 ratifications
   - Convention No. 98: 133 ratifications
   - Convention No. 100: 127 ratifications
   - Convention No. 105: 120 ratifications
   - Convention No. 111: 123 ratifications

Id.


27. See Declaration, supra note 24, arts. 20, 23, at 75; ICCPR, supra note 25, art. 22, 999 U.N.T.S. at 178, 6 I.L.M. at 374-75; ICESCR, supra note 26, art. 8, 993 U.N.T.S. at 6-7, 6 I.L.M. at 362.

28. See Declaration, supra note 24, arts. 2, 7, at 72-73; ICCPR, supra note 25, arts. 3, 26, 999 U.N.T.S. at 174, 179, 6 I.L.M. at 369, 375; ICESCR, supra note 26, arts. 3, 7(c), 993 U.N.T.S. at 5-6, 6 I.L.M. at 361-62.
The Declaration and ICCPR also prohibit slavery and servitude. Thus, these rights may be considered the core of an evolving positive and customary international law of labor and human rights.

Possibilities for enforcement of these provisions at the international level, however, are extremely limited. The ILO has established a vast expertise in promulgating labor standards and has authority to provide technical assistance, oversee labor conditions, and publicize violations. It has no ability to impose sanctions, however, and its enforcement authority is limited to "mobilizing shame" against member state violators. Similarly, the human rights instruments themselves provide few possibilities for sanction-backed enforcement. The U.N. Human Rights Committee, which is responsible for oversight of state compliance with the ICCPR, has limited investigatory and reporting authority but no ability to impose sanctions. Efforts to achieve global enforcement of these rights by linking state labor practices to trading privileges under the WTO repeatedly have faltered, as discussed in Part II. Thus, elaboration and enforcement of the standards prescribed at the global level is left largely to regional and national mechanisms.

29. See Declaration, supra note 24, art. 4, at 73; ICCPR, supra note 25, art. 8, 999 U.N.T.S. at 175, 6 I.L.M. at 371.

30. In its 1996 study, the OECD similarly identified (1) freedom of association and the right of collective bargaining; (2) the prohibition of forced labor; (3) the prohibition of discrimination in employment; and (4) the prohibition of exploitative forms of child labor as "core" labor standards. See OECD STUDY, supra note 1, at 25. The OECD describes these standards as expressing "well-established elements of international jurisprudence concerning human rights." Id. at 27. The U.S. State Department also recognizes that [a]n international consensus exists, based on several key International Labor Organization (ILO) Conventions, that certain worker rights constitute core labor standards. These include freedom of association—which is the foundation on which workers can form trade unions and defend their interests; the right to organize and bargain collectively; freedom from gender and other discrimination in employment; and freedom from forced and child labor.


32. See ICCPR, supra note 25, arts. 28-45, 999 U.N.T.S. 179-84, 6 I.L.M. 376-81 (outlining the structure and authority of the Human Rights Committee). The jurisdiction of the International Court of Justice (ICJ) is limited to claims between states that have submitted voluntarily to the court's jurisdiction. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36(2). Decisions of the court are enforceable only through action of the U.N. Security Council. See U.N. CHARTER art. 94, ¶ 2; see also Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 934 (D.C. Cir. 1988) (holding that "neither individuals nor organizations have a cause of action in an American court to enforce ICJ judgments").
B. Regional Labor Rights Regimes

1. The European Union.—Regional economic and political agreements also have given increasing attention to questions of worker rights. Undoubtedly the most advanced such agreement is the so-called “Social Chapter” of the 1992 Maastricht Treaty, the foundational instrument of the EU. The Social Chapter is a modern outgrowth of the social provisions of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1961 European Social Charter adopted by the Council of Europe, the 1989 Social Charter, and the implementing Social Action Programme. The Chapter obligates members of the EU to respect the following basic rights: (1) freedom of movement; (2) employment and fair remuneration; (3) living and working conditions; (4) social protection; (5) freedom of association and collective bargaining; (6) vocational training; (7) equal pay for men and women; (8) information, consultation, and participation rights; (9) workplace health and safety; (10) protection of children; (11) protection of the elderly; and (12)
protection of the disabled. The most important development under the Social Chapter is that issues relating to working conditions, sex equality, and other worker concerns are now subject to qualified majority voting among Union members, whereas labor rights provisions other than health and safety previously required unanimity and were routinely blocked by the United Kingdom. Thus, the Maastricht Treaty makes possible the majoritarian adoption of trans-European workplace rights, creating the only regional system of workplace regulation in the world.

This EU system provides for "upward harmonization" of worker rights. Commission directives are intended to establish the floor below which no member state may go, although states are welcome to provide protections in excess of the Commission's directives. Directives generally must be individually implemented by member states according to their own "choice of form and methods."

Importantly, trans-European labor provisions are enforceable both through national courts and through the European Court of Justice of the European Communities (ECJ). Member states and the Commission are allowed to bring original actions before the ECJ, alleging that another state has failed to comply with the Convention's provisions or to enact legislation implementing a directive. Under Article 177 of the European Economic Community Treaty, individuals may enforce rights protected by EU law in their domestic courts, with decisions rendered regarding EU law reviewable in the European Court. National courts may also request advisory rulings from the ECJ on interpretations of EU law arising in domestic litigation.

In addition to the rules and mechanisms available under the Social Chapter, the EU recently agreed to a provision that directly links the

41. See MacShane, supra note 3, at 69 n.12; see also Jackson, supra note 35, at 31 (noting that the Maastricht Social Chapter "covers the same ground" as the 1989 Social Action Programme).
42. The EU continues to require unanimous voting for instruments relating to social security, employment contract terminations, collective bargaining, and immigration. See Dowling, supra note 35, at 55.
44. See EC TREATY art. 117.
45. Id. art. 189 (as amended 1992).
46. See id. art. 169 (allowing the Commission to bring an action); id. art. 170 (allowing states to bring actions).
47. For further discussion of the legal structure of the EU, see Jackson, supra note 35, at 16-21.
48. See EC TREATY art. 177 (as amended 1992).
granting of EU Generalized System of Preferences (GSP) trade benefits to compliance with worker rights and provides special incentives for countries that adopt and apply core ILO standards. The EU invoked the provision to terminate GSP benefits to Burma due to that country's forced labor policies, representing the first time that the EU has formally linked trade benefits with worker rights.

2. The North American Free Trade Agreement.—Compared to Europe, regional efforts at overseeing worker rights protections are newcomers to the western hemisphere. Responding to pressure from domestic labor groups, Congress and President Clinton conditioned their approval of NAFTA in 1993 on the adoption of the so-called "labor side agreement," the North American Agreement on Labor Cooperation (NAALC). The NAALC stands as the first regional labor agreement among the United States, Canada, and Mexico and as the first international trade agreement conditioned on labor protections that the United States has ever signed. Unlike the European Social Chapter, the NAALC is not designed to require "upward harmonization" of regional labor standards. The agreement instead requires the NAFTA member countries to comply with and enforce their domestic labor laws, and to ensure the availability of fair domestic tribunals to adjudicate labor disputes. The NAALC also establishes an international complaint process through which interested private parties may challenge another country's compliance with its own labor laws.

The NAALC recognizes eleven labor rights as fundamental: (1) freedom of association and the right to organize; (2) the right to bargain collectively; (3) the right to strike; (4) the prohibition of forced labor; (5) the prohibition of child labor; (6) minimum employment standards

49. See OECD STUDY, supra note 1, at 186-88.
52. Although the first such trade agreement, NAFTA is not the first international agreement between the United States and Mexico relating to worker rights. The Bracero Treaty, which was first adopted in 1942, established a foreign guestworker program allowing the importation of Mexican agricultural workers into the United States, conditioned on certain labor protections. See Agreement Between the United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, U.S.-Mex., 56 Stat. 1759. Approximately 400,000 Mexicans were employed in the United States under the Bracero program in its heyday in the late 1950s. See Richard Louv, Mexican Migration Story of Hope and Pain: Hospitality Parallels Hostility, SAN DIEGO UNION TRIB., Mar. 16, 1986, at A1.
(minimum wages and overtime pay); (7) nondiscrimination in employment; (8) equal pay for men and women; (9) occupational health and safety; (10) worker compensation; and (11) protection of migrant workers.\footnote{53} No minimum acceptable standards are set forth in the NAALC, and member states are obligated to promote these principles through their own labor laws "to the maximum extent possible."\footnote{54} The interpretation of these rights is not expressly tied to ILO standards.

NAALC oversight emphasizes collaboration, and the enforcement structure is much weaker than that in Europe. Alleged violations of the NAALC are not subject to judicial review, but they can be considered pursuant to a three-tier administrative investigation and enforcement process. Oversight of the first three rights covered by the NAALC (freedom of association and the right to organize, the right to bargain collectively, and the right to strike) is limited to consultation among the appropriate ministers. Violations of the five labor standards relating to forced labor, employment discrimination, equal pay, worker compensation, and migrant workers are subject to both ministerial consultation and consideration by the multilateral Evaluation Committee of Experts. Actual sanctions can be imposed only to enforce the norms relating to occupational health and safety, child labor, and minimum wage standards, and then only if a nation has established a "persistent pattern" of nonenforcement.\footnote{55} Like the ILO, the NAALC Council and Secretariat promote regional cooperation and publish reports on various labor-related issues. Member governments also must maintain a National Administrative Office (NAO) within their labor ministries to gather and share information and to receive public communications on labor issues.\footnote{56} To date, a number of labor petitions have been filed under the NAALC, most notably alleging Mexico's violations of the right to freedom of association and, more recently, of gender discrimination in the workplace.\footnote{57} The petitions have resulted in reviews of various Mexican and U.S. practices, although no sanctions have been imposed.\footnote{58}

\footnote{53} See NAALC, \textit{supra} note 51, Annex 1, at 1515-16.
\footnote{54} Id. art. 1, at 1503.
\footnote{55} Id. art. 27, at 1509. For further discussion of the NAALC review process, see generally Murphy, \textit{supra} note 51, at 407-15.
\footnote{56} See NAALC, \textit{supra} note 51, arts. 5, 8, 9, 12, 15, 16, 32 I.L.M. at 1504-07.
\footnote{57} In response to a NAALC complaint filed by Human Rights Watch and other American and Mexican human rights and labor groups, the U.S. Labor Department recently investigated claims of sex discrimination in the maquiladora industries at the U.S.-Mexican border. The Department found that many of the 2,700 maquiladora plants, most of which are U.S.-owned, fire or force the resignation of pregnant women workers. Based on this investigation, the Labor Department requested consultation with Mexico. See Sam Dillon, \textit{Sex Bias at Border Plants in Mexico Reported by U.S.}, \textit{N.Y. Times}, Jan. 13, 1998, at A6. Whether or not the practice violates the NAALC will turn on whether Mexico's domestic labor code prohibits such discrimination.
Despite the NAALC’s prominence as the United States’s first international trade and labor agreement, the accord has been a lightning rod for criticism from both free trade and labor rights advocates. Free trade proponents fear any expansion of the labor rights protections under the side accord and oppose its replication in future trade agreements. Labor unions, on the other hand, have criticized the NAALC for lacking sufficient independence and enforcement authority to be effective.59 In particular, labor critics point to the limited availability of sanctions under the agreement and to the absence of any impetus for improvement or harmonization of labor standards in the member states. Whatever the merits of these criticisms, it is clear that the NAALC’s primary contribution to the transnational labor rights regime to date has been to create a forum for regional public awareness of labor rights issues. As Lance Compa, co-editor of Human Rights, Labor Rights, and International Trade and the former Director of Labor Law and Economic Research at the NAALC Secretariat, explains elsewhere, the NAO review process has “forced the companies and the government to review their own actions and to have subordinate officials explain their decisions to superiors.”60 Graciela Areous concurs that “the greater transparency which is likely to ensue by making each country’s compliance with the labor laws in force a trinational issue, could well contribute to discouraging those management strategies that violate workers’ rights in their efforts to adapt to new economic circumstances.”61 Despite its limitations, then, the NAALC stands as a groundbreaking step toward regional collaboration in the development and oversight of labor rights.

C. Domestic Enforcement of the Transnational Regime

Given the limited availability of multilateral enforcement mechanisms outside the EU, unilateral enforcement by leading trading nations can play an important role in giving teeth to the international labor rights system. Despite its persistent unwillingness to ratify ILO conventions, the United States has been a leader in tying its trade and foreign assistance laws to
compliance with internationally recognized worker rights. Voluntary social labeling schemes and corporate codes of conduct, and nascent efforts at litigating international labor rights in domestic courts, round out the United States's contribution to the transnational labor rights regime.

1. United States Trade Laws.—Within the United States, efforts to promote international labor rights have gained strength even as the membership of the U.S. labor movement has waned. In the past fifteen years, a number of U.S. statutes relating to international trade and investment have been amended to condition the granting of benefits on compliance with international labor rights. The most notable of these statutes is the Generalized System of Preferences (GSP) established under the 1974 Trade Act. In 1984, the GSP was amended to require that the President withhold GSP trading privileges from any country that "has not taken or is not taking steps to afford [its workers] internationally recognized worker rights." Internationally recognized labor rights" are defined as (1) freedom of association; (2) the right to organize and bargain effectively; (3) freedom from forced labor; (4) freedom from child labor; and (5) minimum employment conditions (minimum wages, hours of work, and occupational safety and health). With the exception of the prohibition on discrimination in employment (which the GSP statute does not include), these rights mirror those recognized by the ILO as fundamental. The statute does not expressly incorporate ILO standards with respect to these rights, although the U.S. State Department interprets the rights in light of the applicable ILO conventions and publishes information relating to labor rights compliance in its annual Country Reports.

Trade and investment laws with similar provisions include the Caribbean Basin Initiative, the Overseas Private Investment Corporation


64. Id. § 2462(b)(7).
65. See id. § 2462(a)(2).
Act (OPIC), and the Omnibus Trade and Competitiveness Act of 1988. Since 1994, federal law has required U.S. delegates to the World Bank, the International Monetary Fund, and other international lending programs under the International Financial Institution to use their “voice and vote” to press borrowing countries to guarantee internationally recognized worker rights as set forth in the GSP and relevant ILO conventions. Clauses conditioning benefits on labor rights compliance are included in the Andean Trade Preference Act and the Multilateral Investment Guarantee Agency. After revelations that the U.S. Agency for International Development (AID) was providing funding to help companies in Central America blacklist union activists, the AID statute was amended to prohibit any foreign aid that “contributes to the violation” of worker rights.

In contrast to the ILO and NAFTA systems, many of the domestic trade and investment laws do provide for the imposition of sanctions against countries whose labor practices are deemed insufficient. Benefits to a number of countries have been canceled, withheld, or suspended pursuant to these provisions. The U.S. State Department’s annual


73. Foreign Assistance Programs of the United States Agency for International Development, 22 U.S.C. § 2151 (1994); see also Compa, supra note 51, at 340 n.14 (discussing the amendment to the AID statute and other trade and investment laws).

investigation and reporting of labor rights conditions, pursuant to these provisions, also plays an important domestic role in the mobilization of shame against egregious labor rights violators.

In addition to the general trade, foreign assistance, and investment laws discussed above, country-specific statutes help to ensure respect for international worker rights by restricting foreign investment in, or the importation of products from, certain countries that engage in repressive human rights practices. In April 1997, for example, President Clinton imposed a ban on new U.S. investment in Burma pursuant to the 1996 Cohen-Feinstein law, which mandates sanctions if the Burmese military government engages in "large scale repression" against political dissidents. In the fall of 1997, President Clinton signed a ban on the importation of goods made by bonded child labor, although Congress appropriated no additional Customs Service funds for its enforcement. Indeed, proposed legislation sanctioning foreign nations or imposing trade barriers on foreign goods produced by child or forced labor has become vogue. More than nine other such bills were introduced in Congress during 1997.
Unilateral enforcement of the labor rights regime through U.S. laws that are not expressly tied to ILO standards has provoked criticism by Philip Alston and others that U.S. trade linkage is a rogue system which undermines the effort to develop universal labor standards. Unilateral trade restrictions also may conflict with U.S. obligations under the antidiscrimination provisions of the GATT, such as the "National Treatment" provision, which has been construed by the WTO as prohibiting countries from differentiating among foreign products based on methods of production that do not affect the product's character. Such shortcomings aside, however, domestic trade laws pose a potentially valuable means for nations to encourage compliance with fundamental labor rights.

2. Private Corporate Codes of Conduct and Social Labeling.—In the private sector, the past decade has also seen a dramatic increase in the development of voluntary "codes of conduct" and "social labeling" schemes by multinational corporations and industries to guide their economic activities abroad. Private codes of conduct draw inspiration from international instruments such as the United Nations Code of Conduct on Transnational Corporations, the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and


81. See United States—Restrictions on Imports of Tuna from Mexico, GATT B.I.S.D. (39th Supp.) at 155, 205 (1993) (holding that U.S. import restrictions based on the method used to harvest foreign tuna violated GATT rules); see also LAWYERS COMMITTEE, supra note 62, at 66 ("Without an internationally recognized basis on which to impose trade sanctions, any United States action under Section 301 to address the denial of worker rights by a fellow signatory would appear to constitute a substantive violation of GATT's MFN clause, or at least a procedural evasion of GATT's dispute resolution mechanism."). The Multilateral Agreement on Investment, which the OECD has been negotiating since 1995, may pose similar obstacles to domestic efforts to link labor rights and international investment. For a draft of this agreement, see Multilateral Agreement on Investment (last modified Feb. 20, 1998) <http://www.oecd.org>. Negotiations on the agreement are scheduled for completion in May 1998.

82. In the early 1970s, the United Nations developed a Code of Conduct on Transnational Corporations, which would obligate multinational corporations to respect human rights and fundamental freedoms in the countries in which they operate. The Code was never formally adopted. See Lance A. Compa & Tashia Hinchliffe Darricarrère, Private Labor Rights Enforcement Through Corporate Codes of Conduct, in Pp. 181, 183-84 (discussing the U.N. code).

83. See Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 61 INT'L LAB. OFF. OFFICIAL BULL. 49 (1978) (Series A). The ILO guidelines for multi-
the OECD Guidelines for Multinational Enterprises, as well as the "Sullivan Principles," a voluntary anti-apartheid code of conduct promoted for U.S. corporations doing business in South Africa. Development of the modern codes of corporate conduct has been spurred by public outcry over exploitative labor conditions abroad, such as the controversies surrounding Wal-Mart's Kathie Lee Gifford clothing line, and overseas operations of the Nike Corporation. The voluntary codes are intended to ensure that a corporation's foreign business practices, as well as those of its foreign subsidiaries and suppliers, are consistent with basic international human and labor rights. Such codes have now been adopted by more than a hundred companies, primarily producers of consumer goods such as Levi-Strauss, Reebok, Gap, Nike, Sears, JCPenney, Wal-Mart, Home Depot, and Philips Van-Heusen, whose operations are highly susceptible to public exposures of labor abuses.

Corporate codes of conduct vary widely in their scope, detail, and particularly in their provisions for monitoring activities and compelling compliance. The Nike Corporation, for example, has been the object of much recent criticism both for the conditions in its Indonesian, Chinese, and Vietnamese plants, and for the apparently self-serving and ineffectual nature of its internal monitoring process. Levi-Strauss, on the other hand, has a fairly elaborate structure for auditing, evaluating, and enforcing its code terms, and by 1994 had withdrawn operations from two countries (China and Burma), terminated contracts with thirty of its worldwide suppliers, and forced reforms of the employment practices of over one national corporations include a complaint system for raising labor rights violations, but they do not provide for the imposition of sanctions.

87. See infra note 89 and accompanying text.
88. See Compa & Darricarrère, supra note 82, at 186-87, 193; Posner & Clarizio, supra note 86, at 15.
89. See Dana Canedy, Nike's Asian Factories Pass Young's Muster, N.Y. TIMES, June 25, 1997, at D2 (reporting that human rights groups contend that by hiring Andrew Young to investigate overseas labor practices, Nike was trying to deflect accusations that its foreign subcontractors subject workers to sweatshop conditions); Steven Greenhouse, Nike Shoe Plant in Vietnam Is Called Unsafe For Workers, N.Y. TIMES, Nov. 8, 1997, at A1 (reporting that Ernst & Young's investigation of Nike plants in January 1997 found that workers were required to work 65 hours per week, for $10 a week, and were exposed to carcinogens at 177 times local legal standards); Bob Herbert, Nike’s Boot Camps, N.Y. TIMES, Mar. 31, 1997, at A15 (describing Nike's Vietnam factories as "military boot camps" in which workers are subjected to various forms of humiliation and corporal punishment"); Editorial, Watching the Sweatshops, N.Y. TIMES, Aug. 20, 1997, at A22 (criticizing Young's investigation of Nike factories for scheduling visits in advance and using Nike translators).
hundred others. The Gap has allowed local religious, labor, and human rights groups to monitor a contractor plant in San Salvador, a move that resulted in promising improvements in plant conditions. Liz Claiborne recently announced that it will begin opening its Guatemalan factories to inspection by independent local monitors, and Ikea and the Pottery Barn periodically hire outside agents to monitor overseas carpet looms for child labor.

Industry-wide and regional codes of conduct are being developed as well. Concerns about sweatshop conditions and exploitation in the clothing and footwear industries led President Clinton to convene the Apparel Industry Partnership in the fall of 1996. The Partnership, which is composed of industry representatives, unions, and advocacy groups, has developed an interim Workplace Code of Conduct for the apparel industry, which sets minimum standards for child labor, forced labor, workplace discrimination, and working hours. The Partnership has proposed internal and external monitoring standards and plans to create an independent association to oversee compliance with the code. Ultimately the Partnership intends to develop a “No Sweat” labeling system to identify for consumers products that were produced under conditions

90. See Compa & Darricarrê, supra note 82, at 187-90.
91. See Citizen Shell, N.Y. TIMES, Mar. 31, 1997, at A10; Watching the Sweatshops, supra note 89.
92. See Watching the Sweatshops, supra note 89. The announcement followed reports by a watchdog organization that one of Liz Claiborne’s Honduran factories employed 13-year-old children working 12-hour days, and paid the workers 65 cents to make a sweater that sold in the U.S. for $90. See id.
93. See lvovine, supra note 77 (quoting a Pottery Barn official as saying that “child labor is an issue that we cannot afford to be associated with”).
94. See Posner & Clarizio, supra note 86, at 14-15. Specifically, the code requires participating companies to pledge to provide abuse-free factories, to hire children fifteen years of age or older (or 14 years of age or older in countries allowing child labor below age 15), to limit the workweek to 60 hours, to protect the right of workers to organize without fear of retaliation, and to pay the local minimum wage. The code calls for companies to hire independent monitors, which can include company-designated accounting firms, and requests that the monitors work with local human rights, labor, and religious groups. See, e.g., A Modest Start on Sweatshops, N.Y. TIMES, Apr. 16, 1997, at A22 (identifying the primary features and faults of the code); Steven Greenhouse, Accord to Combat Sweatshop Labor Faces Obstacles, N.Y. TIMES, Apr. 13, 1997, § 1, at 1 [hereinafter Greenhouse, Accord] (expressing labor and human rights groups’ concern that outside monitors be independent enough to point out and publicize violations). Labor and human rights groups failed to reach an agreement with the Partnership to ban all child labor below age fifteen, to impose a 48-hour workweek, and to require local independent monitoring and payment of a living wage. See Greenhouse, Accord, supra; Steven Greenhouse, Voluntary Rules on Apparel Labor Prove Hard to Set, N.Y. TIMES, Feb. 1, 1997, § 1, at 1 [hereinafter Greenhouse, Voluntary Rules]. The living wage issue was considered particularly important for workers in countries such as Vietnam, Haiti, and Indonesia, where the legal minimum wage can be as low as 27 cents per hour, well below subsistence levels. See A Modest Start on Sweatshops, supra (discussing Vietnam); Greenhouse, Voluntary Rules, supra (discussing Haiti and Indonesia).
95. See Posner & Clarizio, supra note 86, at 14.
free from child or prison labor or other substandard conditions. Thus, the group hopes to utilize market incentives to encourage industry compliance with the voluntary regime.

Monitoring difficulties with the Partnership and other corporate codes remain. Internal monitoring by companies may smell of the fox minding the chicken coop, and serious questions arise regarding the extent to which code violations will be disclosed to the public or affect a company's ability to utilize the "No Sweat" labels. Labeling programs also run the risk that goods will be fraudulently mislabeled as "child-" or "sweat-free." Accordingly, legislation was introduced in Congress last spring which would have authorized the United States Department of Labor to develop voluntary child-labor-free labeling standards, to maintain a list of companies that made exemplary progress toward ensuring they did not use child labor, and to sanction fraudulent labeling practices. In short, as Human Rights, Labor Rights, and International Trade authors Compa and Derricarrère note, given the variety of resources available from the ILO and elsewhere, drafting a workable corporate code of conduct or labeling scheme for an industry is a relatively easy task. Whether or not the codes

96. See Greenhouse, Accord, supra note 94.
97. Other industry-wide efforts include the Toy Manufacturers of America, which adopted a limited code of conduct regarding forced and child labor, and the Federation International of Football Associations, which adopted a strong labor code for soccer ball manufacturers following stories that 80% of the world's soccer balls were produced in Pakistan, often by child and bonded labor. See Robin Broad & John Cavanaugh, Checking It Once, Checking It Twice: Making Sure Child Labor Is off Your Christmas List, WASH. POST, Dec. 8, 1996, at C5.

Such efforts also are not limited to the United States. "Rugmark," a child-labor carpet labeling effort in India and Nepal that was originally funded by the German government, has been in operation since 1994 with promising results. The Foundation is comprised of campaigners against child labor, consumer groups, carpet manufacturers, the London-based Anti-Slavery International, UNICEF, and other international organizations. Rugmark oversees a voluntary program whereby carpet exporters can mark their carpets as child-labor free, operates shelters and schools for rescued child workers, and monitors production by exporters using the label. One percent of the price paid by foreign importers goes toward assisting rescued children. To date, Rugmark has issued 144 export licenses, covering nearly 500,000 exported carpets, and has pulled licenses from 174 looms that were found to be employing children illegally. See Mukul Sharma, Slaves of the Looms Escape to Rediscover Childhood, SCOTLAND ON SUNDAY, Feb. 8, 1998. Here again, monitoring of the widely dispersed looms remains the largest concern, with critics pointing out that "[l]abels can and will be bought." See Iovine, supra note 77 (discussing criticisms of rug labeling efforts); see also Molly Moore, Factories of Children: Youth Labor Force Growing in Asia to Meet Export Demand, Help Families, WASH. POST, May 21, 1995, at A1 (noting that carpet manufacturers have responded to child labor inquests by moving work from large factories to smaller loom owners and subcontractors in villages accessible only "by foot or bullock cart"); Christopher Thomas, Drive to Ban Child Labour Makes India's Poor Poorer, TIMES (London), Feb. 3, 1996 (describing the difficulty in monitoring a cottage industry in which carpet production is carried out in thousands of mud houses across northern India), available in LEXIS, NEWS Library, NON-US File.
98. Greenhouse, Accord, supra note 94; see also Bob Herbert, A Good Start, N.Y. TIMES, Apr. 14, 1997, at A17 (discussing obstacles to successful monitoring under the code).
of conduct and social labeling efforts will be backed up by credible auditing and enforcement regimes remains to be seen.100

3. Litigating Compliance with the Labor Regime.—Domestic litigation is also playing an increasingly important role in the definition and enforcement of the transnational human and labor rights regime. Although labor rights have not been a traditional focus of such litigation, the past decade has seen initial, tentative efforts at enforcing international worker rights through the U.S. courts. The authors of *Human Rights, Labor Rights, and International Trade* discuss three such suits: one in which U.S. labor organizations sought to compel U.S. compliance with the GSP labor rights provisions and two in which foreign workers sought damages for a breach of a foreign collective bargaining contract and for toxic chemical exposure.

In *International Labor Rights Education and Research Fund v. Bush,*101 labor and human rights groups brought an Administrative Procedure Act challenge to the Bush administration's enforcement of the GSP labor provisions. In essence, the plaintiff organizations claimed that the administration had acted arbitrarily and in violation of the GSP statute by continuing to extend trading privileges to countries such as Malaysia, despite well-documented evidence of labor abuses. The district court dismissed the suit as nonjusticiable, finding that the vague wording of the GSP statute committed labor rights determinations to agency discretion and yielded "no law" for the court to apply.102 The decision was affirmed on appeal in a per curiam opinion with separate concurrences from Judge Henderson, who would have dismissed the action on the grounds that the Court of International Trade had exclusive jurisdiction over the claims,103 and Judge Sentelle, who would have held that the labor union and human rights organization plaintiffs lacked standing.104 Judge Mikva dissented, finding that the labor unions had standing and that the statute imposed a mandatory duty on the executive that was subject to judicial review.105

In *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*,106 employees of the Pico Korea Corporation sued to enforce their collective

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100. See Compa & Darricarrère, *supra* note 82, at 194.
104. *See id.* at 749-52 (Sentelle, J., concurring).
105. *See id.* at 754-59 (Mikva, C.J., dissenting).
bargaining agreement against the U.S.-based parent corporation, Pico Products, Inc. (Pico). The suit, which was filed in the Northern District of New York, alleged that Pico Products had tortiously interfered with the workers' contract by forcing the shutdown of the Korean corporation, in violation of the workers' collective bargaining agreement. The trial court denied Pico's motion to dismiss on grounds of forum non conveniens, finding that Pico Korea had been dissolved and no longer was subject to suit in the Korean courts. At trial, however, the court ruled for the defendants, finding that the workers had failed to demonstrate that the parent corporation could be held liable under New York law.

Finally, in *Dow Chemical Co. v. Castro Alfaro*, banana workers employed by the Standard Fruit Company in Costa Rica successfully sued the Dow Chemical Corporation in Texas state court for torts arising from the workers' exposure to dibromochloropropane (DBCP), a highly toxic pesticide used in banana production. The pesticide was known to cause infertility in men; it had been banned by the Environmental Protection Agency in the United States, and Dow previously had been held liable to California workers for millions in damages due to DBCP-related sterility. Nevertheless, Dow had continued exporting DBCP to Costa Rica without any effort to inform workers of the risks of exposure. Like the Pico defendants, Dow sought dismissal based on forum non conveniens, a motion which, if successful, effectively would have precluded the workers from suing in any forum. The Texas Supreme Court rejected this defense, however, and in 1992 the case settled with a substantial recovery for the plaintiff workers. Following the Castro Alfaro settlement, approximately twenty-five thousand other suits were filed in Texas and Louisiana between 1993 and 1995 on behalf of sterilized banana workers in twelve countries. Many of these cases have been partially settled by chemical company defendants and are still pending against banana companies.

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108. See id. at 258.
110. See Dow Chemical, 786 S.W.2d at 683 (Doggett, J., concurring) (criticizing the defendants' use of forum non conveniens in their effort to escape liability). The court ultimately held that Texas has statutorily abolished the forum non conveniens defense. Id. at 679.
111. See Costa Rica: The Price of Bananas, THE ECONOMIST, Mar. 12, 1994, at 48 (reporting that a suit by approximately 800 workers is believed to have settled for a total of $20 million, with distributions to individual workers ranging from $1500 to $15,000).
112. See Interview with Emily Yozell (Feb. 12, 1998); see also Jim Gomez, Pesticide Fund Pays Filipino Workers, FORT WORTH STAR-TELEGRAM, Dec. 12, 1997, at 2 (reporting that 13,000 agricultural workers worldwide are eligible to receive payments from a $41.5 million fund resulting from the settlement of DBCP claims against U.S. chemical companies). As a result of the Castro Alfaro litigation, the Texas legislature adopted a new forum non conveniens statute designed to limit the ability
The Bhopal environmental disaster litigation also bears mentioning here. Following the tragic leak of methyl isocyanate gas from the Union Carbide pesticide factory in Bhopal, India in December 1984, private plaintiffs and the Indian government sued Union Carbide in the Southern District of New York, seeking damages on a state law tort theory. The plaintiffs attempted to pierce the corporate veil and establish liability over the U.S. parent corporation under a theory of "multinational enterprise liability," arguing that the parent corporation, which controlled a majority interest in the Indian subsidiary, had a nondelegable duty to assure that the subsidiary's hazardous activities did not cause harm.113 Neither the tort claims nor the parental liability issues were addressed on the merits. The district court dismissed the suit on grounds of forum non conveniens, in a decision which was largely upheld on appeal.114

These cases illustrate some of the formidable obstacles that confront transnational labor suits in U.S. courts, including the doctrines of standing, forum non conveniens, piercing the corporate veil, executive deference, and personal and subject matter jurisdiction. As authors Terry Collingsworth, Frank Deale, and Emily Yozell repeatedly note, such suits can be extremely expensive, may involve difficult attorney-client relations, and may present unfamiliar issues of international law to potentially hostile courts. Nevertheless, the cases also suggest that positive results can be

of foreign claimants to bring personal injury suits in Texas courts for injuries arising outside of the jurisdiction. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon 1997). See Terrence Stutz, Senate OKs Limits on Product Liability, DALLAS MORNING NEWS, Jan. 29, 1993, at 36A (reporting that business interests have been trying since 1990 to reverse the Texas Supreme Court’s Castro Alfaro ruling).

113. For a discussion of the Bhopal case, see Koh, supra note 9, at 2369-70; see also INDIAN LAW INST., MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE (Upendra Baxi et al. eds., 1986) (collecting the pleadings, motions, and briefs from the Bhopal case); Jay Lawrence Westbrook, Theories of Parent Company Liability and the Prospects for International Settlement, 20 TEX. INT’L L.J. 321, 326-27 (1985) (proposing a multinational responsibility theory for the management of subsidiary companies in developing countries).

114. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), aff’d in part, 809 F.2d 195 (2d Cir. 1987). The plaintiffs opposed dismissal due to forum non conveniens on the grounds that they were entitled to deference in choice of forum, that Indian courts and Indian law were insufficiently equipped to deal with the mass tort, that Union Carbide’s principal place of business was the United States, and that the most probative evidence regarding Union Carbide’s negligence and causation were located in the United States. See In re Union Carbide, 809 F.2d 195, 202 (2d Cir. 1987). The court found that suit in India was more appropriate, among other reasons, because (1) the plaintiffs were foreign nationals; (2) India provided an adequate alternative forum; (3) Indian courts were better able to construe applicable Indian law; (4) witnesses and sources of proof were located almost entirely in India; (5) relevant parts of the Bhopal plant were manufactured in India; (6) plant records were almost entirely in Hindi or other Indian languages; and (7) the Indian government (which had chosen the U.S. forum) had a greater interest than the United States in enforcing its laws and regulations and in adjudicating the victims’ claims. See id. at 202-03. In re Union Carbide, 634 F. Supp. at 845-47, 859-67. Based on these considerations, the Second Circuit held that “it might reasonably be concluded that it would have been an abuse of discretion to deny a forum non conveniens dismissal.” In re Union Carbide, 809 F.2d at 202 (emphasis omitted).
achieved, whether in the form of monetary damages, an annunciation of human or labor rights norms, or by publicizing the workers' cause and marshalling moral opprobrium at the violation.

II. Two Challenges for the Labor Rights Regime

The picture that emerges from the discussion above is of a surprising ferment of activity in the transnational labor rights regime. Where barely a decade ago the ILO stood as an isolated and, in many minds, ossified monument to the goal of an international labor system, a growing consensus now has emerged that at least certain worker rights can be considered fundamental. Basic prohibitions against forced labor and sex discrimination in the workplace, and respect for freedom of association and the right to collective bargaining are incorporated in nearly every major instrument in the transnational labor rights regime, from ILO conventions and human rights instruments, to the provisions of NAFTA and the EU, to U.S. trade laws and private codes of conduct for corporations. As oversight and sanctioning mechanisms proliferate, enforcement of these protections has become a reality, and states and corporations no longer can conduct business impervious to the human and labor rights contexts in which they operate.

Nevertheless, two fundamental challenges continue to face the global community: (1) whether universal agreement can be reached on the definition of relative rights such as child labor, minimum wages, and working conditions; and (2) whether global enforcement should be promoted through direct linkage of trade and worker rights.

A. Defining Relative Rights

As noted in Part I, the ILO's fundamental conventions relating to freedom of association and the right to organize and bargain collectively, forced labor, equal pay, and workplace discrimination have received broad international support (outside the United States), with well over a hundred nations acceding to their terms. Other rights, however, such as a minimum wage, the prohibition of child labor, and occupational health and safety conditions, are sufficiently contingent on the stage of a country's economy, and thus sufficiently controversial, that it is difficult to formulate any universally acceptable norm.

The reasons for the difficulty in achieving universal definition and acceptance of these rights are readily apparent. With respect to child labor, for example, in countries such as India, Nepal, and Pakistan, unemployment is widespread, educational opportunities are minimal or nonexistent, and large portions of the population scrape an existence out of the informal or subsistence economies. Under such conditions, child labor
is a necessity of life. Families and children have few viable alternatives, and the enforcement of any prohibition is correspondingly difficult. In this context, efforts by well-meaning nations to prohibit all child labor through the age of fourteen or fifteen at best appear foolishly naive and misguided. At worst, they can result in children being thrown from carpet looms to much worse fates in gangs and urban brothels. Similarly, a "universal" minimum wage set at a specific monetary level will never be appropriate, and health and safety conditions considered minimally acceptable in some regions or industries will be unfathomable luxuries in others, so long as the extreme global disparity in wages and living conditions remains.

On the other hand, allowing corporations to benefit economically from grossly substandard working conditions is equally inappropriate, harms the workers they employ, and may reasonably be considered an unfair trade practice. Thus, the effort to both allow for necessary relativism in conditions, while discouraging truly exploitative practices, remains a primary challenge for the labor rights regime.

Fortunately, some creative proposals are being made on this front. The ILO and other organizations have been working for many years to develop recommendations and interpretations of minimum wages and working conditions that are sufficiently flexible to accommodate the needs of developing economies. As the U.S. State Department explains,

[d]ifferences in .. economic development are taken into account in the formulation of internationally recognized labor standards [regarding acceptable conditions of work]. For example, many ILO standards concerning working conditions permit flexibility in their scope and coverage. They may also permit countries a wide choice in their implementation, including progressive implementation, by enabling countries to accept a standard in part or subject to specified exceptions. Countries are expected to take steps over time to achieve the higher levels specified in such standards. It should be understood, however, that this flexibility applies only to internationally recognized standards concerning working conditions. No flexibility is permitted concerning the acceptance of the basic principles contained in human rights standards, i.e., freedom of

115. See Moore, supra note 97 (describing the economic plight of families in the northern Indian state of Bihar).
116. See BETTEN, supra note 2, at 316 (noting that child labor legislation may lead to a movement of child labor from the formal to the informal sectors of the economy).
117. See, e.g., id. at 206 ("The right to fair wages cannot be regulated in international law in any detailed and precise way.").
118. See id. at 208-10 (discussing ILO efforts at obtaining an international consensus regarding a minimum wage).
association, the right to organize and bargain collectively, the prohibition of forced labor, and the absence of discrimination.\textsuperscript{119}

In this vein, the European Social Charter Committee of Experts has defined a “decent standard of living” for the EU as sixty-eight percent of a nation’s average wage, and has formally found European nations in noncompliance.\textsuperscript{120} \textit{Human Rights, Labor Rights, and International Trade} contributor Steven Herzenberg also offers an interesting solution to minimum wage relativism by arguing for a formulaic minimum wage. Under his proposal, workers as a whole would be paid some minimum portion of the value added in manufacture as an acceptable wage (for example, forty percent). The local minimum wage would be set at half this amount, on the theory that the minimum wage should equal roughly half the average manufacturing wage in a given country.\textsuperscript{121} In light of the increasing focus of global attention on child labor issues and the longstanding inability of the present child labor convention to achieve consensus, the ILO is also developing a new convention prohibiting the most intolerable forms of child labor, which may be available for adoption by June 1999.\textsuperscript{122}

B. \textit{The Debate over Linkage}

The debate over linkage has proven intractable and tenacious. Efforts to include worker rights considerations in the GATT have appeared continually from the GATT’s founding in the 1940s to the most recent ministerial conferences of the WTO, with little or no permanent progress. Despite the promise of the NAFTA labor side accord, the United States’s conditioning of the GSP and other trade laws on labor rights compliance, and the EU’s tentative steps in this direction, linkage between labor rights and trade agreements at the global level remains highly contentious. Developing nations view proposals that labor rights should be treated as an unfair trade practice as raw protectionism which infringes on their sovereignty and improperly strips them of their comparative advantage in low-wage labor. These nations similarly view the United States’s unilateral enforcement regime as a hypocritical attempt to impose upon them international standards that the United States has not ratified and with which it does not comply. Accusations of protectionism are bolstered by the fact that many of the groups advocating strong international labor rights

\begin{itemize}
  \item \textsuperscript{119} U.S. DEP’T OF STATE, APPENDIX B TO COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997 \textit{\sffamily f}E, \textit{supra} note 66.
  \item \textsuperscript{120} BETTEN, \textit{supra} note 2, at 213-14 (describing the European approach used to determine a “decent standard of living”).
  \item \textsuperscript{121} See Herzenberg, \textit{supra} note 13, at 109.
  \item \textsuperscript{122} See ILO, \textit{Human Rights, supra} note 17.
\end{itemize}
protections, particularly domestic trade unions, also have a substantial interest in erecting barriers to foreign competition. The accusations of hypocrisy are further supported by the United States's inconsistent imposition of trade sanctions for labor and human rights violations, most notably by the exceptional treatment of trade with China, which the Clinton administration has disengaged from labor and human rights concerns.

Free trade economists and multinational corporations, on the other hand, argue that incorporating labor and environmental "externalities" into the global trading system will stifle economic development, and point to the currently sluggish economies of the EU as confirmation of their position. Even labor rights advocates disagree sharply over whether sanctions or constructive engagement is the best way to protect worker rights. Detractors of sanctions point out that withdrawing operations from a country often hurts most the very workers who were intended to be helped.

In light of this opposition, it is not surprising that the immediate prospects for extending linkage between labor and trade in new or existing trade agreements appear dim. Recent efforts by the United States even to discuss worker rights in the context of the GATT, for example, have been thwarted repeatedly by developing countries. The Human Rights, Labor Rights, and International Trade authors optimistically note that in 1994 the United States finally succeeded in extracting an agreement to consider labor rights issues in the next WTO negotiations. The U.S. Trade Representative's prediction that the Clinton administration had overcome international opposition to discussing labor standards, however, proved premature. Linkage was again strenuously opposed at the 1996 Singapore Ministerial Conference of the WTO by India and other developing nations, despite support for the initiative from Canada, the European Commission, Norway, and the United States.

123. See Bilahari Kausikan, Asia's Different Standard, FOREIGN POL., Sept. 22, 1993, at 24 (arguing that concerns about economic competitiveness drive the AFL-CIO's critique of labor conditions in Malaysia and elsewhere).


125. MacShane, supra note 3, at 63 (discussing the opposition to a GATT "social clause").

126. See Michael Bergsman, Kantor Announces U.S. Has Secured GATT Deal to Discuss Labor Rights, INSIDE U.S. TRADE, Apr. 8, 1994, at S1.


We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these [ILO] standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be
Linkage issues also pose a major obstacle for future regional trade agreements modeled on NAFTA. Although supporters of free trade fear any worker rights linkage that might prove stronger than the NAALC, labor advocates have rallied to oppose new trade agreements for fear that they will not adequately protect international worker rights. The Clinton administration has substantially retreated from its position at the time of NAFTA that such agreements should include adequate worker rights protections. In the absence of such protections, President Clinton's request for renewed fast track authority to negotiate a NAFTA-type regional free trade agreement in the fall of 1997 was defeated by a substantial backlash from U.S. labor.

III. Vindicating the Transnational Labor Rights Regime Through the Alien Tort Claims Act

Whither the transnational labor rights regime? As discussed in Part I of this essay, the vacuum of enforcement at the global level has spurred the proliferation of other mechanisms. Much recent innovation at the intersection of trade and labor rights has occurred in nontraditional fora—whether private corporations, administrative agencies, or nations' domestic courts. In this context, it seems reasonable to predict that there will be a future role for the United States's Alien Tort Claims Act (ATCA) in the articulation and enforcement of the prohibition against forced labor and other fundamental worker rights.

A. A Remedy for Violations of the Law of Nations

The ATCA has played an important role in the rise of transnational public law litigation, and its recent contribution to human rights
enforcement has in many ways paralleled developments in the efforts to promulgate and enforce fundamental labor rights. Adopted by the first Congress in the Judiciary Act of 1789, the statute provides both a federal cause of action and a federal forum for claims brought (1) by an alien; (2) alleging a tort; (3) committed in violation of a U.S. treaty or the law of nations. To be actionable, the suit must simply state a claim for a


132. See 28 U.S.C. § 1350 (1994) (providing for federal district court jurisdiction over "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").
tortious violation of contemporary international law—whether customary law or a treaty—and the plaintiff must establish personal jurisdiction over the defendant. Thus, the statute remarkably provides a domestic forum for claims brought by aliens, against aliens or U.S. nationals, for events occurring wholly outside the United States, and stands as a unique transnational public law vehicle for the articulation and vindication of fundamental international rights.

The source of only limited litigation during its first 150 years, the ATCA has received increasing attention from human rights litigators since the seminal decision in *Filartiga v. Peña-Irala*, in which relatives of a Paraguayan citizen who had been murdered by a police official in Paraguay successfully sued the official for torture in the United States. After the statute's near evisceration in the subsequent case of *Tel-Oren v. Libyan Arab Republic*, Congress breathed new life into the ATCA with the passage of the Torture Victim Protection Act of 1991. In explaining the basis for the new legislation, Congress embraced the interpretation of the ATCA adopted in *Filartiga* and observed that “[the ATCA] should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.” Subsequent decisions consistently have found that Congress intended the ATCA to provide subject matter jurisdiction and a cause of action for violations of the law of nations.

The recent revival of the ATCA is producing a burgeoning body of suits exploring the range of claims that can be considered violations of “the law of nations” within the meaning of the statute. Torture has been a common claim under the ATCA, but courts have found a variety of other claims to be cognizable as well. In *Kadic v. Karadžić*, for example,
the Second Circuit allowed Croat and Muslim victims of atrocities in the former Yugoslavia to assert claims of genocide, torture, war crimes (including rape), and extrajudicial killing against Radovan Karadžić, the self-proclaimed leader of the Bosnian-Serb Republic. The court observed that the list of claims actionable under the ATCA should include, as a minimum, the rights recognized by the Restatement (Third) of the Foreign Relations Law of the United States as peremptory norms of customary international law. These include: (a) genocide; (b) slavery or slave trade; (c) murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman, or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; and (g) a consistent pattern or gross violations of internationally recognized human rights. To date, in addition to claims of torture, courts have held that the ATCA allows consideration of claims alleging summary execution, genocide and war crimes, disappearance, arbitrary detention, and cruel, inhuman, or degrading treatment. Environmental torts may be actionable under section 1350, although no court has granted relief on an international environmental tort claim.

Other suits are exploring the range of possible defendants and the scope of state action requirements under the ATCA. The statutory language does not limit defendants to natural persons or state officials, and courts have heard claims against private individuals, corporations, and associations. Foreign governments, on the other hand, enjoy immunity from suit unless their activities fall into some exception to the Foreign Sovereign Immunities Act.

140. See id. at 237.
141. See id. at 240-44; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). Section 404 of the Restatement additionally recognizes that universal jurisdiction exists to define and prescribe punishment for acts of piracy, hijacking, genocide, war crimes, and certain acts of terrorism, whether the action is taken by an official state actor or by a private individual. Id. § 404.
143. See Kadlic, 70 F.3d at 241-42.
146. See, e.g., Xuncax, 886 F. Supp. at 187-89; see also Abye-Jira v. Negewo, 72 F.3d 844 (11th Cir.), cert. denied, 117 S. Ct. 96 (1996); Avril, 901 F. Supp. at 335.
148. See Bealance v. FRAHP, No. 94-2619 (E.D.N.Y., filed June 1, 1994) (involving a plaintiff who is suing a Haitian paramilitary organization under the ATCA for torture).
149. See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994); Argentine Republic
Although the ATCA does not require that the defendant have acted under color of law, most courts have held that customary international law itself imposes a state action requirement for claims of torture, summary execution and disappearance, cruel, inhuman, or degrading treatment, arbitrary detention, and systematic race discrimination. Such state action requirements limit the availability of the ATCA for claims against private individuals and corporations. Nevertheless, as with state action requirements under section 1983 of the Civil Rights Act and other domestic laws, private persons and entities can be held liable as state actors where they are "jointly engaged with state officials in the challenged action." Accordingly, ATCA suits recently have been brought against a number of private corporations, alleging that violations of international law have occurred through joint action with state officials. On the other hand, "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private


individuals." International law thus imposes no state action require-
ment for claims of piracy, slavery, or slave trading.

Remedies have proven a persistent problem in ATCA litigation. Although substantial damages have been awarded to plaintiffs, individual defendants frequently default, and actual recovery generally requires enforcement of the judgment in a foreign forum, against assets that are hidden or non-existent. Few ATCA plaintiffs have successfully collected on damages awards resulting from ATCA litigation, though the Marcos plaintiffs are presently seeking to enforce their judgment against Ferdinand Marcos's estate. Attorneys' fees may be awarded and depend on the law which the court applies to the case.

The ATCA is not mentioned in Human Rights, Labor Rights, and International Trade and has been largely neglected by labor rights activists, no doubt due in part to the recent uncertainty regarding the statute's continued vitality and to the historical gulf between the human rights and labor rights movements. Nevertheless, the statute could provide a domestic vehicle for vindicating some of the most fundamental international labor rights violations. As several of the Human Rights, Labor Rights, and International Trade authors note, many of the basic human rights violations committed around the world are directed at labor rights activists and union organizers, who often are victims of summary execution, torture, and arbitrary detention, either at the hands of governments or as a result of joint action between state officials and private parties. Often today, as Yale's labor historian David Montgomery observes,

the most urgent need is simply for the protection of individual trade unionists who are prosecuted, or threatened with disappearance, in Guatemala, in South Korea, or even in Los Angeles, where exiled Salvadoran union activists have been pursued by agents of the Salvadoran military. In 1992 alone, according to the records of the International Confederation of Free Trade Unions, 260 people were killed around the world for trade union activity, and some 2,500 were imprisoned.

"Disappearances" of labor leaders were common occurrences in Guatemala in the 1980s, as they were under the Argentinean military regime in

154. Kadic, 70 F.3d at 239.
155. Id.
158. See Leary, supra note 31, at 22-23 (noting that repressive regimes "inevitably try to suppress or control" labor unions and detailing the violent means used to achieve that goal).
159. David Montgomery, supra note 21, at 18-19.
the 1970s. China continues to arbitrarily detain labor activists. Summary execution and disappearance, torture, and arbitrary detention in this context unquestionably constitute violations of peremptory international norms that are actionable under the ATCA against foreign officials, and individuals and companies who collude in such conduct.

Slavery, servitude, and forced labor also remain widespread in various parts of the world. According to Michael Platzer of the United Nations Centre for International Crime Prevention, approximately 200 million people in the world today are “victims of contemporary forms of slavery,” while the U.S. State Department also reports, among others, that slavery persists in the Sudan, and that forced or compulsory labor remains a serious problem in Burma. The 1996 OECD Study of labor practices in ninety-one countries noted serious problems regarding forced labor in Brazil, China, India, and Pakistan. Slave-like practices take a number of forms in the modern world, including debt bondage, private convict labor, child bondage, traffic in women for purposes of prostitution, and forced marriage. Around the world, the victims of forced labor most commonly are women, children, immigrants, and domestic and migrant workers—all groups which, for reasons of distance from their homeland, gender, youth, poverty, and social status, are particularly vulnerable to exploitation.

Debt bondage remains one of the most severe and pernicious forms of forced labor. Typically, bonded labor plays out in the following manner:

[W]orkers are hired on the basis of false information as regards working conditions and wages on estates thousands of kilometers away. On arrival, wages turn out to be lower than promised and the workers are charged for transport and accommodation. The only

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166. See OECD STUDY, supra note 1, at 47. Notably, the study excluded any examination of labor practices in the countries of the former Soviet Union, Eastern Europe, large portions of Africa, and some countries of the Middle East. See id. at 39-40.
place to obtain food is the company store which charges exorbitant prices and purchases are deducted from wages. When workers claim their pay, they discover it has been entirely “spent” as their debt is by then higher than their wages. Workers who try to escape from the estate are pursued by gunmen and when they are caught and returned they are subjected to ill treatment in many cases resulting in death.\(^\text{167}\)

Although this excerpt was drafted with reference to bonded labor practices in Brazil,\(^\text{168}\) the practice is replicated with Haitian sugarcane workers in the Dominican Republic, workers in the Peruvian mining industry, and brick-kiln workers in Pakistan.\(^\text{169}\) Unfortunately, it applies equally to immigrant garment workers and migrant agricultural workers in the United States, who are often recruited in Mexico and Central America on false representations and then forced to work off their transportation “debts.”\(^\text{170}\)

\(167.\) \textit{BETTEN, supra note 2}, at 141.

\(168.\) \textit{MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 144; see also BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOUR, U.S. DEP’T OF STATE, BRAZIL COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997 § 6(c) (1998), available in} \textit{(visited Mar. 3, 1998) <http://www.state.gov/www/global/human_rights/1997_hrp_report/brazil.html> (“Labor organizations allege that in mining and the rural economy thousands of workers, including minors, are hired on the basis of false promises, subjected to debt bondage, with violence used to retain or punish workers who attempt to escape. . . .”).}

\(169.\) \textit{See BETTEN, supra note 2, at 135-45.}

\(170.\) In 1997, for example, Miguel Flores, a Mexican farm labor contractor, pleaded guilty to coercing migrant workers in South Carolina to harvest cucumbers against their will and was sentenced to 15 years in prison. Flores had been charged with recruiting workers in Mexico and smuggling them to South Carolina labor camps, where they were threatened with physical abuse and death to prevent them from leaving. \textit{See Child Labor, RURAL MIGRATION NEWS, Jan. 1998, at 5; see also Ky Henderson, The New Slavery: Immigrants Hoping to Forge a Better Life Are at the Mercy of Greedy Smugglers, HUM. RTS., Fall 1997, at 12, 12 (reporting that Flores pleaded guilty to 25 “counts of enslavement, extortion, and immigration and labor violations”). Since 1990, the U.S. Justice Department has prosecuted at least 50 people for violations of domestic antislavery laws, at least 44 of whom were convicted or pleaded guilty. Recent revelations regarding the slave-like practices used to exploit Thai garment workers in California, deaf Mexican trinket sellers in New York City, and migrant workers in South Carolina and Florida confirm that such practices remain a vexing problem in the United States. See, e.g., Joseph P. Fried, \textit{Woman Pleads Guilty in Case of Deaf Mexican Peddlers, N.Y. TIMES, Nov. 18, 1997, at B13 (reporting that “threats of violence were used” to force deaf Mexicans to work and hold them against their will); Kenneth B. Noble, \textit{Los Angeles Sweatshops Are Thriving, Experts Say, N.Y. TIMES, Aug. 5, 1995, at 6 (discussing recent Justice Department prosecutions under U.S. anti-slavery laws); Kenneth B. Noble, \textit{U.S. Warns Big Retailers About Sweatshop Goods, N.Y. TIMES, Aug. 15, 1995, at A14 (reporting on the U.S. Department of Labor investigation into a sweatshop where Thai immigrants were held in “prison-like conditions,” working up to twenty-two hours a day for as little as fifty cents an hour); Joe Sexton, \textit{Guilty Plea in Smuggling of Immigrants, N.Y. TIMES, Dec. 19, 1997, at B3 (reporting the guilty plea of Adriana Paoletti, who conspired to smuggle deaf Mexican immigrants into a “brutal slavery ring”); Sweatshop Workers Share $1.1 Million, N.Y. TIMES, Mar. 9, 1996, at A11 (reporting that Thai and Hispanic garment workers received back pay totaling $1.1 million from employers convicted on federal slavery charges).}
B. The International Prohibition of Forced Labor

International law draws technical distinctions between slavery, "slave-like" practices, and forced labor. The U.N. Human Rights Committee, which is responsible for oversight and interpretation of the ICCPR, has described the relationship among these practices as follows:

As with torture, the official abolition of and international ban on slavery have led to the development of more subtle forms and to their underground practice. The classic degradation of the human being to the mere property of another has given way to highly sophisticated forms of personal dependence and economic exploitation.171

"Slavery," in its strict sense, is defined by the 1926 Slavery Convention as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."172 The focus is on the loss of legal personhood. Servitude or "slave-like" practices, as defined in the 1957 Supplementary Convention on the Abolition of Slavery,173 include debt bondage,174 serfdom,175 compulsory marital arrangements,176 and the sale of children into labor.177 Like slavery,
such practices are prohibited regardless of whether the individual voluntarily offers herself for the bonded condition. Forced or compulsory labor, on the other hand, requires involuntariness and is defined by the ILO Forced Labour Convention (No. 29) as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."\(^{178}\) While the prohibitions against slavery and servitude are nonderogable, international conventions recognize certain exceptions to the prohibition against forced labor.\(^{179}\) Finally, the international prohibitions of slavery, servitude, and forced labor apply to state actors and private entities alike. States are obligated to take affirmative steps to ensure the realization of the prohibition,\(^{180}\) including the imposition of criminal sanctions.\(^{181}\)

In sum, slavery, servitude, and forced labor may be understood as follows:

*Slavery* indicates that [the person] is wholly in the legal ownership of another person, while *servitude* concerns less far-reaching forms of restraint and refers, for instance, to the total of the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he cannot change. *Forced labour* and *compulsory labour*, on the other hand, do not refer to the total situation of the person concerned, but exclusively to the involuntary character of the work.\(^{182}\)

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\(^{179}\) The Forced Labour Convention excludes from the definition of forced labor military service, normal civic obligations and minor communal services, prison labor when performed under public supervision and pursuant to a lawful conviction, and work exacted in cases of emergency. *See id.* art. 2(2), 39 U.N.T.S. at 58, *reprinted in 1 LABOUR CONVENTIONS*, *supra* note 18, at 116. Similar exceptions are recognized under Article 8 of the ICCPR. *See infra* note 195.

\(^{180}\) *See NOWAK*, *supra* note 168, at 145.

\(^{181}\) The 1957 Supplementary Convention, for example, obligates states parties "to bring about . . . the complete abolition" of all slave-like practices, *see supra* note 173, art. 1, 18 U.S.T. at 3204, 266 U.N.T.S. at 41, including imposing criminal penalties for such conduct. *See id.* art. 3, 18 U.S.T. at 3205, 266 U.N.T.S. at 42 (requiring criminal sanctions for slave trading); *id.* art. 6, 18 U.S.T. at 3206, 266 U.N.T.S. at 43 (requiring criminal penalties for slavery or servitude). Article 25 of the ILO Forced Labour Convention requires states to make forced labour "punishable as a penal offence." *See Convention Concerning the Abolition of Forced Labour*, *supra* note 19, art. 25, 39 U.N.T.S. at 74, *reprinted in 1 LABOUR CONVENTIONS*, *supra* note 18, at 123. The ICCPR also obligates states parties to provide effective domestic remedies for any individuals whose rights recognized by the treaty have been violated. *See ICCPR*, *supra* note 25, art. 25(3)(a), 999 U.N.T.S. at 174, 6 I.L.M. at 369; *see also RATNER & ABRAMS*, *supra* note 10, at 144 (discussing the imposition of penalties for slavery and forced labor under international law).

\(^{182}\) *P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION*
As numerous courts have observed, slavery shares a position with torture, piracy, and genocide as one of the most fundamental international law violations. The prohibitions of forced labor and slave-like practices are now widely recognized in conjunction with slavery as customary international norms. Most international instruments address the prohibitions against these practices coterminously. Thus, the 1926 Slavery Convention, the basic international instrument prohibiting slavery, commits states to eradicate forced labor for any nonpublic purpose, and the 1957 Supplementary Convention sets forth the basic definitions of debt bondage and other slave-like practices. Numerous other international instruments prohibit slavery, servitude, and forced labor, including the American Convention on Human Rights (Art. 6), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 4), the European Social Charter (Art. 1), the African Charter of Human and People’s Rights (Art. 5), and the U.N. Convention for the Suppression of the Traffic in Persons and of the
Exploitation or the Prostitution of Others.\textsuperscript{190} The ILO's Forced Labour Convention\textsuperscript{191} and the Convention Concerning the Abolition of Forced Labour (No. 105) are both deemed "fundamental" human rights conventions by the ILO.\textsuperscript{192} Indeed, the Forced Labour Convention is the most widely ratified instrument of the ILO, with 143 states party to the agreement.\textsuperscript{193}

The ICCPR, which has now been ratified or accepted by 140 states,\textsuperscript{194} prohibits all forms of slavery and forced labor. Article 8 of the ICCPR states in relevant part as follows:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour.\textsuperscript{195}

\begin{flushleft}
\textsuperscript{191} The ILO Forced Labour Convention provides in relevant part as follows:
\begin{itemize}
\item Article 1
\begin{itemize}
\item Each Member [state] . . . undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.
\end{itemize}
\item Article 4
\begin{itemize}
\item [Member states] shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies, or associations.
\item Where such forced or compulsory labour for the benefit of private individuals, companies, or associations exists at the date on which a Member's ratification of this Convention is registered by the Director-General of the International Labour Office, the Member shall completely suppress such forced or compulsory labour from the date on which this Convention comes into force for that member.
\end{itemize}
\item Article 5
\begin{itemize}
\item No concession granted to private individuals, companies, or associations shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies, or associations utilize or in which they trade.
\item Where concessions exist containing provisions involving such forced or compulsory labour, such provisions shall be rescinded as soon as possible, in order to comply with Article 1 of this Convention.
\end{itemize}
\end{itemize}
\textsuperscript{192} See supra note 17 and accompanying text.
\textsuperscript{193} See supra note 22 and accompanying text. One hundred twenty states have also ratified the Convention Concerning the Abolition of Forced Labour (No. 105).
\textsuperscript{195} ICCPR, supra note 25, art. 8, 999 U.N.T.S. at 175, 6 I.L.M. at 371. The ICCPR excludes from the definition of "forced or compulsory labor" the following: (a) hard labor imposed as punishment for a crime; (b) work normally imposed in consequence of a lawful court order; (c) military and national service; and (d) service exacted in cases of emergency threatening the life and well-being of the community. \textit{Id.} art. 8(3)(b), 999 U.N.T.S. at 175, 6 I.L.M. at 371.
\end{flushleft}
The travaux préparatoires of the ICCPR indicate that the drafters defined slavery, servitude, and forced labor according to the existing Conventions on the issue. Thus, "slavery" was understood in the narrow sense set forth in Article 1(1) of the 1926 Slavery Convention. Servitude, by contrast, was intended by the drafters to apply broadly to all "slave-like practices" as defined in the 1957 Supplementary Convention. The drafters of the ICCPR also looked to the ILO Forced Labour Convention for the definition of forced or compulsory labor, though they did not adopt the exceptions set forth in that Convention.

The United States has ratified four of the most important international instruments prohibiting slavery and forced labor, including the 1926 and 1957 Slavery Conventions, and ILO Convention No. 105. Although the United States has not ratified the ILO Forced Labour Convention, it did finally ratify the ICCPR in 1992, which incorporates the forced labor definition of that instrument. Thus, the fundamental prohibitions against slavery and forced labor are binding treaty obligations on the United States, as with the majority of the world.

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196. See Marc J. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights 167 (1987) ("[S]lavery, which implied the destruction of the judicial personality, was a relatively limited and technical notion.").

197. Nowak, supra note 168, at 148; see also Nina Lassen, Slavery and Slavery-Like Practices: United Nations Standards and Implementation, 57 Nordic J. Int'l L. 197, 207 (1988) (outlining institutions and practices that are deemed by the 1957 Supplementary Convention to be similar to slavery). The proposals of the U.S. delegation that the term "servitude" be substituted with "peonage or serfdom" or "involuntary servitude" were viewed by the Human Rights Committee as too narrow and as failing to protect against the possibility that individuals might voluntarily contract themselves into bondage. See Bossuyt, supra note 196, at 167; Nowak, supra note 168, at 148.

198. See Bossuyt, supra note 196, at 169 ("This definition, especially when read in the light of the exceptions, was not considered entirely satisfactory for inclusion in the covenant.").

199. The Convention Concerning the Abolition of Forced Labour (No. 105), which is narrower in scope than the Forced Labour Convention, obligates states parties to:

 suppress and not make use of any form of forced or compulsory labour—

(a) as a means of political coercion or education or as a punishment for the holding or expressing of political views or views ideologically opposed to the established political, social or economic system;

(b) as a method of mobilising and using labour for purposes of economic development;

(c) as a means of labour discipline;

(d) as a punishment for having participated in strikes;

(e) as a means of racial, social, national or religious discrimination.


C. The Present Status of ATCA Labor Litigation

Despite the fact that slavery and forced labor enjoy a status akin to torture in the international human rights lexicon, the ATCA has been largely neglected as a means for enforcing this prohibition or any other core international labor standard. To date, only two published cases have been filed under section 1350 alleging international labor violations, National Coalition Government of the Union of Burma v. Unocal, Inc.,201 and Doe v. Unocal Corp.202 In those two cases, Burmese nationals and the Federation of Trade Unions of Burma (FTUB) sued the Unocal Corporation for human rights and labor violations committed during the construction of a natural gas pipeline in cooperation with entities of the Myanmar government.203 The plaintiffs alleged, inter alia, that the project had exploited forced labor to assist in the construction of the pipeline and an accompanying railway, and that these forced labor practices had saved the project approximately $159 million dollars annually.204 The plaintiffs contended that Unocal was liable as a joint venturer in the project and because Unocal knew of, authorized, acquiesced in, or ratified the human rights abuses committed during the course of the project and conspired to injure the plaintiffs. In 1997, the federal district court in California denied Unocal’s motions to dismiss the forced labor claims, concluding that the allegations that Unocal knowingly accepted the benefit of, and approved the use of, forced labor could be sufficient to state a claim for participation in slave trading.205 The court has not specifically

203. The complaints state claims for torture, forced labor, expropriation of property, and sexual assault. The district court dismissed the expropriation claims based on the act of state doctrine, see Unocal Corp., 963 F. Supp. at 899 (holding prudential concerns in the act of state doctrine preclude consideration of expropriation claims), and for failure to state a claim under international law, see National Coalition Gov't, 1997 WL 731512, at *23 (holding that "expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law").
204. See National Coalition Gov't, 1997 WL 731512, at *3. In describing these labor practices, the court stated:

Plaintiff John Doe I . . . alleges that, on several occasions, [the government] has subjected him to forced labor, without compensation and under threat of death, on various railroad and pipeline projects in connection with and in the ordinary course of business of the Project. Specifically, he alleges he was forced to clear jungle along the path of the Ye-Tavoy railroad; forced to build military barracks for a SLORC camp in the pipeline region; and forced to build barracks and helipad facilities, clear jungle and land, break rocks for construction, and carry sand and rocks for construction . . . . He alleges he frequently witnessed physical abuse and brutality against other forced laborers, including one worker who was beaten until he vomited blood and was then tied to a stake for 15 hours.

Id. at *4.
205. See Unocal Corp., 963 F. Supp. at 892. The Unocal Corp. court stated:

Although there is no allegation that [the government] is physically selling Burmese citizens to the private defendants, plaintiffs allege that, despite their knowledge of [the] practice
addressed whether the customary international prohibition against forced labor itself is actionable under the ATCA. Indeed, to date, no court has considered a forced labor or slavery claim under section 1350 on the merits.

D. Prospects for Alien Tort Claims Act Labor Litigation

What can ATCA suits against individuals or corporations accomplish in enforcing worker rights? Obviously, labor suits under the ATCA cannot redress many of the problems considered by the authors in *Human Rights, Labor Rights, and International Trade*. Some “core” labor rights may be either sufficiently difficult to apply in practice, or lack sufficient definitional acceptance by the international community, to be effectively promoted under the ATCA. Nor can suits alleging customary international law and treaty violations redress the pervasive problems created by low-wage forms of work organization (exploitatively low wages, poor working conditions, and lack of opportunities for skills development or advancement) that lie at the root of many international labor violations.

Litigation under the ATCA also faces a number of procedural hurdles. Although intended to redress violations of international law committed against foreigners, personal jurisdiction must be established over the defendant, generally by means of service of process somewhere in the United States. Individuals and corporate entities who engage in gross labor violations but evade the United States forum thus cannot be reached. Absent evidence of governmental collusion, the state action requirement may also preclude suits against strictly private actors for certain international torts (for example, torture, extra-judicial killing, and

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of forced labor . . . the private defendants have paid and continue to pay [the government] to provide labor and security for the pipeline, essentially treating [the government] as an overseer, accepting the benefit and approving the use of forced labor. These allegations are sufficient to establish subject matter jurisdiction under [section 1350].

*Id.; see also National Coalition Gov't*, 1997 WL 731512, at *16 (noting that although the allegations of forced labor may have justified a claim for participation in slave trading, the court did not need to resolve the issue). In support of its motions, Unocal argued that the government’s requirement that its citizens provide labor for the project was more analogous to a national service requirement than to slavery. *Id.*


207. One of the earliest ATCA cases, *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607), involved three slaves who had been seized as a prize of war. The issue presented in the case, however, was the restitution of property, not the legality of slavery under international law.

arbitrary detention), although notably not for claims of slavery and forced labor.209

As in the Pico and Bhopal cases, the doctrine of forum non conveniens may pose a substantial, but surmountable, obstacle for ATCA labor rights litigants. The success of a motion to dismiss on forum non conveniens grounds turns in large part on the availability of an adequate, alternative forum for the claims.210 The doctrine has not been significant in ATCA cases to date. Indeed, no court has dismissed an ATCA suit on forum non conveniens grounds, despite the fact that ATCA plaintiffs by definition are aliens who may be entitled to less deference in their choice of forum.211 This is partly attributable to the fact that the defense is waived by defendants who default, and partly to the fact that the suits often involve allegations of egregious official conduct. Courts are understandably reluctant to find that foreign governments which tolerate torture or genocide will provide an adequate remedy for these violations, or to protect a plaintiff alleging such claims.212 In Eastman Kodak Co. v. Kalvin,213 for example, the court had little difficulty finding that the Bolivian corporate defendant had demonstrated that the balance of public and private interests favored the Bolivian forum.214 Nevertheless, the court rejected

209. On the other hand, the act of state doctrine generally does not obstruct claims alleging violations of peremptory international norms. As the Second Circuit observed in Kadic, “it would be a rare case in which the act of state doctrine precluded suit under section 1350,” since by definition, jus cogens norms actionable under section 1350 share sufficient international consensus that actions taken in violation of them cannot be considered official acts of state. Kadic, 70 F.3d at 250; see also In re Estate of Marcos Human Rights Litig., 878 F.2d 1439 (9th Cir. 1989) (unpublished table decision) (reversing the district court’s dismissal of the Ferdinand Marcos litigation on act of state grounds).

210. See Piper Aircraft v. Reyno, 454 U.S. 235, 254-55, 260-61 (1981) (affirming a dismissal on forum non conveniens grounds of a suit seeking damages for the deaths of Scottish nationals resulting from an airplane crash in Scotland). Other important considerations include the private and public interests in maintaining the action in the forum. Id. at 255.

211. Id. at 255. But see Lacey v. Cessna Aircraft Co., 932 F.2d 170, 179 n.6 (3d Cir. 1991) (observing that lack of deference to a foreign national’s choice of forum can be overcome by a strong showing of convenience).

212. See Kadic, 70 F.3d at 250-51 (“[I]t seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs’ claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs’ preference for a United States forum.”); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (holding that “to force [the] plaintiff to bring this action in Ghana would unnecessarily put him in harm’s way”).


214. See id. at 1083-84. With respect to the private factors, the court noted as follows: [E]verything connected with this case happened in Bolivia. The seventy-year relationship between Kodak and Casa Kalvin occurred solely in Bolivia, which was also the cite [sic] of Mr. Carballo’s imprisonment, the negotiations to secure his release, [and] the subsequent criminal prosecutions. . . . If the lawsuit were to take place in the United States, almost all relevant documents would have to be translated into English, and interpreters would be required for many, if not most, witnesses. All claims in the Kodak
the forum non conveniens arguments, finding, in light of the plaintiff's extensive evidence regarding targeted corruption in the Bolivian legal system, that the defendants had failed to meet their burden of establishing that Bolivia was an adequate alternative forum.215

Corporate defendants in ATCA labor suits may experience somewhat greater success in claims of forum non conveniens. Multinational corporations are less likely to default than individual defendants, and suits alleging labor violations such as forced labor do not require allegations of direct governmental misconduct which necessarily raise questions about the adequacy of the foreign forum.216

Nevertheless, any defendant seeking dismissal in favor of a foreign forum bears a substantial burden of proof. U.S. corporate defendants in ATCA suits may have a difficult time justifying dismissal of a suit from their domicile, and courts may be less willing to dismiss suits where foreign corporate defendants have control over their witnesses and, thus, are able to produce them in the distant forum.217 Congress also has clearly indicated that the ATCA should be available to remedy such violations.218 Moreover, countries that tolerate forced labor or other fundamental labor violations on a widespread basis are unlikely to provide an adequate remedy for such injuries, if they provide any remedy at all.219 In short, properly applied, the doctrine of forum non conveniens does not appear to conflict with the goals of the ATCA in allowing a remedy for international law violations.

The second potential barrier to ATCA litigation against corporations is the problem of establishing liability by piercing the corporate veil. Corporate structures leading to extreme labor violations can be very complex, with multiple layers of subcontractors shielding the questionable operations, as the Kathie Lee Gifford case illustrates. Gifford's Wal-Mart contract required that she be informed of the companies that were producing her clothing, and her contract indicated a New York company that

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215. Id. at 1087.
217. See Cabiri v. Assasia-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (rejecting the forum non conveniens argument in part because "the access to sources of proof and the availability of witnesses are . . . in [the] defendant's control").
218. See supra note 137 and accompanying text.
would subcontract a portion of the work to a garment manufacturer in Alabama. What the contract did not reveal was that the Alabama firm in turn sub-subcontracted the work to a New Jersey company, which sub-subcontracted the work to a sweatshop in the New York garment district. When such operations are made more complex by intervening national borders, attributing conduct to a multinational parent can be a difficult task. Finally, of course, litigation often is a blunt, unwieldy, and expensive instrument for accomplishing any transnational public law goals.

On the other hand, ATCA suits against corporations alleging forced labor or other labor claims may avoid many of the difficulties commonly confronted by ATCA plaintiffs. State action requirements would not obstruct suits alleging slavery or forced labor. Because such suits are more likely to involve private defendants than governments or public officials, claims that the suit implicates the political question or act of state doctrines may be less likely to arise. Actions of foreign governments that violate fundamental labor rights may also fall within the commercial activities exception to foreign sovereign immunity. Personal jurisdiction may be more easily obtained over corporate actors than other foreign defendants (setting aside the piercing the corporate veil issues discussed above), since many multinational corporations are domiciled in or conduct substantial operations in the United States. If liability is successfully established, remedies are also more likely to be available. Corporations—at least those with high public profiles and substantial assets—are both less likely to default and more likely to have substantial, reachable assets, than traditional individual ATCA defendants.

As a domestic policy matter, enforcement of forced labor through the ATCA would help bring the United States more fully into compliance with its affirmative international obligations in this area. Although existing U.S. law prohibits peonage and involuntary servitude, the U.S. Supreme Court has adopted a restrictive interpretation of "involuntary servitude" that is not clearly coterminous with the international prohibition of forced labor. U.S. law thus appears to preclude the possibility that

220. See Strom, supra note 86 (describing the Gifford clothing production chain).
221. See U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction."); 18 U.S.C. § 241 (1994) (prohibiting any conspiracy to prevent the free exercise of a citizen's constitutional rights); 18 U.S.C. § 1584 (1994) (authorizing criminal punishment of any individual who knowingly and willfully holds any person in involuntary servitude or sells a person into a condition of involuntary servitude); see also Bailey v. Alabama, 219 U.S. 219 (1911) (holding unconstitutional under the Thirteenth Amendment a statute compelling labor in liquidation of a debt).
222. Compare Forced Labour Convention, supra note 19, art. 2(1), 39 U.N.T.S. at 58, reprinted in 1 LABOUR CONVENTIONS, supra note 18, at 115 (defining forced labor as "work or service which is exacted from any person under the menace of any penalty and for which the said person has not
involuntary servitude or forced labor could result from blackmail or psychological coercion, in possible violation of U.S. obligations under the ICCPR and customary international law.  

IV. Conclusion

In the end, the authors of *Human Rights, Labor Rights, and International Trade* are concerned with the viability of increased enforcement of labor rights in a world where existing mechanisms are scattered and the ATCA is available to redress the most universally abhorred forms of labor violations. Proposals regarding a universal minimum wage, a cut-off age for child labor, and acceptable working conditions may be controversial. But workers, companies, and nations can agree that it is a violation of international law for companies to produce goods with forced or slave labor, or for states to murder, arbitrarily detain, or torture union-organizing officials. As for those presently accused of committing war crimes, political torture and executions, and genocide, for individuals and corporations which contact the U.S. forum, the ATCA stands as a warning that fundamental labor violations will not be tolerated. The ATCA thus can fill an important niche in underscoring the United States’s abhorrence for violations of those basic principles on which the global community can agree. Within the fabric of the transnational labor rights regime that the authors depict, there is a place for the ATCA.

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offered himself voluntarily”), *with* United States v. Kozminski, 487 U.S. 931, 952 (1988) (holding that involuntary servitude under U.S. law means “a condition of servitude in which the victim is forced to work . . . by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process”).
