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## ARTICLES

### FUNDAMENTAL RIGHTS AT WORK AND THE LAW OF NATIONS: AN AMERICAN LAWYER'S PERSPECTIVE<sup>†</sup>

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#### I. INTRODUCTION

The move toward international standards, be they labor, environmental, or otherwise, is fueled, in part, by an attempt to place a human

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face on globalization and to address some of its pernicious consequences, notwithstanding its beneficent aspects.<sup>1</sup> Elsewhere, I have written that the case for international labor standards is an uneasy one and I shall not reiterate those points now.<sup>2</sup> Suffice it to say that a number of dynamics have come together to focus a renewed and increased attention on the subject. International labor standards have been addressed through a wide variety of national, regional, and international avenues, with varying degrees of intensity and effectiveness.<sup>3</sup>

The first of the factors giving rise to a renewed focus is that of global poverty and increased inequality, not only between the developing and industrialized world, but also within both the developing and industrialized countries themselves. The average income gap between the richest twenty countries and the poorest twenty puts the former thirty-seven times ahead of the average of the latter, “[This] gap has doubled in the past forty years.”<sup>4</sup> The poorest are not sharing in the move towards globalization, and the exclusion disproportionately affects both Africa and the Muslim countries. Notwithstanding gains in Southeast Asia, progress in the developing world is uneven.<sup>5</sup> This problem is exacerbated by declining foreign assistance from the industrialized world and American direction of its miniscule and paltry assistance to relatively

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1. John Cassidy, *Winners and Losers: The Truth About Free Trade*, THE NEW YORKER, Aug. 2, 2004 at 26; Joseph Kahn, *Globalism Unites A Many Striped Multitude of Foes*, N.Y. TIMES, Apr. 15, 2000, at A5.

2. See William B. Gould IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 81 (Robert J. Flanagan & William B. Gould IV eds., 2003).

3. See generally Robert B. Zoellick, *Falling Behind on Free Trade*, N.Y. TIMES, Apr. 14, 2002, at 13.

4. Bob Hepple, *Sinzheimer Lecture 2002: Labour Law, Inequality, and Global Trade*, 6 HUGO SINZHEIMER INSTITUUT AMSTERDAM 9 (2002); Joe W. Pitts, *Inequality is No Myth*, FOREIGN AFFAIRS (2002).

5. Progress is highly uneven across and within countries. The global target will largely be achieved because of the significant progress on poverty reduction in China and India. Sub-Saharan Africa lags far behind, and though poverty rates are much lower in some of the other regions, for example Latin America and the Caribbean, progress over the last fifteen years has been insufficient to achieve the income poverty target in 2015, without more rapid growth or policies better targeted to the poor. Within regions, progress has also been uneven. Despite the huge overall reduction in East Asia, several countries, for example Cambodia, Lao PDR, and Papua New Guinea, are off track to meet the goal. In Sub-Saharan Africa, there are only eight countries—representing fifteen percent of the sub-continent’s population—that will potentially make significant progress toward achieving the income poverty target. The International Bank for Reconstruction and Development/The World Bank, *Global Economic Prospects: Trade, Regionalism and Development* (2005), available at <http://www.worldbank.org>.

wealthy countries like Israel.<sup>6</sup> With the echoes of promises made at Monterey, Mexico four years ago still rhetoric and unrealized, the issue has now received renewed attention because of America's tardy and initially inadequate response to the 2004 Asian Tsunami and its consequent calamity.<sup>7</sup>

Meanwhile, in many of the fastest developing countries there is a growing inequality; China being one of the most recent and well-publicized examples. The growing gap between rich and poor, rooted in technology as well as trade,<sup>8</sup> in the United States<sup>9</sup> has in some measure been mirrored in Europe, though not to the same extent.

The second factor which weaves its way into any discussion about trade, labor, and the developing countries is the loss of jobs incurred in the industrialized world.<sup>10</sup> The United States 2004 political campaign focused upon the outsourcing of both manufacturing and service jobs to the Third World.<sup>11</sup> China and India have been the recipients of much of this work and it is no coincidence that the AFL-CIO international trade

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6. See *Foreign Aid: The Kindness of Strangers*, THE ECONOMIST, May 7, 1994, at 19; see also *Foreign Aid: Kind Words, Closed Wallet*, ECONOMIST, Mar. 27, 1993, at 26.

7. *Are We Stingy? Yes.*, N.Y. TIMES, Dec. 30, 2004, at A22; *Prosperity, Aid and the Tsunami*, FIN. TIMES (London) Dec. 31, 2004, at 8; see also Steven R. Weisman, *Irate Over 'Stingy' Remark, U.S. Adds \$20 Million to Disaster Aid*, N.Y. TIMES, Dec. 29, 2004, at A14. Andrew Balls, *Richest Nations Boost Funds Available to Poor*, FIN. TIMES, Feb. 24, 2005, at 4. Elizabeth Becker, *U.S. Nearly Triples Tsunami Aid Pledge, to \$950 Million*, N.Y. TIMES, Feb. 10, 2005, at A3. In an extraordinary interview defending the fact that America gives the least foreign assistance of any industrially advanced country, Andrew S. Natsios, a Bush administration official, said, "the reason that people quote that is because in Europe it's been used as a standard, but our economy grows so much faster than the Japanese or the European economy that we would never catch up. No matter how much we do, we could never be. . .if we did, we would dominate the entire world and overwhelm everybody with the amount of money but a 140 percent increase in three years is a massive increase in development assistance." NPR interview with Gwen Ifill, Dec. 29, 2004. Compare Martin Wolf, *We Must Find the Will and the Means to End Poverty*, FIN. TIMES (London), Feb. 16, 2005, at 13. The Pentagon budget is 25 times the size of foreign aid. The United States contributions amount to "near rock bottom" of such assistance. *Thousands Died in Africa Yesterday*, N.Y. TIMES, Feb. 27, 2005, at 12.

8. See John Cassidy, *Who Killed the Middle Class*, THE NEW YORKER, Oct. 16, 1995, at 113. See also John Cassidy, *Helping Hands: How Foreign Aid Could Benefit Everybody*, THE NEW YORKER, Mar. 18, 2002, at 60.

9. See, e.g., *Ever Higher Society, Ever Harder to Ascent*, THE ECONOMIST, Jan. 1, 2005, at 22.

10. See generally, Paul A. Samuelson, *Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization*, 18 J. OF ECON. PERSPECTIVES 135, 135-46 (Summer 2004); Jagdish Bhagwati et al., *The Muddles Over Outsourcing*, Aug 25, 2004 (draft on file with author).

11. Senator John Kerry, Speech at the 2004 Democratic National Convention (July 29, 2004) reprinted in, *Kerry's Acceptance, 'There is a Right Way and a Wrong Way to be Strong,'* N.Y. TIMES, June 30, 2004, at P5.

position has carefully chronicled not only China's fairly rigid resistance to freedom of association among workers<sup>12</sup> and the development of free trade unions among workers. These inhumane labor conditions are inconsistent with the International Labor Organization's (ILO) "decent work" commitment.<sup>13</sup> At the 2004 Boston Democratic National Convention, the Presidential standard bearer, Senator John Kerry, noted that workers of all countries must have a "fair playing field."<sup>14</sup>

The third factor, in the United States, recognition of worker rights is now receiving attention in the human rights context in ways that it never did before. Even during the tenures of Woodrow Wilson and Jimmy Carter, the two presidents most focused upon international human rights in American history. President Bill Clinton promoted this agenda not only with a well-publicized address to the ILO in Geneva but, even beforehand, at the World Trade Organization (WTO) meeting in Seattle in December 1999, when he said:

[T]he WTO must make sure that open trade does indeed lift living standards-respects core labor standards that are essential not only to worker rights, but to human rights . . . .To deny the importance of these issues in a global economy is to deny the dignity of work.<sup>15</sup>

However, the problem of how to promote dignity in actuality<sup>16</sup> has bedeviled the nation-states as well as supranational organizations and has in the process spawned a vast literature.<sup>17</sup>

## II. AMERICAN COURTS AS A FORUM FOR INTERNATIONAL LABOR STANDARDS

Within the past few years, the United States Supreme Court has begun to cite and rely upon international instruments and to consider for-

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12. See Section 301, Petition of American Federation of Labor and Congress of Industrial Organizations, Before the Office of the United States Trade Representative 7-8 (Mar. 16, 2004).

13. See generally Int'l Labour Office: Geneva, *Decent Work and the Informal Economy*, Report VI, Int'l Labor Conference, 90th Sess. (2002).

14. Kerry, *supra* note 11, at P6. Ironically, however, there has been little attention or aid given to the plight of workers dislocated by trade. See David Wessel, *Aid to Workers Hurt by Trade Comes in Trickle*, WALL ST. J., Aug. 11, 2005, at A2.

15. President Bill Clinton, Remarks at Luncheon in Honor of Ministers Attending the Meetings of the World Trade Organization (Dec. 1, 1999).

16. See generally, EDWARD C. LORENZ, *DEFINING GLOBAL JUSTICE: THE HISTORY OF THE U.S. INTERNATIONAL LABOR STANDARDS POLICY* (2001).

17. See, e.g., Philip Alston, *Core Labour Standards*, 15 EUR. J. INDUS. L. 457 (2004).

eign law in its judgments. This provides evidence of a revival of a long-standing tradition that could translate into American promotion of better labor standards in the developing world as well as in the United States. To illustrate the tradition, in 1900 the Court said:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.<sup>18</sup>

As Yale Law School Dean Harold Hongju Koh has written “From the beginning [of the Republic]. . . American courts regularly took judicial notice of both international law and foreign law (the law and practice of other nations) when construing American law.”<sup>19</sup> Thus, as Chief Justice John Jay said in 1793, “[T]he United States had, by taking a place among the nations of the earth, become amenable to the law of nations”<sup>20</sup> and had construed American law so as to avoid violation of the law of nations where any possible construction to the contrary existed.<sup>21</sup>

The Declaration of Independence states that its reasoning is prompted out of “a decent Respect to the Opinions of Mankind.”<sup>22</sup> As Justice Ruth Ginsburg has stated: “The drafters and signers of the Declaration of Independence cared about the opinions of other peoples; they placed before the world the reasons why the States, joining together to become the United States of America, were impelled to separate from Great Britain.”<sup>23</sup> For obvious historical reasons, at the beginning, the Court integrated English common law into American jurisprudence<sup>24</sup>

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18. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *accord*, *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

19. Harold Hongju Koh, *Agora: The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L. L. 43, 45 (2004).

20. *Chisholm v. Georgia*, 2 U.S. 419, 473 (1793).

21. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

22. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), available at [http://www.archives.gov/national-archives-experience/charters/declaration\\_transcript.html](http://www.archives.gov/national-archives-experience/charters/declaration_transcript.html).

23. Assoc. Justice Ruth Bader Ginsburg, Address at the 99th Annual Meeting of the American Society of Int'l Law, *A Decent Respect to the Opinions of [Human]kind* (Apr. 1, 2005), available at <http://www.asil.org/events/AM05/ginsburg050401.html>.

24. See *McDonald v. Hovey*, 110 U.S. 619, 628 (1884) (“[W]here English statutes. . . have been adopted into our own legislation, the known and settled historic construction of these statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority.”).

and indeed had looked to the practices of the King of Great Britain in determining the legal status of Indian tribes under the Constitution.<sup>25</sup>

In two areas, the use of international law in practice has been particularly prevalent. One is where international law issues are traditionally raised, such as disputes arising on the high seas.<sup>26</sup> Sometimes the issue lends itself to foreign law comparison because the practices of other nation-states are directly relevant, such as the right to retain citizenship.<sup>27</sup> In 2004, the “War on Terror” and the Iraqi war have generated issues which have required the Court to look at international instruments such as the Geneva Conventions.<sup>28</sup> Events involving international war tribunals, such as those relating to the former Yugoslavia and Rwanda, have caught the attention of the United States as well as the world.<sup>29</sup>

The issue of international and foreign law’s relevancy to a determination of what constitutes “cruel and unusual punishment” arose in a series of cases referring to community standards. The first series consists of Eighth Amendment issues related to the death penalty. Beginning in the 1970s, the Court declared that international opinion is “not irrelevant”<sup>30</sup> to the question of what community standards exist in this country and examined the felony murder rule through examination of doctrines in other countries.<sup>31</sup> Again, a plurality of the Court gave great weight to the international condemnation of the death penalty relating to juveniles

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25. *Worcester v. Georgia*, 31 U.S. 515, 560 (1832) (noting that “the King of Great Britain, at the treaty of peace, could cede only what belonged to his crown”).

26. *See generally* *The Georgia*, 74 U.S. 32 (1869) (holding that a neutral party, who purchased in good faith a disabled Confederate vessel of war, docked in Liverpool, was found not to take good title as against the right of capture from the United States). The events of this incident are chronicled in my book *Diary of a Contraband*, my great-grandfather William B. Gould was involved in the seizure of the Confederate vessel, the C.S.S. *Georgia*, by his ship, the U.S.S. *Niagara*. WILLIAM B. GOULD IV, *DIARY OF A CONTRABAND: THE CIVIL WAR PASSAGE OF A BLACK SAILOR*, 205-13 (2002).

27. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86 (1958). Comparable disputes have arisen out of the right to travel. *See generally* William B. Gould IV, *The Right to Travel and National Security*, 1961 WASH. U.L.Q. 334 (1961) (discussing constitutional and other disputes that have arisen out of the right to travel).

28. *See, e.g.*, *Rumsfeld v. Padilla*, 540 U.S. 1159 (2004); *see generally* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (using the Geneva Convention as a reference in whether legal authorization exists for the detention of citizen enemy combatants).

29. *See generally* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003). Of course, the world has been influenced by the United States and its Bill of Rights. *See* Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537 (1988).

30. *See* *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977).

31. *See* *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982).

and practice in other countries,<sup>32</sup> yet a year later the Court disregarded the importance of international opinion; Justice Scalia emphasized that “American conceptions of decency. . .are dispositive.”<sup>33</sup> Nonetheless, in determining whether long delays prior to execution constitute cruel and unusual punishment under the Eighth Amendment, Justice Breyer relied upon foreign authority when he dissented from the denial of certiorari.<sup>34</sup>

In 2002, the Court held it was unconstitutional to execute the mentally disabled and noted that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. . .[providing] further support to our conclusion that there is a consensus among those who have addressed the issue.”<sup>35</sup> The late Chief Justice Rehnquist – who had earlier said “it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative proc-

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32. See *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion).

33. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989). In his dissent, Justice Brennan cited foreign authority and multiple human rights treaties, noting that the “choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society.” *Id.* at 384, 390. Curiously, Justice Scalia, who generally objects to reliance upon foreign law, has cited foreign standards when they appeared to suit his purposes. *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 381 (1995) (Scalia, J. dissenting). He also stressed reliance upon foreign decisions in *Olympic Airways v. Husain* where he was arguably tongue-in-cheek when he stated:

[w]hen we interpret a treaty, we accord the judgments of our sister signatories ‘considerable weight.’ . . . [citations omitted] Today’s decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us. This sudden insularity is striking, since the Court in recent years has canvassed the prevailing law in other nations (at least Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations’ courts have no role in enforcing [citing decisions discussed *infra* on the Eighth Amendment and the criminalization of homosexual conduct]. One would have thought that foreign courts’ interpretations of a treaty that their governments adopted jointly with ours, and that they have an actual role in applying, would be (to put it mildly) all the more relevant. The Court’s new abstemiousness with regard to foreign law is not without consequence: Within the past year, appellate courts in both England and Australia have rendered decisions squarely at odds with today’s holding. Because the Court offers no convincing explanation why these cases should not be followed, I respectfully dissent.

*Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting).

34. See *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting) (noting the practices of foreign countries). Justice Thomas concurred with the denial of certiorari, and noted that “[w]ere there any support in our own jurisprudence [for Justice Breyer’s proposition], it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.” *Id.* at 990.

35. *Atkins v. Virginia*, 536 U.S. 304, 316-17 n.21 (2002).

ess. . .<sup>36</sup>—now joined with Justice Scalia to scorn reference to international opinion.<sup>37</sup>

Again, in 2005, the Court, relying on foreign law, declared the execution of juveniles under 18 to be violative of the Eight Amendment and, in so doing, relied upon foreign law.<sup>38</sup> Justice Kennedy, writing for the majority, said:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. . . . [But] the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments' . . . .

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, of resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

. . . Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples

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36. William Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers, eds., 1993). See also *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8, 718 n.6 (1997), where the Court, in an opinion authored by Chief Justice Rehnquist, noted the practices of other countries including England, New Zealand, and Colombia, in upholding a state law criminalizing assisted suicide, and found that “in almost every western democracy – it is a crime to assist a suicide.”

37. *Atkins*, 536 U.S. at 324-25 (Rehnquist, J., dissenting).

38. *Roper v. Simmons*, 125 S.Ct. 1183, 1198 (2005). Once again, Justice Scalia, writing for Chief Justice Rehnquist and Justice Thomas, dissenting, decried reliance upon foreign law. *Id.* at 1226. Justice O'Connor, also dissenting, agreed that the use of foreign law, while relevant, is inappropriate in this case. *Id.* at 1215-16.



simply underscores the centrality of those same rights within our own heritage of freedom.<sup>39</sup>

The Court also cited to foreign authority regarding affirmative action in a concurring opinion by Justice Ginsburg,<sup>40</sup> the First Amendment in Justice Breyer's opinion,<sup>41</sup> and in Justice Breyer's dissenting opinion, examining the constitutionality of the Brady Bill.<sup>42</sup>

In 2003, while considering the constitutionality of anti-sodomy laws in *Lawrence v. Texas*,<sup>43</sup> the Court produced "promising signs. . .that the American ostrich is finally starting to take its head out of the sand."<sup>44</sup> This was the first United States Supreme Court decision to cite and rely upon a decision of the European Court of Human Rights in Strasbourg. Here the Court reexamined its earlier decision,<sup>45</sup> which proceeded upon the assumption that European law and practice were intolerant of homosexual sodomy. This shift produced an anguished and angry dissent by Justice Scalia,<sup>46</sup> who decried reliance upon European law, and a resolution by sixty conservative Republican members of the United States House of Representatives (including the House Whip, Tom DeLay), stating that it is essential to freedom that Americans have:

[the] ability to live their lives within clear legal boundaries [under]. . .the foundation of the rule of law. . .[Judicial determinations] should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such. . .[matters] are incorporated into the legislative history of laws passed. . . or otherwise in-

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39. *Id.* at 1198, 1200.

40. *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing to the International Convention on the Elimination of All Forms of Racial Discrimination). *See also* Ruth Bader Ginsburg & Deborah Jones Meritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & L. REV. 193, 195 (1999).

41. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (noting the consistency between First Amendment jurisprudence and decisions of the European Court of Human Rights and the Canadian Supreme Court).

42. *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (discussing the federal systems of Switzerland, Germany, and the European Union).

43. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003). Some insights into both *Lawrence* and its author, Justice Anthony Kennedy's views on its use of foreign law are provided in Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, at 42.

44. Koh, *supra* note 19, at 48.

45. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (holding that homosexuals do not have any fundamental right to engage in acts of consensual sodomy).

46. H.R. Res. 568, 108th Cong., (2d. Sess. 2004).

form an understanding of the original meaning of the laws of the United States.<sup>47</sup>

The decisions of the Court, as we shall see – particularly in *Lawrence*—have produced a backlash akin to any potential citation of international labor law by the National Labor Relations Board (hereinafter “NLRB or Board”). In the 1990’s, when I was its Chairman, had the NLRB dared cite a decision or opinion by the ILO, it would have risked denial of appropriations and perhaps worse.<sup>48</sup> Indeed, sponsors of the House Resolution have spoken boldly of impeachment of lifetime tenured judges, promoting calls for the preservation of judicial independence by Chief Justice Rehnquist and Justice O’Connor.<sup>49</sup>

One of the most prominent and relevant illustrations of the shift is the Supreme Court’s June 29, 2004 decision in *Sosa v. Alvarez-Machain*,<sup>50</sup> where as noted below, the Court authorized the federal courts to examine international instruments under the Alien Tort Claims Act of 1789<sup>51</sup> when considering the lawfulness of extraterritorial conduct.

### III. THE SITUATION IN THE UNITED STATES

Any discussion of fundamental rights at work in the United States must necessarily focus upon the country’s domestic labor law and its compatibility with the conventions of the ILO, particularly Convention

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47. *Lawrence*, 539 U.S. at 586 (2003) (Scalia, J., dissenting).

48. William B. Gould IV, *Labor Law and its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667, 684 (2003). Cf. *Former NLRB Chairman Reflects on Freedom of Association as ILO Celebrates Major Milestones*, 12 ILO Focus (1999) (interview with William B. Gould IV (on file with author)).

49. See generally Linda Greenhouse, *Rehnquist Resumes His Call For Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10. Justice O’Connor’s remarks are discussed in *O’Connor Advises Judges to Meet Their Lawmakers*, S.F. DAILY J., July 23, 2004. She tells members of the 9th Circuit ways to improve relations between Congress and the federal judiciary.” *Id.* This is not the first time that the Chief Justice has complained about judicial independence. William B. Gould IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB – A MEMOIR*, 131-33 (2000). See generally David G. Savage, *Rehnquist Sees Threat to Judiciary*, L.A. TIMES, Jan. 1, 2005, at A1.

50. See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). See generally Sarah H. Cleveland, *The Alien Tort Statute, Civil Society and Corporate Responsibility*, 56 RUTGERS L. REV. 971 (2004); Beth Stephens, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” For Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 534 (2004).

51. 28 U.S.C. § 1350 (2000) (conferring original jurisdiction in federal courts 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”).

No. 87 regarding freedom of association<sup>52</sup> and Convention No. 98 on the right to organize and bargain collectively.<sup>53</sup> The United States has been a major proponent of the 1998 Declaration on Fundamental Principles and Rights at Work promulgated by the ILO,<sup>54</sup> unanimously concurred in by all members of the organization. This instrument, which does not carry the force of law,<sup>55</sup> is designed to enshrine so-called “core” standards, i.e., (1) protection of freedom of association and recognition of the right of collective bargaining, (2) prohibitions against forced labor, (3) prohibitions against discrimination, and (4) “effective” abolition of child-labor. However, as is well known, with the exceptions of Convention No. 182 addressing the worst forms of child labor<sup>56</sup> and Convention No.

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52. Convention No. 87 provides that ratifying countries must guarantee the rights of “workers and employers to join organizations of their own choosing without previous authorization” and without any interference from public authorities, as well as their right to freely organize for the purpose of furthering and defending their interests. *See* Convention Concerning Freedom of Association and Protection of Right to Organise (Convention No. 87) art. 2, July 9, 1948.

53. Convention No. 98 provides that workers shall “enjoy adequate protection against acts of anti-union discrimination in respect of their employment” and that, where necessary measure be taken to encourage and promote “voluntary negotiation between employers or employers’ organizations and workers’ organizations” with a view toward collective agreements. *See* Convention Concerning the Right to Organise and Bargain Collectively (Convention No. 98), July 1, 1949.

54. International Labor Organization, Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Sess. (June 1998), *available at* <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE>.

55. Professor Hepple stated the following:

It has been argued that the U.S. is bound by the principles of non-discrimination and freedom of association purely as a result of ILO membership [due to the Declaration] despite its failure to ratify the relevant conventions. Such an argument is unlikely to make any practical difference because the Declaration is regarded as purely promotional. The more interesting question, from a legal viewpoint, is whether any of the fundamental principles and rights embodied in the Declaration have become part of customary international law [because they are part of ‘habitual state practice’] and understood to be required by international law. . . . While the prohibition of slavery and forced labour may be said to be matters on which state practice is broadly consistent, it is much more difficult to show this in respect of the prohibitions on child labour and the elimination of discrimination. Widespread abuse of the freedom of association and the denial of collective bargaining in many countries make it virtually impossible to regard these human rights as part of consistent state practice, but the growing observance of the relevant conventions may in time change this.

BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE*, 59-60 (2005).

56. Convention No. 182 on the Worst Forms of Child Labor provides that ratifying countries must take “immediate and effective measures” to eliminate the worst forms of child labor, including slavery, trafficking of children, debt bondage, prostitution, pornography, drug trafficking and other forms of work relating to children that will harm their health, safety, and morals. *See* Worst Forms of Child Labour Convention (Convention No. 182), June 17, 1999, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>. *See also* Minimum Age Convention (Convention No. 138), June 26, 1973, *available at* <http://www.onchr.org/english/law/pdf/ageconvention.pdf>.

105 on the abolition of forced labor,<sup>57</sup> the United States has failed to ratify four of the eight ILO fundamental conventions.<sup>58</sup> This is the case, notwithstanding the fact that the international community has overwhelmingly ratified these treaties. Consider for instance that of the total 178 ILO signatory countries, 168 and 165, respectively, have ratified the dual ILO Conventions on the elimination of forced and compulsory labor.<sup>59</sup> Also, 144 states have ratified Convention No. 87 which protects and promotes freedom of association while 154 states have ratified Convention No. 98,<sup>60</sup> addressing the right to organize and bargain collectively.

In what form should domestic law be shaped so as to comport with international law in labor-management relations? The United States Constitution was written and ratified at a time when labor unions and labor organizations were virtually nonexistent, although soon thereafter, they would be besieged with doctrines of criminal conspiracy and the like.<sup>61</sup> While the Thirteenth Amendment has prohibited involuntary servitude, slavery, and associated practices<sup>62</sup> since 1865, none of the other

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This convention obligates the ratifying countries to establish a minimum age for admission to work, of not less than fourteen years, and to "raise progressively the minimum age for admission to employment" to a level consistent with the fullest physical and mental development of young persons.

57. Convention No. 105 prohibits the use of forced or compulsory labor, including as a means of "political coercion," "economic development," "a means of labor discipline" or as "a means of racial, social, national or religious discrimination," and provides that ratifying member states must take effective measures to "secure [its] immediate and complete abolition." See Convention Concerning the Abolition of Forced Labor (Convention No. 105), June 25, 1957, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105>. See also Forced Labor Convention, (Convention No. 29), June 28, 1930 (stipulating that ratifying countries must undertake to "suppress the use of forced or compulsory labor in all its forms within the shortest possible period"), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>.

58. These include Conventions No. 87, 98, 138, and 29, *supra* notes 52, 53, and 56. Additionally, the Equal Remuneration Convention, Convention No. 100, provides that ratifying countries shall apply the "principle of equal remuneration for men and women" for work of equal value. Finally, Convention No. 111 requires ratifying states to "declare and pursue" a national policy aimed at promoting equal opportunity and treatment in respect of employment and occupation, so as to eliminate discrimination in these fields. Convention Concerning Discrimination (Employment and Occupation) Convention (Convention No. 111), June, 25, 1958, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>.

59. See ILOLEX Database of International Labour Standards, available at <http://www.ilo.org/ilolex/english/>. [hereinafter ILOLEX Database].

60. *Supra* text accompanying note 53.

61. Commonwealth v. Pullis (The Philadelphia Cordwainer's Case), Mayor's Court of Philadelphia (1806). See J. COMMONS, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (1910).

62. U.S. CONST. amend. XIII, § 1. See generally James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law*, 102

Constitutional amendments directly affect labor and employment. Nonetheless, sixty years ago, the Court in *Thomas v. Collins*<sup>63</sup> concluded that “[t]he right. . .to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly,” protected by the First Amendment of the United States Constitution.<sup>64</sup> This ruling has been subsumed within the Court’s landmark decision in *NAACP v. Alabama*, in which the Court first proclaimed the freedom of association as part of free speech and assembly rights protected by the Bill of Rights.<sup>65</sup> In the freedom of association cases involving civil rights activities, the Court relied upon *Thomas* in *NAACP v. Button*<sup>66</sup> as a basis for its enunciation of free association and as authority for some of its dicta: “We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers”<sup>67</sup> as well as upon other freedom of association cases.”

In the 1960s, the Federal Courts of Appeals began to connect the freedoms established in *Thomas* to union associational rights.<sup>68</sup> However, in the 1970s, the Court in *Smith v. Arkansas State Highway Employees, Local 1315*<sup>69</sup> by a 7-1 vote in a *per curiam* opinion, explicitly restricted this freedom, although it reiterated *Thomas* and applied the First Amendment freedom of association of rights to unions. The Court first restated its prior decrees:

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COLUM. L. REV. 1 (2002); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997).

63. *Thomas v. Collins*, 323 U.S. 516 (1945).

64. *Id.* at 532.

65. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

66. *NAACP v. Button*, 371 U.S. 415 (1960).

67. *Id.* at 430; *see also* *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958) (standing for the proposition that the ordinance imposed an unconstitutional censorship upon the enjoyment of First Amendment freedoms); Note, *Validity of Statutes and Ordinances Requiring Licensing of Union Organizers*, 70 HARV. L. REV. 1271, 1275 (1958).

68. *See, e.g.,* *McLaughlin v. Tilendis*, 398 F.2d 287, 289 (7th Cir. 1968) (“Unless there is some illegal intent, an individual’s right to form and join a union is protected by the First Amendment”); *Am. Fed’n of State, County, & Mun. Employees v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) (citing *Thomas* and finding that “[u]nion membership is protected by the right of association under the First and Fourteenth Amendments”); *Atkins v. City of Charlotte*, 296 F. Supp 1068, 1077 (W.D.N.C 1969) (three-judge court) (stating that the “right of association includes the right to form and join a labor union”); *Vorbeck v. McNeal*, 407 F. Supp. 733, 738 (E.D. Mo. 1976) (three-judge court) (noting that the “appropriate method for protecting the state’s legitimate interest in averting such a strike is not to restrict freedom of association, but rather to fashion such precise legislation declaring such strikes illegal”).

69. *Smith v. Ark. State Highway Employees Local 1315*, 441 U.S. 463 (1979).

The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members.<sup>70</sup>

However, the Court further emphasized that the “First Amendment is not a substitute for the national labor relations laws.”<sup>71</sup> Thus, the Court refused to extend First Amendment protection to create “any affirmative obligation of the government to listen, to respond or, in this context, to recognize the association and bargain with it.”<sup>72</sup> In a series of subsequent decisions, the courts have concluded that there is no constitutional duty to bargain,<sup>73</sup> notwithstanding the fact that a statutory one has existed since 1935. Coincidentally, the European Court of Human Rights has established a constitutional protection for the right to associate, without a similar guarantee for the collective bargaining process.<sup>74</sup> Indeed, the United States Supreme Court has steered away from constitutional regulation of labor management activities as a general proposition,<sup>75</sup> due to a fear of reviving doctrines associated with the 1920s when judicial economic regulation brought discredit to the impartial administration of justice.<sup>76</sup>

Meanwhile, the National Labor Relations Act of 1935<sup>77</sup> (hereinafter “Act”) does provide – or purports to provide – for freedom of association protection as well as the right to organize and bargain collectively.<sup>78</sup> However, the statute has been plagued with cumbersome qualities. These qualities have created delays in the administrative process for the National Labor Relations Board, the quasi-judicial administrative agency that has jurisdiction to deal with representation and unfair labor practice

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70. *Id.* at 464.

71. *See id.*

72. *Id.* at 465.

73. In *Hanover Township Fed’n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 461 (7th Cir. 1972), the court relied on an earlier decision that held that “[t]here is no constitutional duty to bargain collectively with an exclusive bargaining agent.” *Indianapolis Educ. Ass’n v. Lewallen*, 72 L.R.R.M. 2071, 2072 (7th Cir. 1969).

74. The European Court of Human Rights has adopted a similar approach by drawing a demarcation line between trade union activity that is associational in nature and that which involves the collective bargaining process itself. *See Wilson & The National Union of Journalists v. United Kingdom*, 35 Euro. Ct. H.R. 20 (2002). *See also* Brian Bercusson, *The European Social Model Comes to Britain*, 31 INDUS. L.J. 209 (2002).

75. *See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.* 335 U.S. 525 (1949).

76. *See Lochner v. New York*, 198 U.S. 45, 64 (1905).

77. National Labor Relations Act, Pmbl., 29 U.S.C. §§ 151-168 (2000).

78. National Labor Relations Act, § 7, 29 U.S.C. § 157 (2000).

issues, as well as awarded limited remedies (which have been shaped by a series of United States Supreme Court rulings).<sup>79</sup> In the 1990s, during my Chairmanship of the NLRB, innovations were put in place which attempted to address these issues. These innovations included injunctions against unfair labor practices and expedited procedures. These procedures included the authority for administrative law judges (the trial judges of the NLRB who hear cases in the field) to issue bench awards without the filing of briefs at the hearing itself or within 72 hours of its completion in order to avoid the months of delay associated with post-hearing filings.<sup>80</sup> Special remedies were also instituted through case law adjudications that provided unions with access to private property to which they were not normally entitled,<sup>81</sup> obliging employers to pay both Board and union attorney's fees and double costs,<sup>82</sup> as well as nationwide orders and postings at all of an employer's facilities throughout the United States.<sup>83</sup> However, these procedures were of limited effect—sometimes rejected by the courts<sup>84</sup> and Congress<sup>85</sup>—and have fallen into disuse with the new “Bush” Board of the twenty-first century.<sup>86</sup>

The Act contains exclusions, such as those which leave agricultural workers unprotected.<sup>87</sup> Also, the Supreme Court has held that constitu-

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79. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM 219-22* (1993) (discussing the Supreme Court's fashioning of sanctions and remedies under the NLRA).

80. See William B. Gould, *Four-And-One Half Year Report by William B. Gould IV, Chairman, National Labor Relations Board 1994-1998*, at 1-3 (N.L.R.B. 1998); Lamont Stallworth et al., *The NLRB'S Unfair Labor Practice Settlement Program: An Empirical Analysis of Participant Satisfaction*, DISP. RESOL. J., Nov. 2004-Jan. 2005 at 22-29.

81. *Fieldcrest Cannon, Inc.*, 318 N.L.R.B. 470, 473 (1995). *enforced in part* 97 F.3d 65 (4th Cir. 1996).

82. *NLRB v. Unbelievable, Inc.* 71 F.3d 1434 (9th Cir. 1995).

83. See *Beverly Cal. Corp.*, 310 N.L.R.B. 222 (1993) (“Beverly I”); *Beverly Cal. Corp.*, 326 N.L.R.B. 153 (1998) (“Beverly II”); *Beverly Cal. Corp.*, 326 N.L.R.B. 232 (1998) (“Beverly III”) (addressing the appropriateness of a broad nationwide cease-and-desist order and nationwide posting of the order at all of a respondent employer's facilities). In *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 596 (2d Cir. 1994), the United States Court of Appeals for the Second Circuit denied enforcement of the corporate-wide order in *Beverly I*. More recently, the Seventh Circuit held that the NLRB did not abuse its discretion in principle in imposing a corporate-wide remedy, but remanded to the Board to refine the corporate-wide aspects of the remedial order. *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817 (7th Cir. 2000).

84. James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L. J. 1675, 1728 (1999).

85. See WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB – A MEMOIR* 133-34 (2000).

86. See generally Steven Greenhouse, *Labor Board's Detractors See a Bias Against Workers*, N.Y. TIMES, Jan. 2, 2005, at 12.

87. See National Labor Relations Act, 29 U.S.C. § 152(3) (2000).

tionally mandated election procedures may not be implemented as a result of the freedom of association cases.<sup>88</sup> Supervisors,<sup>89</sup> managerial employees,<sup>90</sup> confidential employees,<sup>91</sup> and domestic servants<sup>92</sup> are also beyond the Act's protection. The new employment relationships, which involve the use of independent contractors<sup>93</sup> and so called "contingent employees,"<sup>94</sup> have meant that the right to organize is more ephemeral than significant. Undocumented workers, though regarded as employees within the meaning of the Act since 1984 by virtue of a 5-4 Supreme Court ruling authored by Justice O'Connor,<sup>95</sup> have subsequently been left unprotected by virtue of a 2002 Supreme Court ruling, authored by Chief Justice William Rehnquist (which Justice O'Connor joined), denying such workers back pay.<sup>96</sup>

In the 1990's, the NLRB expanded the right of association by protecting a union's right to undertake a wide variety of actions and tactics to enforce other employment laws, such as those regarding anti-discrimination, minimum wage, and occupational health and safety.<sup>97</sup>

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88. *Babbitt v. UFW*, 442 U.S. 289, 312-14 (1979).

89. 29 U.S.C. § 152(3). *Cf. Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493-501 (1947) (Douglas, J., dissenting) (questioning Congress' intent regarding supervisors under the NLRA).

90. *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 269 (1974).

91. *NLRB v. Hendricks County Rural Elect. Membership Corp.*, 454 U.S. 170, 191 (1982).

92. 29 U.S.C. § 152(3) (2000).

93. *See generally* *Roadway Package System Inc.*, 326 N.L.R.B. 842 (1998); *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, (1998) (Chairman Gould, dissenting). *Cf. Elite Limousine Plus, Inc.*, 324 N.L.R.B. 992, (1997) (Chairman Gould, dissenting) (finding that limo drivers are employees of a limo service franchise).

94. *See, e.g., M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000), *overruled by* *H.S. Care L.L.C.*, 343 N.L.R.B. No. 76 (2004).

95. *Sure Tan Inc. v. NLRB*, 467 U.S. 883 (1984).

96. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 137 (2002). This decision reversed the Clinton Board's holding in *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995), *enforced*, 134 F.3d 50 (2d Cir. 1997).

97. *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000e (2000); The Occupational Safety and Health Act ("OSHA") of 1970, 29 U.S.C. §§ 651-678 (2000 & Supp. 2005); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000); *see* *Novotel New York*, 321 N.L.R.B. 624, 646 (1996) (Member Cohen, dissenting) (recognizing that under the Act, unions have an essential role in assisting workers in the exercise of their Section 7 rights to better their working conditions and that part of this role involves the financing of employment litigation). *But see* *Freund Bakery Co. v. NLRB*, 165 F.3d 928, 935 (D.C. Cir. 1999) (finding that the union's sponsorship of a lawsuit seeking overtime pay for unit employees prior to a representation election was impermissible, even where there was no evidence that the union financed the suit or was directly responsible for it, because the union "encouraged voters to believe that it was" responsible). *See also* *Nestle Ice Cream Co., v. NLRB*, 46 F.3d 578 (6th Cir. 1995) (finding that the union had provided employees with an impermissible benefit prior to a representation election when it helped them file a RICO suit against the employer).



Mail ballot elections became more widespread, the effect of which limited an employer's ability to engage in anti-union "captive audience" speeches during working hours.<sup>98</sup> However, the courts again have resisted,<sup>99</sup> and it is fair to say that the Board has taken regressive steps in the last four to five years. For instance, the NLRB has excluded through interpretation of a decision the right to statutory protection of some university employees<sup>100</sup> which for different doctrinal reasons, augments a prior Supreme Court ruling, denying many private university professors status as employees.<sup>101</sup> It is likely that the NLRB will soon render other decisions which will make nugatory the rights in the statute in the early part of the twenty-first century.

This trend makes relatively unimportant the extraterritorial impact of labor law. In contrast to both antitrust law<sup>102</sup> and the Civil Rights Act of 1964 as amended in 1991,<sup>103</sup> the Supreme Court has limited the extraterritorial impact of the National Labor Relations Act.<sup>104</sup> Nonetheless, some forms of economic activity involving secondary pressure undertaken in concert between American and Japanese unions may be within the sweep of American law.<sup>105</sup>

More recently the Court, speaking through Justice Kennedy, has

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98. The policy of using mail ballots to maximize the opportunity of workers to exercise their statutory right to vote in representation elections is reflected in the Board's decision in *San Diego Gas and Elect.*, 325 N.L.R.B. 1143, 1145 (1998) (Chairman Gould, concurring), and *Sitka Sounds Seafoods*, 325 N.L.R.B., 685, 686 (1998).

99. *See Shephard Convention Serv., Inc.*, 314 N.L.R.B., 689, 689-90 (1994) (holding that a mail ballot should be provided where it was unlikely that on-call employees would be able to exercise the franchise at the plant facility because of the irregular nature of their work and the fact that they have other employment, *enforcement denied*, 85 F.3d 671 (D.C. Cir. 1996).

100. *Brown Univ.*, 342 N.L.R.B. 42 (2004) *available at* [http://www.nlr.gov/nlr/shared\\_sfiles/decisions/342/342-42.pdf](http://www.nlr.gov/nlr/shared_sfiles/decisions/342/342-42.pdf).

101. In *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 (1980), the Supreme Court held that at least under certain circumstances, faculty members in universities are properly excluded from the definition of "employee."

102. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 794-99 (1993); *U.S. v. Aluminum Oil of America*, 148 F.2d 416 (2d Cir. 1945).

103. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *rev'd by the Civil Rights Act of 1991*. *See generally* Bellace, *The International Dimension of Title VII*, 24 CORNELL INT'L L.J. 1 (1991).

104. *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). However, the Act has been applied extraterritorially in *Int'l Longshoremen's Local 1416 v. Adiranne Shipping Co.*, 397 U.S. 872 (1970); *Asplundh Tree Expert Co.*, 336 N.L.R.B. 1106 (2001), *enf. denied*, 365 F.3d 168 (3d Cir. 2004). However, the Sarbanes-Oxley Act of 2002 has been denied extraterritorial scope regarding foreign nationals. *Carrero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006).

105. *See Int'l Longshoremen's Ass'n*, 323 N.L.R.B. 1029, 1031 (1997), (Chairman Gould, dissenting); *Dowd v. Longshoremen ILA*, 975 F.2d 779 (11th Cir. 1992).

applied Title III of the American with Disabilities Act of 1990 to foreign flagships.<sup>106</sup> Notably, the United States has not ratified most of the fundamental Conventions, even the anti-discrimination conventions, an area in which the United States pioneered in the mid-1960's through the statutory prohibition on race, sex, religion, national origin, and age discrimination in employment, and in the 1990's with what appeared to be a relatively comprehensive Americans with Disabilities Act.<sup>107</sup> However, national labor policy is resolute in both its opposition to various forms of discrimination as well as employer interference with the right to organize and bargain collectively. The policy provides some measures of specificity regarding how workers may band together.<sup>108</sup> It is against this backdrop that American efforts to implement the Conventions must be viewed.

#### IV. AMERICAN CONCERNS WITH STANDARDS ABROAD

Historically, there have been two principal problems with the development of international labor standards: (1) the question of what standards should be promoted and (2) how enforcement is to be instituted.<sup>109</sup> Legislators like former Congressman Richard Gephardt of Missouri, for instance, have bandied about the idea of an international minimum wage. These proposals assume that a uniform minimum wage would not be appropriate, instead promoting national legislation which would impose some minimum wage obligations upon developing countries. The difficulty here is that such proposals would not only deny disadvantaged, developing nations their comparative advantage in trade, but would also empower the industrialized world to create the standards to be imposed upon Third World nations as a condition of retaining trade, thus promoting a new round of world-wide outrage at American-unilateralism.

Conversely, promotion of so-called "core" labor standards is a different matter which is unlikely to affect trade performance negatively. In

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106. *E.g.* *Spector v. Norwegian Cruise Line Ltd.*, 125 S.Ct. 2169, 2184 (2005).

107. Americans with Disabilities Act, 42 U.S.C. § 12101 (1990).

108. *Republic Aviation v. NLRB*, 324 U.S. 793, 805 (1945) (establishing protection for the right of employees to solicit on company property); *Caterpillar Inc.*, 321 N.L.R.B. 1178, 1184 (1996) (providing free speech rights for employees vis-à-vis management).

109. COMMITTEE ON MONITORING INTERNATIONAL LABOR STANDARDS, NATIONAL RESEARCH COUNCIL, MONITORING INTERNATIONAL LABOR STANDARDS: TECHNIQUES AND SOURCES OF INFORMATION 1 (2004), available at <http://www.nap.edu/books/0309091349/html> (last visited Oct. 24, 2005).

a series of important studies, the Organization for Economic Cooperation and Development (OECD) has acknowledged that the core labor standards take into account the different stages of development of the nation-states and need not retard improved employment conditions, thereby establishing a framework for substantive standards which can be voluntarily negotiated or devised by national government policy.<sup>110</sup> As noted above, the core standards are procedural generally in nature and have been accepted by all ILO members in 1998 in the form of the Declaration on Fundamental Principles and Rights of Work.<sup>111</sup> These standards, viewed to be of a fundamental nature of a democratic society, expand upon the historic ILO Declaration of Philadelphia in 1944,<sup>112</sup> which established special support for the principles of freedom of association and collective bargaining.

These standards are essentially procedural and thus do not directly affect the substance of the employment relationship, i.e., freedom of association, the right to organize and bargain collectively, non-discrimination in employment and, the prohibition of forced labor and the elimination of child labor. Although the child labor prohibition possesses special problems, a key finding by the OECD was that there was no empirical evidence that low core standards could be correlated with low real-wage growth. Therefore, raising core labor standards would not be inconsistent with a pattern of higher real-wage growth.<sup>113</sup> This contradicts a portion of the race to the bottom argument by supporting the view that there is no gain for developing countries when they attempt to repress workers rights in any of these areas.<sup>114</sup>

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110. See Organization for Economic Co-Operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (1996) [hereinafter OECD 1996]; Organization for Economic Co-Operation and Development, *International Trade and Core Labour Standards* (2000) [hereinafter OECD 2000].

111. International Labor Organization, *Declaration on Fundamental Principles and Rights at Work* (1998) available at <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE> (last visited Jan. 8, 2006).

112. See About the ILO, Who We Are: Declaration Concerning the Aims and Purposes of the International Labour Organization, Art. III(e) (1944), at <http://www.ilo.org/public/english/about/iloconst.htm#annex> (last visited Dec. 1, 2004) (committing the ILO to "further world programmes which will achieve . . . the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures").

113. OECD 1996, *supra* note 110, at 37.

114. Robert J. Flanagan, *Labor Standards and International Competitive Advantage*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 39 (Robert J. Flanagan & William B. Gould IV, eds., 2003).

Another comparable finding by the OECD about these core principles highlights a positive two-way relationship between trade liberalization and freedom of association. The OECD identified no cases where existing freedom of association rights worsened when trade reforms were instituted. Also, freedom of association and bargaining rights did not impede trade liberalization in any of the cases.<sup>115</sup> Yet, with regard to its findings, the OECD itself has noted that they were made in the time before China became a full-fledged world trading partner and a member of the World Trade Organization.<sup>116</sup> Now, some of the ongoing debate about outsourcing and the impact that it has on white-collar, as well as blue-collar, jobs in the United States suggests that the specter of the Chinese economy poses a potential “race to the bottom” which was not contemplated by the evidence available at the turn of the century.<sup>117</sup>

#### V. ENFORCEMENT AND REMEDIES

But how are these rights, once identified, to be enforced? Rights without remedies are relatively unimportant.

Historically, since its formation through the Treaty of Versailles, the International Labor Organization has been the principal international forum for enforcement of labor rights. It has shaped conventions on all of the so-called “core” principles which have been unanimously supported in the Declaration of Principles. It utilizes a variety of means to monitor application or observance of its conventions. The first is the regular system of supervision based on the ratification of conventions of ILO member countries. The ILO tripartite system allows for any employer or worker organization to seek an examination of the government’s alleged failure to apply conventions it has ratified.<sup>118</sup> As previously noted, the difficulty with regard to the United States is that the nation has not ratified any of the conventions containing the core principles, with the exceptions of Conventions No. 182, regarding the worst

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115. OECD 1996, *supra* note 110, at 49.

116. *Exporting top spot still only a dream*, CHINA DAILY, Sept. 22, 2005, at 4, available at [http://www.chinadaily.com.cn/english/doc/2005-09/22/content\\_479800.htm](http://www.chinadaily.com.cn/english/doc/2005-09/22/content_479800.htm) (last visited Jan. 17, 2006).

117. See, e.g., Aaron Bernstein, *Special Report: Shaking Up Trade Theory*, BUS. WK., Dec 6, 2004, at 116.

118. ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, Oct. 24, 2005, available at <http://www.ilo.org/public/english/standards/norm/sources/men.htm>.

forms of child labor,<sup>119</sup> and No. 105, regarding the abolition of forced labor.<sup>120</sup>

Governments may also bring complaints or concerns against other governments, and special machinery is established to address freedom of association complaints from worker organizations or employers against governments that have not ratified Conventions 87 and 98. This machinery provides for freedom of association, the right to organize, and collective bargaining. For instance, the United States Supreme Court's holding that undocumented workers were not entitled to back pay under the National Labor Relations Act was referred to the Committee of Experts on Freedom of Association, and that body concluded that the Court's decision did not provide adequate protections to workers within the meaning of Conventions 87 and 98.<sup>121</sup>

Attempts to extend the freedom of association machinery to other core conventions, such as those regarding forced labor and non-discrimination, have been rejected because these conventions are not embedded in the ILO constitution, as are Conventions 87 and 98. This presents a problem for those who seek to enforce such Conventions against non-ratifying countries like the United States. And even with regard to ratifying countries, the ILO machinery is not self-enforcing. Though there is a potential resort to the International Court of Justice in The Hague, pursuant to ILO Article 33, it has not been tried, even in the more notorious cases such as apartheid in South Africa. Only once was it utilized, in the case of forced labor problems of Myanmar. It is perhaps an exaggeration to characterize the ILO as a debating society; but at this juncture there are no meaningful remedies and sanctions for violations beyond the court of international public opinion.

The United States has entered into regional treaties like the North American Free Trade Agreement (NAFTA), which promotes adherence and enforcement of existing labor laws between the three member countries: United States, Canada, and Mexico. But the problem with NAFTA is that only existing standards at the nation-state level are protected and, even in connection with core standards, there is no remedy beyond the

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119. See Convention No. 182, *supra* note 56.

120. See Convention No. 105, *supra* note 57.

121. ILO, Comm. on Freedom of Ass'n, Case no. 227, Report No. 332: Complaints Against the Government of the United States Presented by the American Federation of Labor and the Congress of Industrial Organizations and the Confederation of Mexican Workers, ¶ 610, Vol. LXXXVI, 2003, Series B, No. 3.

ministerial consultations.<sup>122</sup> Subsequent trade agreements with, for instance, Jordan and Chile contain their own deficiencies.<sup>123</sup>

There have been numerous debates about these insufficient protections in the context of other regional treaties, even prior to mechanisms such as the Generalized System of Preferences (GSP). The GSP provides for sanctions through national legislation when some core principles and other standards are violated. However, the United States has engaged in selective enforcement of GSP, attributable, in part, to changing political winds. Of course, a root problem with the GSP approach is the problem of unilateralism. During the Bush Administration, the United States has been frequently associated with unilateralism as the result of many measures, especially the war in Iraq.

## VI. THE ALIEN TORT CLAIMS ACT

Perhaps the most promising initiatives have been undertaken in connection with the Alien Tort Claims Act (ATCA) as a result of the Supreme Court's landmark *Sosa* decision referred to above.

*Sosa* was not a labor case. In this case, the Drug Enforcement Administration (DEA) approved using *Sosa* and other Mexican nationals to abduct Alvarez, also a Mexican national, from Mexico to stand trial in the United States for the torture and murder of a DEA agent.<sup>124</sup> Alvarez was a physician in Mexico who allegedly prolonged the life of a DEA agent on assignment in Mexico, in order to extend his interrogation and torture.<sup>125</sup> When extradition efforts failed, *Sosa* and others seized Alvarez from his home in Mexico and forcibly transferred him to the United States where he was arrested by federal agents and faced trial in a United States court.<sup>126</sup> When Alvarez was later acquitted, he sued (1) the United

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122. See North American Agreement on Labor Cooperation, Sept. 13, 1993, art 22(1), 32 I.L.M. 605 (1993) (supplemental labor agreement to the North American Free Trade Agreement. See also *The North American Agreement on Labor Cooperation: Linking Labor Standards and Rights to Trade Agreements*, 12 AM. U.J. INT'L L. & POL'Y 815 (1997) (discussing the successes and failures of the North American Agreement on Labor Cooperation and the National Administrative Offices created in each country).

123. See generally Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S. – Jordan, Oct. 24, 2000, 41 I.L.M. 63, 76 (2002) (creating a committee between the United States and Jordan while not enabling it to have any authority beyond ministerial matters); see generally Free Trade Agreement, U.S. - Chile, June 6, 2003, available at [http://www.tcc.mac.doc.gov/pdf/chileFTA/00\\_preamble\\_EEUU.pdf](http://www.tcc.mac.doc.gov/pdf/chileFTA/00_preamble_EEUU.pdf).

124. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2003).

125. *Id.* at 697.

126. *Id.* at 697-98.

States, for false arrest under the Federal Tort Claims Act, which waives the United States' sovereign immunity under certain circumstances and (2) *Sosa*, for violating the law of nations under the Alien Tort Claims Act of 1789,<sup>127</sup> which grants federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations. . . ."<sup>128</sup> It is the latter aspect of this litigation, relating to *Sosa* and the law of nations, which has implications for international labor standards.

The Court held that the claim against the United States, under the first statute, must fail because such claims are barred by a statutory exception precluding waiver of the U.S. government's sovereign immunity for claims arising in a "foreign country" – in this case Mexico.<sup>129</sup> The Court also held that Alvarez was not entitled to recovery of damages from *Sosa* under the Alien Tort Claims Act, but its reasoning sparked a new war over the subject even though the battle had already been lost.

Speaking through Justice Souter, the Court concluded that although the ATCA is "in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in very limited category defined by the law of nations and recognized at common law."<sup>130</sup> However, the Court said that it did not view this "limited, implicit sanction" to hear a "handful of international *cum* common law claims" as sustaining the right of action asserted by Alvarez in this case.<sup>131</sup> The Court then concluded that "history and practice" nonetheless sustains the view that "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time."<sup>132</sup> The Court recognized that the "brooding omnipresence"<sup>133</sup> of common law had been taken away from the federal courts in diversity cases by *Erie R.R. v. Tompkins*.<sup>134</sup> However, it concluded that *Erie* did not affect the development of customary international law as part of domestic law because of the grant of authority to Congress by the First

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127. *Id.* at 698.

128. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000).

129. *Sosa*, 542 U.S. at 712.

130. *Id.*

131. *Id.*

132. *Id.*

133. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (arguing against such a conception of the common law). *See also*, Kurt L. Hanslowe, *Section 301 of Taft-Hartley and the Brooding Omnipresence of William Winslow Crosskey*, 35 U. DET. L.J. 201 (1957).

134. *Erie R.R. v. Tompkins*, 304 U.S. 64, 73 (1938).

Congress and by the unwillingness of Congress to change the law during the past quarter century, as the federal courts began to revive the 1789 statute.<sup>135</sup>

The Court noted that “[i]n the years of the early Republic, this law of nations comprised two principal elements: (1) the first covering the general norms governing the behavior of national states with each other” – this falling within the realm of executive and legislative authority, and; (2) within the judicial sphere, a body of “judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.”<sup>136</sup> This focused upon mercantile questions in such matters as disputes about the status of coast fishing vessels in wartime. There was, noted the Court, an area in which transactional rules relating to individuals overlapped with the “norms of state relationships,”<sup>137</sup> such as matters relating to violations of safe conduct, infringements of the rights of ambassadors, and piracy. Said the Court:

An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. . . . It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the [ATCA] with its reference to tort.<sup>138</sup>

The Court took account of a paucity of legislative history relating to the ATCA. Said Justice Souter, “despite considerable scholarly attention, it is fair to say that a consensus understanding what Congress intended has proven elusive.”<sup>139</sup> But the Court stated that there was nonetheless a rich historical record indicating Congressional concern with the law of nations, both in the pre-Constitutional period and thereafter. Accordingly, the Court inferred from history that the ATCA furnished ju-

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135. In *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) the Second Circuit found that federal subject matter jurisdiction existed for a torture claim under the ATCA. As the Court noted in *Sosa*, this position has been “assumed by the federal courts for 24 years.” *Sosa*, 542 U.S. at 731. The Court also noted the division in the Court of Appeals for the District of Columbia Circuit in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (dismissing claims for violations of international law under the ATCA for lack of subject matter jurisdiction and an expired statute of limitations).

136. *Sosa*, 542 U.S. at 714.

137. *Id.* at 715.

138. *Id.*

139. *Id.* at 718-19.



risdiction for “a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors. . .violations of safe conduct were probably understood to be actionable. . .and individual actions arising out of prize captures and piracy may well have also been contemplated. . . .”<sup>140</sup>

As noted above, the Court then concluded that the First Congress, which enacted the ATCA, understood that the district courts recognized private causes of action for “certain torts in violation of the law of nations,”<sup>141</sup> though it could not find illustrations beyond those noted above. Yet because Congress had not amended the statute of limited civil common law powers under any other statute, the Court concluded that there was good reason for:

a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.<sup>142</sup>

Thus, there are two themes in *Sosa* which will instruct the federal district courts in future litigation about international labor standards: (1) the exercise of discretion with “judicial caution,” which the Court has stressed; and (2) a “specificity comparable to the features of the Eighteenth-century paradigms.” The latter means, as the Court has noted, that the lower courts must look to “legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.”<sup>143</sup>

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140. *Id.* at 720.

141. *Id.* at 724.

142. *Id.* at 725.

143. *Id.* at 726. Justice Scalia, Justice Ginsburg and Justice Breyer each issued concurrences in part and in the judgment in *Sosa*. In his opinion, Justice Scalia objected to the majority’s endorsement of the federal judiciary’s power to engage in a “lawmaking role” and create causes of action for enforcement under ATCA. He supported his position largely with the *Erie* rule that a grant of jurisdiction does not itself entail a grant of authority to create a cause of action. Justice Ginsburg’s concurrence, in part and in the judgment, departed from the majority on the grounds that the majority unnecessarily considered choice of law developments after the enactment of the FTCA. Justice Breyer, in his concurrence, in part and in the judgment, elaborated upon the requirements for an actionable claim within the meaning of ATCA and urged the court to consider questions of comity in the exercise of ATCA jurisdiction. A vulnerability of the Scalia opinion is that, on the one hand, it asserts that *Erie* has deprived the courts of fashioning new norms of international law, and yet

The Court stressed the need for a “high bar” to new causes of actions for violating international law and drew attention to the “potential implications” for foreign relations between the United States and other countries. Said the Court: “Since many attempts by federal courts to craft remedies for the violation of new norms of international laws would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.”<sup>144</sup> Here, Justice Souter noted that the “potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affair.”<sup>145</sup> In this respect Justice Breyer’s concurring opinion reiterates Souter’s emphasis upon “serious weight” that should be given to the Executive in such cases.<sup>146</sup>

The Court demonstrated similar caution in response to Justice Scalia’s concurring opinion, noting that it was persuaded that “the judicial power should be exercised on the understanding that the door [to the ATCA] is still ajar subject to vigilant door keeping, and thus open to a narrow class of international norms today.”<sup>147</sup> Yet again, the Court, expressing considerable interest in the possibility of future Congressional guidance, said that nothing Congress had done is a reason for the courts to “shut the door to the law of nations *entirely*.”<sup>148</sup>

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does not contend that the kinds of actions contemplated by the First Congress discussed by the Court have been exempted from the 1789 statute. As noted:

Justice Scalia, in accord with recent revisionist scholarship, would have it that customary international law ceased to be part of federal law altogether, except to the extent allowed by statute. But such a result has its problems. In the first place, this approach has been criticized for ignoring the federal interest in vindicating international law norms as part of a unified foreign policy. It also downplays the extent to which the intent behind the ATCA was to empower the federal government to act on such matters, making the statute in *Sosa* precisely the sort of congressional authorization required in this model. Finally, Justice Scalia’s opinion seems to conflate a skepticism of courts’ capacity to recognize modern customary norms with his views of the effects wrought by *Erie* on judicial authority. After all, Justice Scalia fails to explain why, despite *Erie*, he apparently does not dispute the ongoing ability of federal courts to recognize ATCA claims in Blackstone’s three areas. Given the founding generation’s understanding that the law of nations was in a state of continuous development, the courts’ authority under the ATCA cannot logically depend on whether the international norm in question dates to the eighteenth century.

Note, *Leading Cases: Alien Tort Statute*, 118 HARV. L. REV. 446, 452-53 (2004).

144. *Sosa*, 542 U.S. at 727-28.

145. *Id.* at 727.

146. *Id.* at 760-61.

147. *Id.* at 729.

148. *Id.* at 731 (emphasis added).

What, then, does *Sosa* mean for international labor standards cases, i.e. particularly those involving core principles like forced labor, freedom of association, discrimination and child labor? These cases have begun to wind their way through United States courts.

## VII. THE *SOSA* LABOR CASES

Three cases in which opinions were rendered in the year prior to *Sosa* – and one which was issued subsequent to the ruling - will shed some light on what is to come.

### A. Drummond

*Estate of Rodriguez v. Drummond Co.*,<sup>149</sup> saw a federal district judge deny a motion to dismiss a complaint filed by a Columbian union and the heirs of mine workers asserting claims under the Alien Tort Claims Act and the Torture Victim Protection Act.<sup>150</sup> In that case, decedents worked in the company's mines in Columbia and were the leaders of a union in negotiation with the Drummond Co.<sup>151</sup> The complaint alleged that Columbian paramilitaries entered the mining facilities and killed the union organizers.<sup>152</sup> The district court concluded as a preliminary matter that the union, as well as the heirs, did not have standing to sue.<sup>153</sup> In response to the motion to dismiss, the court stated that the defendants had sufficiently alleged conduct in conjunction with paramilitaries which would violate the laws of wars codified in the Geneva Conventions.<sup>154</sup> Most relevant to *Sosa* and international labor standards is the district court's conclusion that ILO Conventions No. 87 and No. 98, protecting the right to organize and engage in collective bargaining, are "norms of customary international law" even though the United States has not ratified them.<sup>155</sup> The court also noted that "treaties and judicial decisions by international tribunals can embody customary international law"<sup>156</sup> and that the rights to "associate and organize" are fundamental

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149. 256 F. Supp. 2d 1250, 1250 (N.D. Ala. 2003).

150. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000).

151. *Drummond*, 235 F. Supp. 2d at 1253.

152. *Id.* at 1254.

153. *Id.* at 1268.

154. *Id.* at 1261.

155. *Id.* at 1263.

156. *Id.* at 1263 (citing *Ford v. Jose Guillermo Garcia*, 289 F.3d 1283, 1293 (11th Cir. 2002)).

rights as reflected in Article 22 of the International Covenant on Civil and Political Rights (Covenant).<sup>157</sup> The *Drummond* court noted that the “rights to associate and organize are reflected in the [Covenant], the Universal Declaration of Human Rights,<sup>158</sup> Conventions No. 87, and No. 98 of the ILO.”<sup>159</sup>

The Supreme Court in *Sosa*, subsequent to *Drummond*, noted that while the Covenant does bind the United States as a matter of international law, “the United States ratified the Covenant under the express understanding that it was not self-executing and did not itself create obligations enforceable in the federal courts.”<sup>160</sup> With regard to the Universal Declaration of Human Rights (Declaration), the Court in *Sosa* held that it “does not of its own force impose obligations as a matter of international law.”<sup>161</sup> Thus, the Court concluded that the Declaration and Covenant cannot themselves establish “relevant and applicable” rules of international law.<sup>162</sup>

Still, the *Sosa* Court examined the question of whether international prohibitions on arbitrary arrest have reached the status of “binding customary international law.” The Court found that a general prohibition upon arbitrary detention, defined as “officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances,” was a rule which was too excessively broad to achieve the status of a “binding customary norm today.”<sup>163</sup> The Court in *Sosa* said that such a “broad rule as the predicate for a federal lawsuit. . . would be breathtaking.”<sup>164</sup>

The fundamental question in *Drummond* is whether the rights to associate and organize constitute “norms of international law” for purposes of formulating a cause of action under the ATCA. The court noted that no federal court prior to *Drummond*, had specifically found that the right to associate and organize are sufficient norms of international law, but

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157. *Id.* at 1264; International Covenant on Civil and Political Rights, Dec. 19, 1996, 999 U. N. T. S. 171, available at <http://www.unhchr.ch/html/menu3/b/accpr.htm> (recognizing in Article 22 the fundamental right to associate and organize).

158. Universal Declaration of Human Rights, G.A. Res. 217 (III), GAOR, 3d Sess., at 71, U.N. DOC A/810 (1948), available at <http://www.un.org/Overview/rights.html> (recognizing in Article 20(1) the right to associate and in Article 23 (4) the right to form and join trade unions).

159. *Drummond*, 256 F. Supp. 2d at 1264.

160. *Sosa*, 542 U.S. at 735.

161. *Id.*

162. *Id.*

163. *Id.* at 735.

164. *Id.* at 736.

held that “at this preliminary stage in the proceedings. . .the rights to associate and organize are generally recognized as principles of international law sufficient to defeat defendants’ motion to dismiss.”<sup>165</sup> In a cautious approach remarkably similar to that employed in *Sosa*, the court held that it “reluctantly found that the fundamental rights to associate and organize support actionable torts under the ATCA. . . .”<sup>166</sup>

Finally, the court found that the defendants had alleged the requisite state action to pursue a claim under the ATCA.<sup>167</sup> The union asserted that the paramilitary forces responsible for murdering the trade union leaders were acting within the “course and scope of a business relationship with Defendants with the advance knowledge, acquiescence, or subsequent ratification of Defendants.”<sup>168</sup> The complaint further alleged that the paramilitary forces consisted of Columbian military soldiers and those engaged in a “symbiotic relationship with the military.”<sup>169</sup> The court held that the union had properly implicated the State inasmuch as some of the paramilitaries in question were members of the Columbian military and dressed in Columbian military uniforms.<sup>170</sup>

### B. Del Monte

A different approach to the international norms-law of nations issue as it relates to international labor law was taken by the district court in *Aldana v. Fresh Del Monte Produce, Inc.*,<sup>171</sup> also decided in the months preceding *Sosa*. In this case, workers brought suit against the owners and operators of a Guatemalan banana plantation for conduct arising in 1999. Plaintiffs alleged that Del Monte Produce Co. actively participated in human rights violations of union officers including torture, unlawful detention, and denial of the right to associate and organize.<sup>172</sup> The complaint alleged that a security force met with agents of Del Monte at a lo-

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165. *Drummond*, 256 F. Supp. 2d at 1264 (italics omitted).

166. *Id.* (emphasis added).

167. *Id.* at 1265. For discussion of the state actor requirement for crimes of international law and exceptions to the state actor requirement, see *Kadic v. Karadzic*, 70 F.3d 232, 241-42 (2d Cir. 1995) (discussing the state actor requirement and holding that genocide committed by private actors is actionable under the ATCA). See also *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320-24 (S.D.N.Y. 2003) (explaining that corporations may be subject to complicity and aiding and abetting liability under the ATCA).

168. *Id.* at 1264.

169. *Id.*

170. *Id.* at 1265.

171. See *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003).

172. *Id.* at 1291.

cal restaurant to plan violent action against plaintiffs and other union leaders, in an attempt to put an end to their leadership in the trade union and to gain a bargaining advantage in an ongoing labor dispute.<sup>173</sup> The plan was effectuated, and many of the plaintiffs were, it was alleged, detained, held at gunpoint, threatened with death, and made to sign letters of resignation.<sup>174</sup>

The *Del Monte* court, noting the “stringent and rigorous standards” applicable to ATCA cases, held that while the claims alleged “extreme mental anguish resulting from the intimidation and actions of coercion” as well as “credible death threats” and physical torture because of repeated “jabbing of loaded guns,” they constituted an “eight-hour aggravated assault and not the form of torture contemplated by norms of international law.”<sup>175</sup> The court said that there were no direct allegations of “serious physical injury to their persons – just that they were exposed to a harrowing set of conditions.”<sup>176</sup> Thus, the court denied the torture claims under the ATCA. The court also denied the claims relating to detention, for many of the same reasons.

Finally, the court in *Del Monte* examined the allegation that plaintiffs were denied their fundamental rights to associate and organize. The court rejected the defendant’s argument that a lack of “consistent practice” regarding the rights claimed could establish the non-existence of universal consensus. The critical consideration, said the court, was the state’s assertion that the practices were required by law; thus, state violations of the right to organize and associate could not *per se* establish the absolutes of international law.<sup>177</sup> But, said the court, the plaintiffs needed to produce stronger evidence of the existence of an international legal norm than “assumptions based on the absence of a country’s explicit protestations regarding the existence of a fundamental right to associate and organize.”<sup>178</sup>

The court rejected the view that the Conventions and Covenant cited in *Drummond* provided a basis for a customary norm of international law under the ATCA. The absence of ratification by ILO signatory members to the Conventions, said the court, undercut the “firm basis for

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173. *Id.* at 1289-90.

174. *Id.* at 1290.

175. *Id.* at 1294.

176. *Id.* (italics omitted).

177. *Id.* at 1297.

178. *Id.*

declaring a universal obligation of customary international law for the right to associate and organize.”<sup>179</sup>

The absence of ratification does not seem fatal in *Sosa*. The Supreme Court in its Eighth Amendment jurisprudence has declared failure to ratify irrelevant or, at least, not dispositive. The court also has said, in language foreshadowing *Sosa*, “[I]dentifying a specific and definable norm is the meat and potatoes of an alleged ATCA violation,” and the court’s view was that the Covenant provided “little direction as to the specific conduct that would be in violation of its terms.”<sup>180</sup> The court said that these rights were “amorphous” and could not, therefore, be sustained under ATCA.<sup>181</sup> Finally, the court found the requisite state conduct to be lacking, because it was not alleged that the security force at issue was a state instrumentality.<sup>182</sup>

*Del Monte* was appealed to the Eleventh Circuit, which partially affirmed and partially reversed the district court.<sup>183</sup> The court appeared to assume that violations of freedom of association rights can be deemed tantamount to a violation of international law. In dismissing plaintiffs’ argument that defendants’ practices constituted “a crime against humanity,” the Eleventh Circuit stated: “plaintiffs’ reliance—found exclusively in the appellate brief—on alleged systematic and widespread efforts against organized labor in Guatemala is too tenuous to establish a prima facie case, especially in the light of *Sosa*’s demand for vigilant door keeping.”<sup>184</sup>

However, the appellate court reversed the district court when it concluded that claims of “alleged torture based on intentionally inflicted mental pain and suffering”<sup>185</sup> should have been addressed by the district court.

### C. Unocal

A third case comes out of the Court of Appeals for the Ninth Circuit in San Francisco, *John Doe I v. Unocal Corp*<sup>186</sup> a decision vacated

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179. *Id.* at 1298.

180. *Id.*

181. *Id.* at 1299

182. *Id.* at 1304.

183. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1253 (11th Cir. 2005).

184. *Id.* at 1247.

185. *Id.* at 1253.

186. *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh’g granted*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14,

upon rehearing. This case involved forced labor in Myanmar. Plaintiffs alleged that defendant, Unocal Corporation, a wholly owned subsidiary of Union Oil of California, directly or indirectly subjected villagers to forced labor, murder, rape, and torture when constructing a gas pipeline in that country.<sup>187</sup> The Myanmar military provided security and other services for the gas pipeline project.<sup>188</sup> There was a genuine issue of material fact as to whether the project had in fact hired the Myanmar military through Myanmar Oil to provide services, and whether Unocal knew about this. Successive military governments of the country had a “long and well-known history of imposing forced labor on their citizens,” a finding made by the ILO in 1998.<sup>189</sup>

Judge Pregerson of the Ninth Circuit noted that, with regard to some crimes or torts, individual liability may be incurred without the involvement of the state – an approach employed by the Second Circuit.<sup>190</sup> Under this approach “even crimes like rape, torture, and summary execution, which by themselves require state action for ATCA liability to attach, do *not* require state action when committed in furtherance of the most egregious crimes under international law like slave trading, genocide, or war crimes, which, by themselves do not require state action for ATCA liability to attach.”<sup>191</sup> The Ninth Circuit was of the view that domestic authority supported the conclusion of forced labor as a “modern variant of slavery.”<sup>192</sup> The court noted that forced labor was within the definition of slavery of the Thirteenth Amendment. It accordingly examined not only Thirteenth Amendment litigation decisions, but also the Japanese forced labor cases arising out of World War II,<sup>193</sup> and con-

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2003).

187. *Id.* at 936.

188. *Id.* at 937.

189. *Id.* at 940. Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), at III.8, V.14(3) (July 2, 1998), at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>.

190. Compare *Doe v. Unocal*, 395 F.3d 932, 945-46 (9th Cir. 2002) (agreeing with the Second Circuit’s contention that some crimes attribute individual liability and do not require state action) with *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (acknowledging that courts with general jurisdiction adjudicate torts between individuals over whom they exercise personal jurisdiction).

191. See *Doe*, 395 F.3d at 945-46 (emphasis added).

192. *Id.* at 946.

193. See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); See also *In Re: World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1178 (N.D. Cal. 2001).



cluded that forced labor is a variant of slavery which does not require state action for liability to incur under the ATCA.

The court examined four factors to determine whether the plaintiffs' claims could be barred by an "act of state" doctrine, i.e., a doctrine which is non-jurisdictional, prudential and based on the notion that the "courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."<sup>194</sup> The court noted the existence of an international consensus which has recognized that murder, torture and slavery are *jus cogens*, i.e., "violations of norms that are binding on nations even if they do not agree to them."<sup>195</sup> Moreover, with regard to implications of foreign relations affecting the executive branch, the court noted that the Clinton Administration had taken a position in 1997 that the adjudication of claims based on torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with Myanmar.<sup>196</sup> While the court noted that the present government controlling Myanmar would be offended by this litigation, the public interest merited hearing the matter.<sup>197</sup> Because of the prospect of both a trial and liability, the matter was settled prior to a re-hearing before Ninth Circuit.<sup>198</sup> Part of the settlement was that the company "would pay the plaintiffs an unspecified amount of money and fund programs to improve living conditions for people from the region surrounding the \$1.2-billion pipeline and 'who may have suffered hardships.'"<sup>199</sup>

#### D. In re South African Apartheid Litigation

Finally, in the first post-*Sosa* decision, Judge Sprizzo of the Southern District of New York, has dismissed a complaint under the ATCA in *In re: South African Apartheid Litigation*.<sup>200</sup> This case involved claims against American corporations that did business in products which the South African apartheid regime used to suppress the black African majority. Specifically, as the court found, defendant corporations "supplied resources such as technology, money, and oil, to the South African gov-

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194. Doe v. Unocal, 395 F.3d 932, 958 (9th Cir. 2002) (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

195. *Id.* at 959.

196. *Id.*

197. *Id.* at 960.

198. Lisa Girion, *Unocal to Settle Claims*, L.A. TIMES, Dec. 14, 2004, at A1.

199. *Id.*

200. See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 539 (S.D.N.Y. 2004).

ernment or to entities controlled by the government. Not surprisingly, many of those resources were used by the apartheid regime to further its policies of repression and persecution of the African majority.”<sup>201</sup> The court noted that precedent established that genocide and torture under the ATCA were actionable even when engaged in by private parties.<sup>202</sup>

In an opinion which was surprising in its reliance upon Justice Scalia’s concurrence in *Sosa*,<sup>203</sup> the court noted the reticence with which the Supreme Court had spoken about claims under the 1789 statute and emphasized the “Court’s teaching” in *Erie* to the effect that the judiciary should be “averse to innovate without legislative guidance. . . .”<sup>204</sup> The court, alluding to the allegation of a “veritable cornucopia of international law violations, including forced labor, genocide, torture, sexual assault, unlawful detention, extra-judicial killings, war crimes, and racial discrimination”<sup>205</sup> dismissed the claims because none of the theories to link the defendants to state action by acting under the “color of law.”<sup>206</sup> Nor did the court believe that aiding and abetting the apartheid regime in the commission of these violations could make out international law violations.<sup>207</sup>

The court held that an indirect economic benefit from unlawful government activity is not sufficient to establish state action and that the conduct here did not elevate defendants to the status of state actors, notwithstanding the fact that they benefited from unlawful state action of the apartheid regime.<sup>208</sup> Similarly, the court concluded that defendants could not be deemed liable in tort for having aided and abetted international law violations because those cited were not “universally accepted

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201. *Id.* at 544-45. The court found illustrations of this, noting for example, that the apartheid regime tracked the whereabouts of African individuals on IBM computers and kept its military machines running with oil provided by Shell. *Id.*

202. *See Kadic*, 70 F.3d 232, 241-42 (2d Cir. 1995); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 320 (S.D.N.Y. 2003).

203. Even though Justice Scalia’s opinion is a concurrence because it supports the dismissal of plaintiff’s claims, it challenges the rationale of *Sosa* as it relates to federal court jurisdiction to interpret the law of nations and to fashion common law based upon it. Its reasoning is thus akin to a dissenting opinion.

204. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 547.

205. *Id.* at 548.

206. *Id.* at 548-49.

207. *Id.* at 549.

208. *Id.* *See also* *Bigio v. Coca Cola Co.*, 239 F.3d 440, 448-49 (2d Cir. 2001) (citing to *Kadic*, 70 F.3d at 245, for the notion that “a private individual [must act] together with state officials [or]. . . with significant state aid” and noting that “[a]n indirect economic benefit from unlawful state action is not sufficient”).

as a legal obligation.”<sup>209</sup> Specifically, the court stated that the jurisprudence of international criminal tribunals for Rwanda and the former Yugoslavia, the Nuremberg trials, as well as the International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”) were not clearly defined norms for the purpose of a legal obligation within the meaning of *Sosa*. The court dismissed the first two as irrelevant and said that the Apartheid Convention did not pass the bar established in *Sosa*, because it was “not ratified by a number of major world powers, including the United States, Great Britain, Germany, France, Canada and Japan.”<sup>210</sup> The court said that “without the backing of so many major world powers, the Apartheid Convention is not binding international law.”<sup>211</sup>

The court’s reasoning in this regard seems to be deeply flawed. The jurisprudence of the international criminal tribunals is part of customary international norms of the kind that *Sosa* contemplated. Notwithstanding the fact that the apartheid convention is not binding, it is nonetheless persuasive appropriate authority upon which the courts may rely for the purpose of establishing an international norm. Its non-binding nature does not diminish its persuasive relevance.

The court further concluded that, at least in a civil context, aider and abettor liability concept was not recognized under ATCA.<sup>212</sup> Its view was that this approach was properly “heedful” of *Sosa* and its admonition that “innovative interpretations” were to be discouraged. Yet, the *South African Apartheid Litigation* court itself seems to have been innovative in rejecting the position of both the Ninth and the Second Circuit Courts of Appeals; the Ninth Circuit position expressly held that aider and abettor liability is compatible with ATCA in a labor case.<sup>213</sup>

Even if *Sosa* can be read to require an international consensus on ancillary issues like vicarious liability and not simply on the underlying violation itself, “for over 200 years international law has recognized ac-

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209. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 549.

210. *Id.* at 550.

211. *Id.*

212. *Id.* (citing *Cent. Bank of Denv. v. First Interstate Bank of Denv.*, 511 U.S. 164 (1994), for the rule that where Congress has not explicitly provided for aider and abettor liability in a civil context, it should not be inferred). *See also* *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d. 837, 841 (2d Cir. 1998) (applying *Cent. Bank* to conspiracy claims under Rule 10b-5).

213. *In re S. Apartheid Litig.*, 346 F. Supp. 2d at 550. *See John Doe I*, 395 F.3d at 945-47 (9th Cir. 2002) (holding that aider and abettor liability under the ATCA extends to forced labor.).

complice liability.”<sup>214</sup> On the issue of state action itself, the weight of authority is that egregious misconduct - war crimes, torture, forced labor and slavery - applies to private parties without any requirement of a finding of state involvement. Liability exists where misconduct is committed by corporations as well as private individuals. *Sosa* validates these pre-2004 decisions.<sup>215</sup>

Finally, the court held that a number of treaties dealing with genocide and torture, as well as apartheid, and a “number of General Assembly and Security Council declarations and resolutions”<sup>216</sup> were insufficient to support the claim. This was true of the Genocide Convention<sup>217</sup> and the Convention Against Torture,<sup>218</sup> said the court, because they were both criminal in nature and neither were self-executing. Again, the fact that these conventions are not self-executing is not relevant to the question of whether they are part of international customary law. Moreover, the fact that they are criminal in nature does not diminish their significance in tort damage actions. The standards for criminal law, after all, are more exacting than those in tort. Therefore, the fact that the prohibitions against genocide and torture are contained under criminal standards argues *for* their inclusion in tort actions. The court, through a curious inversion of logic, comes to the opposite conclusion.

Moreover, the court found that establishing war crimes tribunals was applicable only to the government and not to private actors. Beyond ignoring the weight of authority on liability for private conduct, the court erred as well inasmuch as those conventions deal with state responsibility; the decisions address imposing obligations upon the private parties as opposed to the state exclusively.

The court also held that the U.N. Charter and the Declaration of Human Rights, as well as General Assembly resolutions were insufficient. The court said that “[t]he U.N. Charter and the Declaration speak in broad aspirational language that does not meet the specificity required under the ATCA.”<sup>219</sup> The court further said that the Declaration is not

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214. Stephens, *supra* note 50, at 558.

215. *Id.* at 557-58.

216. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 551.

217. Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), Dec. 9, 1948, art. 1, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277.

218. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”), Dec. 10, 1984, art. 4, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 113.

219. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 552. The Court went on to note that international agreements oftentimes set unattainable aspirational goals that cannot reasonably be

specific enough to meet *Sosa* standards and General Assembly resolutions are deficient because the U.N. does not have the power to legally bind member states and that the court would not be “swayed” by such non-binding resolutions, because they “never matured into the customary international law actionable under the ATCA.”<sup>220</sup>

Again, the fact that an instrument is non-binding is not dispositive under either *Sosa* or constitutional law holdings such as the Eighth Amendment. The U.N. Charter and the declaration are part of international customary law. With regard to the specificity argument, it would appear that the court’s reasoning would exclude all conventions dealing with such universally condemned practices protected under all major human rights conventions prohibiting slavery and the lack of a fair public hearing as vague and non-specific. The court’s rather cavalier dismissal of such standards as void for vagueness under *Sosa* seems unpersuasive.

The court was also of the view that foreign policy repercussions would be harmful. This is not surprising because both the South African and United States governments were opposed to the litigation, fearing that it would discourage foreign investment in South Africa and harm the relationship between the two countries. Notwithstanding that the Reagan Administration’s policy of “constructive engagement” in South Africa was rejected by Congress when it enacted comprehensive disinvestment legislation in 1986<sup>221</sup> and that economic pressure against the government was critical in changing South Africa’s direction, the court relied upon declarations to the effect that “constructive engagement” was in actuality the policy in effect during the relevant period of time. The court concluded that the United States “still relies on the tool of economic investment as a means to achieve greater respect for human rights and a reduction in poverty in developing countries”<sup>222</sup> – a policy that has a totally different meaning for the democratically-elected South African government of today. It may be that of all the court’s contentions, this deference, clearly contemplated by *Sosa* for foreign policy considerations, and supported by both the Bush Administration as well

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understood to create international legal obligations, such as the Kellogg-Briand Pact of 1928, 46 Stat. 2343 (1928), which renounced war as an instrument of U.S. foreign policy.

220. *Id.* at 553.

221. See William B. Gould IV, *South African Sanctions, Carefully Calibrated*, SAN JOSE MERCURY NEWS, Aug. 3, 1986, at C1; Cf. William B. Gould IV, *Black Unions in South Africa: Labor and Apartheid*, 17 STAN. J. INT’L L., 99 (1981).

222. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 554.

as South Africa, argues for dismissal of the claims. Indeed, the *Sosa* Court spoke skeptically of the *South African Apartheid Litigation* claims in the Souter opinion.<sup>223</sup>

However, *In re South African Apartheid Litigation* may be atypical. Since 1994 South Africa has had a democratically elected government free from apartheid. South Africa's own courts provide a forum for redress which may be exhausted,<sup>224</sup> a feature that distinguishes it from many other countries where human rights violations are present. The Bush Administration's uncritical, generalized support of human rights defendants, emphasizes this point on the ground that foreign policy and investments will be disrupted. Deference to the executive branch cannot be provided indiscriminately.<sup>225</sup> The constitutional separation of powers requires that the judiciary carefully scrutinize executive branch submissions.<sup>226</sup>

#### *E. The Implications of Sosa and Its Progeny*

It is difficult to determine at this point what *Sosa* will mean for the viability of labor rights cases. The above-noted division amongst various federal district and appellate courts illustrates this point vividly. The prerequisite for "comparable specificity" will constitute the first hurdle.

It seems that the specificity requirement will preclude examination of any issue beyond the core labor standards. Indeed, all litigation thus far has focused upon the core standards as well as violence and murder. Notwithstanding inevitable disputes about state involvement, and the extent to which forced labor by private multinational corporations implicates the state, forced labor constitutes egregious conduct. This issue has been addressed by ILO standards for so many years, that it should qualify. As noted above, more than 160 of the ILO member countries have ratified both conventions on compulsory and forced labor.<sup>227</sup>

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223. *Sosa*, 542 U.S. at 733 n.21.

224. See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 555 n.19. Although international human rights law is universal, the Court of Appeals for the Second Circuit has applied forum non conveniens principals to such actions. *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995), cert. denied 518 U.S. 1005 (1996).

225. Cf. *Republic of Aus. v. Altman*, 542 U.S. 677, 702 (2004).

226. *Stephens*, *supra* note 50, at 567 ("The highly politicized, extreme positions taken by the executive branch under the leadership of President Bush may ultimately undermine the respect normally accorded executive branch views by the Supreme Court").

227. ILOLEX Database, *supra* note 59. For analogous American jurisprudence involving the Thirteenth Amendment, see Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the*

The freedom of association and right to organize Conventions should also qualify, as one court has already held. With regard to Convention No. 87, it would seem that American acceptance of freedom of association principles, relating to the right of workers to organize as a fundamental right under the Constitution, coupled with detailed ILO case law in connection with both the Freedom of Association Committee as well as with the ILO's supervisory process, provide substantial arguments for the specificity necessary to qualify under *Sosa*.

Curiously, the district court in *Aldana v. Fresh DelMonte Produce, Inc.*,<sup>228</sup> which took a different view of Convention No. 87, seems to have based its reasoning upon an incorrect assessment of the facts relating to ratification. The court said that close inspection of both Conventions No. 87 and No. 98 did not provide "solid support" for plaintiff's assertion that they were "universal rights."<sup>229</sup> In this connection, the court noted that the conventions, by their own terms, purport to bind only the countries that have actually ratified them, but then concluded that "acceptance of those documents is hardly unanimous, as roughly less than one-third of the ILO signatory countries have ratified the conventions."<sup>230</sup> Here, the court cited a declaration of Georgetown Law Professor Barry Carter incorrectly. Professor Carter in his declaration said: "[a]bout 50 countries out of a possible 192 countries have not ratified No. 87 and nearly 40 countries have not ratified No. 98."<sup>231</sup> Professor Carter's position that less than one third of the ILO has not ratified directly opposes the court's conclusion.

Convention No. 98, insofar as it imposes a duty to bargain along with recognition, may be more troublesome because, as noted above, American courts have resisted constitutional recognition for the collective bargaining process itself.<sup>232</sup> Moreover, drawing from NLRB and judicial experience would indicate that the duty to bargain concept would argue for the proposition that this right is more "amorphous"<sup>233</sup> and thus

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*Global Economy*, 102 COLUM. L. REV. 973 (2002).

228. 305 F. Supp. 2d 1285.

229. *Id.* at 1297-98.

230. *Id.* at 1298.

231. Barry Carter, Carter Declaration, ¶ 45 (on file with the Hofstra Labor & Employment Law Journal).

232. ILOLEX Database, *supra* note 59.

233. *E.g.*, NLRB v. Gen. Elec. Co., 418 F.2d 736 (2d Cir. 1969); Telescope Casual Furniture Inc., 326 N.L.R.B. 588, 589-92 (1998) (Chairman Gould, concurring); White Cap Inc., 325 N.L.R.B. 1166, 1170 (1998) (Chairman Gould, concurring), *rev. denied* 206 F.3d 22 (D.C. Cir. 2000).

unmanageable for courts of general jurisdiction – a factor which has undoubtedly influenced the appellate courts in their unwillingness to expand the freedom of association concept to cover recognitional and bargaining problems.

Both child labor and aspects of anti-discrimination are more troublesome. Child labor will give rise to problems in the American courts and elsewhere because of the fact that these rights must be accompanied by financial assistance to Third World countries – the absence of which will move children into the worst forms of child labor. i.e., prostitution and the like, which itself is condemned by Convention No. 182.<sup>234</sup> This means that the legislative process is directly involved, as is support by the executive branch, and that foreign policy considerations will be bound up with this. The cautionary note in *Sosa* with regard to foreign policy and the involvement of the executive and legislative branches would seem to have particular force here. Nonetheless, the key consideration of ratification, which the lower courts have accepted as highly significant, would argue for the proposition that prohibitions on both child labor and discrimination are binding norms under *Sosa*. The conventions regarding child labor – No. 138 and No. 182 – have been ratified by 135 and 150 countries, respectively.<sup>235</sup> This suggests that they have become part of customary international law. Yet, at the same time, the complexity involved dictates caution.

Anti-discrimination, particularly as related to sex-discrimination and perhaps religious discrimination, is also troublesome. There is an international consensus against racial discrimination, as the experience with South Africa demonstrates. Indeed, a special reporting machinery was established with regard to apartheid in South Africa, so strong was the expression of the international community. Moreover, Americans have led the way with their employment practices legislation, beginning in the 1960s at the federal level and even earlier in the 1950s in state legislation.<sup>236</sup> Both specificity and international consensus seem to be established. Again, the ratification rates for the ILO anti-discrimination conventions are particularly impressive here – Convention No. 110 has been

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234. William B. Gould IV, *What Works in the Rest of the World*, N.Y. TIMES, July 26, 2004 at A19.

235. See ILOLEX Database, *supra* note 59.

236. See WILLIAM B. GOULD IV, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 33 (1977). This process was furthered and facilitated by the Supreme Court landmark ruling in *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954) (declaring “separate but equal” in public education to be unconstitutional).



ratified by 186 countries and Convention No. 111 by 160, in excess of all other "core" conventions except for forced and compulsory labor itself.<sup>237</sup>

Both sex and religious discrimination present problems of their own. Substantial portions of the Muslim world do not seem to accept equality insofar as it relates to sex in employment. On the other hand, some of the countries that in practice oppose prohibitions against sexual discrimination have ratified the ILO Conventions which prohibit them.<sup>238</sup> Equally persuasive is the widespread ratification accorded to the Convention on the Elimination of All Forms of Discrimination Against Women, which has been in force for a quarter of a century.<sup>239</sup> This self-standing convention prohibits sex discrimination in employment including provisions relating to "equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work."<sup>240</sup>

After all, while the Conventions relating to freedom of association and the right to organize are accepted with near universality, the fact of the matter is that actual practice may differ from the relevant Conventions—even in the United States itself! In sex discrimination, the difference is that offending countries may state contrary views explicitly. Some theocracies, and indeed portions of Christendom like Spain, historically, may either be opposed to reducing barriers on religious discrimination or have a very different concept of what the prohibition should constitute. However, the overriding appropriate consideration is universality of ratification. This means that sexual, religious, and racial discrimination should be viewed as akin to freedom of association and forced labor. Child labor raises complex issues which may make it too difficult to qualify under *Sosa*. Thus, it would seem that the reasoning of *Sosa* provides a basis for allowing the lower courts to sustain claims based upon the present-day law of nations in the freedom of association, forced labor, and discrimination arena. This basis rests on the grounds

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237. See ILOLEX Database, *supra* note 59.

238. Consider Iran, which has ratified anti-discrimination conventions No. 100 and No. 111, yet retains discriminatory laws in the employment arena - among others - such as those that make women ineligible for ministry positions and judgeships. See *Special Report: Women in Iran, Shorn of Dignity and Equality*, THE ECONOMIST, Oct. 18, 2005, at 23; see also ILOLEX Database, *supra* note 59.

239. U.N. Dept. of Econ. & Soc. Affairs, *Division for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination against Women*, 29th Sess., U.S. Doc A/58/38 (July 18, 2003).

240. LOUIS HENKIN ET AL., HUMAN RIGHTS 198 (Supp. 2001).

that both the civilized world accepts them and that they possess specificity comparable to 18th century paradigms.

Nonetheless, as the Court has said in *Sosa*, the “bar” is a “high” one.<sup>241</sup> Moreover, it is of some note that the very same federal courts that have been so unreceptive to orders of the NLRB<sup>242</sup> will be the ones with jurisdiction over *Sosa* claims. *In re: South African Apartheid Litigation* provides the first illustration of the reticence of the lower courts and, in that case, their receptiveness to Justice Scalia’s concurring opinion, rather than the majority position adopted through Justice Souter. Nonetheless, these first steps are important ones. And as Professor Sarah Cleveland has noted, *Sosa*, litigation in this country has already promoted human rights litigation abroad which has cited the former as authority.<sup>243</sup>

#### VIII. CONCLUSION

In a sense, *Sosa* has stepped into a vacuum in the world of international labor standards. At worst it complements the other efforts at an international and regional level, and at best it fortifies them. This is why the criticism of this line of cases by Jagdish Bhagwati, to the effect that they reflect “moral arrogance and hubris” and “amounts to judicial activism being imposed on others outside of the United States [which has] no legitimacy,”<sup>244</sup> is so misguided. The careful use of the ATCA in the federal courts and the insistence upon universality as reflected in ratification represents the antithesis of Professor Bhagwati’s characterizations. These cases bring the United States tentatively and belatedly into the world community, representing an attempt to fashion a new common law based upon the law of nations. They provide a basis for remedying, in an exceedingly incremental fashion, the violation of international norms by multinational companies and a wide range of suppliers and contractors operating in countries such as Colombia, Indonesia, Nigeria and the new labor landscape that is taking shape now in China.

Curiously and perhaps coincidentally, during the 1990’s the United States ratified the second of the so-called “core” or fundamental conventions of the International Labor Organization. This occurred simultane-

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241. *Sosa*, 542 U.S. at 727.

242. See generally James J. Brudney et al, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L. J. 1675 (1999).

243. Cleveland, *supra* note 50.

244. JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 252 (2004).

ously with the most sustained opposition to domestic legislation, protecting the right to organize in the form of bald hostility from Congress through appropriations, opposition to appointments, and an attempt to interfere with adjudication,<sup>245</sup> as well as resistance to enforcement of NLRB orders by much of the federal judiciary. The political climate in the years to come will undoubtedly influence this volatile issue of labor-management relations, whether it exists under the rubric of domestic or international law. Hostility to international law coupled with a dislike of governmental intervention generally could induce Congress to take a shot at reining in the Court (indeed the *Sosa* Court has said that it welcomes the guidance of Congress!).

In addition, the appointments process to the federal judiciary will provide us many of the answers to these issues as new arbiters are created by the President and the Senate. Meanwhile, the Supreme Court, as *Sosa* indicates, will be cautious, just as it has been with domestic labor laws issues.<sup>246</sup> But, make no mistake, the Court has opened a new frontier at the beginning of the twenty-first century - a frontier of human rights comparable in significance to vital foreign aid.<sup>247</sup> It is a frontier in which the rights and dignity of labor abroad will be likely enhanced-and possibly enhanced even at home in the United States!

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245. See *supra* text accompanying note 49.

246. See generally William B. Gould IV, *The Burger Court and Labor Law: The Beat Goes On—Marcato*, 24 SAN DIEGO L. REV. 51 (1987) (discussing major labor law decisions of the Burger Court which highlight the Court's trepidation).

247. *Thousands Died in Africa Yesterday*, N.Y. TIMES, Feb. 27, 2005, at 12.