

# Corporate Liability for Violation of Labor Rights Under the Alien Tort Claims Act

Wesley V. Carrington\*

*ABSTRACT: The Alien Tort Claims Act (“ATCA”) allows foreign claimants to bring causes of action in U.S. courts for violations of customary international law. Although the ATCA was originally used against sovereign-state defendants, courts now permit ATCA claims against private corporations. A recent district-court decision held that a claim against a U.S. corporation alleging violation of the rights to associate and organize was actionable under the ATCA. Such labor claims expose corporations to broad-based liability, offsetting the competitive advantages of labor outsourcing and heavily disrupting international commerce and foreign direct investment. However, this Note concludes that although a labor claim against a U.S. corporation might satisfy the basic jurisdictional requirements of the ATCA, the rights to associate and organize are not part of customary international law actionable under the ATCA. Additionally, policy concerns and practical considerations weigh against making such claims actionable under the ATCA and render ATCA corporate liability for labor violations highly unlikely.*

I. INTRODUCTION.....	1383
II. BACKGROUND OF THE ALIEN TORT CLAIMS ACT .....	1386
A. THE JUDICIARY ACT OF 1789.....	1386
B. TWO CENTURIES OF ATCA OBSCURITY.....	1387
C. FILARTIGA REVIVES THE ATCA.....	1387
D. TWENTY YEARS OF CIRCUIT-COURT DEVELOPMENT OF ATCA JURISPRUDENCE .....	1388
E. THE RISE OF CORPORATE LIABILITY UNDER THE ATCA .....	1390
F. THE SUPREME COURT ISSUES MODERN GUIDELINES IN SOSA.....	1391
G. ATCA JURISPRUDENCE REMAINS ONLY PARTIALLY DEVELOPED.....	1393
III. THE DRUMMOND CASE.....	1394

---

\* J.D. Candidate, The University of Iowa College of Law, 2009; B.A., Wheaton College (Ill.), 2006.

IV.	THRESHOLD QUESTIONS FOR LABOR CLAIMS UNDER THE ATCA.....	1395
A.	<i>JURISDICTIONAL VERSUS SUBSTANTIVE CONSTRUCTION OF THE ATCA</i> .....	1395
B.	<i>THE POLITICAL-QUESTION LIMITATION ON THE ATCA</i> .....	1396
C.	<i>THE STATE-ACTION REQUIREMENT AND STANDARDS OF AIDING AND ABETTING</i> .....	1398
D.	<i>OTHER ATCA JURISDICTIONAL REQUIREMENTS</i> .....	1400
E.	<i>LABOR CLAIMS WOULD LIKELY SURVIVE THRESHOLD LIMITATIONS</i> ..	1401
V.	LABOR RIGHTS IN CUSTOMARY INTERNATIONAL LAW.....	1402
A.	<i>SOSA GUIDELINES FOR LAW-OF-NATIONS VIOLATIONS UNDER THE ATCA</i> .....	1402
B.	<i>GENERAL GUIDELINES FOR DETERMINING COGNIZABLE CUSTOMARY INTERNATIONAL LAW UNDER THE ATCA</i> .....	1403
C.	<i>SOURCES OF CUSTOMARY INTERNATIONAL LAW FOR LABOR-RIGHTS CLAIMS</i> .....	1404
	1. International Labour Organization (“ILO”) Agreements .	1406
	2. Other International Declarations and Covenants .....	1409
D.	<i>SCHOLARLY OPINION REGARDING CUSTOMARY INTERNATIONAL LAW</i> .....	1412
E.	<i>LABOR RIGHTS ARE NOT PART OF CUSTOMARY INTERNATIONAL LAW ACTIONABLE UNDER THE ATCA</i> .....	1413
VI.	PRACTICAL CONSIDERATIONS AND POLICY CONCERNS .....	1413
VII.	A CAVEAT REGARDING FUTURE ATCA CAUSES OF ACTION .....	1416
VIII.	CONCLUSION .....	1418

## I. INTRODUCTION

On July 26, 2007, a jury absolved the Drummond Company of liability for the deaths of three Colombian union leaders.<sup>1</sup> The importance of this case, however, lies not in the verdict but rather in the fact that a trial occurred at all. The *Drummond* case marked the first time that an action against a corporation under the Alien Tort Claims Act (“ATCA”) reached trial.<sup>2</sup> More importantly for this Note, it was also the first time a federal court held that the “rights to associate and organize” can support a claim under the ATCA.<sup>3</sup>

The ATCA states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>4</sup> The ATCA therefore allows an alien to bring a claim in U.S. court against any defendant based on events that occurred in any country,<sup>5</sup> so long as a judge determines that the claim is actionable under the ATCA.

The ATCA is unique within international law.<sup>6</sup> Largely unused for nearly 200 years, the ATCA was revived in 1980, and since that time, plaintiffs have invoked it in a wide variety of claims for violations of international law. While plaintiffs initially used it against states and their agents, plaintiffs have recently brought ATCA claims against U.S.

1. Kyle Whitmire, *Alabama Company Is Exonerated in Murders at Colombian Mine*, N.Y. TIMES, July 27, 2007, at C2.

2. *Id.*

3. Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003). There have been other ATCA cases in which plaintiffs have pleaded violations of the rights to associate and organize. See *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1280–81 (S.D. Fla. 2006) (describing allegations that the defendants, owners of a Colombian soft-drink plant, had cooperated with paramilitaries to carry out reprisals against the plaintiffs, union members at the plant); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1296–99 (S.D. Fla. 2003) (evaluating an ATCA claim alleging that the defendants, owners of a Guatemalan banana plantation, had attempted to end the plaintiffs’ union activities), *aff’d in part, vacated in part sub nom. Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

4. 28 U.S.C. § 1350 (2006). Although the ATCA’s language includes “treaty of the United States” as a basis for ATCA actionability, this “treaty” prong has been infrequently invoked or discussed in ATCA cases. Accordingly, this Note examines the ATCA based on its “law of nations” language, which is the predominant analysis throughout ATCA litigation. See *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) (“Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (formulating the requirements of the ATCA as: “(1) an alien sues (2) for a tort (3) committed in the violation of the law of nations”).

5. This, of course, assumes that the claim satisfies other standard federal jurisdictional requirements, such as personal jurisdiction.

6. See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 46 (2003) (“No other country has a *civil* statute that remotely resembles the [ATCA].”).

corporations. This extraordinary statute now has the potential to expose corporations to massive amounts of litigation due to their operations outside of the United States.

In *Drummond*, relatives of murdered Colombian trade-union representatives brought suit against the Drummond Company, an Alabama corporation, in U.S. district court.<sup>7</sup> The plaintiffs alleged that the men were killed by Colombian paramilitaries acting as agents for Drummond.<sup>8</sup> In addition to claims for extrajudicial killing, the plaintiffs asserted that Drummond violated international law through its “denial of the fundamental rights to associate and organize.”<sup>9</sup> The court found that the rights to associate and organize were contained in a number of international declarations and treaties and that its job was to “evaluate the status of international law at the time th[e] lawsuit was brought.”<sup>10</sup> The court then determined that “the rights to associate and organize are generally recognized as principles of international law sufficient to defeat defendants’ motion to dismiss.”<sup>11</sup>

*Drummond’s* holding—that the rights to associate and organize are sufficiently recognized to form the basis of an ATCA claim—is unique within ATCA jurisprudence and represents a dramatic broadening of the scope of ATCA claims. While most ATCA claims involve violent and universally condemned crimes—such as genocide, torture, and extrajudicial killing<sup>12</sup>—claims against corporations based on their foreign labor practices involve routine corporate policies that implicate outsourcing and comparative advantage. The ATCA actionability of violations of the rights to associate and organize threatens to incite a veritable explosion of ATCA litigation against U.S. corporations, leading one court to observe that “it is hard to imagine what claims of violations of the fundamental right to associate and organize would *not* be heard” if such claims were allowed to proceed.<sup>13</sup> Similarly, one scholar has noted that the ATCA “has the potential to be a new weapon in the international movement for labor rights.”<sup>14</sup> Indeed, over 140 Colombian plaintiffs recently filed a suit against Chiquita Brands International, alleging,

---

7. *Drummond*, 256 F. Supp. 2d at 1253–54. The murdered men were from a union that represented employees at Drummond’s mines in Colombia. *Id.* at 1253.

8. *Id.* at 1254.

9. *Id.* at 1258.

10. *Id.* at 1264.

11. *Id.*

12. *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1300 (S.D. Fla. 2003), *aff’d in part, vacated in part sub nom.* *Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

13. *Id.* at 1299.

14. Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT’L L. 203, 209 (2004).

among other things, that the company violated their murdered relatives' "fundamental rights to associate and organize."<sup>15</sup>

*Drummond's* dramatic expansion of the ATCA's scope to include labor-rights claims raises the specter of foreign claimants flooding into U.S. courts, perhaps alleging that corporations did not give them room to hold union meetings in Nicaragua or did not allow them to collectively bargain in Bhutan. Beyond a glut of cases in the U.S. judicial system, however, courts' allowance of such labor claims could also have substantial ramifications for U.S. trade and foreign investment.<sup>16</sup> Many of the competitive advantages that prompt U.S. corporations to develop multinational operations and outsource labor-intensive work would be fundamentally altered. Broad-based corporate liability for labor conditions in foreign countries could depress foreign investment, cause divestment from developing countries, and dampen international commerce.<sup>17</sup>

However, such a scenario is unlikely to occur. This Note asserts that despite the court's reasoning in *Drummond*, violations of the rights to associate and organize are not properly actionable under the ATCA. Part II provides background on the ATCA, tracing the development of corporate liability under the ATCA.<sup>18</sup> Part III examines the conclusions and reasoning of the *Drummond* court.<sup>19</sup> Part IV analyzes common threshold requirements for ATCA jurisdiction and applies those to labor-rights claims, concluding that such claims would likely satisfy these threshold requirements.<sup>20</sup> Part V, however, examines customary international law under the ATCA and concludes that the rights to associate and organize likely do not satisfy the requirements for ATCA actionability.<sup>21</sup> Part VI argues that even if courts were to determine that labor rights technically qualify for ATCA jurisdiction, practical and policy considerations would militate against allowing these labor-rights claims.<sup>22</sup> Finally, Part VII issues several caveats, noting the constantly evolving nature of international law and the possibility that the

---

15. Complaint at 44, 47, *Does v. Chiquita Brands Int'l, Inc.*, C.A. No. 1:07-1048 (D.D.C. June 7, 2007), available at [http://www.iradvocates.org/Doe\\_v\\_Chiquita\\_Complaint\\_Final.pdf](http://www.iradvocates.org/Doe_v_Chiquita_Complaint_Final.pdf). This case was subsequently consolidated with similar actions from other federal districts. *In re Chiquita Brands Int'l, Inc., Alien Tort Statute & S'holders Derivative Litig.*, 536 F. Supp. 2d 1371 (J.P.M.L. 2008) (transfer order).

16. See HUFBAUER & MITROKOSTAS, *supra* note 6, at 1-2 (describing the potential trade and investment ramifications of ATCA litigation); see also *infra* Part VI (examining the practical concerns associated with the expansion of ATCA liability).

17. See HUFBAUER & MITROKOSTAS, *supra* note 6, at 37-43 (analyzing the collateral economic damage and reduction in trade that would result from a wave of ATCA litigation).

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part V.

22. See *infra* Part VI.

rights to associate and organize could blossom into ATCA actionability in the future.<sup>23</sup>

## II. BACKGROUND OF THE ALIEN TORT CLAIMS ACT

### A. THE JUDICIARY ACT OF 1789

The language of the modern Alien Tort Claims Act has survived largely unchanged from the Judiciary Act of 1789 (“Judiciary Act”).<sup>24</sup> The Judiciary Act stated that the district courts “shall . . . have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>25</sup> This section of the Judiciary Act is without any significant legislative history, and thus the precise meaning and purpose intended by the legislature is unclear.<sup>26</sup>

There are clues, however, indicating legislative intent. In 1784, a high-profile confrontation occurred in Philadelphia between Frenchman Charles Julian de Longchamps and Francis Barbe Marbois, who was a French diplomat.<sup>27</sup> Although a state court eventually found de Longchamps guilty—and in so doing stated that the “crime . . . [was] an infraction of the law of nations”<sup>28</sup>—its decision came after government frustration regarding the perceived “inability of the Continental Congress to enforce the law of nations” within the United States.<sup>29</sup> Some courts have interpreted the ATCA section of the Judiciary Act to mean that such diplomatic incidents would be fully justiciable in U.S. federal courts and, therefore, that a potential foreign-affairs controversy could be avoided in the future.<sup>30</sup> However, the de Longchamps incident, at most, merely demonstrates that Congress wished to assure some form of judicial recourse for foreign diplomats and other aliens when they were harmed; the incident does little to shed light on what kind of offenses Congress intended to be actionable under the ATCA.

---

23. See *infra* Part VII.

24. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 242 (2d Cir. 2003) (noting that the language of the ATCA has not changed significantly from the original language in the Judiciary Act). Compare Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (original version), with 28 U.S.C. § 1350 (2006) (current version).

25. Judiciary Act of 1789 § 9, 1 Stat. at 76–77.

26. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718–19 (2004); *Flores*, 414 F.3d at 242.

27. *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111–12 (Pa. Oyer & Terminer 1784). During an argument, de Longchamps struck the cane of Marbois, who then responded in kind. *Id.* The court convicted de Longchamps and explicitly stated that the law of nations, “in its full extent, is a part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers.” *Id.* at 116.

28. *Id.* at 116.

29. Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 464 (2007).

30. See *Sosa*, 542 U.S. at 716–18 (discussing the events leading up to the passage of the Judiciary Act).

## B. TWO CENTURIES OF ATCA OBSCURITY

After its passage in 1789 and over the course of the next two centuries, the ATCA went largely unused and unnoticed.<sup>31</sup> A study by Professor Kenneth C. Randall could not locate a single case that utilized the ATCA in the nineteenth century and found that only three cases did so prior to 1958.<sup>32</sup> Potential litigants likely overlooked the ATCA because of Congress's narrow, diplomatic purpose in passing the statute. A Second Circuit case in 1975 noted that the ATCA "is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came."<sup>33</sup>

## C. FILARTIGA REVIVES THE ATCA

In 1980, the Second Circuit decided *Filartiga v. Pena-Irala*<sup>34</sup>—a breakthrough for ATCA usage that would irrevocably shape the statute's legal future. *Filartiga* involved a Paraguayan plaintiff whose son had been kidnapped, tortured, and killed in Paraguay by the Stroessner regime.<sup>35</sup> The defendant, living in the United States under a visitor's visa, was formerly an Inspector General of Police in Paraguay.<sup>36</sup> The court accepted the plaintiff's ATCA claim, holding that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights."<sup>37</sup>

*Filartiga*'s determination of ATCA actionability hinged on whether the defendant's conduct violated the law of nations.<sup>38</sup> *Filartiga* rejected the idea that "law of nations" in the ATCA had remained static since 1789.<sup>39</sup> Rather, the court stated that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>40</sup> After noting that the law-of-nations standard is a "stringent one,"<sup>41</sup> the court examined numerous international treaties, declarations, and adjudications, as well as the practices and usage of nations,

31. See Saad Gul, *The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350*, 109 W. VA. L. REV. 379, 380 (2007) (stating that the ATCA has only recently come to life after "two centuries of hibernation").

32. *Id.* (citing Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4 n.15 (1985)).

33. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted).

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

35. *Id.* at 878.

36. *Id.*

37. *Id.* With regard to jurisdiction, the court held that under the ATCA, the nationality of the parties was irrelevant; so long as the defendant was "served with process by an alien within [the] borders" of the United States, the ATCA provided federal jurisdiction for the claim. *Id.*

38. *Id.* at 880.

39. *Filartiga*, 630 F.2d at 881.

40. *Id.*

41. *Id.*

in determining that torture violated the law of nations.<sup>42</sup> Importantly, *Filartiga* rejected the defendant's argument that federal jurisdiction over ATCA claims was unconstitutional, stating that "[t]he constitutional basis for the [ATCA] is the law of nations, which has always been part of the federal common law."<sup>43</sup>

D. TWENTY YEARS OF CIRCUIT-COURT DEVELOPMENT OF ATCA JURISPRUDENCE

A series of ATCA cases in the 1980s and 1990s explored and defined the basic jurisdictional and substantive contours of the ATCA. In *Tel-Oren v. Libyan Arab Republic*,<sup>44</sup> decided in 1984, future Supreme Court nominee Robert Bork sparred with fellow Circuit Judge Harry Edwards over the jurisdictional nature of the ATCA. While their competing concurrences did not neatly or conclusively define the contours of the ATCA, they illuminated the issues that are relevant to how the ATCA should work and also clarified competing viewpoints about the nature of the ATCA. Bork suggested that the ATCA's drafters contemplated only very specific offenses against the law of nations—such as violations of safe conduct, infringement on the rights of ambassadors, and piracy—as triggering ATCA jurisdiction.<sup>45</sup> Edwards objected to Bork's interpretation of the ATCA because it required the source of the international law to contain an explicit grant of remedy for its violation.<sup>46</sup> Also, while generally affirming the rule that only sovereign states can violate international law, Edwards examined whether torture was an exception to that rule and therefore whether private individuals could violate international law.<sup>47</sup> Bork also looked at critical threshold questions that were important in determining whether a court should exercise ATCA jurisdiction. Underscoring the importance of separation of powers, Bork expressed concern about the political implications and foreign-policy consequences if foreign states were prosecuted in U.S. courts.<sup>48</sup>

Several cases in the 1990s further defined and shaped the contours of the ATCA. These cases were influential in lieu of a Supreme Court decision involving the ATCA, which would not occur until 2004.<sup>49</sup> In *Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litigation)*, the Ninth Circuit held that former Philippine President Ferdinand Marcos could be held liable for

---

42. *Id.* at 882–85.

43. *Id.* at 885.

44. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

45. *Id.* at 813–15 (Bork, J., concurring) (discussing these violations).

46. *Id.* at 779 (Edwards, J., concurring).

47. *Id.* at 794–95.

48. *Id.* at 801–02 (Bork, J., concurring). Bork also recognized a paradox of the ATCA: "Recognition of suits presenting serious problems of interference with foreign relations would conflict with the primary purpose of the adoption of the law of nations by federal law—to promote America's peaceful relations with other nations." *Id.* at 816.

49. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

torture and summary execution that occurred while he was in office.<sup>50</sup> The court found that torture violated a *jus cogens*<sup>51</sup> fundamental principle of international law and was therefore actionable under the ATCA.<sup>52</sup> The court also rejected the argument Judge Bork had made in *Tel-Oren*, namely that international law must provide a “*specific* right to sue.”<sup>53</sup> Rather, “[n]othing more than a *violation* of the law of nations is required to invoke [the ATCA].”<sup>54</sup>

A year after *Estate of Marcos*, the Second Circuit, in *Kadic v. Karadzic*,<sup>55</sup> decided a seminal case that opened the door for suits against private individuals and corporations. The court held that the president of a Bosnian–Serb political entity could be held liable under the ATCA for genocide, war crimes, and “other instances of . . . death, torture, and degrading treatment.”<sup>56</sup> *Kadic*’s conclusion that, in some instances, private individuals could violate international law was critical in expanding the reach of the once-dormant ATCA. The court looked to section 404 of the *Restatement (Third) of the Foreign Relations Law of the United States* and noted that “the inclusion of piracy and slave trade from an earlier era and aircraft hijacking from the modern era demonstrates that offenses of ‘universal concern’ include those capable of being committed by non-state actors.”<sup>57</sup> Indeed, private parties could commit genocide in violation of international law, and the court found no congressional intent that would restrict genocide violations to state actors.<sup>58</sup> *Kadic* recognized that plaintiffs could

50. *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994).

51. *Jus cogens* refers to those norms of international law that are binding even without a nation’s consent. *Doe v. Unocal Corp.*, 395 F.3d 932, 945 n.14 (9th Cir. 2002), *vacated and reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), and *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005).

52. *Estate of Marcos*, 25 F.3d at 1473.

53. *Id.* at 1475; see also *supra* notes 44–48 (discussing *Tel-Oren*).

54. *Estate of Marcos*, 25 F.3d at 1475 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring)). The court also decided against applying foreign sovereign immunity. Rejecting the defendant’s contention that litigation against Marcos was barred because of the Foreign Sovereign Immunities Act, the Ninth Circuit found that Marcos’s actions violated Philippine law and therefore were not within his sovereign capacity. *Id.* at 1472. The court concluded that a suit could be brought against Marcos under the ATCA because Marcos was “not doing the business which the sovereign has empowered him to do.” *Id.* at 1470 (quoting *Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990)).

55. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

56. *Id.* at 241–44.

57. *Id.* at 240 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)). The court also noted that it was persuaded by the executive branch, which urged in the case that private parties could be held liable for “acts of genocide, war crimes, and other violations of international humanitarian law.” *Id.* at 239–40.

58. *Id.* at 242. To determine the nature of the genocide claim, the court in *Kadic* examined the Convention on the Prevention and Punishment of the Crime of Genocide and the Genocide Convention Implementation Act. *Id.* at 241–42; see also Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, S. EXEC. DOC. O,

bring ATCA claims against private defendants who had violated international law if those private defendants satisfied the state-action requirement by having a “semblance of official authority.”<sup>59</sup> Therefore, while *Kadic* is not an affirmation of completely unrestricted private-party liability under the ATCA, the case indicates that a defendant need not be a fully sovereign state to be liable under the ATCA.<sup>60</sup>

E. THE RISE OF CORPORATE LIABILITY UNDER THE ATCA

In 1996, Myanmar villagers brought an ATCA suit against a corporation in *Doe v. Unocal Corp.*<sup>61</sup> In *Unocal*, the Ninth Circuit focused on Judge Edwards’s *Tel-Oren* concurrence and *Kadic*’s examination of private-actor liability in deciding that the plaintiffs’ allegations against the defendant oil company were sufficient for ATCA jurisdiction.<sup>62</sup> *Unocal* involved an agreement between the defendant and the Myanmar military whereby the latter agreed to provide security for an oil pipeline that the former was constructing.<sup>63</sup> The plaintiffs alleged that the Myanmar army subjected them to forced labor, torture, murder, and rape,<sup>64</sup> and that Unocal was liable for aiding and abetting the army in these activities.<sup>65</sup>

After concluding that torture, murder, slavery, and rape (as a form of torture) were *jus cogens* violations of international law, the court examined whether a private party could be liable under the ATCA for these violations.<sup>66</sup> Following the *Kadic* analysis, the court in *Unocal* determined that some privately committed crimes always violate international law, while other privately committed crimes violate international law only if they are committed “‘in pursuit of genocide or war crimes.’”<sup>67</sup> The court first examined forced labor. It determined that forced labor was a “modern variant of slavery” and that slavery “is among the ‘handful of crimes . . . to which the law of nations attributes individual liability.’”<sup>68</sup> It then determined that a

---

81-1 (1949), 78 U.N.T.S. 277 (prohibiting genocide); Genocide Convention Implementation Act of 1948 (the Proxmire Act), Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified as amended at 18 U.S.C.A. §§ 1091–1093 (West 2000 & Supp. 2008)) (same).

59. *Kadic*, 70 F.3d at 245.

60. *Kadic* also served as a prelude to corporate-liability cases under the ATCA because it examined actions in concert with a foreign state. *Id.*

61. *Doe v. Unocal Corp.*, 395 F.3d 932, 942–43 (9th Cir. 2002), *vacated and reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), and *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005).

62. *Id.* at 945–46.

63. *Id.* at 937–38.

64. *Id.* at 939.

65. *Id.* at 947.

66. *Unocal*, 395 F.3d at 945.

67. *Id.* at 945–46 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995)).

68. *Id.* at 946 (alteration in original) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring)).

reasonable factfinder could find Unocal liable under the ATCA for aiding and abetting the military in committing forced-labor violations.<sup>69</sup> The court found that Unocal knew that abuses were taking place and yet continued its agreement with the Myanmar military. Unocal thus met the standard of aiding and abetting, namely “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”<sup>70</sup>

Next, the court examined the plaintiffs’ claims of torture, murder, and rape. These crimes, although requiring state action when committed in isolation, could be actionable under the ATCA when committed by a private actor in “pursuit” of genocide or war crimes.<sup>71</sup> The court then found that the record contained sufficient evidence to support liability for the murder and rape claims, but not for the torture claims.<sup>72</sup> The court concluded that Unocal could be liable as a private party that had aided and abetted the Myanmar military in violating customary international law.<sup>73</sup> The *Unocal* case settled in 2004 for an undisclosed amount,<sup>74</sup> demonstrating the possible financial consequences for corporations in ATCA litigation.

#### F. THE SUPREME COURT ISSUES MODERN GUIDELINES IN SOSA

*Unocal* was the first case to allow an ATCA claim to proceed against a corporation,<sup>75</sup> and it did so without Supreme Court precedent. In 2004, the Supreme Court finally decided a case that involved the ATCA. In *Sosa v. Alvarez-Machain*, a Mexican national brought claims against the U.S. Drug Enforcement Administration (“DEA”) and other Mexican nationals based on his abduction from Mexico to the United States.<sup>76</sup> Specifically, the plaintiff brought an ATCA claim against Sosa, a Mexican national who helped the DEA forcibly bring the plaintiff to the United States.<sup>77</sup> Although the Court in *Sosa* directly addressed the ATCA in its opinion, it used basic

---

69. *Id.* at 947.

70. *Id.* Additionally, while finding that there was no need to address the plaintiffs’ other theories of liability, the court noted that “joint venture, agency, negligence, or recklessness may in fact be more appropriate theories than aiding and abetting.” *Id.* at 947 n.20.

71. *Unocal*, 395 F.3d at 954.

72. *Id.* at 956.

73. *Id.* In contrast to the judgment against Unocal, the court affirmed summary judgment in favor of Myanmar, holding that as a sovereign state, it was “entitled to immunity under the Foreign Sovereign Immunities Act.” *Id.*

74. Edward Alden & Doug Cameron, *Unocal Pays Out in Burma Abuse Case*, FIN. TIMES, Dec. 14, 2004, available at <http://www.ft.com/cms/s/0/22eae4e6-4d77-11d9-b3be-00000e2511c8.html>; see also *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (dismissing the case per the parties’ stipulation, and vacating the district court’s order).

75. Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. INT’L L. & POL. 39, 40 (2005).

76. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

77. *Id.*

principles rather than specific tests in its analysis of ATCA actionability.<sup>78</sup> Thus, *Sosa* is useful for defining the outer limits of and general policy considerations pertaining to the ATCA, but many circuit-court cases provide a greater depth of analysis in determining the specific contours of the ATCA.

The *Sosa* Court began by affirming that the ATCA is a jurisdictional statute that does not grant the “power to mold substantive law.”<sup>79</sup> However, after reviewing the historical context in which the ATCA was passed, the majority emphasized that “Congress did not intend the [ATCA] to sit on the shelf until some future time” and that “the statute was intended to have practical effect the moment it became law.”<sup>80</sup> Thus, *Sosa* concluded that “Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”<sup>81</sup> After establishing that the ATCA was a jurisdictional grant for a limited number of substantive violations of international law, the Court discussed the present-day substantive claims that may be brought under the ATCA.<sup>82</sup> While acknowledging that “a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision,”<sup>83</sup> the Court nevertheless issued a guideline: “[C]ourts 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>84</sup> The majority determined that the plaintiff’s one-day illegal detention did not satisfy this stringent standard for violations of international law.<sup>85</sup>

The *Sosa* Court’s standard is broad and ambiguous. The Court noted that the consequences of allowing private actions for international-law violations “argue for judicial caution.”<sup>86</sup> The opinion also warned that the potential foreign-relations implications “should make courts particularly wary” of interfering with the executive and legislative branches and that attempts to craft remedies for international-law violations “should be undertaken, if at all, with great caution.”<sup>87</sup> Additionally, a court should

---

78. See Scarborough, *supra* note 29, at 458, 469 (explaining how *Sosa* did not provide a “defining body of law” capable of resolving many of the legal issues that arise in ATCA cases, and noting that *Sosa* was only a “blurry conclusion” to a long debate on the scope of the ATCA).

79. *Sosa*, 542 U.S. at 713.

80. *Id.* at 724.

81. *Id.* at 720.

82. *Id.* at 725.

83. *Id.* at 726.

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

85. *Id.* at 738.

86. *Id.* at 727.

87. *Id.* at 727–28.

consider the “practical consequences” of allowing an ATCA claim when determining “whether a norm is sufficiently definite to support a cause of action.”<sup>88</sup> *Sosa* also affirmed the importance of prior exhaustion of remedies in a domestic forum, stating that it “would certainly consider [the exhaustion-of-remedies] requirement in an appropriate case.”<sup>89</sup> Finally, in an oft-quoted phrase from the case, the Court concluded that “judicial power [under the ATCA] should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”<sup>90</sup> Therefore, *Sosa*, while affirming the use of the ATCA for a narrow set of contemporary international norms, urges much judicial restraint and caution in granting ATCA jurisdiction for international-law claims.

*Sosa* also touched on various threshold questions that circuit courts have wrestled with—namely the political-question doctrine and the exhaustion-of-domestic-remedies requirement—but neglected to flesh out an analysis of these considerations.<sup>91</sup> With regard to corporations—critical to this Note—*Sosa* mentioned that extending ATCA liability to private actors is a “related consideration,” but the Court declined to delve into any analysis.<sup>92</sup>

#### G. ATCA JURISPRUDENCE REMAINS ONLY PARTIALLY DEVELOPED

Though decades of ATCA jurisprudence, starting with *Filartiga*, have opened the door to claims against corporations and other private actors for violations of international law, the precise contours of the ATCA remain undefined. Courts have attached importance to considerations such as the state-action requirement, the political-question doctrine, forum non conveniens, and the proper substantive scope of customary international law, but no precise formula exists for determining whether a court will entertain a given claim against a corporation. The *Drummond* case was decided in 2007, three years after *Sosa*’s broad and ambiguous standards were issued. Although only a district-court case, *Drummond* was one of the first post-*Sosa* cases to analyze an ATCA claim against a corporation, the first to proceed to trial, and the first to hold that the rights to associate and organize can form the basis of an ATCA claim.<sup>93</sup>

---

88. *Id.* at 732–33.

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

90. *Id.* at 729. This quote from *Sosa* has been used by, among others, the courts in *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 23 (D.D.C. 2005), and *Taveras v. Taveras*, 477 F.3d 767, 772 (6th Cir. 2007).

91. *See Sosa*, 542 U.S. at 727–28, 733 n.21 (briefly mentioning these doctrines).

92. *Id.* at 732 n.20.

93. *See supra* notes 2–3 and accompanying text.

III. THE *DRUMMOND* CASE

This Note now examines the reasoning of the *Drummond* case, which concluded that labor-rights claims are actionable under the ATCA. Below, in Parts IV through VII, the Note analyzes whether labor-rights claims are actionable under relevant Supreme Court and circuit-court jurisprudence. Because *Drummond* was only a district-court case (albeit a significant one), the analysis in this Note is guided by federal appellate precedent and assumes that prior appellate decisions involving the ATCA will guide any future Supreme Court or circuit decision on whether labor rights are ultimately actionable under the ATCA.<sup>94</sup>

*Drummond* involved a claim by relatives of murdered union workers against the Drummond Company, an Alabama-based mining corporation with mines in Colombia.<sup>95</sup> The plaintiffs alleged that Colombian paramilitaries acting as Drummond's agents had subjected Drummond to ATCA liability by committing acts of violence and denying the slain union workers their fundamental rights to associate and organize.<sup>96</sup> The court in *Drummond* held that, as "principles of international law," the rights to associate and organize were sufficient to overcome the defendants' motion to dismiss.<sup>97</sup> The court determined that the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and Conventions 87 and 98 of the International Labour Organization reflected the customary-international-law status of the rights to associate and organize.<sup>98</sup> *Drummond* found that because of their embodiment in the international agreements above, the rights to associate and organize were "sufficiently 'specific, universal and obligatory'" to qualify as international-law norms, and that the ATCA provided the "implementing legislation" necessary to execute these international norms.<sup>99</sup> However, beyond citing these international treaties and conventions, the court did not explain how or when a right becomes "sufficiently 'specific, universal and obligatory'" to qualify as a norm of customary international law.<sup>100</sup>

*Drummond* also determined that the plaintiffs' claim met the ATCA's jurisdictional state-action requirement. The court reached this conclusion

---

94. Thus, this Note concludes that appellate courts, if presented with the issue, would likely ignore and overturn *Drummond's* affirmation of labor-rights claims, thereby establishing binding appellate precedent that violations of labor rights are not actionable under the ATCA.

95. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1253–54 (N.D. Ala. 2003).

96. *Id.* at 1254, 1262.

97. *Id.* at 1264.

98. *Id.*

99. *See id.* at 1263–64 (quoting *Alvarez-Machain v. United States*, 266 F.3d 1045, 1050 (9th Cir. 2001)).

100. *See Drummond*, 256 F. Supp. 2d at 1262–64 (discussing the rights to associate and organize).

because (1) the paramilitary forces that acted against the labor unions did so within the course of a business relationship with the defendant corporation and (2) at least some of the paramilitaries were dressed in Colombian military uniforms and were in fact members of the military.<sup>101</sup>

Thus, the *Drummond* court held that violations of the fundamental rights to associate and organize are actionable under the ATCA. Although the court only preliminarily determined the matter on a motion to dismiss, it nonetheless recognized that these labor principles are sufficiently established in customary international law to support an ATCA claim. Indeed, other plaintiffs have recognized that violations of these labor rights are a potential source of ATCA liability: the plaintiffs in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*<sup>102</sup> and *In re Sinaltrainal Litigation*<sup>103</sup> included claims that their fundamental rights to associate and organize were violated under the ATCA.

#### IV. THRESHOLD QUESTIONS FOR LABOR CLAIMS UNDER THE ATCA

This Part examines several preliminary, threshold questions that courts often consider in determining ATCA actionability,<sup>104</sup> including: (1) whether the ATCA is jurisdictional or substantive, (2) whether the claim involves a nonjusticiable political question, (3) whether the claim meets the state-action requirement, and (4) whether forum non conveniens or the exhaustion-of-remedies doctrine precludes ATCA liability. This Note concludes that an ATCA claim for violation of the rights to associate and organize would likely overcome these preliminary hurdles.

##### A. JURISDICTIONAL VERSUS SUBSTANTIVE CONSTRUCTION OF THE ATCA

Over the course of ATCA jurisprudence, courts have often wrestled with the nature of the ATCA's grant of authority. *Filartiga* characterized the ATCA as a jurisdictional statute that provided a federal forum for violations of international law.<sup>105</sup> *Tel-Oren* also addressed the precise nature of the power that the ATCA confers on federal courts. Judge Bork's concurring opinion strongly opined that the ATCA does not "expressly or impliedly

---

101. *Id.* at 1264–65.

102. *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1296–99 (S.D. Fla. 2003), *aff'd in part, vacated in part sub nom.* *Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

103. *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1280–81 (S.D. Fla. 2006).

104. As noted above, *see supra* note 94, this Note's analysis of whether labor-rights violations are actionable under the ATCA proceeds despite *Drummond's* affirmative answer and concludes that federal appellate courts would likely reverse *Drummond* if faced with the issue.

105. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (“[W]henver an alleged torturer is found and served with process by an alien within our borders, [the ATCA] provides federal jurisdiction.”).

grant[] a cause of action.”<sup>106</sup> Rather, Bork argued that the ATCA only “define[s] a class of cases [that] federal courts can hear” and that other statutes need to independently authorize substantive claims for violations of the law of nations.<sup>107</sup>

However, in *Estate of Marcos*, the court rejected the idea that an independent, statutory cause of action was necessary to make violations of international law actionable under the ATCA.<sup>108</sup> In *Sosa*, the Supreme Court qualifiedly agreed with *Estate of Marcos* and rejected Judge Bork’s interpretation of the ATCA in *Tel-Oren*. The Court in *Sosa* noted that although the ATCA is technically only jurisdictional, it contemplates a “very limited category” of claims “defined by the law of nations and recognized at common law.”<sup>109</sup> Thus, the law of nations need not independently provide a cause of action in order for a claim to qualify for the ATCA; rather, the ATCA made actionable a limited number of preexisting violations of the law of nations.<sup>110</sup> *Sosa* struck a nuanced balance between viewing the ATCA as purely jurisdictional and viewing it as purely substantive. The ATCA does not “mold substantive law”; it incorporates and makes actionable violations of certain parts of the law of nations.<sup>111</sup> Thus, in order to support an ATCA claim, the rights to associate and organize must be recognized as part of a “very limited category” of substantive international law.<sup>112</sup>

#### B. THE POLITICAL-QUESTION LIMITATION ON THE ATCA

The political-question doctrine, another potential limitation on ATCA claims,<sup>113</sup> does not preclude ATCA actionability for violations of the rights to associate and organize. Under the political-question doctrine, courts may decline to adjudicate sensitive political questions, invoking deference to the executive and legislative branches.<sup>114</sup> ATCA cases often implicate political questions because they arise from torts that occurred on foreign soil and

---

106. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 811 (D.C. Cir. 1984) (Bork, J., concurring).

107. *Id.*

108. *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474–75 (9th Cir. 1994).

109. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

110. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984) (“[F]rom our national beginnings both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanction.”).

111. See *Sosa*, 542 U.S. at 713–14 (discussing the nature of the ATCA).

112. *Id.* at 712.

113. 3C AM. JUR. 2D *Aliens and Citizens* § 2122 (2005) (noting that courts “may decline to exercise jurisdiction . . . [if] the plaintiff seeks to litigate an essentially political question”); cf. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1169 (1999) (noting that under the authors’ theory of customary international law, courts have the power to apply customary international law in the absence of executive guidance).

114. See *Baker v. Carr*, 369 U.S. 186, 210–11 (1962) (discussing the doctrine’s basis in separation of powers).

usually involve another country's government.<sup>115</sup> If a court were to determine that claims based on the rights to associate and organize implicated purely political questions—to be properly handled by the executive and legislative branches through the means of foreign policy—such claims would likely not be actionable.<sup>116</sup>

The ATCA case of *Sarei v. Rio Tinto, PLC* confronted the political-question limitation and decided that adjudication of the claim should continue despite the U.S. government's issuance of a statement of interest urging the court not to continue adjudication because of the sensitivity of political relations with the foreign state involved.<sup>117</sup> The *Sarei* court first noted the influential political-question balancing test developed by the Supreme Court in *Baker v. Carr*.<sup>118</sup> Applying the *Baker* factors, the *Sarei* court decided that adjudication should continue because there was no "constitutional commitment" of the issue to the other branches of government, the case could be resolved independently without embarrassing or expressing lack of respect for the other branches, and there was no "already made" political decision that demanded "unquestioning adherence."<sup>119</sup>

Other cases have indicated that courts should be hesitant to apply the political-question doctrine as a bar to adjudication of ATCA claims. *Kadic* noted that "[n]ot every case 'touching foreign relations' is nonjusticiable" and that "judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive" human-rights questions.<sup>120</sup> And in *Doe v.*

---

115. See *Kadic v. Karadzic*, 70 F.3d 232, 248–49 (2d Cir. 1995) (noting that ATCA cases can implicate U.S. foreign relations and "sensitive matters of diplomacy").

116. See *Sosa*, 542 U.S. at 727–28 (explaining that when U.S. foreign relations are implicated, courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches").

117. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1205–06 (9th Cir. 2007), *vacated and reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007), *and remanded for limited determination en banc*, 550 F.3d 822 (9th Cir. 2008). Papua New Guinea ("PNG") was the foreign state involved in the case, and the plaintiffs accused Rio Tinto and the PNG government of racial discrimination, environmental devastation, war crimes, and other crimes against humanity. *Id.* at 1197–98.

118. *Id.* at 1203 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). *Baker* set forth six factors that courts should consider when evaluating the justiciability of a potential political question: (1) the "textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) the "lack of judicially discoverable and manageable standards for resolving" the issue; (3) the impossibility of resolving the issue without "an initial policy determination of a kind clearly for nonjudicial discretion;" (4) the impossibility of resolving the issue without showing a "lack of the respect due [other] branches of government;" (5) an "unusual need" to adhere to a previous political decision; and (6) the potential embarrassment resulting from "multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. *Sarei* considered only four of these factors. *Sarei*, 487 F.3d at 1203 & n.8.

119. *Sarei*, 487 F.3d at 1203–08.

120. *Kadic*, 70 F.3d at 249 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

*Exxon Mobil Corp.*, the court noted that in ATCA cases, “courts do not abdicate their Article III responsibilities on executive command.”<sup>121</sup>

Despite the broad latitude that these cases appear to grant a judge in deciding whether an ATCA claim presents an essentially political question, the *Sosa* case issued a cautionary warning. The Court noted that allowing international rules to be privately actionable carries possible “collateral consequences” for foreign relations and warned that courts should be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”<sup>122</sup> “[C]raft[ing] remedies” for violations of international law raises risks of “adverse foreign policy” and therefore “should be undertaken, if at all, with great caution.”<sup>123</sup>

An ATCA claim involving the rights to associate and organize presents the same risk of interference with foreign policy that other ATCA claims present. Claims for genocide, extrajudicial killing, and torture that originated in another country or involve another government all potentially implicate sensitive political issues, yet in ATCA cases, the political-question doctrine has generally not been a bar to justiciability.<sup>124</sup> Although *Sosa* urges consideration of political factors in all ATCA cases, the number of ATCA cases that have proceeded—as well as the inherently political nature of nearly all ATCA claims—indicates that labor claims would likely survive the application of the political-question doctrine.

### C. THE STATE-ACTION REQUIREMENT AND STANDARDS OF AIDING AND ABETTING

Another potential limitation, the state-action requirement, would not likely preclude ATCA actionability for violations of the rights to associate and organize. Rather, joint-actor liability, aider-and-abettor liability, and purely private liability are possible under the ATCA. When an ATCA case involves a private defendant (such as a corporation), a threshold determination is whether the tort requires state action to violate international law,<sup>125</sup> and if so, whether the private defendant was engaged in

---

121. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 23 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008).

122. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

123. *Id.* at 727–28.

124. *Compare Sarei*, 487 F.3d at 1205–06 (concluding that the political-question doctrine did not bar ATCA claims for racial discrimination, environmental devastation, war crimes, and crimes against humanity, even in the face of a statement of interest filed by the executive branch urging the court not to proceed with the case), *and Kadic*, 70 F.3d at 249–50 (concluding that the political-question doctrine did not bar ATCA claims for genocide, rape, torture, and wrongful death), *with Exxon*, 393 F. Supp. 2d at 27 (refusing to adjudicate an ATCA claim because the determination of whether the defendants engaged in joint illicit action with the Indonesian military amounted to political adjudication).

125. *Doe v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *and appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005).

state action as a joint actor with or as an aider and abettor to the state.<sup>126</sup> Modern cases, beginning with *Kadic*,<sup>127</sup> have allowed private liability under the ATCA by loosening the state-action requirement as well as permitting aider and abettor liability, despite Judge Edwards's statement in *Tel-Oren* that "the law of nations provides no substantive right to be free from the private acts of individuals."<sup>128</sup> The Supreme Court in *Sosa* did not address corporate liability under the ATCA and therefore did not issue guidelines on the state-action requirement. Instead, *Unocal* serves as a useful guide in determining whether a claim based on the rights to associate and organize would satisfy the ATCA state-action requirement.

*Unocal* involved claims by Myanmar villagers against Unocal, a multinational corporation, for its involvement in a pipeline construction project in Myanmar.<sup>129</sup> The plaintiffs alleged that the Myanmar government provided Unocal with security protection for the construction of the pipeline.<sup>130</sup> During the process, the army allegedly subjected nearby villagers to forced labor, rape, torture, and summary execution.<sup>131</sup> The *Unocal* court noted that although most crimes require state action to violate international law and therefore invoke ATCA liability, certain egregious violations—such as genocide, war crimes, and slavery—do not require state action.<sup>132</sup> Further, the court held that acts such as rape, torture, and summary execution—which ordinarily have a state-action requirement—were actionable without regard to state action if they were committed in furtherance of genocide or war crimes.<sup>133</sup> Moreover, even private acts of forced labor could be actionable under the ATCA because "forced labor is a modern variant of slavery."<sup>134</sup> Thus, *Unocal's* creative reasoning expands ATCA actionability to certain purely private conduct—either because such conduct is in itself exempted from a state-action requirement (e.g., genocide) or because it is committed in furtherance of conduct that is so exempted.

---

126. *Id.* at 945, 947.

127. The court in *Kadic* stated that it did "not agree that the law of nations, as understood in the modern era, confines its reach to state action." *Kadic*, 70 F.3d at 239. Rather, the court held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Id.* The court also noted that crimes of "universal concern" can be committed by non-state actors. *Id.* at 240 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)).

128. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 780 n.4 (D.C. Cir. 1984) (Edwards, J., concurring).

129. *Unocal*, 395 F.3d at 937.

130. *Id.* at 937–38.

131. *Id.* at 939.

132. *Id.* at 945–46. The court described itself as following the lead of the Second Circuit in *Kadic*. *Id.* at 946.

133. *Id.* at 946.

134. *Unocal*, 395 F.3d at 946.

Finally, the court held that a reasonable factfinder could have concluded that Unocal's conduct aided and abetted the Myanmar military in subjecting the villagers to forced labor, defining the aiding-and-abetting standard as "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."<sup>135</sup> The court noted that Unocal had continued to pay and advise the Myanmar military even after Unocal realized that the military was using forced labor.<sup>136</sup> This encouragement of the Myanmar military and knowing disregard of the military's violations had a "substantial effect" on the occurrence of the crime.<sup>137</sup> Therefore, the aiding-and-abetting standard was met, and a reasonable factfinder could find Unocal liable under the ATCA.<sup>138</sup> Thus, according to *Unocal*, there are several different ways in which a corporation can be liable under the ATCA for violating the rights to associate and organize: as a joint actor with a government, as an aider and abettor to a government, or even as a purely private actor, so long as the violation occurred in furtherance of a sufficiently egregious crime (e.g., genocide or war crimes).

#### D. OTHER ATCA JURISDICTIONAL REQUIREMENTS

Some courts have considered two other possible limitations on ATCA claims: exhaustion of remedies and forum non conveniens. However, neither of these limitations bars claims for violations of the rights to associate and organize. The exhaustion-of-remedies limitation requires the claimant to exhaust his domestic legal remedies prior to pursuing an ATCA claim.<sup>139</sup> The Court in *Sosa* noted that it "would certainly consider this

---

135. *Id.* at 947. The *Restatement (Second) of Torts* declares that "[a]dvice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance." RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

136. *Unocal*, 395 F.3d at 947, 952–53 & n.29.

137. *Id.* at 952–53.

138. *Id.* The court also noted in dicta that joint venture, agency, negligence, and recklessness might be "viable theories" of private-actor liability under the ATCA. *Id.* at 947 n.20. Although post-*Kadic* ATCA jurisprudence has generally allowed aider-and-abettor liability for private actors, a few courts have rejected this form of liability. *See Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005) (noting that some courts have rejected aider-and-abettor liability), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) ("[T]he ATCA presently does not provide for aider and abettor liability, and this Court will not write it into the statute."), *aff'd in part, vacated in part sub nom.* *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008). On appeal, the Second Circuit expressly rejected *South African Apartheid's* conclusion about the unavailability of aider-and-abettor liability for ATCA claims. *Khulumani*, 504 F.3d at 260 (per curiam) ("We hold that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA.")

139. *See generally Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc) (discussing the exhaustion requirement in ATCA cases).

requirement in an appropriate case.”<sup>140</sup> Following *Sosa*’s rationale, the Ninth Circuit in *Sarei* held that although there is no “absolute requirement of exhaustion in [ATCA] cases,” prudential (i.e., discretionary) exhaustion is applicable to the ATCA<sup>141</sup>—meaning that some (though not all) ATCA claims will have an exhaustion requirement.<sup>142</sup> *Sarei*, however, placed the burden of justifying an exhaustion requirement on the defendant.<sup>143</sup> While scholars speculate that it is possible that courts could require exhaustion in ATCA cases, they also admit that “[i]n most international human rights cases, it is simply not possible to obtain a remedy in the country where the abuse took place.”<sup>144</sup> Both in general and in the labor-rights context, a cursory showing that pursuit of a remedy in the claimant’s domestic courts would be futile—a very low bar, since the government itself is often involved in the violation—should satisfy an exhaustion-of-remedies requirement<sup>145</sup> (assuming the court were to require exhaustion at all).

Forum non conveniens has rarely been invoked successfully in ATCA litigation, although several courts have considered it.<sup>146</sup> Similar to exhaustion of remedies, a court invoking forum non conveniens must determine that the plaintiff will be able to obtain a fair trial in another forum,<sup>147</sup> a condition unlikely to be met in ATCA cases. Thus, even if a court were to require exhaustion of remedies or apply forum non conveniens in ATCA litigation, a plaintiff’s action for violation of the rights to associate and organize would likely survive if the plaintiff could show that she could not obtain a remedy in her domestic forum.

#### E. LABOR CLAIMS WOULD LIKELY SURVIVE THRESHOLD LIMITATIONS

In sum, despite the panoply of threshold limitations on ATCA claims, an ATCA action for violation of the rights to associate and organize would likely withstand the application of these limitations because: (1) a valid ATCA claim for violations of customary international law—including the rights to associate and organize (assuming they qualify as customary

---

140. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

141. *Sarei*, 550 F.3d at 824 (plurality opinion); see also *id.* at 825 (concluding that the district court erred by failing to “analyze exhaustion as a discretionary matter”).

142. *Id.* at 832 n.10.

143. *Id.* at 832.

144. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 405 (2d ed. 2008).

145. See *id.* at 405–06 (noting that no ATCA cases have been dismissed on exhaustion grounds and that this result is explainable by the fact that “countries that permit [human-rights abuses] do not have a good record of providing remedies for those offenses”).

146. *Id.* at 395.

147. See Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. INT’L L.J. 53, 103 (1981) (“If the court has doubts about whether the plaintiff can obtain a fair trial in the other forum, the proper procedure is either not to dismiss or to dismiss conditionally . . .”).

international law)—does not require an independent cause of action found in the law of nations, (2) a claim for denial of the rights to associate and organize does not involve a political question to a greater extent than other ATCA claims that have been held actionable, (3) a court could hold a corporation liable under the ATCA as a joint actor, an aider and abettor, or a private party acting in furtherance of other crimes, and (4) neither an exhaustion-of-remedies requirement nor a forum non conveniens limitation—assuming they were even imposed—would prohibit labor claims.

## V. LABOR RIGHTS IN CUSTOMARY INTERNATIONAL LAW

Even if a claim for violation of the rights to associate and organize were to survive the largely procedural threshold questions for ATCA jurisdiction, a court would still have to determine that such a violation constitutes a violation of the law of nations actionable under the ATCA.<sup>148</sup> *Sosa* is the only Supreme Court case to address the ATCA, and therefore an examination of whether a violation of the rights to associate and organize is actionable as a violation of the law of nations should begin with the guidelines discussed in that case. Subpart A examines the *Sosa* guidelines, while Subpart B examines other recurring guidelines noted throughout ATCA cases. Subparts C and D then apply these guidelines to the rights to associate and organize.

### A. SOSA GUIDELINES FOR LAW-OF-NATIONS VIOLATIONS UNDER THE ATCA

The *Sosa* Court examined the ATCA after more than two decades of lower-court ATCA adjudication.<sup>149</sup> *Sosa* did not provide detailed instructions or an explicit roadmap for the proper use of the law of nations in ATCA claims. However, *Sosa* did issue broad guidelines and policy considerations that are helpful in framing the proper use of the law of nations. The Court began by examining the legislative history and historical context of the ATCA, finding that Congress intended the ATCA to furnish a remedy for only a “relatively modest set of actions alleging violations of the law of nations.”<sup>150</sup> Actions for piracy, prize captures, and violations of safe conduct were likely part of the original legislature’s conception of a “modest set of actions.”<sup>151</sup> Based on this legislative history, the Court concluded that any law-of-nations violation actionable under the ATCA should “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>152</sup> These norms must have as much contemporary acceptance

---

148. See 28 U.S.C. § 1350 (2006) (providing federal jurisdiction for torts “committed in violation of the law of nations”).

149. *Filartiga*, a 1980 case, marked the beginning of modern ATCA jurisprudence. See *supra* Part II (detailing the history of ATCA jurisprudence).

150. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

151. *Id.*

152. *Id.* at 725.

“among civilized nations [as] the historical paradigms familiar when [the ATCA] was enacted.”<sup>153</sup>

In addition to these relatively vague and circular statements, the Court’s opinion stressed the practical consequences of litigation and the value of judicial hesitancy in determining what torts are actionable under the ATCA. The opinion acknowledged that judges have a substantial amount of discretion in determining whether a norm meets ATCA standards<sup>154</sup> and stressed that judges should take into account the “practical consequences” of allowing a particular ATCA claim.<sup>155</sup> *Sosa* stated that judges “have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding . . . have not affirmatively encouraged greater judicial creativity.”<sup>156</sup> Similarly, courts should use “great caution” when considering extending the law of nations to include private rights.<sup>157</sup> The Court concluded that courts should exercise “vigilant doorkeeping” when considering international norms, but that the “door is still ajar” for additional actionable international norms.<sup>158</sup>

Therefore, *Sosa* delivered a cautionary message about recognizing new international-law claims under the ATCA, but it left the door “ajar” for judicial discretion. Ultimately, courts will require more than a norm that *might* be defined as customary international law or that has only a modicum of international influence. Rather, the norm must be an “established” and “universally recognized” rule of customary international law.<sup>159</sup>

B. GENERAL GUIDELINES FOR DETERMINING COGNIZABLE CUSTOMARY  
INTERNATIONAL LAW UNDER THE ATCA

In addition to *Sosa*’s guidelines, courts have generally formulated other requirements for the determination of whether a claim pleads a violation of customary international law under the ATCA: (1) the norm must have acquired *opinio juris* binding status, where parties accede to it out of a sense of obligation, and (2) the norm must contain sufficiently specifiable and articulable standards so as to allow a judge to adequately identify a violation.

In order for a norm to constitute binding customary international law, states must abide by and accede to it “out of a sense of legal obligation,”<sup>160</sup>

---

153. *Id.* at 732.

154. *Id.* at 726.

155. *Sosa*, 542 U.S. at 732–33.

156. *Id.* at 728.

157. *Id.* at 727–28.

158. *Id.* at 729.

159. Gul, *supra* note 31, at 412 (quoting Terry Collingsworth, “Corporate Social Responsibility,” *Unmasked*, 16 ST. THOMAS L. REV. 669, 680 (2004)).

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

or *opinio juris*.<sup>161</sup> This excludes norms that states choose to follow for moral or political reasons.<sup>162</sup> The *opinio juris* limitation imposes a higher standard than mere identification of a potentially suggestive or advisory international norm. Instead, a state must feel legally bound by the norm. This higher standard reduces the class of norms available for pleading ATCA actionability. Additionally, the *opinio juris* status of a given norm is generally difficult to prove, as it is difficult to quantify a state's subjective sense of obligation.<sup>163</sup>

Second, a norm of international law actionable under the ATCA must have "clearly articulated principles" and "discernable standards and regulations" with which to identify potential violations.<sup>164</sup> In rejecting the plaintiffs' claims, the district court in *Villeda Aldana v. Fresh Del Monte Produce, Inc.* noted that the plaintiffs had not given the court any indication of what conduct would amount to an international-norm violation.<sup>165</sup> The court went on to describe the norm's specificity and ease of definition as the "meat and potatoes" of an ATCA claim, stating that in the absence of these characteristics, the norm lacks a "legally discernable shape."<sup>166</sup> For instance, in *Flores v. Southern Peru Copper Corp.*, the plaintiffs sued a corporation for environmental degradation that allegedly infringed on their "right to life" and "right to health."<sup>167</sup> The court held that these rights were "insufficiently definite to constitute . . . customary international law" under the ATCA.<sup>168</sup>

### C. SOURCES OF CUSTOMARY INTERNATIONAL LAW FOR LABOR-RIGHTS CLAIMS

The Statute of the International Court of Justice ("ICJ Statute")<sup>169</sup> is a useful guide to the sources a court will use to determine whether a claim pleads a violation of the "law of nations" under the ATCA. Article 38 of the ICJ Statute "embodies the understanding of States as to what sources offer competent proof of the content of customary international law."<sup>170</sup> The

161. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987) ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*) . . .").

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

163. See Goldsmith & Posner, *supra* note 113, at 1117–18 (discussing problems raised by the *opinio juris* requirement).

164. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165, 167 (5th Cir. 1999).

165. *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1298 (S.D. Fla. 2003), *aff'd in part, vacated in part sub nom.* *Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

166. *Id.*

167. *Flores*, 414 F.3d at 236–37 (internal quotation marks omitted).

168. *Id.* at 254.

169. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute].

170. *Flores*, 414 F.3d at 251.

*Restatement (Third) of the Foreign Relations Law of the United States* declares that Article 38 is “commonly treated as an authoritative statement of the ‘sources’ of international law.”<sup>171</sup> Article 38 stipulates that the ICJ shall apply (1) “international conventions . . . establishing rules expressly recognized by the contesting states,” (2) “international custom, as evidence of a general practice accepted as law,” (3) “general principles of law recognized by civilized nations,” and (4) “judicial decisions and the teachings of the most highly qualified publicists . . . as subsidiary means.”<sup>172</sup> Of these sources identified in Article 38, courts discuss “international conventions” (including agreements, treaties, covenants, conventions, and declarations) most often when analyzing ATCA claims, because conventions present the most objective and straightforward means of analysis. Further, “international custom” and “general principles of law” are usually codified in international agreements if they truly represent universal, customary international law.<sup>173</sup> Therefore, this Subpart primarily examines international agreements—conventions and treaties made by states—that pertain to the rights to associate and organize. These international agreements create certain duties and obligations for the signatory parties. The *Restatement (Third) of the Foreign Relations Law of the United States* declares that “[i]nternational agreements create law for the state parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”<sup>174</sup>

The *Drummond* case held that the rights to associate and organize were “generally recognized . . . principles of international law” and therefore sufficient to support an ATCA claim.<sup>175</sup> In so holding, the court stated that the rights to associate and organize were embodied in the International Covenant on Civil and Political Rights (“ICCPR”), the Universal Declaration of Human Rights (“Universal Declaration”), and Conventions 87 and 98 of the International Labour Organization (“ILO”).<sup>176</sup> Thus, these international

171. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters’ note 1 (1987). The *Restatement* also notes that its own provision on the sources of international law (section 102) relies on Article 38 of the ICJ Statute. *Id.*

172. ICJ Statute, *supra* note 169, art. 38(1).

173. See *Flores*, 414 F.3d at 252 (“[T]he records or evidence of international law are the documents or acts proving the consent of States to its rules . . . .” (emphasis omitted) (quoting CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 2 (1965))).

174. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987). The *Restatement* was drafted by four “renowned international law scholars” and, when published, was influential to courts. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 834 (1997).

175. *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003).

176. *Id.* The plaintiffs in *Villeda Aldana* also relied on each of these sources for their labor-rights claims. *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1297 (S.D. Fla. 2003), *aff’d in part, vacated in part sub nom.* *Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

agreements are critical sources for a court that must determine the ATCA actionability of violations of the rights to associate and organize. The sources of international labor rights can be divided into two groups: (1) ILO Conventions that speak specifically and exclusively to international labor rights, and (2) broader human-rights conventions that include labor-rights provisions.<sup>177</sup>

### 1. International Labour Organization (“ILO”) Agreements

ILO labor agreements do not adequately evidence customary international law so as to make violations of the rights to associate and organize actionable under the ATCA. Since its formation in 1919, the ILO has been the “pre-eminent international body concerned with the promotion and enforcement of international labour rights and standards.”<sup>178</sup> ILO Conventions 87 and 98, as well as the ILO Declaration on Fundamental Principles and Rights at Work, contain language pertaining to the rights to associate and organize.

Convention 87 states that “[e]ach Member of the [ILO] for which this Convention is in force undertakes to give effect to the following provisions,” one of which states that “[w]orkers and employers, without distinction whatsoever, shall have the right to establish and . . . join organisations of their own choosing.”<sup>179</sup> Convention 98 states that “[w]orkers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.”<sup>180</sup> Additionally, both Conventions have limiting language that purports to bind only ILO members that have ratified the Conventions.<sup>181</sup>

In many ways, Conventions 87 and 98 reflect a broad, global consensus that the rights to associate and organize are basic human rights. Conventions 87 and 98 have been ratified by 142 and 154 countries,

---

177. Philip Alston, *Labour Rights as Human Rights: The Not So Happy State of the Art*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 1, 14 (Philip Alston ed., 2005).

178. Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers’ Right, Human Right, International Right?*, in *LABOUR RIGHTS AS HUMAN RIGHTS*, *supra* note 177, at 61, 64.

179. Int’l Labour Org., Int’l Labour Org. Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize arts. 1–2, *adopted* July 9, 1948, 68 U.N.T.S. 17 [hereinafter ILO Convention 87].

180. Int’l Labour Org., Int’l Labour Org. Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively art. 1(1), *adopted* July 1, 1949, 96 U.N.T.S. 257 [hereinafter ILO Convention 98]. Convention 98 also states that union protection shall apply specifically against acts calculated to (1) “make the employment of a worker subject to the condition that he shall not join a union or shall relinquish . . . union membership,” or (2) “cause the dismissal of or otherwise prejudice a worker by reason of union membership.” *Id.* art. 1(2).

181. *Villeda Aldana*, 305 F. Supp. 2d at 1298 (quoting ILO Convention 87, *supra* note 179, art. 15; ILO Convention 98, *supra* note 180, art. 8).

respectively<sup>182</sup>—although not by the United States<sup>183</sup> or other populous countries such as China, Brazil, and India.<sup>184</sup> The ILO's Committee of Experts regards Conventions 87 and 98 as establishing, in binding terms, the right to freedom of association that was embodied in the Universal Declaration of Human Rights.<sup>185</sup> Others regard the ILO Conventions as establishing international labor standards “that are binding on the countries that ratify them.”<sup>186</sup> The ILO has established a complex supervisory system—including reporting, dialogue with member countries, and complaint procedures—indicating the ILO's intent that these Conventions are binding.<sup>187</sup>

However, the customary-law status of the ILO Conventions, particularly with respect to the United States, is doubtful. Although the United States has been a member of the ILO since 1934 and has ratified some ILO Conventions, it has not ratified Conventions 87 and 98.<sup>188</sup> And, although the U.S. government has tactfully stated that its laws are “generally in compliance” with Conventions 87 and 98, the ILO's drafting-committee vice chairman (and representative of a U.S. employers' group) stated that ILO member states have “no obligations as concerns the specific provisions of the Conventions they have not ratified.”<sup>189</sup> Moreover, the ordinary rule followed by U.S. courts is that treaties do not create “either obligations or rights for a third state without its consent.”<sup>190</sup> Because the United States has not ratified or consented to Conventions 87 and 98, claims of binding customary international law based on those Conventions are unpersuasive.

In addition, many countries that have ratified Conventions 87 and 98 have a problematic record of labor-rights violations and do not seem to uphold the Conventions' ideal of labor rights.<sup>191</sup> Finally, the district court in *Villeda Aldana* rejected Conventions 87 and 98 as customary international law

---

182. Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, in *LABOUR RIGHTS AS HUMAN RIGHTS*, *supra* note 177, at 85, 126 n.130.

183. *Villeda Aldana*, 305 F. Supp. 2d at 1297 n.7.

184. Maupain, *supra* note 182, at 126 n.130.

185. Macklem, *supra* note 178, at 70 n.36.

186. NAT'L RESEARCH COUNCIL, *MONITORING INTERNATIONAL LABOR STANDARDS: TECHNIQUES AND SOURCES OF INFORMATION* 17 (2004).

187. *Id.*

188. SAMUEL ESTREICHER, *GLOBAL ISSUES IN LABOR LAW* 59 (2007).

189. *Id.* at 59–60 (quoting Int'l Labour Conference, 91st Sess., Provisional Record No. 14, at 1 (June 13, 2003), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/pr-14.pdf>) (internal quotation marks omitted).

190. JOSEPH D. BECKER, *THE AMERICAN LAW OF NATIONS: PUBLIC INTERNATIONAL LAW IN AMERICAN COURTS* 34 (2001) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324(1) (1987)).

191. NAT'L RESEARCH COUNCIL, *supra* note 186, at 109; see also *supra* notes 160–63 and accompanying text (discussing *opinio juris* and how a country's perceived binding obligation to uphold certain rights is evidence of those rights' status as customary international law).

and therefore actionable ATCA norms.<sup>192</sup> The court noted that these Conventions “are only evidence of international law and do not provide a basis for development of a customary norm of international law that is actionable under the ATCA,” and that it would be “premature” to find the Conventions binding.<sup>193</sup>

The ILO’s 1998 Declaration on Fundamental Principles and Rights at Work (“1998 Declaration”) was an effort to pare down the ILO Conventions to a core set of labor rights that “constitute baseline entitlements” and “operate as universal constraints.”<sup>194</sup> The text of the 1998 Declaration states that even those ILO members that have not ratified specific Conventions have an obligation to realize “the principles concerning the fundamental rights which are the subject of those Conventions, namely . . . freedom of association.”<sup>195</sup> Essentially, the 1998 Declaration attempted to distill the myriad Conventions into core principles that would be universally applicable. However, the simplicity and lack of specificity of these “core standards” instead might erode the standards’ universality by allowing governments and corporations to interpret these vague guarantees in a self-interested manner.<sup>196</sup> Philip Alston and James Heenan argue that historical international labor standards (such as the ILO Conventions) were superseded in 1998 by a “nebulous, open-ended, and essentially self-defined and self-evaluated system of so-called core labor standards.”<sup>197</sup> They predict that the “failure to link” the 1998 Declaration’s core standards to specific Conventions will allow multinational corporations to determine their own international labor standards.<sup>198</sup> Similarly, the 1998 Declaration does not meet *Sosa*’s standards for an actionable ATCA claim: it does not contain highly specific, readily articulable standards with which to easily identify a breach.<sup>199</sup>

Therefore, notwithstanding the court’s declaration in *Drummond* that ILO labor norms are evidence of customary international law for ATCA

---

192. *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1297–98 (S.D. Fla. 2003), *aff’d in part, vacated in part sub nom.* *Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

193. *Id.* at 1297.

194. Macklem, *supra* note 178, at 68; *see also* Maupain, *supra* note 182, at 135 (noting the emphasis on “fundamental rights” in the 1998 Declaration).

195. Int’l Labour Org., Int’l Labour Org. Declaration on Fundamental Principles and Rights at Work para. 2, *adopted* June 18, 1998, 37 I.L.M. 1237; *see also* NAT’L RESEARCH COUNCIL, *supra* note 186, at 17–18 (stating that the 1998 Declaration committed members to protect certain fundamental rights regardless of whether those members had ratified the Conventions).

196. *See* Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT’L L. & POL. 221, 223 (2004) (describing the erosion of labor standards’ universality).

197. *Id.* at 263.

198. *Id.* at 242.

199. *See supra* Parts V.A–B (detailing *Sosa*’s specificity standards and the general ATCA requirement of readily articulable and discernable standards).

claims, the ILO norms do not in fact represent customary international law and therefore do not support ATCA jurisdiction for labor-rights claims. The ILO norms fail to create a universal sense of binding obligation, the United States has not ratified the Conventions, and the 1998 Declaration lacks the requisite specificity.<sup>200</sup>

## 2. Other International Declarations and Covenants

Broader international agreements are also insufficient to show that labor rights are customary international law and therefore, actionable under the ATCA. In addition to the norms promulgated by the ILO, three other declarations are often cited as evidence of customary international law actionable under the ATCA: (1) the International Covenant on Civil and Political Rights (“ICCPR”), (2) the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), and (3) the Universal Declaration of Human Rights (“Universal Declaration”). These three international agreements are viewed as the most important formulations of internationally protected human rights.<sup>201</sup>

Article 22 of the ICCPR states that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>202</sup> Plaintiffs have invoked the ICCPR in numerous ATCA cases, claiming that it represents customary international law.<sup>203</sup> There is a modicum of support for classifying the ICCPR as customary international law actionable under the ATCA. It is one of the principal instruments that the international community has created

200. Although other international materials contain labor standards, they are even less likely to qualify as evidence of customary international law under the ATCA, as their level of international influence does not approach that of the ILO Conventions. *See e.g.*, Dominican Republic–Central America Free Trade Agreement arts. 16.1(1), 16.8(a)–(b), Aug. 5, 2004, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/asset\\_upload\\_file320\\_3936.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file320_3936.pdf) (referring to the rights to associate and organize as “internationally recognized”); North American Agreement on Labor Cooperation, U.S.-Can.-Mex., annex I, Sept. 14, 1993, 32 I.L.M. 1499 (noting that freedom of association and the right to organize should be “guiding principles” for each party to the agreement); ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 17 (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (“Enterprises should . . . [r]espect the right of their employees to be represented by trade unions . . .”).

201. Blum & Steinhardt, *supra* note 147, at 68 & n.71.

202. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 22(1), U.N. Doc. A/6316 (Dec. 16, 1966).

203. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (noting the plaintiff’s reliance on the ICCPR); *Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (noting other courts’ reliance on the ICCPR in allowing causes of action under the ATCA); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1351 (S.D. Fla. 2001) (stating that the plaintiffs were suing under the ATCA for actions in violation of the ICCPR); *cf. Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380–81 (S.D. Ga. 2000) (noting that the plaintiff could have brought an ATCA claim under the authority of the ICCPR but for his failure to plead the claim properly).

for the protection of human rights, and over 150 countries, including the United States, have ratified it.<sup>204</sup> In *Ralk v. Lincoln County*, the court—in spite of holding that the plaintiff had not properly pleaded his case—stated in dicta that the plaintiff could bring a claim for ICCPR violations under the ATCA.<sup>205</sup> And in the district court case of *Estate of Cabello v. Fernandez-Larios*, the court determined that the ATCA was the legislation implementing ICCPR rights and that a court may consider the ICCPR actionable as legal authority similar to the U.S. Bill of Rights.<sup>206</sup>

However, both the ICCPR's ratification history and *Sosa*'s statements about the ICCPR render it highly unlikely that a court would rely on the ICCPR as evidence of customary international law. First, during the ICCPR's 1992 U.S. ratification process, the Bush Administration proposed a declaration—which was later fully adopted—stating that Articles 1 through 27 are not self-executing.<sup>207</sup> Similarly, the Senate Committee on Foreign Relations recommended “including a declaration that the substantive provisions of the Covenant are not self-executing.”<sup>208</sup> A non-self-executing treaty cannot be relied upon for private enforcement of the rights that it grants.<sup>209</sup> Further, perhaps with an eye toward judicial mechanisms such as the ATCA, the Committee declared that “[t]he intent is to clarify that the Covenant will not create a private cause of action in U.S. courts.”<sup>210</sup> Because of the importance of legislative intent in determining ATCA causes of action,<sup>211</sup> and in light of the ICCPR's legislative history, an ATCA claim based on the ICCPR is unlikely to be upheld. Second, the Supreme Court in *Sosa* cited the non-self-executing nature of the ICCPR and held that it did not “establish the relevant and applicable rule of international law.”<sup>212</sup> *Sosa* noted that despite the plaintiff's citation of “well-known international agreements” that carried “moral authority,” the agreements did not serve to

---

204. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11–12 (2004), available at <http://www.unhchr.ch/pdf/report.pdf>.

205. *Ralk*, 81 F. Supp. 2d at 1380–81.

206. *Estate of Cabello*, 157 F. Supp. 2d at 1361; see also Pagnattaro, *supra* note 14, at 234 (arguing that the ATCA could be “an appropriate and effective vehicle for the enforcement of” international labor rights found in the ICCPR). But see *Villeda Aldana*, 416 F.3d at 1247 (rejecting *Estate of Cabello* in light of *Sosa*); *infra* notes 212–13 and accompanying text (discussing *Sosa*'s statements about the ICCPR).

207. S. EXEC. REP. NO. 102-23, at 9 (1992), reprinted in 31 I.L.M. 645, 652; David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 141 (1999).

208. S. EXEC. REP. NO. 102-23, at 19, reprinted in 31 I.L.M. at 657.

209. 3C AM. JUR. 2D *Aliens and Citizens* § 2122 (2005).

210. S. EXEC. REP. NO. 102-23, at 19, reprinted in 31 I.L.M. at 657.

211. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (noting the importance accorded to congressional intent when determining private rights of action under an international norm).

212. *Id.* at 735.

“create obligations enforceable in the federal courts.”<sup>213</sup> Thus, especially post-*Sosa*, the ICCPR is not a viable source of customary international law for ATCA actionability.

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) is another broad international agreement that contains labor rights. Article 8 proclaims that the “[p]arties to the present Covenant undertake to ensure . . . [t]he right of everyone to form trade unions and join the trade union of his choice,” and “[t]he right of trade unions to function freely.”<sup>214</sup> Nearly 150 countries have ratified the ICESCR,<sup>215</sup> and plaintiffs have relied upon it in a few ATCA cases, although less frequently than the ICCPR.<sup>216</sup> However, unlike the ICCPR, the United States has not ratified the ICESCR.<sup>217</sup> The *Flores* court stated that the ICESCR is “vague and aspirational,” noted the signatory states’ poor compliance with the ICESCR, and held that the plaintiff’s reliance on the ICESCR for an ATCA claim was misguided.<sup>218</sup> In addition to the lack of U.S. ratification, the ICESCR is also subject to the same criticisms of the ICCPR that are discussed above. Thus, it appears even less likely that the ICESCR could provide the basis for an ATCA claim.

The U.N. General Assembly adopted the Universal Declaration of Human Rights (“Universal Declaration”) in 1948.<sup>219</sup> The Universal Declaration is one of the most well-known and influential documents concerning international human rights.<sup>220</sup> Although the Universal Declaration is not a treaty to be signed or ratified, some international-law scholars view it as having acquired “significant legal status.”<sup>221</sup> Article 23 of the Universal Declaration states that “[e]veryone has the right to form and to join trade unions for the protection of his interests.”<sup>222</sup> Regardless of its importance in international-human-rights theory, however, the Universal Declaration’s labor-rights contents are insufficient as evidence of customary international law under the ATCA. The Universal Declaration lacks the

---

213. *Id.* at 734–35. In *Villeda Aldana*, the Eleventh Circuit recognized *Sosa*’s position on the ICCPR and rejected its authority under the ATCA. *Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005).

214. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 8(1)(a), (c), U.N. Doc. A/6316 (Dec. 16, 1966).

215. OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, *supra* note 204, at 12.

216. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 258 (2d Cir. 2003) (noting that the plaintiffs relied on the ICESCR).

217. *Id.* (noting the plaintiffs’ reliance on the “unratified” ICESCR).

218. *Id.*

219. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

220. *See* LOUIS HENKIN, *THE AGE OF RIGHTS* 19 (1990) (discussing the Universal Declaration).

221. *Id.*

222. Universal Declaration of Human Rights, *supra* note 219, art. 23(4).

specificity and concrete nature required to support ATCA claims, and the *Sosa* Court recognized that the Universal Declaration is a statement of principles and not an agreement that imposes binding obligations.<sup>223</sup> *Sosa* stated that the Universal Declaration “does not of its own force impose obligations as a matter of international law.”<sup>224</sup> And in *In re South African Apartheid Litigation*, a U.S. district court recognized the Universal Declaration’s inability to support ATCA causes of action, stating that the Universal Declaration “simply do[es] not create binding international law” and that its “broad aspirational language” does “not meet the specificity require[ment]” of the ATCA.<sup>225</sup> Therefore, despite the inclusion of labor rights—and specifically the rights to associate and organize—in the international agreements discussed above, a court would be unlikely to accept these agreements as creating actionable labor rights under the ATCA.

#### D. SCHOLARLY OPINION REGARDING CUSTOMARY INTERNATIONAL LAW

Article 38 of the ICJ Statute includes the “teachings of the most highly qualified publicists of the various nations” as a “subsidiary means” of determining international law.<sup>226</sup> Many courts, including the *Sosa* Court, have indicated that they look to “the works of jurists and commentators” in determining the status of customary international law.<sup>227</sup> However, this Note posits that courts applying the ATCA will rarely accord more than passing regard to the opinions of individual jurists.

First, it is important to note that the ICJ Statute includes scholarly opinion only as a “subsidiary means” of determining international law, with international conventions and custom forming the primary evidence of customary international law.<sup>228</sup> Second, the opinions of jurists on customary international law are merely reflective of international principles that have already been codified in agreements. Because of *Sosa*’s admonition to use judicial hesitancy and caution in declaring new ATCA claims,<sup>229</sup> and because

---

223. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004).

224. *Id.* at 734. As one recent article noted, the Supreme Court “categorically” determined that “aspirational norms” such as the Declaration cannot impose legal obligations under the ATCA; indeed, *Sosa* “explicitly and unequivocally” rejected such an idea. Gul, *supra* note 31, at 414.

225. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 552 (S.D.N.Y. 2004), *aff’d in part, vacated in part sub nom. Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff’d for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008). The Second Circuit in *Flores* noted that, as a practical matter, the types of amorphous international agreements and declarations upon which plaintiffs rely are difficult to discern or apply in a systematic way. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 252 (2d Cir. 2003).

226. ICJ Statute, *supra* note 169, art. 38(1)(d).

227. *Sosa*, 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *see also* *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999) (noting the role of the work of jurists in ascertaining the law of nations).

228. ICJ Statute, *supra* note 169, art. 38(1).

229. *Sosa*, 542 U.S. at 727–28.

*Sosa* requires that international norms have specificity and universal acceptance comparable to a few well-defined norms,<sup>230</sup> scholarly writings will rarely be useful unless they reflect already-obvious and well-documented (by international agreement) international norms.

Finally, the work of jurists is inherently subjective and reflects individualized thought, failing to satisfy the *Sosa* requirement that a claim of international law “rest on a norm of international character accepted by the civilized world.”<sup>231</sup> The court in *Flores* emphasized that the ICJ Statute does not “recognize[] as a source of customary international law the policy-driven or theoretical work of advocates that comprises a substantial amount of contemporary international law scholarship.”<sup>232</sup> Therefore, this Note submits that an ATCA court would accord importance only to a clear and overwhelming scholarly consensus that labor rights are part of customary international law. Because a clear and overwhelming consensus does not appear to exist with regard to labor claims, it is highly unlikely that scholarly opinions will be important factors in labor-rights ATCA cases.<sup>233</sup>

*E. LABOR RIGHTS ARE NOT PART OF CUSTOMARY INTERNATIONAL LAW  
ACTIONABLE UNDER THE ATCA*

Courts are unlikely to determine that the rights to associate and organize form a part of customary international law that is actionable under the ATCA. Under *Sosa*, as well as the body of other ATCA jurisprudence, the international agreements that contain the rights to associate and organize do not constitute actionable customary international law under the ATCA.

VI. PRACTICAL CONSIDERATIONS AND POLICY CONCERNS

This Part examines several practical considerations and policy arguments that a court would likely consider when determining whether violations of the rights to associate and organize are actionable under the ATCA. These considerations militate against a conclusion that such violations are actionable under the ATCA. First, labor rights have historically been regarded as at the margins of international human rights and “peripheral to the field.”<sup>234</sup> This makes redress of their violation through an ATCA claim unlikely because ATCA jurisprudence has traditionally been

---

230. *Sosa*, 542 U.S. at 732.

231. *Id.* at 725.

232. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 265 (2d Cir. 2003). The court went on to state that “although scholars may provide accurate descriptions of the *actual* customs and practices and legal obligations of States, only the courts may determine whether these customs and practices give rise to a rule of customary international law.” *Id.*

233. *See* Macklem, *supra* note 178, at 83 (noting that while civil and political rights are seen as the “cornerstones of international human rights law,” labor rights have been given a “marginal status” within the international-human-rights paradigm).

234. *Id.*

concerned with redressing only the most clear and fundamental violations of international human rights, such as genocide, torture, and slavery.<sup>235</sup> Labor rights create obligations that are different in kind from those created by traditional “human rights,” and a more nuanced analysis is often required to determine whether labor rights are being violated.<sup>236</sup> While the systematic extermination of human beings or the infliction of excruciating torture evokes dramatic emotional reprehension, denial of labor rights often does not evoke such a response, perhaps because labor rights do not represent such an “essential feature of what it means to be human.”<sup>237</sup> Therefore, courts adjudicating ATCA claims—under *Sosa*’s cautionary warning to define the set of actionable ATCA violations narrowly—will likely be hesitant to protect rights that are not viewed as central to the international-human-rights paradigm.

Second, the *Sosa* Court’s directive that courts consider the practical effects of broadening ATCA jurisdiction militates against a conclusion that labor-rights violations are actionable. *Sosa* emphasized that an “element of judgment about the practical consequences” should be exercised before recognizing new ATCA claims<sup>238</sup> and that it did not encourage “judicial creativity” in this endeavor.<sup>239</sup> The practical effects of allowing labor-rights claims against corporations in U.S. courts would be striking. To date, ATCA claims against U.S. corporations have primarily involved violent crimes such as genocide, torture, and extrajudicial killing.<sup>240</sup> Such claims largely represent spontaneous or isolated occurrences of corporate wrongdoing or complicity with wrongdoing. If courts broadened the ATCA’s scope to include the rights to associate and organize, systematic U.S. corporate practices would be implicated. Multinational corporations often operate in foreign countries precisely because of the lack of organized-labor strictures and the resulting reduced labor costs.<sup>241</sup> Therefore, courts’ allowance of

---

235. See Blum & Steinhardt, *supra* note 147, at 87–97 (describing the “core” of actionable violations under the ATCA).

236. See Macklem, *supra* note 178, at 83–84 (describing reasons for the marginalization of labor rights).

237. *Id.* at 84.

238. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004).

239. *Id.* at 728. Jack Goldsmith and Eric Posner put forth a theory of customary international law that holds that “in the absence of executive guidance, . . . the court is in effect deputized to apply [customary international law] in accordance with the national interest.” Goldsmith & Posner, *supra* note 113, at 1169.

240. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 243–44 (2d Cir. 2003) (discussing the history of ATCA jurisprudence); *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1274 (S.D. Fla. 2006) (“Since [*Filartiga*], a number of individuals who directly engaged in violent human rights abuses, especially torture and extrajudicial killing, have been found liable [under the ATCA].”).

241. See Kate Bronfenbrenner & Stephanie Luce, *Offshoring: The Evolving Profile of Corporate Global Restructuring*, MULTINATIONAL MONITOR, Dec. 2004, at 26 (detailing the increasing number of production jobs and the disproportionately high number of unionized jobs that are being shifted out of the United States).

labor claims under the ATCA would spawn broad-based and perhaps unlimited corporate liability. The fundamental structure of U.S. foreign investment and commerce would be affected in such a scenario.

Further, such a broadening of the ATCA's scope would likely stray from the *Sosa* Court's mandate to consider the practical consequences of allowing new ATCA causes of action.<sup>242</sup> Indeed, the court in *South African Apartheid*—which addressed an ATCA claim against U.S. corporations for doing business in apartheid-era South Africa<sup>243</sup>—cited *Sosa* and stated that it needed to consider the collateral consequences of recognizing a new international-law violation.<sup>244</sup> The court, facing a policy question much like those raised by ATCA labor claims, concluded that the “consequences are not only far-reaching but would raise the prospect of serious impediments to the flow of international commerce.”<sup>245</sup>

Finally, considerations of congressional intent should render courts hesitant to broaden ATCA actionability so as to include labor-rights claims. Congress has provided neither a mandate nor affirmative approval for courts' recent expansion of the ATCA's scope.<sup>246</sup> When the ATCA was originally passed as part of the Judiciary Act of 1789, Congress contemplated only a few causes of action, such as actions for offenses against ambassadors, violations of safe conduct, and piracy.<sup>247</sup> Accordingly, modern judicial allowance of additional claims—such as claims for genocide, torture, and wrongful death—has transcended original congressional expectations. *Sosa* noted that “Congress as a body has done nothing to promote [these] suits” and that “[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations.”<sup>248</sup> The court in *South African Apartheid* gave special consideration to the absence of a congressional mandate as it declined to expand ATCA liability to U.S. corporations that did business with the apartheid regime in South Africa.<sup>249</sup>

242. *Sosa*, 542 U.S. at 732–33.

243. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542 (S.D.N.Y. 2004), *aff'd in part, vacated in part sub nom.* *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

244. *Id.* at 553.

245. *Id.* The court then continued its pragmatic analysis, stating:

In a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce.

*Id.* at 554.

246. *Sosa*, 542 U.S. at 728.

247. *Id.* at 720.

248. *Id.* at 728.

249. *S. African Apartheid*, 346 F. Supp. 2d at 550.

## VII. A CAVEAT REGARDING FUTURE ATCA CAUSES OF ACTION

This Note concludes that it is highly unlikely that courts will accept labor claims under the ATCA. However, several caveats counsel against completely ruling out future actionability of labor claims. First, the constantly evolving nature of international law and the rapid recent evolution of ATCA suits signal that future acceptance of ATCA labor claims cannot be precluded. Second, the inherently subjective nature of ATCA adjudication cautions against complete judicial predictability.

International law—and particularly customary international law actionable under the ATCA—is constantly changing. In the influential nineteenth-century case *United States v. La Jeune Eugenie*, Justice Story noted that “[i]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.”<sup>250</sup> Indeed, ATCA jurisprudence—from its origins in piracy and ambassadorial disputes in 1789 to its concern for genocide two centuries later—is a potent example of the evolving nature of customary international law.<sup>251</sup>

Norms that do not currently meet the requisite criteria for ATCA actionability might be eligible in the future. As one group of commentators has noted, “[g]iven that the [ATCA] incorporates an evolving standard, claims could either achieve the level of consensus and definition required to trigger jurisdiction or fall beneath that level based on future developments in international human rights law.”<sup>252</sup> Additionally, courts applying the ATCA continue to recognize that they must apply international law “as it has evolved and exists among the nations of the world today.”<sup>253</sup> The International Law Association has stated that the right to form and join trade unions is “at least [a] potential candidate[] for . . . recogni[tion] under customary international law.”<sup>254</sup>

---

250. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

251. *See Kadic v. Karadzic*, 70 F.3d 232, 239–40 (2d Cir. 1995) (noting the inclusion in ATCA jurisprudence of torts from an earlier era as well as modern torts such as genocide).

252. STEPHENS ET AL., *supra* note 144, at 134.

253. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *see also Kadic*, 70 F.3d at 241 (stating that in order to determine whether international-law violations are within the scope of the ATCA, the court must be “mindful of the important precept that ‘evolving standards of international law govern who is within the [ATCA’s] jurisdictional grant’” (quoting *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev’d*, 488 U.S. 428 (1989))).

254. Comm. on the Enforcement of Human Rights Law, Int’l Law Ass’n, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, 66 INT’L L. ASS’N REP. CONF. 525, 548 (1994); *see also Bradley & Goldsmith, supra* note 174, at 840–41 (describing the progression of customary international law toward regulation of those matters traditionally regulated by domestic law).

Another possibility is that the rights to associate and organize could eventually be viewed as corollaries of the right against slavery or forced labor. A recent Note argues that bonded labor—where a worker must pay back a debt or monetary penalty prior to quitting a job—is analogous to slavery and forced labor, both of which are actionable under the ATCA.<sup>255</sup> Courts could eventually extend ATCA actionability to violations of the rights to associate and organize because of their similarity to the right against forced or bonded labor.

Finally, precisely predicting judicial behavior is difficult because of the substantial amount of judicial discretion regarding what constitutes customary international law for ATCA jurisdiction. The *Sosa* Court, while describing its guidelines for actionable ATCA claims, acknowledged that “a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.”<sup>256</sup> Another court remarked that *Sosa*’s “leaving th[e] door open . . . invite[s] the kind of judicial creativity that . . . caused [pre-*Sosa*] disparity of results and differences of opinion.”<sup>257</sup>

Individual judges attempting to determine whether a claim is actionable under the ATCA might come to differing conclusions. The discretionary nature of *Sosa*’s guidelines allows judges to make subjective determinations.<sup>258</sup> In addition, the choice of federal forum might affect the judicial determination of customary international law. The Second and Ninth Circuits, in particular, have been the forum choice of most ATCA plaintiffs, ostensibly because of their willingness to recognize the greatest number of ATCA claims.<sup>259</sup> Therefore, despite this Note’s conclusion that the rights to associate and organize cannot form the basis of an actionable ATCA claim, lower courts’ subjectivity and individual judicial discretion inject an element of unpredictability into the recognition of ATCA claims.<sup>260</sup>

---

255. See Igor Fuks, Note, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 125–29 (2006) (evaluating bonded labor as an ATCA claim).

256. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004).

257. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004), *aff’d in part, vacated in part sub nom. Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff’d for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

258. See *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (holding that torture constitutes an actionable ATCA claim while using subjective, colorful language in the opinion: “The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate.” (quoting *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 717 (9th Cir. 1992))).

259. HUFBAUER & MITROKOSTAS, *supra* note 6, at 14 box 4.1.

260. Unpredictability does not, however, mean free rein. As noted in Parts V.A and VI, the only Supreme Court decision addressing the ATCA (*Sosa*) primarily sounded a note of caution regarding recognition of new ATCA causes of action. *Sosa* used strong language, such as “judicial caution,” “high bar,” and “vigilant doorkeeping.” *Sosa*, 542 U.S. at 727, 729. If a district

## VIII. CONCLUSION

As the previous Part demonstrates, the subjective nature of determining what constitutes customary international law necessarily renders predictions about ATCA jurisprudence somewhat speculative. Nevertheless, this Note concludes that violations of the rights to associate and organize are not actionable under the ATCA. Claims based on the rights to associate and organize likely satisfy the threshold jurisdictional questions for ATCA jurisdiction, yet these rights do not qualify substantively as customary international law under the ATCA. Practical and policy considerations also militate against making violations of the rights to associate and organize actionable.

The *Sosa* Court, expressing a hesitance to further expand the ATCA that seemed to course through the entire opinion, stated that “[i]t 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>261</sup> This statement properly situates the ATCA within its historical context. Congress passed the ATCA to apply to a few narrowly defined violations of the law of nations clearly recognized in 1789.<sup>262</sup> While the modern ATCA renaissance has witnessed courts’ increasing willingness to recognize additional ATCA claims, the rights to associate and organize should be excluded at this time. The extraordinary remedy of providing U.S.-court jurisdiction for violations of customary international law that occur in other countries argues in favor of careful discretion, or what *Sosa* calls “vigilant doorkeeping.”<sup>263</sup>

---

or circuit court expanded ATCA actionability beyond the current narrow class of violations, the Supreme Court would possibly step in to enforce such “vigilant doorkeeping.” *Id.* at 729.

261. *Id.* at 726.

262. *See supra* notes 150–51 and accompanying text (describing the original ATCA violations likely contemplated by Congress in 1789).

263. *Sosa*, 542 U.S. at 729.