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The Alien Tort Statute after Sosa: A Viable Tool in the Campaign to End Child Labor

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The Alien Tort Statute after Sosa: A Viable Tool in the Campaign to End Child Labor?

Vanessa R. Waldrep

The Supreme Court’s decision in Sosa v. Alvarez-Machain kept the door ajar for new claims alleging violations of international law under the Alien Tort Statute (ATS). These new claims must be definite and universally accepted, which poses a challenge in the labor rights context because domestic labor laws vary dramatically between nations and because international agreements rarely establish labor standards with specificity. This Article argues that recent International Labour Organization (ILO) conventions and declarations that focus on “core” labor rights and call for an end to the “worst forms” of child labor illustrate sufficient universal opposition to specific child labor practices to establish a cause of action under customary international law. This Article contributes to the growing literature on the ATS and international labor standards by articulating a cause of action for child labor under the ATS and by engaging in a normative and practical analysis of the risks and benefits of an ATS claim. The Article continues by analyzing whether labor rights advocates should use ATS claims in light of prominent economic and theoretical arguments that such efforts may cause more harm than good. It recognizes the limits of a universal rights-focused litigation strategy to resolve specific child labor situations and the need for local resources to facilitate children’s transition from work to school. Then, it counters neo-liberal economic arguments that contend child labor restrictions impede efficiency and economic growth. The Article concludes that advocates should utilize ATS claims only as a component part of a comprehensive campaign to end harmful child labor practices.

† Georgetown Law Scholar; J.D., Georgetown University Law Center, 2008. I am grateful for the helpful feedback on this Article provided by many individuals in the Georgetown Law Fellows program and the Berkeley Journal of Employment and Labor Law staff. I also thank my husband, Jeffrey Brogan, for his love and support and Professor Alvaro Santos for his invaluable insight and guidance.
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I. INTRODUCTION

Can labor rights advocates use an old law to protect young workers? The Alien Tort Statute (ATS) was passed by Congress as part of the Judiciary Act of 1789 to ease international trade tensions. This Article explains the origins of the ATS and discusses its viability, over 200 years later, to address international child labor rights violations. Over the last three decades, human rights advocates have utilized the ATS as a mechanism to bring attention to international human rights abuses and seek remedies for alien tort victims. A number of scholars have written about enforcing internationally-recognized labor rights through the ATS.1 In 2004, the United States Supreme Court addressed the ATS for the first time...

in *Sosa v. Alvarez-Machain*² and limited potential new claims. After *Sosa*, claims brought under the ATS must implicate norms that are universally accepted, specific, and concrete.³

The *Sosa* Court’s discussion of viable ATS claims limits the potential claims labor rights advocates may pursue in court. However, the International Labour Organization’s (ILO) recent shift in focus to cement international agreement on “core” rights and condemnation of the “worst forms” of child labor in the last ten years bolsters the claim of universal agreement on these basic labor rights. Scholars debate the effectiveness of narrowing international labor rights to a few “core” rights,⁴ but these recent agreements establish sufficient international consensus to support a cause of action under ATS for the “worst forms” of child labor. With a potentially powerful new enforcement mechanism for child labor violations, advocates must consider what international efforts are most effective to support and improve children’s lives. Because of the dynamics of the global marketplace and the inherent limitations of a universal rights strategy, human rights advocates should use ATS as one part of a comprehensive campaign to end international child labor abuses.

This Article contributes to the growing literature on the ATS and international labor standards by focusing on a cause of action for child labor under the ATS and engaging in a normative analysis of the practical consequences and efficacy of bringing an ATS lawsuit. Part II of this Article addresses the history and purpose of the ATS and the opportunities for a new cause of action after the *Sosa* decision. Part III discusses the growing international support for a cause of action for violations of child labor laws, rooted in the ILO’s effort to focus on “core” rights. In Part IV, I recognize the benefits and limitations of a rights-based litigation strategy to address child labor practices and, in particular, of reliance on U.S. courts as the enforcement mechanism for ATS claims. Part V argues that child labor market restrictions can be efficient, just, and beneficial for children and families. Part VI concludes that ATS litigation can be a valuable tool to end child labor if selectively used as part of a comprehensive campaign.

**II. HISTORY OF THE ATS AND CUSTOMARY INTERNATIONAL LAW**

The ATS provides federal district courts with jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of

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³ Id. at 731-36.
nations or a treaty of the United States.” In recent years this one sentence has generated a flurry of litigation and considerable legal controversy. Congress passed the ATS as part of the Judiciary Act of 1789 to assure European nations that it was safe to conduct business with the new United States, whose courts would apply a foreseeable “law of nations.” The Framers were concerned that state courts, notoriously biased against foreigners, would render inflammatory rulings against aliens that could provoke international conflict. Thus, the statute was a national security measure, a signal to European nations that the United States’ federal courts would be neutral, fair arbiters to foreign litigants and avoid potentially war-inciting denials of justice. The statute lay dormant for almost 200 years, however, until advocates recognized the ATS as a potential tool for foreign victims of human rights abuses to recover damages for violations of customary international law.

In the early 1980s, U.S. courts began to recognize alien plaintiffs’ claims against dictators, war criminals, and terrorists for torture, slavery, genocide, and other egregious acts under the ATS. Courts recognized these claims as valid under the body of law known as “customary international law.” Customary international law consists of well-established, universally recognized norms of law. In 2000, the Supreme

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5. The Alien Tort Statute, 28 U.S.C. § 1350 (2006), captioned as “Alien’s action for tort” provides in full: “The district courts shall have 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.” Id. Prior to Sosa, federal courts and legal scholars largely referred to the statute as the Alien Tort Claims Act. In Sosa, the Court referred to the statute as the Alien Tort Statute (ATS), and I will use that title in this Article. See Sosa, 542 U.S. 692.


7. Id. at 173. D’Amato notes that because the statute remained obscure, the Founders’ strategy apparently worked without resort to the courts. Id.


9. See, e.g., Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (recognizing that ATS reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties); In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994) (alleging torture and other abuses by former president of the Philippines); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (alleging claims against Libya based on armed attack upon civilian bus in Israel; raising concerns that torture by private actors should not violate international law); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (allowing ATS claim to proceed, holding that torture perpetrated under the color of official authority violates universally accepted norms of international human rights law).


11. See generally 44B AM. JUR. 2d International Law § 7 (2010) (“While jus cogens and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm. In contrast, jus cogens embraces customary laws considered binding on all
Court recognized in The Paquete Habana that customary international law was implicitly incorporated into the United States’ own federal common law, declaring that “international law is part of our law.”\textsuperscript{12} A violation of the law of nations arises when an actor violates the standards, rules, or customs that govern the relationships between nations or between individuals and foreign nations.\textsuperscript{13} Thus, even when a norm has not been codified in an enforceable treaty or convention, violation of that norm may still be actionable under customary international law.

In 1980, the Second Circuit decided a landmark ATS case, Filartiga v. Peña-Irala.\textsuperscript{14} The plaintiffs in Filartiga successfully established that torture against a Paraguayan national perpetrated under the color of Paraguayan state authority was a violation of customary international law.\textsuperscript{15} The Filartiga plaintiffs, who had moved from Paraguay to the United States, were the surviving family members of Joelito Filartiga. The family alleged that the Paraguayan police tortured and assassinated Joelito because of his father’s political activities.\textsuperscript{16} Upon learning that the alleged perpetrator of torture, Americo Peña-Irala, was in the United States, the family sued under the ATS and served Peña-Irala while he was held in U.S. immigration detention.\textsuperscript{17} At trial, the court recognized a private right of action under the ATS, the plaintiffs proved their case,\textsuperscript{18} and eventually the plaintiffs were awarded monetary damages of over ten million dollars.\textsuperscript{19}

Whether the ATS provided plaintiffs a private cause of action or was merely a jurisdictional grant remained disputed among the circuit courts.\textsuperscript{20}

\textsuperscript{12} The Paquete Habana, 175 U.S. 677, 700 (1900).
\textsuperscript{14} 630 F.2d 876.
\textsuperscript{15} Id. at 884-85.
\textsuperscript{16} Id. at 878.
\textsuperscript{17} Id. at 879.
\textsuperscript{18} Id. at 887-88.
\textsuperscript{19} Filartiga v. Peña-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984) (determining punitive damage award to “reflect adherence to the world community’s proscription of torture and to attempt to deter its practice”).
\textsuperscript{20} A series of decisions followed Filartiga’s lead and recognized innovative ATS claims independent of other congressional statutes or enacting legislation. See, e.g., Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (recognizing a cause of action for genocide, rape, torture, and murder committed by Bosnia-Serbian military forces under the command of Radovan Karadzic); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (recognizing a cause of action for torture, arbitrary detention, summary executions, and disappearances). In contrast, in his concurring opinion in Tel-Oren v. Libyan Arab Republic, District of Columbia Circuit Judge Robert Bork argued that the ATS was merely jurisdictional. 726 F.2d 774, 801-05 (D.C. Cir. 1984) (Bork, J., concurring). The George W. Bush
Courts that held the ATS was only jurisdictional required plaintiffs to point to congressional statutes or enacting legislation that granted a specific cause of action under the ATS.\textsuperscript{21} These courts ruled that plaintiffs could only use the ATS if another treaty or statute specifically provided a cause of action for the alleged violation. In contrast, if the ATS provides a cause of action, the court's role is to evaluate whether the plaintiffs' proposed norm exists under customary international law. Practically, if the ATS was merely jurisdictional, it would no longer be a useful tool for human rights advocates to bring innovative claims seeking relief for alien tort victims, because many of the claims would lack grounding in existing statutory or other positive law.

In 2004, the Supreme Court addressed the ATS for the first time in \textit{Sosa v. Alvarez-Machain}.\textsuperscript{22} The Sosa case arose from an incident involving the Drug Enforcement Administration (DEA), which approved a plan enlisting Jose Francisco Sosa and other Mexican nationals to abduct Humberto Alvarez-Machain from Mexico.\textsuperscript{23} The DEA alleged that Alvarez-Machain, a physician and a Mexican national, was involved in a 1985 torture and murder of a DEA agent.\textsuperscript{24} The DEA hired Sosa and others to abduct Alvarez-Machain and bring him to the United States to stand trial.\textsuperscript{25} After Alvarez-Machain was brought to the United States, tried, and acquitted, he sued Sosa for violating the law of nations under the ATS.\textsuperscript{26}

In \textit{Sosa}, the Court focused on the ATS's history to narrow the \textit{Filartiga} court's understanding of its scope.\textsuperscript{27} The Court held that the statute was jurisdictional and did not create a new cause of action.\textsuperscript{28} However, because Congress intended the statute "to have practical effect the moment it became law," the Court recognized that the federal common law would provide a cause of action for what the "First Congress understood" as torts in violation of the laws of nations. Such torts included Blackstone's "three primary offenses: violation of safe conducts, infringement on the rights of ambassadors, and piracy,"\textsuperscript{29} which, if carelessly addressed in U.S. state

\begin{itemize}
\item \textsuperscript{21} See \textit{Tel-Oren}, 726 F.2d at 813 (Bork, J., concurring).
\item \textsuperscript{22} 542 U.S. 692 (2004).
\item \textsuperscript{23} \textit{Id.} at 698.
\item \textsuperscript{24} \textit{Id.} at 697.
\item \textsuperscript{25} \textit{Id.} at 698.
\item \textsuperscript{26} \textit{Id.} (Dr. Alvarez-Machain also sued the United States under the Federal Tort Claims Act).
\item \textsuperscript{27} \textit{Id.} at 732 ("[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").
\item \textsuperscript{28} \textit{Id.} at 712.
\item \textsuperscript{29} \textit{Id.} at 724.
\end{itemize}
courts, could threaten "serious consequences in international affairs." The Sosa Court stated that although the ATS did not create a new cause of action, courts today may recognize novel claims based on evolving principles of international law.

Federal courts may only recognize a cause of action for a "claim based on the present-day law of nations [if it rests] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of . . . 18th-century paradigms . . . ." Blackstone's "three primary offenses" reflected the international legal norms of the 18th century. Courts today may consider international agreements, conventions, treaties, and the laws and practices of nation states to determine modern international norms. Thus, because federal common law incorporates customary international law that is universally accepted, specific, and concrete, a new cause of action under the ATS may exist in these limited circumstances. This lack of specificity was "fatal" to Alvarez-Machain's claim, because no universal understanding about abduction was sufficiently concrete to rise to the level of customary international law. Although the Sosa Court carefully limited the ATS's scope, it explicitly left the door ajar to new causes of action for violations of sufficiently definite norms of customary international law. Thus, in the labor rights context, the scope of the acts covered by the ATS can increase as nations reach greater international consensus about fundamental labor rights.

III.
ARGUMENT FOR AN ATS CAUSE OF ACTION FOR CHILD LABOR VIOLATIONS

The Sosa Court provides human rights advocates with the narrow parameters for new ATS claims. All new claims under customary

30. See id.
31. See id. at 732.
32. Id. at 725.
33. See id. Alvarez-Machain argued that his abduction was an "arbitrary arrest" that violated customary international law. The Court disagreed, and explained that recognizing a cause of action for arbitrary arrest would be unduly broad, and, in any case, Alvarez-Machain's arrest and one-day detention did not violate specific, well-established international norms:

His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment. . . . It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

Id. at 736-37.
international law must be based on legal norms that are universal, specific, and concrete.\textsuperscript{34} Prior to \textit{Sosa}, labor scholars argued that courts should consider fundamental labor rights as internationally-recognized human rights enforceable under the ATS.\textsuperscript{35} The new guideposts pose particular challenges for labor rights advocates because domestic labor laws vary dramatically between nations and because international agreements rarely establish labor standards with specificity. For example, the United Nations Convention on the Rights of the Child and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) illustrate historic concern about children's rights and development in broad-brush terms.

The ILO, the primary international organization dedicated to promoting workers' rights, traditionally promoted aspirational labor standards through topical conventions that member countries could adopt as domestic legislation. The ILO has shifted its focus in the last decade to brokering broad international agreement on "core" labor rights and the "worst forms" of child labor. This new focus, which has sparked controversy within the ILO, provides a stronger grounding for a cause of action under the ATS than the ILO's traditional conventions on child labor and opens the door for new enforcement opportunities. I argue that even though countries do not unanimously oppose all forms of child labor, sufficient international consensus exists to establish a cause of action under the ATS for the worst forms of child labor that violate the core rights that are well established as customary international law.

\textbf{A. International Support for Children's Rights}

The international community has long expressed concern about the effect of work on children's development. Child workers are typically kept out of school and often exposed to hard, demanding and even dangerous conditions of work. Child labor thus diminishes children's prospects for mental and physical flourishing and retards their long-term economic prospects. Scholars and activists who seek to remedy the problem of child labor recognize the challenge of defining who is a "child" and what constitutes harmful "work" in different parts of the world.\textsuperscript{36} Critically, labor rights advocates who seek to ban child labor want to thereby

\footnotesize{\begin{itemize}
\item \textsuperscript{34} For a standard to be "universal" does not require unanimity. \textit{Flores v. S. Peru Copper Corp.}, 414 F.3d 233, 248 (2d Cir. 2003) ("States need not be universally successful in implementing the principle in order for a rule of customary international law to arise. If that were the case, there would be no need for customary international law. But the principle must be more than merely professed or aspirational.").
\item \textsuperscript{35} See Cleveland, \textit{supra} note 1; Pagnattaro, \textit{supra} note 1 (arguing that international treaties, agreements and conventions illustrate consensus about core labor rights and support a cause of action under the ATS).
\end{itemize}}
encourage child development and education, and not, for example, force working children into the informal sector, leaving them in even more dangerous situations and worse economic conditions. These ambiguities and potential perverse consequences make it challenging to draw and enforce a firm line on which child labor practices constitute a violation of international law.

The ILO’s definition of “child labor” does not encompass all work performed by children. Rather, the ILO has always sought to eliminate a specific, especially problematic subset of child work. The Director-General of the ILO defined the child labor it seeks to eradicate as:

Work that places too heavy a burden on the child; work that endangers his safety, health or welfare; work that takes advantage of the defenselessness of the child; work that exploits the child as a cheap substitute for adult labor; work that uses the child’s effort but does nothing for his development; work that impedes the child’s education and training and thus prejudices his future.

This definition encompasses many of the most serious problems broadly recognized to accompany child labor: dangers of physical harm, developmental harm, exploitation, and the resulting harm to society. The international community, through the ILO and the United Nations, seeks to remedy these problems by encouraging nations to adopt minimum age legislation and promoting the fundamental rights of children.

Thirty years after the U.N. General Assembly passed the first Declaration of the Rights of the Child, the United Nations passed the 1989 Convention on the Rights of the Child (CRC). The CRC speaks to the civil, political, economic, social and cultural rights of children. Almost all

37. See KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? (2003) (arguing that global labor standards can improve the conditions of workers to allow them to benefit from increased global trade under certain conditions); Clyde Summers, The Battle in Seattle: Free Trade, Labor Rights, and Societal Values, 22 U. PA. J. INT’L ECON. L. 61, 78-79 (2001) (arguing that free market policies are not best for workers in developing countries because they fail to protect social values).
38. Bol, supra note 36, at 1141-42.
40. Bol, supra note 36, at 1143-49.
members of the United Nations except the United States have ratified this
convention. The CRC recognizes "the right of the child to be protected
from economic exploitation and from performing any work that is likely to
be hazardous or to interfere with the child’s education, or to be harmful to
the child’s health or physical, mental, spiritual, moral or social
development." Additionally, the CRC requires signatories to "take
legislative, administrative, social and educational measures" to implement
the article on child labor by providing for minimum ages in employment,
wage and conditions regulations, as well as effective enforcement
provisions. In particular, parties to the CRC shall: "(a) Provide for a
minimum age or minimum ages for admission to employment; (b) Provide
for appropriate regulation of the hours and conditions of employment; (c)
Provide for appropriate Penalties or other sanctions to ensure the effective
enforcement of the present article."

Similarly drawing from the tradition of the Universal Declaration of
Human Rights, the International Covenant on Economic, Social and
Cultural Rights (ICESCR) is a multilateral treaty adopted by the U.N.
General Assembly in 1966. Article 10 of the ICESCR provides:

Children and young persons should be protected from economic and social
exploitation. Their employment in work harmful to their morals or health
or dangerous to life or likely to hamper their normal development should be
punishable by law. States should also set age limits below which the paid
employment of child labour should be prohibited and punishable by law.

Even though neither of these treaties is self-executing, each illustrates
widespread agreement about protecting the most vulnerable persons from

43. Even though the United States is not a signatory to the CRC, the United States demonstrates
its commitment to the international child labor standards detailed in the CRC through its comprehensive
statutory regime that protects children from harmful labor practices. Furthermore, the United States was
actively involved in the drafting process of the CRC’s articles and a number of articles were included at
the insistence of the United States. The United States has not ratified the CRC due in part to political
roadblocks in Congress where conservative interest groups have voiced their concerns about the CRC
infringing on the rights of the family. See Susan Kilbourne, U.S. Failure to Ratify the U.N. Convention
on the Rights of the Child: Playing Politics with Children’s Rights, 6 TRANSNAT’L L. & CONTEMP.
44. CRC, supra note 42, at art. 32.
45. Id.
46. Id.
16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Although the United States has not ratified this treaty,
as of 2004 149 countries are parties. Office of the U.N. High Commissioner for Human Rights, Status
of Ratifications of the Principal International Human Rights Treaties (as of June 9, 2004) at 10, 11,
available at http://cej.org/publications/IAWJ%20Conference/NB%20List%20of%20countries%20and%
20treaties%20ratified%20ratification%20report.pdf.
48. ICESCR, supra note 47, at art. 10.
exploitative or dangerous working conditions. Although the language of the treaties is general, in conjunction with the ILO's new emphasis on core rights and the worst forms of child labor, these popular agreements lend support to an international consensus against child labor violations that could meet the demanding ATS standard set forth in Sosa.

B. The ILO’s Movement to Recognize “Core” Labor Rights

The ILO has advocated an end to child labor since its inception in 1919, but the Worst Forms of Child Labor Convention of 1999 (Convention No. 182) reflects a shift in the ILO’s priorities to eradicate specific harmful child labor practices. Convention No. 182 has successfully achieved greater consensus around ending the following child labor practices: slavery and bonded labor, child prostitution, use of children for illicit activities, and “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.” Because of this focus on the “worst forms” of child labor, the United States and numerous other countries quickly ratified Convention No. 182, unlike previous child labor conventions.

In the past decade, the ILO’s focus on promoting a core set of fundamental rights and bringing attention to the “worst forms” of child labor has fostered a spirited debate among labor scholars about the “ranking” of rights. The 1998 ILO Declaration on Fundamental Principles and Rights at Work (Declaration on Fundamental Principles) has been the centerpiece of this debate. The debate is particularly relevant in the child labor context, as the Declaration on Fundamental Principles calls for the abolition of child labor and Convention No. 182 illustrates the transitioning focus to “core” rights for child workers. In this Part, I describe the ILO’s recent conventions on child labor and the debate around the ILO’s prioritization of rights, and then I highlight how the establishment of “core” rights reflects broad international consensus supporting an ATS claim for the worst forms of child labor.

49. If the treaties were self-executing and ratified by the United States, they would indisputably create obligations enforceable in the U.S. federal courts. See Sosa, 542 U.S. at 735. The Sosa Court explained that because the United States ratified the International Covenant on Civil and Political Rights on the condition that it was not self-executing, plaintiffs seeking to enforce the principles and standards articulated in the Covenant must take an additional step to demonstrate that the alleged norm that has been violated has “attained the status of customary international law.” See id. Similarly, the ICESCR and the CRC are insufficient as independent treaties to establish that a norm regarding child labor has obtained the status of customary international law, but, combined with other international treaties and agreements, demonstrate widespread international commitment to child labor standards.


51. See Alston, supra note 4; Langille, supra note 4.
1. ILO Child Labor Conventions

The ILO Minimum Age Convention of 1973 (Convention No. 138) updated a series of ILO conventions on child labor dating back to 1919. Convention No. 138 distinguished between children engaging in economic and non-economic work, recognizing that sibling child care and housekeeping chores are non-economic.\(^{52}\) Convention No. 138 sets the minimum age for economic work at fifteen years old, but recognizes that developing countries may temporarily set the minimum age a year younger. A country’s minimum age for work should always be above the minimum age to which the applicable law requires children to be in school. One hundred and fifty-four countries have signed on to Convention No. 138 since 1973.\(^{53}\) The United States still has not ratified the convention, due in part to concerns shared by other developed nations that the convention’s articles protecting children are overly proscriptive and potentially in conflict with the nation’s current legal framework.\(^{54}\)

In 1998 the ILO succeeded in adopting a new Declaration, the ILO Declaration on Fundamental Principles and Rights at Work. The Declaration on Fundamental Principles differed from past ILO conventions because it declared that all members of the ILO have a constitutional obligation to promote and realize the principles concerning the four fundamental workplace rights, even if the members had not ratified the relevant conventions.\(^{55}\) The four “core” categories of workers’ rights include: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination in respect to employment and occupation. Some scholars contend that less international

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consensus exists around child labor than the other "core labor rights." 56
Two main concerns underlie this perceived lack of consensus: an expansive
definition of child labor 57 and concern about proper enforcement of labor
standards. 58 Achieving a universal definition of child labor violations is
difficult given the dramatically different living and working conditions that
exist for children around the world. In 1997, UNICEF noted that treating
all work by children as equally unacceptable confuses and trivializes the
issue, making it more difficult to end the most serious abuses. 59

Because of this difficulty, the ILO sought to achieve greater consensus
against child labor in 1999 with the Worst Forms of Child Labour
Convention (Convention No. 182). In Convention No. 182, member states
agree to eradicate the following child labor practices: slavery and bonded
labor, child prostitution, use of children for illicit activities, and "work
which, by its nature or the circumstances in which it is carried out, is likely
to harm the health, safety or morals of children." 60 Previous conventions
had called for the eradication of slavery, bonded labor, child prostitution,
and the use of children for illicit activities such as drug trafficking; the
language about work that will "harm the health, safety or morals of
children" is the major additional accomplishment for Convention No. 182.
One hundred and seventy-one countries, including the United States, have
already ratified this recent convention. 61 Convention No. 182 was the
second ILO core convention on child labor, which required member states
to "design and implement programmes of action to eliminate as a priority
the worst forms of child labour." 62 Member states must take into account
"the importance of education in eliminating child labour" and make timely
steps to prevent children from engaging in these dangerous labor
practices. 63

Convention No. 182 provides labor rights advocates who seek to utilize
the ATS with specific and concrete labor standards about which universal
consensus exists. The CRC and ICESCR espoused broad child labor rights
and lacked the explicit support of the United States. Previous ILO

56. See e.g., Cleveland, supra note 1, at 1557.
57. See Moore, supra note 52, at 533 ("It is difficult if not impossible to obtain reliable and
comparable statistics for the number of working children, because 'child labour' is illegal throughout the
world, yet defined differently in terms of the ages and activities included.").
58. See Cleveland, supra note 1, at 1557-58; Claire Moore Dickerson, Transnational Codes of
REV. 611 (2001) (promoting "top-down, optional codes [of conduct]" for multinational corporations
rather than mandatory standards to avoid the perverse consequences of displacing child workers).
http://www.unicef.org/sowc97/.
60. Convention No. 182, supra note 50, at art. 3.
61. Id.
62. Id. at art. 6.
63. Id. at art. 7(2)(a).
conventions listed aspirational labor standards rather than identifying specific labor practices that all countries would agree to eradicate. Under Convention No. 182, widespread agreement exists among countries to end child slavery and bonded labor, child prostitution, use of children for illicit activity, and labor that harms the health, safety or morals of children. Advocates may point to this convention, with the supportive background of previous international treaties on child labor, to establish a cause of action under customary international law for child labor violations that meets the requirements articulated by the *Sosa* Court.

2. **The ILO “Core” Labor Rights Debate**

Scholars differ on the efficacy of the ILO’s focus on promoting a core set of fundamental rights. Labor scholar Philip Alston argues that the core labor standards regime is actually a negative development from the labor rights perspective. In fact, he contends that the development of a hierarchy of certain rights will erode the current system of protection for all workers’ rights. Alston questions the motivation of the ILO’s movement from its traditional “maximalist” approach to baseline core “fundamental principles.” Central to his concerns are that these changes arise in a time when neo-liberal policies flourish and companies who are implementing voluntary codes of conduct seek blessing from the international community that they are doing their part. His concern is that the ILO’s focus legitimates countries and companies who adopt only the bare minimum of rights rather than promote enhanced protections more broadly. By looking to general principles to which the international community already agrees, the ILO’s “core” labor standards regime is regressive, in Alston’s view, and will actually result in less enforcement of labor standards.

Responding to Alston, Brian Langille argues that the ILO’s adoption of core labor rights is conceptually coherent, reflects specific moral and ethical choices, and serves a practical function of increasing the enforceability of labor rights. By moving toward a “core” group of rights, the ILO receives greater buy-in and participation from all countries at a critical time in the growth of the global economy. Shifting focus to internationally-shared principles allows more countries to ratify the ILO conventions and promotes practical methods to achieve the conventions’ goals. For

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64. Alston, *supra* note 4, at 461.
65. *Id.* at 464.
66. See Langille, *supra* note 4, at 411-12, 424.
67. Langille details the problem-focused rationale behind Convention No. 182: The result was the need for a new type of child labour convention, one which, rather than setting out detailed schedules of age limits . . . [instead] identified the basic problem (the worst forms of child labour) which are at the core, if I can use that term, of the international community’s concern. This is a much more sensible approach to many ILO convention topics and law in general. This is combined with a renewed emphasis on, first, the connection
example, Langille explains that the ILO’s Convention No. 138, the main convention on child labor, was extremely detailed and set out “specific age limits for certain forms of work.”68 This specificity precluded many countries from ratifying the convention because it conflicted with national statutes that similarly had detailed regulations. In contrast, over 150 countries ratified Convention No. 182 in the first five years, a dramatic increase over the average rate of ratification.69

Despite Alston’s concerns regarding the negative consequences of ranking rights, the establishment of “core” rights reflects broad international consensus supporting an ATS claim for the worst forms of child labor. The widespread acceptance of the ILO Convention No. 182, situated against a background of long-standing international agreements that provide for the protection of child workers, illustrates an emerging consensus that countries reject egregious child labor practices. The ILO’s movement to recognize core rights supports a conclusion that international consensus exists around these rights, triggering a potential cause of action under the ATS as well as other international enforcement mechanisms. In fact, the widespread recognition of these core rights may provide the ILO greater legitimacy and international support to effectively enforce both core and non-core rights.

C. Additional Legal Obstacles to ATS Claims

Significant legal obstacles remain even if ATS plaintiffs establish that an international norm against the worst forms of child labor is universally accepted, specific, and concrete. Courts have held ATS claims to be non-justiciable on the grounds of the Act of State,”o Political Question,” or between the convention and ILO programmes and technical assistance to eliminate child labour, and second, on the idea that the whole point is to positively assist members in achieving the goals of the convention rather than condemn them in a formal legal manner and proceeding for violating some legislative detail, a result often with little or no verifiable impact in the real world whatsoever.

Id. at 424 (footnote omitted).

68. Id.

69. Id. at 425.

70. The Act of State doctrine is a non-jurisdictional, prudential doctrine based on the notion that, to avoid foreign relations conflicts, countries should not judge the acts of another country committed within its boundaries. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). ATS cases that have raised the Act of State doctrine include: Sarei v. Rio Tinto PLC, 487 F.3d 1193, 1206 (9th Cir. 2007), rev’d on other grounds, 550 F.3d 822 (9th Cir. 2008) (en banc) (reversing the district court’s ruling that the Act of State doctrine barred plaintiffs’ claims of environmental harm and racial discrimination surrounding a mining operation in Papa New Guinea despite the district court’s concerns that it would have to assess the legality of the Papa New Guinea government’s official actions); Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) (noting that “it would be a rare case in which the act of state doctrine precluded suit” under the ATS).

71. The Political Question doctrine arises when separation of powers principles suggest that the judiciary should decline to rule on a legal issue in deference to the executive or legislative branches. See In re Nazi Era Cases Against German Defendants Litigation, 129 F. Supp. 2d 370 (D.N.J. 2001)
International Comity doctrines. Additionally, courts dismiss cases under forum non conveniens, ruling that a United States court is an inappropriate forum in which to litigate the plaintiff’s claim. The Sosa Court did not clarify whether plaintiffs may bring ATS claims against private actors, which would be critical for labor activists who seek to sue multinational corporations for child labor violations. Finally, ATS plaintiffs may also have difficulty meeting the standard litigation thresholds of standing, service of process, and personal jurisdiction over an international defendant.

The Sosa Court specifically instructed lower courts to consider the following five cautionary guidelines to limit new claims: how the prevailing conception of common law has changed since 1789, the appropriate role of federal courts creating federal common law post-Erie, (declining to rule on controversial case because court could not fashion remedy without interfering with resolution efforts by other branches of government).

72. International Comity is a discretionary doctrine that arises when the adjudication of claims in U.S. federal district courts would implicate laws of a foreign sovereign nation. Courts may decline to exercise jurisdiction and defer to the laws or interests of the foreign country. See In re Nazi Era Cases Against German Defendants Litigation, 129 F. Supp. 2d at 379-80; Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 490 (applying International Comity doctrine when the German government had taken the position that foreign citizens may not assert direct claims for wartime forced labor against private companies).

73. Under the forum non conveniens analysis, courts consider whether an appropriate remedy exists in the plaintiff’s native land and if the plaintiff should exhaust local claims before bringing an ATS claim in U.S. federal courts. See, e.g., Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 103-06 (2d Cir. 2000) (reversing the district court’s dismissal on forum non conveniens grounds, reasoning that the court should defer to Nigerian plaintiffs’ choice of forum and inconvenience to the defendants was not substantial); Abdullahi v. Pfizer, Inc., 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. Sept. 17, 2002), rev’d on other grounds, 2009 U.S. App. LEXIS 1768 (2d Cir. Jan. 30, 2009) (dismissing Nigerian plaintiffs’ class action alleging violations of international law resulting from Pfizer’s administration of antibiotic products on grounds of forum non conveniens). In Gulf Oil Corp. v. Gilbert, the Supreme Court ruled that federal courts could use the forum non conveniens doctrine to protect defendants from harassment by plaintiffs who lacked substantial connection to the forum and who filed suit in a forum inconvenient to the defendant or the judicial system. 330 U.S. 501, 507 (1947). The Gilbert Court articulated a two-part test to determine whether dismissal of a case is proper on the grounds of forum non conveniens: first, the court determines whether an adequate alternative forum exists; if so, the court then engages in a multi-factor balancing test that weighs various private and public interest factors. Id. at 506-07.

74. Footnote 20 of the Sosa decision mentions ATS’s potential application to private actors in the Court’s discussion of whether a norm is sufficiently definite to support a cause of action, but does not resolve the question. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) (“A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).”).

75. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938). The Erie Court rejected the late nineteenth-century belief that the common law was part of a body of preexisting legal principles that judges discovered, declared, and applied. After Erie, the Court “understand[s] common law not as a discoverable reflection of universal reason but . . . as a product of human choice.” Sosa, 542 U.S. at 729. The Sosa Court acknowledged that Erie limits federal courts’ authority to derive “‘general’
the legislature’s preeminence in the creation of private rights of action, implications for foreign relations, and the presence of a congressional mandate.\textsuperscript{76} With these cautions, the \textit{Sosa} Court left the door ajar to new claims, inviting lower federal courts to recognize and enforce international norms when they are sufficiently “universal, specific, and obligatory.”\textsuperscript{77} Although the \textit{Sosa} standard for new causes of action is narrow, federal courts may recognize a new ATS claim in limited situations: when widespread agreement among nations exists that specific international labor rights constitute violations of international customary law.

The broad international agreement around the ILO’s fundamental principles and condemnation of the worst forms of child labor fits within the \textit{Sosa} Court’s requirements for a new ATS cause of action. The extensive agreement among nations to eradicate the worst forms of child labor, illustrated by Convention No. 182, with the background of international support of child labor rights, addresses the \textit{Sosa} Court’s concerns regarding the potential overreach of federal courts applying international norms as federal common law. Furthermore, this broad agreement mitigates potential foreign policy problems. Congress’s ratification of Convention No. 182 and the United States’ own legal framework that supports protecting children from harmful labor practices presents no conflict with recognizing an ATS claim for the worst forms of child labor.

\section*{IV. SHOULD ADVOCATES USE THE ATS TO ADDRESS CHILD LABOR?}

If a court recognizes an ATS cause of action for child labor, how would this practically affect the lives of child workers around the world? Despite widespread agreement among nations about the ILO’s fundamental principles and the dangers of the worst forms of child labor, multiple voices in the international community caution that human rights advocates may cause more harm than good. Scholars raise the concern that a hegemonic focus on universal rights ignores context and discourages more effective, pragmatic efforts that seek to improve conditions of workers on the ground.\textsuperscript{78} Courtroom-focused litigation strategies like the ATS may

\begin{footnotesize}
\textsuperscript{76} \textit{Sosa}, 542 U.S. at 725-28.

\textsuperscript{77} \textit{Id.} at 732 (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.” (quoting \textit{In re Estate of Marcos Human Rights Litigation}, 25 F.3d 1467, 1475 (9th Cir. 1994))).

\end{footnotesize}
exacerbate this risk of disconnect with the workers’ environment and needs. Additionally, economists argue that any interference with free market functions will force capital away from the individuals most in need, leaving children and families in a worse economic position.

Given these concerns, the normative debate surrounding whether advocates should use an ATS claim to implement child labor restrictions necessarily is tied to the practical consequences of recognizing and enforcing these standards. Labor rights advocates should only seek to enforce child labor standards through the ATS if their efforts will improve the daily lives of children. This Part recognizes the potential and the limitations of an ATS litigation strategy in those terms. The ATS provides concrete, “hard law” opportunities to hold corporations responsible for their violations of child labor standards, but an international rights strategy based in a U.S. courtroom faces numerous legal, political, and practical problems.

I turn to Wal-Mart’s firing of Bangladeshi child garment workers in response to U.S. consumer pressure in the early 1990s as a case study to examine the potential benefits and risks of international rights efforts.

Attuned to these pragmatic concerns, I argue that the ATS is a powerful tool that advocates should use only as part of a comprehensive campaign to end specific child labor abuses.


The ATS opens the door of U.S. courts to potential “hard law” rulings for alien tort victims, with the potential benefits of vindicating their rights, putting “teeth” into efforts to deter such violations, and providing direct financial compensation. The growth of the global economy poses challenges for national legal systems. International organizations such as the ILO and WTO have limited authority and capacity to enforce international labor law, which frustrates advocates who seek to hold multinational corporations accountable for violations of “hard law” labor standards.

Labor rights advocates frequently criticize the ILO’s lack of process for tradeoffs among them, leaving only the vague suspicion that the more privileged got theirs at the expense of the less privileged.”

79. See id. at 116-17.
81. The firing of child workers in the Bangladesh garment sector is a much-cited situation of advocates actually harming the population that more stringent labor standards were supposed to help. Dickerson, supra note 58, at 612-14; ELLIOT & FREEMAN, supra note 37, at 112; WOLF, supra note 80, at 188.
82. Lance Compa, Pursuing International Labour Rights in U.S. Courts: New Uses for Old Tools, 57 RELATIONS INDUSTRIELLES / INDUSTRIAL RELATIONS 48, 49 (2002); Katherine Van Wezel Stone, To The Yukon and Beyond: Local Laborers in a Global Labor Market, 3 J. SMALL & EMERGING BUS. L.
enforcement power to ensure commitment to its core labor rights and other conventions. The ILO’s expertise lies in promulgating labor standards, providing technical assistance, and monitoring and reporting on labor conditions. Rather than enforcing through sanctions or an official tribunal, the ILO publicizes a country’s failure to comply with the conventions to effectuate a “mobilization of shame.” Other international organizations, such as the U.N. Human Rights Committee, also lack the power to sanction and employ similar “soft law” approaches to encourage compliance with human rights standards. Additionally, advocates have encouraged multinational corporations to adopt codes of conduct and open the doors of their foreign businesses to international monitoring efforts.

Although these soft law approaches create “space for labour rights advocacy and cross-border solidarity efforts,” they lack the “teeth” of trade sanctions to pressure compliance with labor standards. Even where labor standards are linked to trade laws, international organizations like the WTO can only target countries’ beneficiary trade status through trade sanctions or other foreign policy efforts. Critically, the WTO lacks authority to provide direct redress from multinational corporations to their workers, which an ATS litigation strategy offers. In addition to gaining recompense for victims, an ATS litigation strategy might effectively call labor rights violators to account and powerfully assign guilt for abuses.

A major victory for human rights plaintiffs utilizing the ATS occurred after eight years of litigation against Unocal Corporation, a multinational oil and gas company involved in building an extensive pipeline in Burma. In John Doe v. Unocal Corp., the complaint alleged that Unocal, an American company, acted in concert with the Myanmar/Burma government, which enlisted its military to force peasants to clear the path for the pipeline and engaged in numerous egregious human rights abuses. Plaintiffs obtained documentation of Unocal’s prior knowledge of the forced labor and terror

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83. See, e.g., Cleveland, supra note 1, at 1541; Leary, supra note 55, at 40-41 (responding to critics of the ILO’s lack of enforcement power by noting that international bodies generally lack enforcement power similar to national legal systems).
84. Cleveland, supra note 1, at 1541.
85. Id.; Leary, supra note 55, at 41.
86. Cleveland, supra note 1, at 1541.
88. Compa, supra note 82, at 49.
89. Id.
90. Id.
91. Id. at 50.
tactics of the military regime. A Unocal consultant had reported that the company’s reliance on the Myanmar military’s version of events regarding the pipeline construction “appears at best naive and at worst [makes Unocal] a willing partner in the situation.” The Ninth Circuit permitted the plaintiff’s ATS claims to proceed, concluding that sufficient evidence existed to support the plaintiff’s allegations of Unocal’s involvement with the use of forced labor and other human rights violations. In 2004 Unocal entered a confidential settlement agreement with the plaintiffs. The Unocal case illustrates the powerful possibilities of “hard law” to hold corporations liable for labor rights abuses abroad. Binding norms and the potential for corporate liability can effectively deter corporations from complicit engagement in international human rights abuses.

B. The Limitations of a “Rights” Strategy to End Child Labor

Rights vocabulary is powerful, is recognized by courts, and offers new opportunities for labor advocates to seek “hard law” rulings to benefit workers. However, advocates should pursue ATS litigation only in conjunction with a comprehensive campaign driven by the needs of workers, rather than an isolated rights-based strategy. The potential benefits make an ATS cause of action for child labor a compelling tool within the array of mechanisms available to human rights advocates to raise labor standards around the world. Litigation strategies by human rights advocates, however, can place the courtroom, rather than the lives of workers on the ground, at the center of the struggle for better conditions. Legalistic, rights-centered approaches may disembodify concrete problems by translating them into specific, narrow claims for relief and neglecting alternative remedial methods. Isolated claims under the ATS raised by

93. Doe I v. Unocal Corp., 395 F.3d 932, 941-42 (9th Cir. 2002); Compa, supra note 82, at 64, 66-67.
94. Doe I, 395 F.3d at 942.
95. Id. at 962; see also Donald J. Kochan, No Longer Little Known but Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence, 8 CHAP. L. REV. 103, 109, 116 (2005) (raising concern about the evolving role of the ATS to allow extraterritorial enforcement of “supposedly internationally accepted norms” and the Supreme Court’s lack of clarity in the Sosa decision).
97. See Kennedy, supra note 78, at 102-07 (encouraging lawyers and the human rights movement “to adopt a more pragmatic approach to human rights”).
98. Mark Tushnet, The Critique of Rights, 47 SMU L. REV. 23, 25 (1993) (“[L]awyers are likely to overestimate the contributions they can make to social progress . . . . And, to the (relatively small) extent that progressives make decisions about where to allocate their limited resources, the cautions [about overestimating legal victories] serve to improve the accuracy of the calculation of the possible benefit of investing in legal action rather than something else—street demonstrations, public opinion campaigns, or whatever.”).
U.S. labor rights advocates in U.S. courts pose precisely these dangers. Because of the limits of international policy-making and enforcement, even efforts around universal, shared rights are addressed most effectively in their specific context. In this Section I first acknowledge the critique of universal application of binding international law, and then I address the practical concerns of resource allocation to ATS efforts rather than alternative methods to improve the conditions of workers.

1. Rights, Power, and Politics

In addition to the legal obstacles to ATS claims that require plaintiffs to identify adequate international norms, unilateral implementation by U.S. courts of these rights and norms raise serious concerns about sovereignty, power, and foreign relations. Lama Abu-Odeh offers a radical critique of universal jurisdiction, pointing out that the creation of binding international law necessarily occurs within the pre-existing matrix of political, military, and economic struggles for power. She argues that universal jurisdiction provides those who currently hold power the ability to define “rights,” judge what constitutes a “crime,” and ultimately reinforce their own power and authority. She advocates that “[m]essy calculations about who wins and who loses, and not some abstract and general sense of what is ‘right,’ should guide us.” Otherwise, the “rights” that international human rights advocates seek to protect may harm the intended beneficiaries in the long run by undermining organic efforts to resist oppression and shift the balance of power. David Kennedy also criticizes rights-focused humanitarian efforts, which he fears can result in negative effects on the victims of human rights abuses by applying overly simplistic labels of “victims,” “violators,” and “bystanders” in a complex political culture. He warns against the human rights model that speaks about “what is good for people, abstract people, here and there, now and forever.”

ATS advocates should heed these insightful critiques of the rights model, but not take them as reason to relinquish a powerful advocacy tool to improve the standards of vulnerable workers. Concerns about generalized, unilaterally-imposed human rights campaigns arise from a fear that advocates are out of touch with the political and social reality of the people they seek to assist and therefore fail to represent them genuinely. Pursuing ATS claims in collaboration with intentional, localized efforts to

100. Id. at 394.
101. Id. at 396.
102. Id. at 394.
103. Kennedy, supra note 78, at 111-12.
104. Id. at 112.
improve the conditions of families on the ground avoids the problems of abstraction and generality. Additionally, ATS litigation, when pursued in conjunction with corporate campaigns, consumer pressure, codes of conduct, and local international monitoring efforts, holds the potential to create ripple effects of improved working standards in multiple contexts. Recognizing the risks of a rights-focused, courtroom-based campaign, advocates should pursue ATS efforts to address child labor only in a collaborative, comprehensive campaign with firm grounding in the concrete needs of workers.

2. Practical Risks and Benefits of an ATS strategy

ATS claims against child labor practices may require unusual and challenging litigation strategies. The high likelihood that a court may quickly dismiss an ATS claim for jurisdictional problems or discretionary foreign policy concerns before reaching the merits of the case remains a constant risk for ATS advocates. Where advocates survive early dismissal, preparing an ATS claim may involve time-intensive and expensive discovery processes in foreign countries.\textsuperscript{105} Representing foreign clients with few resources raises a number of logistical problems: financial limitations, language barriers, cultural differences, and the need to bridge clients' lack of familiarity with the U.S. court system.\textsuperscript{106} Even after settlement or a courtroom victory, finding foreign clients in remote villages to distribute a monetary award is challenging.\textsuperscript{107}

On the other side, corporate defendants are sophisticated global actors, capable of quickly redistributing resources, influencing local and international policy, and developing a corporate legal structure that limits liability. Corporate defendants have substantial financial and legal resources to extend costly lawsuits, and they may ultimately be legally insulated from liability through the use of subcontractors and subsidiary companies in foreign countries.\textsuperscript{108} Overall litigation costs make the ATS a high-risk, potentially high-reward strategy for improving labor standards.\textsuperscript{109} The risks of court costs, expensive discovery fees, and the likelihood of early dismissal make ATS suits a significant drain on limited resources. The potential huge reward of a decision finding a corporate defendant liable under the statute and subject to a large punitive damages award may or may not balance out the risks of ATS litigation.\textsuperscript{110} Like in \textit{Unocal}, corporations are concerned about the reach of ATS, and may settle to avoid bad

\textsuperscript{105} Compa, \textit{supra} note 82, at 50.
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.} ("It is no surprise that labour rights lawsuits are dramatic, groundbreaking, and few.").
\textsuperscript{110} Collingsworth, \textit{supra} note 82, at 16.
precedent. Fear of such litigation would encourage other international actors to raise their labor standards to avoid the high costs of litigation and corresponding negative publicity. Alternatively, corporations may invest heavily in litigation to secure precedent to close off future ATS claims. In either situation, advocates must select their cases carefully, ensure that they are connected with the needs of people on the ground, and utilize ATS claims as only one avenue among many to end labor rights abuses.

C. Avoiding Perverse Consequences: Wal-Mart in Bangladesh

Wal-Mart’s firing of Bangladeshi child garment workers in response to U.S. consumer pressure in the early 1990s is a much-cited example of human rights advocates actually harming the population that the more stringent labor standards were supposed to help.111 This example provides insight into the potentially adverse consequences of international efforts to end child labor practices without sufficient resources on-site. Ideally, human rights enforcement causes children to leave hazardous working conditions to pursue educational opportunities. The ILO conventions call for countries to implement programs not only to eliminate child labor practices but also to develop educational resources. If the structures are not in place to assist in the transition of children from work to school, however, removing the children from their jobs may force them into the more dangerous informal sector.112

In 1992, United States consumers watching a Dateline program were outraged at the sight of Bangladeshi children sewing clothes destined for Wal-Mart. Advocates and consumers demanded that Wal-Mart enforce its code of conduct, which prohibited child labor, and called for governmental action. Senator Harkin introduced the “Child Labor Deterrence Act,” which called for a ban of manufactured imports made with child labor.113 Although this legislation never passed, the Bangladesh Garment Exporters and Manufacturers Association (BGMEA) recommended that employers dismiss workers under the national minimum age of fourteen to avoid export problems with the critical U.S. market. Because families did not possess the resources to send their children to school, many speculate that

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111. Dickerson, supra note 58, at 614, 639-42 (noting the difficult balance between using the “carrot” and the “stick” to encourage multinational corporations to improve labor standards in developing countries); ELLIOT & FREEMAN, supra note 37, at 112-13; WOLF, supra note 80, at 188.


113. ELLIOT & FREEMAN, supra note 37, at 112.
child workers were subsumed into the informal sector and possibly prostitution.\textsuperscript{114}

Economist Martin Wolf commented that the "conscience of Western agitators" may "have been salved," but "[t]housands were sacked, many of whom moved on to more dangerous and less well-paid jobs."\textsuperscript{115} Wolf and other scholars and economists who cite this difficult case, however, only tell the initial, concerning story of children's loss of jobs. But, the international community who sought to end child labor abuses continued its response to the child labor situation after the initial firing of child workers. After children were fired from their positions in the garment factories, the media attention around the fired child workers raised international awareness about the children's plight. Representatives from the ILO and UNICEF responded to the crisis and worked closely with the BGMEA to facilitate a smoother transition for children exiting the garment sector economy.\textsuperscript{116} Recognizing the danger to children and families of eliminating a source of income, especially in the absence of educational opportunities for the children, the ILO and UNICEF investigated what structural supports would be necessary to benefit the children and community.

In 1995, the ILO, UNICEF, and BGMEA signed a Memorandum of Understanding (MOU program) endorsed by the government of Bangladesh that explicitly articulated the intent and methods of removing children from factories and placing them in schools.\textsuperscript{117} The ILO developed workplace verification and monitoring systems to identify underage children, provided them with a stipend, and enrolled them in school; UNICEF developed an education program with NGO partners and opened their first education centers in January 1996.\textsuperscript{118} The MOU program "recognized the need for multiple actions to protect children: from the commitment of the government, to supportive community actions, social protection mechanisms to support children and families at risk, and more open discussion of practices harmful to children."\textsuperscript{119}

Responding to the situation caused by the abrupt dismissal of child workers, international labor rights activists have in the end done much more good than harm. Notwithstanding the initial displacement caused by the Bangladesh campaign, the MOU program that arose from the Bangladesh garment industry child labor crisis became a well-known child labor

\textsuperscript{114} Reports from UNICEF and the ILO noted that child workers who lost their jobs may have been forced into worse situations, but provided no specific information to support this speculation. \textit{Id}; see also ILO & UNICEF, supra note 112, at 6.

\textsuperscript{115} \textit{WOLF}, supra note 80, at 188.

\textsuperscript{116} ILO & UNICEF, supra note 112, at 6-7.

\textsuperscript{117} \textit{Id}.

\textsuperscript{118} \textit{Id}. at 8-10.

\textsuperscript{119} \textit{Id}. at 18.
intervention and serves as a model for what resources are necessary to support the transition of working children into school.\textsuperscript{120} The attention that the MOU program received both nationally and globally helped raise worldwide attention to the problem of child labor by the end of the 1990s.\textsuperscript{121} For example, the soccer ball stitching industry in Pakistan followed a similar agreement in 1997, which avoided the mass firings of child workers in favor of carefully supported transition from work to newly created educational opportunities for at least 6,000 children.\textsuperscript{122} Similarly, the Rugmark program reduced child labor in the Indian carpet industry.\textsuperscript{123} These efforts resulted in parents taking on these positions, receiving higher wages, and did not result in the flight of industry.\textsuperscript{124}

Although this story highlights the initial negative consequences of a narrow, international rights-focused effort centered in the United States to help children abroad, it also illustrates how the concern around children’s rights sparked a coordinated campaign of international aid that gathered the necessary resources to effectively address child labor practices on the ground. ATS claims can serve as this spark and, if they are pursued in collaboration with local non-governmental organizations attuned to local resources, can avoid such initial perverse effects. Intentional, well-planned efforts to end child labor practices can and should be carried out with the proper economic support and social and structural resources.

\section*{V. ECONOMIC EFFECTS OF RECOGNIZING AN ATS CAUSE OF ACTION}

In addition to the critiques from progressive scholars who suggest that an isolated “rights” strategy may cause more harm than good, some economists who champion the free market argue that any imposition of labor standards deprives workers in developing countries of their comparative advantage and discourages much-needed economic investment.\textsuperscript{125} Economist Gary Hufbauer terms the ATS the “awakening

\begin{itemize}
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. at 17.
\item \textsuperscript{122} \textit{Elliot & Freeman}, supra note 37, at 115; ILO & UNICEF, supra note 112, at 18. The “Foul Ball” campaign, launched by the U.S. non-governmental organization the International Labor Rights Fund, mobilized consumer pressure on Nike and other soccer ball marketers to end child labor practices. In response to this pressure, the International Federation of Football Associations (FIFA) adopted a code of conduct and the Pakistan Chamber of Commerce entered into an agreement with the ILO and UNICEF to provide the necessary support to children and families to allow the children to attend school. \textit{Elliot & Freeman}, supra note 37, at 114.
\item \textsuperscript{123} Summers, supra note 37, at 78.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} See \textit{Wolf}, supra note 80, at 11. Although Wolf acknowledges that “trade liberalization, on its own, regardless of the circumstances, will not generate rapid growth,” he insists that social regulation not be linked to trade. \textit{Id.} at 202. Instead, he argues for “[e]ncouraging export-led growth from the
monster" and focuses his critique on the potential negative economic effects of the U.S. federal court system's interference with foreign affairs and trade through alien civil tort claims. He predicts ATS cases will damage target countries by curtailing trade, investment, and access to credit, which will leave workers in a more perilous position. To ensure that their efforts to aid child workers will result in improved conditions, advocates who seek to utilize ATS claims to enforce child labor restrictions must respond to this economic critique.

Free market advocates like Hufbauer and Mitrokostas oppose labor standards, alleging that they limit competition and interfere with the efficient functions of market relations. Those who advocate the free market as the only correct development path, however, often fail to investigate the extent to which labor standards actually interfere with efficiency or consider the social values and policy choices behind these standards. Additionally, they fail to recognize that the "free" market is not neutral, but exists within a background legal system constructed by those in power. Because empirical data illustrates that labor restrictions may not impede economic efficiency, moral and redistributive considerations strongly support recognition of internationally-shared fundamental labor rights. Some economists take even a stronger stance against the neo-liberal model and offer a competing theory, arguing that concrete efforts to increase wages will better promote growth and human development than the free market by immediately redistributing wealth to support working families. To illustrate the various economic forces at play in the global market, I discuss a current child labor controversy in Liberia and evaluate the potential beneficial effects of an ATS claim.

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126. HUFBAUER & MITROKOSTAS, supra note 8.
127. Id. at 46-48.
128. Id. at 42.
129. See, e.g., id. at 42-43.
A. The Labor Standards Versus Efficiency Debate

A compelling argument against child labor prohibitions, rooted in free-market advocates' opposition to labor market regulation, is that market restrictions will harm their intended beneficiaries. In Why Globalization Works, economist Martin Wolf takes on critics of globalization and argues that the world would be “worse if they had it their way.” Specifically, critics are wrong about the “so-called race to the bottom in environmental and social regulation” and ill-informed about their “fashionable crusade for the elimination of child labour.” Wolf presents the free-market analysis; he argues that the focus should not be on labor market restrictions but on raising income levels in developing countries, which will lead to an overall reduction in child labor and enhanced investment in children’s education. In his view, restrictions on the labor market, such as minimum wages or age restrictions, limit productivity, efficiency, and growth. The “only desirable path” of development requires openness to trade and repeal of any labor market restrictions, and starts with rapid growth of output and employment in a profitable modern sector. In time, the overall labor market will tighten and wages will increase. Wolf argues that any restrictions on the free market will only impede the developing country’s economy and cause critical capital flows to move elsewhere.

This view of the market neglects data that undermines its central premise. Labor standards need not impede economic efficiency. Empirical studies illustrate that countries that observe core labor standards do not lose their competitive advantage. Indeed, a 1996 study by the Organization for Economic Cooperation and Development (OECD) reported that countries that respect core labor standards receive as much foreign direct investment as those that abuse these core labor rights. The report highlighted the lack of correlation between real wage growth and countries’ observance of the ILO’s core labor rights. The study also proposed that improved labor standards might actually result in higher productivity, which would encourage more foreign investment.

133. WOLF, supra note 80, at 11.
134. Id.
135. Id. at 187.
136. See id. at 186.
137. Id. at 187.
138. Id. at 187-88.
140. Id.; see also Deakin & Wilkinson, Rights vs. Efficiency, supra note 130, at 310.
141. Hepple, supra note 139, at 349 (citing OECD, supra note 131).
142. Id.
143. Id.
144. Id.
Furthermore, if all countries must comply with core labor standards, each country would be protected against the race to the bottom.\textsuperscript{145}

In addition to empirical data from the OECD that disputes whether labor standards result in lost foreign investment, some economists challenge Wolf's underlying premise that deregulation is more efficient than a labor standards regime. Global labor markets do not operate in a vacuum; they suffer from structural imperfections including uncertainty, limited information, and sunk costs.\textsuperscript{146} Because of these externalities, deregulation of labor markets cannot restore the competitive ideal that the neo-liberal models promise.\textsuperscript{147} Labor regulation can correct these externalities and actually improve efficiency in some circumstances to ensure that economic development generates sustainable, competitive markets.\textsuperscript{148} Because deregulation cannot create a purely competitive free market, Deakin and Wilkinson argue that economists cannot insist that deregulation is the only efficient market strategy and must instead recognize the role of social policy in creating efficient markets.\textsuperscript{149} Labor market interventions that support employment rights may prove more efficient than deregulation. Thus, labor rights advocates should continue to pursue ATS claims and other efforts to end child labor.

Furthermore, leaving labor standards entirely to the market reflects a policy choice that excludes the opportunity for domestic governments and the international community to commit to shared labor rights principles.\textsuperscript{150} To the extent that deregulation policies are efficient, advocating for a "free market" is a positivistic view that assumes that the market is currently functioning well and that economic efficiency in itself is a good.\textsuperscript{151} The values of economic efficiency as promoted by free market advocates should be decoupled from non-economic values, such as recognition of the ILO's core labor rights and dedication to end child labor.\textsuperscript{152} As Clyde Summers notes, restrictions serve more than protectionist purposes; they reflect shared international values of human rights. Restrictions on child labor protect children from hazardous work conditions and recognize that education best fosters children's growth and development. Free market advocates promote one policy choice for the global economy, and it should

\textsuperscript{145} Summers, \textit{supra} note 37, at 70; see Deakin & Wilkinson, \textit{Labour Law, supra} note 130, at 55.

\textsuperscript{146} Deakin & Wilkinson, \textit{Rights vs. Efficiency, supra} note 130, at 293.

\textsuperscript{147} Id.

\textsuperscript{148} Id. at 310.

\textsuperscript{149} Id.

\textsuperscript{150} Deakin & Wilkinson, \textit{Labour Law, supra} note 130, at 55-56.

\textsuperscript{151} See Summers, \textit{supra} note 37, at 77.

\textsuperscript{152} See id. at 79 ("Those who oppose any conditioning of free trade on recognition of the most fundamental labor rights proceed from an uncompromising laissez-faire premise that the international market should be left completely free of labor regulations, a premise that has been rejected by every industrial country in promoting its internal economy.").
not be the default framework for globalization. Advocates for stronger labor standards promote alternative policies that recognize core social values shared by the world community. Recognizing that the market is a social institution, which does not prescribe one "correct" development path, opens the door for policymakers to justify labor standards on efficiency as well as redistribution grounds.

Because development and regulatory decisions reflect policy choices, governments should consider which standards create the most benefit for all workers rather than assuming deregulation and rapid growth is the "only desirable path." James Galbraith challenges Wolf's assumption that the free-market deregulatory model will produce growth and eventual improvement in labor conditions; he argues that sustainable economic growth actually requires an initial reduction in inequality. Although rapid economic growth increases income levels of all workers, Galbraith maintains that it primarily benefits the well-off and increases income inequality and instability. The resulting inequality leaves the weakest, least competitive components of the economy most vulnerable during economic downturns and precludes sustainable growth; the current labor market policies polarize wage and wealth differences, reduce the common interest in social programs, and prevent the growth of a healthy, secure middle class.

In contrast, Galbraith advocates "egalitarian growth," which calls for an immediate redistribution of resources through government intervention requiring higher wages and greater protection of unions. An economy that mandates higher wages and labor standards requires an employer to be more efficient and creative to maintain high productivity. Because maintaining higher wages will reduce inequality, provide more security to workers, and promote sustainable growth, Galbraith argues this economic

153. See id. at 78-79.
154. See Deakin & Wilkinson, Labour Law, supra note 130, at 55-56 (arguing that "[t]he existence of multiple equilibria arising out of contractual incompleteness also means that legislators might be justified in choosing one state of the world over another on equity-related grounds").
155. WOLF, supra note 80, at 187.
156. See GALBRAITH, supra note 132, at 147-49 (demonstrating how inequality rises when unemployment is high, which "brutally undermines the competitive market model under which relative wages are not affected by macroeconomic conditions").
157. Id. at 143.
158. See GALBRAITH, supra note 132.
160. Id.
model is a desirable and efficient alternative to current labor market policies.161

The dramatic increase in the international exchange of goods brought about by globalization requires developing countries to participate in the global market. Free market advocates are correct that workers will benefit from increased capital, but incorrectly assert that deregulation is the only correct path of development. Alternative policies that ensure all workers basic labor standards may be equally efficient and are supported by concerns of fairness, justice, and long-term economic stability. Even if child labor restrictions impede economic efficiency, the international community can commit to respecting the ILO's fundamental principles to promote human development. Indeed, regulations that prohibit child labor and increase overall wages may best advance sustainable growth to benefit all workers and society.

Although loss of children's jobs as a result of ATS claims poses the risk of leaving children and their families in worse economic conditions, economic forces do not render this result inevitable. As discussed in Part IV, economic and social supports are critical for immediate aid to children and families losing an income source. But, the economic consequences of ATS claims are not necessarily dire; the reduction in low-cost child labor shrinks the labor pool and can encourage full adult employment and raise wages. When parents' wages increase, parents are better able to support their families and send children to school. As prior child labor campaigns in the garment sector and carpet industries illustrate, companies did not flee the countries that implemented labor standards, while children received greater educational opportunities. Advocates utilizing ATS claims must remain aware of the social and economic context of the children they are seeking to assist, but should not be deterred by economic arguments that promote one model of economic growth.

B. Current Efforts to Address Child Labor through the ATS

Labor rights advocates are currently pursuing an ATS claim in a campaign against child labor practices on Liberian rubber plantations. This campaign to improve the working conditions of the families who labor on the rubber plantations provides a helpful example of the potential risks and benefits of ATS claims in the global economy. In 2007, the Liberian plaintiffs' ATS claim for child labor survived a motion to dismiss in the U.S. District Court for the Southern District of Indiana.162 The plaintiffs in

161. Id. (highlighting the Scandinavian Model known for "universal unions, high minimum wages, and a strong welfare state" while practicing free trade).
162. Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1022 (2007). The decision dismissed the adult plaintiffs' ATS claim, finding that the underlying facts of their forced labor claim did not violate "specific, universal, and obligatory" international norms. Id. at 1019.
Roe v. Bridgestone allege forced child labor violations at the Firestone Rubber Plantation ("the Plantation") in Liberia. Although the claim alleges forced labor, the coercion present is nuanced; plaintiffs allege that Bridgestone places quotas on families to produce a certain amount of rubber which are "so high that use of child labor is both necessary and inevitable." The U.N. Mission in Liberia issued a report on the rubber plantations that supports plaintiffs' allegations that children as young as ten work in the Plantation and lack proper training and protective equipment for tapping and handling the formic acid used to treat rubber.

The court held that, giving the plaintiffs the benefit of their factual allegations, the circumstances alleged fall within the ILO's "worst forms of child labor" because the work conditions would likely "harm the health and safety" of the young child plaintiffs. The court heeded Sosa's caution in creating a cause of action, and noted that not all child labor practices violated international norms. Additionally, the court considered foreign relations concerns, and other practical consequences of recognizing a cause of action for child labor. Ultimately, the court refused to dismiss the claims in light of Convention No. 182, which both the United States and Liberia have ratified, because the allegations of paid child labor in "heavy and hazardous jobs" on the Plantation met the Sosa standard for ATS claims.

Even if the child laborers' ATS claim never makes it to the merits, the filing of a legal action for child labor abuses highlights the issue of child labor in Liberia and captures the attention of multinational corporations who could be subject to liability under an ATS claim. To raise public awareness of the issue of child labor, the International Labor Rights Fund

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163. Id. at 991.
164. Id.
165. Id. at 1021.
   First, the work load of tappers has increased over the years due to the diminishing productivity of rubber trees, thus obliging all members of the family to assist in meeting the tapper's designated workload. Second, the location of schools is too far for some children to reach on foot and parents rather have their children follow them to work than stay idle in the camps. Third, sub-contractors and their dependents do not receive social benefits from the corporations or management companies and therefore cannot afford to pay school fees. Fourth, the financial incentive for tapping more rubber trees drives children to assist their family members in the plantations rather than go to school.
167. Roe, 492 F. Supp. 2d at 1021 (referring to Convention No. 182, supra note 60, at art. 3).
168. Id. at 1022.
launched a media campaign to “shame” Bridgestone-Firestone into changing the labor practices at the rubber plantations in Liberia that supply the raw materials for the company’s tires. This campaign resulted in a number of high-profile opinion and editorial pieces in major newspapers at a time when Bridgestone received increased media coverage as a sponsor of the 2008 Super Bowl.  

At the local level, the long-term presence of the U.N. Mission in Liberia and ILO monitoring efforts can assist the transition of children from plantation work to school. Currently, Bridgestone offers education to children of Plantation employees at “Firestone schools,” which the plaintiffs argue they cannot access because of the high rubber production quotas placed on the parents. Highlighting the role of children’s labor to reach the quotas raises attention to the overall working standards in the Plantation and pressures Bridgestone to improve labor conditions for adults as well as to cease the use of child labor. Because the industry is based around local latex resources, Bridgestone is more likely to invest additional resources in the Plantation than abandon its current workers and seek alternate locations.

Using the ATS in combination with these broader corporate “shaming” campaigns can be a powerful tool to provide additional leverage and credibility. Because corporations desire to avoid negative publicity, costly litigation, and the risk of damaging ATS precedent, they may desire to settle an ATS case. A financial settlement would provide some immediate financial relief to workers, and it could also be an opportunity to coordinate with non-governmental organizations on the ground to effectively channel settlement proceeds into local educational resources.

VI.
CONCLUSION

Sufficient international consensus exists to support a cause of action for the worst forms of child labor under the ATS as interpreted in Sosa. The efforts by the ILO to draw international attention and agreement to end the worst forms of child labor provide grounding for ATS claims that allege harmful working conditions for children. Beyond the “worst forms” of child labor, the outer limit of a cause of action for child labor remains unclear, but this ambiguity may encourage companies who fear liability to take additional precautions to prevent potentially harmful child labor


conditions. ATS claims provide critical "teeth" to ILO conventions that share widespread international agreement and support. Because of the limits of a universal rights strategy in the global economy, advocates who seek to improve children's lives must not rely on ATS litigation alone, but must further ensure that adequate local structural supports are in place to effectively aid children's transition from work to school. Human rights advocates should selectively use the ATS litigation strategy as a powerful tool to complement comprehensive campaigns to end international child labor violations.