

Saint Louis University Public Law Review

Volume 23

Number 2 *We the Students . . . The Law of
Educating Our Children (Volume XXIII, No. 2)*

Article 11

2004

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Recommended Citation

Kolly, Faye M. (2004) "The Right of Association: Enforcing International Labor Rights of Undocumented Workers Via the Alien Tort Claims Act," *Saint Louis University Public Law Review*. Vol. 23 : No. 2 , Article 11.

Available at: <https://scholarship.law.slu.edu/plr/vol23/iss2/11>

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**THE RIGHT OF ASSOCIATION: ENFORCING INTERNATIONAL
LABOR RIGHTS OF UNDOCUMENTED WORKERS
VIA THE ALIEN TORT CLAIMS ACT**

I. INTRODUCTION

The Bureau of Citizenship and Immigration Services (BCIS), formerly the Immigration and Naturalization Service (INS), estimates that there are approximately seven million unauthorized immigrants living in the United States.¹ Studies have found that immigrants, both those lawfully present and undocumented, comprise an increasingly large share of the U.S. labor force.² At least one study has found that of the 17.9 million foreign-born workers 12.7 million are here legally, while approximately 5.2 million are working either with expired work authorization or without work authorization altogether.³ The low-wage labor force has the highest share of undocumented workers.⁴ It is widely believed that undocumented workers in the low wage sector face an increased risk of being taken advantage of by their U.S. based employers, either by underpayment, non-payment, or arbitrary termination from their jobs, often through coercion and threats of deportation.⁵

In 2002, the Supreme Court in *Hoffman Plastic Compounds v. NLRB* agreed that a man named Jose Castro, who was employed at a company in California, was unlawfully fired due to his union activities.⁶ The National Labor Relations Board (NLRB) determined that the employee was wrongfully terminated and recommended that the traditional remedies of back pay and

1. See U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 1 (2001), available at <http://uscis.gov/graphics/shared/aboutus/statistics/publist.htm> (last visited Apr. 18, 2004).

2. RANDY CAPPS, MICHAEL FIX & JEFFREY S. PASSEL, URBAN INSTITUTE IMMIGRATION STUDIES PROGRAM, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (2003), at <http://www.urban.org/url.cfm?ID=310880> (last visited Apr. 18, 2004).

3. *Id.* at 2.

4. *Id.* at 5 (the study finds that of the 8.6 million low-wage immigrant workers, 3.4 million, or 40%, are undocumented and approximately 23% are naturalized citizens).

5. Sarah Cleveland, Beth Lyon & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Remedies Are Restricted on Workers' Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795, 806-09 (2003).

6. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 140 (2002).

reinstatement be granted.⁷ The company objected, claiming that the man's immigration status as an undocumented worker did not give him the right to work, and thus, he was not entitled to an award of back pay or reinstatement.⁸ Ultimately, the Supreme Court agreed that the remedy was in conflict with federal immigration laws and therefore Mr. Castro was not entitled to the typical remedies under the National Labor Relations Act (NLRA).⁹ Many critics of the decision have argued that this creates an incentive for employers to hire and abuse undocumented workers.¹⁰ Supporters have argued that the decision settles conflicts between federal immigration and labor laws.¹¹

This comment will explore the right of association of unauthorized workers in light of the Supreme Court's decision in *Hoffman* and whether the prohibition of back pay to undocumented workers fired for their union activity, in contravention of United States labor laws, violates the law of nations. Further, the possibility of using the Alien Tort Claims Act (ATCA) as a mechanism for undocumented workers to obtain back pay denied to them by U.S. based employers will be explored. The following sections of this paper will define and then set forth the key legal issues in labor, immigration, and international law to determine whether a prohibition in awarding back pay to unauthorized workers violates international treaty or customary law and if that violation is actionable under the ATCA.¹²

II. UNDOCUMENTED WORKERS AND LABOR RIGHTS IN THE U.S.

A. Definitions

In order to understand the distinctions made by federal immigration and labor laws, the definitions of "employee," "employer," and "unauthorized alien" must be given, along with clarification of the terms as used in this paper. Definitions in federal labor and immigration laws tend to be concerned with defining terms in the context of the purpose of the particular act. For instance, the immigration regulations define "employer," for the purpose of prohibiting employment of an "unauthorized alien," to mean any agent or person who

7. *Id.*

8. *Id.* at 146.

9. *Id.* at 151-52.

10. See Rebecca Smith and Maria Blanco, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v. NLRB*, 8 BENDER'S IMMIGR. BULL. 890 (2003); see also Gabriela Robin, *Hoffman Plastic Compounds Inc. v. National Labor Relations Board: A Step Backwards For All Workers in the United States*, 9 NEW ENG. J. INT'L & COMP. L. 679, 694 (2003).

11. See generally, Timothy M. Cox, *A Call to Revisit Sure-Tan v. NLRB: Undocumented Workers and Their Right to Back Pay*, 30 SW. U.L. REV. 505 (2001).

12. 28 U.S.C. § 1350 (2001).

engages the services or labor of an employee.¹³ The regulations further define “employee” to mean a person who provides services or labor for an employer.¹⁴ These definitions are circular because they reference each other without actually defining either “employee” or “employer.” The Immigration and Nationality Act (INA) provides a specific definition of “unauthorized alien” to mean an immigrant or alien who is not authorized by the Attorney General as either lawfully admitted as a permanent resident or as an immigrant or alien authorized under United States law to be employed in the United States.¹⁵ The terms “undocumented worker” and “unauthorized workers” will be used in this paper to refer to workers who lack the proper documentation to be employed legally in the United States. Undocumented workers may either be aliens who lack any legal authorization to be present in the United States or legal aliens present in the United States, but unauthorized to work.¹⁶

Similarly, but without reference to a person’s immigration status, the NLRA defines employee to:

include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.¹⁷

Employer is defined only as including any person acting as an agent of the employer.¹⁸ Under the NLRA “back pay” is a remedy received by an employee who has been wrongfully terminated under the Act.¹⁹ An employee discriminated against in violation of the NLRA is entitled to any damages that result in a loss of earnings. The employee is entitled to be made whole by the

13. 8 C.F.R. § 274a.1(g) (2002) (The term employer means “a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor.”).

14. *Id.* § 274a.1(f) (The term employee means “an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors . . .”).

15. 8 U.S.C. § 1324a(h)(3) (“As used in this section, the term ‘unauthorized alien’ means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.”).

16. RYSZARD CHOLEWINSKI, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW* 4-5 (1997) (describing the difference between workers who enter a country through clandestine means and others who enter lawfully into a country but are not legally permitted to work).

17. 29 U.S.C. § 152(3) (2001).

18. *Id.* § 152(2).

19. 1 N. PETER LAREAU, *NAT’L LABOR REL. ACT: LAW & PRACTICE* § 8.13(2)(a) (2003).

employer. Remedies include, if appropriate, payment of all wages and benefits lost, plus interest.²⁰

B. Right of Association and Undocumented Workers Under the NLRA

Undocumented workers have historically, and to varying degrees, been afforded basic protections under various federal labor acts. The right to organize is one of the areas in which the rights of undocumented workers have been protected to some degree.²¹ However, these labor protections have at times come into conflict with federal immigration policies. In 1984, the Supreme Court in *Sure-Tan, Inc. v. NLRB*²² affirmed in part the National Labor Relations Board's (NLRB) interpretation of the NLRA on two key issues. First, the Court found that the NLRA's definition of "employee" included "undocumented aliens" and extended some protection under the Act for collective bargaining purposes.²³ Secondly, the Court held that there was no conflict between the application of the NLRA to undocumented employees and the mandate of the INA.²⁴ The Court in *Sure-Tan* reasoned that the remedy for discriminatory discharge, which included back pay and/or reinstatement, did not wholly turn on the employee's legal status in the United States, although the Court's decision placed limitations on remedial measures based on the employee's immigration status.²⁵ The Court also determined that the remedies of back pay and reinstatement were available to immigrant workers who were able to prove or obtain lawful entry into the United States.²⁶

In *Sure-Tan*, the Court reasoned that the "task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act'" and accorded the NLRB deference to its interpretation.²⁷ Further, the Court found no conflict between the federal labor and immigration laws. The Court reasoned, in part, that Congress did not at that time make it unlawful to employ "undocumented aliens."²⁸ The Court found that the purpose of the NLRA in protecting workplace conditions and

20. *Id.*

21. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, HARV. C.R.-C.L.L REV. 345, 352 (2001) (noting that the Court's decisions previous to the passage of the Immigration Reform Control Act (IRCA) defined undocumented workers as employees within the definition of the NLRA). However, the author also notes that the decision limited the remedy of back pay to those immigrant workers who were "available" based on immigration status. *Id.* at 353.

22. *Sure-Tan, Inc. v. NLRB* 467 U.S. 883, 891 (1984).

23. *Id.*

24. *Id.* at 892.

25. *Id.* at 902-05.

26. *Id.*

27. *Sure-Tan*, 467 U.S. at 891 (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)).

28. *Id.*

employee rights was furthered, as protecting worker rights created a disincentive for employers to abuse the rights of undocumented employees.²⁹ Ultimately, the Court found a violation of the NLRA where the employer reported the undocumented worker to immigration authorities as part of a direct retaliation for participating in union activities.³⁰ However, it reversed the decision of the court of appeals to impose a minimum back pay award and specific reinstatement offers.³¹ In his concurrence, Justice Brennan foreshadowed what would become a major critique of the Court's later decision in *Hoffman*. He stated "[o]nce employers . . . realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost back pay, their 'incentive to hire such illegal aliens' will not decline, it will increase."³²

The 5-4 decision in *Sure-Tan* reflected the subsequent circuit split regarding the eligibility of back pay for unlawful termination of undocumented workers.³³ In 2002, the Supreme Court in *Hoffman* revisited the issue of remedial measures under the NLRA.³⁴ In the interim years between the Court's decision in *Sure-Tan* and its decision in *Hoffman*, changes had been made to federal immigration laws that would substantially impact how the Court would view an undocumented worker's entitlement to back pay under the NLRA.

Specifically, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA).³⁵ The Act clearly stated that one of the central purposes of the IRCA was to combat the employment of unlawfully present immigrants,

29. *Id.* at 893.

30. *Id.* at 891-92.

31. *Id.* at 906.

32. *Sure-Tan*, 467 U.S. at 912 (Brennan, J. concurring in part, dissenting in part) (quoting the majority opinion, *id.* at 893).

33. *NLRB v. A.P.R.A. Fuel Oil*, 134 F.3d 50, 56 (2d Cir. 1997) (U.S. employer who knowingly hires undocumented workers cannot use the IRCA as a shield to avoid liability under the NLRA); *Del Rey Tortilleria v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992) (required "employees" to show that they are lawfully available for employment during the back pay period); *Egbuna v. Time-Life Libraries*, 153 F.3d 184, 188 (4th Cir. 1998) (undocumented workers employed in violation of the Immigration Reform and Control Act (IRCA) are subject to risks of immigration laws); *NLRB v. Felbro*, 795 F.2d 705, 722 (9th Cir. 1986) (holding that NLRB's decision to condition Felbro's payment of back pay upon proof of legal status in the U.S. is inconsistent with NLRA and immigration law).

34. *See Hoffman*, 535 U.S. at 137.

35. 8 U.S.C. §§ 1324a (a)(2), 1324a (e)(4)(A), 1324a(f)(1), 1324c(a)(1)-(3) (1994) (combating employment of illegal aliens made central to the policy of immigration law and further established an employment verification system. It made it unlawful for the employer to knowingly hire undocumented immigrant workers subjecting employers to a civil penalty and possible criminal prosecution. It also made it a criminal offense for undocumented workers to use false documents for the purpose of obtaining employment in the United States).

making it illegal for employers to knowingly hire undocumented workers.³⁶ The IRCA also made it unlawful for those immigrants to obtain and to use false documentation in order to gain employment. Both employers and undocumented workers were now subject to civil and criminal penalties for violation of the Act.³⁷ Despite the enactment of the IRCA, the NLRB indicated that awards of back pay to undocumented workers were proper but were unavailable “during periods when [the workers] were not lawfully entitled to be present and employed in the United States.”³⁸

In 2002 however, the Court in *Hoffman* held that allowing the NLRB to award back pay to “illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of immigration laws, and encourage future violations.”³⁹ The Court was explicit in indicating that the NLRB still had at its disposal other remedial measures when dealing with the NLRA, such as cease and desist orders and notice postings.⁴⁰ However, the statutory remedies of back pay and reinstatement were found to be in conflict with federal immigration laws. Chief Justice Rehnquist explained that because immigration laws made it impossible for undocumented workers to find employment in the United States without contravening federal immigration law, awarding back pay under the labor laws to “illegal aliens” would run counter to immigration policy.⁴¹ Thus, undocumented workers are no longer entitled to back pay for wrongful termination under the NLRA.

The decision in *Hoffman* was sharply split, with four Justices dissenting. Justice Breyer, who authored the dissent, stated, “I cannot agree that the back pay award before us, ‘runs counter to,’ or ‘trenches upon,’ national immigration policy.”⁴² The dissent found, as the court did earlier in *Sure-Tan*, that the enforcement of labor laws, including awarding back pay for unlawful discharge for union activities, was congruent with the purposes of immigration laws.⁴³ The dissent reasoned that an order from the NLRB to grant back pay was a reasonable deterrence to employers who seek to unlawfully deny the right of workers to organize and also served to further immigration policy by deterring the hiring of undocumented workers for exploitation.⁴⁴ In effect, the decision in *Hoffman* recognized the “illegality” of an undocumented worker’s

36. *Id.* § 1324a(a).

37. *Id.*

38. WEST, 11 EMP. COORD. § 43.80 (2004).

39. *Hoffman*, 535 U.S. at 151.

40. *Id.* at 152.

41. *Id.* at 149.

42. *Id.* at 153 (Breyer, J., dissenting).

43. *Id.* at 153-55.

44. *Hoffman*, 535 U.S. at 155.

employment by penalizing the undocumented worker for the unlawful actions of the employer.

The rights of undocumented workers, with respect to pay for work actually performed, continues to be covered under the Fair Labor Standards Act (FLSA),⁴⁵ which sets minimum standards for working conditions in the United States.⁴⁶ The FLSA defines the term “employee”⁴⁷ to include undocumented workers who can bring an action under the Act for unpaid wages and liquidated damages.⁴⁸ However, the FLSA was not intended to regulate labor relations, except to substitute its own minimum wage rate for any that was substandard and an overtime rate for hours above the number it set.⁴⁹ In *Singh v. Jutla*, a recent case deciding whether the *Hoffman* analysis applies to the FLSA, a federal district court in California declined to extend the *Hoffman* analysis to state and FLSA remedial measures for undocumented workers.⁵⁰ In *Singh*, a man from India was awarded \$200,000 in unpaid wages and damages for retaliation.⁵¹ While the federal district court in this case declined to extend the scope of *Hoffman*, other commentators predict that various federal courts may reach an opposite result.⁵² What is known is that while undocumented workers are still entitled to payment for work actually performed, back pay for unlawful retaliatory measures under the NLRA is not allowed. Despite this decision protecting the rights of undocumented workers under the FLSA, the substantive federal laws protecting an undocumented worker’s right to participate in or organize labor unions continues to be severely undercut by the Court’s decision in *Hoffman*.⁵³

III. INVOKING THE ALIEN TORT CLAIMS ACT TO PROTECT THE RIGHT TO ORGANIZE FOR UNDOCUMENTED WORKERS IN THE UNITED STATES

A. *Overview of the Alien Tort Claims Act*

The Alien Tort Claims Act (ATCA), enacted in 1789, provides that the “[d]istrict courts shall have original jurisdiction of any civil action by an alien

45. 29 U.S.C. §§ 201-219 (2001).

46. *Id.*

47. *Id.* § 203(e).

48. *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988).

49. *Id.*

50. *Singh v. Jutla & C.D. & R Oil Inc.*, 214 F. Supp. 2d 1056, 1061 (2002) (though *Hoffman* prevents an undocumented worker from seeking back pay, it does not preclude an undocumented worker from seeking *any* form of relief, as shown through the court’s granting of both injunctive and declaratory relief).

51. Bob Egelko, *Jury Awards \$200,000 to Illegal Immigrant*, S. F. CHRON., Dec. 20, 2003, at A3.

52. *See generally supra* note 10 and accompanying text.

53. *Id.*

for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁵⁴ The ATCA creates federal jurisdiction over a tort committed in violation of the law of nations. The ATCA has been primarily directed toward the action of states in violation of the law of nations or treaties.⁵⁵ Under the ATCA either treaty obligations, the law of nations, or customary law may give rise to a lawsuit under the Act.⁵⁶ The “law of nations” is defined by Article 38 of the Statute of the International Court of Justice as: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; and (3) the general principles of law recognized by civilized nations.⁵⁷ In order to support a tort action of customary international law, the norm must be “universal, definable, and obligatory.”⁵⁸ However, there is no requirement of unanimity between all nations, but just a general recognition that the action is prohibited.⁵⁹

In a seminal case extending federal court jurisdiction under the ATCA, the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala* ruled that an act of torture committed by a state official against a person in detention constituted a violation under the law of nations.⁶⁰ In order to establish that torture violated the law of nations, the court consulted the work of international jurists, general usage, practice of nations, the United Nations Charter, United Nations General Assembly resolutions, international treaties, and documents expressing U.S. policy on the matter.⁶¹

Recently, the ATCA has also been used as a vehicle to litigate claims of persons who have suffered human rights abuses committed abroad including torture, genocide, war crimes, summary execution, arbitrary detention, and compulsory labor claims against states and non-state actors such as

54. 28 U.S.C. § 1350 (2001).

55. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (holding that the ATCA provides federal jurisdiction in a claim against a Paraguayan official by the estate of a torture and murder victim); *see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (dismissing an action brought under the ATCA by survivors of persons murdered in an attack on a civilian bus in Israel). Congress confirmed the Second Circuit’s approach by enacting the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992); *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995) (concerning genocide, rape, and torture in the former Yugoslavia).

56. DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS 768 (2001).

57. Statute for the Permanent Court of International Justice, Dec. 13, 1920, art. 38, 6 L.N.T.S. 390, *reprinted in* ALEXANDER P. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE: ITS CONSTITUTION, PROCEDURE AND WORK 355 (1932).

58. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

59. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988).

60. *Filartiga*, 630 F.2d at 876, 878.

61. *Id.* at 880-81.

corporations.⁶² U.S. courts have construed the ATCA, in the context of human rights, to extend to violations under the “law of nations,” including torture, genocide, and crimes against humanity.⁶³ For example in *Kadic v. Karadzic*, the Second Circuit expanded the scope of the ATCA so that it not only applies to state actors, but also those persons acting as private individuals.⁶⁴ The court indicated that acts such as genocide and war crimes do not require state action to be a violation of the law of nations, although the court also cautioned that some violations do require perpetration by a state actor.⁶⁵ In fact, it has been suggested that the relative increased use of ATCA claims against private corporations has led U.S. courts to apply more readily apply international human rights standards under the ATCA.⁶⁶

B. Application of the ATCA in Labor and Migrant Workers Claims

Nothing in the statute prohibits the use of the ATCA to enforce the rights of immigrant workers and the freedom to associate.⁶⁷ The ATCA may be used as a vehicle to enforce the rights of “unauthorized workers” in the United States, in conjunction with other remedial measures under state and federal law have failed. Problematic prongs of the ATCA in the context of labor rights are whether freedom of association falls within the realm of the law of nations and whether failure to provide an adequate remedy to protect this right is actionable under the statute.

Historically, the ATCA has been used to challenge conduct committed outside the United States. The ATCA has also been invoked domestically by immigrants to challenge the conditions of detention pending removal and

62. *See* *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000) (reversing dismissal of ATCA claims for torture, imprisonment, and killings allegedly performed by Nigerian authorities at the instigation of private oil companies); *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1164 (N.D. Cal. 2001) (holding that forced labor allegations by Chinese and Korean workers stated a claim under ATCA but dismissing claims as time-barred); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000) (holding that non-state actors may be liable for slavery and forced labor under ATCA, but granting summary judgment for defendants on facts of the case); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 491 (D.N.J. 1999) (holding the same, as to slave labor claims brought under ATCA against German subsidiary of Ford Motor Co.); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (holding that Burmese pipeline workers alleging forced labor and slavery stated a claim under ATCA).

63. Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 54 DEPAUL L. REV. 433, 436 (2002).

64. *Kadic*, 70 F.3d at 239.

65. *Id.* at 244.

66. Elliot Schrage, *Emerging Threat: Human Rights Claims*, HARV. BUS. REVIEW, Aug. 2003, at 1.

67. Michael J. Wishnie, *Immigrant Workers and Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 532-33 (2002).

forced labor claims of aliens within the United States.⁶⁸ In a case that comes close to applying the ATCA in the domestic labor context for violations of international labor rights, immigrant workers in Saipan initiated three class action suits against clothing manufacturers based on the island.⁶⁹ The lawsuits were filed in 1999 and challenged unlawful factory conditions.⁷⁰ Two of the lawsuits claimed federal jurisdiction under the ATCA.⁷¹ In one of the ATCA related cases, 30,000 foreign garment workers brought suit against nineteen retailers and eleven Saipan-based garment contractors.⁷² In another ATCA suit, immigrant workers sued in federal court in Saipan alleging, in part, that they were drawn to Saipan with promises of jobs but were subject to deplorable working conditions, indentured servitude, unsanitary living and working conditions, unpaid work, and forced abortions.⁷³

Saipan, located in the Northern Pacific Ocean, is part of a chain of islands known as the Northern Marianas.⁷⁴ More than one-half of the population on the island consists of foreign workers.⁷⁵ The island's status as a U.S. territory makes specific federal laws, including some labor laws, enforceable on the island.⁷⁶ Immigration law on the island is controlled by local administration

68. *Papa v. I.N.S.*, 281 F. 3d 1004, 1007 (9th Cir. 2002) (claiming violations of the ATCA for the killing of an immigrant while in I.N.S custody); *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 382 (E.D.N.Y. 2002) (claim brought alleging abuse and forced labor as domestic servant); *Ashik Ahmed v. Ahm Sadiqul Hoque*, 2002 U.S. Dist. Lexis 14852 at *1, *2 (S.D.N.Y. 2002) (claim was dismissed due to lack of jurisdiction, but alleged abuse and forced labor of a domestic servant); *Pushpa Topo v. Dhir*, 210 F.R.D. 76, 77 (2002) (claiming violation of the ACTA for trafficking, involuntary servitude, and false imprisonment).

69. *Saipan Sweatshop Litigation: An Update* (March 11, 2002), at http://www.sweatshopwatch.org/swatch/marianas/update_mar02.html (last visited Apr. 18, 2004).

70. *Id.*

71. *Id.*

72. *First-ever Lawsuits Filed Charging Sweatshop Conspiracy Between Major U.S. Clothing Designers and Retailers, Foreign Textile Producers*, (January 13, 1999), at <http://www.sweatshopwatch.org/swatch/marianas/lawsuit.html> (last visited Apr. 18, 2004) (companies listed in the lawsuits included: The Gap; Cutter & Buck, Inc.; Target Corp.; J. Crew, Inc.; J.C. Penny Company, Inc.; Nordstrom, Inc.; Sears Roebuck & Company; The Limited, Inc.; OshKosh B'Gosh, Inc.; Jones Apparel Group, Inc.; Gymboree Corp.; The Associated Merchandising Corp.; The May Department Stores Company; The Dress Barns, Inc.; Lane Bryant, Inc.; Tommy Hilfinger USA, Inc.; Warnaco Group, Inc.; Calvin Klein, Inc.; Abercrombie & Fitch Co.; The Talbots, Inc.; Brooks Brothers; Woolrich, Inc.; and Levi Strauss).

73. *Id.*

74. 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS § 23-201 (2003).

75. *Id.*

76. *Id.* at 23-204 (noting that the NLRA, FLSA (with certain exceptions), Family Medical Leave Act, Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Occupational Safety and Health Act, Social Security Act, Longshore and Harbor Workers' Compensation Act, and the Employee Retirement and Income Security Act are applicable on the island).

rather than by U.S. federal immigration statutes.⁷⁷ The lawsuits were ultimately settled out of court, including a twenty million dollar award and the establishment of an independent monitoring program to ensure compliance with international labor and human rights standards.⁷⁸ Some commentators suggest that this case serves as an important model for U.S. federal courts to extend their jurisdiction over transnational corporations using the ATCA.⁷⁹ The case, however, may also serve as an example of how domestic courts can apply the ATCA to enforce international labor standards, including the freedom of association, for alien workers within the borders of the United States.

Professor Michael Wishnie has noted that “[s]lavery, servitude, and forced labor are now banned by numerous international instruments, and public and private violations of the prohibitions are fully enforceable under ATCA, as the courts to consider the question have uniformly held.”⁸⁰ Wishnie and other commentators have also noted several potential difficulties in enforcing international labor rights under the ATCA. Sarah Cleveland noted that “[d]espite the fact that slavery and forced labor enjoy a status akin to torture in the international human rights lexicon, the ATCA has been largely neglected as a means for enforcing this prohibition or any other core international labor standard.”⁸¹

However, Virginia Leary wrote that a strong argument could be made for the status of freedom of association and the right to organize as customary international law, binding on all nations.⁸² First, she argued that while the Restatement (Third) of the Foreign Relations Law of the United States does not explicitly list freedom of association as recognized under customary international law, its omission is not determinative of its status under the law of nations.⁸³ She contended that the Restatement is not an exclusive list of rights but that the determination of whether a human rights norm has become customary international law is based on the criteria of legal adherence and its adoption by national and international bodies.⁸⁴

77. *Id.* at 23-206.

78. Jenny Strasburg, *Saipan Lawsuit Terms OKs: Garment Workers Get \$20 Million*, S. F. CHRON., Apr. 25, 2003, at B1.

79. Jane C. Hong, *Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Right Violations*, 19 WIS. INT'L L.J. 41, 61 (2000).

80. Wishnie, *supra* note 67, at 536.

81. Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1574 (1998).

82. VIRGINIA A. LEARY, HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 31 (1996).

83. *Id.* at 32.

84. *Id.*

IV. FREEDOM OF ASSOCIATION UNDER INTERNATIONAL LAW

The freedom of association includes the rights to organize, to bargain collectively, and to strike.⁸⁵ In a treatise regarding the right of association, author Sheldon Leader described the philosophical and political underpinnings of this right:

Right to freedom of association is, in its strongest form, a bilateral liberty indicating that one is neither under an obligation to associate or to dissociate, and this is coupled with an immunity from any imposition of a contrary duty as well as by a claim-right against other forms of interference either by the state, private groups, or individuals.⁸⁶

For a state to meet its international obligations of the freedom of association requires it to take a “negative” rights approach, or the obligation of the state to allow workers to exercise these rights free of encumbrances, and a “positive” rights approach that includes the state’s obligation to protect these rights if violated.⁸⁷

The right to organize, or freedom of association, has been subject over time to different interpretations amongst nations as to the extent and nature of national protections to be afforded.⁸⁸ Despite the varying governmental policies protecting the freedom of association, this fundamental right has been consistently defined as the right of workers to form and join trade unions for the protection of their interests.⁸⁹ The contours of the freedom of association have been further defined in several international treaties and covenants.

A. *Treaties and Covenants*

Modern international human rights law has its foundation in the United Nations Charter and three related treaties: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹⁰ Conventions or treaties are agreements between states that create legally binding rules for the parties. The Vienna Convention describes a treaty as an agreement concluded between states that must be written and is

85. Lance Compa, *Assessing Assessment: A Survey of Efforts to Measure Countries’ Compliance with Freedom of Association Standards*, at 4 (September 30, 2002), available at <http://www.national-academies.org/internationallabor>.

86. SHELDON LEADER, *FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY* 15 (1992).

87. *Id.*

88. *Id.* at 4.

89. LEARY, *supra* note 82, at 29 (citing the 1919 ILO Constitution; 1944, ILO Declaration of Philadelphia, ILO Convention Nos. 87 & 98, and the Universal Declaration of Human Rights).

90. Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, *reprinted in* WEISSBRODT, *supra* note 56, at 8-9.

governed by international law.⁹¹ The Vienna Convention also provides that once a treaty has entered into force, it must be observed in good faith.⁹² Participation in treaties can range from bilateral treaties to multilateral treaties.⁹³

1. ICCPR & ICESCR

The United States is bound by its ratification of the ICCPR. Article 2(1) of the Covenant ensures to “all individuals” the rights recognized in the ICCPR without distinction of any kind.⁹⁴ Currently, the ICCPR has 151 signatory countries.⁹⁵ Commentary to the ICCPR by the Human Rights Committee states that the rights set forth in the ICCPR apply to everyone, irrespective of reciprocity and irrespective of his or her nationality or statelessness, and must be guaranteed without discrimination between citizens and aliens.⁹⁶ Article 22(1) recognizes the right of everyone to the “association with others, including the right to form and join trade unions.”⁹⁷ However, this Article also permits restrictions on the exercise of this right as prescribed by law to protect national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.⁹⁸ As author Rysard Cholewinski notes, “these limitation clauses, therefore, present state parties with the possibility of further restricting aliens’ and migrant workers’ rights: ‘Invoking these clauses, and provided such measures do not amount to the ‘destruction of the rights at stake, governments can suspend or limit the exercise by aliens of certain rights.’”⁹⁹ The Supreme Court’s decision in *Hoffman*, however, does not consider the United States’ international obligations or limitations under the Covenant.

91. *Id.* at 110.

92. *See id.* at 111.

93. *Id.*

94. International Convention for Civil and Political Rights, Mar. 23, 1976, art. 2, 999 U.N.T.S. 171 [hereinafter ICCPR], *reprinted in* SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 37 (David Weissbrodt, et al. eds., 2001) (“Each state party to the present Covenant undertakes to respect and to ensure the all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

95. *See* OFFICE OF THE UNITED NATIONAL HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS RATIFICATION OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES AS OF NOVEMBER 2, 2003 (2003).

96. *Report of the Human Rights Committee*, 41 U.N. GAOR, Supp. No. 40, at 117-19, U.N. Doc. A/41/40 (1986).

97. ICCPR, *supra* note 93, at 42.

98. *Id.*

99. CHOLEWINSKI, *supra* note 16, at 55 (quoting M. Tardou, *Migrant Workers*, in ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 372-73 (R. Bernhardt ed., 1981)).

The United States is also a signatory to the ICESCR but has not ratified the treaty.¹⁰⁰ The treaty has 148 state signatories.¹⁰¹ As such, the United States is arguably not bound by the specific provisions of the treaty. As a signatory to the Convention, however, the United States is obliged not to defeat the object and purpose of the treaty.¹⁰² Article 8 of the treaty obliges state parties to undertake to ensure the right of everyone to form trade unions in order to protect economic and social interests.¹⁰³

While a treaty sets out the obligations that parties have committed themselves to, states may, in some instances, modify their interpretation of the treaty by entering a reservation or declaration at the time the state becomes a party to the treaty.¹⁰⁴ Article 2(1)(d) of the Vienna Convention defines a reservation as a “unilateral statement . . . made by the State . . . whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in application to that State.”¹⁰⁵ However, the reservations must be compatible with the *object* and *purpose* of the treaty in question.¹⁰⁶ For instance, in the case of a human rights treaty, it would not be permissible to enter a reservation that would allow a state to continue to practice torture, as this would clearly conflict with the purpose of the treaty.

In ratifying the ICCRP, the United States entered a declaration that the treaty was not self-executing.¹⁰⁷ However, some courts have held that non-self-executing treaties may still have domestic effect.¹⁰⁸ Other courts, however, have used the non-self-executing provision of treaties to rule that

100. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR], *reprinted in* SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 28 (David Weissbrodt et al. eds. 2001).

101. *See* OFFICE OF THE UNITED NATIONAL HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 94.

102. Vienna Convention on The Law of Treaties, Jan. 27, 1980, art. 18, 1155 U.N.T.S. 331, [hereinafter Vienna Convention], *reprinted in* P.K. MELON, THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS 178 (1992).

103. ICESCR, *supra* note 100, at art. 8.

104. WEISSBRODT, *supra* note 56, at 113.

105. *Id.*

106. *Id.* at 112.

107. UNITED NATIONS, ICCPR DECLARATIONS AND RESERVATIONS, *available at* <http://www.hri.ca/fortherecord1997/documentation/reservations/ccpr.htm>. (last visited Apr. 18, 2004).

108. *See* Beharry v. Reno, 183 F. Supp. 2d 584, 594-5 (E.D.N.Y. 2002) (quoting United States v. Toscanino, 500 F.2d 267, 276-77 (2d Cir. 1974)); Maria v. McElroy, 68 F. Supp. 2d 206, 231-32 (E.D.N.Y. 1999); United States v. Duarte-Acero, 132 F. Supp. 2d 1036, 1040 (S.D. Fla. 2001); *see also* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999).

they are not judicially enforceable in United States courts.¹⁰⁹ While federal courts have been inconsistent in determining whether U.S. reservations make certain human rights treaties enforceable in the courts, the United States' obligation under international law remains intact.¹¹⁰ However, the failure of courts to apply particular treaty provisions due to a reservation or failure to ratify a treaty would not have effect, because the state may still be bound if aspects of the treaty have become norms under customary international law.¹¹¹

2. International Labor Organization Conventions

The International Labor Organization (ILO) was founded in 1919 by the Treaty of Versailles both to regulate international labor standards and to offset economic and competitive disadvantages incurred by states attempting to institute fair labor practices.¹¹² The ILO promotes human rights through the standard setting and adoption of conventions dealing with general and specific labor rights.¹¹³ At their essence, ILO standards are concerned with the promotion of human rights, including fundamental freedoms and rights of individuals.¹¹⁴ The ILO conventions impose binding legal obligations on states that ratify them — to adopt national laws and practices in conformity with the conventions.¹¹⁵ Trade union rights include the right to freedom of association and collective bargaining and are fundamental tenets of the ILO.¹¹⁶ The United States is bound by virtue of its ILO membership to protect the freedom of association found in the following two conventions.¹¹⁷

Specifically, Article 2 of the ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize bestows workers and employers, without distinction, the right to establish their own organizations.¹¹⁸ Convention 98 Article 1.1 indicates that workers shall enjoy adequate protection against acts of anti-union discrimination with respect to their

109. *See id.* at 594 (citing *Beazley v. Johnson*, 242 F.3d 248, 263-68 (5th Cir. 2001) (ICCPR does not apply to the imposition of the death penalty in the United States as the treaty was non-self executing)).

110. RESTATEMENT (THIRD) OF THE LAW OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115(b) (1986) (“That the rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligations or of the consequences of a violation of that obligation.”).

111. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 32-33 (1988).

112. CHOLEWINSKI, *supra* note 16, at 80.

113. *Id.* at 81.

114. *Id.*

115. *Id.* at 82.

116. *Id.* at 111.

117. CHOLEWINSKI, *supra* note 16, at 111.

118. Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, Jul. 9, 1948, 68 U.N.T.S. 17, 19.

employment.¹¹⁹ David Montgomery has noted that “[h]ere in the United States freedom of association has long provided an essential link between the exercise of human rights and conditions of employment. Nineteenth-century workers justified their collective action, before the courts and before public opinion, as constitutionally sanctioned freedom of speech and association.”¹²⁰

3. North American Agreement on Labor Cooperation

The freedom of association was further reinforced by the United States’ ratification of the North American Agreement on Labor Cooperation (NAALC) in 1993.¹²¹ The NAALC was a side agreement to the North American Free Trade Agreement (NAFTA). Unlike other international conventions, NAALC affirms the right of each party to establish its own labor laws and regulations and imposed a duty to strive continually to improve labor standards.¹²² But Article 2 of the Agreement also provides that each member party must ensure that its labor laws provide for high labor standards.¹²³

The NAALC recognizes the freedom of association.¹²⁴ Specifically the Labor Principles in Annex I of the agreement state that the parties to the agreement commit to promote principles under each country’s domestic legal regime including the “freedom of association and protection of the right to organize.”¹²⁵ Article 4 of the treaty further binds the United States to ensure that parties with a legally recognized interest under its laws have access to the courts or administrative processes to enforce a member state’s labor laws.¹²⁶ The agreement allows for remedies to ensure enforcement of labor rights including orders, fines, penalties, imprisonment, and injunctions.¹²⁷ In turn, the Supreme Court’s decision in *Hoffman* served to diminish previously existing protections of labor rights, including the remedy of back pay to

119. Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, Jul. 1, 1949, 96 U.N.T.S. 257, 258.

120. David Montgomery, *Labor Rights and Human Rights: A Historical Perspective*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 16 (Lance A. Compa & Stephen F. Diamond eds., 1996).

121. North American Agreement on Labor Cooperation, Sept. 13, 1993, art. 2, 32 I.L.M. 1502 [hereinafter NAALC], reprinted in 2000 DOCUMENTS SUPPLEMENT TO NAFTA: A PROBLEM-ORIENTED COURSEBOOK 396 (2000) (affirming full respect for each Party’s constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations. Each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light).

122. *Id.*

123. *Id.*

124. *Id.* at 395-96.

125. *Id.* at 395.

126. NAALC, *supra* note 121, at 397.

127. *Id.* at 398.

undocumented workers in the United States.¹²⁸ The Court's decision in *Hoffman* recognized the legal interest of undocumented immigrant workers as "employees," but it did not ensure proper enforcement of their rights under domestic law.

B. Customary International Law

Customary international law arises when a state considers itself required to act or to refrain from acting in a specific manner. This requirement of consistent state practice over time must stem from a sense of legal obligation that such state acts are required by law, also known as *opinio juris*.¹²⁹ In the context of human rights, several customs have been recognized, including prohibitions against genocide, torture, slavery, extra-judicial disappearance or murder, arbitrary detention, and racial discrimination.¹³⁰ While many of these rules have been codified into treaty law, customary rules do not have to be written down in order to prove their existence.¹³¹ One of the most important aspects of customary international law is that it is binding on states, whether they have consented to it or not. The only way a state may not be bound is by consistent and express objection to the rule during its formation.¹³²

Customary international law creates legal obligations that may bind the United States. As early as 1784, the Supreme Court recognized that the international law is considered to be part of the law of the United States.¹³³ The United States generally considers customary international legal rules to be incorporated into its domestic legal order.¹³⁴ In *Paquete Habana*, the Supreme Court stated:

[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.¹³⁵

Thus, customary international law is considered federal law and is supreme over state law.¹³⁶ Treaties and statutes may supersede customary international law, however. Where a statute is ambiguous, U.S. courts will attempt to interpret federal law so as to avoid conflict with international law, whether that

128. *Hoffman*, 535 U.S. at 151.

129. WEISSBRODT, *supra* note 56, at 22.

130. *Id.* at 209-10.

131. *Id.* at 22.

132. *Id.* at 719.

133. *Republica v. De Longchamps*, 1 U.S. 111, 112 (1784).

134. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

135. *Id.* at 677.

136. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-32 (1964).

international law is in the form of a treaty or custom.¹³⁷ United States courts have recognized customary international law, including human rights norms, in which there is a consensus in the international community that the right is protected and where there is a shared understanding of the scope of that protection.¹³⁸ Generally, the development of customary human rights law is established differently than other customary law, due to the historic notion that human rights have been a matter treated between a state and its citizens.¹³⁹

Support for the proposition that freedom of association has risen to the level of customary law also stems from several sources including international instruments that recognized the freedom of association as a fundamental right. Several international bodies, including the ILO, have stated that “freedom of association has become a customary rule.”¹⁴⁰ Further evidence of *opinio juris* is state adoption of domestic laws that protect the freedom of association. As discussed above, labor laws in the United States clearly protect the right of employees to form trade unions.¹⁴¹ Additionally, as demonstrated below, several other sources can be used to demonstrate the acceptance of freedom of association as part of customary international law.

1. National Legislation

Many countries have explicitly recognized the right to freedom of association in the texts of their legal instruments, such as constitutions or statutes.¹⁴² National legislation recognizing the right to association and supporting legislation providing protection of such a right is evidence of consistent state practice over time that stems from a sense of legal obligation. In Europe, both national and European Union law protects the freedom of association. For example, the right to freedom of association and assembly is

137. *The Charming Betsy*, 6 U.S. (2 Cranch) 108, 109 (1804).

138. *Stephens*, *supra* note 63, at 464; *Filartiga v. Pena-Irala*, 630 F.2d 867, 884 (2nd Cir. 1990); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997).

139. RESTATEMENT (THIRD) OF THE LAW OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. b (1986). Practices accepted as building customary human rights law include: virtually universal adherence to the United Nations Charter and its human rights provisions and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even only in principle. *Id.*

140. INTERNATIONAL LABOUR OFFICE, THE TRADE UNION SITUATION IN CHILE: REPORT OF THE FACT-FINDING AND CONCILIATION COMMISSION ON FREEDOM OF ASSOCIATION ¶ 466, at 108 (1975) (finding that although Chile had not ratified the Freedom of Association and Protection to of the Right to Organize ILO Convention No. 87, its membership to the ILO bound it to the Convention; further noting that the freedom of association has become customary international law).

141. 29 U.S.C. § 141 *et. seq.* (2004).

142. For more information see ILO Natalex database available at http://www.ilo.org/dyn/natlex/natlex_browse.home?p_lang=en (last viewed Apr. 18, 2004).

recognized by the Charter of Fundamental Rights of the European Union.¹⁴³ The European Court of Human Rights has interpreted this right in the context of the European Convention on Human Rights.¹⁴⁴

Several countries protect the right to freedom of association through constitutional provisions. Under such a legal scheme, the constitutional recognition of the right to organize trade unions or freedom of association is regarded as a fundamental source of labor law in that particular country. For example in South Korea, Article 33 of the 1987 Constitution guarantees the right of workers to organize.¹⁴⁵ This constitutional provision serves as a basis for further labor legislation.¹⁴⁶ Other countries recognizing a constitutional right to the freedom of association include: Brazil,¹⁴⁷ Canada,¹⁴⁸ Germany,¹⁴⁹ Japan,¹⁵⁰ Mexico,¹⁵¹ Italy,¹⁵² South Africa,¹⁵³ and Spain.¹⁵⁴

Other countries, including the United States,¹⁵⁵ do not recognize the right to form trade unions in their constitutions, but explicitly recognize this right under national or federal laws. For example, the United Kingdom bases this right on various common law rules, statutory principles, and treaty ascension so that discrimination based on, or prohibition of, a worker's membership to a

143. Charter of Fundamental Rights of the European Union, art. 12, Dec. 7, 2000, 2000 O.J. (C 364) 1, *in* SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 28, 271 (2001).

144. Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Sept. 3, 1953, art.11, 213 U.N.T.S. 222, *reprinted in* SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 245 (2001); *Wilson v. United Kingdom*, App. No. 30668/96, 35 Eur. H.R. Rep. 20, 523 (2002).

145. 2 INTERNATIONAL LABOR AND EMPLOYMENT LAWS *supra* note 74, at 36-37.

146. *Id.*

147. BRAZ. CONST. Ch. 11 art. 8, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 13 (2002) (persons are free to form professional trade unions).

148. CAN. CONST. § 2, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 61 (1999) (everyone is entitled to freedom of association).

149. F.R.G. CONST. art. 9, para. 3, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 9 (2003) (freedom of association to improve work and economic unions for everyone).

150. JAPAN CONST. art. 28, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 17 (1990) (workers have a right to organize and bargain collectively).

151. MEX. CONST. art. 123, § XVI, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 100 (1998) (Every person has a right to form unions).

152. ITALY CONST. art. 18, 39, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 4 (2003) (Art. 18 protects citizens right to form trade associations freely, and Art. 39 states that trade union organization is free).

153. S. AFR. CONST. art. 18, 23, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 14 (2004) (Art. 18 states that everyone has freedom of association, and Art. 23 that every worker has right to form trade unions).

154. SPAIN CONST. art. 22, 28, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 7 (2003) (Art. 22 recognizes the right of association, and Art. 28 that all persons have the right to unionize freely).

155. 29 U.S.C. § 157, § 201 (2000).

union is unlawful.¹⁵⁶ Other examples of countries that recognize the freedom of association by statute include Australia¹⁵⁷ and Singapore.¹⁵⁸

2. Non-Binding Resolutions and Treaties

The Universal Declaration of Human Rights (UDHR), passed in 1948, delineated specific universal human rights.¹⁵⁹ Because it was passed as a declaration of the General Assembly of the United Nations, many states considered it a statement of principles rather than binding international law.¹⁶⁰ In the United States, some courts have reasoned that while the UDHR is not a treaty, it has “an effect similar to a treaty,” including the acceptance of the UDHR as customary international law.¹⁶¹ The UDHR holds that everyone has the right to peaceful assembly and association.¹⁶² The UDHR further indicates that everyone has rights to freedom of association and to form trade unions.¹⁶³

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) was adopted by the United Nations General Assembly in 1990.¹⁶⁴ The Convention is an important standard for the protection of the rights of non-national workers.¹⁶⁵ The Convention has not entered into force.¹⁶⁶ The ICMW recognizes the principle of equal treatment between migrant and national workers with respect to conditions of work and terms of employment.¹⁶⁷ The Convention also places an obligation upon state and private parties to guarantee the rights of migrant workers, without distinction as to their nationality or immigration status.¹⁶⁸ While the ICMW explicitly allows states to legislate immigration laws, including the exclusion of aliens, it does not allow unfair applicability of labor laws to those same aliens.¹⁶⁹ As noted above, the ICMW is not binding, and

156. 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 74, at 7-1 to 7-56.

157. 2 INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 74, at 34-20 to 34-21.

158. *Id.* at 35-12 to 35-13.

159. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948) [hereinafter UDHR], in UNITED NATIONS RESOLUTIONS 135 (1973).

160. *But see* Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (the UDHR is “an authoritative statement of the international community”).

161. *Beharry v. Reno*, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002).

162. UDHR, *supra* note 158, at art. 20.

163. *Id.* at art. 23, ¶ 1.

164. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 45/158, *adopted by General Assembly*, December 18, 1990, art. 25. GA res. 45/158 [hereinafter ICMW].

165. CHOLEWINSKI, *supra* note 16, at 137.

166. OFFICE OF THE UNITED NATIONAL HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 94.

167. ICMW, *supra* note 163, at art. 25.

168. *Id.* at art. 7; CHOLEWINSKI, *supra* note 16, at 157.

169. CHOLEWINSKI, *supra* note 16, at 155.

the United States is not a signatory to the instrument. But this Convention is persuasive evidence that the rules and norms that have been derived from other national and international instruments, as applied to the rights of migrant/immigrant workers, have in fact risen to the level of customary international law.

3. Industry Codes of Conduct

Aside from the development of treaties or jurisprudence, many international bodies and conferences have developed instruments such as “codes of practice,” “standards,” and “resolutions.”¹⁷⁰ These instruments are sometimes referred to as “soft law,” as they are not legally binding.¹⁷¹ The development of these rules may either signify a further codification of existing customary law or indicate the emergence of new rules of customary law.

External voluntary codes developed by nongovernmental organizations, private corporations, and other international actors further harmonize the principles of workplace conduct and lend support to the contention that the right to organize has risen to the level of customary international law. On August 13, 2003, the U.N. Sub-Commission on the Promotion and Protection of Human Rights adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.¹⁷² This voluntary code of conduct explicitly recognized the freedom of association for employees in conformity with international treaties and covenants.¹⁷³ This code, like ILO conventions, places a primary obligation on states to ensure that corporations and business entities within their jurisdictions respect the rights of workers.¹⁷⁴

Individual corporations and trade associations in conjunction with labor, human rights, and religious groups have developed voluntary codes of conduct.¹⁷⁵ At least 240 voluntary codes of conduct addressing labor standards

170. WEISSBRODT, *supra* note 56, at 20.

171. *Id.*

172. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. Doc. A/Res/53/144 (2003), available at http://www.umn.edu/humanrts/intrce/Res_53_144.html (last viewed Apr. 18, 2004).

173. *See generally id.* at preamble, art. 9 (Transnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant conventions of the International Labor Organization).

174. Patrick Macklem, *Labour Law Beyond Borders*, 5 J. OF INT'L ECO. L. 605, 605 (2002).

175. INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 74, at 51-5 to 51-7 (Noting that the Levi Strauss & Co. Corporate Code of Conduct was one of the first. Trade

have been identified,¹⁷⁶ and at least forty-two corporations worldwide make explicit reference to the adoption of human rights standards in their own codes of conduct.¹⁷⁷ Some of these voluntary codes of conduct explicitly recognize the freedoms of association and collective bargaining for workers.¹⁷⁸ For example, the Fair Labor Association (FLA) has promulgated rules obliging members to comply with policies regarding child labor, discrimination, and freedom of association.¹⁷⁹ An example of another developed standard is the Social Accountability 8000 (SA8000) authored by the Council on Economic Priorities Accreditation Agency (CEPAA). This standard encourages companies to apply socially acceptable workplace practices in factories around the world.¹⁸⁰ The SA8000 uses ILO Conventions and other human rights instruments as a basis for its rules. The code specifies minimum compliance in the area of the rights to association and collective bargaining, among others.¹⁸¹

These norms are evidence and instruments of a developing custom.¹⁸² The traditional focus on state obligations to enforce rights under domestic and international law has seen a shift towards corporations as entities capable of rule-making authority.¹⁸³ Significant numbers of state and business entities have, over time, acted with the intent to be legally bound by these principles, thus giving them legal effect. While these voluntary norms would not be considered legally binding instruments, they can be adopted as an authoritative interpretation of the responsibilities of business under international labor and human rights law.¹⁸⁴ The norms serve not as an end in themselves, but as an important step toward the development of international human rights law. These norms can be applied toward state and non-state actors in promoting a legally binding regime for corporate conduct.

C. *Current International Legal Efforts*

Current advocacy efforts have called into question the Supreme Court's decision in *Hoffman* and have asked whether it can withstand scrutiny under international law. In two recent actions brought forth to recognize the

Association Models include the National Retail Federation Statement of Principles on Supplier Legal Compliance and the International Council of Toy Industries (ICTI) Code of Business Practices).

176. *Id.* at 51-1.

177. See generally Business and Human Rights Resource Centre, at <http://www.business-humanrights.org/Categories/Companies/Policies/Companieswithhumanrightspolicies> (last visited Apr. 18, 2004).

178. INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 74, at 51-8.

179. *Id.* at 51-9.

180. *Id.* at 51-12.

181. *Id.*

182. *Id.*

183. Macklem, *supra* note 174, at 632.

184. WEISSBRODT, *supra* note 56, at 22.

international labor rights of undocumented immigrant workers, governments and NGOs have utilized international legal mechanisms to call into question the Court's decision. Currently, no decision has been made in either case.

In November 2002, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submitted a complaint before the ILO Freedom of Association Committee against the government of the United States.¹⁸⁵ The complaint alleged that the United States Supreme Court decision in *Hoffman* violated the rights of undocumented workers including the right of freedom of association, the right to organize, and the right to bargain collectively.¹⁸⁶ The complaint further alleged that the United States was in breach of obligations under ILO Conventions Nos. 87 and 98 under the 1998 Declaration on Fundamental Principles and Rights at Work.¹⁸⁷

Complaints may be lodged by either employers or worker rights organizations to the International Labor Office, alleging that a member state has failed to implement its Convention obligations.¹⁸⁸ Matters relating to the freedom of association are handled using a special procedure to supervise the implementation of this principle and to assure its application.¹⁸⁹ Under this procedure, parties may submit a complaint to the Committee on the Freedom of Association (CFA) regardless of whether the state has ratified Convention No. 87 concerning the freedom of association or Convention No. 98 concerning the right to organize.¹⁹⁰ Under the ILO procedures, a complaint that is received and adopted would not have the effect of overturning the Supreme Court decision. If the CFA determines that a complaint is violative of the Conventions, it may express concern to the government, recommend steps to remedy the situation, request a follow-up report, or initiate further investigation into the matter.¹⁹¹

Additionally, in the wake of the decision in *Hoffman*, the Mexican Government requested an advisory opinion from the Inter-American Court of Human Rights.¹⁹² The request asked the Court to consider whether the United States was in violation of its international legal obligations by limiting labor law remedies based on immigration status.¹⁹³ Several *amicus curiae* briefs were also filed with the Inter-American Court of Human Rights at the request

185. *AFL-CIO Complaint Filed with United Nations*, DAILY LAB. REP. (BNA), Nov. 12, 2002, at 1.

186. *Id.*

187. *Id.*

188. CHOLEWINSKI, *supra* note 16, at 87.

189. *Id.*

190. *Id.*

191. INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 74, at 40-27.

192. Cleveland, *supra* note 5, at 796.

193. *Id.*

of the government of Mexico.¹⁹⁴ An *amicus* brief written on behalf of labor, civil, and immigrant's rights organizations in the United States claimed that the United States was in violation of its international obligations by failing to protect the right to freedom of association and to bargain collectively.¹⁹⁵ The brief argued that the unequal application of the law is a further violation of international law because it is discrimination based on nationality.¹⁹⁶ Further, the brief enumerated several anecdotal harms that arose because of the Court's decision in *Hoffman*.¹⁹⁷

V. RIGHT TO AN EFFECTIVE REMEDY FOR IMMIGRANT WORKERS

The modern concept of human rights law has well established that individuals are protected without regard to their status as nationals or aliens.¹⁹⁸ Several United Nations resolutions relating to the rights of migrant/immigrant workers also have been contemplated and adopted by the international community.¹⁹⁹ These resolutions and work of the special committees of the United Nations and the International Labor Organization led to an emphasis that existing ILO instruments should protect migrant workers no matter their immigrant status.²⁰⁰ Further, as referenced above, many of the international treaties regarding the freedom of association obligate a state to provide access to a judicial process and an adequate remedy for violations of those rights. For example, Article 26 of the ICCPR requires equality before the law regardless of "national origin . . . or other status."²⁰¹ The UDHR and customary

194. *Id.* (briefs filed by the Government of Mexico along with several groups in the United States).

195. *Id.* at 812.

196. *Id.* at 814.

197. Cleveland, *supra* note 5, at 817.

198. U.N. CHARTER, art. 55(c), *reprinted in* SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 14 (2001) ("The United Nations shall promote . . . universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.").

199. CHOLEWINSKI, *supra* note 16, at 139. The UN promulgated several resolutions in the 1970s regarding migrant worker rights including, GA res. 2920 (1972), *reprinted in* UNITED NATIONS RESOLUTIONS 135 (1978); GA Res. 3224 (1977), *reprinted in* UNITED NATIONS RESOLUTIONS 135 (1984); GA Res. 3449 (1975), *reprinted in* UNITED NATIONS RESOLUTIONS 135 (1984); GA Res. 31/127 (1976), *in* UNITED NATIONS RESOLUTIONS 366 (1984); GA Res. 32/120 (1977), *reprinted in* UNITED NATIONS RESOLUTIONS 615 (1984); GA Res. 33/163 (1978), *reprinted in* UNITED NATIONS RESOLUTIONS 402 (1984).

200. CHOLEWINSKI, *supra* note 16, at 139-40.

201. ICCPR, *supra* note 94, at art. 26.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any

international law also establishes that a right conferred in a legal regime is entitled to an effective remedy.²⁰²

The ILO's current policy regarding national immigration laws and international labor rights states:

[m]embers should apply the provision of this Recommendation within the framework of coherent policy on international migration for employment. That policy should be based upon the economic and social needs of both countries of origin and countries of employment; it should take account not only of short-term manpower needs and resources but also of the long-term social and economic consequences of migration for migrants as well for the communities concerned.²⁰³

The ILO has noted, in a case involving the rights of undocumented workers in Spain, that a country's legislation involving the prohibition of foreign workers can be justified.²⁰⁴ However, that same case reinforced the ILO position that the right of a country to exclude foreigners should not impinge on the fundamental right of association in contravention of ILO Convention No. 87.²⁰⁵

The Supreme Court's decision in *Hoffman* conferred a right without an effective remedy under the NLRA.²⁰⁶ The Court's decisions regarding remedies for undocumented workers who have suffered a violation under the NLRA only attempted to settle conflicts as they might exist between labor and immigration laws.²⁰⁷ However, the Court's construction of labor and immigration laws did not consider the United States' international legal obligations with respect to both worker and immigrant rights.²⁰⁸ If viewed in this context, the Court's decision in *Hoffman* runs afoul of U.S. international legal obligations. In other words, failure of an appropriate remedy for undocumented immigrant workers who have been fired for their union activities flouts the United States obligations under treaty and customary international law.²⁰⁹

ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id.

202. WEISSBRODT, *supra* note 56, at 771-72.

203. CHOLEWINSKI, *supra* note 16, at 96.

204. See ILO, 327TH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION, Case No. 2121 (Spain), GB.283/8, ¶ 561 (Mar. 2002).

205. *Id.*

206. Robin, *supra* note 10, at 692; Nessel, *supra* note 21, at 352.

207. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 883 (1984).

208. Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastics Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L.REV. 1, 28 (2003).

209. See *supra* notes 201, 202 and accompanying text.

Detractors of this position may argue that *Hoffman* did not strip all remedies for undocumented workers. In fact, these workers are still afforded the right to cease and desist orders from a court for violation of the NLRA and to the requirement that an employer post notices of employee rights under the Act.²¹⁰ Detractors might further argue that while customary international law may confer a right to a remedy, it does not specify the type of remedy to which an undocumented worker is entitled. This argument, while compelling, does not take into account principles of non-discrimination in application of the law.²¹¹ Congress clearly set forth its mandate for a remedy of back pay for workers fired in contravention of the NLRA. The Supreme Court's decision to deny the right of back pay to a worker based on his or her immigration status violated the principle of non-discrimination.²¹² Further, Congress acted under immigration law to create civil and criminal penalties for employing undocumented workers and did not choose to preempt remedies for these same workers under the NLRA.²¹³ The Supreme Court in rendering its decision to deny the remedy of back pay imposed a separate penalty on undocumented workers not contemplated by Congress.

VI. CONCLUSION

There is general agreement that the ATCA is an appropriate method for protecting human rights, although litigation promoting the use of the ATCA for labor rights is scarce. The difficulty with the position of this paper is the recognition of a two-step violation. First, the violation of the freedom of association involves an act on the part of a private employer. Secondly, it also involves the failure of the state to enforce the right properly.

The proposition that the Supreme Court's decision violates both treaty and customary law is likely to garner much skepticism, despite the evidence demonstrated above. Further, the call to utilize the ATCA to vindicate the freedom of association for undocumented workers will not likely be heeded in the near future. But, it has been suggested that the ATCA was intended to provide a remedy "rarely provided in international law."²¹⁴ International law, while remotely enforceable through a system of global or regional institutions, is best enforced using national mechanisms. The enforcement of international human rights norms plays a critical role in the implementation of international law.²¹⁵ Noted scholar Joan Fitzpatrick may have summarized the future role of the ATCA well when she stated:

210. *Hoffman*, 535 U.S. at 152.

211. ICMW, *supra* note 164, at art. 7, 25; CHOLEWINSKI, *supra* note 16, at 156-57.

212. *Id.*

213. *See supra* note 35 and accompanying text.

214. WEISSBRODT, *supra* note 56, at 771.

215. *See Stephens, supra* note 63, at 450-51.

This two-hundred-year old statute is beginning to achieve its full flowering not only as a vehicle for vindicating the rights of victims of extreme tortious conduct but also as an emblem of the United States' commitment to respect the principles of customary international law and faithful provisions of judicial remedies for its breach, despite the cynicism, indifference, or impotence of other states and international institutions.²¹⁶

The developing and uncertain nature of ATCA litigation for violations of human rights and labor rights makes a decision to pursue such an action in court difficult at best. The practicalities of enforcing the right of association and remedy for undocumented workers via the ATCA in the United States faces considerable obstacles, only one of which is demonstrating before a court of law that the right of association falls within the realm of the law of nations.²¹⁷ But, by taking the decision of the Court in *Hoffman* outside the context of domestic labor and immigration policy and placing it squarely in the context of international law, perhaps recognition that "illegal aliens" have enforceable rights will serve as an alarm for employers who would otherwise believe that these workers have no rights at all.

FAYE M. KOLLY*

216. Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In Re Marcos Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491, 521 (1993).

217. See Cleveland, *supra* note 5, at 1574.

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