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Seen but Not Heard: Child Soldiers Suing Gun Manufacturers under the Alien Tort Claims Act

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NOTE

SEEN BUT NOT HEARD: CHILD SOLDIERS SUING GUN MANUFACTURERS UNDER THE ALIEN TORT CLAIMS ACT

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INTRODUCTION

International human rights law is a body of rules primarily regulating the rights and obligations individuals owe one another as members of a collective society.[1] Humans' stay on earth is temporary, and

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[1] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) (A), U.N. GAOR, 3d Sess., at 71–72, U.N. Doc. A/810 (1948) [hereinafter UDHR] (

> The [United Nations] General Assembly,
> Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . . .
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

(emphasis omitted)). The Inter-American Commission on Human Rights has held that states have a positive obligation to prevent violations of human rights by private actors, and therefore if human rights abuses occur, the state must show that it made its best effort to prevent such violations. *See* Velásquez Rodríguez Case, Case 4, Inter-Am. C.H.R. 35, OEA/ser. C./No.4, doc. 13, paras. 165–167 (1988), *available at* http://www.corteidh.or.cr/seriecing/serie_c_4_ing.doc.

this fleeting visit does not come without transactional costs represented by exercising reciprocal rights and obligations we owe one another as members of a collective society.[2] However, this social *quid pro quo* is attenuated on the human rights landscape when what is bargained for and exchanged lacks the participatory input of all stakeholders, resulting in exclusion and exploitation. The essence of human rights law is to implement and enforce minimum standards[3] in the regulation of individual and collective rights. What is required is an entire transformative process where the quality of life for men, women and children is revolutionized.

The framework of structure and agency is useful in illustrating the tension arising from institutional arrangements that have both liberating and oppressive effects.[4] Law, as a structural institution, not only regulates rights and obligations, but also redefines and recreates spaces in which individuals can negotiate and exploit both new and existing rights and obligations. Yet only those who are aware of these spaces and have the requisite vernacular to navigate them hy virtue of their training, wealth, and privilege are able to benefit from legal institutions. Thus, those who lack the sophistication and knowledge of the institutional *lingua franca* are excluded or marginalized, and are thereby severely disadvantaged.

The most empowering aspect of this theoretical framework is agency—the ability of individuals to renegotiate, recontest, and redefine their role within a given set of structures.[5] Agency describes individuals' ability to make institutional arrangements accountable to them.[6] Law is empowering because it creates room for maneuverability, allowing one to make incremental changes to repressive structures. Ideally, it strives for a policy that is beneficial to the whole, whether attainable or not. The view of some legal scholars that law should not be used as a society-wide insurance policy simply exposes

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2 Douglass C. North, Nobel Laureate, argues that societal success flourishes with the existence of legal and governmental institutions that protect individual freedoms, enforce contracts, combat crime, and provide access to the courts. *See generally* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (arriving at this conclusion).

3 *See, e.g.*, UDHR, *supra* note 1.

4 *See generally* 21 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 14223–33 (Neil J. Smelser & Paul B. Baltes eds., 2001) (describing the dynamic relationship between structural arrangements and individual actors, and how various modifications of it can effect social change).

5 *Cf. id.* at 14228–32 (discussing individual actors' attempts and ability to transform structural arrangements leading to social change).

6 *See id.* at 14229–30.

the reality that only a few are secure.[7] Yet, intrinsic to the ideals of human rights law is the protection of all human beings.[8]

This Note explores how the Alien Tort Claims Act, an instrument of international law, can empower child soldiers (the agents) by holding weapons manufacturers accountable for the increased armed conflicts caused by the proliferation of small arms and light weapons (the structure). Through this case study, the Note seeks to illuminate the strengths and limitations of international law in protecting defenseless individuals. Structure and agency theory serves as the Note's guiding principles. Part I outlines the foundational issues regarding small arms and light weapons proliferation. It also highlights several failed attempts by the international community to address this issue via treaties and national legislation, thus necessitating another solution. Part II further discusses the humanitarian consequences of the proliferation problem, specifically focusing on the plight of child soldiers. In addition, it contains a general discussion of the international law governing children. Part III evaluates the Alien Tort Claims Act as a legal mechanism that allows child soldiers to maneuver for change within the status quo's oppressive structure. Finally, Part IV argues that gun manufacturers who know or have reason to know that those to whom they sell weapons use child soldiers should be liable under the Alien Tort Claims Act.

I

THE ISSUE OF SMALL ARMS AND LIGHT WEAPONS (SALW)

"The most potent symbol of conflict and violence in the closing years of the 20th century [was] the AK47."[9]

The prevailing literature is clear: small arms and light weapons[10] are causally related to international security and human rights abuses.[11] According to the United Nations Institute for Disarmament

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7 *See, e.g.*, discussion *infra* notes 58–61 and accompanying text (questioning the proper role of tort law in domestic gun litigation).

8 *See supra* note 1 and accompanying text.

9 UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, DISARMAMENT AND CONFLICT RESOLUTION PROJECT, SMALL ARMS MANAGEMENT AND PEACEKEEPING IN SOUTHERN AFRICA 1 (1996) [hereinafter DISARMAMENT].

10 Small arms and light weapons include both military-style weapons and commercial firearms (i.e., handguns and long guns). *See* GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM 8 (2001) [hereinafter SMALL ARMS SURVEY]; *see also* DISARMAMENT, *supra* note 9, at xv–xvi ("Small arms . . . include pistols, machine-guns, rocket launchers, anti-personnel grenades and the . . . AK-47 assault rifle.").

11 *See, e.g.*, SMALL ARMS SURVEY, *supra* note 10, at 2 (quoting United Nations Secretary-General Kofi Annan: "The proliferation of small arms sustains and exacerbates armed conflicts . . . . It undermines respect for international humanitarian law." (emphasis omitted)); HUMAN RIGHTS WATCH ARMS PROJECT, ARMING RWANDA: THE ARMS TRADE AND HUMAN

Research, "small arms [are a] part of those sources of conflict that have been called the 'proximate causes' of internal conflicts."[12] Indeed, "it is the proximate causes that transform potentially violent situations into full-scale confrontations."[13] The small arms and light weapons[14] proliferation problem is a relatively new phenomenon on the international scene.[15] The roots of the problem can be traced to the days of the Cold War when the United States and the Soviet Union jockeyed for the loyalties of Third World nations.[16] During this period, these superpowers either donated weapons to developing nations as "military aid," or granted them under "soft loan arrangements."[17] However, it was primarily the end of the Cold War that caused small arms manufacturers to seek alternative markets abroad and flock to developing countries in Asia and Africa to compensate for domestic defense budget cuts.[18]

Because private companies produce most of the SALW, governments' control of the manufacture, possession, and trade in small arms has decreased in recent years.[19] As one recent survey noted, 600 manufacturing firms in approximately 95 countries produce small arms, light weapons, or other types of ammunition and parts.[20] Another study estimated that approximately 385 manufacturing compa-

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RIGHTS ABUSES IN THE RWANDAN WAR 4 (1994) ("The influx of weapons from foreign sources . . . contribute[s] significantly to needless and abusive civilian deaths and suffering.").

12 BOBI PIRSEYEDI, UNITED NATIONS INSTITUTE FOR DISARMENT RESEARCH, THE SMALL ARMS PROBLEM IN CENTRAL ASIA: FEATURES AND IMPLICATIONS 6 (2000).

13 *Id.*; *see also Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), Paragraph 19, in Relation to Sierra Leone*, U.N. SCOR, 55th Sess., ¶ 167, U.N. Doc. S/2000/1195 (2000) [hereinafter *UN Panel of Experts*] ("Small arms play an important role in sustaining conflicts, in exacerbating violence, in contributing to the displacement of innocent populations and threatening international law, and in fuelling crime and terrorism."), *available at* http://www.un.org/Docs/sc/committees/SierraLeone/SLselectedEng.htm. This Note does not argue that the proliferation of small arms is the sole proximate cause of conflicts around the world. Indeed other factors such as poverty, illiteracy, family issues and weak governance have a role to play. This Note simply argnes that SALW exacerbate conflicts, resulting in severe humanitarian abuses such as the illegal use of children as combatants.

14 The scope of this problem ranges from human rights and humanitarian law to public health, arms control and disarmament, and even to issues of terrorism and criminality. *See* SMALL ARMS SURVEY, *supra* note 10, at 2.

15 *Id.*

16 *See* CAMPAIGN AGAINST ARMS TRADE, DEATH ON DELIVERY: THE IMPACT OF THE ARMS TRADE ON THE THIRD WORLD 10 (1989).

17 *Id.*

18 *See* PIRSEYEDI, *supra* note 12, at 8; *see also* DISARMAMENT, *supra* note 9, at 1 (noting that while "not purely a post-Cold War phenomenon . . . . the impact and social cost of light weapons proliferation" grew with the withdrawal of superpower patronage).

19 *See* SMALL ARMS SURVEY, *supra* note 10, at 7.

20 *Id.* at 3.

nies in 64 countries produced arms in the 1990s—almost a two hundred percent increase from the prior decade.[21]

A. The Legal and Illegal Trade of SALW

While this Note specifically addresses the illicit[22] trade of arms, it must be noted that the legal and illegal SALW trades go hand in hand.[23] This dual trade[24] "passes through legal channels under the guise of fulfilling a civilian function."[25] Globally, the legal SALW trade is valued at an estimated $4–6 billion annually, and accounts for eighty to ninety percent of the total annual value of the small arms trade.[26] At the same time, SALW represent only five percent of the total value of legal arms exports.[27] Although this is a small percentage, SALW exports account for as much as ninety percent of casualties in armed conflicts.[28]

In addition to this legal trade,[29] there is also a substantial illicit SALW market. The illicit market includes

> sales to recipient countries that have no identifiable legal government or authority . . . and transfers by governments to non-state actors (i.e. rebel and insurgent groups). In addition, there are cases where governments illegally hire brokers to transfer weapons (e.g. the 'Iran-Contra Affair'). Such transfers may be in violation of the supplier and/or recipient country's national laws or policies. They may also contravene international law. Regulating [this] market . . . poses . . . the greatest challenge to the international community today.[30]

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21 *See id.* at 9; *see also* Ken Epps, *Canadian Military Exports—No Change in Volume or Practice,* PLOUGHSHARES MONITOR (June 2001) ("Canada closed the first post-Cold War decade with arms exports 15 percent higher than when it began."), http://www.ploughshares.ca/content/MONITOR/monj01b.html (last visited Apr. 17, 2004).

22 This Note uses the terms "illicit" and "illegal" interchangeably. The illicit market has two interconnected areas, the "grey market" and the "black market." *See* SMALL ARMS SURVEY, *supra* note 10, at 165. "[G]rey market transfers are usually *covert,* conducted by governments, government-sponsored brokers, or other entities, that exploit loopholes or intentionally circumvent national and/or international law or policies." *Id.* at 166 (emphasis added). Black market transfers, by contrast, include the "type of illegal arms 'trafficking' tak[ing] place in clear violation of national and/or international laws and policies, and without the government's official knowledge, consent, or control." *Id.*

23 *See id.* at 165–68.

24 *See* CAMPAIGN AGAINST ARMS TRADE, *supra* note 16, at 18–19.

25 *Id.* at 19 (italics omitted).

26 *See* SMALL ARMS SURVEY, *supra* note 10, at 141.

27 *See id.* at 145.

28 *See id.*

29 Legal arms transfers are "those carried out by governments or their authorized agents in accordance with both international and national laws and with the policies of exporting and [importing] states." *Id.* at 141.

30 *Id.* at 166.

It is this type of illicit small arms trade that fuels civil strife and presents the largest global threat in terms of armed conflict.[31]

B. The Relationship Between SALW and Armed Conflict

1. *The Accessibility Thesis*

The accessibility thesis posits that access to guns "facilitates violence."[32] Undoubtedly, this is a highly contested proposition. Proponents of this theory argue that both the availability and the actual acquisition[33] of small arms unquestionably contribute to the intensification of warfare and criminality.[34] They contend that "[i]t is not only the availability of arms [but] *the arms themselves* that condition violence."[35] Further, some argue that arms-manufacturing governments and firms "disseminat[e] . . . a deliberately fabricated culture of mistrust and confrontation, [engage in] direct 'market-creation' activities . . . [and] conspire to cultivate a demand for weapons. . . ."[36]

This thesis has significant implications for the international SALW trade. As defense sector budgets decrease in the wake of the Cold War, arms surpluses are "dumped" at extremely low prices into war zones, creating a buyer's market.[37] For example, "an AK47 complete with a couple of clips of ammunition can be bought for less than $15.00, or for a bag of maize."[38] The widespread availability of inex-

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31 *See id.* at 167 ("The illicit trade accounts for 10-20 percent of the total trade in small arms but [it] is the prime culprit in fuelling crime, civil conflict, and corruption.").

32 *Id.* at 202. For a more detailed discussion of the accessibility thesis and its implications, see *id.* at 202–05.

33 *See id.* at 204 ("Availability . . . is distinct from 'acquisition'—where the triggering effect of increased transfers on conflict outbreak is more clearly defined. But the two elements—availability and acquisition—frequently overlap.") (footnote omitted).

34 *See id.* at 204–05.

35 *Id.* at 205 (emphasis added).

36 PAUL CORNISH, CONTROLLING THE ARMS TRADE: THE WEST VERSUS THE REST 11 (1996).

37 *See* SMALL ARMS SURVEY, *supra* note 10, at 97 ("[T]he ready availability of massive surplus arms stocks from the West and the former Soviet bloc, together with new production, has created a flourishing 'buyer's market. . . .'"); *see also* CORNISH, *supra* note 36, at 3 ("With huge excesses in supply combined with declining demand, it is also a market in which much of the initiative has shifted to the buyer."); PIRSEYEDI, *supra* note 12, at 8.

38 DISARMAMENT, *supra* note 9, at 9; *see also* SMALL ARMS SURVEY, *supra* note 10, at 17 (same); Impact of Armed Conflict on Children: Report of the Expert of the Secretary General, Graça Machel, U.N. GAOR, 51st Sess., ¶ 27, U.N. Doc. A/51/306 (1996) [hereinafter *Machel Report*] ("[A]n AK-47 automatic machine gun can be purchased for the cost of a chicken [or] . . . for the price of a goat."), *available at* http://www.unicef.org/graca/a51-306_en.pdf .

pensive weapons like these tend to fuel conflicts,[39] as countries have a multitude of suppliers and weaponry from which to choose.[40]

Opponents of the accessibility thesis oversimplify the problem by arguing that people, not guns, kill.[41] Additionally, they note that gun legislation tends to create economies of scale in the weapons manufacturing industry, which serves as a catalyst to surplus production and unintentional diffusion.[42] Other researchers argue that accessibility to arms improves self-protection, which may even aid in "reduc[ing] mortality and morbidity."[43] They further point out that because countries have an interest in self-defense, stemming the flow of arms exports would only result in buyers going elsewhere.[44] In other words, "if we don't export, others will."[45] This argument finds support in Article 51 of the United Nations Charter, which establishes a state's right "to defend itself and . . . to decide for itself what, and from whom, to buy in the arms market . . . ."[46] Therefore, opponents of the accessibility thesis reason, "[w]hy . . . should jobs, foreign earnings, and an important sector of national industrial life, be sacrificed to some vague and pious idea of self-restraint . . . ?"[47] Even if the few Western suppliers who dominate the market were to exercise self-restraint, the effect would be limited since a significant portion of the international market is outside of their control.[48]

2. *Contextualizing the Issue: U.S. Gun Litigation*

a. *The U.S. Gun Lobby: A Look at the National Rifle Association (NRA) and Its Opponents*

While the current debate in American politics and jurisprudence regarding gun litigation may not be directly relevant to a suit against

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39 *See generally* CAMPAIGN AGAINST ARMS TRADE, *supra* note 16, at 81–97 (describing the role of arms in fueling violent conflicts); HUMAN RIGHTS WATCH ARMS PROJECT/AFRICA, ANGOLA: ARMS TRADE AND VIOLATIONS OF THE LAWS OF WAR SINCE THE 1992 ELECTIONS (1994) (documenting the role of arms in maintaining the rebel group UNITA's insurgency against the Angolan government and citizenry).

40 *See* SMALL ARMS SURVEY, *supra* note 10, at 16, 20–24 (listing the most notorious producers and types of small arms).

41 *See id.* at 202.

42 *Id.*

43 *See id.*

44 *See* CORNISH, *supra* note 36, at 3–4.

45 *Id.* (internal quotation marks omitted).

46 *Id.* at 5; U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs. . . ."). *But see Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 282 (June 27) (separate opinion of Judge Ago) (holding that any use of force in self-defense must be necessary and proportionate to the impending and actual threat); Muna Ndulo, *International Law and the Use of Force: America's Response to September 11*, 28 CORNELL L.F., Spring 2002, at 5, 6–7 (same).

47 CORNISH, *supra* note 36, at 19.

48 *Id.* at 45.

gun manufacturers under the Alien Tort Claims Act,[49] it vividly illustrates the influence of gun manufacturers within the United States. The domestic debate centers on individual responsibility and the meaning of "the text and the original intent of the Second Amendment [to] clearly protect the right of individuals to keep and bear firearms."[50] Supporters of gun litigation argue that it is proper to hold manufacturers responsible as supervisors of retail gun sales because litigation forces them to install safety features that would render the guns inoperable for unauthorized users.[51] Opponents respond that lawsuits unjustly target gun manufacturers and serve as a roadblock to citizens exercising their constitutional right to bear arms or their ability to acquire guns for self-defense.[52] According to the 131-year old National Rifle Association, "[t]he very notion of trying to hold a lawful industry responsible for a criminal's actions defies logic[.]"[53]

With over four million members, the NRA is the nation's largest group lobbying state legislatures to pass immunity laws that would bar cities and municipalities from suing gun manufacturers.[54] Currently, thirty-one states have passed such laws.[55] The NRA asserts that the gun industry is law-abiding and therefore should not be held responsible for the actions of third parties.[56] Moreover, the NRA views such litigation as a means for "anti-gun extremists" to drive gun manufacturers into bankruptcy.[57]

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49 The impediments to suits against gun manufacturers in the United States under state tort law will not similarly impede a claim under the Alien Tort Claims Act; a court will apply the substantive law that provides a remedy for international wrongs. *See infra* Part III.C.2.a.

50 Letter from Bill Pryor, Alabama State Attorney General, to John Ashcroft, United States Attorney General (July 8, 2002) [hereinafter Letter to John Ashcroft] (internal quotation marks omitted), *available at* http://www.nraila.org/media/misc/pryorlet.PDF5. The Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. *But see* Silveira v. Lockyer, 312 F.3d 1052, 1056 (9th Cir. 2002) (noting that the Second Amendment "does not confer an individual right to [actually] own or possess" guns).

51 *See, e.g.*, Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1247 (2000).

52 *See id.*; News Release, National Rifle Association, NRA Applauds Mississippi for Passing Lawsuit Preemption (Dec. 3, 2002) [hereinafter NRA Preemption Law], *available at* http://www.nraila.org/News/Read/Releases.aspx?ID=2152.

53 *See* NRA Preemption Law, *supra* note 52 (internal quotation marks omitted).

54 *See id.*; *see also Lawsuit Preemption Remains Top Priority*, 10 NRA-ILA GRASSROOTS ALERT (Jan. 24, 2003) [hereinafter GRASSROOTS ALERT] ("[O]ne of [the] NRA's top priorities during this congressional session will be the passage of federal legislation that will prohibit these junk lawsuits."), *available at* http://www.nraila.org/CurrentLegislation/ActionAlerts/Read.aspx?ID=148.

55 *See* NRA Preemption Law, *supra* note 52.

56 *See id.*

57 *See id.*

Many legal academics support this position and argue that using litigation to regulate the gun industry destroys sound tort principles that "manufacturers are usually not responsible for criminal misuse of their products."[58] Others, however, counter that courts must impose a duty on gun makers to stop marketing guns to criminal elements or unauthorized users.[59] Still others argue that tort law complements legislative efforts to regulate the gun manufacturing industry.[60] This narrow argument claims that civil suits, which target marketing and sales practices resulting in increased criminal use of guns, will make the firearm industry more responsible and ultimately reduce gun violence.[61]

b. *Status of Municipal Lawsuits Against Gun Manufacturers*

As of 2001, courts dismissed nine of the twenty-three lawsuits against the firearms industry filed by thirty-two municipalities and one state Attorney General.[62] The primary challenge plaintiffs faced was demonstrating that manufacturers actually knew "how their guns were channeled toward illegal uses," and whether there was any "indication that they could have stopped the trafficking."[63] However, new information from an industry insider indicates that gun manufacturers knowingly maintained distribution systems and permitted guns to fall into the hands of unauthorized individuals such as children and criminals.[64] Robert A. Ricker, former chief lobbyist and executive director of the American Shooting Sports Council, underscored the firearms manufacturers' encouragement and reward of illegal activity by

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58 *See* H. Sterling Burnett, *Suing Gun Manufacturers: Hazardous to Our Health*, 5 TEX. REV. L. & POL. 433, 467 (2001). The concern is that there will be a domino effect—if tort principles are "completely discarded, the courts will be crushed under a tide of new lawsuits and it will not be long before the extremists among us try to use the law to shut industrial civilization down." *Id.*

59 *See* Amy Edwards, Notes & Comments, *Mail-Order Gun Kits and Fingerprint-Resistant Pistols: Why Washington Courts Should Impose a Duty on Gun Manufacturers to Market Firearms Responsibly*, 75 WASH. L. REV. 941, 943 (2000).

60 Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 5 (2000).

61 *Id.* This position cites as an example the role of the tort system in regulating the automotive industry. "While automobile design specifications are regulated [by a federal administrative agency], liability exposure for manufacturing, warning, and design defects provides a powerful incentive for manufacturers to adhere not merely to published regulations but to ensure that their car designs provide an optimal mix of safety and effectiveness." *Id.* at 62.

62 *See* Updates in Municipal Litigation, *at* http://www.firearmslitigation.org/content/newsletter/news_2001_vol15.html (last visited Feb. 12, 2003).

63 William Glaberson, *Gun Strategists Are Watching Brooklyn Case*, N.Y. TIMES, Oct. 5, 2002, at B1.

64 *See* Fox Butterfield, *Gun Industry Ex-Official Describes Bond of Silence*, N.Y. TIMES, Feb. 4, 2003, at A14.

corrupt dealers and distributors, and admitted that manufacturers place lawful, conscientious dealers at a disadvantage:

> The firearms industry . . . has long known that the diversion of firearms from legal channels of commerce to the illegal black market . . . occurs principally at the distributor/dealer level. Many of those firearms pass quickly from licensed dealers to juveniles and criminals . . . to gun traffickers . . . by corrupt dealers or distributors who go to great lengths to avoid detection by law enforcement authorities. [The] industry [has] long known that greater . . . action to prevent illegal transactions is possible and would curb the supply of firearms to the illegal market. However, until faced with a serious threat of civil liability for past conduct, [they] have consistently resisted taking constructive voluntary action to prevent firearms from ending up in the illegal gun market and have sought to silence others within the industry who advocated reform.[65]

Ricker's detailed comments prove what advocates of stricter gun regulations have consistently argued: that gun manufacturers are complicit in the illegal sale and use of weapons.

3. *The Unregulated SALW Market: A Prescription for Abuse*

Currently, no international treaties or laws address small arms and light weapons proliferation. "[I]llicit transfers of small arms currently operate in favourable (i.e. legally lax) domestic and international environments."[66] Many of the regulations in place are nation-specific, without international coordination.[67] Indeed, very few national laws specifically address the issue of arms brokering.[68] In a survey of twenty-eight countries with national arms control systems, only seven had legislation directly regulating arms dealers, while another eight did so indirectly.[69] Even in those countries with such systems,

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65 Decl. of Robert A. Ricker in Support of Pls.' Opp'n to Def. Manufacturers' Mot. for Summ. J. at 4–5, People v. Arcadia Machine & Tool, Inc., No. 4095, 2003 WL 21184117 (Cal. Super. Ct. 2003) [hereinafter Ricker's Declaration], *available at* http://www.cbc.ca/disclosure/archives/030218_guns/documents/ricker_affadavit.pdf. In one case, plaintiffs successfully established that "manufacturers and distributors . . . can . . . substantially reduce the number of firearms leaking into the illegal secondary market and ultimately into the hands of criminals. . . ." N.A.A.C.P. v. AcuSport, Inc., 271 F. Supp. 2d 435, 449–50 (E.D.N.Y. 2003), *dismissed on other grounds.*

66 SMALL ARMS SURVEY, *supra* note 10, at 123; *see also* DISARMAMENT, *supra* note 9, at xvi (noting international forces that have led to SALW proliferation in southern Africa).

67 *See generally* SMALL ARMS SURVEY, *supra* note 10, at 123–26 (outlining various national approaches to the problem of illegal arms transfers).

68 *See id.* at 125.

69 *See id.* at 124. The United States has a comprehensive law on arms brokering, which amended the Arms Export Control Act. *Id.* at 125. The law now permits U.S. citizens, any foreign national residing in the United States, or anyone subject to U.S. jurisdiction to obtain brokering authorization. *Id.* As of 2001, the United States had registered and authorized 137 brokers to facilitate arms transfers outside the United States, and had granted 200 licenses for arms deals. *Id.* at 134 n.56.

arms transfers still occur through loopholes in the law, avoidance of the nation's jurisdictional reach by routing the transfer through a third country, and limited enforcement of the laws.[70] In addition, the relatively few international initiatives that exist do not adequately address the SALW proliferation problem.[71]

a. *Non-Transparency in the SALW Trade*

The limited legal infrastructure currently in place is undermined by a lack of transparency in the international arms trade.[72] The crux of this problem is that the original sources of the weapons—the producers who contravene U.N. Security Council embargoes—remain unknown.[73] Indeed, "[t]he secrecy surrounding illicit arms transfers often makes it difficult to identify the actors involved and the services they provide."[74] This secrecy also undermines the ability to identify, trace, freeze and confiscate the financial assets—"the heart of all criminal enterprise"—of those involved.[75]

The non-transparency problem is further exacerbated by a lack of monitoring controls that could trace weapons from manufacturer to end user. The AK-47 assault rifle, while originally a Russian design, is so widely produced in various forms by many countries that "a thorough study of model numbers, serial numbers and factory markings would be required in order to determine their precise origin."[76] Although many weapons bought on the open market are second- or third-hand purchases, such monitoring would assist in ascertaining the sale, supply and trail of weapons.[77]

b. *The Role of International Financial Institutions*

The transparency problems involved with small arms and light weapons proliferation exist in tandem with other illicit international activities.[78] Because "[f]inancial non-transparency . . . facilitate[s] . . .

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70 *See id.* at 125–26; discussion *infra* Part I.C.

71 *See* SMALL ARMS SURVEY, *supra* note 10, at 127–29. The primary intent of this Note is to bridge this gap in the regulation of small arms and light weapons, and argue that legal accountability for gun manufacturers is the first step toward addressing this problem. *See* discussion *infra* Part IV.

72 *See id.* at 126.

73 *See UN Panel of Experts, supra* note 13, ¶¶ 167–76.

74 SMALL ARMS SURVEY, *supra* note 10, at 98.

75 *See UN Panel of Experts, supra* note 13, ¶ 246.

76 *Id.* ¶ 177.

77 *See id.*

78 While this Note specifically discusses the SALW proliferation issue, it is extremely important to recognize that this issue does not exist in a vacuum. SALW proliferation persists in an interconnected environment with other illegal contraband, such as trafficking in diamonds, timber, drugs, and oil, and money laundering. *See, e.g., UN Panel of Experts, supra* note 13 (discussing the relationship between conflict, illicit arms, diamonds, and money laundering in Sierra Leone).

many of the world's more significant social ills, including civil war and civic instability,"[79] any discussion of SALW proliferation must recognize the critical role of international financial institutions.

Noting that the main thrust of civil war is more about "engag[ing] in profitable crime under cover of warfare" than winning wars,[80] one commentator explains that financial institutions that permit the anonymous transfer of funds into anonymous accounts fuel conflict and illegal activities.[81] In addition, gaps in the international financial regulatory system further destabilize national supervision and enforcement measures.[82] The existing global financial infrastructure consists of "(a) small international business companies or trusts, established in jurisdictions of convenience, which establish (b) bank accounts at local financial institutions, which have correspondent banking relationships with (c) major international financial institutions, which (d) move funds willy-nilly throughout the world without regard to the provenance of the funds."[83]

Thus, the best means of reducing illicit activities has been to establish accountability and traceability standards for international financial institutions.[84] Dubbed "know your customer," these standards mandate that "[a]t the front end, bankers and other financial [institutions must] know with whom they are dealing, and . . . what [their] customers have been doing with their money."[85] On the back end, when customers withdraw funds financial institutions must be cognizant of both the money's origin and who is receiving it.[86] Similar standards must be established for financial institutions involved with the

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79 Jonathan M. Winer, Combating Global Conflict by Promoting Financial Transparency: The Utility of a Global White List, Paper presented at the International Peace Academy, Program on Economic Agendas in Civil Wars, Rockefeller Foundation Study and Conference Center, Bellagio, Italy, May 20–24, 2002, at 2 (on file with *The Cornell Law Review*). For instance, money laundering is an essential element of the illicit diamond trade, which in turn fuels civil conflicts. *Id.*

80 *Id.* at 11 (internal quotation marks omitted).

81 *See id.* at 6 ("[A]ccess to the international financial services infrastructure by regions and institutions that have no controls on placement remains a major vulnerability to terrorism."); *id.* at 9–20 (outlining the impact of globalized illicit financing on political stability, areas of conflict and terrorism).

82 *See id.* at 3. These gaps include: "[f]ragmented supervision," "[e]xploitation of differences among national laws [used] to . . . circumvent more stringent national laws and international standards," "[s]ecrecy laws which impede the sharing of information," "[i]nadequate attention to electronic payments in existing anti-money laundering supervision and enforcement," "lack of international standards governing key mechanisms used in transnational financial transactions," and "[m]inimal due diligence by company formation agents, attorneys, and financial institutions." *Id.*

83 *Id.* at 9. (listing fifteen international financial institutions, including Citibank, J.P. Morgan-Chase, the Bank of New York, and Credit Lyonnais, that have been involved in money laundering).

84 *Id.* at 3.

85 *Id.*

86 *Id.*

SALW trade to encourage gun manufacturers to make best efforts in monitoring with whom they do business.

C. The Players in the SALW Trade

The lack of adequate transparency and robust regulatory systems in both the SALW trade and international financial transactions fosters an intercontinental criminal web comprised of nefarious actors engaged in the type of intrigue and deception usually relegated to a John Le Carré novel.[87] SALWs are obtained directly from weapon producing countries or from the excess stocks of national armed forces.[88] The typical movement of arms entails cross-border shipments and country stop-overs, and it involves the assistance of customs inspectors, licensing governments, weapons flights, and even heads of state.[89]

1. *The Legal Sale*

In a recent U.N. Panel of Experts case study on Sierra Leone,[90] inspectors discovered that "[v]irtually all of the weapons shipped into RUF [Revolutionary United Front] territory are trans-shipped through at least two other countries . . . ."[91] As one example, the study cites a 68-ton shipment of Ukrainian weapons to the RUF in Sierra Leone via Burkina Faso.[92] Ukrainian documents showed that a Gibraltar-based company representing the Ministry of Defence of Burkina Faso, and a Ukrainian state-owned company, Ukrspetsexport, contracted for the weapons.[93] Moreover, Air Foyle, a British aircraft company acting as agent for the Ukrainian air carrier, was under contract to ship the weapons via a Gibraltar-based chartering company.[94] After the Minister of Defense in Burkina Faso issued Ukrspetsexport

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87 Although fictional, Le Carré wrote a gripping, realistic post-Cold War thriller on arms dealers. *See* JOHN LE CARRÉ, THE NIGHT MANAGER (1993).

88 *See UN Panel of Experts*, *supra* note 13, ¶ 194.

89 *See id.* ¶ 195–97; SMALL ARMS SURVEY, *supra* note 10, at 123 ("[A]rms transport networks will always cohere on the fringes of armed conflicts . . . channeling material support from external governments and actors.").

90 For a brief summary of the nine-year civil war in Sierra Leone, see Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Court of Sierra Leone*, 19 N.Y.L. SCH. J. HUM. RTS. 849, 849–52; United Nations Mission in Sierra Leone, Sierra Leone—UNAMSIL—Background [hereinafter UNAMSIL Background], *available at* http://www.un.org/Depts/dpko/missions/unamsil/background.html (last visited Feb. 28, 2004).

91 *UN Panel of Experts*, *supra* note 13, ¶ 202.

92 *See id.* ¶ 203–11; *see also* SMALL ARMS SURVEY, *supra* note 10, at 122–23 (noting that the consignment was for "3,000 Kalashnikov assault rifles, 50 machine guns, 25 RPG launchers, five Strela-3 surface-to-air missile systems, and five Metis ATGW systems, plus ammunition for them . . . .").

93 *See UN Panel of Experts*, *supra* note 13, ¶ 204.

94 *See id.*; *see also* SMALL ARMS SURVEY, *supra* note 10, at 122 (documenting a prior arms shipment by the Air Foyle company).

an end-user certificate authorizing the Gibraltar-based company to purchase the weapons on behalf of Burkina Faso, the Ukraine licensed the sale.[95]

2. *The Illegal Transfer, The Paymaster and The Wealthy Businessmen*

Burkina Faso, certified as both the end-user and the place of final destination, denies U.N. evidence indicating that the weapons were re-exported to a third country.[96] The U.N. investigation revealed that some weapons were offloaded in Burkina Faso's capital, Ouagadougou, others were trucked to the Western Burkina Faso city of Bobo Dioulasso, and the remaining weapons made their way to Liberia.[97]

The fact that these weapons found their way to Liberia is significant because Charles Taylor, Liberia's then-president and former U.S. prison escapee, was closely involved in fueling the Sierra Leonean conflict.[98] One of his business partners and primary confidant was an internationally wanted Israeli named Leonid Minin;[99] it was Minin's BAC-111 that flew the weapons to Sierra Leone.[100] Three days after the Ukrainian weapons arrived, Taylor's private presidential jet flew into Ouagadougou, where weapons were loaded on board and flown back to Liberia.[101] In all, this process was repeated three times, and an additional three flights were made into Bobo Dioulasso to pick up the weapons located there.[102]

Every individual involved in this weapons trafficking scheme had to be compensated to ensure their compliance. In the Sierra Leone example, the paymaster was Tatal El-Ndine, a wealthy businessman from Lebanon.[103] El-Ndine pays "Liberians fighting in Sierra Leone

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95 *See UN Panel of Experts, supra* note 13, ¶ 205.

96 *See id.* ¶ 206.

97 *Id.* ¶ 207.

98 *See id.* ¶ 212; *see also* SMALL ARMS SURVEY, *supra* note 10, at 120 ("[T]he President of Liberia, Charles Taylor, has provided critical support to the RUF in terms of arms and other materiel . . . while retaining up to 90 per cent of the [RUF's] diamond profits."). After being indicted for war crimes in June 2003, Taylor found asylum in Nigeria and on August 11, 2003, stepped down as president. *See Charles Taylor: A Wanted Man, available at* http://www.cnn.com/2003/WORLD/africa/06/10/liberia.taylor/index.html (last visited Apr. 17, 2004).

99 *See UN Panel of Experts, supra* note 13, ¶ 208. Minin "is identified in the police records of several countries and has a history of involvement in criminal activities ranging from east European organized crime, trafficking in stolen works of art, illegal possession of firearms, arms trafficking and money laundering." *Id.*

100 *See id.* The aircraft was registered in the Cayman Islands but operated by a Monaco-based company, LIMAD. *See id.*

101 *Id.* ¶ 209.

102 *See id.* This number of flights was necessary because the plane had limited cargo capacity. *Id.*

103 *See id.* ¶¶ 23, 214.

alongside the RUF, and those bringing diamonds out of Sierra Leone" personally.[104] He also brings "foreign businessmen and investors to Liberia . . . who are willing to cooperate with the regime in legitimate business activities [including dealings] in weapons and illicit diamonds."[105] Many of these businessmen operate internationally, obtaining their weapons primarily from Eastern Europe.[106]

While the Burkina Faso weapons shipment strongly illustrates the interplay of legal and illegal arms transfers and the multifarious actors involved, its main significance is in confirming the role of small arms and light weapons in sustaining conflict. An earlier shipment, made in December 1998, precipitated the Burkina Faso one.[107] Minin's BAC-111 flew twice from Niamey Airport in Niger to Liberia,[108] and on the second trip weapons that may have come from the Nigerian armed forces' existing stockpiles were flown to Liberia and offloaded.[109] Just days later, "the RUF rebels started a major offensive that eventually resulted in [a] destructive January 1999 raid on Freetown[, Sierra Leone]."[110]

The Sierra Leone case study highlights the role and interactions of several players in the SALW trade, and reveals that the legal commencement of illicit arms transfers can nonetheless be "diverted to unauthorized end-users or . . . used for abuses that constitute serious international crimes.[111] This Note argues that the ultimate consequences of transactions like these are foreseeable, and even intended, by SALW manufacturers when they sell guns in reckless disregard of current political and economic situations.[112]

II
WAR IS NOT CHILD'S PLAY: THE ISSUE OF CHILD SOLDIERS

"It is immoral that adults should want children to fight their wars for them . . . There is simply no excuse, no acceptable argument for arming children."
Archbishop Desmond M. Tutu[113]

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104 *Id.* ¶ 214.

105 *Id.*

106 *Id.* ¶ 213.

107 *Id.* ¶ 211.

108 *Id.*

109 *Id.*

110 *Id.*

111 SMALL ARMS SURVEY, *supra* note 10, at 129.

112 *See id.*

113 *See* University of Essex, Children and Armed Conflict Unit, *Child Soldiers: Issues & Themes*, *available at* http://www.essex.ac.uk/armedcon/themes/child_soldiers/default.htm (last visited Feb. 28,, 2004).

While an estimated 300,000 children engage in military conflict in 40 countries,[114] "paramilitary organizations, guerrilla groups, and civil militias" conscript about another 500,000 in over 85 countries.[115] As young as ten, children are used in all aspects of military life.[116] They serve as frontline troops,[117] sex slaves,[118] porters, cooks, spies,[119] and perform "life-threatening tasks such as planting land mines."[120] Children are attractive combatants because they are "more obedient, do not question orders and are easier to manipulate than adult soldiers."[121] Moreover, children usually do not demand pay.

Recruitment of children has a direct correlation to enduring conflict.[122] The "shortage of manpower, due to increasing casualties and escalation of the conflict, leads to an ever more desperate search for fresh recruits to fill the ranks."[123] Specifically, children are recruited in three different ways: forcibly, via conscription, and voluntarily.[124]

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114 Cris R. Revaz, *The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers, in* CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW, HUM. RTS. BRIEF, Fall 2001, at 13, 15.

115 *See id.*; *see also* Amy Beth Abbott, Note, *Child Soldiers—The Use of Children as Instruments of War*, 23 SUFFOLK TRANSNAT'L L. REV. 499, 507 ("Child units currently serve both state and non-state forces in international and internal conflicts around the world.").

116 *See Machel Report, supra* note 38, ¶¶ 44–48 (describing the variety of tasks to which child soldiers are assigned); *id.* ¶ 115 ("In Cambodia, a survey of [landmine] victims in military hospitals found that 43 per cent of them had been recruited between the ages of [ten] and [sixteen]."); *see also* discussion *infra* Part II.A (exploring the debate over the age of child soldiers).

117 *See* Abbott, *supra* note 115, at 507–08 ("[C]ommanders capitalize on a child's fearlessness by sending child troops to serve as advance forces in ambush attacks and in suicide bombings."). America's war on terrorism has brought U.S. troops face-to-face with child soldiers. *See* Mike Barber, *A Growing Concern: Child Soldiers Never Know What They Die For*, SEATTLE POST-INTELLIGENCER, Apr. 8, 2002, at A1 (noting that a 14-year-old boy with an AK-47 assault rifle shot and killed the first American soldier to die in Afghanistan).

118 *See Machel Report, supra* note 38, ¶ 46 (reporting the experiences of a 13-year-old girl from Honduras, who was "obliged to have sexual relations 'to alleviate the sadness of the combatants.' . . . At [her] young age [she] experienced abortion.").

119 *Id.* ¶ 34; Rachel Stohl, *Remembering the Smallest Veterans*, 43 WEEKLY DEFENSE MONITOR, Nov. 4, 1999, *at* http://www.cdi.org/weekly/1999/issue43.html#2 (last visited Apr. 17, 2004).

120 JEREMY ROSENBLATT, INTERNATIONAL CONVENTIONS AFFECTING CHILDREN 259 (2000).

121 *Machel Report, supra* note 38, ¶ 34 (internal quotation marks omitted).

122 *See* Coalition to Stop the Use of Child Soldiers, *The Use of Children As Soldiers: A Growing Phenomenon* [hereinafter *A Growing Phenomenon*], *at* http://www.child-soldiers.org/cs/childsoldiers.nsf/0/035a7e1f4ee6b20c802569ba007cd51a?OpenDocument (last visited Feb. 28, 2004).

123 *Id.*

124 *See* UNESCO INSTITUTE FOR EDUCATION, HUMAN PROFILE CASES: WHO ARE CHILD & YOUNG ADULT SOLDIERS? [hereinafter UNESCO REPORT] (noting that "[c]onscription is the legal obligation of citizens . . . to serve in the military," while "[f]orced recruitment is . . . a response to an immediate shortfall of manpower, either because a conflict or an opposition group is unpopular or because of a higb rate of migratory labor," and "[v]oluntary recruitment is . . . the . . . conscious choice to volunteer for armed service"), *at* http://www.ginie.org/ginie-crises-links/childsoldiers/human.html, (last visited Feb. 28, 2004). This Note uses "conscription" and "forced recruitment" interchangeably, as cbil-

Often children are "press-ganged" under the threat of violence or abduction to participate in combat.[125] In Sierra Leone, the RUF rebels forced children to slaughter neighboring villages and to witness—and sometimes even partake in—the execution of their own immediate family members.[126] Additionally, "children . . . who were reluctant, hesitant or refused to fight and train were executed . . . on the spot. This tactic was used a great deal [to recruit] additional [child] soldiers."[127] Finally, a number of children were given hard drugs to bolster their courage and dull their sensitivity to pain.[128]

The use of the term "voluntary" in reference to the enlistment of child soldiers is questionable, given the horrific conditions that motivate children to join armed forces.[129] Survival is one of the primary factors influencing volunteerism.[130] As one scholar notes, "[o]ne of the most basic reasons that children join armed groups is economic. Hunger and poverty may drive parents to offer their children for ser-

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dren are left without a choice in joining armed conflict in both cases. *See also* ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 13–43 (1994) (outlining the reasons and ways children become involved in military forces).

125 *Machel Report*, *supra* note 38, ¶ 36; *see also* Abbott, *supra* note 115, at 513 (noting that child soldier "enrollment in governmental armed forces and opposition groups often results from abduction, coercion or manipulation").

126 *See* E-mail from Alan W. White, Ph.D., Chief of Investigations, Special Court for Sierra Leone, to Nancy Morisseau, J.D. Candidate, Cornell Law School (Dec. 24, 2002, 03:46:54 PST) (on file with the *Cornell Law Review*) [hereinafter White E-mail]; *see also* COHN & GOODWIN-GILL, *supra* note 124, at 27, noting that

> A typical . . . recruitment practice involved taking a boy soldier back to his village and forcing him to kill someone known to him . . . in such a way that the community knew that he had killed, thus effectively closing the door to the child ever returning to his village.

(internal quotation marks omitted). The result was that the child became dependent on his captors and sometimes even came to "identify with their cause." *Id.*

127 White E-mail, *supra* note 126; *see also* Abbott, *supra* note 115, at 515 ("Once a child combatant escapes, the guerrilla groups deem the child a deserter, subjecting the child to on-the-spot execution if found.").

128 *See Machel Report*, *supra* note 38, ¶ 47; *see also* White E-mail, *supra* note 126 ("The children would be drugged by slicing their temple and putting cocaine directly into their bloodstream and the children would go on killing sprees for up to 72 hours or until the drug wore off, killing innocent civilians in villages.").

129 *See A Growing Phenomenon*, *supra* note 122 ("[A] broad interpretation of the term 'volunteer' [is needed] as brutal circumstance leaves little room for genuine choice."); *see also* Abbott, *supra* note 115, at 517 ("In any war-torn nation, a child's motivation to become a soldier lies in the roots of the conflict that have come to define the child's life; therefore, one needs to look critically at whether the child did indeed have freedom of choice in his or her decision to volunteer.").

130 Many of the children who join armed forces tend to be "at risk" youth. *See* UNESCO REPORT, *supra* note 124 ("Regardless of age, gender, or how they are recruited, child soldiers disproportionately come from the poor and marginalized segments of society, isolated rural areas, the conflict zones themselves, and from disrupted or non-existent family backgrounds.") In the case of volunteerism, "[l]ack of education is the primary hallmark of the youth [who] volunteer. . . ." *Id.* Another "uniquely disadvantaged subgroup are the inhabitants of refugee camps or internally displaced persons." *Id.*

vice . . . . [c]hildren themselves may volunteer if they believe that this is the only way to guarantee regular meals, clothing or medical attention."[131] Moreover, families are often threatened with violence or property confiscation if they do not contribute a son to the "cause."[132]

It is doubtful, however, that a young child has the intellectual aptitude to evaluate and examine Delphic concepts like ideology or nation.[133] Thus, Article 12 of the 1989 United Nations Convention on the Rights of the Child (CRC)[134] considers a child's age and maturity in requiring that only a child with the capacity to form his or her own opinions has the right to express them.[135] Whatever the means of recruitment, children simply do not belong in warfare, and thus their enlistment must end.[136]

A. The Age Controversy: How Old is a Child?

In any discussion of policy affecting children, there must be an examination of the age at which one moves from childhood to adulthood.[137] The age classification of a child is critical in determining

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131 *Machel Report*, *supra* note 38, ¶ 39; *see* COHN & GOODWIN-GILL, *supra* note 124, at 23 ("[O]ften a gun is meal-ticket and a more attractive option than sitting at home afraid and helpless."); *A Growing Phenomenon*, *supra* note 122 (citing a UN report which showed that "the single major factor of . . . volunteering is ill-treatment of themselves or their families by government troops.").

132 COHN & GOODWIN-GILL, *supra* note 124, at 29.

133 *See id.* at 35–36.

134 U.N. GAOR, 44th Sess., Annex, U.N. Doc. A/RES/44/25 (1989) [hereinafter CRC].

135 *See id.* at 168.

136 This Note argues that child soldiers are as much victims of armed conflict as those they harm. Therefore, they should not be criminally prosecuted for their actions because they performed them under duress and coercion. *See generally* Amnesty International, *Child Soldiers: Criminals or Victims?* (Dec. 22, 2000) (

> In a situation where crimes have been committed by children, particularly when they have been terrorized and [brutalized] into submission, complex questions about their criminal responsibility are raised . . . .
> Amnesty International considers that the focus and priority should be on prosecuting those who committed crimes against children, particularly the crime of recruiting children who are under 15.

), *available at* http://web.amnesty.org/ai.nsf/Index/IOR500022000?OpenDocument&of=THEMES/CHIL .

137 This requires a discussion of the cultural, legal, and institutional definitions of a child, as each definition has different needs that lead to different age requirements. *See* COHN & GOODWIN-GILL, *supra* note 124, at 7 ("The 'age of majority' is a social, religious, cultural or legal device by which societies acknowledge the transition to adulthood; and there is no *necessary* correlation between any of the levels."); *see also* Madeleine Grey Bullard, *Child Labor Prohibitions Are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 HOUS. J. INT'L L. 139, 163–64 (2001) (discussing the International Labor Organization's Minimum Age Convention which established "not less than 15 years and not less than the age of completion of compulsory schooling" as the minimum age to enter into the workforce). *But see* Krijn Peters, *Children as Perpetrators of Atrocities*, *in* CHILDREN IN EXTREME SITUATIONS: PROCEEDINGS FROM THE 1998 ALISTAIR BERKLEY MEMORIAL LECTURE at 88, 89 (Dev. Studies Inst.,

who is entitled to the special status of a child under international humanitarian law.[138] While one may argue that a universal definition of "childhood" is rigid and overly simplistic, a coherent approach is not only long overdue,[139] but it has serious implications for those who may participate in armed conflict. In other words, "the higher the age bracket, the higher the ceiling, the more children we can protect. The lower the ceiling, the fewer children we can protect."[140]

The CRC defines the term child to mean "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."[141] Signed and ratified by every nation but the United States and Somalia,[142] the significance of this definition is that the internationally recognized age of maturity, by which the majority of countries set their legal voting age, is eighteen.[143] This definition, however, pertains only to the child as a civilian, not as a child combatant.[144] Article 38(2) of the CRC and Article 77(2) of the 1977 Protocol I to the Geneva Conventions declare the legal age for recruitment and participation in armed conflict to be fifteen.[145]

There is near-unanimous consensus within the international community that the minimum age for recruitment and participation in armed forces should be eighteen.[146] In May 2000, the United Nations adopted an Optional Protocol to the CRC on the Involvement of Chil-

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London Sch. of Econ. & Pol. Sci., Working Paper Series No. 00-05 2000) (arguing that children are not always victims of wars, and that they often join armed insurgency with their eyes wide open).

138 *See* ROSENBLATT, *supra* note 120, at 259 ("[P]ursuant to the Declaration on the Rights of the Child 1924, 'mankind owes to the child the hest it has to give' . . . .").

139 INTERNATIONAL DOCUMENTS ON CHILDREN XIX (Geraldine Van Bueren ed., 1993).

140 *See* Olara Otunnu, *The Convention and Children in Situations of Armed Conflict, in* CHILDREN IN EXTREME SITUATIONS: PROCEEDINGS FROM THE 1998 ALISTAIR BERKLEY MEMORIAL LECTURE, *supra* note 137, at 51, 60.

141 CRC, *supra* note 134, at 167.

142 *See* Bullard, *supra* note 137, at 162 n.153.

143 Abbott, *supra* note 115, at 527.

144 *See* ROSENBLATT, *supra* note 120, at 259; *see also infra* Part II.C.2 (discussing the international law governing child civilians and child soldiers).

145 CRC, *supra* note 134, at 171; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 77(2), 1125 U.N.T.S. 3, 7 [hereinafter Geneva Protocol I].

146 *See, e.g.*, COHN & GOODWIN-GILL, *supra* note 124, at 3 (citing the "general agreement among the participants" at a 1991 Conference on Children of War organized by, among others, the Swedish Red Cross); *cf.* Dominguez v. United States, Case 12.285, Inter-Am. C.H.R. 913, ¶¶ 85–87, OEA/ser. L/V/II.117, doc. 5 rev. 1 (2002) (holding that an international consensus has determined the age of a child to be less than 18 and thus it is now a *jus cogens* norm). *But see* Jenny Kuper, *Children in Armed Conflict: The Law and Its Uses, in* CHILDREN IN EXTREME SITUATIONS: PROCEEDINGS FROM THE 1998 ALISTAIR BERKLEY MEMORIAL LECTURE, *supra* note 137, at 41, 48 (asking whether "such widespread ratification [of agreements like the CRC has] any real significance, especially when . . . countries enter sweeping reservations . . . that render their ratification of it almost meaningless").

dren in Armed Conflicts (Child Soldiers Protocol).[147] This groundbreaking piece of international legislation outlaws the use of children under the age of eighteen in armed conflict, with the exception that sixteen- and seventeen-year olds may voluntarily join a nation's armed forces.[148]

The United States was the strongest opponent of raising the minimum age for child participation in armed conflict to eighteen.[149] Although comprising less than one-half of one percent of their armed forces, the United States's practice of recruiting seventeen-year olds, and the sheer number of Junior ROTC programs operating in high schools throughout the country,[150] would directly violate such an age restriction. In addition, conservatives in Congress questioned the convention's stance of taking children's views into account.[151] They argued that considering children's views undermines parental authority, provides children with a cause of action against their parents, and empowers U.N. bureaucrats to "in effect, tak[e] over family life."[152] American opponents of the treaty also expressed concern about impairing the United States's ability to deploy its seventeen-year-old recruits.[153]

However, facing international and domestic pressure, the United States government changed its policy.[154] While the United States was

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147 G.A. Res. 263, U.N. GAOR, 54th Sess., Agenda Item 116(*a*), Annex I, at 2, U.N. Doc. A/RES/54/263 (2001) [hereinafter Child Soldiers Protocol]. The other Optional Protocol is on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography. *See id.* Annex II, at 7. The Protocols were "signed by 96 countries and ratified by 14." *International Treaty Bans Use of Child Soldiers*, CHARLESTON GAZETTE, Feb. 12, 2002, at 2A. It is important to note that while both protocols are related to the 1989 CRC, they are independent of it. Rachel Stohl, *Senate Holds Hearing on Child Soldiers Treaty*, 6 WEEKLY DEFENSE MONITOR, Mar. 28, 2002, *at* http://www.cdi.org/weekly/2002/issue07.html (last visited Apr. 17, 2004).

148 *See* Child Soldiers Protocol, *supra* note 147, at art. 3 (raising the minimum age for voluntary recruitment to sixteen); *see also* Revaz, *supra* note 114, at 16 (citing CRC Article 38(3)).

149 *See* Revaz, *supra* note 114, at 16; Stohl, *supra* note 147.

150 *See A Growing Phenomenon*, *supra* note 122; Abbott, *supra* note 115, at 530 ("[T]he U.S. Government recognizes that in order to sign the CRC all fifty states must harmonize their laws relating to children."); *see also* Center for Defense Information, Children & Armed Conflict Project, *Facts About Child Soldiers* ("The Pentagon sponsors JROTC programs for approximately 400,000 high school boys and girls, where children are taught to march, shoot, act, and think like soldiers."), *available at* http://www.cdi.org/atp/ChildSoldiers/facts.html (Dec. 1, 1998).

151 *See Oh, and Somalia Too*, THE ECONOMIST, May 4, 2002, at 32, 32 [hereinafter *Somalia Too*].

152 *Id.*

153 University of Essex, *Clinton Hailed for Signing Ban on Child Combatants* (July 5, 2000), *available at* http://www.essex.ac.uk/armedcon/Issues/Texts/Soldiers009.htm (July 5, 2000).

154 *See* Revaz, *supra* note 114, at 16 (noting that the American Bar Association "adopted policy statements urging the United States to expeditiously ratify both Protocols.").

a signatory,[155] President Clinton did not agree to support eighteen as the minimum age requirement for military service until early 2000.[156] In March 2002, the Senate Foreign Relations Committee finally held hearings on ratifying the Child Soldiers Protocol.[157]

Unfortunately, the willingness of the United States to support the Child Soldiers Protocol did not alter its domestic position. Noting that the protocol does not adversely affect any of the U.S. armed forces' recruiting programs, retired Rear Admiral Eugene J. Carroll, Jr. testified before the Senate Foreign Relations Committee that the "Department of Defense [m]ilitary training programs can legally begin for children as young as 13 years of age and recruiting for active service still begins [for those who are seventeen]."[158] Moreover, he emphasized that the "[seventeen]-year-old recruits who are available for assignment to combat units number fewer than 200, or about one tenth of one percent of the current 1,400,000 active duty force."[159] The U.S. armed forces' training and management procedures ensure that this small number of recruits do not participate directly in armed hostilities.[160] Nonetheless, the import of the United States's support of the Child Soldiers Protocol solidifies eighteen as the minimum age for participation in armed conflict under international law.[161]

B. The Impact of SALW Proliferation

While SALW are not the "cause" of child soldier recruitment, the proliferation of SALW and the protracted length of armed conflicts

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155 The United States signed both protocols in 1995 but never sent them to Congress for ratification. *Somalia Too*, *supra* note 151, at 32. However, one could argue that even this act undermined the United States' opposition to raising the minimum age to eighteen. A rule of international law is binding on all states except those that have "persistently objected" to it. *See* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 458 (1985) ("A state that has persistently objected to a rule is not bound by it, so long as the objection was made manifest during the process of the rule's emergence.") Thus, the argument advanced in favor of eighteen as the minimum age emphasizes that the United States had not persistently objected to the protocols. *But see* JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 97 (2000) (arguing that the persistent objector principle is "theoretically unsound since customary international law rests upon general assent or general patterns of expectation (not unanimous consent)").

156 *See* Revaz, *supra* note 114, at 16.

157 Stohl, *supra* note 147.

158 S. REP. No. 107-4, at 66 (2002).

159 *Id.* at 67.

160 *Id.* Moreover, the Department of Defense interprets the Child Soldiers Protocol's requirement that a State take "all feasible measures" to ensure that a child does not participate in armed conflict to mean that it must prevent "immediate and actual action on the battlefield that is likely to cause harm." *See* Stohl, *supra* note 147 (internal quotation marks omitted).

161 Revaz, *supra* note 114, at 16. *But see* Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(b)(xxvi), U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, 1008 (making the recruitment of children under age fifteen a war crime).

does make the use of child combatants pragmatic.[162] "[T]he increased reliance on small arms and light weapons as the primary instrument of war . . . [has] made using children practical as these weapons are easy for a small child to operate and repair."[163] Moreover, "[t]he ubiquitous nature of [SALW] and their easy use have contributed to the perpetration of violence by children and have been used to force children to commit acts that sever their ties to their families and communities."[164] At least in part because of SALW proliferation, an estimated two million children were killed in armed conflict in the 1990s.[165] Those who survive often suffer severe psycho-social trauma,[166] and may "fall victim to preventable and treatable diseases and conditions because of the lack of healthcare services available."[167] Besides the loss of health services, children also lose educational and economic services.[168]

C. International Law Governing Children

International law governing children may be found in the broad realm of human rights law encompassed by treaties, international humanitarian law, customary international law, and in the laws and practices of individual states.[169] Despite the great variety in the sources of applicable international law, the law still tends to treat children as objects rather than subjects[170]—a status that reinforces the old adage that children should be seen but not heard. Traditionally, children were presumed to depend on adults to exercise their rights, thus many earlier international laws targeted child welfare and were more concerned with a child's socioeconomic and psychological needs than with facilitating their individual autonomy.[171] However, since the In-

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162 *See* Rachel J. Stohl, *Under the Gun: Children and Small Arms*, 11 AFR. SECURITY REV. 17, 21 (2002); *see also* Abbott, *supra* note 115, at 508 ("Throughout history, military groups have utilized children as soldiers, but in recent years, the deliberate recruitment of child soldiers has dramatically increased in many global conflicts.").

163 Stohl, *supra* note 119; *see also Machel Report*, *supra* note 38, ¶ 27 ("Previously, the more dangerous were either heavy or complex, but these guns are so light that children can use them and so simple that they can be stripped and reassembled by a child of 10.").

164 *See* Stohl, *supra* note 162, at 22.

165 *Id.* at 18.

166 *See id. at* 18–19; *see also Machel Report*, *supra* note 38, ¶¶ 49–57 (explaining the difficulties with reintegrating children back into society after they have served as soldiers).

167 Stohl, *supra* note 162, at 20.

168 *Id.* (noting that the proliferation of small arms and the protracted nature of conflict make it dangerous for children to attend schools and lessen "basic commercial services").

169 COHN & GOODWIN-GILL, *supra* note 124, at 55.

170 INTERNATIONAL DOCUMENTS ON CHILDREN, *supra* note 139, at xv.

171 *Id.*; *see also* LEAGUE OF NATIONS, O.J. Spec. Supp. 23, at 177 (1924) (

> By the present Declaration of the Rights of the Child . . . men and women of all nations, recogni[z]ing that mankind owes to the child the best that it has to give, declare and accept it as their duty that. . .

ternational Year of the Child in 1979,[172] there has been a movement within the international community to examine international laws dealing with children from a child rights perspective.[173]

1. *Customary International Law and International Humanitarian Law*

The four 1949 Geneva Conventions and the two 1977 Additional Protocols comprise the framework for international humanitarian law.[174] Since these bodies of law apply equally to government and opposition forces and include all "parties to the conflict,"[175] international law protects child soldiers in any conflict in which they participate.[176] Even where a state has not ratified or consented to any particular treaty, customary international law may still bind it[177] "[o]nce a pattern of practice or expectation is generally accepted or [becomes] extant."[178]

Most human rights treaties or treaties that protect children are not self-executing and thus require domestic legislation to create a private cause of action.[179] Nevertheless, signatories to these treaties have an ongoing responsibility "to observe [them] with good faith and scrupulous care."[180] Indeed, the United Nations Charter requires all signatories, including the United States, to support resolutions adopted by the Security Council.[181] However, depending on whether the armed conflict is classified as an international armed conflict, a

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I. The child must be given the means requisite for its normal development, both materially and spiritually;
II. The child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured [sic];
III. The child must be the first to receive relief in times of distress;
IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;
V. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

(internal quotation marks omitted)).

172 On December 21, 1976, the United Nations General Assembly passed the enabling resolution, which urged governments "to review their programmes for the promotion of the well-being of children and to mobilize support for national and local action programs" to that end. G.A. Res. 169, U.N. GAOR, 31st Sess., Supp. No. 39, at 74, U.N. Doc. A/RES/31/169 (1976).

173 INTERNATIONAL DOCUMENTS ON CHILDREN, *supra* note 139, at xv.

174 COHN & GOODWIN-GILL, *supra* note 124, at 55.

175 *Id.* at 56 (internal quotation marks omitted).

176 *See id.*

177 *Id.* at 55.

178 Bullard, *supra* note 137, at 159.

179 *Id.* at 159–60.

180 *Id.* at 160.

181 U.N. CHARTER art. 55.

domestic armed conflict, or a civil disturbance, different rules apply.[182] "Governments may have a vested interest . . . in declaring that a conflict in their territories is simply a civil disturbance, and thereby avoid having to comply with the more stringent standards that would apply if it was accepted as a non-international, or particularly an international, armed conflict."[183]

2. *International Humanitarian Law Governing Child Soldiers*

International humanitarian law addresses both child civilians and child combatants.[184] Starting from the basic tenet that children in armed conflict are entitled to special treatment,[185] the rules state that children should not be randomly killed, tortured, sexually abused or ill-treated.[186] Moreover, children should have priority in receiving basic necessities such as food and shelter.[187] Lastly, children must be kept with their families and communities; if separation is unavoidable, it must be for the shortest possible length of time, and there must be some mechanism to later identify the child.[188]

As previously mentioned, it is widely accepted that children under the age of fifteen should never be combatants,[189] nor should they be recruited for the purpose of serving as soldiers—whether voluntarily or through compulsory means.[190] But "when, in contravention of the law, children under [fifteen] do participate in hostilities and are then captured, they are entitled to special treatment in the same way as are child civilians. . . ."[191] Moreover, military recruiters should only target children between the ages of fifteen and eighteen with priority accorded to those who are older.[192] Finally, the death

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182 Kuper, *supra* note 146, at 42.

183 *Id.*

184 *Id.*

185 *See* Geneva Protocol I, *supra* note 145, art. 77; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), June 8, 1977, art. 4(3), 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]; Kuper, supra note 146, at 42. Both protocols are incorporated within the 1989 Convention on the Rights of the Child. CRC, *supra* note 134, art. 38.

186 *See* Geneva Protocol I, *supra* note 145, art. 77(1); Geneva Protocol II, *supra* note 185, art. 4(3); CRC, *supra* note 135, arts. 6, 9, 34, 37.

187 *See, e.g.*, LEAGUE OF NATIONS, *supra* note 171, at 177; Declaration of The Rights of The Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 20, U.N. Doc A/4354 (1959) (Principle 8).

188 *See* Kuper, *supra* note 146, at 42 (referring to Article 49 of the 1949 Geneva Convention IV, Article 78 of Geneva Protocol I, Articles 4(3)(b) and (e) of Geneva Protocol II, and arguably, Articles 10 and 20 of the CRC).

189 *See supra* notes 147–48 and accompanying text.

190 Kuper, *supra* note 146, at 43 (referring to Article 77(2) of Geneva Protocol I, Article 4(3)(c) of Geneva Protocol II, and Article 38(3) of the 1989 CRC).

191 *Id.* (referring to Article 77(3) of Geneva Protocol I, and Article 4(3)(d) of Geneva Protocol II).

192 *Id.* (referring to Article 77(2) of Geneva Protocol I and Article 38(3) of the CRC).

penalty does not apply to offenses related to conduct committed by children who are less than eighteen years of age.[193]

D. Gaps in Existing International Law

Arguably, the international law relating to child combatants is largely aspirational.[194] That is, international law is "simply a set of fine-sounding phrases that have, ultimately, little meaning or use for such children, but that satisfy the conscience of those concerned about human rights."[195] While international law serves as a possible method of retribution, the unpleasant reality is that only a small percentage of war criminals have ever been punished.[196]

Moreover, in the context of children in armed conflict, international law is a limited tool[197] because of the current gap between the actual laws pertaining to children and the non-observance of the laws in practice.[198] One area in which this gap is particularly salient is the age limit for recruitment of children in armed forces. For example, while children eighteen or younger cannot serve as soldiers in the Sudan and Sierra Leone, they are nonetheless recruited for this purpose.[199] Unfortunately, no sanctions have been brought against those who so brazenly ignore the international law governing childrens' rights.[200]

These examples illustrate the need for a two-pronged approach to the problem of child soldiers. Not only must the age limit be raised, but compliant nations must collectively pressure those countries that employ child soldiers.[201] At the same time, this body of international law provides a potentially powerful legal framework from which child soldiers themselves can agitate for change. In sum, without adequate enforcement mechanisms, international laws protecting children serve only as window dressing.[202]

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193 *Id.* at 44 (referring to Article 68 of the 1949 Geneva Convention IV, Article 77(5) of Geneva Protocol I, and Article 6(4) of Geneva Protocol II).

194 *See id.* at 47.

195 *Id.*

196 *Id.* at 49.

197 *Id.* at 50.

198 *See* Otunnu, *supra* note 140, at 53.

199 *Id.* at 60.

200 *See* Gerison Lansdown, *The Convention: History and Impact, in* CHILDREN IN EXTREME SITUATIONS: PROCEEDINGS FROM THE 1998 ALISTAIR BERKLEY MEMORIAL LECTURE, *supra* note 137, at 6, 9.

201 *See* Abbott, *supra* note 115, at 500 (noting that collective pressure is necessary "to initiate the necessary enforcement and rehabilitative mechanisms").

202 Megan E. Kures, Note, *The Effect of Armed Conflict on Children: The Plight of Unaccompanied Refugee Minors*, 25 SUFFOLK TRANSNAT'L L. REV. 141, 157–58 (2001) (arguing that enforcement of the international law dealing with children is the first step towards the ultimate goal of protecting them); *see also* Otunnu, *supra* note 140, at 60 ("[T]he most important and pressing challenge today is how to translate the impressive body of interna-

III

THE ALIEN TORT CLAIMS ACT (ATCA) OF 1789: AMERICA'S INTERNATIONAL HUMAN RIGHTS LAW

"[U]niversal condemnation of human rights abuses 'provide[s] scant comfort' to the numerous victims of gross violations [of international human rights law] if they are without a forum to remedy the wrong."[203]

The Alien Tort Claims Act (ATCA) of 1789[204] permits aliens to sue for a tort committed anywhere in the world in violation of the law of nations or a United States treaty.[205] The United States currently stands alone as the only nation allowing such suits.[206] Because there is little legislative history to guide courts and scholars on the drafters' intent, interpretations of the statute remain controversial.[207] However, two seminal Second Circuit cases, *Filartiga v. Pena-Irala*[208] and *Kadic v. Karadžić*,[209] and a congressional statute, the Torture Victim Protection Act of 1991 (TVPA),[210] have transformed the ATCA into a formidable piece of human rights legislation.

This Part illustrates how the ATCA can empower and liberate individuals from oppressive institutional arrangements by providing a forum in which to adjudicate their claims. Because the ATCA permits awards of punitive and compensatory damages, it not only creates a forum in which to redress wrongs, but also acts as a deterrent for future violators of international law.[211] For example, one Bosnian Muslim plaintiff stated that his case was more about legal accountability

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tional norms and local values into commitments that can make a difference to the fate of children exposed to danger on the ground.").

203 Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 106 (2d Cir. 2000) (second alteration in original).

204 28 U.S.C. § 1350 (2000) reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

205 *Id.*; Kadic v. Karadžić, 70 F.3d 232, 238 (2d Cir. 1995).

206 *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 2033 (2001) [hereinafter *Law Developments*].

207 *Wiwa*, 226 F.3d at 104 n.10; *see also* Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2125–26 (1995) (summarizing four predominant scholarly and judicial theories of the ATCA drafters' intent). *But see* Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361, 362–63 (2001) (arguing that the ATCA's drafters clearly did not intend for the statute to permit "suits against foreign corporations for acts occurring outside the United States").

208 630 F.2d 876 (2d Cir. 1980).

209 70 F.3d 232 (2d Cir. 1995).

210 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. note § 1350 (2000)).

211 *See Law Developments*, *supra* note 206, at 2042. ATCA judgments have yielded awards as large as $4.5 billion. *Id.* at 2041 n.105; *see also* Matthew Haggard, *A Whopper of a Year*, MIAMI DAILY BUS. REV., Dec. 16, 2002, at 18 (describing the $54.6 million award, including both punitive and compensatory damages, to three Salvadoran nationals who brought suit for kidnapping and torture); *Judge Awards $140 million in Torture Case*, SOUTH FLORIDA SUN-

than money: "I brought this case because I felt an obligation towards those who were killed or tortured by [the defendant]."[212]

A. Alien v. Alien (And Americans Too): The Right to Sue in U.S. Federal Courts

In *Filartiga*, Paraguayan citizens sued a former Paraguayan police official in the Eastern District of New York for wrongful death in the alleged torture and murder of their son.[213] The court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights" and wherever the "alleged torturer is found and served with process by an alien within our borders, [the ATCA] provides federal jurisdiction."[214] Congress endorsed *Filartiga*'s support for an alien's private right of action under ATCA by enacting the TVPA.[215] The TVPA is not a jurisdictional statute itself,[216] but rather is a statutory note to the

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SENTINEL, April 30, 2002, at 4A (reporting that an Atlanta federal district judge awarded each of the four Bosnian Muslim plaintiffs $35 million).

212 *See Judge Awards $140 million in Torture Case, supra* note 211 (internal quotation marks omitted).

213 630 F.2d at 878–79.

214 *Id.* at 878. It is important to note that the ATCA only confers subject matter jurisdiction; plaintiffs must still establish personal jurisdiction for cases to move forward. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94–99 (2d Cir. 2000) (finding subject matter jurisdiction and personal jurisdiction over foreign defendants separately in an ATCA claim); Kadic v. Karadzic, 70 F.3d 232, 248 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996) (holding that defendant personally served with summons and complaint while in New York, but outside of the U.N. headquarters district, does not have immunity and is subject to personal jurisdiction); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 755–58 (discussing an ATCA case in which defendants did not contest subject matter jurisdiction but moved to dismiss based on lack of personal jurisdiction). *But see* Doe v. Unocal Corp., 248 F.3d 915, 925 (9th Cir. 2001) (holding that, in a parent-subsidiary relationship, the contacts of the subsidiary are not imputed to the parent for personal jurisdiction purposes).

215 *See Wiwa*, 226 F.3d at 104–05; Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 443 (D.N.J. 1999). Thus, the TVPA overruled *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984), which held that the ATCA did not provide subject matter jurisdiction. The TVPA reads in relevant part:

> Sec. 2. ESTABLISHMENT OF CIVIL ACTION.
>
> (a) LIABILITY. —An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. note § 1350 (2000)) (internal quotation marks omitted).

216 *See Iwanowa*, 67 F. Supp. 2d at 441–43.

ATCA extending the ATCA's subject matter jurisdiction and remedy to "any individual," including U.S. citizens.[217]

B. The Act of State Doctrine

While the TVPA expressly creates a cause of action under U.S. law,[218] it differs from the ATCA in that it "contains explicit language requiring state action."[219] The act of state doctrine is a common law rule that prohibits courts of one country from sitting in judgment over the acts of another country within that other country's own borders.[220] However, under both the TVPA and the ATCA, the state action requirement does not preclude suits brought against private groups or individuals. Under the TVPA, "[c]ertain private groups may constitute a *de facto state,* in which case they will be held liable. . . ."[221] In other words, the concern is not for the legitimacy of the group but its power.[222]

Comparatively, when no state action exists, courts will narrowly construe plaintiffs' claims against private parties.[223] Judge Edwards's pre-TVPA concurring opinion in *Tel-Oren v. Libyan Arab Republic*[224] established the now oft-cited proposition that there are a "handful of crimes to which the law of nations attributes individual responsibility."[225] In other words, because crimes such as slave trading and tor-

217 *See Wiwa,* 226 F.3d at 104–05.

218 *See id.*; *see also Kadic,* 70 F.3d at 245 (noting that the " [l]egislative history confirms that [the TVPA] was intended to 'make clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with . . . purely private groups.'").

219 Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 23 (D.D.C. 2000) (internal quotation marks omitted). Moreover, unlike the ATCA, the TVPA has exhaustion of remedies and statute of limitations requirements. *See* 28 U.S.C. note § 1350 ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."); *id.* ("No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."); *see also* Papa v. United States, 281 F.3d 1004, 1012–13 (9th Cir. 2002) (finding that the statute of limitations provided by the TVPA applies to the ATCA); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1195–96 (S.D.N.Y. 1996) (holding that the TVPA's statute of limitations applies retroactively, especially where plaintiff had fair notice that torture was not a lawful act); Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995) (finding that plaintiff's twelve hours of in-court testimony in Guatemala and the languishing of her criminal case for several years without resolution prohibited her from bringing a civil action in Guatemalan courts and therefore she sufficiently exhausted the local remedies available to her). *But see* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1133 (C.D. Cal. 2002) (noting that "the ATCA does not require exhaustion of local remedies").

220 Ramsey, *supra* note 207, at 364.

221 Doe v. Islamic Salvation Front, 993 F. Supp. 3, 9 (D.D.C. 1998) (emphasis added).

222 *Id*; *see also* Rabkin, *supra* note 207, at 2131 ("The inquiry . . . is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.").

223 Williams, *supra* note 214, at 764–66.

224 726 F.2d 774 (D.C. Cir. 1984).

225 *Id.* at 795 (Edwards, J., concurring).

ture confer individual liability, state action is not necessary for ATCA liability to attach.[226]

Kadic v. Karadžić[227] is the leading judicial opinion holding private actors liable for torturous human rights violations.[228] In *Kadic*, victims from Bosnia-Herzegovina sued a self-designated president of an unrecognized Bosnian-Serb entity.[229] Stating that the plaintiffs needed an opportunity to prove their allegations, the court held that "[a] private individual acts under color of law . . . when he acts together with state officials or with significant state aid."[230] Moreover, the court stated that "atrocities are actionable under the [ATCA], without regard to state action, to the extent that they were committed *in pursuit of* violations of the law of nations.[231]

"[A] broader array of factual circumstances can give rise to liability" if the harm involved state action or a private individual who acted under color of state law.[232] This wider scope is necessary to encompass ATCA claims against corporate actors like gun manufacturers; an ACTA plaintiff could address the actions of local government and corporate partnerships to curb corporate action.[233] As an example of how courts might evaluate such a claim, a district court in California recently upheld the imposition of vicarious liability on a third-party

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226 John Doe I v. Unocal Corp., Nos. 00-56603, 00-57197, 0056628, 00-57195, 2002 WL 31063976, at *9 (9th Cir. Sept. 18, 2002) [hereinafter *Doe I*] ("Forced labor is a modern variant of slavery to which the law of nations attributes individual liability such that state action is not required." (emphasis omitted)), *vacated sub. nom.* Doe v. Unocal, Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003). *But see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (acknowledging the international law trend "toward a more expansive allocation of rights and obligations to entities other than states" but declining personally to read the ATCA "to cover torture by non-state actors, absent guidance from the Supreme Court").

227 70 F.3d 232 (2d Cir. 1996).

228 *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d. 424, 444 (D.N.J. 1999) (noting that pre-*Kadic* decisions only recognized state actors as liable for international law violations).

229 *Kadic*, 70 F.3d at 236–37.

230 *Id.* at 245; *see also Doe I*, *supra* note 226, at *1 (holding that the defendant Unocal may be liable under the ATCA); Jama v. INS, 22 F. Supp. 2d 353, 371–72 (D.N.J. 1998) (finding a correctional facility and its officers, directors and guards to be state actors because they were performing government services under contract with the INS); *cf. Iwanowa*, 67 F. Supp. 2d at 445 ("No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."). *But see* Bigio v. Coca-Cola Co., 239 F.3d 440, 449 (2d Cir. 2001) (finding that "an indirect economic benefit from unlawful state action is not sufficient to support jurisdiction over a private party under the [ATCA]"); Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 22 (D.D.C. 2000) (noting that a "substantial degree of cooperative action" between a private corporation and the state government was needed to find a corporation whose soccer balls were assembled by forced labor liable under the ATCA).

231 *Kadic*, 70 F.3d at 244 (emphasis added).

232 Williams, *supra* note 214, at 766.

233 *Id.* at 766–67.

corporate defendant because it knowingly aided and encouraged the state's commission of violations.[234]

Ironically, "the involvement of a state in the contested activities can create sovereign immunity problems for plaintiffs."[235] In *Aquinda v. Texaco, Inc.*,[236] Ecuadorian nationals sued Texaco for damages caused by the company's oil exploration activities.[237] In response, Texaco argued that because the Ecuadorian government was an indispensable party, the court should dismiss plaintiffs' claims for failure to join the Ecuadorian government under Rule 19 of the Federal Rules of Civil Procedure.[238] While this argument was ultimately unsuccessful,[239] in other situations involving a sovereign state, the corporate defendant could "argue that the challenged actions were those of the government partner, which cannot be sued because of sovereign immunity or the act of state doctrine, and that the [corporate defendant] cannot be held responsible for how [its] joint venture partners use their sovereign power."[240] However, the Second Circuit noted in

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234 *See* Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1142–49 (C.D. Cal. 2002).

235 Williams, *supra* note 214, at 767 ("[U]nder the Foreign Sovereign Immunities Act ("FSIA"), foreign states can be brought into court in the United States to litigate claims arising from their commercial activities but not to hear claims based upon their sovereign activities.").

236 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). This discussion comes from Williams, *supra* note 214, at 752–55. The correct spelling of the plaintiff's name in this case is "Aguinda," rather than "Aquinda," as the official reporter states. For purposes of consistency and to eliminate any confusion, this Note uses the name "Aquinda" as officially reported.

237 *See Aquinda*, 945 F. Supp. at 626.

238 Williams, *supra* note 214, at 767. *See* FED. R. CIV. P. 19 (pertaining to joinder of necessary parties); *see also Jota*, 157 F.3d at 162 ("[S]ince much of the relief sought could be fully provided by Texaco without any participation by [the government of] Ecuador, dismissal of the entire complaint on Rule 19 grounds exceeds [the district court's] discretion.").

239 A change in Ecuador's government led the state to intervene in support of plaintiffs' claim. The Second Circuit felt that this change in position merited consideration. *See* Williams, *supra* note 214, at 754.

240 *Id.* at 767–68. A plaintiff could also bring a claim under the Foreign Services Immunity Act of 1976 (FSIA). *See* Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. § 1330(a) (2000)) ("The district courts shall have original jurisdiction . . . in . . . any nonjury civil action against a foreign state as defined in [28 U.S.C.] 1603(a) . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . . "). Specifically:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
> . . . in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

28 U.S.C. § 1605(a). Moreover, the Ninth Circuit recently held that "a state engages in commercial activity . . . where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Doe I*, *supra* note 226,

Kadic that "it would be a rare case in which [state action] precluded suit under [the ATCA]."[241]

C. Elements of an ATCA Claim

1. *An Alien Sues for a Tort*

A successful ATCA claim must establish that the ATCA encompasses the claim and provides a cause of action.[242] As the Eleventh Circuit noted, "the 'committed in violation' language of the statute suggests that Congress did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under the [ATCA]."[243] However, it is still unclear whether an alien-plaintiff must establish an ordinary tort that violates international law, or whether the violation of international law itself is the tort under the Act.[244]

The Ninth Circuit recently found that a corporate defendant could be held liable under the ATCA for "aiding and abetting the Myanmar Military in subjecting [p]laintiffs to forced labor."[245] The court noted that the standard for aiding and abetting in the international criminal law context was similar to that for domestic tort law.[246] The majority found that, under the ATCA, aiding and abetting is any "knowing practical assistance or encouragement that has a substantial

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at *18 (internal quotation marks omitted) (quoting Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993) (internal quotation marks omitted)); *see id.* at *19 ("[A] foreign state's conduct '*in connection with* a commercial activity' must itself be a commercial activity to fall within the third exception to foreign service immunity."); *see also* Xuncax v. Gramajo, 886 F. Supp. 162, 176 (D. Mass. 1995) (holding that the defendant, a former Guatemalan Minister of Defense, was not immune under the FSIA for conduct that was beyond the scope of his official authority). The effect of these rulings is that child soldiers can bring an action against the gun manufacturing states under FSIA as well as under the ATCA. *See* Rabkin, *supra* note 207, at 2129 (arguing that the ATCA must be viewed in conjunction with both the TVPA and the FSIA).

241 Kadic v. Karadžić, 70 F.3d 232, 250 (2d Cir. 1995).

242 Ramsey, *supra* note 207, at 362–63; *see also* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 438–39 (D.N.J. 1999) (noting that ATCA grants a cause of action as well as subject matter jurisdiction).

243 Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); *see also* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1139 (C.D. Cal. 2002) (noting that "the ATCA does not adopt wholesale all principles of international law. Rather, it creates a domestic cause of action for violations of international law.").

244 Most times this should not be a problem given that most human right violations translate into common law torts. For example, torture is an extreme form of battery, and placing someone in jail unjustly deprives them of their liberty.

245 *Doe I*, *supra* note 226, at *10 (empbasis omitted). However, some courts suggest that the ATCA does not permit ordinary tort violations. *See Law Developments*, *supra* note 206, at 2036–37 & n.86 (outlining court holdings under ATCA dealing with environmental abuses, restrictions on freedom of speech, libel fraud, misappropriation of funds, and breach of fiduciary duty).

246 *Doe I*, *supra* note 226, at *12.

effect on the perpetration of the crime."[247] However, in a concurrence that demonstrates the nature of the disagreement over the correct standard, Judge Reinhardt expressed his belief that defendant "Unocal's third-party tort liability should be resolved by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard," rather than a newly formed international standard.[248]

Other cases also highlight this disagreement over which torts satisfy the ATCA. For example, in *Iwanowa v. Ford Motor Co.*,[249] a New Jersey district court found that the defendant's subsidiary committed a tort by requiring unpaid forced labor under inhumane conditions.[250] Based on this finding, the court held that the plaintiff satisfied the tort requirement under ATCA.[251] In comparison, in *Jogi v. Piland*,[252] another district court dismissed the alien-plaintiff's claim because he alleged a violation of the Vienna Convention on Consular Relations, which was not a tort.[253] Because of these varied and conflicting decisions and the Supreme Court's continued silence, judges and lawyers are left uncertain as to what exactly constitutes a "tort" under the ATCA.[254]

2. *Violation of the Law of Nations*

A threshold question in ATCA claims is whether the alleged tort violates the law of nations.[255] To determine whether a violation has occurred, courts "must consider: (1) whether [the claim] identif[ies] a specific, universal, and obligatory norm of international law; (2) whether that norm is recognized by the United States; and (3) whether [the claim] adequately allege[s] its violation."[256] Moreover, because courts must interpret modern international law, not the law as it existed in 1789,[257] they should "consult[ ] the works of jurists, writing professedly on public law; or . . . the general usage and practice of nations; or . . . judicial decisions recognising [sic] and enforc-

247 *Id.* at *10.

248 *Id.* at *24 (Reinhardt, J., concurring); *see also* discussion *infra* Part III.C.2.a (regarding choice of law challenges faced under ATCA claims).

249 67 F. Supp. 2d 424 (D.N.J. 1999).

250 *See id.* at 439–40.

251 *See id.*

252 131 F. Supp. 2d 1024 (C.D. Ill. 2001).

253 *See id.* at 1026 ("Only those treaty provisions that would actually give rise to a tort action by reason of their violation are implicated by the [ATCA].").

254 *See* Rabkin, *supra* note 207, at 2129.

255 *See* Kadic v. Karadžić, 70 F.3d 232, 238 (2d Cir. 1995) (noting that "the [ATCA] requires that plaintiffs plead a 'violation of the law of nations' at the jurisdictional threshold . . . .").

256 Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1132 (C.D. Cal. 2002).

257 *Kadic*, 70 F.3d at 238.

ing that law."[258] Through these means, courts can determine whether the alleged conduct violates universally accepted international norms, and therefore violates the law of nations.[259]

That a broad array of conduct has been found to violate the law of nations under this test[260] has particular implications for child soldiers. At the outset, the TVPA expressly provides that extrajudicial killing and torture are violations of international law, thereby making the responsible party liable for damages.[261] Moreover, "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation" under the ATCA.[262] Because the prohibition on the use of child soldiers is undisputed under international law, the selling of arms to public or private actors who use child combatants in armed conflict is a violation of the law of nations.

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258 United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820); *see also* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 439 (D.N.J. 1999) (quoting *Smith*); Jama v. INS, 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (same).

259 *See Kadic*, 70 F.3d at 238–39.

260 *See, e.g.*, *Doe I*, *supra* note 226, at *8 (finding that forced labor is sufficiently widely condemned that it constitutes a violation of the law of nations); Alvarez-Machain v. U.S., 331 F.3d 604, 620–22 (9th Cir. 2003) (noting that transborder abduction is a violation of the law of nations), *cert. denied*, 124 S. Ct. 821 (Dec. 1, 2003); Bao Ge v. Li Peng, 201 F. Supp. 2d 14 (D.D.C. 2000) (noting that "certain forms of conduct" such as piracy, slave trade, attacks or hijacking of aircraft, genocide, war crimes, murder, torture, arbitrary detention of civilians, and certain acts of terrorism violate international law whether undertaken by the state or a private actor).

261 28 U.S.C. note § 1350 (2000). The TVPA states in pertinent part:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages. . . .

Id. (internal quotation marks omitted).

262 Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980); *see also Doe I*, *supra* note 226, at *8 (noting that because torture is widely condemned, it has achieved *jus cogens* status). As the Ninth Circuit observed:

> Because the underlying conduct alleged constitutes a violation of customary international law, the violation was allegedly committed by a governmental entity, and Unocal's liability, if any, is derivative of that government entity's, *jus cogens* is irrelevant. . . .
>
> [Moreover,] because there is no requirement that plaintiffs state a *jus cogens* violation . . . under the ATCA[, *jus cogens* is necessary if a non-state actor engages *directly* in the unlawful conduct] and that other conduct of private parties that would violate international law if engaged in by a governmental entity is not actionable under the ATCA. [Thus,] [t]he well-established principle that forced labor practices violate customary international law is sufficient in itself to confer jurisdiction . . . *jus cogens* or not.

Id. at *24–25 (footnotes omitted).

a. *Choice of Law*

One unresolved and critical component of a successful ATCA claim is what law the court should apply.[263] Specifically, a court must decide whether to apply the law of the state where the alleged torturous conduct took place, the law of the forum, or international law.[264] This decision is extremely important as the law that the court applies determines whether the ATCA claim will survive pretrial motions.[265] Moreover, choice of law issues impact the collection of ATCA judgments abroad.[266]

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263 Although federal courts do not uniformly address choice of law issues in suits under the Alien Tort Claims Act, courts will generally apply choice of law principles that will provide a remedy for a violation of an international norm. *See infra* Part III.C.2.a; *see also* Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law, in* 21 CAUSES OF ACTION 2d 327, § 8, at 360–61 (2003) (stating that "[t]he only unifying principal that can be found in these [diverse federal] decisions is a will to fashion a remedy to the neglect of legal process") In *Tachiona v. Mugabe,* a U.S. federal district court synthesized the choice of law principles emerging from ATCA cases:

> (1) the local law of the state where the wrongs and injuries occurred and the parties reside may be relevant and may apply to resolve a particular issue insofar as it is substantively consistent with federal common law principles and international law and provides a remedy compatible with the purposes of the ATCA and pertinent international norms; (2) in the event the local law of the foreign state of the parties' residence and underlying events conflicts with federal or international law, or does not provide an appropriate remedy, or is otherwise inadequate to redress the international law violations in question, a remedy may be fashioned from analogous principles derived from federal law and the forum state, or from international law embodied in federal common law; (3) should the application of law from federal and forum state principles as to some aspect of the claim defeat recovery, an analogous rule drawn from the municipal law of the foreign jurisdiction may be applied to the extent it supplies a basis for a decisional rule that may permit relief; (4) if some part of the claim cannot be sustained as a violation of international law, a remedy might be found by application of the foreign state's municipal law under the federal court's pendent jurisdiction if so invoked.

234 F. Supp. 2d 401, 418–19 (S.D.N.Y. 2002) (footnotes omitted).

264 *Compare Doe I, supra* note 226, at *11 (applying substantive international law to an ATCA claim), *with* Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2001) (applying the 1986 Restatement (Third) of Foreign Relations Law of the United States to determine if there was a violation of the law of nations) *and* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.12 (2d Cir. 2000) (stating that the U.S. courts have not resolved the choice of law issue). Some commentators note that such conduct often violates both international and U.S. law. *See, e.g.*, Rabkin, *supra* note 207, at 2142 n.133 (noting that "[o]fficial torture and extrajudicial killing" are torts under both international law and U.S. common law).

265 *See* Rabkin, *supra* note 207, at 2142 ("[Such] distinctions are analytically useful, because the result of a motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim may turn on how a court" resolves these issues).

266 *See* Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting § 1350 Judgments Abroad,* 107 YALE L.J. 2177, 2190–91 (1998).

Where third-party tort liability under the ATCA is at issue, some argue that federal common law applies.[267] According to this view, there are "unique federal interests involved in [ATCA] cases that support the creation of a uniform body of federal common law to facilitate the implementation of such claims."[268] Indeed, the essence of the court's role in an ATCA claim is to "fashion domestic common law remedies to give effect to violations of customary international law."[269] Some courts have even found that settled international law is interchangeable with the law of nations, and thus part of federal common law.[270] In fact, the TVPA was enacted to codify the *Filartiga* holding that the law of nations is incorporated into U.S. law.[271]

b. *Forum Non Conveniens*

Another doctrinal hurdle plaintiffs face is forum non conveniens.[272] This doctrine is concerned with determining the proper forum in which to litigate a plaintiff's claim.[273] Because many multinational corporations are subject to personal jurisdiction and venue in the United States, and therefore cannot contest the suit for lack of jurisdiction or venue, a significant number challenge plaintiffs' claims on forum non conveniens grounds.[274] However, a fundamental tension exists between the doctrine and the purpose of the ATCA:

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267 *See, e.g., Doe I, supra* note 226, at *26 (Reinhardt, J. concurring) (arguing that the majority should not apply international law in resolving ancillary legal issues arising under ATCA).

268 *Id.*; *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring) ("[T]he substantive right on whicb [an alien's action] is based must be found in the domestic tort law of the United States.").

269 Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); *cf.* Jama v. INS, 22 F. Supp. 2d 353, 364 (D.N.J. 1998) (suggesting that domestic law may preempt international law wbere Congress has "occup[ied] a field so thoroughly" as to manifest its intent for domestic law to govern).

270 *See, e.g., Doe I, supra* note 226, at *11; Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 438 n.14 ("The terms 'law of nations' and 'customary international law' are intercbangeahle.").

271 *See* H.R. REP. No. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.AN. 84, 86. Moreover, the primary concern in resolving choice of law issues is fairness. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980). Thus some consideration should be given to applying the law where the challenged conduct is actionable under ATCA. *Id.*

272 As a discretionary judicial device, forum non conveniens allows a court to dismiss a claim when a suitable alternative forum is available, even in cases where jurisdictional and venue requirements are met. *See* Aquinda v. Texaco, Inc., 303 F.3d 470, 476 (2d Cir. 2002). If an adequate forum does exist, the court must weigh a number of factors regarding the parties' private interests in adjudicating the claim in an alternative forum, and it must assess any public interests that might be at stake. *See id.* Moreover, the burden is on the defendant to prove the existence and appropriateness of an adequate alternative forum in which to litigate the claim. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000).

273 *See Wiwa*, 226 F.3d at 99–101.

274 Matthew R. Skolnik, Comment, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A* Shell *of Its Former Self After* Wiwa, 16 EMORY INT'L L. REV. 187, 201 (2002).

simply dismissing a claim for forum non conveniens frustrates the congressional intent "to provide a federal forum for aliens suing domestic entities for violation of the law of nations."[275]

In *Wiwa v. Royal Dutch Petroleum Co.*,[276] the Second Circuit stated that under the ATCA, international law violations are "our business."[277] Because the status quo of merely condemning violations of international norms "provide[d] scant comfort" to victims, the court found that the ATCA and TVPA created a strong domestic policy interest in favor of adjudicating disputes arising thereunder.[278] In keeping with this policy, the Second Circuit recently sought to ensure that the *Aquinda* plaintiffs had a forum in which to adjudicate their claims.[279] In that case, the court required that the defendant, Texaco, subject itself to personal jurisdiction in either Ecuador or Peru before the court would grant Texaco's motion to dismiss on forum non conveniens grounds.[280] Despite this line of precedent, the United States is the more appropriate forum for child soldier suits because the ATCA has both the jurisdictional and the remedial powers necessary to hold corporations accountable for human rights violations.

c. *Political Question Doctrine*

Another criticism of the ATCA is that it requires "judicial stretches to produce a legal regime in which courts . . . become deeply involved in U.S. foreign policy."[281] As such, claims under the Act may bring nonjusticiable political questions before the federal courts. Rooted in the concept of separation of powers, the political question doctrine counsels against adjudicating cases that involve issues more appropriately addressed by the executive or legislative branches.[282] However, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[283] Noting that the doctrine is one of "political questions," not "political cases,"

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275 Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998).

276 226 F.3d 88 (2d Cir. 2000).

277 *Id.* at 106 (internal quotation marks omitted).

278 *Id.* (alteration in original) (internal quotation marks omitted). *But see* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1034–35 (2001) (suggesting that the *Wiwa* court's holding is weakened because it based its reasoning on the TVPA, rather than the ATCA).

279 *See* Aquinda v. Texaco, Inc., 303 F.3d 470, 479 (2d Cir. 2002).

280 *See id.* at 476–79; *see also Jota*, 157 F.3d at 159 ("[D]ismissal for fornm non conveniens is not appropriate . . . absent a commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts for purposes of this action.").

281 Ramsey, *supra* note 207, at 366.

282 *See* Baker v. Carr, 369 U.S. 186, 210–13 (1962); Kadic v. Karadžić, 70 F.3d 232, 249–50 (2d Cir. 1995) (outlining the standards for finding a political question, and applying them to an ATCA claim).

283 *Baker*, 369 U.S. at 211.

the *Kadic* court held that the better approach under ATCA is to carefully balance relevant considerations on a case-by-case basis.[284]

IV
SEEN AND HEARD: EMPOWERING CHILD SOLDIERS UNDER THE LAW

The gun makers' "see no evil, hear no evil" attitude[285] of ignoring unscrupulous dealers and corrupt brokers who channel firearms to gray and black markets must end. This insouciant approach fosters "a culture of evasion of firearm laws and regulations."[286] As the Burkina Faso example strongly illustrates,[287] gun makers have full knowledge that selling small arms and light weapons to unauthorized users exacerbates and sustains conflicts that involve child combatants. While corporate legal scholars may argue that the only social responsibility multinational corporations have is to increase profits,[288] engaging in business with unauthorized individuals is against the law. Corporations generally, and gun manufacturers specifically, are just as blameworthy as individuals when they violate the brokering and SALW laws by selling arms to unauthorized users.[289] Gun manufacturers facilitate—and indeed thrive on—the existence of gray and black markets and the lack of transparency in SALW sales; they are not simply law-abiding companies doing business. In other words, gun manufacturers are well aware of the ramifications of their actions, and a successful lawsuit will create an incentive to incorporate mechanisms for traceability and accountability of unauthorized users, thus minimizing the use of child soldiers.[290]

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284 *Kadic*, 70 F.3d at 249–50 (refusing to dismiss an ATCA claim on grounds of nonjusticiability); *see also* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (holding that plaintiff's claim for torture and cruel, inhumane treatment was not barred by the political question doctrine). *But see* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 489 (D.N.J. 1999) (finding that plaintiff's claims of forced labor during the Nazi era were nonjusticiable).

285 *See* Butterfield, *supra* note 64, at A14 (internal quotation marks omitted); Glaberson, *supra* note 63, at B1.

286 *See* Butterfield, *supra* note 64, at A14 (internal quotation marks omitted); *see also supra* Part I.B.3 (discussing the unregulated SALW market).

287 *See* discussion *supra* Part I.C.

288 *See, e.g.*, Ariadne K. Sacharoff, Note, *Multinationals In Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Right Violations?*, 23 BROOK. J. INT'L L. 927, 930 (1998) (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)).

289 "Unauthorized user" here encompasses not just crooked brokers and dealers or outright criminals, but also governments and insurgent groups that use children as combatants.

290 The accountability and traceability standards established for the international financial institutions serve as a possible model for similar standards here. *See supra* text accompanying notes 84–86.

A. The ATCA is the Most Appropriate Statute For Child Soldier Lawsuits

The ATCA is a powerful "avenue toward breaking down the political shield protecting [gun manufacturers] from scrutiny."[291] Because international law dealing with child soldiers is generally not self-executing,[292] the ATCA can aid enforcement by providing a cause of action for torts committed in violation of international law. That is, if a plaintiff alleges a violation of international law prohibiting the use of children in armed conflict, the ATCA can both compensate and deter future violations. However, while a cause of action under the ATCA is theoretically possible against every actor or entity involved in SALW proliferation,[293] these individual defendants are typically unavailable for suit.[294] Gun manufacturers are the most plausible defendants given their level of complicity with, and encouragement of, the sale of SALW to unauthorized individuals.[295]

B. Child Soldiers v. Gun Manufacturers: The Lawsuit Can Work

1. *Gun Manufacturers Committed a Tort in Violation of the Law of Nations*

Under the ATCA, a child soldier would likely succeed against SALW manufacturers. The child soldier plaintiff would sue for a tort committed in violation of the law of nations: the sale of small arms and light weapons in contravention of customary international law and U.S. brokering law. The child soldier would then argue that these sales perpetuate both armed conflicts and the recruitment of children in these conflicts.[296] If the child soldier plaintiff could not prove a direct violation of the law of nations, she could alternatively claim that SALW manufacturers negligently marketed the weapons.[297] Moreover, while the factual and procedural thresholds of an ATCA suit are considerable, the proximate cause requirements for successful gun litigation suits[298] under the ATCA are lower than under domestic tort

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291 Sacharoff, *supra* note 288, at 930.

292 *See supra* text accompanying 179.

293 *See supra* Part III.A.

294 *See, e.g., supra* text accompanying notes 72–73; *see also* Lucinda Saunders, Note, *Rich and Rare Are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds*, 24 FORDHAM INT'L L.J. 1402, 1472 (2001) (arguing in favor of suing De Beers under the ATCA where the insurgent groups were unavailable for suit).

295 *See supra* Parts I.B.3, I.C.

296 *See* discussion *supra* Parts I, II.

297 *Cf.* Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 26–31 (2000) (discussing a successful domestic suit against a California gun manufacturer for, *inter alia*, negligently marketing ("overpromoting") a particular firearm model).

298 *See supra* Part III.C.

law. All a child solider plaintiff must show is that the manufacturers are violating the law of nations.[299] As the Burkina Faso example illustrates, SALW manufacturers are on notice that their behavior constitutes such a violation.[300]

Gun makers violate international law governing children in armed conflict when they blatantly disregard the broker-dealers with whom they do business. Rebel and government groups rely on the proliferation of SALW to fight wars. Thus, gun manufacturers who knowingly sell to unauthorized users or legal users who ultimately transfer the weapons to insurgent groups not only contravene the laws regulating the SALW proliferation, but also knowingly aid and encourage the employment of child soldiers by these groups.[301] In the alternative, because the International Labor Organization deems the use of child soldiers to be a violation of child labor laws,[302] child plaintiffs can argue that the use of child soldiers is a modern form of slavery—a violation of international law for which state action is not required.[303]

The defendant-manufacturers will likely argue that the plaintiffs lack the necessary facts to show complicity. Specifically, they will deny responsibility for the actions of third parties, in this situation the insurgent groups or governments that are recruiting child combatants.[304] However, plaintiffs can defeat this argument by showing that the gun manufacturers could not act without the assistance of government authorities in the contracting of weapons sales, and vice versa.[305]

2. *Child Soldier Plaintiffs Can Overcome the Procedural Hurdles*

Defendants, whether the Ukrainian Ukrspetsexport or an American-based gun company, will likely seek dismissal on forum non conveniens grounds.[306] The child soldiers, however, have no alternative

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299 *See* discussion *supra* Part III.C.2; *see also* Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1195–96 (S.D.N.Y. 1996) (finding that the TVPA applies retroactively where defendants had notice that torture was an unlawful act).

300 *See supra* Part I.C.

301 *See supra* Part II.B (discussing the impact of SALW proliferation on children).

302 *See* Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, art. 3(a), 38 I.L.M. 1207, 1208, *available at* http://www.ilo.org/public/english/standards/ipec/ratification/convention/text.htm.

303 *See supra* note 226.

304 *Cf.* discussion *supra* Part I.B.2.a (describing the NRA's arguments against gun manufacturer liability for victims of violent crimes).

305 *See, e.g.*, Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 22 (D.D.C. 2000).

306 There is also a related personal jurisdiction issue for defendant gun manufacturers. Plaintiffs will most likely prevail on this issue because many international organizations have business ties with the United States. The intricate involvement of the multifarious actors in the SALW trade will likely establish sufficient contacts to the United States. *See generally* Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102 (1987) (establishing

forum in which to bring their suit. While the International Criminal Court (ICC) has declared the recruitment of children under the age of eighteen to be a violation of international law, and thus could provide a suitable alternative forum, the ICC will only hear cases concerning crimes committed after July 1998.[307] Also, even though some states, such as Sierra Leone, have statutes permitting suits for war crimes against child combatants, such forums tend to be dangerous for the child soldier plaintiff because the governments of those states often participated in the original weapons purchase.[308] Even if another forum is available, the interests of justice require that the court direct the defendants to either submit themselves to personal jurisdiction in the alternative forum or to the United States.[309]

Finally, gun manufacturers will likely invoke the political question doctrine in their defense. The only potentially political question in this area, however, is the age at which a child may participate in war. The international consensus, even in the United States, is that no matter how the legislature defines a child's age, a child must not and should not participate in war.[310]

CONCLUSION

Currently, there are an estimated 300,000 children under the age of eighteen mobilized for war efforts either by legitimate state governments or rebel groups.[311] While authorities suggest that there is no direct causal link between SALW and child soldiers, substantial research indicates that armed conflict and the subsequent violence committed by children have escalated because of the proliferation of small arms and light weapons. Child soldiers are defenseless individuals who have been robbed of their childhood; they should not be exploited for the sake of filling the financial coffers of gun manufacturers. Gun manufacturers who sell to insurgent or government entities that use child soldiers commit a tort in violation of the law of nations for which they should be held liable. The Alien Tort Claims Act is a

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the current minimum contacts standard for establishing personal jurisdiction over the defendant); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that a defendant corporation must have sufficient contacts with the United States as fairness and justice require).

307 *See* Rome Statute of the International Criminal Court, July 17, 1988, art. 11(1), U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, 1010 ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.").

308 *See supra* note 22 (discussing the "grey market" in SALW).

309 *See supra* Part III.C.2.b. For a specific example of defendants contesting personal jurisdiction, see *supra* text accompanying notes 279–80 (discussing Aquinda v. Texaco, Inc., 303 F.3d 470, 476 (2d Cir. 2002)).

310 The international debate revolves around the minimum age defining "child," not whether those so defined should enter combat. *See* discussion *supra* Part II.A.

311 *See supra* notes 114–20 and accompanying text.

key tool that child soldiers can use to combat SALW proliferation and its accompanying human rights abuses.