

**CHILD LABOR PROHIBITIONS ARE
UNIVERSAL, BINDING, AND OBLIGATORY
LAW: THE EVOLVING STATE OF
CUSTOMARY INTERNATIONAL LAW
CONCERNING THE UNEMPOWERED
CHILD LABORER**

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Child labor¹ is the most prevalent source of child exploitation and child abuse in the world today.² At least 250

1. In construing the meaning of “child labour” as used in ILO Convention 138, the U.S. Department of Labor gives it a broad definition: “the term ‘child labor’ generally refers to any economic activity performed by a person under the age of 15.” 5 BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T OF LABOR, *BY THE SWEAT AND TOIL OF CHILDREN: EFFORTS TO ELIMINATE CHILD LABOR* ii (1998) [hereinafter *BY THE SWEAT AND TOIL*]; see also Katherine Cox, *The Inevitability of Nimble Fingers?: Law, Development, and Child Labor*, 32 VAND. J. TRANSNAT’L L., 115, 122–27 (1999) (discussing the difficulties associated with defining “child” and “labor”); see also Andrea Giampetro-Meyer et al., *The Exploitation of Child Labor: An Intractable International Problem?*, 16 LOY. L.A. INT’L & COMP. L.J. 657, 657–58 (1994) (exploring the relation between definitional problems and the regulation of child labor).

2. See *Child Labour: Targeting the Intolerable*, para. 1, ILO (1996), <http://www.ilo.org/public/english/standards/ipec/publ/clrep96.htm> (“Child labour is simply the most important source of child exploitation and child abuse in the world today.”). The U.S. Department of Labor’s Bureau of International Labor Affairs (ILAB) has researched and documented child labor practices worldwide since 1993, and has visited and investigated sixteen countries including Bangladesh, Brazil, Egypt, Guatemala, India, Kenya, Mexico, Nepal, Nicaragua, Pakistan, Peru, the Philippines, South Africa, Tanzania, Thailand, and Turkey. *BY THE SWEAT AND TOIL*, *supra* note 1, at i.

million children between the ages of five and fourteen³ are working in developing countries.⁴ Approximately 120 million of these children work full-time, and tens of millions of these children work under oppressive,⁵ exploitative,⁶ and hazardous⁷ conditions.⁸ According to recent global estimates by the International Labor Organization (ILO), the majority of the world's working children are found in Asia (61%), followed by Africa (32 %) and Latin America and the Caribbean (7%).⁹

3. With only a few exceptions, the minimum age for employment in the United States is fourteen years. NAT'L CONSUMERS LEAGUE, *An Overview of Federal Child Labor Laws*, at <http://www.nclnet.org/child%20labor/fact1.htm> (last visited Aug. 24, 2001); see also *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) ("The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.") [hereinafter DRC].

4. BY THE SWEAT AND TOIL, *supra* note 1, at ii. In many developing countries, children work in such industries as glass, metal works, textiles, mining, and fireworks manufacturing. Undoubtedly, many consumer goods sold in the United States are made with child labor, including soccer balls, tennis shoes, toys, clothing, and hand-knotted rugs sold in the most exclusive stores. Terry Collingsworth, *Child Labor in the Global Economy*, FOREIGN POL'Y IN FOCUS, Oct. 1997, at 1.

5. See 29 U.S.C. § 203(l) (1994) (defining oppressive child labor); see also Allan L. Schwartz, Annotation, *Validity, Construction, Application, and Effect of Child Labor Provisions of Fair Labor Standards Act*, 21 A.L.R. FED. 391, 409-14 (1974).

6. See Cox, *supra* note 1, at 121 (maintaining that even non-abusive child labor is harmful to a child because a child is not an adult. "Until a child has had the opportunity to mature, acquire independent thought and gain self-awareness, any work that she does must be regarded, in some sense, as 'forced' labor." *Id.*).

7. The Fair Labor Standards Act, 29 U.S.C. § 201 (Supp. V 1998), defines hazardous and prohibited jobs for children under eighteen years old as: the manufacture or storage of explosives, driving a motor vehicle and being an outside helper on a motor vehicle, coal and other forms of mining, logging and sawmilling, jobs that involve power-driven wood-working, metal-working, or hoisting machines, exposure to radioactive substances, meat packing or processing, power-driven bakery or meat slicing machines, manufacturing brick and tile, power-driven saws, wrecking, demolition and ship-breaking operations, roofing, and excavation. See 29 C.F.R. §570.5; see also NAT'L CONSUMERS LEAGUE, *An Overview of Federal Child Labor Laws*, at <http://www.nclnet.org/child%20labor/fact1.htm> (last visited Aug. 24, 2001) (listing the prohibited jobs for sixteen- and seventeen-year-olds).

8. BY THE SWEAT AND TOIL, *supra* note 1, at ii.

9. *Id.* The ILO, a United Nations agency represented by 174 countries, has taken the lead in international efforts to eliminate child labor. The ILO makes significant contributions to the general practice of child labor prohibitions. Judy Mann, *Working to Protect Children From Work*, WASH. POST, Dec. 8, 1999, at C14. However, the

Africa, the world's poorest region, has the highest incidence of child workers—approximately 40%—while the corresponding figure for Asia and Latin America is about 20%.¹⁰ The United Nations Children's Fund ("UNICEF") estimates that hundreds of millions of children worldwide under the age of fifteen are employed.¹¹

Traditional governmental approaches to preventing the premature entry of children into the workforce include the enactment and enforcement of child labor legislation and compulsory primary education.¹² These efforts, while noble and necessary, fall short of eliminating the problem.¹³ Children need special protection and should be given opportunities, by law and other means, to enable them to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner, with freedom and dignity. As such, international law should be relied upon to put an end to the abuse.

While most countries have laws that regulate the employment of children, the laws may be limited by their narrow scope, lack of clarity, and loopholes.¹⁴ The most daunting

ILO considers the estimate of 250 million working children to be low "since it does not include children working in non-economic activities such as household work in the homes of their parents or guardians. Fifteen to 20 percent of children in the five to 14 age group are estimated to be engaged in such activities." BY THE SWEAT AND TOIL, *supra* note 1, at 11 n.1.

10. ILO & UNICEF, STRATEGIES FOR ELIMINATING CHILD LABOUR: PREVENTION, REMOVAL AND REHABILITATION, 2-3 (1997), <http://www.unicef.org/aclabor/synthesi.pdf> [hereinafter STRATEGIES].

11. See CAROL BELLAMY, UNICEF, THE STATE OF THE WORLD'S CHILDREN: 1997 26 (revealing that many countries do not keep statistics on child labor because the activity is proscribed by law and the statistics are excluded from official data); see also Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 63 (1994) (claiming that exact figures on working children are not known because the problem is frequently unreported, denied, or undetected).

12. BY THE SWEAT AND TOIL, *supra* note 1, at iii-iv.

13. See Christopher M. Kern, *Child Labor: The International Law and Corporate Impact*, 27 SYRACUSE J. INT'L L. & COM. 177, 185 (2000).

14. See BY THE SWEAT AND TOIL, *supra* note 1, at 37; see also Smith, *supra* note 11, at 112 (claiming that the enforcement dilemma is complicated when children are involved; the difficulty involves employment in hidden sectors, manpower and equipment shortages, legal loopholes whereby violators can avoid prosecution, and failure to admit abuses).

problem, though, lies in monitoring and ensuring enforcement of the domestic labor laws of another sovereign nation.¹⁵ While some forms of international law rest on the consent given by states to limit their sovereignty and be bound by the rules of international law,¹⁶ some rules have become so entrenched and well recognized that consent is not required.¹⁷ Thus, these international norms should be used to protect those who cannot protect themselves—children.

Widespread international concern for working children has compelled foreign governments to protect children through legislation, but lacking adequate enforcement¹⁸ and supervision, some child labor laws are virtually impotent.¹⁹ For example, in some developing countries, laws protecting children are promulgated but not enforced, primarily because child labor is already a structural part of the economy.²⁰ Likewise, in the poorest countries, families put their children to work out of necessity; the children's meager earnings help provide basic food and medicine for themselves and younger siblings.²¹ The

15. See discussion *infra* Part III for an analysis of potential solutions to the enforcement dilemma.

16. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 20 (Sept. 7).

17. See JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 3 (1996) [hereinafter PAUST, *INTERNATIONAL LAW*].

18. Enforcement is the most daunting problem associated with legislative measures that attempt to remedy the problem of child labor. The ILO encourages members to provide for other criminal, civil or administrative remedies, where appropriate, to ensure the effective enforcement of national provisions for the prohibition and elimination of the worst forms of child labor, such as special supervision of enterprises which have used the worst forms of child labour, and, in cases of persistent violation, consideration of temporary or permanent revoking of permits to operate. *Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, ILO R190, ILO Gen. Cont., 87th sess., art. 14 (1999) [hereinafter ILO R190].

19. See BY THE SWEAT AND TOIL, *supra* note 1, at iii, 37.

20. Pilar Franco, *Latin America: Millions of Minors in Virtual Slavery*, at <http://www.igc.org/trac/corner/worldnews/other/319.html> (Feb. 19, 1999). Although a nation may condone or participate in a practice prohibited by international law during or before the development of the norm, such objection or dissent from the evolving norm does not relieve the nation from liability thereunder. See PAUST, *INTERNATIONAL LAW*, *supra* note 17 at 3, 14 n.14; see also JORDAN J. PAUST, ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 97 (2000) [hereinafter PAUST, *LITIGATION*].

21. Gary S. Becker, "Bribe" *Third World Parents to Keep Their Kids in School*,

sentiment that the children need to work to survive is reflected by foreign labor inspectorates' reluctance to discourage the practice of child labor when it is discovered.²² Additionally, foreign labor ministries are usually understaffed and lack resources; inspectors are poorly trained, and their low pay makes them easily corruptible.²³ Unfortunately, when inspectors do attempt to enforce child labor laws, they are often faced with public indifference, hostility from powerful economic interest groups, and parents' reluctance to cooperate.²⁴ Furthermore, enforcement is often impeded because employers routinely receive advance warning of visits by inspectors, who are usually residents of the area.²⁵ When violations are reported and charges are brought, judicial responses are often slow and inadequate.²⁶ Despite the recent proliferation of human rights conventions,²⁷ proposed²⁸ and current²⁹ legislation, and international labor

BUS. WK, Nov. 22, 1999, at 15; see also BY THE SWEAT AND TOIL, *supra* note 1, at 37.

22. See BY THE SWEAT AND TOIL, *supra* note 1, at 50. Some local observers turn a blind eye to the practice of child labor because they believe the children need the work to survive. See Robert A. Senser, *On Their Knees*, 167 AMERICA 166 (1992) [hereinafter *Knees*].

23. BY THE SWEAT AND TOIL, *supra* note 1 at 37; see also Charles D. Gray & Robert A. Senser, *Children Who Labor*, AM. EDUCATOR, Summer 1989, at 26, 28 (noting reports from some child laborers that supervisors hide them in toilets and large container boxes during visits by government inspectors) [hereinafter Gray & Senser].

24. BY THE SWEAT AND TOIL, *supra* note 1 at 37.; see also Becker, *supra* note 21, at 15 (stating that officials are reluctant to punish parents of working children).

25. STRATEGIES, *supra* note 10, at 13 (noting that when inspectorates attempt to take enforcement action, they are faced with the complicity of children and their parents).

26. See BY THE SWEAT AND TOIL, *supra* note 1, at 37.

27. See, e.g., *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, ILO C182, ILO Gen. Conf., 87th sess. (2000) [hereinafter ILO C182]; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR 3d sess., Pt. I, at 71, Doc. A/810 (1948) [hereinafter Universal Declaration]; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th sess., supp. No. 49, U.N. Doc. A/RES/44/25 (1989), 28 I.L.M. 1448 (1989) [hereinafter CRC]; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (Dec. 9, 1966) [hereinafter Covenant on Civil and Political Rights]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

28. See S. 1551, 106th Cong. (1999); see also Anjali Garg, *A Child Labor Social Clause: Analysis and Proposal for Action*, 31 N.Y.U. J. INT'L L. & POL. 473, 506 (1999) (discussing an unenacted legislative measure, The Child Labor Deterrence Act, which

agreements that address labor problems,³⁰ harmful child labor practices continue to flourish throughout the world.³¹

Fortunately, however, these instruments and developments could serve to convert child labor prohibitions into violations of international law.³² Recently there has been considerable movement in the international community towards elevating harmful child labor practices to the level of customary

sought to rectify the prolific problem of unenforceable child labor standards linked to U.S. trade policy).

29. See Exec. Order No. 13,126, 64 Fed. Reg. 32,383 (1999) (prohibiting federal agencies from buying products made with forced or indentured child labor).

30. See The North American Agreement on Labor Cooperation, Sept. 8, 1993, art.11, 32 I.L.M. 1499, 1505. As part of NAFTA, Canada, Mexico and the United States established the North American Agreement on Labor Cooperation to address labor law issues, including child labor prohibitions. *Id.* at 1502, 1505. North American Free Trade Agreement, Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289.

31. See Lena Ayoub, *Nike Just Does It—and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 397–98 (1999) (claiming that labor violations persist and will likely continue to grow); see also Cox, *supra* note 1, at 116 (claiming that the incidence of child labor is increasing); see also John Weeks, *Economic Integration in Latin America: Impact on Labour*, available at <http://www.ilo.org/public/english/employment/strat/publ/etp18-7.htm> (last visited Dec. 26, 2000); Robert A. Senser, *Marching the Young into Factories and Away from Schools: They Need the Work, but Why Little Boys and Girls?*, 4 HUM. R. FOR WORKERS, at <http://www.senser.com/4-8.htm> (Apr. 8, 1999) [hereinafter Senser, *Marching*] (claiming that whatever the labels on a soccer ball read, they are still stained by child labor). Robert A. Senser is a writer on the staff of the A.F.L.-C.I.O.'s Asian-American Free Labor Institute in Washington, D.C. Knees, *supra* note 22, at 166. As of 1992, Mr. Senser had twice visited Dhaka, Bangladesh to study the extent of child labor there, and he reports that in Bangladesh, children as young as seven work nine to twelve hours a day for as little as \$4.00 a month. See *id.*; see also CAMPAIGN FOR LABOR RIGHTS, *Soccer Balls: Inflated with Hot Air?* at http://www.summersault.com/~agj/clr/alerts/soccer_balls.html (last updated Aug. 8, 1998) (citing the soccer industry's own research, which shows up to twenty percent of the balls brought to the United States continue to be stitched by children under the age of fourteen, and thousands of children still toil for poverty wages) [hereinafter *Soccer Balls*].

32. While the ILO has no power to enforce its own conventions, their mere existence evidences the proscription of harmful child labor practices. See Ayoub, *supra* note 31, at 427 (explaining that international agreements can legally bind nations). “Principles of customary international law may be discerned from an overview of express international conventions, the teachings of legal scholars, the general custom and practice of nations and relevant judicial decisions.” *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980).

international law.³³ Due to the emerging patterns of accepted practice and expectation—as evidenced by judicial opinions,³⁴ human rights conventions,³⁵ United Nations declarations,³⁶ and secondary materials³⁷—the prohibition of child labor arguably has attained the status of customary international law.³⁸ Indeed, the worst forms of child labor violate *obligatio ergo omnes*, and are therefore crimes against humanity.³⁹ That is, harmful child labor is a breach of those obligations that are owed to humanity.⁴⁰ As customary international law, child labor prohibitions are universal, obligatory, and binding on all nations and individuals.

Child labor is a primary issue in international relations today; the subject embraces many controversies, including state sovereignty, economic development, trade globalization, international labor rights, cultural sovereignty, poverty, racism, and inequality.⁴¹ Indeed, evolving international human rights

33. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 (D. N.J. 1999) (explaining that “customary international law is comprised of such widely held fundamental principles of civilized society that they constitute binding norms on the community of nations”).

34. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (initiating a trend in U.S. jurisprudence to find federal subject matter jurisdiction for peremptory norms *jus cogens*); *see also* discussion *infra* Pt. III.

35. *See, e.g., ILO C182, supra* note 27; *see also* discussion *infra* Part II.B.1.a. (addressing the ILO Convention).

36. *See, e.g., DRC, supra* note 3; *see also* discussion *infra* Part II.B.1.d. (exploring in detail the United Nations Declaration of the Rights of the Child).

37. *See, e.g., Jennifer Bol, Using International Law to Fight Child Labor: A Case Study of Guatemala and the Inter-American System*, 13 AM. U. INT’L L. REV. 1135 (1998).

38. Customary international law is dynamic; it is created by what people think and what people do. PAUST, INTERNATIONAL LAW, *supra* note 17, at 3. Significantly, the way the world thinks about child labor is radically different from some fifteen years ago. BY THE SWEAT AND TOIL, *supra* note 1, at 1. International perspectives on child labor show an emerging consensus that the world community has the duty and the obligation to combat intolerable forms of child labor that still persist. *Id.*

39. *Obligatio ergo omnes* are obligations *to all of mankind*, rather than duties owed merely to certain states or nations. PAUST, LITIGATION, *supra* note 20, at 48.

40. *See id.*; *see also* WILLIAM BLACKSTONE, COMMENTARIES 609 (Wm. Hardcastle Brown ed., 1897) (declaring that the law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world).

41. *Bol, supra* note 37, at 1137.

laws support the claim that every society has an obligation to respect every human being within its control, including children.⁴²

This article will encompass the issues necessary to support the proposition that the worst forms of child labor are now prohibited by customary international law. Evidence of such a proposition requires the discussion of the extent, causes, and effects of child labor in the world today (Part I). Part II will discuss the role of various international organizations and the treaties they have created to protect children. Part III will analyze the proposition that the worst forms of child labor are now prohibited as customary international law.

I. THE EXTENT, CAUSES, AND EFFECTS OF CHILD LABOR

A. *The Nature of the Problem*

There is a distinction between child labor and child labor that is exploitative.⁴³ Not every job that a child can do is necessarily harmful.⁴⁴ Part-time, after-school jobs that can be performed without interfering with a child's development and education can benefit a child by providing wages and experience.⁴⁵

On the other hand, jobs which require long hours, do not pay a living wage, prevent children from attending school, and subject children to hazardous conditions are exploitative.⁴⁶ The

42. See *Maria v. McElroy*, 68 F. Supp. 2d 206, 233 (E.D.N.Y. 1999) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701).

43. Smith, *supra* note 11, at 57 (“[E]xploited children are those forced into premature adulthood through working long hours at substandard pay under circumstances which threaten their physical health and mental well-being.”); see also BY THE SWEAT AND TOIL, *supra* note 1, at 11.

44. BY THE SWEAT AND TOIL, *supra* note 1, at 11.

45. *Contra* Laurence Steinberg & Sanford M. Dornbusch, *Negative Correlates of Part-Time Employment During Adolescence: Replication and Elaboration*, 27 DEV. PSYCHOL. 304, 304 (1991) (claiming that part-time employment of lower- and middle-class American teenagers is, in fact, harmful, because the work does not prepare teens for future careers nor do the tasks they perform increase their employment skills).

46. See BY THE SWEAT AND TOIL, *supra* note 1, at 12–13 (claiming that the type of child labor that is the focus of current international eradication efforts is abusive commercial exploitation of children—which is either hazardous work or work that

ILO has defined harmful child labor as

work that places too heavy a burden on the child; work that endangers his safety, health or welfare, work that takes advantage of the defencelessness of the child, work that exploits the child as a cheap substitute for adult labour, work that uses the child's effort but does nothing for his development; [and] work that impedes the child's education or training and thus prejudices his future.⁴⁷

Significantly, many jobs held by children are compelled; this lack of choice is tantamount to slavery and is universally condemned.⁴⁸

Not only are child workers more vulnerable to injury and illness on the job⁴⁹ "due to inattention, fatigue, lack of knowledge of work processes, and the fact that most work places and equipment are designed for adults,"⁵⁰ exploited children may not fully develop their mental or physical abilities and may suffer severe emotional problems.⁵¹ Indeed, it has been shown that children forced into exploitative and harmful labor cannot properly develop physically, mentally, emotionally, socially, or psychologically.⁵² Unquestionably, children that are forced into

prevents young children from receiving an education).

47. INT'L LABOUR OFFICE, REPORT OF THE DIRECTOR-GENERAL 37 (69th Sess. 1983).

48. See *Convention Concerning Forced or Compulsory Labour*, ILO C29, ILO Gen. Conf., 14th Sess., arts. 1, 11 (1930) (requiring the suppression of forced or compulsory labor in all its forms, prohibiting all forms of child labor, and requiring that forced or compulsory labor be immediately abolished for males under eighteen and females altogether) [hereinafter ILO C29]; see also *Convention Concerning the Abolition of Forced Labour*, ILO C105, ILO Gen. Conf. 40th Sess., art. 1 (1957) (prohibiting the use of forced or compulsory labor as a means of workforce mobilization, labor discipline, or punishment for participation in strikes) [hereinafter ILO C105]; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(b) (1987).

49. David Parker, M.D., *Stolen Dreams: Gallery at* <http://www.hsph.harvard.edu/gallery/intro.html> (stating that health problems are compounded for children because children are more susceptible to the types of illnesses and injuries caused by occupational hazards, including dust-related lung diseases, degenerative joint diseases related to carpet weaving, and unknown illnesses from working inside chemical-filled leather tanning drums).

50. Smith, *supra* note 11, at 66; see also Giampetro-Meyer, *supra* note 1, at 658.

51. See Bol, *supra* note 37, at 1143-46.

52. See *id.* at 1145-48.

the workforce face dismal long-term economic prospects.⁵³

B. Education

The ILO reports that about twenty percent—or 145 million—of the world's children six to eleven years old (eighty-five million girls and sixty million boys) are not in school.⁵⁴ Work impedes a child's attendance and successful completion of primary school,⁵⁵ and a child's hope for a better future is compromised by the absence of meaningful education.⁵⁶ Working children have low enrollment and high absentee and dropout rates; these figures may be attributable to fatigue from long hours of labor, work related injuries and illnesses, and work schedules that conflict with school hours.⁵⁷

Labor that prevents children from attending school causes serious harm⁵⁸ and should be universally prohibited. Poverty compels families to send their children to work, but sending children to work—instead of school—condemns them to a life of poverty.⁵⁹ Those who rob children of an education rob their nations of a future as well.⁶⁰ Education is the key to reversing poverty, and the perpetuation of child labor will ensure the perpetuation of poverty.⁶¹

C. Slavery

Many child laborers are compelled to work⁶² and do so under appallingly cruel conditions—with wages so low as to be non-

53. See Becker, *supra* note 21, at 15.

54. BY THE SWEAT AND TOIL, *supra* note 1, at 55.

55. See *id.*

56. Smith, *supra* note 11, at 57.

57. BY THE SWEAT AND TOIL, *supra* note 1, at 66.

58. See Bol, *supra* note 37, at 1145–46.

59. Collingsworth, *supra* note 4, at 1.

60. Gare Smith, Alternate Head of U.S. Delegation to the UN Human Rights Commission, Rights of the Child (April 14, 1997), at http://www.state.gov/www/policy_remarks/970414.smith.html.

61. Robert A. Senser, *Outlawing the Crime of Child Slavery*, 24 FREEDOM REV. 29, 32 (1993) (noting that child labor perpetuates poverty) [hereinafter Senser, *Slavery*].

62. Smith, *supra* note 60.

existent.⁶³ The conditions under which some children work constitute slavery and are universally condemned.⁶⁴ Slavery is not merely a historical concept or bad memory; to children that labor under compulsion, slavery is alive and well.⁶⁵ For example, the Indian carpet making industry compels nearly 300,000 children under age thirteen to work in bondage or under conditions that approximate slavery.⁶⁶ The ILO defines forced or compulsory labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁶⁷

Employers find it easier to enslave children than adults because children are inherently weaker and more easily manipulated through scare tactics and discipline.⁶⁸ As with the classic slavery model, the fear of punishment keeps children working up to eleven hours a day, seven days a week,⁶⁹ and minor mistakes are severely punished.⁷⁰ The children in the Indian carpet industry are often beaten into submission, branded with red hot irons, and even hung from trees upside

63. *Id.*

64. The prohibition of slavery has long been regarded as customary international law. *See* RESTATEMENT, *supra* note 48, § 702(b); *see also supra* note 48 (enumerating the limitations on forced or compulsory labor); ILO C182, *supra* note 27, arts. 1, 3 (prohibiting “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour”).

65. Senser, *Slavery*, *supra* note 61, at 29 (“Who says slavery is dead?”). Robert Senser reports that on September 18, 1993 a march of about 250 children took place in New Dehli to protest the employment of children in sweatshops. *Id.*

66. *See* Robert A. Senser, *How the Global Economy Promotes Child Labor*, at <http://www.senser.com/clali.htm> [hereinafter Senser, *Global*] This article was previously published as *Meet Ali—and Others Just Like Him: Countries Like the US Should Ban Imports Produced By Child Labor*, CHRISTIAN SCIENCE MONITOR, June 16, 1995 at 19.

67. *See* ILO C29, *supra* note 48, at art. 2.

68. Garg, *supra* note 28, at 481 (pointing out that “[c]hildren are easier to exploit than adults because they perform monotonous work without complaining and are easily intimidated” and explaining that some “[e]mployers prefer to hire children instead of adults because they are cheaper, more malleable, and are believed to have better suited physical qualities . . . [such as] small, supple fingers necessary to weave fine knots into carpets and polish small gems”). *See also* Senser, *Global*, *supra* note 66.

69. *See* Senser, *Global*, *supra* note 66.

70. *See Knees*, *supra* note 22, at 167 (stating that children received blows to the head for miscounting).

down to gain their compliance.⁷¹ It is clear that the lack of choice on behalf of child laborers and the threatening tactics of some employers is tantamount to slavery—a practice that has been universally condemned.⁷²

Further, the enslavement of children is easy because children lack political strength.⁷³ Employers know they risk little by violating children's rights because the children's own domestic governments have historically ignored their plight.⁷⁴ However, this form of exploitation is equivalent to slavery,⁷⁵ and as such, it is prohibited by customary international law.⁷⁶ The prohibition of slavery is a peremptory norm *jus cogens* and universally proscribed.⁷⁷ As all nations have an interest in preventing slavery, all of mankind has a duty to seek out and punish its practitioners; thus, seeking out and punishing those that compel child laborers is an *obligatio ergo omnes*.⁷⁸

D. Hazardous Conditions

Children are often found working in extremely hazardous conditions.⁷⁹ The ILO Recommendation defines “hazardous

71. Senser, *Global*, *supra* note 66.

72. RESTATEMENT, *supra* note 48, § 702(b); *see also* ILO C29, *supra* note 48, art. 1; Senser, *Slavery*, *supra* note 61 (recounting the story of a fourteen-year-old who was lured away from home by promises of wages up to \$100 a month for working at a loom two hours a day while going to school, but instead was forced to work, eat, and sleep locked in the same room, knotting carpets from 4 a.m. until late evening for pennies a day).

73. *See* Smith, *supra* note 60.

74. *See id.*

75. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 829 (1988) (explaining that the doctrine of universal jurisdiction enables all nations to prosecute slave traders because they have violated international law).

76. ILO C182, *supra* note 27, arts 1, 3 (prohibiting “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour”).

77. Generally speaking, a norm *jus cogens* is a universally binding norm of the highest degree. *See infra* nn. 124–127 and accompanying text. *Obligatio ergo omnes* is a legal duty owed by mankind to mankind. *See supra* note 39 and accompanying text.

78. *Supra* note 39 and accompanying text.

79. Gray & Senser, *supra* note 23, at 28 (reporting that accidents resulting in the death of working children are not uncommon and that due to local class or caste

work” as the following: work which exposes children to

physical, psychological or sexual abuse; work underground, under water, at dangerous heights or in confined spaces; work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads; work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health; work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.⁸⁰

The ILO Recommendation notes that member states should ensure that criminal and civil penalties “are applied for violations of the national provisions for the prohibition and elimination of any type of work referred to in Article 3(d) of the Convention,”⁸¹ but the reality is that such penalties are rarely assessed.⁸² Child laborers risk their lives and their health for pennies an hour to make products for more fortunate children

systems, employers may not care whether a child lives or dies, and therefore, preventative measures are rarely taken). The *Washington Post* reports that Brazilian children

often suffer eye, hand and arm injuries from cutting the spiny sisal plant and processing it with sharp tools. . . . [C]lose to 150,000 children are employed as orange harvesters during the six-month season. They pick oranges in severe heat, for up to 12 hours a day, and some end up with fingertips eroded by toxic pesticides and citric acid. . . . During peak seasons, close to half of the Kenyans involved in planting, weeding and harvesting on sugar estates are children. Tens of thousands of children harvest cotton in Egypt. Estimates of child workers in Pakistan have ranged as high as 19 million, with 7 million in the 5- to 9-year-old range. Thousands work in Pakistan’s soccer ball industry.

Mann, *supra* note 9.

80. ILO R190, *supra* note 18, art. 3. See, e.g., Gray & Senser, *supra* note 23, at 27–28 (claiming that children are often exposed to toxic substances and perform dangerous construction work, that in the glass factories of India, children who appear to be no more than eight years old work with 1,500-degree molten glass, and that employers provide no protective glasses, shoes, or gloves—no safety gear at all, not even for pouring molten metal).

81. ILO R190, *supra* note 18, art. 13.

82. Gray & Senser, *supra* note 23, at 28, 33–34.

their own age on the other side of the globe.⁸³

E. The Inadequacy of Child Wages

Jitti, a thirteen year old leather factory worker in Thailand, works 11 to 14 hours a day with only two days off a month. He receives \$45 a month, but has to pay \$16 to a middle man, so he really only gets \$29 a month—about a dollar a day, or approximately eight cents an hour.

Pattinathar, a cigarette maker in South India made beedis (cigarettes) for six years, starting when he was six. He was paid \$1.30 [a week] for working up to 16 hours a day, six days a week. If Pattinathar had a really bad week and had to work 96 hours, that translates into less than a penny and a half per hour.⁸⁴

These stories illustrate with shocking clarity the insufficiency of child wages. However, some commentators argue that comparing the wages earned by foreign workers to U.S. earnings in U.S. dollars is misleading.⁸⁵ Specifically, proponents of multinational corporations argue that labor figures are deceptive because standards for defining poverty are subjective and manipulable.⁸⁶ Unfortunately, varying international

83. See *id.* at 30; see also Mann, *supra* note 9 (“We don’t like to think about it, and most of the time we can’t be sure, but there’s a chance the fruits and vegetables we eat, soccer balls we buy for our kids and carpets we put in our homes are the products of child labor.”); Senser, *Slavery*, *supra* note 61, at 32 (stating that few customers “know that children help make almost every garment exported from Bangladesh and almost every hand-knotted carpet from India and Pakistan”).

84. *What Does the Wage of a Child Laborer Buy?*, at <http://us.ilo.org/ilokids/wage.html> (last visited May 2, 2000) [hereinafter *Wages*]. This website was presumably designed for children; it illustrates the inadequacy of the child laborer’s wages through the true stories of three exploited children by describing the buying power of each in terms of Beanie Babies. *Id.* Jitti, the most well-paid, could buy about one and a half Beanie Babies with a week’s wages. *Id.* Pattinathar, the most poorly paid, could not buy a Beanie Baby until he had worked for four weeks. *Id.*

85. See, e.g., Eugene B. Mihaly, *Multinational Companies and Wages in Low-Income Countries*, 3 J. SMALL & EMERGING BUS. L. 1, 2–3 (1999) (claiming there are “no absolute standards of what constitutes low wages, or on the other end of the spectrum, good wages”).

86. *Id.*

exchange rates also compound the problem,⁸⁷ but defenders of multinational corporations prefer to define poverty in terms of “basic human needs,” which is also subjective.⁸⁸ One commentator lists several flexible standards by which to determine who “live[s] on the fortunate side of the poverty line”: decent housing, access to competent healthcare, clean water and sanitation facilities, access to education, freedom from unending labor (the ability to enjoy some leisure time), and enough disposable income to pay for decent clothing, transportation, and a modicum of consumer goods.⁸⁹ It is clear that the wages paid to child laborers fail to provide these basic human needs.⁹⁰ However unreliable may be the comparison of foreign wages to U.S. dollars, that unreliability cannot undermine the evidence that virtually all child laborers are not paid a living wage—no matter how the hourly wage is figured.⁹¹ Indeed, the wages paid to child laborers are shameful;⁹² the earnings of a child laborer can only be a supplement to another wage-earner in the family. The wages earned by child labor cannot provide even basic sustenance.⁹³

F. The Economic Impact on Nation States

The implications of child labor extend beyond the injured individual, creating a devastating impact on families, society, and the future of those nations that allow it to occur.⁹⁴ As discussed *infra*, child labor perpetuates poverty and lack of opportunity in all sectors of society.⁹⁵ Likewise, the healthy

87. *Id.* at 3.

88. *Id.*

89. *Id.* at 3–4.

90. *See, e.g.*, Smith, *supra* note 11, at 57–58.

91. *See* Giampetro-Meyer, *supra* note 1, at 658–59.

92. Garg, *supra* note 28, at 482.

93. Garg, *supra* note 28, at 480 (“While studies have found that children can contribute up to twenty percent of household income in poor regions, additional research has discovered that, in real terms, child labor does not increase household income because it generally tends to depress adult wages and contributes to the high levels of adult unemployment.”).

94. Kern, *supra* note 13, at 180; Becker, *supra* note 22.

95. Garg, *supra* note 28, at 483–84 (“In addition to the immediate suffering of the children involved, child labor impedes childhood education and literacy and

development of children is crucial to the future well-being of any society.⁹⁶

Not only is child labor intolerable and barbaric—creating lasting and permanent effects to the individual—child labor practices preclude a nation from ever achieving the economic growth necessary to pull itself from the throes of poverty.⁹⁷ The child laborers of today will make up the adult population of the future, but that future adult population will be poor, illiterate, underdeveloped and unable to compete in the global economy—except, of course, to assemble products.⁹⁸ Without a base of educated citizens, a developing country has no hope of escaping poverty.⁹⁹

A nation cannot successfully eliminate child labor without enacting and enforcing compulsory education laws, and universal primary education is a top requirement for the growth and economic development of a nation.¹⁰⁰ Domestic legislative measures are an essential element of any policy aimed at eliminating child labor, and any legislation attempting to regulate child labor serves in part as evidence that the practice is becoming globally condemned.¹⁰¹

perpetuates the cycle of poverty, frustrating the economic development of countries by undermining the efficient maximization of human capital.”).

96. Smith, *supra* note 60.

97. Anthony G. Freeman, *Child Labor and Exploitation*, 14 ST. JOHN'S J. LEGAL COMMENT. 383, 383 (2000) (“Exploitative child labor is a problem because it deprives the child and it deprives the country of its own potential.”). *See also* Becker, *supra* note 21, at 15 (agreeing that something should be done to save the children from dismal long-term economic prospects).

98. *Supra* note 60 and accompanying text.

99. Kern, *supra* note 13, at 180.

100. BY THE SWEAT AND TOIL, *supra* note 1, at 55.

Universal primary education is widely recognized as one of the most effective instruments for combating [sic] child labor. It is believed that no country can successfully eliminate child labor without first enacting and implementing compulsory education legislation. Schooling removes children from the workforce and provides them with [fundamental life skills, such as literacy, numeracy, and critical reasoning]. Quality basic education, particularly at the primary level, not only improves the lives of children and their families, but contributes to the future economic growth and development of a country.

Id.

101. *Supra* note 33 and accompanying text; *see also* United States v. Smith, 18 U.S. 153, 160–61 (1820) (“What the law of nations on this subject is, may be ascertained

G. The Cycle of Poverty is Enhanced by Child Labor

Poverty is partially fueled by child labor.¹⁰² Employers who seek to lower costs by hiring children at a lower wage displace adult laborers,¹⁰³ and thus, a large body of working children ultimately becomes a body of poor, illiterate and unskilled adults.¹⁰⁴ This destructive cycle puts the nation at a disadvantage in the global marketplace, thus perpetuating the poverty it is aimed at combatting.¹⁰⁵ By enacting legislation aimed at educating children rather than allowing them to be enslaved, governments stand a better chance of decreasing poverty and improving economic conditions within their borders.¹⁰⁶

H. Child Labor Under the Rubric of World Trade

Globalization could offer children an escape from lives of toil and drudgery, but instead, it draws more children into servitude.¹⁰⁷ Children stand to lose the most under globalization, which fosters their labor, but provides no assurances for protection in the workplace and no economic advantages to their families.¹⁰⁸ "In the present competitive international economy, both businesses and consumers are seeking cheaper and cheaper sources of goods."¹⁰⁹ Some multinational companies must utilize

by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.").

102. *Supra* note 95 and accompanying text.

103. Freeman, *supra* note 97, at 384.

104. Kern, *supra* note 13, at 180.

105. *See id.*

106. *See id.*

107. David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labour*, 16 HOFSTRA LAB. & EMP. L.J. 383, 383 (1999) (noting activists' and commentators' claims that "globalization and internationalization of the economy has [sic] exacerbated the child labour problem, by causing children to become exploited parts of the world system of trade in ways different from, and sometimes worse than, that found under traditional forms of child labour"). *See also* Senser, *Global*, *supra* note 66.

108. Smith, *supra* note 11, at 62–63.

109. Senser, *Global*, *supra* note 66.

lower wage markets to stay competitive,¹¹⁰ and some developing nations are eager to offer their cheap and unprotected labor force to entice investment within their borders—hoping to eventually modernize and improve conditions domestically.¹¹¹ Developing countries which have nothing to offer other than a cheap labor force, may, out of necessity, use their enormous labor pools to attract capital.¹¹² In addition, the early years of industrial growth are marked by a high incidence of employment of children.¹¹³ As a result, some countries refuse to enforce their own child labor laws because their economic survival depends on the foreign investment attracted by cheap labor.¹¹⁴ Wealthy multinational companies then exploit these labor pools to increase their profits.¹¹⁵

Despite a few success stories, the globalization of commerce exacerbates the problem of child labor. The trend of seeking out cheap labor could thrust many more children into the global labor force,¹¹⁶ but growing attention to the child labor problem has fueled international efforts to end it.¹¹⁷

The exploitation of child labor in order to be more competitive in the global marketplace is a violation of international human rights law.¹¹⁸ Child labor is not just a national problem—human rights is a concern of all nations.¹¹⁹ To

110. Joshua Briones, Comment, *Paying the Price for NAFTA: NAFTA's Effect on Women and Children Laborers in Mexico*, 9 UCLA WOMEN'S L.J. 301, 323 (1999).

111. See Mihaly, *supra* note 85, at 8–11.

112. *Id.* at 9–11.

113. Smith, *supra* note 11, at 63.

114. See Smolin, *supra* note 107, at 389 (asserting that many developing countries have industries that rely on relatively low-skill labor and substantially lower labor costs); see also Smith, *supra* note 11, at 66 (arguing that “employers are inclined to ignore labor laws and to tolerate” ineffective and inefficient labor law regulation).

115. See Garg, *supra* note 28, at 481.

116. Senser, *Global*, *supra* note 66.

117. Mann, *supra* note 9.

118. Elizabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659, 660 n.2 (1998) (arguing that the combination of the individual protections set forth in international human rights documents reasonably adds up to the prohibition of child labor); see also, ICESCR, *supra* note 27, art. 10(3).

119. See, e.g., Garg, *supra* note 28, at 51 (noting “about 159 countries have signed the World Declaration on the Survival, Protection and Development of Children”).

allow the practice of child labor is to deprive a child of childhood, to rob the child of freedom, to ensure illiteracy, to perpetuate poverty and to rob the child and his nation of a future.¹²⁰ The practice of child labor affects the whole of mankind, and is properly the concern of all nations.¹²¹

II. STANDARDS IN INTERNATIONAL LAW

A. *International Law*

International law is of two types: that which has devolved as custom, or customary international law, and that which is consented to by international agreement.¹²² Norms (or rules) of customary international law are found by “consulting juridical writings on public law, considering the general practice of nations, and referring to judicial decisions recognizing and enforcing international law.”¹²³ Peremptory norms, known as “*jus cogens*,” proscribe a limited set of activities so universally condemned by the international community that they cannot be undertaken under any circumstances.¹²⁴

The prohibition of the worst forms of child labor is an evolving¹²⁵ international norm of the highest form: a peremptory norm *jus cogens*.¹²⁶ Such an international norm preempts others

120. Kern, *supra* note 13, at 180–81.

121. Theodor Meron, Comment, *Ideal to Law to Practice: The Universal Declaration Today and Tomorrow*, 11 PACE INT'L L.J. 89, 89 (1999) (stating that the principle of international accountability has been broadly accepted, that governments recognize they must be accountable to the international community for the way they treat their own peoples, and that basic human rights constitutes *ergo omnes* obligations).

122. PAUST, LITIGATION, *supra* note 20, at 35.

123. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 890 (C.D. Cal. 1997).

124. *Id.* at 890 n.7.

125. *The Paquete Habana*, 175 U.S. 677, 694 (1900) (finding that a period of a hundred years was sufficient to enable what originally may have rested in custom or comity to grow, by the general assent of nations, into a settled rule of international law).

126. A peremptory norm *jus cogens* is a universally binding law, from which no derogation is permitted. PAUST, LITIGATION, *supra* note 20, at 49. While one may argue that prohibitions against some forms of child labor do not rise to non-derogable norms because those forms of child labor are generally accepted, compelled child labor or labor characterized as tortuous, is clearly prohibited by a norm *jus cogens*.

of a lesser sort, whether treaty or custom based.¹²⁷ Considering the defenseless nature of children, their lack of political clout, and their mental, emotional, and developmental vulnerabilities, the worst forms of child labor and exploitation are being elevated to the level of an international crime, sanctionable by the entire global community.¹²⁸

B. The Nature of International Law: International Agreements and Customary International Law

A rule of international law is “one that has been accepted as such by the international community of states, in the form of customary law, by international agreement, or by derivation from general principles common to the major legal systems of the world.”¹²⁹ The two most important types of international law are international agreements and customary international law.¹³⁰ International agreements are only binding upon the signatories and their nationals, unless the provisions of a treaty are already considered customary international law.¹³¹ While treaty law is consensual, customary international law is universally obligatory.¹³² Once a pattern of practice or expectation is generally accepted or extant it becomes binding customary international law.¹³³

Human rights treaties that protect children are not self-executing,¹³⁴ and thus do not support private causes of action.¹³⁵

127. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992).

128. Smolin, *supra* note 107, at 383. Professor Smolin asserts that millions of children are economically exploited in ways that permanently harm them and that the stories of young children sold into the carpet industry, tied to their looms for twelve or more hours a day, have shocked the world. *Id.* See also Randall, *supra* note 75, at 830–31 (asserting that the right to prosecute offenders of norms *jus cogens* corresponds to the notion that violations of fundamental obligations offend all other states).

129. RESTATEMENT, *supra* note 48, § 102(1).

130. *Supra* note 122 and accompanying text.

131. PAUST, LITIGATION, *supra* note 20, at 35.

132. *Id.*

133. *Id.*

134. See RESTATEMENT, *supra* note 48, § 111(i) (noting that international agreements can not be enforced in many nations until those nations adopt domestic laws to support them).

While the treaties may not always be enforced by their signatories or subjects, their existence and near global recognition significantly contributes to the creation of universally binding customary international law.¹³⁶ The following sources may demonstrate that the prohibition of child labor has evolved into custom and is universally obligatory.¹³⁷

1. *Human Rights Treaties*

While human rights instruments are not recognized as supporting private causes of action,¹³⁸ signatories have a continuing obligation to observe treaties with good faith and scrupulous care.¹³⁹ Indeed, the various conventions and treaties are significant because each nation-state, organization, or individual is a participant in creating international law, and may initiate a change in children's rights—or simply contribute momentum for change.¹⁴⁰ Notably, the wide-spread ratification of human rights treaties supports the assertion that exploitative child labor practices are evolving¹⁴¹ into a prohibited norm, condemned by the international community.¹⁴²

135. *Id.*

136. Unlike treaties, customary international law is directly and indirectly incorporable and as such has been relied on in civil and criminal cases from the beginning of the United States. PAUST, LITIGATION, *supra* note 20, at 112. Section 102(3) of the Restatement provides that international agreements “may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.” RESTATEMENT, *supra* note 48, § 102(3).

137. Customary International Law has been long recognized as law in the United States. PAUST, LITIGATION, *supra* note 20, at 113 (citing articles III and VI of the U.S. Constitution and copious case law).

138. *Dickens v. Lewis*, 750 F.2d 1251, 1254 (5th Cir. 1984) (holding that “individual plaintiffs do not have standing to raise any claims under the United Nations Charter [or] . . . other international obligations”).

139. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 [hereinafter Vienna Convention]. Entitled “Pacta Sunt Servanda,” this article declares that every treaty in force is binding upon the parties to it and must be performed by them in good faith. *Id.*

140. See *supra* notes 125–28 and accompanying text; see also RESTATEMENT, *supra* note 48, § 102 cmt. b (stating that customary international law is created through the cumulative practices of each state).

141. See *The Paquete Habana*, 175 U.S. 677, 694 (1900) (finding that international law evolves from the collective behavior of nations).

142. Office of the U.N. High Commissioner for Human Rights, *Status of*

a. *The Convention on the Worst Forms of Child Labor*

On December 2, 1999, the United States ratified the ILO Convention on the Worst Forms of Child Labor.¹⁴³ The Convention protects children under the age of eighteen and defines the worst forms of child labor as slavery, bondage, prostitution, drug trafficking, and any work likely to harm the health, safety or morals of children.¹⁴⁴ The Convention requires ratifying countries to take immediate and effective measures to prohibit and eliminate the worst forms of child labor by designing and implementing programs for enforcement, monitoring, sanctions, prevention, and child removal, rehabilitation and social reintegration.¹⁴⁵ Importantly, the Convention creates disincentives for those trading in products produced by child labor, a significant first step towards global trade policy that protects people who lack the power to protect themselves: children.¹⁴⁶

More significantly, the Convention declares that some of the worst forms of child labor are covered by other international instruments such as the Forced Labor Convention of 1930 and the 1956 United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.¹⁴⁷ Because the prohibition of slavery has been a rule of customary international law for over a century,¹⁴⁸ as well as a preemptory norm *jus cogens* prevailing

Ratifications of the Principal International Human Rights Treaties, at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (as of Aug. 22, 2001); see also *supra* n.119 and accompanying text.

143. See ILO Convention, *supra* note 27; ILO, *Convention No. C182 Was Ratified by 98 Countries*, at <http://ilolex.ilo.ch:1567/cgi-lex/ratifce.pl?C182> (last visited Sept. 21, 2001).

144. Mann, *supra* note 9. The treaty also requires ILO member countries to make an annual report of child labor in their countries. *Id.*

145. See ILO C182, *supra* note 27.

146. *Id.*; See also Robert Shapiro, Under Sec'y of Commerce for Econ. Affairs, Keynote Address at the "Globalization With a Human Face" Conference (October 12, 1999), at <http://www.us.ilo.org/news/ilowatch/9912.html>.

147. ILO C182, *supra* note 27, pmbl.

148. See RESTATEMENT *supra* note 48, § 702; see also PAUST, INTERNATIONAL LAW, *supra* note 17, at 8 (recognizing slave trading as actionable under customary international law within a "generation or so" of the formation of the U.S. Constitution).

over all other forms of international law, many of the child labor practices carried out around the globe—being little more than slavery—are also prohibited by customary international law.¹⁴⁹ Thus the Convention further reinforces the assertion that child labor is developing into a peremptory norm of general international law. A peremptory norm *jus cogens* enjoys the highest status within international law, and the prohibition against forced child labor rises to the level of a peremptory norm *jus cogens*; therefore, the jurisdiction to proscribe child labor may be premised on violation of that norm.¹⁵⁰

b. *United Nations Convention on the Rights of the Child*

On November 20, 1989, the United Nations General Assembly adopted a landmark international instrument: the Convention on the Rights of the Child (“CRC”).¹⁵¹ The CRC is the most universally accepted human rights instrument in history¹⁵²—it has been ratified by every country in the world except two.¹⁵³ “The Convention on the Rights of the Child is the first legally binding international instrument to incorporate the full range of human rights—civil and political rights as well as economic, social and cultural rights.”¹⁵⁴ Under the provisions of the CRC, any labor that interferes with a child’s right to participation in family life is prohibited as harmful.¹⁵⁵ By

149. See *supra* note 128 and accompanying text (noting stories of children sold into the carpet industry and tied to their looms for twelve or more hours a day).

150. Doe v. Unocal Corp., 963 F. Supp. at 880, 890 (C.D. Cal. 1997) (explaining that “[t]he prohibition against official torture rises to the level of a *jus cogens* norm, and jurisdiction may be premised on a violation of that norm”).

151. CRC, *supra* note 27.

152. Rebecca Rios-Kohn, *The Convention on the Right of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 140–41 (1998).

153. The CRC has been ratified by 191 states; only the United States and Somalia have not ratified it. *Id.* at 140–141.

154. UNICEF, *The Convention on the Rights of the Child, Introduction*, at <http://www.unicef.org/crc/introduction.htm> (last visited Aug. 22, 2001). In the preamble, the CRC specifically refers to the family as the “fundamental group of society and the natural environment for the growth and well-being of all its members . . . particularly children.” CRC *supra* note 27, pmbl.

155. The Convention protects a child’s right to a role in family life. “Under the Convention, States are obliged to respect parents’ primary responsibility for providing care and guidance for their children and to support parents in this regard, providing

recognizing children's rights, the Convention establishes the prohibition of child labor.¹⁵⁶

Because of its near-universal acceptance by the community of nations, the Convention on the Rights of the Child has brought attention to children's rights by establishing clear obligations for the proscription of child labor.¹⁵⁷ The CRC also requires states to provide effective remedies and stronger monitoring of child labor.¹⁵⁸ The CRC reflects a global consensus and in a very short period of time has become a form of *opinio juris*, thus indicating a sense of the legal obligation of all nations to adhere to its provisions.¹⁵⁹ This treaty is law to its signatories, and it should be considered custom to non-signatories.¹⁶⁰

c. The Minimum Age Convention

In attempting to defend child labor practices, problems often arise in the definition of "child" or "childhood."¹⁶¹ In response, the ILO adopted the Minimum Age Convention with the express purpose of achieving the effective abolition of child labor.¹⁶² The Minimum Age Convention to defines "childhood" by setting the

material assistance and support programmes." UNICEF The Convention on the Rights of the Child, at <http://www.unicef.org/crc/convention.htm> (last visited Oct. 16, 2001); see also CRC, *supra* note 27, pmb., art. 5 (asserting that the family environment is crucial to a child's development and should be protected).

156. CRC, *supra* note 27, art. 32 ("States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.").

157. *Id.*

158. *Id.* arts. 32, 43, 44.

159. See UNICEF, *The Process: From Signature to Ratification*, at <http://www.unicef.org/crc/process.htm> (stating the Convention represents actual law for signatory nations and imputed authority and custom for non-signatory nations) (last visited Sept. 9, 2001).

160. *Id.*

161. Determining the extent of child labor worldwide is difficult because there is no generally accepted definition of "child." Because the age of adulthood is determined by the culture in which the child lives, there may be little consensus on what constitutes child labor. Bol, *supra* note 37, at 1139 (pointing out that some cultures view age biologically rather than chronologically).

162. Convention Concerning Minimum Age for Admission to Employment, ILO C138, ILO Gen. Conf., 58th Sess., pmb. (1973).

minimum age for entry in the workforce not less than 15 years and not less than the age of completion of compulsory schooling.¹⁶³ Although the Minimum Age Convention has not been widely ratified, its standards are arguably influential, or becoming custom, as states attempt to curb child labor.¹⁶⁴

d. The United Nations Declaration of the Rights of the Child

The United Nations Declaration of the Rights of the Child was adopted in 1959,¹⁶⁵ and calls upon all nations to recognize the rights contained in the proclamation and “strive for their observance by legislative and other measures.”¹⁶⁶ The principles set forth in the Declaration include the child’s right to “develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”¹⁶⁷ The Declaration also asserts a child’s right to free and compulsory education,¹⁶⁸ entitlement to play, and recreation.¹⁶⁹ A child cannot enjoy these rights if compelled to perform harmful child labor. The Declaration mandates that a child must not be admitted to employment before an appropriate minimum age and must not be caused or permitted to engage in any occupation or employment which would prejudice the child’s health or education, or interfere with the physical, mental, or moral development of the child.¹⁷⁰ These mandates are evolving norms and should become universally binding international law.¹⁷¹

163. *Id.* art. II; *Cf.* CRC, *supra* note 27, art. 1 (defining childhood as extending to the age of eighteen unless domestic law provides otherwise).

164. *See, e.g.,* Franco, *supra* note 20 (arguing that while the Minimum Age Convention has been ratified by fewer than 10 Latin American countries, discourse on the eradication of child labor is ongoing, as evidenced by Mexico City’s forum to gradually eradicate child labor).

165. DRC, *supra* note 3.

166. *Id.*, pmb1.

167. *Id.* princ. 2.

168. *Id.* princ. 7.

169. *Id.*

170. *Id.* princ. 9.

171. *See* The Paquete Habana, 175 U.S. 677, 694 (1900) (emphasizing that international customs and practices evolve into binding law through the passage of

e. The United Nations Charter

Constitutionally, the U.N. Charter is part of the supreme law of the land, and the United States and other signatories have a continuing obligation to observe with good faith and scrupulous care all of its actions under the treaty, including support of the resolutions adopted by the Security Council.¹⁷² The goals of the Charter include: the promotion of higher standards of living; full employment; conditions of economic and social progress and development; the employment of international machinery for the promotion of economic and social advancement of all peoples; and the achievement of international cooperation in solving international problems of an economic character.¹⁷³ The creation of a body of international human rights law is the role of the United Nations, and the Charter's employment provisions clearly apply to child laborers.¹⁷⁴ As discussed above, when child laborers are prevented from achieving "economic and social development," the principles of United Nations Charter have been offended.

f. Universal Declaration of Human Rights

The Universal Declaration of Human Rights is a body of principles and standards of behavior for all people.¹⁷⁵ The

time).

172. *Supra* note 139 and accompanying text; *see* U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby . . ."); U.N. CHARTER, art. 55; *see also* *United States v. Steinberg*, 478 F. Supp. 29, 31 (N.D. Ill. 1979) (stating that the United States is bound by treaties of the United Nations and decisions of the U.N. Security Council as evidenced by the binding authority of Resolution 277).

173. U.N. CHARTER, pmb., art. 1, 55.

174. The Charter's binding obligations give rise to new norms of international law. *See* J.M. Spectar, *Pay Me Fairly, Kathie Lee! The WTO, The Right to a Living Wage, and a Proposed Protocol*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 61, 78-79 (2000) (stating the mechanisms in which human rights law is emerging); U.N. CHARTER, art. 55.

175. Universal Declaration, *supra* note 27, pmb.; *see also* *Fernandez v. Wilkinson*, 505 F. Supp. 787, 796 (D. Kan. 1980).

Since 1948, the Universal Declaration of Human Rights has become the inspiration for national and international efforts to promote and protect human rights and fundamental freedoms. It set the direction for all efforts in the field of human rights and provided the basic philosophy for the legally binding international instruments that followed, including instruments

Declaration sets forth the human rights and fundamental freedoms of all men and women in all nations; thus, children are protected under the Declaration as well.¹⁷⁶ The substantive provisions recognize as fundamental every person's right to life, liberty, security, equality and dignity.¹⁷⁷ Among the rights recognized by the Declaration are: the right to freedom from slavery; freedom from cruel, inhuman or degrading treatment; freedom from arbitrary arrest and from interference with family; the right to recognition as a person before the law; the right to a fair trial; the right to marry and have a family; and the right to freedom of thought and peaceful assembly.¹⁷⁸ The economic, social and cultural rights the Declaration recognizes include the right to work and the right to equal pay for equal work, the right to education, the right to a standard of living adequate for health and well-being, the right to rest and leisure, and the right to participate in the cultural life of communities.¹⁷⁹ A child engaged in harmful child labor cannot enjoy these rights. The standards set by the Universal Declaration of Human Rights, although initially only declaratory and non-binding, have

addressing the rights of ethnic minorities, women's rights and, most recently, children's rights.

UNICEF, *A Background Note on Human Rights in General*, at <http://www.unicef.org/crc/bg001.htm> (last visited Sept. 9, 2001).

176. Universal Declaration, *supra* note 27, pmb.; Amy Beth Abbott, Note, *Child Soldiers—the Use of Children as Instruments of War*, 23 SUFFOLK TRANSNAT'L L. REV. 499, 501–02 (2000).

177. Universal Declaration, *supra* note 27.

178. *Id.*

179. Universal Declaration, *supra* note 27, arts. 4, 5, 23–25.

[N]o one shall be held in slavery or servitude . . . No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . . Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment . . . [and] to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has right to form and to join trade unions for the protection of his interests. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. *Id.*

become binding customary international law through wide acceptance and recitation by nations.¹⁸⁰ Because certain provisions of the Universal Declaration of Human Rights have achieved customary international law status, harmful child labor practices may be proscribed by law.¹⁸¹

The standards of law articulated in the international covenants and conventions further reinforce the proposal that child labor prohibitions are evolving into customary international law.¹⁸² While human rights treaties are generally not held to be self-executing or to create private rights of action in domestic courts,¹⁸³ the human rights treaties developed by international organizations such as the United Nations and the declarations of the General Assembly are evidence that child labor is evolving into a universally condemned practice—and soon its proscription will be law.¹⁸⁴

2. Customary International Law

International law has two primary sources: international agreements and customary international law.¹⁸⁵ “Customary international law, unlike [international] agreements as such, is universally obligatory.”¹⁸⁶ International agreements can later become custom for the entire global community.¹⁸⁷ While treaties may contribute to its creation, customary international law has two main components: 1) *opinio juris*; and 2) general patterns of practice and behavior.¹⁸⁸ All human beings participate in the

180. *Fernandez*, 505 F. Supp. at 795; Abbott, *supra* note 176, at 502.

181. Abbott, *supra* note 176, at 502.

182. *The Paquete Habana*, 175 U.S. 677, 694 (1900) (pointing out that customary behavior may grow through general assent into binding international law).

183. Russell G. Donaldson, Annotation, *United Nations Resolution as Judicially Enforceable in United States Domestic Courts*, 42 A.L.R. FED. 577 (1979).

184. *The Paquete Habana*, 175 U.S. at 694; Universal Declaration, *supra* note 27, art. 23 (advocating just and favorable working conditions for everyone, which by inference includes children).

185. PAUST, LITIGATION, *supra* note 20, at 35 (stating that customary international law is universally obligatory, while treaty law generally binds only signatories).

186. *Id.*

187. *Id.*

188. See Jordan J. Paust, *The Complex Nature, Sources and Evidences of*

dynamic process of acceptance or expectation [sic], which, in turn, leads to *opinio juris*.¹⁸⁹ *Opinio juris* necessitates that, before a custom can be considered international law, “it must be followed because the complying country considers itself obligated to do so.”¹⁹⁰

In customary international law, relevant patterns of legal expectation need only be generally shared in the international community.¹⁹¹ That is, customary international law rests upon general assent or general patterns of expectation, not unanimous consent.¹⁹² The U.S. Supreme Court has declared of customary international law, “[t]hat law is of universal obligation.”¹⁹³

Writers around the globe contribute to the dynamic process of creating customary international law.¹⁹⁴ Some may play a more significant role in creating international law because of their relatively higher respectability, power, enlightenment, education, skill, or wealth.¹⁹⁵ The declarations, writings, or opinions of all human beings—including state actors—contribute to the dynamic creation of international law.¹⁹⁶ The proliferation of child labor has generated considerable international attention; prevention of the worst violations of

Customary Human Rights, 25 GA. J. INT’L & COMP. L. 147, 148–49 (1995) [hereinafter Paust, *Rights*].

189. *Id.*

190. David H. Culmer, Note, *The Cross-Border Insolvency Concordat and Customary International Law: Is it Ripe Yet?*, 14 CONN. J. INT’L L. 563, 570 (1999); but cf. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115 (1999) (arguing that “[s]tates do not comply with [customary international law] because of a sense of moral or legal obligation; rather, [customary international law] emerge[s] from the states’ pursuit of self-interested policies on the international stage”).

191. See Paust, *Rights*, *supra* note 188, at 150–51.

192. PAUST, INTERNATIONAL LAW, *supra* note 17, at 14 n.14; PAUST, LITIGATION, *supra* note 20, at 97 n.7.

193. *The Scotia*, 81 U.S. 170, 187 (1871).

194. “Courts ascertain customary international law ‘by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’” *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714–15 (9th Cir. 1992).

195. Paust, *Rights*, *supra* note 188, at 157.

196. *Id.*

children's rights has "becom[e] a universal moral imperative of the international community."¹⁹⁷

a. Opinio Juris

Two elements contribute to customary international law: state practice and a sense of legal obligation, commonly called "*opinio juris*."¹⁹⁸ *Opinio juris* is a mental state or psychological component in which countries believe they are acting out of a legal or moral obligation as evidenced by multilateral conventions, declarations, and international agreements.¹⁹⁹ Customary international law is described as "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation."²⁰⁰ The development of *opinio juris* involves an expression of consent by states to be bound by international law.²⁰¹ Because mental state is difficult to prove, a state's belief in the binding nature of an international norm is best evidenced by its policy statements, domestic judicial decisions on international issues, domestic legislation conforming to the international norm, and legislative history.²⁰² "Treaty law can be evidence of state practice and *opinio juris* in that treaties tend to reflect customary norms."²⁰³ While

197. See *id.* at 156–58. See also a recent proclamation from UNICEF:

All human rights—civil, political, economic, social and cultural—are inherent to the human dignity of every person. They do not constitute an option and are not open to free and arbitrary interpretation, nor are they neutral. . . . States have a responsibility to protect and promote universal respect for and fulfillment of, human rights in their individual and joint actions. Human rights must inform national policies and international cooperation.

UNICEF, *The UN and Human Rights*, at <http://www.unicef.org/crc/humanr.htm>. (last visited Feb. 21, 2000); Rebecca Rios-Kohn, *UNICEF's Mission to Protect the Rights of the Child*, 4 *LOY. POVERTY L.J.* 185, 188 (1998).

198. Ayoub, *supra* note 31, at 427–28 ("Opinio juris is a psychological component in which countries believe that they are acting under a legal obligation.").

199. *Id.* at 428–29.

200. RESTATEMENT, *supra* note 48, § 102 cmt. b.

201. See Culmer, *supra* note 190, at 570.

202. Ayoub, *supra* note 31, at 428.

203. *Id.* at 429; Garg, *supra* note 28, at 512 ("The assertion that ILO conventions contribute to the formation of CIL [Customary International Law] is not novel. The ILO has drafted several conventions delineating standards which have

provisions concerning international labor standards found within the U.N. Charter,²⁰⁴ the Universal Declaration of Human Rights,²⁰⁵ and applicable U.N. General Assembly resolutions²⁰⁶ are not legally binding and are usually interpreted as recommended behavior, they may in fact reflect state practice and compel *opinio juris*, thus creating a customary international norm that is legally binding.²⁰⁷

b. General Practice of Nations

The atrocities of World War II and the proceedings of the International Military Tribunal influenced the growth of customary international law.²⁰⁸ Customary international law is generally developed over time²⁰⁹ and evidenced by general patterns of practice and expectation.²¹⁰ The International Court of Justice, for example, applies international conventions and international customs as evidence of “general practice accepted as law.”²¹¹ Under article 38 of the Statute of the International

subsequently achieved the status of CIL.”).

204. See U.N. CHARTER, art 55.

205. Universal Declaration, *supra* note 27, art. 23.

206. See RESTATEMENT, *supra* note 48, §102 (stating that declarations of the United Nations General Assembly may be expressions of *opinio juris*).

207. Although not binding international law, General Assembly resolutions may reflect *opinio juris*, and may thus serve to define, identify and clarify norms of international law. See PAUST, INTERNATIONAL LAW, *supra* note 17, at 4; See also *Military and Paramilitary Activities (Nicar. v. United States)*, 1986 I.C.J. 14, 101 (June 27) (claiming that the International Court of Justice can draw on the formulations contained in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in order to determine a rule of international law). The prohibition of torture, as evidenced and defined by Universal Declaration of Human Rights, has become customary international law. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

208. See Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protestors*, 40 HASTINGS L.J. 397, 406–08 (1989).

209. *The Paquete Habana*, 175 U.S. 677, 686 (1900) (describing the practice of nations as “gradually ripening into a rule of international law”). *But see North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 43 (Feb. 20) (stating “the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law”).

210. See *supra* note 207 and accompanying text.

211. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060; see also *Military and Paramilitary Activities*, 1986 I.C.J. at 101. One

Court of Justice,²¹² the court's function is deciding disputes in accordance with international law; in determining that law the court will apply general principles of law as recognized by civilized nations, as well as the judicial decisions and teachings of the most qualified jurists of the various nations.²¹³

The evolving nature of customary international law can take many forms. For example, U.N. General Assembly declarations have been influential in establishing international norms.²¹⁴ Declarations and resolutions of the General Assembly have been held an indication of *opinio juris*, and thus, contribute to the creation of customary international law.²¹⁵ The United Nations Declarations prohibiting torture or other cruel, inhuman, or degrading treatment or punishment are significant because they evidence the general practice of nations to proscribe such behavior.²¹⁶ Because cruel, inhuman, or degrading treatment or punishment is prohibited by article 5 of the Universal Declaration of Human Rights,²¹⁷ and the practice of the worst forms of child labor constitutes cruel, inhuman, and degrading treatment,²¹⁸ the practice should be regarded as prohibited by custom and agreement.

Indeed, the wide variety of treaty law, recommendations, and declarations contributes to the proposition that the worst forms of child labor are prohibited by evolving norms of customary international law.²¹⁹ As such, states are universally

recent example of such a practice may be seen in the United States's signing of a treaty that would create the first permanent international court designed to try those accused of crimes against humanity. Thomas E. Ricks, *Clinton Signs Pact to Form Global Court*, HOUS. CHRON., Jan. 1, 2001, at 1A.

212. Statute of the International Court of Justice, *supra* note 211, 59 Stat. at 1060.

213. PAUST, LITIGATION, *supra* note 20, at 36.

214. *See supra* note 207 and accompanying text.

215. *Id.*

216. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882–84 (2d Cir. 1980).

217. Universal Declaration, *supra* note 27, art. 5.

218. *See, e.g.,* Rios-Kohn, *supra* note 152, at 186 (suggesting that recruiting little boys as soldiers in armed conflicts, employing young children as bonded laborers, and forcing little girls to work in brothels as prostitutes are practices “tantamount to slavery”); *see also supra* note 128 and accompanying text.

219. *See supra* notes 128, 194–197 and accompanying text; *see also* Janelle M. Diller & David A. Levy, Note and Comment, *Child Labor, Trade and Investment: Toward*

obligated and bound by such prohibitions.²²⁰

III. SOLUTIONS IN INTERNATIONAL LAW

A. *Litigation Under Customary International Law*

The growing trend towards global economic integration, led by multinational corporations, has created a need for more labor protections, especially for children.²²¹ Despite corporate codes of conduct,²²² trade accords aimed at labor abuses,²²³ and the efforts of international organizations like ILO and UNICEF, achieving global labor reform is extremely difficult.²²⁴ Where legislation and international agreements are concerned, stronger enforcement mechanisms are essential to reduce or help eliminate the problem of child labor.²²⁵ Some argue that child

the Harmonization of International Law, 91 AM. J. INT'L L. 663, 663–65 (1997).

220. See *supra* note 128 and accompanying text.

221. Unfortunately, enforcement mechanisms at the multilateral level may not adequately protect the child laborer. For example, those in place in NAFTA and its side agreements lack adequate, enforceable human rights safeguards. See GLOBAL TRADE WATCH, NAFTA AT FIVE: A REPORT CARD (1998), available at <http://www.igc.org/trac/feature/humanrts/globalization/nafta.html> (calling NAFTA's labor side agreement toothless in stopping the abuse of workers).

222. Due to increased scrutiny by international organizations—and undoubtedly fears of litigation and adverse public opinion—multinational corporations have resorted to developing self-monitoring codes of conduct. See PAUST, LITIGATION, *supra* note 20, at 16; see also Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 668 (1995). For example, the soccer ball industry sought to preempt legislation and independent monitoring by writing a self-monitoring Partnership Agreement which it cosigned with UNICEF and the ILO. *Soccer Balls*, *supra* note 31. Nike and Reebok agreed to set up stitching centers where production could be monitored and child labor could be prevented. *Id.* However, according to the industry's own research, soccer balls are still being stitched by children. *Id.*

223. International trade agreements could provide bans and criminal sanctions similar to those that prohibit trade in products cultivated from endangered species, and compliance with child labor prohibitions could be enforced in the same way that patent holders secure their copyrights internationally. See Senser, *Global*, *supra* note 66.

224. See Michael A. Tonya, Note, *Baby Steps Toward International Fair Labor Standards: Evaluating the Child Labor Deterrence Act*, 24 CASE W. RES. J. INT'L L. 631, 640–41 (1992) (stating that enforcement of labor agreements is the key to establishing fair labor standards; however, dissenting states can and do still ignore these agreements, making enforcement even more difficult).

225. See Senser, *Marching*, *supra* note 31.

labor laws and treaty accords are virtually useless because of enforcement difficulties.²²⁶ Indeed, most international laws are expensive and difficult to enforce; yet these efforts do not provoke the same intense cynicism as that aimed at child labor reform.²²⁷ Lacking a strong lobby, the problems associated with the enforcement of child labor laws will not be adequately addressed through treaties and additional legislation.²²⁸ Without the political and economic resources of the corporate lobby, the incidence of exploitative child labor will not be diminished.²²⁹

Litigation, however, could alleviate enforcement difficulties. Because trade agreements are difficult to enforce²³⁰ and member

226. For example, the legal mechanisms for the enforcement of labor rights under NAFTA, as well as those under traditional U.S. trade law, are tedious, time-consuming, and inherently political. See Teresa R. Favilla-Solano, Comment, *Legal Mechanisms for Enforcing Labor Rights Under NAFTA*, 18 U. HAW. L. REV. 293, 337–38 (1996).

227. See, e.g., David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. INT'L L. 497, 517 (1998) (calling into question any organization's capability to monitor compliance of international marine agreements). However, while the NAFTA Labor Side Agreement "does provide that failure to enforce national child labor laws may result in trade sanctions, the rigorous enforcement procedures included in the main document to protect intellectual property rights were not extended to protect children." Smith, *supra* note 11, at 60; see also Weeks, *supra* note 31.

A final argument used against the abolition of child labour is that it is expensive to enforce, and enforcement may be ineffective. This argument could be applied, of course, to all labour legislation. Again, it is not a serious argument. On a regular and extensive basis, societies enact and seek to implement many prohibitions, which are difficult and expensive to enforce. The 'cost of enforcement' argument could be equally applied to most activities that societies define as crimes: drug use, theft, etc. Further, there are many crimes against capital, which are extremely difficult both to define and enforce, yet are implemented regularly: insider trading, theft of intellectual property, embezzlement, to name a few. Child labour, often in the form of forced child labour, is a crime in most countries. It should be penalised as such within the framework of freer trade.

Id.

228. Cf. John P. Isa, *Reprint: Testing the NAALC's Dispute Resolution System: A Case Study*, 7 AM. U. J. GENDER SOC. POL'Y & L. 179, 184–85 (1998) (citing, for example, the success of lobbying by unions and public pressure as catalysts for the inclusion of protection for Mexican workers' rights in NAFTA).

229. Cf. *id.*

230. According to one commentator, "the NAFTA side agreements [are] ineffective . . . workers' rights are trampled by U.S. corporations like GE and Honeywell,

nations are reluctant to enforce them, the alternative entails putting economic pressure on the multinational corporations ("MNCs") through litigation.²³¹ The exploitation of child labor will not be eradicated in our hemisphere unless MNCs are sanctioned and exposed²³² for their complicity.²³³ By raising the practice of exploitative child labor to the level of customary international law, the child employer will likely be deterred. It will also simplify litigation for jurisdictional purposes,²³⁴ thus creating further disincentives for countries and corporations to ignore or promote harmful child labor practices.²³⁵ Litigation aimed at rogue countries and exploitative MNCs could provide not only real remedies for injured children, but could also supplement unenforceable or ineffective legislative and diplomatic attempts to eliminate child labor practices around the globe.²³⁶ Advocates of children's rights should concentrate their efforts to eliminate child labor by focusing on litigation.²³⁷

protected by the lack of any action on the part of the government." Richard Al, *Union Leaders Upset After Labor Complaints on Mexico Shunned*, DALLAS MORNING NEWS, Oct. 14, 1994, at D1.

231. See, e.g., Favilla-Solano, *supra* note 226, at 338.

232. Increased public pressure on corporations might help improve the child labor problem because no company wants to be associated with the use of child labor. "For instance, Levi-Strauss and Reebok have both recently been targeted as labor law violators in the media. In response, Levi-Strauss and Reebok changed their employment practices because they are dependent on their images." Isa, *supra* note 228, at 215.

233. See Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 101 (1998) (discussing multinational corporations' ability to manipulate state power, those states thereby becoming "complicitous" in human rights violations).

234. See 28 U.S.C. § 1331 (1994) (giving district courts original jurisdiction over all civil cases arising under the laws or treaties of the United States); see also 28 U.S.C. § 1350 (1994).

235. See Favilla-Solano, *supra* note 226, at 338.

236. See Ayoub, *supra* note 31, at 424 (pointing out that even though the United States is in the best position to regulate child labor abuses by U.S.-based MNCs, "it has legally exempted itself from any explicit . . . obligation to do so. The United States is not a signatory to the ICESCR, CEDAW [Convention on the Elimination of Discrimination Against Women] or the CRC which outlaw many of the labor practices conducted by MNCs abroad.").

237. See *id.* at 419-20 (discussing the toothless nature of human rights treaties as they pertain to private actors and suggesting that aliens should seek redress through the courts).

B. Individual Responsibility Under International Law

International law imposes duties on individuals.²³⁸ MNCs are promoting the full-time employment of underage children.²³⁹ MNCs based in the United States have “a long history of engaging in systematic labor rights violations abroad.”²⁴⁰ These abuses are driven by one goal: the steady pursuit of the highest possible economic benefit.²⁴¹ In so doing, MNCs have little if any regard for the costs of their economic pursuit, such as weakened economies, diminished human rights, and environmental degradation.²⁴² To avoid domestic constraints that are applied to domestic enterprises, U.S. corporations sometimes move their businesses from country to country.²⁴³

The most promising tool for the global assertion and realization of basic worker rights lies with litigation against MNCs²⁴⁴ in the courts of the United States.²⁴⁵ Litigation not only increases the cost of doing business for the MNCs that exploit employees, it also raises domestic awareness of the MNCs’ exploitative practices.²⁴⁶ MNCs are not likely to correct inhumane working conditions and insubstantial wages out of a sense of ethical obligation; they must be compelled to remedy their abusive practices by threatening their bottom line.²⁴⁷

Duties under international law reach private individuals²⁴⁸

238. Jordan J. Paust, *The Other Side of Rights: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 51 (1992) [hereinafter Paust, *Private Duties*].

239. Ayoub, *supra* note 31, at 397; see also Senser, *Marching*, *supra* note 31.

240. Ayoub, *supra* note 31, at 397.

241. *Id.* at 406.

242. See Smith, *supra* note 11, at 58–59.

243. *Id.* at 59.

244. See Favilla-Solano, *supra* note 226, at 338.

245. *Id.* To litigate against U.S. corporations in U.S. courts, injured aliens must first establish federal subject matter jurisdiction by utilizing the Alien Tort Claims Act. See 28 U.S.C. § 1350 (1994); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d. Cir. 1995). The Alien Tort Act, 28 U.S.C. § 1350, creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. See 28 U.S.C. § 1350.

246. See Ayoub, *supra* note 31, at 402.

247. See Favilla-Solano, *supra* note 226, at 338.

248. See Paust, *Private Duties*, *supra* note 238 at 58–59.

and juridic persons.²⁴⁹ Under the law, corporations have many of the rights and privileges of individual persons.²⁵⁰ Individuals are bound by customary international law.²⁵¹ Therefore, private corporations may likewise be bound.²⁵² Corporations may be held liable or potentially liable for violations of human rights law.²⁵³ “The issues of child labor, ‘slave’ labor, minimum wage, and maximum hours of work coupled with the victimization of [workers through] physical abuse . . . undoubtedly have the characteristics of legality.”²⁵⁴

Because corporations may be individually bound to abide by international law, MNCs could be responsible for their unlawful child labor practices abroad²⁵⁵ and injured foreigners may have a right to a remedy against them in court.²⁵⁶

249. See PAUST, LITIGATION, *supra* note 20, at 16 n.4.

250. ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 9 (6th ed. 1998).

251. Paust, *PRIVATE DUTIES*, *supra* note 238, at 57.

252. *Kadic v Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (holding that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals”).

253. See *Doe v. UNOCAL Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (involving claims against a corporation for multiple violations of international law, including forced labor).

254. Ayoub, *supra* note 31, at 432.

255. *Id.* at 400–01.

Many well known multinational corporations engage in or have at one time engaged in sweatshop practices. Sweatshop characteristics are defined as follows: ten to twelve hour work days with forced overtime; work that is performed in unsafe and inhumane conditions (including exposure to poisonous chemicals); punishment for the slightest mistake; locked dormitory work conditions; pay averaging less than a living wage; excessively demanding long hours of work without compensation of overtime pay; systematic abuse and/or sexual harassment of workers by the employer(s); and/or the inability of workers to organize. Often, work is performed in locked shops in which armed guards are located at the exits, preventing entrance or exit during work hours. Although many children do work six to seven days a week in factories, they are more likely to work in small subcontracting shops or “homework” situations; adults, on the other hand, are more likely to work in large-scale formal factories.

Id. at 400–01.

256. See *supra* note 244 and accompanying text.

C. Civil Litigation

In January 1999, the first lawsuits were filed to hold U.S. retailers and manufacturers accountable for mistreatment of workers in foreign-owned factories operating on U.S. soil.²⁵⁷ The suits were filed against The Gap, Tommy Hilfiger, J Crew, Gymboree, Jones Apparel Group, Wal-Mart, J.C. Penney, Sears and others on behalf of about 40,000 current or former sweatshop workers.²⁵⁸ The various suits were brought under the Fair Labor Standards Act,²⁵⁹ Racketeering Influenced and Corrupt Organizations Act ("RICO"),²⁶⁰ and the Alien Tort Claims Act,²⁶¹ alleging that the system of garment production in Saipan violates generally-accepted human rights laws.²⁶² To date, seventeen of the U.S. corporations have settled the Saipan lawsuits.²⁶³ The success of these cases represents the greatest

257. Saipan is a U.S. territory in the South Pacific, where thousands of garment workers live and toil in deplorable conditions, working 84 to 100 hours a week, earning \$3.05 an hour. L. M. Sixel, *The 2 Sides of Flap over Saipan Labor*, HOUS. CHRON., July 30, 1999, at C1; Sweatshop Watch, *Summary of Saipan Sweatshop Litigation and Status of Settlement Talks*, (November 15, 1999) at <http://www.sweatshopwatch.org/swatch/marianas/summary.html>; *More Retailers Settle Saipan Class Action*, L.A. TIMES, March 29, 2000, at C2; *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1063 (9th Cir. 2000).

258. A class action suit was filed in federal district court in Los Angeles, alleging violations of RICO; a second case was filed in California state court charging misleading advertising and violations of the Fair Labor Standards Act; and the third suit, also a class action, targets the U.S. retailers' foreign-owned contractors. Arian Campo-Flores, *Sweatshops in Distant Lands? Yes, But in America's Own Backyard?*, AM. LAW., March 1999, at 142; Sweatshop Watch, *Summary of Saipan Sweatshop Litigation and Status of Settlement Talks*, (November 15, 1999) at <http://www.sweatshopwatch.org/swatch/marianas/summary.html>.

259. 29 U.S.C. §§ 201–219 (1994); see *Does I thru XXIII*, 214 F.3d at 1063.

260. 18 U.S.C. §§ 1961–1968 (1994). Section 1964 provides for treble damages, disgorgement of profits, and attorney's fees. 18 U.S.C. § 1964.

261. 28 U.S.C. § 1350 (1994); see discussion *infra* notes 270–272.

262. Campo-Flores, *supra* note 258 at 142.

263. Seventeen U.S. companies have settled, agreeing to pay a one-time contribution to a fund that will finance an independent monitoring program. *Id.* The current total of the fund is \$8 million. Bruce Bigelow, *8 U.S. Clothing Firms to Settle Suit Alleging Sweatshops on Saipan*, SAN DIEGO UNION TRIB., Mar. 29, 2000, at C-2. Nordstrom Inc., Gymboree Corp., Cutter & Buck Inc., and J. Crew Group Inc, while admitting no wrongdoing, have agreed to pay \$1.25 million for factory monitoring. Nancy Cleland, *4 U.S. Retailers Settle Saipan Labor Suit*, L.A. TIMES, Aug. 10, 1999, at C2.

promise in eliminating harmful child labor practices and stands to deter U.S. based companies from utilizing child labor abroad.²⁶⁴

Because litigation naturally creates global awareness and certain economic pressure,²⁶⁵ it may be the most effective deterrent to child labor practices. As MNCs establish factories in other countries and produce products that will travel across international borders, U.S. corporations may find that violations of child labor norms can be detrimental to their image and their bottom line.²⁶⁶ Additionally, as the exploitation of child laborers gains recognition as an internationally proscribed practice,²⁶⁷ jurisdictional bases become more readily available to the injured child plaintiff.²⁶⁸

D. *The Alien Tort Claims Act*

The Alien Tort Claims Act ("ATCA") supplies federal question and jurisdiction for crimes committed against aliens, providing that "[t]he 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."²⁶⁹ Enacted in 1789 as part of the original

264. Plaintiffs' counsel speculate that if they are successful, "it could open up a whole new area of attack on sweatshops," both domestically and abroad. Campo-Flores, *supra* note 258, at 142.

265. Compa, *supra* note 222, at 674-75 (stating that companies most vulnerable to media exposure are those "whose sales depend heavily on brand image and company goodwill, such as Levi Strauss"); Ayoub, *supra* note 31, at 402 (asserting that news media reports cataloguing labor violations make it impossible for multinational corporations to "profit from their name recognition").

266. Compa, *supra* note 222, at 674-75 (noting "[i]nternational media will expose inconsistency and irresponsibility in corporate behavior and vigilant consumers will respond").

267. The Saipan litigation also contributes to the behavioral element of developing international law. "Customary international law results from a *general and consistent practice of states* followed by them from a sense of legal obligation." RESTATEMENT, *supra* note 48, § 102(2) (emphasis added).

268. Campo-Flores, *supra* note 258, at 142 (quoting plaintiff's lawyer Albert Meyerhoff, who notes that the law is evolving to make it easier "to invoke federal jurisdiction for massive amounts of money where human rights have been violated around the world").

269. 28 U.S.C. § 1350 (1994); PAUST, LITIGATION, *supra* note 20, at 118 n.2.

Judiciary Act,²⁷⁰ and one of the first laws to be enacted by the 1st Congress, the ATCA survives today with only minor changes.²⁷¹ As a result of the increasing international concern with human rights abuses, plaintiffs have used the ATCA as a means to gain jurisdiction in U.S. federal courts for various violations of customary international law.²⁷² However, to date, this researcher has been unable to locate a case in which the ATCA has been utilized specifically to remedy child labor abuses.

E. Jurisdiction

Nations may be reluctant to seek out and punish child labor offenses that fall short of slavery or torture²⁷³ due to sovereignty concerns.²⁷⁴ In fact, the term “jurisdiction” refers to a “state’s legitimate assertion of authority to affect legal interests.”²⁷⁵ International law rests on the legitimacy of a state’s exercise of its jurisdiction and the resolution of jurisdictional conflicts

270. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103 (2d Cir. 2000).

271. Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350), Providing for Federal Jurisdiction Over Alien’s Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (1993).

272. In *Royal Dutch Petroleum*, the court noted:

As the result of increasing international concern with human rights issues . . . litigants have recently begun to seek redress more frequently under the ATCA. *See, e.g.*, *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (alleging torture of Ethiopian prisoners); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (alleging torture, rape, and other abuses orchestrated by Serbian military leader); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) (alleging torture and other abuses by former President of Philippines); . . . *Xuncax v. Gramajo*, 886 F. Supp. 162 (D.Mass. 1995) (alleging abuses by Guatemalan military forces).

Royal Dutch Petroleum, 226 F.3d at 104.

273. *Randall*, *supra* note 75, at 788 (asserting piracy and slavery are within a limited class of crimes over which any state can exert jurisdiction because all states have “an interest in exercising jurisdiction to combat egregious offenses” that have been universally condemned).

274. *Id.* at 786 (stating that the “legitimacy of domestic jurisdiction depends on international law’s jurisdictional principles, which were established to foster cooperative foreign relations by avoiding and resolving conflicting assertions of domestic penal authority”).

275. *Id.*

between states.²⁷⁶ Therefore, in “cases involving foreign offenders, foreign victims, or extraterritorial acts, states must evaluate their authority to redress the offense under international law principles.”²⁷⁷ Where oppressive child labor practices exist, jurisdiction over the offense will be a crucial issue, that is, whether a foreign state’s jurisdiction over the offense is legitimate under international law.²⁷⁸ International law provides established rules for determining when a state may exercise authority over offenses that also affect the interests of another state;²⁷⁹ states seeking to enforce domestic child labor laws against another state must first establish a recognized prescriptive jurisdictional base.²⁸⁰

F. *Jurisdiction to Prescribe*

A state is able to employ judicial measures to induce or compel compliance with its laws or regulations, if it has prescriptive jurisdiction.²⁸¹ Customary international law recognizes four bases of prescriptive jurisdiction: 1) territorial (subjective and objective); 2) nationality; 3) protective; and 4) universal.²⁸² “Application of one or more of these principles merely satisfies a requirement that jurisdiction pertain under international law.”²⁸³

276. RESTATEMENT, *supra* note 48, § 401 cmt. b.

277. Randall, *supra* note 75, at 785.

278. *Id.*

279. *Id.*

280. *See id.* at 786.

281. RESTATEMENT, *supra* note 48, § 431(1).

282. *See id.* §§ 402, 404. *See also* United States v. Yunis, 681 F. Supp. 896 (D.C.D. 1988). The Yunis case outlines the five traditional bases of jurisdiction over extraterritorial crimes under international law:

Territorial, wherein jurisdiction is based on the place where the offense is committed; *National*, wherein jurisdiction is based on the nationality of the offender; *Protective*, wherein jurisdiction is based on whether the national interest is injured; *Universal*, wherein jurisdiction is conferred in any forum that obtains physical custody of the perpetrator of certain offenses considered particularly heinous and harmful to humanity; *Passive personal*, wherein jurisdiction is based on the nationality of the victim.

Id. at 899–900.

283. PAUST, LITIGATION, *supra* note 20, at 401 n.1.

When litigating against foreign nations—or their subjects—for child labor violations, jurisdiction could be proper under the universality principle, the nationality principle, and arguably under objective territorial jurisdiction and victim theories. Before a state enforces its domestic laws against another sovereign, a court should be certain it has prescriptive jurisdiction under one or more of these principles.²⁸⁴ Thus, in attempting to adjudicate against child labor practitioners, a state must have competence under international law to proscribe child labor practices.²⁸⁵

G. Universal Jurisdiction

Because the universality principle allows for jurisdiction to enforce sanctions against crimes that have an independent basis in international law,²⁸⁶ jurisdiction for abhorrent child labor offenses would be proper most plausibly under a universal theory. Abhorrent acts that violate *obligatio ergo omnes* and peremptory norms *jus cogens* affect the international community as a whole²⁸⁷ and confer jurisdiction under the universality principle.²⁸⁸ Universal jurisdiction allows any state to apply its laws and punish certain offenses “even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim.”²⁸⁹

Drawing on multinational conventions and *opinio juris* that widely condemn the practice of child labor, universal jurisdiction might allow any nation to prosecute those charged with the

284. *Id.*

285. *Id.* (noting “a state does not have jurisdiction to enforce its laws if, under international law, it did not have competence to prescribe domestic law attempting to reach relevant acts or omissions”).

286. Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 211 (1983) [hereinafter Paust, *Jurisdiction*].

287. See RESTATEMENT, *supra* note 48, § 702 cmts. n, o. See also *Barcelona Traction, Light and Power Co., (Belg. v. Spain)* 1970 I.C.J. 3, 32 (stating that obligations *erga omnes* are the concerns of all states).

288. Paust, *Jurisdiction*, *supra* note 286, at 211.

289. Randall, *supra* note 75, at 785; see also RESTATEMENT, *supra* note 48, § 404 cmt. a.

offense, especially where the employer or state's practices replicate slavery and utilize torture.²⁹⁰ Because the universality principle has been used to prosecute acts that the community of nations widely condemns, extension of the universality principle to cover the worst forms of child labor would not be unreasonable. As the offense of child labor endangers values to which the global community is committed, universal jurisdiction could facilitate the restoration of children and their families, while providing greater disincentive for those perpetuating the practice.

H. Peremptory Norms Jus Cogens

1. Torture

The physical and psychological cruelties inflicted upon bonded children in some instances could be considered torture, and are prohibited by customary international law²⁹¹ and treaty.²⁹² The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment contains a broad mandate that proscribes official torture,²⁹³ and section

290. RESTATEMENT, *supra* note 48, § 404 cmt. a (stating that universal jurisdiction applies as a result of universal condemnation and customary law); *id.* § 702 (stating that prohibitions on slavery and torture are matters of customary law); Sener, *Slavery*, *supra* note 61, at 32 (citing the discoveries of a former Indian Chief Justice of boys working fourteen to twenty hours a day: "[t]hey are beaten up, branded [with red hot iron rods], and even hung from trees upside down" (alteration in original)).

291. RESTATEMENT, *supra* note 48, § 702(d) & cmt. g. The prohibition of torture is considered a peremptory norm *jus cogens*. *Id.* cmt. n.

292. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

293. G.A. Res 39/46, U.N. GAOR, 39th Sess., 93rd plen. mtg., arts. 1-2, 4-5, U.N. Doc. A/RES/39/46 (1984). The Convention defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. art. 1.

702(d) of the Restatement states that international law is violated if, as a matter of state policy, a state practices, encourages, or condones torture or other cruel, inhuman, or degrading treatment or punishment.²⁹⁴ This broad definition should apply when states condone the cruel, inhuman, and degrading treatment suffered by children in bonded labor.²⁹⁵

A crucial aspect of torture and cruel, inhuman or degrading conduct, as defined [in the Restatement], is that they take place in the public realm: a public official or a person acting officially must be implicated in the pain and suffering. The rationale for this limitation is that private acts (of brutality) would usually be ordinary criminal offenses which national law enforcement is expected to repress. International concern with torture arises only when the State itself abandons its function of protecting its citizenry by sanctioning criminal action by law enforcement personnel.²⁹⁶

Governments that fail to enforce the international prohibition of child labor practices, due to apathy, ignorance, or economic reasons, are complicitous²⁹⁷ and should be punished.

2. Slavery

Freedom from slavery has long been recognized as a fundamental human right, and the prevention of slavery is an international obligation.²⁹⁸ An obligation towards the international community as a whole is of the character *obligatio ergo omnes*.²⁹⁹ Child labor practices could be analogous to slavery, a practice which is repugnant to humanity as a whole; labor practices of this sort violate peremptory norms *jus cogens*,

294. RESTATEMENT, *supra* note 48, § 702(d) (1987).

295. *Id.* § 702.

296. Hilary Charlesworth, et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 628 (1991).

297. See Bol, *supra* note 37, at 1214 (asserting that states should be accountable for economic inaction).

298. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 306 (1999).

299. *Id.* at 307.

and should be universally proscribed.³⁰⁰

The child laborer usually lacks the choice of whether to work, and the child's earnings are so slight as to be virtually nonexistent.³⁰¹ Thus, courts should view child labor practices with a discerning eye. The child laborer's lack of choice and the virtual absence of compensation may equate to slavery, and courts should utilize universal jurisdiction upon a demonstration that defendants have compelled employees to work, especially children.³⁰²

IV. CONCLUSION

Despite an abundance of human rights treaties, legislation, and *opinio juris*, the recognition of a legal obligation to prohibit child labor internationally is still not at hand,³⁰³ and no court has considered whether a prohibition of child labor is a customary norm of international law.³⁰⁴

However, the prohibition of child labor is evolving as a rule of customary international law;³⁰⁵ and where the practice of child labor has characteristics of torture, debt bondage, or compulsion, it should be proscribed as a norm of universal obligation.³⁰⁶ The international disdain for harmful child labor practices should give birth to a rule that does not recognize borders. The evidence

300. Ayoub, *supra* note 31, at 426; *see also* Senser, *Slavery*, *supra* note 61, at 32 (arguing under the heading "Slavery by any other name":

[T]he term child labor is too benign for the fate of most children involved in full-time work in industry, certainly for carpet weaving and glassmaking in India . . . [Consider] the low-caste Indian boy aged 10 kidnapped from his home, forced to work in a carpet sweatshop a hundred or more miles away, and beaten if he cries for his mother . . . [C]hildren conscripted into the full-time labor force before a certain age (say 14 or 15), and thus deprived of their right to an education, are suffering a contemporary form of slavery.)

301. *See* Bol, *supra* note 37, at 4–5.

302. *See* Cox, *supra* note 1, at 121–22 (equating child labor with forced labor); *see also* Rassam, *supra* note 298, at 321, 328–29 (stating that forced labor is a modern form of slavery).

303. Cox, *supra* note 1, at 128 n.65.

304. Timothy A. Glut, Note, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203, 1215 (1995).

305. Garg, *supra* note 28, at 510.

306. *See* Diller & Levy, *supra* note 219, at 667–69.

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of states' practice, coupled with an enormous body of *opinio juris*, shows a deep commitment to the eradication of harmful child labor.³⁰⁷ Such universal condemnation and growing intolerance indicates the creation of an internationally prohibited norm—one that makes a crime against a child anywhere a crime everywhere.

307. See Glut, *supra* note 304, at 1243–44; see also Ayoub, *supra* note 31, at 432.