DEPLOYING INTERNATIONAL LAW TO COMBAT FORCED LABOR IN IMMIGRATION DETENTION CENTERS

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ABSTRACT

Using the guise of a "Voluntary Work Program," immigration detention centers across the United States are coercing detained immigrants into forced labor and justifying it by paying them mere cents an hour. This inhumane program is frequently challenged in domestic courts under federal law. Advocates may also benefit from incorporating arguments based on international law into their strategies. In particular, various treaties that the United States has ratified (the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Abolition of Forced Labour Convention) or at least signed (the American Declarations of the Rights and Duties of Man), as well as customary international law, mandate parties protect all persons held in civil detention, as is the case of those in immigration detention, from forced labor and other internationally condemned practices. Detained immigrants, attorneys, non-governmental organizations, and other advocates may thus make use of the international mechanisms available to enforce the human rights of immigrants subject to forced labor conditions, and they may likewise rely on international law to litigate these cases in federal courts. Though the United States has repeatedly attempted to skirt its responsibility to international bodies, the path of pursing accountability under international standards is not foreclosed. Moreover, effective and successful reliance on international law may help build the necessary legal infrastructure to prevent the United States from continuing to wage violence against detained immigrants, especially as these arguments become more widely accepted and the use of international mechanisms of accountability becomes more frequent.

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I. INTRODUCTION

The prolonged and inhumane detention of immigrants in the United States is big business for the private corporations contracted to run these detention centers. In 2017, CoreCivic, the largest and one of the most notorious prison operators in the industry, earned over $444 million in profit from detention centers which primarily imprisoned immigrants.[1] One reason that immigrant detention is so profitable for corporations like CoreCivic is the systematic exploitation of detained immigrant labor used to run and maintain detention centers. Private immigrant detention centers save millions of dollars each

1. CoreCivic Inc., Annual Report (Form 10-K) (Feb. 22, 2018).

year by forcing detained immigrants to work for as little as $0.13 an hour in order to purchase basic hygiene products like toothpaste and toilet paper.[2]

Officially, ICE's Performance-Based National Detention Standards permit detained immigrants to participate in the "Voluntary Work Program,"[3] but the history of immigrant detention centers and the analysis of their current conditions reveals why the work programs are hardly voluntary. The law that the government relies on to authorize labor in immigrant detention centers was passed in 1950, two years before the Immigration and Nationality Act.[4] That year Congress set the wages for immigrant detention at one dollar a day, regardless of the number of hours worked each day.[5] In seventy years, this nominal wage has never been adjusted for inflation, and corporations like CoreCivic continue profiting off the systematic exploitation of detained immigrant labor.

In order to maintain a façade of compliance with both domestic and international law prohibiting forced labor, all work by detained immigrants in the United States is labeled "voluntary." However, investigations into privately run detention centers such as the Stewart Detention Center in Lumpkin, Georgia have revealed that those detained are effectively forced to work.[6] Detention centers operated by corporations like CoreCivic withhold basic hygienic products such as toothpaste, toilet paper, soap, and lotion behind a price tag.[7] As a result, most detained individuals have no option but to participate in the deceitfully named "Voluntary Work Program" to receive the money to afford these necessities.

Detained immigrants and advocates argue that these forced labor conditions constitute "slavery by another name" and violate the Thirteenth Amendment.[8] Historically, the Amendment has extended beyond the scope of the emancipation of physically enslaved peoples—it has also been invoked to "emphasiz[e] the right to contract during the *Lochner* era, New Deal labor and economic rights in the 1930s and 1940s, and desegregation and antidiscrimination during the civil rights era of the 1960s."[9] Thus, holistic interpreters of the Amendment maintain that one of its true objectives is to protect society by prohibiting "certain kinds of evils," like the kinds of human rights violations that result from forced labor.[10] The Amendment contains an

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2. *See* Barrientos v. CoreCivic, Inc., 332 F. Supp. 3d 1305, 1308 (M.D. Ga. 2018).

3. U.S. IMMIGR. AND CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 405 (2016).

4. 8 U.S.C. § 1555 (1950).

5. Victoria Law, *End Forced Labor in Immigrant Detention*, N.Y. TIMES (Jan. 29, 2019), https://perma.cc/K9NJ-PE6M.

6. *Prisoners of Profit: Immigrants and Detention in Georgia*, ACLU (May 2012), https://perma.cc/BK4W-YKEH.

7. *Barrientos,* 332 F. Supp. 3d at 1308.

8. Anita Sinha, *Slavery By Another Name: "Voluntary" Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1 (2015).

9. Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 U. PA. J. CONST. L. 1451, 1452 (2009).

10. Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOLEDO L. REV. 923, 925 (2010).

exception clause, which permits involuntary servitude as a punishment for a crime where the individual has been convicted. This exception, though inhumane in and of itself,[11] does not apply to immigrants at civil detention centers: "immigration violations for which detainees are held are not crimes" and, as such, detained immigrants have not been "duly convicted."[12]

Detained individuals have organized to protest the Voluntary Work Program. For example, immigrants detained at the Atlanta City Detention Center[13] refused to work in the kitchen to protest lack of compensation in June 2018.[14] Facility staff responded by providing the workers with food items like chips, milk, and a boiled egg, but the unjust work conditions ultimately were unchanged.[15] Protests like this are widespread, and officials repeatedly abuse their power to minimize disruptions to their operations, such as by sending individuals to solitary confinement for inciting protests[16] or, in the case of recent strikes in detention centers operated by The Geo Group, dismissing the grievances of protestors by quibbling about the semantic impossibility of striking against a "voluntary" program.[17]

Coalitions of detained immigrants and legal advocates across the country have brought legal challenges to the practice of forced labor in immigrant detention centers under state and federal law.[18] As of this writing, many recent actions have achieved class certification and survived motions to dismiss. Such suits have been filed since at least 1990, when the Fifth Circuit Court of Appeals considered, and rejected, the assertion that detained immigrants should be paid the minimum wage guaranteed by the Fair Labor Standards Act.[19] In 1997, the Fifth Circuit rejected the argument that the work program in an immigrant detention center violated the Thirteenth Amendment.[20] Recent cases urge the federal judiciary to reconsider the

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11. *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. Rev. 899 (2019) (explaining how the Thirteenth Amendment's Punishment Clause not only passively permitted the constitutional preservation of slavery but actively incentivized the transformation of the national legal landscape, leading to expansive criminalization and incarceration of Black people whose enslavement could now be justified on penal grounds as opposed to outmoded notions of inherent inferiority).

12. Sinha, *supra* note 8, at 38–39.

13. The Atlanta City Detention Center used to detain immigrants until Mayor Keisha Lance Bottoms prohibited it from collaborating with ICE. *See* Stephen Deere, *Atlanta Mayor Bottoms Orders Jail to Refuse New ICE Detainees*, ATLANTA J.-CONST. (Jun. 20, 2018), https://perma.cc/TE95-3NBP.

14. *See* PRIYANKA BHATT, PRIYA SREENIVASAN, ANTHONY RIVERA, DANIEL YOON, KEVIN CARON & AZADEH SHAHSHAHANI, INSIDE ATLANTA'S IMMIGRANT CAGES: A REPORT ON THE CONDITIONS OF THE ATLANTA CITY DETENTION CENTER, PROJECT S. 49 (2018), https://perma.cc/V8D2-SGLT ("[A]ll we ask is for food and you think it's too much—you're supposed to be paying us.").

15. *Id.*

16. Spencer Woodman, *ICE Detainee Sent to Solitary Confinement for Encouraging Protest of "Voluntary" Low-Wage Labor*, INTERCEPT (Oct. 10, 2017), https://perma.cc/AY6K-5FMB.

17. *See* Farida Jhabvala Romero, *Immigrant Detainees Strike Over Working Conditions, California Regulators Investigate*, KQED (Jun. 22, 2022), https://perma.cc/LTE9-U45D.

18. *See generally* Barrientos v. CoreCivic, Inc., 332 F. Supp. 3d 1305 (M.D. Ga. 2018) (exemplifying a lawsuit filed by detained immigrants and their legal advocates against a federal immigration detention facility that alleges forced labor under state and federal law).

19. *See* Alvarado Guevara v. I.N.S, 902 F.2d 394, 394 (5th Cir. 1990).

20. *See* Channer v. Hall, 112 F.3d 214, 214 (5th Cir. 1997).

applicability of fair labor standards to detained immigrants. These cases also utilize new, innovative legal arguments, such as charging private prison corporations with violating the Trafficking Victims Protection Act (TVPA).[21]

Although these ongoing civil suits have a high likelihood of success,[22] advocates should deploy an additional tool for recourse under international human rights law.[23] International human rights law describes a set of principles and agreements designed to guarantee basic individual dignity and prevent exploitation. The tenets of international human rights law represent norms developed on the global stage. Forced labor in immigration detention centers violates the core tenets of many human rights agreements. Just as the TVPA has the potential to expand protections under the Thirteenth Amendment for individuals subjected to forced labor, so should the treaties and principles of international human rights bolster challenges to the "voluntary work program" in U.S. immigration detention centers.

Part I of this article will cover the international human rights law applicable to the plight of detained immigrants subjected to perform forced work at U.S. detention centers. More specifically, this discussion will focus on three treaties that the United States has ratified, one treaty that the United States has signed but not ratified, and international common law. Then, Part II will discuss the international mechanisms through which these treaties can be enforced, breaking down the process for those that the United States has ratified and those which the United States has merely signed but not ratified. Lastly, Part III will consider the enforcement of international law in domestic federal courts as permitted by the Alien Torts Statute and provide guidance on how this act may be utilized to protect immigrants subjected to forced labor.

II. IDENTIFYING APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

The canon of international human rights law consists of formal agreements and customary practice.[24] However, as detailed below, even formal agreements

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21. *See Barrientos*, 332 F. Supp. 3d at 1305; Owino v. CoreCivic, Inc., No. 17-CV-1112, 2018 U.S. Dist. LEXIS 81091, at *1 (S.D. Cal. May 14, 2018). Enacted in 2000, the TVPA was designed to "inject 'new potency in the Thirteenth Amendment's guarantee of freedom: whether on farms or sweatshops, in domestic service or forced prostitution.'" Alexandra Levy, *Fact Sheet: Human Trafficking & Forced Labor in For-Profit Detention centers*, THE HUM. TRAFFICKING LEGAL CTR. (2018) (citing 153 CONG. REC. H14114 (daily ed. Dec. 4, 2007) (statement of Rep. Conyers)). The Act prohibits "knowingly provid [ing] or obtain[ing] labor or services of a person" by a broad range of tactics, including: "(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint." 18 U.S.C. § 1589 (2003).

22. *See* Jonathon Booth, *Ending Forced Labor In ICE Detention Centers: A New Approach*, 34 GEO. IMMIGR. L. J. 573, 610 (2020).

23. Recourse related to the U.S. Constitution and federal law has been addressed in several thorough articles. *See, e.g.*, Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Detention from 1943 to Present*, 29 GEO. IMMIGR. L.J. 391 (2016).

24. *E.g.*, STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 1–2 (2018).

are enforceable as U.S. law only after executing legislation is in place.[25] The body of international human rights law that may be applied in the context of immigration detention can be broken down into ratified treaties, treaties that have been signed but not ratified, and customary international law.[26]

A. *Ratified Treaties*

The United States enters into formal agreements through treaty ratification or executive agreement.[27] As outlined in Article II of the Constitution, treaties are negotiated by the executive and ratified upon the advice and consent of the Senate.[28] Ratification depends upon the consent of a two-thirds majority of the Senate. Consent may be conditioned on "reservations, declarations, understandings, and provisos" regarding a treaty's application.[29] As we will see, these qualifications can have a substantial impact on the utility of a ratified agreement. The United States has ratified three treaties relevant to the use of forced labor in immigrant detention centers: the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Abolition of Forced Labour Convention.

1. *The International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) was the first international human rights agreement to confront the issue of forced labor.[30] Adopted by the United Nations in 1966, the ICCPR plainly states, "no one shall be required to perform forced or compulsory labour."[31] Further, the Covenant guarantees that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"[32] "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law,"[33] and that "all persons deprived of their liberty

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25. For a basic discussion of applicable international law, *see* Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 152 (2008).

26. Additionally, there are treaties that the United States has neither signed nor ratified, and which are therefore not directly useful in litigation. These treaties build upon the international legal scheme to further reinforce the rights of immigrants to liberty and protection from being subjected to slavery or forced labor. *See, e.g.*, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 11, 16, Dec. 18, 1990, 30 I.L.M. 1517 (entered into force July 1, 2003). While the practical application of these treaties falls beyond the scope of this article, they may nevertheless prove useful to advocates on non-binding, normative grounds. *See* Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE HUM. RTS. & DEV. L.J. 1, 6 (2005).

27. *See generally* MULLIGAN, *supra* note 24 (explaining how the United States enters into formal international agreements).

28. *See id.*; U.S. CONST. art. II, § 2.

29. MULLIGAN, *supra* note 24, at 4.

30. *See* Vladislava Stoyanova, *United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations*, 38 MICH. J. INT'L L. 359, 360–61 (2017).

31. International Covenant on Civil and Political Rights, art. 8(3)(a), Dec. 16, 1966, S. EXEC. DOC. No. 95-102., 999 U.N.T.S. 171 [hereinafter "ICCPR].

32. *Id.* art. 7.

33. *Id.* art. 9(1).

shall be treated with humanity and with respect for the inherent dignity of the human person."[34] The United States ratified the ICCPR in 1992. In doing so, it assumed an affirmative obligation to "respect and ensure" the rights of detained individuals without discrimination as to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[35]

Article 8 of the ICCPR stipulates certain exceptions to the general prohibition of "forced labor." These exceptions include "hard labour" as punishment for a crime, as well as work "normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention."[36] In other words, Article 8 permits court directives to compel labor under limited circumstances. It is unclear whether the scope of this exception implies the inclusion of pre-trial or civil detention,[37] unlike the Thirteenth Amendment to the U.S. Constitution's express ban on forced slavery in any context "except as a punishment for crime."[38] In addition, it is undetermined whether U.S. immigration courts—administrative bodies under the control of the Department of Justice—would receive the same deference as judicial tribunals. Consequently, an argument could be raised that the Voluntary Work Program in immigration detention centers is not within this exception to Article 8 because individuals held in immigration detention centers are in civil detention and because the work they perform—such as cleaning, cooking, doing laundry, and gardening[39]—is not "normally required" of detained immigrants; rather, it is traditionally the responsibility of paid staff.

Moreover, Article 7 prohibits the "cruel, inhuman or degrading treatment or punishment" of any persons. But this provision is subject to important reservations. The United States conditioned its assent to ICCPR on interpreting those terms as synonymous with "the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."[40] This reservation limits the potential

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34. *Id*. art. 10(1).

35. *Id*. art. 2(1). It is worth noting that the United States issued a reservation to the ratification of the anti-discrimination language of Article 2, stating that "The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective." 138 CONG. REC. S4781-01 (daily ed., April 2, 1992).

36. ICCPR, art. 8(3)(c)(i).

37. The ICCPR has issued no general comments regarding Article 8. *See* Stoyanova, *supra* note 30, at 405.

38. U.S. CONST. amend. XIII, § 1. *But see* Samantha Sherman, *Defining Forced Labor: The Legal Battle to Protect Detained Immigrants from Private Exploitation*, 88(5) U. CHI. L. REV. 1201, 1215 ("Because immigration detention is civil rather than criminal detention, people detained awaiting immigration proceedings do not fall within the Amendment's criminal punishment exception clause . . . But Thirteenth Amendment claims are difficult to win.").

39. Mia Steinle, *Slave Labor Widespread at ICE Detention Centers, Lawyers Say*, PROJECT ON GOV'T OVERSIGHT (Sept. 7, 2017), https://perma.cc/KLD9-CY7Y.

40. *International Covenant on Civil and Political Rights*, U.N. Treaty Collection, https://perma.cc/WW7G-E3RY.

scope of Article 7 to the civil liberties already recognized by U.S. jurisprudence. Nevertheless, the United States is still obligated to take proactive measures to "prevent and punish" acts that violate Article 7 and to report such efforts to the Human Rights Committee.[41] Furthermore, the universal acceptance of the human rights norms enshrined in Article 7 should sufficiently support extending these protections to detained immigrants notwithstanding the reservations expressed by a contrarian United States. Therefore, the United States, as party to the ICCPR, continues to have a duty to take the necessary "legislative, administrative, judicial, and other measures" to prevent and punish the cruel, inhuman or degrading treatment or punishment of immigrants in its detention centers, as is the case of all those subjected to forced labor conditions, and to report its progress on such actions openly and appropriately.[42]

Likewise, Article 10 offers the distinct affirmative obligation that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[43] Given that migrants in detention centers are deprived of their liberty, it follows that detention centers must protect "all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."[44] The Committee has clarified that incarcerated individuals may not "be subjected to any hardship or constraint other than that resulting from the deprivation of liberty" and that "respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons."[45] The Voluntary Work Program violates this ICCPR stipulation. Under the Program, detained immigrants become coerced laborers who have little choice but to submit to work for degradingly meager pay. This systemic dehumanization of forced laborers is inconsistent with the ICCPR's standards of the deprivation of liberty outlined in the ICCPR, and the United States' failure to remedy this inhumane practice clashes with its obligations under Article 10.

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41. UN Hum. Rts. Comm'n., CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/Gen/I/Rev.9 (Vol. I) (1992).

42. *Id.*

43. ICCPR, art. 10. Article 10 goes on to state that the "essential aim" of the penitentiary system is "reformation and social rehabilitation" of incarcerated individuals. The United States qualified the interpretation of this declaration, adding that it "does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system" (citing 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992)).

44. ICCPR, art. 10, General Comment 21 (available at https://perma.cc/JE9W-X4NT); U.N. Off. of the High Comm'r for Hum. Rts., *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers* at 337-38.

45. ICCPR, art. 10, General Comment 21.

2. *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The United Nations adopted the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1984.[46] Ten years later, the United States ratified that treaty. Though CAT primarily addresses torture, it also creates an affirmative obligation for states to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."[47] The scope of this prohibition is limited to actions "committed by," "at the instigation of," or "with the consent or acquiescence of" public officials or other persons acting in an official capacity.[48] The victims of such acts must be individuals "deprived of their liberty" or "otherwise under the factual power or control of the person responsible for the treatment or punishment."[49] If these conditions are met, CAT mandates that states take preventative and interventionist measures, including: educating public officials and agents on the prohibited conduct[50]; systematically reviewing the conditions of detention[51]; and ensuring that violations are investigated.[52] The U.S. Code of Federal Regulations has provisions in place that implement CAT to protect migrants at risk of torture in their countries of origin but whose applications for asylum have been denied.[53]

As with the ICCPR, the United States included a reservation to the ratification of CAT restricting the interpretation of "cruel, inhuman, or degrading treatment or punishment" to conduct prohibited by the "Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."[54] This reservation—like many other U.S. reservations to treaties—has been heavily criticized as a means to preclude the treaty from having any domestic effect.[55] In 2002, the United Nations adopted an Optional Protocol to CAT which establishes a system of regular visits by independent bodies to places of detention, including sites where non-citizens are held in administrative detention. The inclusion of immigration detention centers in this provision makes clear that the protections against torture and cruel, inhuman, and degrading

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46. United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, 113 [hereinafter "UN CAT"].

47. UN CAT, art. 16(1); Barbara MagGrady, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 BROOK. J. INT'L L. 271, 300 (1997).

48. UN CAT, art. 1.

49. J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 149-55 (2021).

50. UN CAT, art. 10.

51. *Id.* art. 11.

52. *Id.* art. 12-13. Notably, UN CAT Article 14, which mandates that victims of torture are provided an "enforceable right to fair and adequate compensation," does not apply to conduct outside of torture.

53. *See, e.g.*, 8 C.F.R. §§ 208.16, 208.18 (1999).

54. Comm. Against Torture, Consideration of Reps. Submitted by State Parties Under Article 19 of the Convention, ¶ 302, U.N. Doc CAT/C/28/Add.5 (Feb. 9, 2000).

55. Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000).

treatment extend to detained immigrants.[56] However, the United States neither signed nor ratified the 2002 Protocol.

U.S. participation in the emerging international standards embodied by the Optional Protocol is urgently needed. This is made clear by the persistence of the Voluntary Work Program, where detained immigrants are denied basic guarantees of dignity in federal custody. Joining the Optional Protocol would allow the United States to preserve a leadership role in international human rights and would compel an end to the Voluntary Work Program.

3. *The Abolition of Forced Labour Convention*

The International Labour Organization (ILO) established the fundamental principles of international human rights law regarding labor.[57] The United States has ratified two foundational ILO conventions, including the 1957 Abolition of Forced Labour Convention (#105).[58] This landmark convention prohibits forced labor under five enumerated circumstances:

(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
(b) as a method of mobilising and using labour for purposes of economic development;
(c) as a means of labour discipline;
(d) as a punishment for having participated in strikes;
(e) as a means of racial, social, national or religious discrimination.[59]

Though the Convention does not define "forced labor," it notes the content of the 1930 Forced Labour Convention (#29), which states that forced labor is "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."[60] The 1930 Convention also specifies types of non-voluntary labor that are not covered by the 1957 Convention including, generally, "any work or service exacted from any person as a consequence of a conviction in a court of law."[61]

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56. *See Migration-Related Detention and International Law: Additional Sources*, GLOB. DET. PROJECT, https://perma.cc/L6DL-H6Y8 (last visited Oct. 10, 2022).

57. *See* Susan Kang, *Forcing Prison Labor: International Labor Standards, Human Rights and the Privatization of Prison Labor in the Contemporary United States*, 31 NEW POL. SCI. 137, 141 n.21 (2009).

58. The United States ratified Convention 105 in 1991. The United States has also ratified the Worst Forms of Child Labour Convention. *See Ratifications for United States of America*, INT'L LAB. ORG., https://perma.cc/R5JU-HR67 (last visited Oct. 10, 2022).

59. International Labour Organization, Abolition of Forced Labour Convention, art. 1, Jan. 17, 1959, ILO No. 105, 320 U.N.T.S. 291.

60. *Id.*; International Labour Organization, Forced Labour Convention, art. 2, ¶ 1, June 28, 1930, ILO No. 29, 39 U.N.T.S. 55.

61. *Id.* ¶ 2(c).

The language of the 1930 Convention, thus, is reminiscent of that of the Thirteenth Amendment—and arguably that of Article 8 of the ICCPR—in that it bars forced labor except in cases of criminal convictions. Accordingly, detained immigrants should not be subject to this exemption because their detention is not the consequence of a criminal conviction.

With that in mind, parties to the 1957 Convention are obliged to follow the standards of the 1930 Convention, [62] which prohibits at least three forms of labor: labor by detained people in civil detention,[63] involuntary labor for private benefit, and seemingly voluntarily labor that is actually coerced.

Forced labor in immigrant detention violates each of these prohibitions. First, immigration detention is civil in nature. Second, many detention centers are operated by private, for-profit corporations that utilize detained immigrant labor as a cost-saving strategy.[64] Indeed, the 1930 Convention has been directly applied to prison labor without an employment contract.[65] Third, the conditions of the "work programs" in the immigrant detention system, including egregiously low wages and absence of any employment contracts, betray tell-tale signs that it is in fact not voluntary.[66]

B. *Treaties That Have Been Signed but Not Ratified: The American Declaration of the Rights and Duties of Man*

The United States has signed, but not ratified, one document relevant to the use of forced labor in immigrant detention centers: the American Declaration of the Rights and Duties of Man ("American Declaration"). The American Declaration was adopted in 1948 by the Pan-American Union, the predecessor to the Organization of American States. The Declaration, signed by the United States in 1948,[67] provides that "[e]very person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family."[68] The document does not differentiate between individuals who are incarcerated and those who are not incarcerated. Though the non-binding Performance-Based National Detention Standards purportedly set out the bare minimum conditions

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62. *See* Kang, *supra* note 57, at 144.

63. Colin Fenwick, *Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law*, 27 HUM. RTS. Q. 249, 269 (2005); International Labour Organization, Forced Labour Convention, art. 4, ¶ 1, June 28, 1930, ILO No. 29, 39 U.N.T.S. 55.

64. The International Labour Organization's Committee of Experts has specified that the profits described by the 1930 Convention need not be monetary but can simply be "for the benefit" of private detention centers. *Id*. at 275.

65. *Id*. at 274.

66. *Id*. at 277; Lautaro Grinspan, *ICE Detainees Say They Were Forced into Labor in Ga., File Lawsuit*, ATLANTA J.-CONST. (Aug. 26, 2022), https://perma.cc/T9KD-67VR.

67. Azadeh Shahshahani & Ayah N. El-Sergany, *Challenging the Practice of Solitary Confinement in Immigration Detention in Georgia and Beyond*, 16 CUNY L. REV. 243, 265 n.122 (2013).

68. Organization of American States, American Declaration of the Rights and Duties of Man, art. XIV, May 2, 1948, *reprinted in* 1 Annals of the O.A.S. 130 [hereinafter "American Declaration"]. The Declaration also provides that "[n]o person may be deprived of liberty for nonfulfillment of obligations of a purely civil character." American Declaration, art. XXV.

for detainment of migrants across the United States, the reality remains that those compelled to work for a wage of one dollar per day are unable to meet their own basic needs, let alone those of their families. The Voluntary Work Program therefore undermines a central principle of the American Declaration.

While it is the position of the Inter-American Commission on Human Rights that the American Declaration creates legally binding human rights obligations, the United States has taken the position that the Declaration was neither drafted with the intention of creating legal obligations nor has it subsequently acquired binding force.[69] Even when accused of violating some of the rights and duties outlined in the Declaration, the United States explicitly reminded the Commission that "the Declaration does *not* create legally-binding obligations and therefore *cannot* be 'violated'" as it is "no more than a recommendation to the United States".[70]

C. *International Common Law*

Norms that have achieved the status of customary international law often have the character of "*jus cogens*."[71] Customary international law is created "by acts of States that are consistent, repetitious, and undertaken with a conscious sense of a legal obligation to follow a certain practice."[72] Principles of international law are binding on a state if "they have not expressly and persistently objected to the norm's development."

The Universal Declaration of Human Rights (UDHR) is a foundational statement of the basic precepts of international human rights law. The UDHR was drafted under the leadership of UN Commission on Human Rights Chair Eleanor Roosevelt and was adopted by the General Assembly in 1948. It stipulates that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[73] The scope of this fundamental acknowledgement of human dignity is not circumscribed. It is generally accepted that this prohibition found in the UDHR has become part of customary international law.[74] Section 702 of the Restatement (Third) of Foreign Relations Law also lists "torture or other cruel, inhuman or degrading treatment or punishment" among the offenses that violate customary international law.[75]

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69. Christina M. Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man Anniversary Contributions*, 30 U. PA. J. INT'L L. 1211, 1217-20 (2009).

70. Organization of American States, Response of the Government of the United States of America to the Inter-American Commission on Human Rights, Report 85/00 concerning Mariel Cubans (Case 9903), art. I, Oct. 23, 2000 (available at https://perma.cc/YC6P-42BC) (emphasis in the original).

71. *See generally* Erika de Wet, Jus Cogens *and Obligations* Erga Omnes, *in* OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 541, 542 (Dinah Shelton ed., 2013).

72. MagGrady, *supra* note 47, at 288 (noting that this creation of obligation is referred to as "opinio juris").

73. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948).

74. MagGrady, *supra* note 47, at 303.

75. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. L. INST. 1987) [hereinafter "RESTATEMENT (THIRD)]; *see* Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1022 (S.D. Ind. 2007).

The prohibition on the use of forced labor may also be viewed as a customary international law. Various NGOs and human rights groups have argued for its recognition as *jus cogens*.[76] Last year, the Supreme Court of Canada determined that "the prohibitions against slavery, forced labour and cruel, inhuman and degrading treatment have attained the status of *jus cogens*."[77] Some United States courts, including the Ninth Circuit, have also recognized forced labor as a *jus cogens* violation.[78]

III. ENFORCING INTERNATIONAL HUMAN RIGHTS LAW TO CHALLENGE THE VOLUNTARY WORK PROGRAM

Having reviewed the legal authorities prohibiting the use of forced labor in detention centers across the United States, the following analysis evaluates the mechanisms available to enforce these laws and protect the rights of detained immigrants.

International law regulates the conduct of the United States both domestically and internationally.[79] On the international stage, the United States is subject to the jurisdiction of the United Nations and the Inter-American legal system.[80] The UN houses the Human Rights Committee, the Committee Against Torture, and the International Labour Organization. These three bodies monitor state party compliance with the three relevant treaties that the United States has ratified: the ICCPR, CAT, and Abolition of Forced Labour Convention. The Inter-American Commission on Human Rights monitors compliance with the American Declaration of the Rights and Duties of Man. While the United States has sought to circumscribe the authority any international or regional body may exert over it,[81] the investigatory and reporting

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76. *See* ANDY SHEN, FINANCING FORCED LABOR (Matthew Fischer-Daly ed., 2016).

77. Nevsun Resources Ltd. v. Araya, [2020] S.C.R. 5 (Can.).

78. *See* Doe v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) (citing Universal Declaration of Human Rights, G.A. Res. 217(A) III (1948) (banning forced labor)); and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 280 (making forced labor a war crime)); Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 686 (S.D. Tex. 2009). For a critique that application of the *jus cogens* label to forced labor claims unnecessarily lowers the standard for the universal peremptory norms, *see* Lukas Knott, Unocal *Revisited: On the Difference Between Slavery and Forced Labor in International Law*, 28 WIS. INT'L L.J. 201 (2011).

79. *E.g.*, MULLIGAN, *supra* note 24, at 1.

80. *See* Denise L. Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 265 (2013).

81. A prime example of this tendency is the United States' erratic relationship with the International Criminal Court (ICC). Though the United States participated in the committees designing the Court as a permanent means of exerting international justice and even collaborated in the drafting of its rules, it ultimately failed to ratify the statute establishing the ICC and even expressed its intent not to ratify it in 2002. Further hostilities against the Court followed including the passage of the American Service-members Protection Act which, among other things, authorized the use of military force against the Court in case any U.S. citizen was ever held in its custody. The United States took a more amicable position after the Court began a series of investigations focused on human rights abuses in various African countries, but the antagonism resumed when the Court announced it would commence an investigation involving U.S. crimes in Afghanistan. The United States responded by revoking the visa of ICC Prosecutor Fatou Bensouda and by imposing other sanctions against ICC personnel. Though these penalties were lifted under the Biden administration, the United States maintains its position that the Court may not assert jurisdiction over it. For a summarized history of tensions between the United States and the ICC, *see*

functions of international bodies still serve important roles like fact finding, awareness building, and consciousness raising.

A. *Enforcing the Rights Conveyed by Ratified Treaties*

The UN Human Rights Treaty Bodies are "committees of independent experts that monitor implementation of the core international human rights treaties," including the ICCPR and CAT.[82] The bodies' specific functions are determined by the treaties authorizing them, but generally include collection and consideration of state reports, consideration of complaints, conducting country inquiries, and the issuance of interpretive comments. The ILO has similar treaty bodies which monitor state implementation and compliance with the Abolition of Forced Labour Convention.[83]

1. *The Human Rights Committee*

The Human Rights Committee, the body that supervises state implementation of the ICCPR, has four monitoring functions.[84] First, it receives and examines reports from state parties on their domestic implementation of the ICCPR.[85] In the United States, the Department of State drafts periodic reports to the HRC.[86] Non-governmental organizations (NGOs) are encouraged to participate in Committee deliberations through the submission of "shadow reports" as well as lists of questions and areas of concern. The Committee's recommendations, though not legally binding, impose a moral obligation on a state party.[87] In 2019, the Committee requested the United States indicate its efforts to "ensur[e] full protection against forced labour for all categories of workers," per Article 8 of the ICCPR, and to describe allegations pertaining to, among other things, "the use of forced labor."[88]

Second, the HRC issues general comments designed to assist states "by providing greater detail regarding the substantive and procedural obligations of States parties."[89] General comments are not state-specific but can offer detailed interpretations of the provisions of the ICCPR as applied to modern

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International Criminal Court Project, *The US-ICC Relationship*, AM. BAR ASS'N, https://perma.cc/EV7D-7BRN (last visited Jul. 27, 2022); *see also* Press Release, Anthony J. Blinken, Sec'y, Dep't of State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court (Apr. 2, 2021) https://perma.cc/M5YB-2AA6 (restating the position of the U.S against ICC jurisdiction over it).

82. *Treaty Bodies in Action*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://perma.cc/9PBD-P3AR (last visited Nov. 17, 2020).

83. *Committee of Experts on the Application of Conventions and Recommendations*, INT'L LAB. ORG., https://perma.cc/7PCJ-G7F7 (last visited Nov. 17, 2020).

84. *Fact Sheet No. 15, Civil and Political Rights: The Human Rights Committee*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (May 1, 2005), https://perma.cc/5M7D-DVHE.

85. *See id.* at 14–15.

86. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, https://perma.cc/KNC7-7N87 (Apr. 2019).

87. *Id.*

88. U.N. Hum. Rts. Comm., List of Issues Prior to Submission of the Fifth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/QPR/5, at 4 (Apr. 18, 2019).

89. *Fact Sheet No. 15*, *supra* note 84, at 15.

circumstances.[90] Consequently, general comments are likely not useful for addressing the forced labor conditions specific to the United States' immigration detention system. Still, they may reiterate the general international framework against forced labor. As such, they can provide clarity and guidance to the global community about the duties of all parties to curb forced labor and other practices barred by the ICCPR, and this in turn may galvanize litigation against states' intent to continue to violate the Covenant.

The final two monitoring mechanisms are "communications" made by individuals who claim violations of their rights under the ICCPR and complaints made by a State party that another State party is violating the ICCPR.[91] However, neither are viable options against the United States. Individual communications are authorized only against state parties to the Optional Protocol to the ICCPR,[92] which the United States is not.[93] Additionally, while the United States has declared it would recognize interstate complaints, the procedure has never been used to date, likely because states are reluctant to jeopardize diplomatic relations with the United States.[94] International enforcement of the ICCPR against the United States has been modest due to the limitations of the interstate and individual complaint procedures.[95]

2. *The Committee Against Torture*

The Committee Against Torture is the monitoring body of the UNCAT.[96] Like the HRC, the Committee has four mechanisms to supervise the compliance of state parties.[97] However, only one of these mechanisms is available against the United States to practitioners and advocates: periodic reports. States must submit periodic reports detailing their implementation of the UNCAT. Once the reports are received, the Committee examines them and issues "concluding observations" containing concerns and recommendations for the State. [98] These observations are persuasive, although not legally binding. It also publishes lists of issues designating particular areas that it wishes the state to report on; the latest list of issues for the United States, published in 2017, contained no mention of forced labor.[99]

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90. *See id.* at 24.
91. *Id.* at 15.
92. *See id.*
93. *Status of Ratification Interactive Dashboard*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://perma.cc/FCR5-M2HM (last visited Mar. 9, 2022).
94. *See* John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1293–94 (1993).
95. *Id.* at 1295–96.
96. *See Committee Against Torture*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://perma.cc/R44F-EB5W (last visited Nov. 17, 2020).
97. *Introduction, Committee Against Torture*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://perma.cc/U8UK-6P5T (last visited Nov. 17, 2020).
98. *Id.*
99. Comm. Against Torture, List of Issues Prior to Submission of the Sixth Periodic Report of the United States of America, U.N. Doc. CAT/C/USA/QPR/6 (Jan. 26, 2017).

Through the different stages of this process,[100] NGOs are encouraged to submit shadow reports and provide the Committee members with a list of suggestions or areas of concern.[101] NGOs are also able to participate in the U.S. report in Geneva by holding briefings with members of the Committee, highlighting where the United States has failed to comply, and recommending measures the country must take to restore compliance.[102] Various human rights NGOs such as the American Civil Liberties Union have submitted their own reports listing issues to which the Committee may request a response from the United States.[103] In the same vein, NGOs may investigate conditions constituting violations of the Convention Against Torture in immigration detention centers—as is the case of forced labor practices—and report their findings to the Committee, which may then instruct the United States to respond in its next periodic report and correct its violations accordingly.

Other mechanisms include submitting individual complaints, an inquiry procedure, and inter-state complaints, but they are either unavailable or unhelpful against the United States. First, the Committee may not consider individual complaints against the United States, as it has not made the necessary declaration under Article 22 of the Convention.[104] Second, the inquiry procedure, which allows the Committee to undertake inquiries upon receiving reliable information of a State's alleged "serious, grave or systematic violations,"[105] is based on state cooperation and is confidential; as such, it is not necessarily a useful procedure to either force compliance or to name and shame the violating state party.[106] Finally, the inter-state complaint process is only available to and against state parties that have made a declaration under Article 21 accepting the competence of the Committee to hear such complaints.[107] The United States has indeed made such a declaration; as such the mechanism is available against it,[108] but its use would require a cooperating state party that has also made such a declaration to make the complaint. To date, no inter-state complaints have been filed against the United States.[109]

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100. *Information for Civil Society, NGOs and NHRIs*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://perma.cc/29T7-EGQQ (last visited Jul. 27, 2022).

101. *FAQ: The Convention Against Torture*, ACLU, https://perma.cc/P28M-7W9Y (last visited Jul. 27, 2022).

102. *Id.*

103. *Id.*

104. *Complaints About Human Rights Violations, Treaty Bodies,* U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS'., https://perma.cc/5H9H-KAMQ (last visited Oct. 30, 2022); Comm. Against Torture, Concluding Observations on the Combined 3rd to 5th Periodic Reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Status of Ratification Interactive Dashboard*, *supra* note 93.

109. *Committee Against Torture*, INT'L JUST. RES. CTR., https://perma.cc/7EY8-SLKM (last visited Aug. 5, 2020).

3. *The International Labour Organization*

The ILO has two bodies that examine the implementation of ILO treaties, including the Abolition of Forced Labour Convention, by state parties. They are the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee on the Application of Standards.[110] The conclusions and recommendations of the ILO supervisory mechanisms are not binding, but they are designed to foster open communication and assessments regarding the implementation of ILO standards.[111]

States are required to submit regular reports to the CEACR detailing their implementation of the Convention. Next, the CEACR publishes observations, or "comments on fundamental questions raised by the application of a particular Convention by a State" in its annual report and communicates "direct requests," usually relating "to more technical questions or requests for further information" to the governments concerned.[112] In the latest CEACR Observation on Abolition of Forced Labour Convention published in 2017, there was no mention of forced labor in immigration detention centers.[113]

The Conference Committee examines the annual CEACR report and selects specific country observations for discussion.[114] It invites those countries to respond to the Committee and offer additional information, then "draws up conclusions recommending that governments take specific steps to remedy a problem or to invite ILO missions or technical assistance."[115] It then publishes a report which highlights special concerns.

Beside these two supervisory mechanisms, the ILO also enforces the Convention through distinct complaint procedures.[116] "Representations" may be filed by worker and employer organizations to draw the attention of an ILO committee to problems in the enforcement of the Convention.[117] "Complaints" may be filed by a state party to a convention alleging the non-compliance of another state party with that same convention[118] or may be initiated by the ILO itself.[119] Complaints result in final recommendations which

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110. *Committee of Experts on the Application of Conventions and Recommendations, supra* note 83; *Conference Committee on the Application of Standards*, INT'L LAB. ORG., https://perma.cc/F39F-X5BM (last visited Oct. 30, 2022).

111. *See, e.g.*, *Conference Committee on the Application of Standards: Record of Proceedings* 36, INT'L LAB. ORG. (July 19, 2019), https://perma.cc/M8SQ-MWYS.

112. *Committee of Experts on the Application of Conventions and Recommendations*, *supra* note 83.

113. International Labour Organization, Abolition of Forced Labour Convention, 1957, ILO No. 105, 320 U.N.T.S. 291.

114. *Conference Committee on Application of Standards*, INT'L LAB. ORG., https://perma.cc/CV4Q-SN5B (last visited Nov. 17, 2020).

115. *Id.*

116. Kari Tapiola & Lee Swepston, *The ILO and The Impact of Labor Standards: Working on the Ground After an ILO Commission of Inquiry*, 21 STAN. L. & POL'Y REV. 101, 104 (2010).

117. *Id.*

118. *Id.*

119. *See id.* at 105 (discussing the Commission of Inquiry).

may be appealed to the International Court of Justice.[120]

The ILO can provide technical assistance to member countries in bringing their labor laws and enforcement procedures into compliance, though it cannot authorize retaliatory trade measures or sanctions, impose fines on offending nations, restrict trade, block foreign investment in economics, or indict leaders.[121] Therefore, critics argue that, other than publishing reports on violations, the ILO lacks the capability to enforce labor standards.[122] Enforcement is limited to monitoring the state reports, providing technical assistance, and moral shaming.[123] However, other actors in the sector, like human rights NGOs and governments, can work together to enforce labor standards set by the ILO, and there have been several examples of successful cases where these actors have come together to improve workers' rights.[124]

B. *Enforcement of Treaties Awaiting Ratification*

The United States has signed but not ratified the 1948 American Declaration of the Rights and Duties of Man. Compliance with this agreement is monitored by the Inter-American Commission on Human Rights (IACHR).[125] The IACHR may investigate and report on human rights violations in any country located within the Western Hemisphere.[126] Other responsibilities of the Commission include monitoring the situation of human rights in all covered countries, publishing reports on areas of special concern, establishing special rapporteurships, and proposing amendments to the 1969 American Convention on Human Rights.[127] The IACHR can also receive and process complaints of specific human rights abuses and will attempt to negotiate a friendly settlement.[128] The IACHR meets twice a year and holds thematic briefings at each session during which non-governmental organizations can apply for an opportunity to provide an in-person briefing on a human rights issue, and the state government is required to send representatives who attend and reply.[129]

Any person, group, or organization can file a petition alleging a violation of human rights against one or more member states, although they must first exhaust all domestic legal remedies available.[130] If the state and petitioner

120. *Id*. at 104–06.
121. William A. Douglas, John-Paul Ferguson & Erin Klett, *An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions, and NGOs*, 26 JOHNS HOPKINS U. PRESS 273, 276 (2004).
122. *See id*.
123. Kang, *supra* note 57, at 142–43.
124. Douglas, *supra* note 121, at 274.
125. *Petition and Case System*, INTER-AM. COMM'N H.R. (2010), https://perma.cc/52PY-NH6J.
126. Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOBAL STUD. L. REV. 639, 650 (2010).
127. *Id*. at 647–48.
128. *Id*. at 648.
129. *The Inter-American Commission on Human Rights*, FEMINIST ALL. FOR INT'L ACTION, https://perma.cc/V7RV-AH4Y (last visited Aug. 6, 2020).
130. *Petition and Case System*, *supra* note 125.

cannot reach a settlement, the IACHR can subsequently recommend measures or report the case to the Inter-American Court of Human Rights if the state has submitted to the jurisdiction of the court.[131] Individuals and groups may initiate petitions with the IACHR alleging a violation of human rights; moreover, when the Commission has determined that a violation of human rights has occurred, it prepares a report issuing recommendations for how the state should address it.[132] Final reports issued by the IACHR applying responsibility and setting forth recommendations are not legally binding, and while the Commission can refer cases to the Court to issue legally binding findings, the Court can only exercise jurisdiction over states that both ratify the Convention and affirmatively recognize the Court's jurisdiction.[133] The United States has done neither.[134]

Furthermore, the United States has neglected to assume any obligation under the American Convention as a way to avoid accountability.[135] Under the Trump administration, U.S. participation with the IACHR was particularly rare.[136] However, the IACHR continues to accept petitions; since 2006, the IACHR has published 23 merit reports and granted 56 precautionary measures against the United States.[137]

IV. ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW IN U.S. COURTS TO CHALLENGE FORCED LABOR IN IMMIGRATION DETENTION CENTERS

The ratification of international covenants obligates the United States to ensure that the country complies with its terms.[138] This includes enacting appropriate legislation to prevent, monitor, and rectify potential violations.[139] The ICCPR spells out this responsibility, stating that ratifying parties must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[140] However, in the United States, ratified treaties often languish without executing legislation and, therefore, with uncertain authority in U.S. courts. Though the Constitution recognizes international agreements as the "supreme Law of

131. Shaver, *supra* note 126, at 648, 650–51.
132. *Id*. at 652, 654.
133. *Id*. at 650, 654.
134. *The United States and the Inter-American System of Human Rights: Is There a Way Forward?*, REAL COLEGIO COMPLUTENSE AT HARVARD UNIV. (Mar. 23, 2016), https://perma.cc/SS4L-T4VN.
135. *See* Joseph Diab, *United States Ratification of the American Convention on Human Rights*, 2 DUKE J. COMP. & INT'L L. 323, 327–28 (1992).
136. Jimena Galindo, *U.S. failure at the IACHR sets a dangerous precedent in the region*, GLOB. AMS. (Oct. 12, 2018), https://perma.cc/K8UL-GDT2.
137. *Statistics*, INTER-AM. COMM'N H.R. (December 2021), https://perma.cc/AZW9-SE8P.
138. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, U.N.T.S 1155 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); RESTATEMENT (THIRD), *supra* note 75, at § 321 ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.").
139. *See* RESTATEMENT (THIRD), *supra* note 75, at § 321 cm. b. ("A state is responsible for carrying out the obligations of an international agreement. A federal state may leave implementation to its constituent units, but the state remains responsible for failures of compliance.").
140. ICCPR, supra note 31, at art. 2(2).

the Land,"[141] courts have long restricted their influence in domestic courts. From *Foster v. Nielsen*,[142] to *Medellín v. Texas*,[143] the Supreme Court has developed the increasingly narrow doctrine of the "self-executing treaty."[144] Under this judicial construct, international law is not actionable in domestic courts unless the United States has explicitly agreed to enforcement upon ratification or Congress has enacted implementing legislation.[145] The ICCPR, UNCAT, and the Abolition of Forced Labour Convention, though ratified, are non-self-executing.[146] Without Congressional action, these agreements are not directly enforceable in U.S. courts under current precedent.[147]

To respond to the deficiency created by the self-executing treaty doctrine, advocates have resorted to enforcing international law through mechanisms like the Alien Tort Statute (ATS), 28 U.S.C. § 1350.[148] The ATS allows U.S. courts to hear tort claims brought by foreign nationals under "the law of nations or a treaty of the United States."[149] Plaintiffs suing under the ATS may recover monetary damages, and ATS cases may result in other strategic benefits including providing a public platform to survivors of human rights abuses and deterring future violations.[150] Conversely, ATS cases fail to guarantee the systematic corrections that the avenues for accountability discussed earlier seek to produce. Nevertheless, under customary international law, domestic courts may hear ATS claims even in the absence of enacting legislation.[151] ATS suits have therefore prioritized claims under "the law of nations," or international common law.

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141. U.S. CONST. art. VI, § 1, cl. 2.

142. Foster v. Nielsen, 27 U.S. 253, 314 (1829). ("Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision.").

143. Medellin v. Texas, 552 U.S. 491, 505 (2008). ("In sum, while treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.'" (quoting Igarta-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005)).

144. *See generally* Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. OF INT'L L. 51, 51–55 (2012) (discussing the evolution of the self-executing treaty doctrine).

145. *See* RESTATEMENT (THIRD), *supra* note 75, at § 111 cmt. h.

146. *See* MagGrady, *supra* note 47, at 301; 137 CONG. REC. 10790-91 (1991).

147. *See* Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225, 234 (1996).

148. *See* 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Other instruments for the indirect enforcement of international common law include 42 U.S.C. § 1983 and Habeus Corpus. *See also* Hathaway, McElroy & Solow, *supra* note 144, at 78–83.

149. 28 U.S.C. § 1350.

150. *See The Alien Tort Statute*, CTR. FOR JUST. & ACCOUNTABILITY, https://perma.cc/39XM-4JVU (last visited Jul. 27, 2022).

151. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 639–40 (1989); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: "Sosa v. Alvarez-Machain" and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2259 (2004) ("The Paquete Habana Court never referred to some cause of action provided by Congress under which those seized in violation of the law of nations could recover compensatory damages from the United States."). A question remains as to whether detained immigrants

The modern era of ATS litigation began in 1980 with the Second Circuit decision in *Filartiga v. Pena-Irala*.[152] The *Filartiga* court recognized a claim by the family of a Paraguayan man against the local Paraguayan official who had tortured the man to death.[153] The decades that followed gave rise to a fierce debate on the implications of such litigation on foreign relations and domestic choice of law. In 2004, the Supreme Court addressed the development of the statute with *Sosa v. Alvarez-Machain*.[154] Justice Souter, writing for the majority, affirmed that the ATS permits federal courts to hear cases arising under international human rights law, even when the offense occurred abroad and the defendant is a foreign national.[155] However, the Court circumscribed the potential bases for such suits, finding that claims must be grounded in a "very limited category defined by the law of nations and recognized at common law."[156] Such claims must "rest on a norm of international character accepted by the civilized world" and be "defined with a specificity" comparable to the narrow category of international torts that were understood to provide a right of action at the time the ATS was adopted.[157] Hence, the Court left the federal judiciary with discretion to recognize new bases for ATS claims subject to this criteria.[158]

Litigation developed under *Sosa* until 2013, when the Court again took up the scope of the ATS with *Kiobel v. Royal Dutch Petroleum Co*.[159] *Kiobel* specifically addressed the question of corporate liability for offenses occurring outside of the United States. The majority in *Kiobel* concluded that the ATS is subject to the "the presumption against extraterritoriality," and therefore that federal courts do not have jurisdiction over ATS claims arising abroad unless the circumstances "touch and concern" the United States with

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may bring a claim for violation of customary international law without invoking the Alien Tort Statute, based instead on the principle that federal courts have jurisdiction over international common law claims because it is part of U.S. law and self-executing by nature. *See* Beth Stephens, *Sosa v. Alvarez-Machain: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 542 (2005); MagGrady, *supra* note 47, at 292. Nevertheless, federal courts have insisted on restricting international common law claims to the framework of the ATS or other statute used for implementation. *See also* Christenson, *supra* note 147, at 234.

152. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

153. *Id*; Stephens, *supra* note 151, at 536.

154. *Sosa*, 542 U.S. at 698.

155. *Id*. at 738.

156. In considering whether the ATS is strictly jurisdictional in nature or whether it was also designed to provide a cause of action, the Court drew a middle line, concluding that ATS "was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject," but that "torts in violation of the law of nations would have been recognized within the common law of the time." *Id*. at 714, 720.

157. ATS was part of the 1789 Judiciary Act. *Id*. at 712, 725. The Court names "Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy" as examples of international torts that would have been enforced then. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1398 (2018); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1508 (2014).

158. *See* Stephens, *supra* note 157, at 1511 ("Despite these striking assertions of judicial power, however, none of the decisions actually imposed substantive norms. Instead, they set out mechanisms by which the courts can hear claims, with no guarantee that courts would actually protect the substantive rights asserted in these or future cases.").

159. 569 U.S. 108 (2013).

"sufficient force to displace the presumption [. . .]." [160] In 2018, the Court revisited corporate liability under the ATS in *Jesner v. Arab Bank* and concluded that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."[161] *Kiobel* and *Jesner* left open a fundamental question on the liability of domestic corporations.[162] In 2021, the Court had an opportunity to decide this question of domestic corporate liability in *Nestle v. Doe*.[163] But the Court decided the case on extraterritoriality grounds. Specifically, the Court determined that plaintiffs had failed to establish a sufficient connection to the United States because all the relevant conduct occurred on the Ivory Coast and because general corporate activity, including major operational decisions, does not by itself establish domestic application.[164] Still, five Justices agreed there was no reason to limit ATS by distinguishing between natural persons and corporations as defendants.[165] Thus, despite continued restriction, the ATS remains an avenue for important claims under international law in a legal scheme with little other recourse to offer.[166]

But, in the context of U.S. immigration, ATS claims can allege that detention systems have characteristics that necessitate distinct legal analyses. ATS claims can point out that, unlike many others, these cases arise in the United States and are brought against U.S. actors. The critique that ATS litigation interferes with executive power over foreign policy therefore does not apply.[167] Likewise, the presumption against extraterritoriality recognized in *Kiobel* is a non-issue. Indeed, enforcing international norms within the United States is often cited as the intended function of the ATS.[168] Thus,

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160. *Id*. Although the Court agreed 9-0 in the outcome, four Justices utilized reasoning other than the presumption against extraterritoriality. *See* David Stewart & Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 603 (2013). Justices Alito and Thomas would strictly foreclose any case arising abroad regardless of additional circumstances. *Id*. at 609.

161. 138 S. Ct. at 1403.

162. *See id*. at 1400. In *Jesner*, the Court discussed, but did not conclude, whether domestic corporate liability should be dependent on evidence of an international norm of enforcement against corporate actors or determined by domestic law (noting that there is "considerable force and weight" in the lower court's finding that an international norm is necessary for enforcement against corporate defendants).

163. 141 S.Ct. 1931 (2021).

164. *Id*. at 1937.

165. *Id*. at 1948 n.4.

166. *See* Nahl v. Jaoude, 354 F. Supp. 3d 489, 499 (S.D.N.Y. 2018) ("While the Supreme Court has narrowed the ability of the ATS to redress modern violations of international law [. . .] Sosa remains binding law.") (internal citations omitted).

167. *E.g*., Al Shimari v. CACI Premier Tech., Inc., 320 F. Supp. 3d 781, 787 (E.D. Va. 2018) ("[B]ecause CACI is an American, rather than a foreign, corporation, there is no risk that holding CACI liable would offend any foreign government") (writ of certiorari granted to determine whether defendant's appeal on the issue of derivative sovereign immunity may be interlocutory).

168. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018) ("The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."); Stewart & Wuerth, *supra* note 160, at 617 (citing Brief for the United States of America as Amicus Curiae, Trajano v. Marcos, No. 86-0297 (D. Haw. July 18, 1986), *appeal docketed*, No. 86-2448 (9th Cir. Aug. 20, 1986)); John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 2

these factors suggest that an ATS claim challenging the violations of international law committed by the U.S. immigration detention system would easily overcome some considerable hurdles that more traditional ATS cases typically face.

Conversely, the fact that the federal government and private contractors are the principal defendants triggers difficult issues of sovereign immunity and corporate liability.[169] The ATS does not explicitly waive sovereign immunity.[170] The federal government may therefore claim a broad shield from liability for all claims except, perhaps, those alleging *jus cogens* violations.[171] In addition, the United States may substitute itself as defendant in suits against federal officials acting in the scope of their employment.[172] In such situations, plaintiffs must turn to the limited abrogation of sovereign immunity found in the Federal Tort Claims Act (FTCA).[173] Private corporations contracted to operate immigration detention centers are not necessarily afforded the same shield from suit as federal officials.[174] These corporations, and their officers and employees, occupy the complicated space between

(2009) ("What little we do know about the ATS's origins suggests that its principal motivation was to provide redress for offenses committed by U.S. persons against foreign officials in the United States.").

169. *See* Jama v. U.S. Immigr. & Naturalization Serv., 343 F. Supp. 2d 338 (D.N.J. 2004).

170. 28 U.S.C. § 1350; Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) (citing Canadian Transport Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980)).

171. Stephens, *supra* note 157, at 1530 ("Almost all ATS claims against the U.S. government and its officials have been dismissed on preliminary motions."); Irena Nikolic, *The Viability of Guantánamo Bay Detainees' Alien Tort Statute Claims Seeking Damages for Violations of the International Law Against Arbitrary Detention*, 37 SETON HALL L. REV. 893, 921 (2007); Najim v. CACI Premier Tech., Inc., 368 F. Supp. 3d 935, 970 (E.D. Va. 2019) (confronting the issue of sovereign immunity as one of first impression for the nation and concluding "sovereign immunity does not protect the United States from claims for violations of jus cogens norms"); *but see* Christenson, *supra* note 147, at 251 ("Peremptory norms of jus cogens quality by themselves do not confer federal question or subject matter jurisdiction, not even for the most heinous wrongs, nor do they justify an implied waiver of sovereign immunity.").

172. Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(d); Karen Lin, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 180 COLUM. L. REV. 1718, 1729 (2008). For an important instance where the court allowed an ATS claim to proceed against individual INS officers, *see* Jama v. U.S. Immigr. & Naturalization Serv., 22 F. Supp. 2d 353, 365 (D.N.J. 1998) (citing Melo v. Hafer, 912 F.2d 628, 634–35 (3d Cir. 1990)) ("The INS officials are being sued in their individual capacities and are not entitled to sovereign immunity.").

173. The FTCA allows suits for damages in situations where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). *See also* Stephens, *supra* note 157, at 1532; Lin, *supra* note 172, at 1736–37 ("The Westfall Act, therefore, has proved to be a practically 'impenetrable shield' for ATCA claimants against individual U.S. officials."). That waiver contains several exceptions, however, that preclude most human rights claims, including exceptions for claims based on discretionary acts, intentional torts, or combat activities, and for claims arising in a foreign country. Stephens, *supra* note 157, at 1531–32; *see also* Steinhardt, *supra* note 151, at 2275–76 (citing 28 U.S.C. § 2679).

174. *See* Jama v. U.S. Immigr. & Naturalization Serv., 343 F. Supp. 2d 338, 357 (D.N.J. 2004) (although an "employee of the government" includes "persons acting on behalf of a federal agency in an official capacity," "federal agency" "does not include any contractor with the United States.") (quoting 28 U.S.C. § 2671); *See also* Steinhardt, *supra* note 151, at 2288 ("There is certainly no rule that corporations, regardless of their relationship with a government, enjoy immunity for their state-like or state-related activities, as when they interrogate detainees, provide public security, work weapons systems in armed conflict, or run prisons.").

government and private action.[175] As federal contractors, these corporations may attempt to claim derivative sovereign immunity;[176] however, their immunity is qualified and they are potentially susceptible to claims under the ATS in their role as state actors and under secondary theories such as conspiracy or accomplice liability.[177]

Under *Sosa*, federal courts may recognize violations according to the "evolving notion of the law of nations."[178] In considering which principles have reached this status, courts evaluate whether a particular offense is sufficiently "specific, universal, and obligatory."[179] Evidence may be found 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."[180] Treaties and other agreements are also cited to support the existence of an enforceable norm.[181] Federal courts have

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175. Immigration detention center operators may be considered state actors for the purpose of analyzing liability for particular wrongs, even though they are distinct from federal officials under the sovereign immunity analysis. *See Jama*, 22 F. Supp. 2d at 371–72 (D.N.J. 1998) ("It must be noted that by virtue of the contract with INS to perform governmental detention functions these defendants became state actors and were not acting simply as a private corporation or private individuals.").

176. "'[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.' That immunity, however, unlike the sovereign's, is not absolute." Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 166 (2016) (quoting Brady v. Roosevelt Steamship Co., 317 U.S. 575, 583 (1943)).

177. John Doe I v. Unocal Corp., 395 F.3d 932, 947 (9th Cir. 2002) (discussing the standard for liability for aiding and abetting under the ATS); Adhikari v. KBR Inc., No. 4:16-CV-2478, 2017 U.S. Dist. LEXIS 156691, at *17 (S.D. Tex. Sep. 25, 2017) (same); Stephens, *supra* note 151, at 558 (noting both that ". . . for over 200 years, international law has recognized accomplice liability" and that "[a]t the time the ATS was enacted, the federal courts clearly recognized accomplice liability for violations of international law."); Al Shimari v. CACI Premier Tech., Inc., 324 F. Supp. 3d 668, 693–94 (E.D. Va. 2018) ("To state a claim for conspiracy under the ATS, plaintiffs must allege that two or more persons agreed to commit a wrongful act, that defendant joined the conspiracy knowing of the goal of committing a wrongful act and intending to help accomplish it, and that one or more violations of the ATS 'was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy.'") (quoting Cabello v. Fernandez-Larios, 402 F.3d 1148, 1159 (11th Cir. 2005)); Steinhardt, *supra* note 151, at 2286–87 (discussing the circumstances allowing for corporate liability).

178. Stephens, *supra* note 157, at 1501–02 (Noting that new offenses may be recognized "without substantive limitations, as long as the modern norms satisfy the same standard of clear definition and widespread acceptance as the three norms cited by Blackstone").

179. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (quoting Hilao v. Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994)); s*ee also* RESTATEMENT (THIRD), *supra* note 75, at § 102 (outlining the sources of customary international law, including "a general and consistent practice of states followed by them from a sense of legal obligation" and "[i]nternational agreements . . . when such agreements are intended for adherence by states generally and are in fact widely accepted"). It is important to note that an international norm need not be peremptory, or *jus cogens*, to be actionable under the ATS. *See* Steinhardt, *supra* note 151, at 2265–67 ("The very language of the ATS, with its reference to 'the law of nations or a treaty of the United States' shows that Congress adopted a high, but not the highest and most controversial, jurisdictional threshold.").

180. *John Doe I,* 395 F.3d at 948 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980). It is worth noting that the courts have utilized international principles of criminal law to inform liability under the ATS. *John Doe I*, 395 F.3d at 949 ("District Courts are increasingly turning to the decisions by international criminal tribunals for instructions regarding the standards of international human rights law under our civil ATCA.") (*vacated on rehearing en banc*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005)).

181. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 137 (2d Cir. 2010) ("Although all treaties ratified by more than one State provide *some* evidence of the custom and practice of nations, a treaty will only constitute *sufficient proof* of a norm of *customary international law* if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its

recognized offenses including torture, slavery, and arbitrary detention.[182] Some courts have adopted an elevated pleading standard for ATS claims, requiring more than a "colorable violation of the law of nations" to allow for subject matter jurisdiction.[183] In addition, the court may determine whether the circumstances require deference to Congress or the executive branch, regardless of the validity of the complaint.[184]

The federal judiciary has wrestled with whether the norm against forced labor is distinct and ubiquitous enough to ground an ATS claim. Some courts have concluded that it is.[185] But the analysis more often focuses on whether the facts at issue implicate customary international law.[186] Forced labor is

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principles.") (*affirmed by* 569 U.S. 108 (2013); *accord* Velez v. Sanchez, 693 F.3d 308, 319 (2d. Cir. 2012)); *see also* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 439–40 (D.N.J. 1999) ("[C]ourts may rely upon treaties (such as the Hague and Geneva Conventions) as evidence of an emerging norm of customary international law.") (recognizing the legitimacy of an ATS forced labor claim before dismissing it as time-barred); *but see Sosa*, 542 U.S. at 734 (discounting the Universal Declaration of Human Rights and the International Covenant on Civil and Political rights as having "little utility" in determining binding norms because they have no legal effect in the United States); John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1023 (2d Cir. 2007) (noting that the *Sosa* "held" that the ICCPR "could not be used to support a claim under the ATS"); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (same).

182. *See* Stephens, *supra* note 151, at 537. According to RESTATEMENT (THIRD) *supra* note 75, at § 702, "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." This list is "not necessarily complete and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future." *Id.* at cmt. a. *See* Steinhardt, *supra* note 151, at 2264 ("The [§702] list generated no opposition from foreign states or from the U.S. government itself and therefore offers an authoritative starting point for giving content to the actionable core of the ATS.").

183. *Compare* Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995) ("[I]t is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States)."); *with Bridgestone Corp.*, 492 F. Supp. 2d at 1006 ("Treating the sufficiency of a claim under the ATS as a jurisdictional requirement would conflict with the most basic original goal of the ATS identified by the Supreme Court in Sosa: to allow the federal courts to hear cases that could affect the young nation's foreign relations, rather than sending such cases to state courts.").

184. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399 (2018) ("[E]ven assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed.") (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004)).

185. *See* Aragon v. Ku, 277 F. Supp. 3d 1055, 1067–68 (D. Minn. 2017); *Bridgestone Corp.*, 492 F. Supp. 2d at 991 ("Some forms of truly forced labor violate specific, universal and obligatory norms of international law, but the circumstances alleged by the adult plaintiffs in this case do not."); Doe I v. Reddy, No. C 02-05570 WHA, 2003 U.S. Dist. LEXIS 26120, at *35 (N.D. Cal. Aug. 4, 2003) ("It is clear that the complaint herein alleges forced labor, which is prohibited under the law of nations."); *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001) ("Given the Ninth Circuit's comment in *Matta-Ballesteros*, 71 F.3d at 764 n.5, that slavery constitutes a violation of *jus cogens*, this court is inclined to agree with the *Iwanowa* court's conclusion that forced labor violates the law of nations.") (dismissing claims for forced labor during WWII as timed-barred).

186. *See, e.g.*, *Velez*, 693 F.3d at 318 (concluding that the facts alleged failed to make out a violation of international law, rendering the question of whether forced labor claims are actionable under ATS unnecessary); Adhikari v. Daoud, 697 F. Supp. 2d at 687 ("The Court finds this sufficient to establish that the trafficking and forced labor alleged in this FAC qualify as universal international norms under Sosa, such that they are actionable under ATS.").

regarded as a modern manifestation of slavery.[187] Accordingly, the courts look for physical force, threats, confinement, and other egregious conduct used to extract labor.[188] Claims based on poor working conditions alone are unlikely to be successful without indicia of coercion rendering the work involuntary.[189] Some courts have employed the 1930 ILO Forced Labour Convention to define "forced 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," subject to enumerated exceptions.[190] The "menace of any penalty" does "not necessarily need to be a physical penalty but can include credible threats of financial penalties, denunciation to immigration authorities, and deportation."[191]

In *Velez v. Sanchez*, the Second Circuit considered a forced labor claim brought by a young woman from Ecuador who worked excessive hours as a domestic helper for extended family in the United States without salary and under the threat of being sent back to Ecuador.[192] The court, granting the motion to dismiss, noted that the complaint lacked "evidence of actual physical abuse or confinement" or even "fear [of] violence."[193] Velez was not "denied food or basic living conditions," and the defendants "never threatened

187. *E.g.*, *Velez*, 693 F.3d at 319 ("The international prohibition against slavery has evolved to encompass more modern variants such as forced labor and servitude."); John Doe I v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002) ("Courts have included forced labor in the definition of the term 'slavery' in the context of the Thirteenth Amendment. The Supreme Court has said that 'the undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of *completely free and voluntary labor* throughout the United States.'") (quoting Pollock v. Williams, 322 U.S. 4, 17 (1944)).

188. *See Bridgestone Corp.*, 492 F. Supp. 2d at 1016 ("Plaintiffs have not alleged that Firestone fails to pay them. They do not allege that Firestone is using physical force to keep them on the job. They do not allege that Firestone is using legal constraints to keep them on the job. Plaintiffs do not allege that they could not freely quit their jobs if they felt they had better opportunities elsewhere in Liberia. Plaintiffs do not allege that they have been held against their will, tortured, jailed, or threatened with physical harm. Plaintiffs do not allege any form of ownership or trafficking in employees."); *Reddy*, 2003 U.S. Dist. LEXIS 26120, at *36 ("What is clear is that the complaint meets notice pleading rules by its assertions explaining that plaintiffs were brought to the United States and forced to work involuntarily and how defendants reinforced their coercive conduct through threats, physical beatings, sexual battery, fraud and unlawful substandard working conditions. These allegations are sufficient to state claims for forced labor, debt bondage and trafficking under the ATCA.").

189. *See Velez*, 693 F.3d at 321 ("In applying the ATS to forced labor claims, courts in the United States have tended to require more than evidence of terrible working conditions and inadequate wages to state a cognizable violation of customary international law.") (concluding that the harm alleged by the plaintiff did not "amount to a 'menace of penalty' sufficient to consider her continued labor as 'forced.'"); *Bridgestone Corp.*, 492 F. Supp. 2d at 1014 (rejecting forced labor claims by tire plantation workers because the complaint alleged only "pure economic necessity.").

190. ILO Convention § 29 (listing exceptions including "compulsory military service," "normal civic obligations," and "work or service exacted from any person as a consequence of a conviction in a court of law"); *See Velez*, 693 F.3d at 320; *Aragon*, 277 F. Supp. 3d at 1065–67 (noting "ILO Convention 29 has not been ratified by the United States and has limited value when determining whether a cause of action exists under the ATS" before concluding that ATS prohibits forced labor according to this definition under customary international law); *Bridgestone Corp.*, 492 F. Supp. 2d at 1012.

191. *Velez*, 693 F.3d at 321; *Aragon*, 277 F. Supp. 3d at 1068; *Bridgestone Corp.*, 492 F. Supp. 2d at 1012–14.

192. *Velez*, 693 F.3d at 314.

193. *Id.* at 321–22.

to report her to immigration authorities, which might have led to imprisonment and confinement."[194]

Using a similar analytical scheme, the District Court of Minnesota permitted an ATS claim to proceed from a group of Latino grocery workers who alleged abuse by their employers. Those workers claimed they had suffered periodic confinement in the store, physical, verbal, and sexual assault, inadequate breaks, deficient medical attention, uncompensated overtime work, and deportation threats.[195] Taken together, the court found that these allegations may have constituted "egregious violations of human dignity," which the norm against forced labor repudiates.[196]

In the case of detained immigrants subjected to forced labor, several factors may support a finding of egregious violations to human dignity. Most evidently, these workers are held in conditions of confinement, and they are deprived not only of their general liberty but also of the freedom to access essential items to cover basic necessities, such as sanitary and hygiene products, on the condition that they work for cents an hour—a pay rate so extremely low that it is nearly non-existent compared to the price of the products they need. This is compounded by the reality that these workers are discouraged from protesting absurdly low wages through threats of punishment like solitary confinement and other physically repressive means. Hence, these conditions of detainment, the failure to adequately compensate the work performed, and the deprivation of items necessary to guarantee basic living conditions, all of which are hallmarks of the Voluntary Work Program, constitute a specific, universal, and obligatory offenses that severely contravene the core principle of the ATS and international norms within the United States. The aforementioned case law thus suggests one course of action under the ATS to seek accountability from the United States for its use of forced work in its detention centers.

Cases alleging cruel, inhumane, and degrading treatment in violation of customary international law have also been analyzed and sometimes accepted by the courts.[197] As with forced labor claims, the courts have primarily focused on whether the facts alleged violate international norms to avoid a categorical holding that cruel, inhuman or degrading treatment is actionable

194. *Id*. at 322.
195. *Aragon*, 277 F. Supp. 3d at 1059–60, 1068–69.
196. *Id*. at 1068–69.
197. *E.g*., Shimari v. CACI Premier Tech., Inc., 263 F. Supp. 3d 595, 604 (E.D. Va. 2017) *appeal denied, writ granted*; Doe I v. Liu Qi, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004) (Noting that "conduct sufficiently egregious may be found to constitute cruel, inhuman or degrading treatment under the ATCA."); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 437–38 (S.D.N.Y. 2002) ("[D]istinctly classified or not, the infliction of cruel, inhuman or degrading treatment by agents of the state, as closely akin to or adjunct of torture, is universally condemned and renounced as offending internationally recognized norms of civilized conduct") *rev'd on other grounds*; Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1347 (N.D. Ga. 2002) ("Cruel, inhuman, or degrading treatment is a discrete and well-recognized violation of customary international law and is, therefore, a separate ground for liability under the ATCA.").

under the ATS.[198] Allegations that have survived a motion to dismiss include physical and sexual abuse by officials,[199] as well as discriminatory degradation based on religion.[200] Despite its broad language, the prohibition against cruel, inhumane, and degrading treatment has been defined as "conceptually linked to torture by shades of misconduct discernible as a continuum."[201] The court in *Shimari v. CACI Premier Tech., Inc.* also turned to the 2002 War Crimes Act, which prohibits "'grave breach[es] of common Article 3' of the Geneva Conventions, including 'cruel or inhuman treatment,'" defined as "[t]he act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control."[202]

Claims in the U.S. immigration detention context were addressed in *Jama v. United States INS*, where the New Jersey District Court considered allegations of cruel, inhuman, and degrading treatment among other violations at a privately-operated facility.[203] The court granted a motion for summary judgement in favor of the INS officials on all ATS claims against individual guards, finding that the conduct alleged, including sexual harassment, theft, racism, and interpersonal violence, did not meet the high bar set by *Sosa* for violations of international norms.[204] However, the court allowed claims to proceed against the private prison company and corporate officers, noting that the case "alleged gross mistreatment, not of criminals or persons accused of crime, but rather of persons who have committed no crime but are awaiting a decision on their applications for asylum" and "the remedies available to those who are held in penal institutions may not be available."[205]

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198. *Bridgestone*, 492 F. Supp. 2d at 1023; *Liu Qi*, 349 F. Supp. 2d at 1322 ("The allegations of specific conduct must be compared with existing authorities on international law to determine whether the specific conduct alleged violated universally established norms.").

199. *Liu Qi*, 349 F. Supp. 2d at 1324–25 (explaining that the allegation of sexual abuse rendered the complaint actionable, where two additional plaintiff's claims involving only detention and physical abuse were not).

200. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002) (noting that officials carried out certain acts "intended specifically to degrade and humiliate plaintiffs").

201. *Mugabe*, 234 F. Supp. 2d at 437; *accord Shimari*, 263 F. Supp. 3d at 603; *see also Vuckovic*, 198 F. Supp. 2d at 1348 ("Generally, cruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not have the same purposes as 'torture.'").

202. *Shimari*, 263 F. Supp. 3d at 604. The Eastern District Court of Virginia specifically chose to utilize the War Crimes Act definition instead of deferring to UNCAT and the U.S. reservation that cruel, inhumane, and degrading treatment is limited to its meaning under the Fifth, Eighth, and Fourteenth Amendments. *Id.* at n.12.

203. Jama v. U.S. Immigr. & Naturalization Serv., 343 F. Supp. 2d 338, 360–61 (D.N.J. 2004).

204. *Id.* ("None of the claims against the individual Esmor Guards can meet the rigorous *Sosa* [*v. Alvarez-Machain*] requirements. Compare the conduct in which each individual Esmor Guards is alleged to have engaged with the torture and murder which was the subject of *Filartiga v. Pena-Irala . . .*").

205. *Id.* ("The law of nations as evidenced in the various conventions, treaties, declarations and other sources cited by the *Jama* Plaintiffs can be said to have reached a consensus that the inhumane treatment of a huge number of persons accused of no crime and held in confinement is a violation of the law of nations."). All but one of the Plaintiffs in the *Jama* litigation settled their claims. The remaining Plaintiff went to trial in 2007. The jury rejected the ATS claims but found for the Plaintiff on other grounds. *See*

Jama, and more specifically its application of the *Sosa* requirements,[206] is instructive for future litigants combatting the federal forced work program in federal courts. Advocates for detained immigrants should be prepared to emphasize the egregious conditions of forced labor, which effectively amount to modern-day slavery, and its similarity to the exploitative and dehumanizing violence condemned in *Filartiga* to demonstrate that its offense to international standards is sufficiently severe to satisfy the *Sosa* requirements. Further, the gross mistreatment of immigrants forced to labor while in civil detention, plus the potential lack of legal avenues available to remedy their grievances contingent on their given circumstances, is so fundamentally inhumane and contraposed to the various international tools outlining the rights of persons as to constitute a violation of the law of nations. The various pertinent treaties, agreements, and other international instruments collectively define a framework of customary international law that is sufficiently specific and that the United States' forced work program violates. Taking these insights from *Jama*, social justice advocates should be well equipped to identify, enumerate, and challenge the forced labor imposed by the Voluntary Work Program to pursue justice for, and to defend the rights of, detained immigrants.

V. CONCLUSION

Labor should never be coerced. No matter the setting, people should not be forced to work in inadequate conditions for nominal compensation. For detained immigrants, the Thirteenth Amendment prohibits such involuntary labor both in its explicit language and in its essence. And yet, the United States has permitted forced labor in its immigration detention system under the guise of the "Voluntary Work Program." Human rights advocates, including detained immigrants, continue to challenge this practice. International law is one tool for public pressure and legal reasoning, though the federal government has narrowed the potential for direct enforcement of international law by refusing to ratify key treaties and neglecting to pass executing legislation for agreements the United States is party to. However, the moral authority of these agreements is not dependent on the reservations included in U.S. ratification or whether the United States has recognized the jurisdiction of an international enforcement body.

Under international law, forced labor is a critical human rights violation occurring daily in the U.S. immigration detention system. However, avenues

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Esmor Correctional Services lawsuit (re immigration detention facility), BUS. & HUM. RTS. RES. CENTRE (June 1, 1997), https://perma.cc/Q3ER-9Z2X.

206. *Jama* additionally dealt with other questions, such as whether liability for abuses in detention centers under state tort law lies on the individual officers for being the direct perpetrators or on the company for negligent training of its employees. *Jama*, 343 F. Supp. 2d at 347. This and all other issues dealing with claims other than the ATS claims are omitted in this analysis for falling beyond the scope of this Article.

exist to challenge such violations. Advocates can utilize international enforcement mechanisms for treaties signed and or ratified by the United States. Advocates and workers may file representations with the ILO, partner with NGOs to submit shadow reports to the HRC, and submit petitions to the IACHR. General comments issued by the HRC may also be utilized to support litigation. In addition, customary international law prohibiting forced labor or cruel, inhumane, and degrading treatment can be incorporated in lawsuits through ATS claims. By understanding the extent to which the "Voluntary Work Program" violates acceptable standards under both domestic and international law, advocates can bolster their efforts to end the practice and protect detained immigrants from future violations of basic human rights.