In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts

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"He'd been petitioning for redress all his life. Of course he hoped for some money, but most of all he needed an admission that he'd been wronged. At 75, he's become a bit obsessed with it. It's the only way he can make sense of his life, the only way he can die easy."[1]

INTRODUCTION

In recent years, numerous Korean and Chinese victims of Japan's World War II forced labor camps have pursued civil claims against Japanese corporations in the United States. A wave of civil claims involving such forced labor arose with the 1999 passage of California Code of Civil Procedure (CalCCP) section 354.6. CalCCP section 354.6 created a cause of action for WWII-era victims of slave or forced labor and extended the statute of limitations for such actions to 2010.[2]

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1. Lincoln Kaye, *Politics of Penitence: China Seeks to Gain from Japan's War Guilt*, FAR E. ECON. REV., July 6, 1995, at 2 (describing Li Wei, the director of a Beijing hospice, as he discusses Liu Kun, a WWII-era forced laborer). To comfort Liu, Li arranged for a volunteer to impersonate a Japanese official, who would "apologize" to Liu each week: "With many a bow and occasional tears, the visitor tells Liu how profoundly sorry the Japanese people and government feel for starving, beating, torturing and enslaving Chinese prisoners at a forced-labor quarry in Kyushu during World War II." *Id.*

2. *See* Cal. Code Civ. Proc. (CalCCP) § 354.6 (West 2000). This Note will use the terms "forced labor" and "slave labor" interchangeably, although the California legislature defines the two terms differently. The California statutory definition of a "WWII-era victim of slave labor" is "any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay." § 354.6(a)(1). The California statutory definition of a "WWII-era victim of forced labor" is "any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay. . ." § 354.6(a)(2). *Cf.* Michael J. Bazyler,

In 2000, the Federal Judicial Panel on Multidistrict Litigation consolidated many of the state and federal cases brought under CalCCP section 354.6, and transferred the consolidated action to the Northern District of California.[3] The district court dismissed the consolidated action in its September 17, 2001 decision, *In re* World War II Era Japanese Forced Labor Litigation ("*Forced Labor*").[4] In 2003, the Ninth Circuit Court of Appeals affirmed the district court's decision, but on narrower grounds.[5] On the other hand, California state courts have been more receptive to the laborers' claims. California state courts have chosen not to follow the district court's reasoning, and instead, have allowed claims brought under CalCCP section 354.6 to go to trial.[6]

Focusing primarily on *Forced Labor*, this article narrates the forced laborers' pursuit of redress and examines the obstacles their claims attempted to overcome in the federal courts. In addition, it reviews possible obstacles to international human rights claims in U.S. courts that were not at issue in the 2001 *Forced Labor* decision.

I. KOREAN AND CHINESE FORCED LABORERS' SEARCH FOR REDRESS

A. Historical Background

Japan's use of foreign slave labor during World War II appears to have equaled or exceeded that of Nazi Germany, which brutally exploited at least ten million slave laborers.[7] Chinese scholars estimate that Japan made use of fifteen million forced laborers in occupied China during the war, nine million in Manchuria alone.[8] By and large, Japan's large

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The Holocaust Restitution Movement In Comparative Perspective, 20 BERKELEY J. INT'L. L. 11, n.71 (2002) (stating that "[i]n the Swiss banks litigation, the terms 'slave labor' and 'forced labor' were used interchangeably").

3. The Judicial Panel on Multidistrict Litigation issued the transfer orders on June 5, 2000 and June 15, 2000. *In re* World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000) [hereinafter *POW Forced Labor*].

4. 164 F. Supp. 2d 1160 (N.D. Cal. 2001) [hereinafter *Forced Labor*].

5. *See* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003).

6. *See, e.g.*, Taiheiyo Cement v. Superior Court, 105 Cal. App. 4th 398, 412-420 (Ct. App. 2003).

7. *See* Donald Macintyre, *WWII: Imperial Japan on Trial*, ASIAWEEK, Nov. 15, 1996, at 36. These estimates will become more reliable as much-needed research on the scale of Japan's WWII slave labor is accomplished, and when and if Japanese government finally opens its files to inspection. *Id.*

8. John Leicester, *Chinese Forced Laborers Are Suing Japanese Firms for Compensation, reprinted in* SEATTLE TIMES, Aug. 24, 2000, at A12 (estimating fifteen million total and quoting Ju Zhifen, a researcher at the Chinese Academy of Social Sciences); Donald MacIntyre, *supra* note 7, at 36 (providing data on Manchuria). MacIntyre states,

> 'At least 9 million northern Chinese and their families were coerced or tricked into going to Manchuria, where they were used as forced laborers,' according to He Tianyi, a scholar who works for a government-run historical research institute in Shijiazhuang, Hebei province. Prisoners were held in concentration camps, processed by bureaucrats, then handed over to Japanese companies in Manchuria--for a fee.

corporations were fully aware of and actively encouraged the Japanese army as it seized workers for Japanese mines and factories in Manchuria.[9] Near the end of the war, Japan also imported about 40,000 Chinese to work as slave laborers.[10] Between four and six million Koreans were slave laborers during the war.[11] 725,000 Koreans worked in Japan, mostly at mines and construction sites, while the rest labored in Korea.[12] The preceding estimates, in particular those for forced labor outside of Japan proper, are unavoidably speculative to varying degrees.[13] Nonetheless, the number of Japan's slave laborers appears to more than double the German figure, particularly considering the sizeable numbers of forced laborers used elsewhere in occupied East Asia.[14]

The bulk of both Japan's and Germany's forced laborers worked for private corporations.[15] The German firms, which included Siemens, Krupp, and Daimler-Benz, and the German government have long paid compensation to labor camp survivors or to organizations that aid them.[16]

MacIntyre, *supra* note 7, at 36.

9. *Id.* (quoting Japanese lawyer Niimi Takashi, "Not only did the construction industry 'fully know about the recruitment situation, [but it also] actively encouraged the army's 'pacification' campaign as a way to increase the labor supply'"). This echoes the Central District of California's reasons for holding several corporate defendants guilty at the Nuremberg Tribunals; the Central District stated that they "were not moved by a lack of moral choice, but, on the contrary, embraced the opportunity to take full advantage of the slave-labor program. Indeed, it might be said that they were, to a very substantial degree, responsible for broadening the scope of that reprehensible system." Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1309-10 (C.D. Cal. 2000) (quoting United States v. Krauch, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 1179 (1952)) [hereinafter *Unocal II*].

10. *See* Macintyre, *supra* note 7, at 36.

11. *Id.* (estimating four million Korean victims); *German Deal Over Ex-Forced Laborers Could Help Japan*, ASIAN ECON. NEWS, Feb. 11, 2002, *available at* 2002 WL 17024078 (estimating six million Korean victims); *Korean Scholars Pledge Drive to Protect Dokdo Sovereignty*, XINHUA NEWS AGENCY, Aug. 16, 2002, *available at* 2002 WL 24700580 (estimating six million Korean victims).

12. *See* Donald Macintyre, *Fighting for Wartime Retribution*, Time Mag., Jan. 17, 2000, at 19 [hereinafter Macintyre, *Fighting*].

13. Japanese labor unions who were sympathetic to international victims of Japan's war used preserved government and company data to compile statistics on Japanese forced labor. The Japanese government itself states that it has records estimating only 110,000 Korean forced laborers. *See* Gregory Clark, *The Nanjing Number Game*, JAPAN TIMES, Feb. 7, 2000, *available at* http://www.japantimes.com ("The only reason we now know in detail about the Chinese forced laborers is because the only one of the many meticulous wartime reports on the subject not to suffer destruction at war's end accidentally fell into the hands of the Taiwan authorities and could not be denied."); Bruce Ramsey, *No Moves in Japan to Pay Asians Forced into Labor in WWII*, SEATTLE POST-INTELLIGENCER, May 24, 1999, at A2. Ramsey also states that, according to a petition presented by Japanese labor unions to an ILO committee investigating WWII-era forced labor in Japan, 17.5 percent of the 39,935 Chinese taken to work in Japan had died by war's end; he adds that no reliable death figure exists for the Korean laborers. Ramsey, *supra*, at A2.

14. 250,000 Asian forced laborers, for example, worked on Thailand's infamous Siam-Burma railway construction project alone. *See* Macintyre, *supra* note 7, at 36. The death toll of these laborers was more than fifty percent, according to Australian historian Gavin Daws. *Id.* Japan also utilized large numbers of forced laborers in occupied Malaysia, Burma, Indonesia, and the Philippines. *Id.*

15. *See id.*

16. *Id.*; *see also* Madeline Doms, *Compensation for Survivors of Slave and Forced Labor: The*

They have also made wartime records public.[17] In 2000, the United States government, the German government, and German corporations established a $5.2 billion fund for "Remembrance, Responsibility and the Future," to compensate individual victims of Nazi forced labor.[18] Austria and its corporations have established a similar fund.[19]

In contrast, Japan's government and Japanese corporations continue to resist this form of remembrance and responsibility.[20] The government has refused to release wartime records[21] – the small number of records that escaped a policy of systematic destruction immediately after the end of the war[22] – and has made no direct payments to forced labor victims, even after a committee of the International Labor Organization urged it to do so.[23] The government claims that post-war treaties, such as the 1951 Peace

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Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Survivors, 14 TRANSNAT'L L. 171, 174-75 (2001) (stating that the German government has paid more than $60 billion in reparations to Holocaust survivors); Detlev Vagts & Peter Murray, *Litigating The Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L. L.J. 503 (2002).

17. *Id.*

18. United States–Germany Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G., 39 I.L.M. 1298 [hereinafter *U.S.-Germany Agreement*]. For analysis of the litigation leading up to the agreement, see Vagts & Murray, *supra* note 17. For further details on the German fund and its usefulness as a model for Japanese compensation agreements, see Russell A. Miller, *Much Ado, But Nothing: California's New World War II Slave Labor Law Statute of Limitations and Its Place in the Increasingly Futile Effort to Obtain Compensation from American Courts*, 23 WHITTIER L. REV. 121, 123 (2001); Marx Coronel, *German Deal Seen as Model for War Laborer Claims*, JAPAN TIMES, Feb. 8, 2002, *available at* http://www.japantimes.com. *Cf.* Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1, 6 (2002) (stating that, although slave and forced laborers of the Third Reich were able to reach a settlement with German corporations for Nazi atrocities during World War II, the laborers were unable to penetrate the corporations' "unwavering avowal of their blamelessness").

19. *See* John R. Schmertz, Jr. & Mike Meier, Esq., *U.S. and Austria Agree on Fund to Compensate Individuals Forced Into Hard Labor During World War II*, INT'L LAW UPDATE, Oct. 2000 (providing a brief report on the Austrian agreement); *see also* Peter Moser, *Restitution Negotiations: The Role of Diplomacy*, 20 BERKELEY J. INT'L L. 197 (2002) (exploring the Austrian agreement).

20. *See* F. T. McCarthy, *The Cost of Japan's Murky Past Catches Up*, THE ECONOMIST, July 8, 2000, *available at* 2000 WL 8142780. *But see* Teresa Watanabe, *Japan's War Victims in New Battle*, L.A. TIMES, Aug. 16, 1999, at A1 (noting that Japan has paid more than $27 billion in nation-to-nation reparations).

21. *See* Clark, *supra* note 13; Stephen Goode, *How the Japanese Used American POWs for Slave Labor*, INSIGHT MAG., Feb. 28, 2001, *available at* http://www.insightmag.com/archive/200103215.shtml; *Lawyer Challenges Japan to Reveal WWII Labor Details, Japan Times*, Sept. 3, 1999, *available at* http://www.japantimes.com [hereinafter *Lawyer Challenges*].

22. *See* Clark, *supra* note 13 ("One reason for the absence of [official] records, of course, was the official policy of destroying all incriminating records as soon as the war ended."); *see also Lawyer Challenges*, *supra* note 21.

23. *See* Mari Yamaguchi, *Japanese Company To Pay Korean War Workers' Kin*, SEATTLE POST-INTELLIGENCER, Sept. 23, 1997, at A2 ("The Japanese government has refused to directly compensate individual [forced labor] victims . . ."); *see also International Organization Urges Compensation for Wartime Forced Labourers*, BBC WORLDWIDE MONITORING, Mar. 12, 1999, *available at* 1999 WL 14069140 (reporting that, in 1999, an International Labor Organization committee had urged Japan's government to make payments to individual victims of forced labor).

Treaty with Japan, entirely resolved the reparations issue.[24]

B. Search for Redress in Japan

Similarly, Japanese courts have viewed the lawsuits by WWII forced laborers unfavorably.[25] Generally, they recognize that Korean and Chinese workers were forced to work without pay – something which Japanese companies have rarely admitted to[26] – but dismissed suits because the statutes of limitation have expired.[27] Japanese courts also dismissed claims based on Japan's 1932 ratification of the International Labor Organization Convention banning forced labor,[28] on the grounds that international law does not give individuals the right to seek government compensation.[29] Japanese courts have ruled that the post-war Japanese government will not be held accountable for government actions taken under the pre-war Meiji Constitution, which shielded the Japanese government from liability for its actions.[30]

Kajima Corporation, Japan's largest construction firm, was the target of a particularly tireless campaign for compensation and an apology.[31] Forced laborers who were treated brutally at the company's Hanaoka labor camp in northern Japan filed a lawsuit in Japan, forcing the company to air unpleasant secrets in a public Tokyo courtroom.[32] In California, where

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24. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169. For Japan's arguments regarding compensation, see generally F. T. McCarthy, *supra* note 20, and Watanabe, *supra* note 20.

25. *See* McCarthy, *supra* note 20 ("More than 40 court cases have been filed in Japan demanding restitution for slave labour. Not one has won. Only three have been settled out of court, and even then on terms that were hardly favourable to former slaves.").

26. Macintyre, *supra* note 7 ("Major manufacturing firms assert they paid their workers. Most Japanese construction and mining companies won't even say if they used forced labor or not. The paperwork, they argue, was lost in the 'confusion' at the end of the war."). One exception, however, is Kajima Corporation, which admitted in 1990 that it had used forced labor at its Hanaoka labor camp. *Id.*

27. *Id.*; *see also Court Rejects Forced Labor Suit*, JAPAN TIMES, July 10, 2002, *available at* http://www.japantimes.com.

28. *See* Ramsey, *supra* note 13.

29. *See* Hiroshi Matsubara, *Mitsui Case Breaks New Ground for Wartime Redress*, JAPAN TIMES, Apr. 27, 2002, *available at* http://www.japantimes.com.

30. *Id.*

31. Macintyre, supra note 7. The company is also one of those accused of being fully aware of the worker 'recruitment' system in Manchuria, and of actively encouraging the army's pacification campaign as a way to increase the slave labor supply. *Id.*

32. *See* Masatoshi Uchida, *The Hanaoka Incident: Corporate Compensation for Forced Labor*, SEKAI No. 684, *available at* http://www.iwanami.co.jp/jpworld/text/hanaoka01.html (Feb. 2001); *see also* Macintyre, *supra* note 7 (stating that a 1948 post-war Allied war crimes tribunal sentenced one labor camp commander and two guards to hang for atrocities committed at the camp).

Of the 986 Chinese laborers taken to work there in August 1944 and thereafter, 418 had died by October 1945. *Kajima to Compensate Chinese for War Labor*, THE JAPAN TIMES, Nov. 30, 2000, *available at* http://www.japantimes.com. 113 of the dead were tortured to death in retaliation for a camp uprising sparked by hunger, cruel working conditions and torture. *Id.*; *see also* Macintyre, *supra* note 7 (stating that U.S. occupation troops discovered the camp in October 1945 and that "[a] photograph of gaunt survivors standing in front of the camp barracks echoes scenes of the German

Kajima has a strong presence, community groups attacked the corporation, leading to the loss of at least one prestigious construction contract.[33] The lawsuit and coordinated campaign also brought Kajima unwelcome publicity in China, where the company has also invested heavily.[34]

Despite the obstacles presented by the Japanese court system, Kajima's forced laborers finally achieved one of their goals in November 2000, when the corporation agreed to pay $4.6 million to the families of the 986 slave laborers at the Hanaoka mining camp.[35] The agreement marked the first time that a Japanese company had "broken ranks" and accepted responsibility for wartime injuries it caused to forced laborers.[36] The size of the "Hanaoka Fund for Peace and Friendship," and the company's admission of moral (but not legal) responsibility contrasts with other forced laborers' out-of-court settlements.[37] In September of 1997, Nippon Steel Corporation reached a more typical settlement with the families of eleven forced laborers, by paying them over $163,000 in "condolence money."[38] The company admitted neither legal nor moral responsibility for its use of forced labor during the war, stating it had been operating under government orders.[39]

Finally, on April 25, 2002, there was another significant breakthrough. For the first time, a Japanese court required a company to compensate slave laborers for wartime damages.[40] The Fukuoka District Court ordered Mitsui Mining Company to pay $1.4 million to fifteen Chinese WWII-era forced laborers.[41] In language reminiscent of the 47 U.S.C. civil rights jurisprudence (which will be discussed in Section IV.C), the court held that Mitsui Mining Company forcibly transported the victims to Japan for the purpose of using them as slave laborers "in a scheme jointly planned and

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death camps that Allied troops had liberated in Europe a few months earlier.").

33. Macintyre, *supra* note 7 ("In Los Angeles, Kajima dropped out of the bidding to build a $22-million expansion of the Japanese American National Museum after community and labor groups protested.").

34. *Id.*

35. *See China Urges Japan to Pay 'Necessary' Wartime Compensation*, AGENCE FR. PRESSE, June 29, 1995, *available at* 1995 WL 7822733; *Kajima Corp. Steps Up Search for Forced Laborers in China*, THE ASAHI SHIMBUN, Feb. 7, 2002, *available at* http://www.asahi.com/english/national/K2002020700400.html (reporting that, as of February, 2002, only 130 of the 986 have been located and compensated); Valerie Reitman, *Japanese Firm to Pay Chinese WWII Laborers*, L.A. TIMES, Nov. 30, 2000, at A1 (stating that the company's apologies for its conduct in 1990 constituted another victory for the Chinese WWII laborers).

36. Maki Arakawa, Recent Development, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 BERKELEY WOMEN'S L.J. 174, 200 (2001).

37. *See* McCarthy, *supra* note 20.

38. *See* Yamaguchi, *supra* note 22.

39. *Id.*

40. *See Mitsui Mining Told to Pay 15 Forced Laborers*, YOMIURI SHIMBUN, Apr. 26, 2002, *available at* 2002 WL 19070390 [hereinafter *Mitsui Mining*]; *see also* Matsubara, *supra* note 29.

41. *See Mitsui Mining*, *supra* note 40.

implemented by the government and Mitsui Mining."[42] On the statute of limitations issue, the court relied on an international law "case-by-case" standard, stating that the application of a statutory limitation on the claim ran "counter to the principle of justice and fairness."[43] Nevertheless, the plaintiffs appealed the ruling, because the court rejected their demand that the Japanese government also pay compensation.[44]

However, the breakthrough Fukuoka case remains an anomaly, and most claims have failed or remain unresolved in the Japanese courts.[45] It has been suggested that the Diet, Japan's national legislature, will need to take action for full redress to occur.[46] This seems unlikely, given Japan's present political climate.[47]

C. California Creates a Cause of Action

Motivated in part by a recognition of the legal difficulties experienced by Nazi Germany slave labor camp victims,[48] the California state legislature passed CalCCP section 354.6 to provide a cause of action for victims and to remove the statute of limitations as an obstacle to their claims.[49] CalCCP section 354.6 reads:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either

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42. *Id.*

43. *See* Matsubara, *supra* note 29.

44. *See Fifteen Ex-Chinese Forced Laborers Appeal Lower Court Ruling*, JAPAN POLICY, May 13, 2002, *available at* 2002 WL 18801077.

45. *See* Ken Hijino, *Japanese Court Dismisses Forced-Labor Claims*, FIN. TIMES, July 10, 2002, at 12 (reporting another dismissal, and that an estimated seventy cases filed by former slave laborers remained unresolved in the Japanese courts).

46. *See* Matsubara, *supra* note 29.

47. *Id.* (citing Ryukoku University professor of sociology, Hiroshi Tanaka, who states that, rather than move toward an acceptance of reparations, "the current Japanese political climate seems to be moving in the opposite direction"). *See* Annie Nakao, *Growing Trend in Japan: No Apology for WWII*, S.F. CHRON., Apr. 28, 2002, at A3; *see also* Ramsey, *supra* note 13.

Commentators and other concerned individuals in Japan have pressed its corporations to deal responsibly with wartime victims. In an editorial on August 5, 2000, *Nihon Keizai Shimbun*, Japan's leading business newspaper, urged for Japanese companies to acknowledge their wrongdoings:

> The [Japanese] government insists that it has settled war reparations with relevant nations on a state-to-state level. But this does not absolve private firms of responsibility for their actions more than half a century ago . . . Taking a cue from their German counterparts, Japanese companies must reflect critically on the dark side of their history in this century so that they can make a fresh start in the next.

Editorial, *Japan: Better to Pay for Past Sins*, ASIA TIMES, Sept. 1, 2000, *available at* http://www.asiatimes.com.

48. *See* Bazyler, *supra* note 2, at 26-27.

49. CalCCP § 354.6 (West 2000).

directly or through a subsidiary or affiliate.[50]

CalCCP section 354.6 extends the statute of limitations to December 31, 2010, and does not limit the cause of action to California residents.[51]

In the year following passage of CalCCP section 354.6, more than thirty lawsuits were filed in California courts. Plaintiffs included civilian American, Chinese, Filipino, and Korean forced laborers, former U.S. and allied prisoners of war, and "comfort women."[52] In addition to claims under CalCCP section 354.6, plaintiffs sought compensation under the Alien Tort Claims Act (ATCA), various state laws, and customary international law.[53]

Defendants included the Japanese government and major Japanese firms such as Kajima, Mitsubishi, Mitsui, Kawasaki Heavy Industries, and Nippon Steel.[54] In response to the claims, the Japanese government contended that the slave labor claims were being settled in negotiations between Japan, China, and North and South Korea.[55] In sharp contrast to its role as a broker during Nazi-era German forced labor negotiations and to its neutrality in private suits against Holocaust-associated corporations, the U.S. State Department sided with Japan and its corporations. The United States asserted that the CalCCP section 354.6 was an intrusion on

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50. *Id.*; *see also Claims for Holocaust Compensation Take Twists and Turns*, INT'L ENFORCEMENT LAW REP., Oct. 1999. Florida and Washington have enacted similar statutes. *See* Holocaust Victim Insurance Act, Fla. Stat., ch. 626.9543 (2002); Holocaust Victims Insurance Relief Act, Wash. Rev. Code § 48.04.060 (2002); Holocaust Victims Insurance Act, Wash. Rev. Code § 48.04.040 (2002). The Florida statute was found unconstitutional on the ground that it violated the Due Process Clause allowing state court jurisdiction only over parties having sufficient minimum contacts with the forum state. *See* Gerling Global Reins. Corp. v. Nelson, 123 F. Supp. 2d 1298 (N.D. Fla. 2000).

51. CalCCP § 354.6(c) (West 2000).

52. *See* Bazyler *supra* note 2, at 27; McCarthy, *supra* note 20. For a discussion of the lawsuits brought on behalf of the "comfort women," the WWII-era women enslaved in Japanese prostitution camps, see Mary De Ming Fan, Comment, *The Fallacy Of The Sovereign Prerogative To Set De Minimis Liability Rules For Sexual Slavery*, 27 YALE J. INT'L. L. 395 (2002). Because the Japanese government was the defendant in the comfort women litigation, claimants brought their suit under the commercial exception established under the Foreign Sovereign Immunities Act. *Id.* The claims failed to qualify under that exception and the case was dismissed in October, 2001. *See* Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52 (D.D.C. 2001). *See generally* Angela M. Higgins, Comment, "*Else We Are Condemned to Go From Darkness to Darkness:*" *Victims of Gender-Based War Crimes and the Need for Civil Redress in U.S. Courts*, 70 UMKC L. REV. 677 (2002).

53. *See* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L. L. 91, 128-29 (2002).

54. *See* Bazyler, *supra* note 2, at 26; *Japan Firms Sued for Korean Slave Labor*, CNN.COM (Feb. 28, 2001), *at* http://www.cnn.com/2001/WORLD/asiapcf/east/02/27/korea.slavelabor/index.html; Shirley Leung, *Suit Will Test State Law On War Labor*, WALL ST. J., Oct. 27, 1999, at CA1.

55. *See Forced Labor*, 164 F. Supp. 2d at 1175 ("In a submission to this court by the Embassy of Japan, the Japanese government points out that the claims of the Korean and Chinese plaintiffs have already been settled or are in the process of being settled through diplomatic negotiations between Japan, China, and North and South Korea.").

the federal government's foreign affairs powers.[56] The United States did not pressure the Japanese government and Japanese firms to settle claims out of court, as it had previously pressured the German government and German companies.[57]

II. *IN RE* WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION

In June 2000, most of the California litigation was consolidated by transfer orders to the courtroom of federal judge Vaughn Walker of the Northern District of California.[58] On September 21, 2000, the Northern District of California dismissed claims brought by the U.S. government and allied POWs and U.S. civilians against the Japanese corporations.[59] The court held that the signatories to Article 14(b) of the 1951 Peace Treaty with Japan, which included the United States and its allies, had waived all claims arising out of actions by the Japan government, Japanese nationals, or private Japanese corporations that were taken "in the course of the prosecution of the war."[60]

Nearly one year later, on September 17, 2001, the Northern District of California also disposed of the claims brought by the Korean, Chinese, and Filipino plaintiffs. The court dismissed the claims by the Filipino citizens on the grounds that, in 1956, the Philippines ratified the 1951 Peace Treaty with Japan.[61] Neither Korea nor China has signed the peace treaty with Japan, and the court found other grounds to dismiss the consolidated action

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56. *See* Bazyler *supra* note 2, at 12 (noting that the results of U.S. government brokering or neutrality regarding Nazi-era claims, and stating that "[a]s a result of the U.S.-based litigation, and concomitant political efforts of the past six years . . . Holocaust-era settlement payouts now total over $8 billion").

57. *Id.* at 28 ("For the Japanese slave labor claims, . . . the U.S. government not only sided with the Japanese companies, but, to date, has failed to press Japan and its private industry to recognize the same type of claims that it forced Germany and its private industry to resolve.").

58. *See POW Forced Labor*, 114 F. Supp. 2d. at 942 (stating that removal of the state court cases to the federal courts was warranted because the actions raised "substantial questions of federal law by implicating the federal common law of foreign relations").

59. *Id.* at 939.

60. *See* Treaty of Peace with Japan, *supra* note 24. Article 14(b) of the Treaty states in full:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Id.

For an argument that Article 14(b) is not unambiguous on its face, see Bazyler, *supra* note 2, at 30. ("It is quite reasonable to interpret [14(b)] to exclude actions taken by private Japanese companies for profit (i.e. the use of unpaid slave labor) as not being actions taken in the 'course of the prosecution of the war.'"). In addition, interpretation of Article 14(b) should be affected by the recent revelation that, in 1951, Japan's then Prime Minister Shigeru Yoshida provided a letter to the Dutch government expressing the view that the treaty "does not involve the expropriation by each Allied government of the private claims of its nationals." John Price, *Fifty Years Later, It's Time to Right the Wrongs of the San Francisco Peace Treaty*, Sept. 6, 2001, *available at* http://www.japantimes.com.

61. *See In re* World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1153 (N.D. Cal 2001) [hereinafter *Filipino Forced Labor*].

by nationals from those countries.[62] The following subsections examine the two grounds for the dismissal and the judicial doctrines giving rise to those grounds.

A. The Foreign Affairs Power

The court declared CalCCP section 354.6 an unconstitutional infringement of the exclusive foreign affairs power of the federal government.[63] The foreign affairs power doctrine allows a court to invalidate state laws which unduly infringe on the federal government's exclusive authority over foreign affairs.[64] The court relied on *Zschernig v. Miller*,[65] stating that the 1968 Supreme Court decision had not been overruled, and rejected suggestions it be limited.[66]

The court also found support in two recent Ninth Circuit cases, *International Association of Independent Tanker Owners v. Locke* and *Gerling Global Reinsurance Corporation v. Low*.[67] The court relied on *Tanker Owners* to affirm that, when a statute causes more than an "incidental or indirect effect in foreign countries," it is an unconstitutional intrusion upon the federal foreign affairs power.[68] The court relied on *Gerling Global* to support the holding that *Zschernig* nullifies state statutes directed at particular countries or involving "diplomatic concerns."[69] Diplomatic concerns arise when a statute triggers judicial assessments of the administration of foreign law or of the trustworthiness of foreign diplomatic statements.[70] In sum, the *Forced Labor* court declared that "California may legislate with respect to local concerns that touch upon foreign affairs, but only if its actions have just 'some incidental or indirect effect in foreign countries.'"[71]

In determining that the California statute resulted in more than incidental or indirect effects in foreign countries, the court relied on the following observations: (1) the terms of CalCCP section 354.6 and its

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62. *See Forced Labor*, 164 F. Supp. 2d at 1168 (quoting treaty language that suggests that the signatory nations, including the United States, "did not intend the Treaty of Peace with Japan to control claims of individuals from non-signatory nations").

63. *Id.* at 1164.

64. *See id.* at 1168-71.

65. 389 U.S. 429 (1968).

66. *Forced Labor*, 164 F. Supp. 2d at 1170-73 (citing with approval cases stating that "there is simply no indication, in . . . any . . . post-*Zschernig* case, that *Zschernig* is not good law and is not binding on us").

67. *Id.* at 1171-72. *See also* Int'l Assoc. of Indep. Tanker Owners v. Locke, 148 F.3d 1053, 1068 (9th Cir.1998); Gerling Global Reinsurance Corp. v. Low, 240 F.3d 739, 751-53 (9th Cir. 2001).

68. *Forced Labor*, 164 F. Supp. 2d at 1172 (quoting *Zschernig*, 389 U.S. at 434).

69. *Id.* at 1172 (asserting that the diplomacy and country-specificity concerns become particularly acute when the state statutes do not regulate commerce).

70. *Id.* at 1170 (quoting *Zschernig*, 389 U.S. at 435).

71. *Id.* at 1173 (quoting *Zschernig*, 389 U.S. at 433).

legislative history showed an intent to influence foreign affairs directly;[72] (2) particular countries were targeted; (3) the statute did not involve an area that Congress had declared expressly as state regulated matters; (4) the statute created a judicial forum for negative commentary about the Japanese government and Japan's corporations; (5) the Japanese government contended that the litigation of CalCCP section 354.6 claims could complicate and impede relations between the countries involved; and (6) the U.S. government, in its Statement of Interest, asserted that the statute was an impermissible intrusion upon the federal government's foreign affairs power.[73] Consequently, the court ruled that the statute was an unconstitutional incursion upon exclusive federal control of foreign affairs, and dismissed the CalCCP section 354.6 claims.[74]

The Ninth Circuit Court of Appeals agreed that CalCCP section 354.6 was unconstitutional, but on a narrower consideration of the foreign affairs doctrine.[75] Following the lower court's reasoning, the Ninth Circuit Court of Appeals stated that the Constitution had allocated the foreign affairs power exclusively to the federal government.[76] The court then focused on the power to make and resolve war, which it found "central to the foreign affairs power in the Constitutional design."[77] Therefore, the foreign affairs power unconstitutionality arose from the statute's invasion of the exclusive power of the federal government "to make and resolve war, including the procedure for resolving war claims."[78]

The foreign affairs power doctrine, incidentally, should not be confused with preemption, which is a judicial doctrine whereby federal legislation may preempt state law.[79] Preemption may occur even if a federal law does not expressly contradict state law, so long as Congress intends the federal statute to occupy a certain area of policy.[80] CalCCP

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72. The decision cites the following statement by the bill's author, State Senator Tom Hayden, as evidence of that intent:

> [CalCCP section 354.6] sends a very powerful message from California to the U.S. government and the German government, who are in the midst of rather closed negotiations about a settlement. . . . If the international negotiators want to avoid very expensive litigation by survivors as well as very bad public relations for companies like Volkswagen and Ford, they ought to settle. . . . Otherwise, this law allows us to go ahead and take them to court.

Id. at 1173-74 (quoting Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, L.A. TIMES, July 29, 1999, at A3).

73. *Forced Labor*, 164 F. Supp. 2d at 1173-76.

74. *Id.* at 1177-78.

75. Deutsch v. Turner Corp., 317 F.3d 1005, 1023 (9th Cir. 2003) ("Although we agree that section 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. We hold that section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.").

76. *Id.* at 1020.

77. *Id.* at 1025.

78. *Id.*

79. *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

80. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, which states:

> Even without an express provision for preemption, we have found that state law must yield to

section 354.6 does not conflict with any federal legislation, so the preemption doctrine is not germane to CalCCP section 354.6 claims.[81]

B. ATCA and Violations of International Human Rights

Having disposed of CalCCP section 354.6, the *Forced Labor* court turned to the Alien Tort Claims Act, the other major basis for the plaintiffs' claims.[82] Although originally adopted in 1789, the statute in its present form declares that the federal district courts 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."[83] The violation of the law of nations (i.e., international law) must be of a "specific, universal and obligatory" international norm.[84] If that is the case, the statute provides both federal jurisdiction and a cause of action.[85]

Before 1980, only twenty-one cases invoked jurisdiction under ATCA. No one, including human rights advocates, paid much attention to it.[86] In 1980, however, a victim of crimes against humanity in Paraguay used the statute successfully in a U.S. federal court.[87] Dr. Joel Filartiga, a Paraguayan physician who arrived in the United States in 1978, alleged that Americao Peña-Irala was responsible for the torture and killing of Filartiga's 17-year-old son. Filartiga initiated legal action in Paraguay, but his attorney was arrested, threatened with death by Peña-Irala, and disbarred without just cause. In 1979, authorities discovered that Peña-Irala was living in the United States, and they held him for deportation. Filartiga served a summons on Peña-Irala for wrongfully causing his son's death, and sought to have the deportation enjoined to ensure Peña-Irala's availability for trial. Filartiga brought the legal action principally under ATCA.[88]

A lower court dismissed the complaint for lack of subject matter jurisdiction, and during the appeal, Peña-Irala was deported back to Paraguay. The Second Circuit soon reversed that decision in favor of Filartiga, and found ATCA applicable in its provision for federal court

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a Congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.

81. *See* Zschernig v. Miller, 389 U.S. 429, 433 (1968).

82. *Forced Labor*, 164 F. Supp. 2d at 1178.

83. 28 U.S.C. § 1350 (2000). ATCA is also known as the Alien Tort Statute and the Alien Tort Act. *Id.*

84. *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984); Filartiga v. Peña-Irala, 630 F.2d 876, 881 (2d. Cir. 1980).

85. *See Unocal II*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000).

86. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT'L. L. & POL., 1, 4-5 n.15 (1985).

87. *See Filartiga*, 630 F.2d at 876.

88. *See id.* at 879.

jurisdiction.[89] The court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, [section] 1350 provides federal jurisdiction."[90] The court further instructed that future courts "must interpret international law not as it was in 1789, but as it has evolved and exists today among the nations of the world. . ."[91] On remand, Peña-Irala took no part in the case, and the court awarded punitive damages of $5 million each to Filartiga and his daughter. They never collected the judgment.

In the twenty years since *Filartiga*, ATCA has been used in several dozen U.S. human rights actions.[92] Nevertheless, it remains unclear how useful the statute is or will be in enforcing international human rights claims; a Supreme Court decision on the issue could help to clarify matters.[93] A practical concern, for example, continues to be the difficulty in collecting damage awards.[94] In addition, it remains unclear how often federal courts will burden ATCA-based human rights claims under discretionary judicial doctrines (which will be discussed *infra* Section III) such as international comity; *forum non conveniens*; sovereign immunity; act of state; color of law (or state action); and political question.

As for the Korean and Chinese forced laborers, their ATCA claims failed to overcome the court's application of the statute of limitations and equitable tolling doctrines. In step with several recent dismissals of ATCA actions based on historic wrongs, the *Forced Labor* court first declared that the corporations' forced labor practices were undoubtedly in violation of customary international law, and found that the violations provided the

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89. *See id.* at 878.

90. *Id.*

91. *Id.* at 881; *see also* Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).

92. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232; *and* Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995). *See also* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1049 (2d ed. 2000). Regarding the numbers of ATCA cases, see Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485, 485 (2001).

93. *See* Tel-Oren v. Libyan Arab Republic, , 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court.").

94. *See* Charles Curlett, *International Law Weekend Proceedings, Introductory Remarks–Alien Tort Claims Act*, 6 ILSA J. INT'L & COMP. L.Q. 273, 274 (2000) ("Although [ATS litigation has] generated two billion dollars in damage awards, none has been collected."); *see also* Shirin Sinnar, Book Note, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 38 STAN. J. INT'L L.331, 332 (2002) (noting, on the subject of ATCA law suits, that while "obtaining redress from perpetrators is often cited as an objective of transnational human rights cases, few claimants actually receive compensation even after a favorable judgment").

plaintiffs with a basis for their ATCA claims.[95] The court then turned to the issue of the statute of limitations, and found in favor of the defendants on the issue.

C. Statute of Limitations

The application of statute of limitations and tolling doctrines to human rights claims under ATCA requires a deep examination into the nature and origins of the doctrines. It is useful to keep in mind four uncontroverted facts about ATCA and international law: ATCA actions are for torts committed in violation of international law;[96] ATCA does not itself contain a statute of limitations;[97] international law is a part of federal common law;[98] and international law does not establish definite statutory limitations for international law violations, but rather takes a case-by-case approach.[99]

In apparent conflict with this last concept of a case-by-case approach, U.S. courts have set concrete statute of limitation rules for alleged ATCA violations. The courts justify the rules on grounds of fairness and on the belief that, when ATCA is understood as a federal statute granting a right of action, it is appropriate to use the normal federal rules that establish time limitations for the laws that do not include their own stated statute of limitations.[100] In *Forti v. Suarez-Mason*, the Northern District of California made the decision not to use international law as its limitations guide.[101] The court explained that the statutory scheme for redressing international law violations does not indicate that Congress intended to use a case-by-case approach to determine the timeliness of claims brought under ATCA.[102] The court further reasoned that "[a]dopting such a rule would be tantamount to permitting the federal claim to be brought at any time. Such a rule has repeatedly been rejected by the United States Supreme Court as 'utterly repugnant to the genius of our laws.'"[103]

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95. *Forced Labor*, 164 F. Supp. 2d at 1179.

96. *See* 28 U.S.C. § 1350 (2000).

97. *Id.*; *see also* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1547 (N.D. Cal. 1987) ("Congress did not provide a statute of limitations for claims brought pursuant to 28 U.S.C. § 1350.").

98. *See Tel-Oren*, 726 F.2d at 810 (Bork, J., concurring) (citing *The Paquete Habana*, 175 U.S. 677 (1900), which states that "[i]nternational law . . . is part of the common law of the United States. This proposition is unexceptionable."); *see also Forti*, 672 F. Supp. at 1544 ("It has long been settled that federal common law incorporates international law.")

99. *See Forti*, 672 F. Supp. at 1547 ("There is no statute of limitations under international law," which takes a "case-by-case approach to determining the timeliness of claims"); *see also* John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1900 (1985) ("In international law, of course, there is no statute of limitations. . . .").

100. *See Forced Labor*, 164 F. Supp. 2d at 1179-80 (describing the usual federal "statute borrowing" procedure).

101. *See Forti*, 672 F. Supp. at 1540.

102. *See Forti*, 672 F. Supp. at 1547.

103. *Id.* (quoting Adams v. Woods, 6 U.S. 336, 341 (1805)).

However, rather than interpret ATCA as granting a right of action, it may be more historically accurate to understand it as allowing an already existing substantive right of action to be exercised in a new venue, namely, the federal courts.[104] ATCA's framers expected that federal courts, when compared to state courts, would be more consistent and less biased toward foreigners.[105] The measure, after all, only added to—it did not replace—a right of action in the state courts.[106] State courts today still retain jurisdiction over cases concerning the citizens of other countries and torts under international law.[107] For example, such was the case in *Forced Labor*, wherein the plaintiffs advanced CalCCP section 354.6 claims and other state tort claims.[108] This right to make an international law-based tort claim in state court arises not from any state statute or constitutional provision, but from the inclusion of the law of nations into common law, during America's colonial period.[109] If the right of action assumed in

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104. Note that *Filartiga* reads ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." Filartiga v. Peña-Irala, 630 F.2d 876, 887 (2d. Cir. 1980). Referring to the above passage from *Filartiga*, the court stated that "It construed this phrase to mean that aliens granted substantive rights under international law may assert them under [section] 1350. This conclusion . . . results in part from the noticeable absence of any discussion in *Filartiga* on the question whether international law granted a right of action." *Tel-Oren*, 726 F.2d at 780 n.5 (D.C. Cir. 1984) (Edwards, J., concurring); *see also Filartiga*, 630 F.2d at 885 ("The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.").

105. *See Tel-*Oren, 726 F.2d at 782-83; *see also* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L. & COMP. L. REV. 221 (1996) (writing that the factors motivating provision of the alien tort statute include "a desire for uniformity in the interpretation of the law of nations, and a fear that state courts would be hostile to alien claims").

106. District court jurisdiction under the Alien Tort Clause is "concurrent with the courts of the several States, or the circuit courts, as the case may be." Dodge, *supra* note 105, at 225 (quoting Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789)).

107. *See* Anthony D'Amato, Editorial Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L. L. 62, 65 (1988); *see also* Taiheiyo Cement, 105 Cal. App. 4th 398 (Ct. App. 2003) (involving the same allegations as those in *Forced Labor*); John Roe III v. Unocal Corp., 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (involving the same allegations as *Unocals I, II*, and *III*).

108. *Forced Labor*, 164 F. Supp. 2d at 1182. The state law claims that Korean and Chinese plaintiffs alleged included (1) false imprisonment; (2) assault and battery; (3) conversion; (4) unjust enrichment and quantum meruit; (5) constructive trust; and (6) violations of California law prohibiting involuntary servitude. *Id.* ATCA suits do not stumble on this doctrine, since that statute expressly provides a federal forum for alien tort suits, which therefore do not need to have minimum contacts with the federal forum. *Id.*

109. *See* Dodge, *supra* note 105, at 232 ("[T]he law of nations . . . [is] adopted in it's [sic] full extent by the common law, and is held to be a part of the law of the land . . . . [in early post-revolutionary America], violations of the law of nations were widely recognized as common-law crimes . . . [and torts] were the civil counterparts of crimes . . . The important point is that in 1789 neither crimes nor torts in violation of the law of nations required positive legislation to be actionable; both were cognizable at common law."); *see also Forced Labor*, 164 F. Supp. 2d at 1182 (regarding the contention that ATCA establishes only jurisdiction and not a cause of action); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825 (1989) ("American revolutionaries held as a fundamental article of faith that the colonists were entitled to the protection of the common law. . . . In the early years of the American Republic, federal judges, leading political figures, and commentators commonly stated that the law of nations was part of the law of the United

ATCA comes from the law of nations, it is reasonable to ask why the law of nations does not regulate the statutory limitations of a right of action that derives therefrom.[110] The court in *Forti* did not address this argument.

It is widely held by international law scholars and jurists that there should be no statutory limitations applied to international law violations, or at least to the subset of crimes against humanity that includes slave labor. Numerous scholars positively state that there are no such limitations.[111] These statements are founded on an understanding that the International Military Tribunal at Nuremberg and the UN Charter value the "primacy of international law" above that of national law in matters involving war crimes and other crimes against humanity.[112] Consequently, it seems odd for national law to be able to extinguish a legal obligation imposed by international law with a domestic statute of limitations.[113]

Despite the assertions and arguments by international commentators, there was a lack of certainty in the late 1960s regarding the statutory limitations matter. This uncertainty compelled the United Nations to convene and to adopt a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[114] As of

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States.").

110. *See Filartiga*, 630 F.2d at 887 (regarding ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law"). The rules of international law regarding statutory limitations would seem to be an internal component of those "rights already recognized by international law." *Id.*

111. *See, e.g.*, Theo van Boven, *The Administration of Justice and the Human Rights of Detainees*, U.N. ESCOR, 48th Sess., Annex 1, Agenda Item 10, at 4, U.N. Doc. E/CN.4/Sub.2/1996/17 (1996) ("civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations"); *see also* M. Cherif Bassiouni, *Accountability for International Crime and Serious Violation of Fundamental Human Right International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 65-66 (1996) (stating that recognition of certain international crimes as jus cogens "carries with it the duty to prosecute or extradite [and] the nonapplicability of statutes of limitation for such crimes. . ."); Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L. L.J. 321, 369 (1994) ("There is no statute of limitations on crimes against humanity."); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2045 (1997) ("The crime against humanity is . . . exempt from traditional jurisdictional principles limiting the prosecution of ordinary crimes, such as territoriality and the passage of time."); Mark E. Wojcik et al., *International Legal Developments in Review: 1999 International Human Rights*, 34 INT'L. L. 761, 765 (1999) (stating that genocide and other crimes against humanity do not have a statute of limitations). A jus cogens norm, as defined in the Vienna Convention on the Law of Treaties, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Siderman de Blake v Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992).

112. Leila Nadya Sadat, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 259 (2001). Sadat states that the Charter "essentially abolished the defense of superior orders, and was explicit in rejecting municipal law as a defense to an international crime. The Nuremberg principles were adopted in a resolution by the United Nations General Assembly in 1946, and have not been seriously questioned since." *Id.*

113. *See id.*

114. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes

December 31, 1997, forty-three nations had signed the Convention.[115] One scholar suggested this "widespread adoption" of the Convention lays to rest any lingering doubt as to whether certain international crimes might have a statute of limitations.[116] In a world of nearly 200 nations, however, it could be argued that adoption of statutory limitations has been widely resisted.

Although the United States has not signed the Convention, from the relevant UN General Assembly proceedings, it appears that the United States did support the principle of no statutory limitations. *Handel v. Artukovic*, a 1985 Ninth Circuit decision dismissing civil claims brought against a former minister of Nazi-era Croatia, characterized the U.S. delegation to the General Assembly as largely in agreement with the original purposes of the convention.[117] The reasons that the U.S. delegation listed for opposing the draft convention, states *Handel*, suggest that the United States had no reservations about those initial purposes.[118] Thus, explained the court, though the United States did not sign the Convention, "it appears to recognize the principle that a statute of no limitation should be applied to the criminal prosecution of war crimes and crimes against humanity."[119] However, *Handel* distinguished statutory limitations appropriate for criminal violations from those appropriate for civil actions; this was a significant distinction for the *Forced Labor* civil action. The *Handel* court reasoned that criminal statutes of limitations "are equivalent to acts of amnesty, [so] the length of the statute of limitations bears a necessary relation to the heinousness of the crime," whereas statutory limitations for civil violations are procedural rather than substantive considerations.[120] For civil violations, statutory limitations ensure that a plaintiff has a reasonable amount of time to present a claim, but also protect against loss of evidence and unreasonably delayed, stale, or fraudulent claims.[121] Considering these factors, the *Handel* court stated:

> [P]laintiffs' international law claims should have a shorter rather than a longer limitations period. . . . While defendant's alleged activities shock the conscience, the gravity of this conduct does not play the role in civil limitation statutes that it fulfills in criminal statutes. Criminal prosecutions of crimes against humanity should be and are subject to a

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Against Humanity, *adopted and opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73.

115. United Nations, Multilateral Treaties Deposited with the Secretary-General 165 (1998).

116. *See* Sadat, *supra* note 112, at 259-60.

117. *See* Handel v. Artukovic, 601 F. Supp. 1421, 1430 (1985) (citing Press Release, United States Delegation to the United Nations (UN), US-UN 220 (Nov. 26, 1968). The original purposes of the convention were: (1) to clarify that under international law, no statutory limitations are applied to war crimes and crimes against humanity, and (2) to institute a new international law rule by obligating states who signed the convention to abolish domestic statutes of limitation applicable to crimes against humanity and war crimes). *Id.*

118. *See id.*

119. *Id.*

120. *Id.*.

121. Handel, 601 F. Supp. at 1431.

statute of no limitations; but civil actions cannot be subjected to this rule under American law.[122]

The *Handel* reasoning helps to explain the federal courts' widespread adoption of statutory limitations for civil actions brought under ATCA. In such cases, federal courts attempt to apply the "most closely analogous statute of limitations under state law."[123] There is a narrow exception to this rule, however, when a federal statute is more closely analogous than any available state statute of limitation, and "the federal policies at stake and the practicalities of litigation make the [federal statute] a significantly more appropriate vehicle for interstitial lawmaking."[124]

The 1991 enactment of the Torture Victim Protection Act (TVPA), which passed as a statutory note to ATCA and was directed at international incidents of torture and extrajudicial killing,[125] created a ten-year statute of limitations and made finding the applicable federal statute in an ATCA case "a relatively straightforward task."[126] Guided by growing federal precedent,[127] and by the similarities between slave labor and the international law violations at which the TVPA is directed, *Forced Labor* applied the TVPA statute of limitations to the ATCA claims.[128] Because both the TVPA and ATCA regulate international law violations, the court found that the TVPA was a much closer analogy to ATCA than was any state law, and thus imported the TVPA's ten-year statute of limitations.[129]

D. Tolling Doctrine

It is conceivable that the *Forced Labor* claimants might have found relief in statutory limitations from equitable tolling rules,[130] which suspend the running down of such statutes. Although the Supreme Court has yet to impose its own, definitive interpretation of the tolling doctrine, it has established general rules to guide federal courts.[131] Specific rules vary

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122. *Id.*; *see also* Marilyn Hutton, The Am. Soc'y of Int'l Law, Panel Session: *Permissible Measures and Obligations for Outside States and Internal Peoples Toward Minority Rule in South Africa*, 80 AM. SOC'Y. INT'L. L. PROC. 308, 324 (Apr. 9-12, 1986) (quoting Jordan J. Paust's criticism of the *Handel* court's reasoning).

123. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 152 (1983).

124. Reed v. United Transp. Union, 488 U.S. 319, 324 (1989) (quoting *DelCostello*, 462 U.S. at 172). Judges do interstitial lawmaking when they remedy gaps or incompleteness in an existing law. *See* Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

125. *See* 28 USC § 1350.

126. *Forced Labor*, 164 F. Supp. 2d at 1180; 28 USC § 1350.

127. *See, e.g.*, Papa v. U.S., 281 F.3d 1004, 1012 (2002), Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 462 (D.N.J. 1999); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 192-93 (D. Mass. 1995).

128. *Forced Labor*, 164 F. Supp. 2d at 1180.

129. 28 USC § 1350, note § 2(c).

130. *See, e.g.*, Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 135 (E.D.N.Y. 2000) ("This Court, under its powers in equity, finds that application of the equitable tolling provisions is merited in this case.").

131. *See, e.g.*, Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) (resolving the "reasonable

among the circuits, but most require both plaintiffs' reasonable diligence in attempting to discover their claims and defendants' active fraud in attempting to prevent such discovery.[132]

In the Ninth Circuit, equitable tolling is available when "(1) defendant's wrongful conduct prevented plaintiff from asserting the claim; or (2) extraordinary circumstances outside the plaintiff's control made it impossible to timely assert the claim."[133] Applying the court's construction of the equitable tolling doctrine in *Hilao v. Estate of Marcos,* which arose from a civil action against the estate of former President of the Philippines, Ferdinand Marcos, the Ninth Circuit concluded that extraordinary circumstances outside the plaintiffs' control created an intimidating atmosphere and real fear of reprisal.[134] The Ninth Circuit concluded that the plaintiffs' claims against Marcos for torture, disappearance, and summary execution were equitably tolled until he was removed from office.[135]

The Second Circuit applied more plaintiff-friendly equitable tolling standards in *Bodner v. Banque Paribas*, an ATCA case against French banks accused of expropriating Jewish customers' assets during the Nazi period.[136] Deciding that plaintiffs were "kept in ignorance of vital information necessary to pursue their claims without any fault or lack of due diligence" on their part, the court ruled that the statute of limitations period would be equitably tolled "during a defendant's fraudulent concealment of facts that would alert the plaintiff to the plaintiff's claim."[137]

Bodner also applied the continuing violation doctrine, which allows the statute of limitations to accrue when there is a continuing wrong, but only from the date of the last wrongful act.[138] The Second Circuit found that the defendants' actions, if proven, would qualify as a continuing violation of international law, because the plaintiffs had asserted continuing denial of assets and frustration of their efforts to recover funds and information from the defendant banks.[139]

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diligence" rule in two contexts, but refusing to resolve a variety of other differences among the district courts regarding statutes of limitation and equitable tolling rules).

132. *See Iwanowa*, 67 F. Supp. 2d at 467 ("To avoid dismissal, a complaint asserting equitable tolling must contain particularized allegations that the defendant 'actively misled' plaintiff.").

133. Doe I v. Unocal Corp., 963 F. Supp. 880, 897 (C.D. Cal. 1997) [hereinafter *Unocal I*].

134. Hilao v. Estate of Ferdinand Marcos, 103 F.3d 1467 (9th Cir. 1996).

135. *Id.* at 1472-73.

136. *Bodner*, 114 F. Supp. 2d 117.

137. *Id.* at 135.

138. *Id.* at 134 (citing U.S. v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995), which holds that "the limitations period for a continuing offense does not begin until the offense is complete").

139. *Id.* at 134-35.

Although the Ninth Circuit applies the continuing violations doctrine in a variety of contexts,[140] the Korean and Chinese forced laborers did not ask the court in *Forced Labor* to invoke the doctrine. Had the plaintiffs made the argument, the court might have considered whether the excess corporate profits from slave labor were analogous to the expropriated bank accounts in *Bodner*. Additionally, the *Forced Labor* court might have concluded that, as in *Bodner*, the defendants continued to benefit from the surplus financial capital resulting from the slave labor.In this way, under *Bodner*'s rules, the *Forced Labor* court might have been able to allow plaintiffs to use the continuing violations doctrine to overcome the statue of limitations, even without evidence of deliberate concealment of the practice of forced labor by the defendant Japanese corporations.[141]

The *Forced Labor* court noted that the Korean and Chinese forced laborers did not assert reasons as to why their claims could not have been brought under ATCA within ten years of the war's end; nor did the plaintiffs offer reasons as to why statutory limitations should have been equitably tolled after the war.[142] The court concluded against the application of equitable tolling, and held that the plaintiffs could have brought their claims within the ten years after the alleged injuries, but failed to do so. The court then dismissed the claims as time-barred.[143] In sum, the court dismissed claims based on CalCCP section 354.6 because the statute was an unconstitutional intrusion into the federal government's exclusive foreign affairs power, and disposed of the ATCA claims on statute of limitation grounds.

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140. *See, e.g.*, Douglas v. Cal. Dep't of Youth Auth., 271 F.3d 812 (9th Cir. 2001) (invoking continuing violations doctrine for concealing of employment discrimination); Fed. Election Comm'n v. Williams, 104 F.3d 237 (9th Cir. 1996) (invoking continuing violations doctrine for concealment of campaign contribution violations); UA Local 343 United Ass'n of Journeymen & Apprentices of Plumbing v. Nor-Cal Plumbing, Inc., 48 F.3d 1465 (9th Cir. 1994) (invoking continuing violations doctrine for misleading union regarding illegal "double breasting").

141. *See Bodner*, 114 F. Supp. 2d 117. Regarding the concealment element as applied to the *Forced Labor* case, see Goode, *supra* note 21. Relevant to the concealment requirement of equitable tolling, the article alleges that Japanese corporate heads destroyed evidence relating to POW forced labor camps, and that U.S. authorities told a former U.S. prisoner of war and slave laborer to hide photographic evidence of the camps. *See also* Clark, *supra* note 13; Lawyer Challenges, *supra* note 21.

142. *See Forced Labor*, 164 F. Supp. 2d at 1181.

143. The Korean and Chinese plaintiffs do not assert reasons as to why their claims could not have been brought under the ATCA within ten years of the war's end. Their reference to the Japanese government's alleged suppression of similar claims brought by Korean forced laborers in Japan shortly after the war does not explain why the same claims could not have been alleged in a U. S. court. *Id.* at 1181. The court also found that applicable statutes of limitations barred claims based on other California statutes. *Id.* at 1182-83.

III. OBSTACLES RELATED TO ATCA THAT DID NOT ARISE IN *FORCED LABOR*

ATCA claims can also be obstructed by a number of other judicial doctrines that did not arise in *Forced Labor*. This Section aims to explore the following such judicial doctrines: international comity; *forum non conveniens*; state action or color of law; sovereign immunity; the act of state doctrine; the political question doctrine; and entity law and limited liability.

A. International Comity

The doctrine of international comity is a judicial tradition based on respect for sovereignty. This is a discretionary doctrine that a court may use to decline jurisdiction in international cases out of respect for the actions and laws of another nation, which are weighed against U.S. international convenience and duties, and against consideration for the rights of nationals and others under protection of its law.[144] In recent years, the Supreme Court has greatly limited the doctrine as a bar to claims against international actors, who often are those bringing ATCA actions. The Court has stated that the international comity doctrine should not be applied unless there is a true conflict between U.S. and foreign law.[145] Such a conflict exists only when a person subject to regulation by two nations is required by the laws of one to act in a fashion prohibited by the laws of the other.[146] Lower courts have consistently ruled that it is inappropriate to bar claims on international comity grounds if defendants cannot point to a conflicting "legislative or judicial statement of policy of a foreign state or court."[147]

International comity rulings also determine whether redress is actually available in another nation's forum. *Bodner* ruled that the application of international comity doctrine was incongruous because, among other reasons, "no existing French law or policy" provided adequate redress for plaintiffs' claims.[148] The *Bodner* court also reiterated the principles of comity, while distinguishing its own set of facts from an earlier Second Circuit ruling that dismissed Nazi-era forced labor claims against German corporations:

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144. *Bodner*, 114 F. Supp. 2d at 129.

145. Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

146. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403, cmt. e).

147. *Bodner*, 114 F. Supp. 2d at 129.

148. *Id.* at 130.

> Unlike the situation in *Iwanowa*,[149] international comity considerations do not block plaintiffs from going forward; traditional judicial deference to a signatory nation's interpretation of a treaty and judicial non-interference with a foreign sovereign's pronouncement of its law, the principles which merited dismissal in *Iwanowa*, are not issues in this case. Since Germany had explicitly taken the position that foreign citizens cannot assert direct claims for wartime labor against private companies, that court was bound to act with "respect for the acts of our fellow sovereign nations" and their pronouncements of their law.[150]

In contrast to *Bodner*, *Iwanowa* explains the circumstances when a discretionary international comity dismissal might be granted: when a foreign state explicitly makes law regarding certain claims and U.S. courts are used to avoid that law.[151] In such a case, international comity doctrine might be applied out of a respect for another state's sovereignty, notwithstanding what may seem to be either delivery of inadequate individual redress, or no delivery of any redress.[152]

If their ATCA claim had not run aground on statutory limitations, the *Forced Labor* slave laborers may have met resistance on international comity grounds. In that case, the history of World War II-era forced labor claims in the Japanese courts might have come to the forefront. Like the plaintiffs in *Bodner*, the *Forced Labor* plaintiffs hoped that a U.S. court would find Japanese law or policy inadequate for redress.

B. Forum non conveniens

Defendants have also used *forum non conveniens* motions to dismiss ATCA actions in U.S. courts.[153] The *forum non conveniens* doctrine, like

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149. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999)424 (dismissing claims because they offended the principles of international comity, were time-barred by statutory limitations, and raised non-justiciable political questions). Elsa Iwanowa sought compensation and damages for forced labor during World War II at Ford's factory. *Id* at 433-34. The German military abducted her at age 17 in Rostov, U.S.S.R., and transported her to Germany. *Id.* There, an agent of Ford's German subsidiary, Ford Werke, purchased her. *Id.* Iwanowa was transported to Ford's factory in Cologne, where she worked for three years at heavy labor without pay. *Id.* She and her sixty-five co-workers, all deported from the Ukraine, were crowded and locked each night into their living quarters, which was a wooden hut lacking heat, sewage facilities, and running water. *Id.* Her supervisors would use rubber truncheons to beat laborers who failed to meet production quotas. *Id.*

150. *See Bodner* at 129, n.9.

151. *See Iwanowa*, 67 F. Supp. 2d at 490-91.

152. At the time of trial, none of Ford Werke's forced laborers, including Iwanowa, had ever received compensation. *See id.*, 67 F. Supp. 2d at 434. Then, in 2000, those of Germany's forced laborers who had survived were to be modestly compensated under the United States–Germany Agreement Concerning the Foundation "Remembrance, Responsibility and the Future." *See U.S.–Germany Agreement, supra* note 18; *see also* Vagts & Murray, *supra* note 17 ("[P]ersons subjected to the worst conditions, namely laborers who were assigned from or who worked in a concentration camp, are to receive $7,500; those who worked in less degrading conditions will receive $2,500 each. Only survivors themselves are eligible for payments.").

153. *See, e.g.*, Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001); Torres v. S. Peru Copper Corp., 965 F. Supp. 899, 903 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997) (finding

the international comity doctrine, is discretionary and permits a court to dismiss a claim even when the claim is in a permissible venue and the court has proper jurisdiction.[154] In order to win a *forum non conveniens* motion, the defendant must demonstrate that an "adequate alternative forum" is available to the plaintiffs and that public and private interests support trial in the non-U.S. forum.[155] The adequate alternative forum requirement is normally satisfied when the defendant is amenable to process in the other jurisdiction and the remedy offered by the alternative forum is satisfactory.[156] For example, the requirement is unmet if the alternative forum does not permit litigation of the case's subject matter.[157]

When the defendant demonstrates an adequate alternative forum, a court weighs the private and public interest factors and determines whether "the balance of conveniences" favors trial in the alternative forum.[158] In *Gulf Oil Corp. v. Gilbert*, The Supreme Court listed many of the private interest factors a court should weigh.[159] The Court also provided several examples of public interest factors a court might need to consider.[160]

Courts also grant U.S. citizens and legal resident plaintiffs greater deference when they choose a U.S. forum, on the reasonable assumption that their choice is convenient.[161] For the foreign plaintiff, however, the Supreme Court noted in *Piper Aircraft Co. v. Reyno* that "this assumption is much less reasonable . . . [b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."[162] The Second Circuit fine-tuned this deference in *Iragorri v. United Techns. Corp.*,[163] fashioning a "sliding scale" for forum deference and stating that, as the "bona fide connection" between the lawsuit or plaintiff and the United States and the

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Peru to be an adequate alternative forum). For an argument against the application of *forum non conveniens* to international human rights cases, see Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L. L. 41 (1998).

154. *See* P.T. United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir.1998); *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

155. *See Bodner*, 114 F. Supp. 2d at 131 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)).

156. *See Gilbert*, 330 U.S. at 506-07. Public and private interest factors will be reviewed shortly.

157. *See Piper Aircraft*, 454 U.S. at 255.

158. *See id.* at 256.

159. *See* Gilbert at 508 (1947). These factors included: ease of access to evidence; ability to compel testimony from unwilling witnesses, and the cost of obtaining attendance at trial of willing witnesses; ability to view, when it is appropriate, the locations of alleged crimes or torts; practical considerations regarding the ease, expeditiousness and expensive of a trial; ability to enforce a judgment; and the chances of obtaining a fair trial and the degree of that fairness. *Id.*

160. *See id.*; *see also Piper Aircraft*, 454 U.S. at 255-56.

161. *See Piper Aircraft*, 454 U.S. at 255-56; *see also* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99-100 (2d Cir. 2000) (reversing the district court and stating that "in balancing the competing interests, the district court did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations").

162. *Piper Aircraft*, 454 U.S. at 256.

163. 274 F.3d 65 (2d Cir. 2001).

chosen forum increases, and as the convenience factors increasingly favor bringing the lawsuit in the chosen forum, it becomes less likely that the defendant will gain dismissal for *forum non conveniens*.[164] Only after it established a degree of deference to the plaintiff's choice of forum, based on the bona fide connection, did the *Iragorri* court apply the adequate alternative forum and balance of conveniences tests.[165] Generally, the court's deference will be lessened when the plaintiff's forum choice is made more for "forum-shopping" purposes than for valid legal reasons.[166]

Because of lesser deference to foreign resident plaintiffs, the interest-balancing test can be a major impediment to ATCA actions. For example, in *Aguinda v. Texaco, Inc.*,[167] the District Court of New York found that factors such as ease of access to evidence, legal costs, and local interest or familiarity in the case outweighed the presumption in favor of the plaintiffs' desire to try the case in the United States. The court stated that it was "preposterous" to think that a New York federal jury was better prepared "than an Ecuadorian judge to apply Ecuadorian law to Spanish-language testimony and documents relating to 30 years of activity by an Ecuador-sponsored Consortium in an Amazonian rain forest."[168]

However, if a plaintiff can demonstrate that the country where the alleged rights violation took place is an inadequate forum because of the threat of violence against the plaintiff or a corrupt legal system, the plaintiff typically will prevail on *forum non conveniens*.[169] Even in such cases, the appraisal of the alternative forum and the balance of public and private interest factors are subjective processes, and a court's application of discretionary doctrines may be affected by biases for or against particular plaintiffs or defendants.[170]

The Korean and Chinese plaintiffs in *Forced Labor* are U.S. citizens or residents, as are the California-based subsidiaries of Japanese corporations. Therefore, the issue of *forum non conveniens* did not arise.

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164. *See id.* at 71.

165. *See id.* at 72.

166. *See* at 71-72.

167. 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

168. *Id.* at 553. Foreign plaintiffs will be looked on with particular lack of deference when tort judgments favorable to them are being awarded in their home country. *See id.* at 539 ("Rather remarkably, [the plaintiffs'] argument ignores the undisputed evidence that certain members of the putative Aguinda class . . . have already brought tort actions in the Ecuadorian courts, on some of the very claims here alleged, . . . and have, in some of these cases, obtained tort judgments in plaintiffs' favor."); *see also In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, 634 F. Supp. 842, 848-952 (S.D.N.Y.1986), *aff'd as modified*, 809 F.2d 195 (2d Cir.1987).

169. *See* Kadic v. Karadzic v. 70 F.3d 232, 250-52 (2d Cir. 1995) (reversing district court dismissal in part because no courts of the former Yugoslavia were available to address the plaintiffs' claims).

170. For example, the *Aguinda* plaintiffs felt the court was biased in favor of the defendants in the case, because an expenses-paid conference that the judge attended was sponsored by an organization that was, in turn, financially supported by Texaco, the defendant in the litigation. The Second Circuit dismissed a motion for Judge Rakoff's recusal. *Aguinda*, 241 F.3d at 198.

The many thousands of forced laborers who are not U.S. citizens or residents, however, may face the *forum non conveniens* obstacle if they decide to file ATCA claims against U.S.-based subsidiaries of Japanese corporations.

C. State Action or Color of Law

Although exceptions exist, most international law violations require state action as an element in an ATCA claim.[171] This is an additional obstacle to ATCA claims against non-state entities, such as the corporate defendants in the *Forced Labor* litigation.[172] The obstacle may be diminished, however, by the courts' recent usage of "color of law" jurisprudence to expand the scope of state action.[173] As the court explained in *Kadic v. Karadzic*,[174] color of law "is a construct extending state liability to an individual where that person 'acts together with state officials or with significant state aid.'"[175] For such an individual, color of law jurisprudence under 42 U.S.C. § 1983 is particularly instructive in determining whether a defendant's conduct amounts to "official action" for purposes of ATCA jurisdiction.[176]

Although the color of law jurisprudence involves the wrongful acts of private parties who are classified as state actors, in the ATCA context courts are also comfortable "reversing this scenario, relying on state action doctrine to link wrongful action by states to private parties somehow connected to the violation."[177] The Ninth Circuit employed such a role reversal in its 1997 decision, *Doe v. Unocal Corporation* ("*Unocal I*").[178] The case involved farmers from Tenasserim, Burma, who brought a class action suit against Unocal Corporation ("Unocal"), Total S.A. ("Total"),

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171. See ATCA wording in the text accompanying *supra* note 84. Regarding exceptions to the state action requirement, see *Unocal II*, 110 F. Supp. 2d at 1305 ("[T]he law of nations has historically been applied to private actors for the crimes of piracy and slave trading, and for certain war crimes."). *See also Kadic*, 70 F.3d at 239-44 (removing the state actor requirement from genocide and war crimes).

172. *See, e.g.*, *Unocal II*, 110 F. Supp. 2d 1294, 1307 (C.D. Cal. 2000); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 373-74 (E.D. La. 1997).

173. Color of law jurisprudence began with civil rights era legal actions that challenged, as state actions, nominally private deprivations of rights. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (finding a basis for relief under section 1983 when a police officer and employee of a private firm "reached an understanding" to violate plaintiff's constitutional rights); United States v. Price, 383 U.S. 787, 794 n.7 (1966) (stating that "[i]n cases under [42 U.S.C. section] 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment"). *But see* Collins v. Womancare, 878 F.2d 1145, 1148 (9th Cir. 1989) (finding that the Supreme Court had made a distinction between the color of law and state action concepts).

174. 70 F.3d 222.

175. Craig Forcese, Note, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487, 498 (2001) (quoting *Kadic*, 70 F.3d at 245).

176. *Kadic*, 70 F.3d at 245.

177. *See* Forcese, *supra* note 175, at 498.

178. *Unocal I*, 963 F. Supp. 880.

the Myanmar Oil and Gas Enterprise ("MOGE"), and the Burmese government's State Law and Order Restoration Council ("SLORC").[179] The farmers alleged that SLORC, through a state-owned oil and gas company, together with the other defendants, committed international human rights violations during work on the Yadana gas pipeline project, which was a joint venture of three defendants, Unocal, Total and MOGE.[180] Plaintiffs specifically alleged that the corporate defendants, through the SLORC military and police forces, had used the farmers as slave labor for the pipeline project.[181] *Unocal I*, however, was overturned in 2000 by *Doe v. Unocal Corporation* ("*Unocal II*"),[182] in which the court found the alleged conspiratorial link between the corporations and the Burmese military too weak to ascribe state action to the corporate defendants.[183] Finally, last year, in *Doe v. Unocal Corporation* ("*Unocal III*"), the Ninth Circuit Court of Appeals overruled *Unocal II* and again found a link between Unocal and the Burmese government sufficient to establish state action.[184] Nevertheless, *Unocal II* warns international human rights plaintiffs of the state action stumbling block to ATCA actions against private parties complicit in state actions that violate human rights.[185]

The Supreme Court, while recognizing its own inconsistencies on the issue, has sanctioned four tests to apply in determining the color of law issue.[186] In establishing joint action, which was critical in *Unocal I*, *II*, and *III*, courts examine whether private parties and state officials have acted together to commit a constitutional rights violation.[187] Courts find a joint constitutional rights violation if there is a "substantial degree of cooperative action" between state and private actors.[188] In *Unocal I*, for example, the plaintiffs alleged that Unocal and state officials were jointly engaged in forced labor and other human rights violations in furtherance of a pipeline project.[189] The court decided that the allegations were sufficient

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179. *Id.* at 883.

180. *Id.*

181. *See id.*

182. 110 F. Supp. 2d 1294.

183. *Id.* at 1306-07.

184. *See* John Doe I v. Unocal Corp., 10-15, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at *10-15 (9th Cir. Sept. 18, 2002) [hereinafter *Unocal III*]. The decision stated that aiding and abetting, under international law, is defined as a mens rea component of "actual or constructive 'knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime.'" *Id.* at *13-14 (discussing an actus reus component of "practical assistance or encouragement which has a substantial effect on the perpetration of the crime of, in the present case, forced labor") (internal citations omitted).

185. *See* Forcese, *supra* note 175, at 488-89.

186. *See* George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996) (identifying the four tests as nexus, state compulsion, public function, and joint action).

187. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995).

188. *Id.* at 1454 (citing Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989)).

189. *Unocal I*, 963 F. Supp. at 891.

to support subject-matter jurisdiction under ATCA.[190] However, during its review of court decisions related to joint action, the *Unocal I* court commented that "some courts have found that the joint action test requires that the state and private actors 'share a common, unconstitutional goal.'"[191] It was exactly this lack of a shared unconstitutional goal between Unocal and the Myanmar military that would later be central to the *Unocal II* reversal of the earlier decision.[192]

Many commentators considered *Unocal I* a victory for victims of human rights violations because the court recognized a "'knew or should have known' theory against a corporation that 'looked the other way' and that benefited from atrocious acts."[193] Human rights advocates saw the decision as a potential legal milestone marking the first time an American corporation would be held liable under ATCA for benefiting from human rights abuses.[194]

Unocal II delivered a blow to such hopes, while *Unocal III* revived them.[195] As a matter of international law, *Unocal II* sought to establish a much narrower interpretation of the joint action test.[196] For their acts to be classified as state actions, private parties such as corporations must not only conspire or participate with the state in violating international law, but must also exercise control over the actions of the state.[197] Relying on section 1983 case law, the court in *Unocal II* stated:

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190. *Id.*

191. *Id.* (quoting *Gallagher*, 49 F.3d at 1453).

192. *See Unocal II*, 110 F. Supp. 2d at 1306-07.

193. John Christopher Anderson, Respecting Human Rights: Multinational Corporations Strike Out, 2 U. Pa. J. Lab. & Emp. L. 463, 500 (2000) (quoting Gregory J. Wallance, *Linked to Slavery Doe v. Unocal Asks Whether American Companies Should Be Held Responsible for the Human Rights Abuses of the Foreign Governments that Are Their Business Partners*, in CORPORATE COMPLIANCE: CAREMARK AND THE GLOBALIZATION OF GOOD CORPORATE CONDUCT 1998, at 1207, 1210 (PLI Corp. Law & Practice Course Handbook Series No. B-1057, 1998)).

194. *Id.* at 494.

195. *See* Maria Ellinikos, *American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?*, 35 COLUM. J.L. & SOC. PROBS. 1, 12 (2001) ("As the Unocal case law reveals, all legal efforts to provide relief for the forced laborers in Burma thus far remain fruitless."). *But see* Sarah M. Hall, Note, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. Rev. 401, 433 (2002) ("[W]ith so few decided cases on point, [multinational corporations] cannot be confident that one victory for one corporation translates into blanket immunity for all."). The basic definition of an "MNC" or "multinational corporation" is a firm that invests abroad. *Id.* at 404.

Meanwhile, plaintiffs re-filed state law claims in the California Superior Court for the County of Los Angeles. In an August 2001 ruling, the court denied Unocal's motion to dismiss on collateral estoppel and federal preemption grounds, stating that the claims are based on California state law elements that differ greatly from those found in the federal law. *See* Terry Collingsworth, *Boundaries In The Field Of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 189 n.28 (2002).

196. *See Unocal II*, 110 F. Supp. 2d at 1305-06; *Unocal I*, 963 F. Supp. at 890 (citing *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

197. *See Unocal II*, 110 F. Supp. 2d at 1305-07. The appeals court applied a different standard for Unocal. *See Unocal III*, 2002 WL 31063976, at *10-15.

> [I]n order for a private individual to be liable for a section 1983 violation when the state actor commits the challenged conduct, the plaintiff must establish that the private individual was the proximate cause of the violation. . . In order to establish proximate cause, a plaintiff must prove that the private individuals exercised control over the government official's decision to commit the section 1983 violation.[198]

The Nuremberg Tribunal characterizations of joint action and complicity underpin *Unocal II*'s understanding of the joint action test.[199] The employment of the Nuremberg joint action test contrasts sharply with the exclusive focus of *Unocal I* on section 1983 litigation. According to *Unocal II*, the Nuremberg Tribunal rested its guilty verdicts of industrialists who used Third Reich slave labor "not on the defendants' knowledge and acceptance of benefits of the forced labor, but on their active participation in the unlawful conduct."[200] Defendants who "did not exercise initiative in obtaining forced labor" were acquitted.[201] In examining Unocal's actions, the court found the evidence suggested that Unocal had knowledge it was using and benefiting from the practice of forced labor.[202] However, guided by Nuremberg, the court ruled that such a showing was insufficient to establish liability under international law since Unocal did not actively seek the forced or slave labor.[203]

Commentaries have criticized the "active participation" standard for corporate complicity and the restricted joint action requirement set down in *Unocal II*,[204] arguing that there is substantial international precedent for employing a state action test that is broader than the joint action test that was relied upon.[205] In *Prosecutor v. Tadic*, for example, the Appeals

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198. *Unocal II*, 110 F. Supp. 2d at 1307 (citing Brower v. Inyo County, 817 F.2d 540, 547 (9th Cir. 1987)). *See also King v. Massarweh*, 782 F.2d 825, 829 (9th Cir. 1986).

199. *See Unocal II*, 110 F. Supp. 2d at 1309-10.

200. *Id.* at 1310. The *Unocal III* court criticized the lower court's use of the Nuremberg standard:

> The District Court incorrectly borrowed the "active participation" standard for liability from war crimes cases before Nuremberg Military Tribunals involving the role of German industrialists in the Nazi forced labor program during the Second World War. The Military Tribunals applied the "active participation" standard in these cases only to overcome the defendants' "necessity defense." In the present case, Unocal did not invoke – and could not have invoked – the necessity defense.

Unocal III, 2002 WL 31063976, at *10.

The Nuremberg tribunal defined the necessity defense as follows: "Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil." *Id.* at *10 n.21 (quoting United States v. Krupp, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1436 (1950)). The *Unocal III* court also stated that a reasonable fact finder might find Unocal liabile even if the "active participation" standard was to be applied. *Id.* at *10 n.22.

201. *Unocal II*, 110 F. Supp. 2d at 1310 (citing Krauch, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1193 (1952)).

202. *Id.* at 1310.

203. *Id.*

204. *See* Forcese, *supra* note 175, at 510-15.

205. *Id.* at 507.

Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") identified a circumstance in which attribution of individual actions to the state did not require substantial state involvement.[206] The court stated that, "When a State entrusts a private individual (or group of individuals) with the specific task of performing lawful actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State,"[207] there need not be substantial participation by the state in the non-state actors' violations of international law for the state to be liable ("substantial participation" understood by the court to be roughly analogous to *Unocal II*'s "active participation").[208] Thus, "by analogy with the rules concerning State responsibility for acts of State officials acting ultra vires,"[209] *Tadic* asserted that if the state specifically asks certain private individuals to act on its behalf, then the state becomes liable.[210]

However, *Tadic* attached the less substantial state involvement requirement only to organized and hierarchically structured military or paramilitary entities.[211] For individuals or groups not organized into military structures, there must either be "specific instructions or directives aimed at the commission of specific acts" or official approval of the acts, after they have taken place.[212]

The *Tadic* court did not justify the more substantial and specific requirement for non-military private parties, which may offer hope to ATCA human rights plaintiffs. If there is no justification for the differential treatment under international law, and U.S. courts apply international law when required (such as in ATCA cases), then courts may feel compelled to apply the *Tadic* test to private party defendants who are complicit with state violations of human rights. This appears to have taken place in *Unocal III*.[213] As a consequence, if courts begin to follow *Tadic*

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206. *See* Prosecutor v. Tadic, Judgment of the Appeals Chamber, ICTYIT-94-1-A (July 15, 1999), *available at* http://www.un.org/icty/tadic/appeal/judgement/index.htm; *see also* Prosecutor v. Tadic, ICTYIT-94-1, ¶ 688 (May 7, 1997), *available at* http:// www.un.org/icty/tadic/trials2/judgement/ index.htm. The *Unocal III* court applied *Tadic* and several other ICTY cases as it worked out an aiding and abetting standard for the case. *Unocal III*, 2002 WL 31063976, at *10-16 (citing *Tadic* and another ICTY case, Prosecutor v. Furundzija, IT-95-17/1 T (ICTY, Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999)).

207. *Tadic*, ICTY-94-1-A, at ¶119.

208. *See id.*

209. *Id.* "Ultra vires" refers to actions "beyond the scope of power allowed or granted by a corporate charter or by law." BLACK'S LAW DICTIONARY 1525 (7th ed. 1999).

210. *Tadic*, ICTY-94-1-A, at ¶119.

211. *Id.* at ¶120; *see Unocal III*, 2002 WL 31063976, at *12 (applying *Tadic*'s less substantial participation standard to its corporate defendants); Tadic, ICTY-94-1-A, at ¶ 688 (stating that an accomplice's actions have the required "[substantial] effect on the commission of the crime" in situations when "the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed.").

212. *Tadic*, ICTY-94-1-A, at ¶132.

213. *See Unocal III*, 2002 WL 31063976, at *12-16.

and *Unocal III*, they will rely less frequently upon one of the recurrent grounds for dismissal of ATCA claims, the joint action or complicity requirement between the private actor and public authority.[214]

As for the Chinese and Korean forced laborers, judicial proceedings have not reached the issue of complicity between the defendant corporations and the nation of Japan. Since the allegations involve conduct decades in the past, plaintiffs may have difficulty demonstrating liability in specific cases, especially under the Nuremberg Tribunal "active participation" standard.[215] The *Tadic-Unocal III* standard would be much more plaintiff-friendly.

D. Sovereign Immunity

Expressed in federal law in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), the sovereign immunity doctrine generally prevents private individuals from bringing ATCA actions against a state or state official.[216] FSIA bars suits against a foreign state, including its agencies and instrumentalities, subject to enumerated exceptions delineated in the Act.[217] With reference specifically to international law violations, the Supreme Court has drawn "the plain implication" that immunity under FSIA is granted for international law violations that do not come within the enumerated exceptions in the Act.[218] The FSIA exceptions relevant to human rights actions are Section 1605(a)(2), focusing on a state's engagement in commercial activities occurring in or having a direct effect in the United States,[219] and Section 1605(a)(5), addressing non-commercial torts that occur in the United States.

However, courts have allowed ATCA actions against a foreign sovereign acting outside the scope of official authority.[220] Acts outside the scope of authority include acts such as jus cogens violations of genocide, torture, and slavery, which violate a country's domestic laws.[221] The Ninth Circuit, in *In re Estate of Ferdinand Marcos*, allowed ATCA claims against former Philippines President Ferdinand Marcos for acts committed outside the scope of his official authority as President.[222] As the court explained,

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214. *See, e.g., Unocal II*, 110 F. Supp. 2d at 1310.

215. *Id.* at 1310.

216. 28 U.S.C. §1330 *et seq.* (2000).

217. 28 U.S.C. §§1605-07 (enumerating the exceptions).

218. Argentine Republic v. Amerada Shipping Corp., 488 U.S. 428, 436 (1989).

219. 28 U.S.C. § 1605(a) (2000). *But see* Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52, 63-64 (D.D.C. 2001) (attempting unsuccessfully to use this exception in an action against the Japanese government).

220. *See* Hilao v. Estate of Ferdinand Marcos, 103 F.3d 1467, 1470 (9th Cir. 1996); Andrew Ridenour, *Recent Development: Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act*, 9 TUL. J. INT'L. & COMP. L. 581, 588-89 (2001).

221. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 889 (2d. Cir. 1980).

222. *See Marcos*, 25 F.3d at 1472.

"Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA."[223]

Despite contentions that jus cogens norms offer a blanket exception to the FSIA, sovereign immunity doctrine concerns may have compelled the Korean and Chinese forced laborers to direct their litigation at parties complicit in the Japanese government's slave labor policy, rather than at the government itself. Fears of a sovereign immunity doctrine-based rejection of claims against government entities are well founded. In 2001, the D.C. Circuit preserved the Japanese government's sovereign immunity in the "comfort women" case, rebuffing the argument that violations of jus cogens norms constitute an implied waiver of the FSIA.[224] The Ninth District *Unocal III* decision also dismissed claims against the Burmese government and military on sovereign immunity grounds.[225]

E. Act of State Doctrine

The act of state doctrine, which prohibits U.S. courts from questioning the legality of state acts that a "recognized foreign sovereign power" commits within its own territory, presents another barrier for ATCA plaintiffs.[226] The doctrine arose from the Supreme Court's concern that its "engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[227] Recent formulations of the doctrine also reflect concerns over separation of powers.[228]

However, in practice, act of state doctrine does not preclude many ATCA claims because such suits typically allege clear-cut and egregious violations of international law that are not the official acts of the state concerned, nor part of the official mandate of the official committing the acts.[229] Hence, liability on the part of state officials might be found. Regarding torture, for example, the Ninth Circuit commented, "[t]hat states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens."[230] Infringement of a "jus cogens norm," an international norm that is "specific, universal, and obligatory,"[231] is the

223. *Id.*
224. *Joo*, 172 F. Supp. 2d at 60-61.
225. *Unocal III*, 2002 WL 31063976, at *17-20.
226. *See* Banco Nacional de Cuba v. Sabatino, 376 U.S. 398, 401 (1964).
227. *Id.* at 423.
228. *See* W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp. Int'l, 493 U.S. 400, 404 (1990).
229. *See* Kadic, 70 F.3d at 250 ("[W]e think it would be a rare case in which the act of state doctrine precluded suit under section 1350.").
230. Siderman de Blake, 965 F.2d at 717.
231. See *supra* note 111 for a definition of a "jus cogens" norm.

emblematic instance of a clear-cut international law violation.[232] The Ninth Circuit in *Unocal III* recognized murder and slave labor, in addition to torture, as examples of jus cogens violations.[233]

Still, as the Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino* (1964), act of state doctrine may preclude judicial consideration of state conduct over which world opinion and international law are sharply divided.[234] In *Banco Nacional*, U.S. commercial interests had argued that the act of state doctrine did not apply to the Cuban government's expropriation of and inadequate compensation for their properties, because the acts were clear violations of international law.[235] The Supreme Court held otherwise, stating that a sharp division of international law and world opinion existed on the issue of expropriation of non-citizens' property.[236] The Court therefore complied with act of state doctrine and refused to impose penalties on the national bank of Cuba.[237] *Unocal I* relied on act of state doctrine too, in its dismissal of claims that also involved expropriation of property.[238] The claim by the Korean and Chinese forced laborers is not troubled by the act of state doctrine, as slave labor is a violation of a jus cogens norm.

F. Political Question Doctrine

Like the act of state doctrine, the political question doctrine bars judicial inquiry into certain matters.[239] The doctrine maintains that federal courts may decline jurisdiction over cases that raise questions properly addressed by the executive and legislative branches of the federal government, or that have been settled by negotiations carried out by or treaties signed by those branches of government.[240] Such questions often arise in the context of foreign affairs, which the Supreme Court has stated, "is committed by the Constitution to the executive and legislative

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232. *Unocal III*, 2002 WL 31063976 at *8 (quoting *Marcos*, 25 F.3d at 1475).

233. *Id.*

234. 376 U.S. 398.

235. *Id.* at 428.

236. *Id.*; *see also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (explaining the act of state doctrine deference regarding § 1350 environmental degradation claims).

237. *Banco Nacional*, 376 U.S. at 428.

238. *Unocal I*, 963 F. Supp. at 899.

239. *See* Christopher R. Chase, Note, *The Political Question Doctrine: Preventing the Challenge of U.S. Foreign Policy in 767 Third Avenue Associates v. Consulate General of Socialist Federal Republic Of Yugoslavia*, 50 CATH. U. L. REV. 1045, 1052-62 (2001) (discussing the nonjusticiable political question doctrine).

240. *See* Baker v. Carr, 369 U.S. 186, 210-11 (1962); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 132 (1972) ("[Regarding foreign affairs], the courts are less willing than elsewhere to curb the federal political branches, are even more disposed to presume the constitutional validity of their actions and to accept their interpretations of statutes, and have even developed doctrines [such as the 'political question' doctrine] of special deference to them."); *id.* at 1045 ("The doctrine of political questions is constitutionally significant only as an ordinance of extraordinary judicial abstention . . .").

[branches]. . . and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[241]

The political question doctrine has often been unsuccessful as an ATCA defense.[242] War reparations claims, however, are an exception, and are often dismissed because they involve non-justiciable political questions.[243] In one such dismissal, for example, a federal judge stated that the plaintiffs were effectively asking the court "to try its hand at refashioning the reparations agreements which the United States and other World War II combatants . forged in the crucible of a devastated post-war Europe . . . . a task which the court does not have the judicial power to perform."[244] In the "comfort women" case, *Hwang Geum Joo v. Japan*, the court found grounds for dismissal of the plaintiffs' claims in the political question doctrine.[245] The court cited two political question concerns: resolution of claims "would require 'an initial policy determination of a kind clearly for nonjudicial discretion,' and resolution of claims would be hindered by a 'lack of judicially discoverable and manageable standards for resolving it.'"[246] The doctrine also compels courts to accept and follow the clear meaning of treaties entered into by the United States.[247] This has led

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241. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

242. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); *see also* K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277 (2001) (stating that political question doctrine has generally failed as a ground for dismissal of international human rights actions).

243. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 485-89 (D.N.J. 1999) (dismissing forced labor claims because, *inter alia*, claims arising out of the war were constitutionally committed to the political branches, and not to the judiciary); *In re* Nazi Era Cases Against German Defendants Litigation, 129 F. Supp. 2d 370, 372, 374-86 (D.N.J. 2001); Burger-Fischer v. DeGussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (declaring that World War II slave labor claims presented non-justiciable political questions); *Tel-Oren*, 726 F.2d at 798-823 (J. Bork, concurring opinion at 798-23). For an extensive critique of these decisions, see Boyd, *supra* note 242. Boyd describes *Tel-Oren* as "a premonitory example of the judicial mistrust of applying customary international human rights law, and the willingness to abdicate this role to the political branches." *Id.* at 290. Boyd also argues that the *Iwanowa* and *Burger-Fischer* courts had incorrectly assumed "that claims brought under treaty norms supplant claims under customary international norms." *Id.* at 298. "However, politically negotiated reparations for gross human rights violations are subject to customary international human rights law and may violate international law if they are used to extinguish a remedy granted to such victims under international law." *Id.*

244. *Burger-Fischer*, 65 F. Supp. 2d at 282-83.

245. 172 F. Supp 2d 52, 64-67 (D.D.C. 2001).

246. *Id.* at 66 (quoting *Baker*, 369 U.S. at 210, 217). *Baker* fashioned a list of six considerations that might generate political question concerns:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

247. *See* Chan v. Korean Air Lines, 490 U.S. 122, 134 (1989) (asserting that if the treaty is unambiguous, courts "have no power to insert an amendment").

to the dismissal of ATCA claims asking courts to grant claims that have been waived by treaty, and claims reopening matters conclusively settled by treaty.[248]

The Ninth Circuit relied on the political question doctrine to dismiss forced labor claims brought against Japanese corporations by nationals of countries that had signed the 1951 Treaty of Peace with Japan, as was discussed *supra* Section III.[249] The court established that the treaty was a final settlement of the signatory nations' claims of reparation.[250] These "signatory national" cases were part of the set of cases, which included *Forced Labor*, that were consolidated in the Ninth Circuit's Northern District of California and decided in 2000 and 2001.[251] The Korean and Chinese forced laborers, however, are (or were) nationals of countries that did not sign the peace treaty, so neither the treaty, nor the political question doctrine more generally, precluded their claims.[252]

G. Entity Law and Limited Liability

The establishment of *in personam* jurisdiction upon parent corporations for actions of their foreign subsidiaries can be a major initial hurdle for human rights litigation against multinational firms like the defendants in *Forced Labor*.[253] For an action brought under ATCA, the jurisdictional effort might require a showing of international law violations by a foreign parent or subsidiary corporation, minimum contacts with the U.S. forum by an affiliated U.S. subsidiary or parent corporation, and an agency or alter-ego relationship between the United States and foreign entities.[254] Corporate entity law regards "each of the constituent corporations of [a corporate] group as a separate juridical person with its own legal rights and duties, separate and distinct from those of its shareholders."[255] Since each member of a corporate group is seen as a separate legal person, the activities of a foreign subsidiary or parent

248. *See Iwanowa*, 67 F. Supp. 2d 424 (claims barred by, *inter alia*, treaty); *Burger-Fischer*, 65 F. Supp. 2d 248; *see also Joo*, 172 F. Supp. 2d at 54 ("Although as plaintiffs argue the claims of the "comfort women" might not have been specifically mentioned in [post-war reparations treaties], the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan.").

249. Treaty of Peace with Japan, *supra* note 24.

250. *In re* World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939, 946 (N.D. Cal. 2000) ("The official record of treaty negotiations establishes that a fundamental goal of the agreement was to settle the reparations issue once and for all."); *Filipino Forced Labor*, 164 F. Supp. 2d 1153 (peace treaty barred claims by nationals of the Philippines, a party to the treaty).

251. *POW Forced Labor*, 114 F. Supp. 2d at 939; *Filipino Forced Labor*, 164 F. Supp. 2d 1153; *Forced Labor*, 164 F. Supp. 2d at 1160.

252. *Forced Labor*, 164 F. Supp. 2d at 1165-68 (dismissing claims, but not on treaty "signatory national" grounds).

253. *See* Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 496-97 (2002).

254. *Id.*

255. *Id.* at 494.

corporation may not constitute enough contact with a U.S. forum sufficient to establish *in personam* jurisdiction.[256] The corporate entity must maintain systematic, substantial, and continuous activities in a state, unless less substantial forum contact directly connects to the plaintiffs' claims.[257]

When forum contact by the foreign subsidiary is less than necessary, jurisdiction must be established through the use of the "veil piercing" or "alter-ego" doctrine.[258] Unless there is a piercing of the corporate veil, limited liability generally provides corporate "parent" (or subsidiary) shareholders with a shield against the liabilities a subsidiary (or parent) corporation incurs. Courts will dismiss such claims against a corporate entity even if there is substantial contact with the forum by another member of the corporate group.[259] If there is a lack of minimum contact by the corporate group member which has directly committed the tort, courts will dismiss claims on the grounds of a lack of *in personam* jurisdiction.[260]

The 1998 *Doe v. Unocal Corp.* ('*Total*') decision, the first international human rights case turning on "attributive intragroup jurisdiction . . illustrates vividly the effectiveness of entity law in shielding the overseas affiliates of multinational groups from American jurisdiction."[261] The *Total* court relied on entity law and derivative liability doctrine to dismiss Unocal partner and French multinational Total Corporation as a defendant in the Unocal litigation. The case against Total was dismissed for lack of personal jurisdiction because the parent's contact with California was too minimal and the court refused to allow the contact of California-based Total subsidiaries to be imputed to the parent corporation to establish minimum contacts.[262] The Court of Appeals affirmed the decision.[263]

Basing its analysis "on conventional entity law, 'the general rule that a subsidiary and the parent are separate entities' and that the mere existence of a relationship between the parent and subsidiary is not sufficient to

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256. *Id.* at 495.

257. Substantial, continuous, and systematic activities in a forum give rise to general in personam jurisdiction, while contacts connected to a claim or cause of action give rise to specific in personam jurisdiction. *See* Hanson v. Denckla, 357 U.S. 235, 250-53 (1958) (concerning specific in personam jurisdiction); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 446 (1952) (concerning general in personam jurisdiction); Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001), *aff'g* 27 F. Supp. 2d 1174 (C.D. Cal. 1998) (adopting, *per curiam*, the *Total* holding that denied specific *in personam* jurisdiction).

258. *Perkins*, 342 U.S. at 446 n.12. The two doctrines, "although formulated quite differently have identical elements and are indistinguishable or interchangeable." They both require (1) lack of separate corporate existence arising from lack of the formal requirements or the excessive exercise of control by the parent corporation or controlling shareholder; (2) fraudulent, unjust or inequitable conduct; and (3) causal link to the plaintiff's injury." Blumberg, *supra* note 253, at 497 n.12. (internal citations omitted).

259. *Id.*

260. *Id.* at 496-98.

261. *Total*, 27 F. Supp. 2d 1174, *aff'd*, Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001).

262. *Total*, 27 F. Supp. 2d at 1190.

263. Doe v. Unocal Corp., 248 F.3d at 915.

establish jurisdiction,"[264] the court in *Total* began by reviewing the Ninth Circuit's "alter ego" doctrine. That doctrine requires that the plaintiff first establish unity of interest and ownership, such that the two corporate entities' separate personalities no longer exist, and second, show that failure to disregard the separate entities would cause injustice or fraud.[265] Application of these doctrinal generalizations, however, is extremely fact-intensive.[266] Consequently, the court looked to the *United States v. Bestfoods* decision for guidance.[267]

In *Bestfoods*, the Supreme Court held that "interference that stems from the normal relationship between parent and subsidiary" does not trigger liability.[268] More specifically, involvement with a subsidiary "consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability."[269] Permissible activities might also include the election of directors and the making of bylaws.[270] The shielding of the parent from subsidiary liability remains intact if some, or even all, of the subsidiary's board of directors and executive officers are also directors or executive officers of the parent corporation.[271] The underpinnings of the decision are apparent in the Court's objection to "the actual control test."[272] The Court reasoned that the test incorrectly asked a somewhat abstract question "about the relationship between the two corporations."[273] Rather, the Court asserted that the correct, and more concrete, question concerns "the parent's interaction with the subsidiary's facility. "[274] *Bestfoods* established that only real interaction between parent and subsidiary, and not abstract ownership and control, leads to

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264. Blumberg, *supra* note 253, at 497 (quoting *Total*, 27 F. Supp. 2d at 1187).

265. *Total*, 27 F. Supp. 2d at 1187.

266. Blumberg, *supra* note 253, at 498.

267. *Total*, 27 F. Supp. 2d at 1186 (citing U.S. v. Bestfoods, 524 U.S. 51, 69, 72 (1998)). *Bestfoods* concerned whether, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, the federal Superfund Law), a parent corporation is the "operator" or "owner" responsible for environmental damage caused by a wholly owned subsidiary. *See generally* Jennifer S. Martin, *Consistency in Judicial Interpretation? A Look at CERCLA Parent Company and Shareholder Liability after United States v. Bestfoods*, 17 GA. ST. U. L. REV. 409, n.233 (2000); Eric L. Yeo, *United States v. Bestfoods: Narrowing Parent Corporation Liability Under CERCLA for The Twenty-First Century*, 51 ADMIN. L. REV. 1267 (1999).

268. *Bestfoods*, 524 U.S. at 71.

269. *Id.* at 72 (internal quotations omitted).

270. *Id.* at 62.

271. *Id.* at 68-69 ("Control through the ownership of shares does not fuse the corporations, even when the directors are common to each.") (internal citations omitted); *id.* ("[I]t is 'normal' for a parent and subsidiary to 'have identical directors and officers.'") (internal citations omitted).

272. *Id.* at 71.

273. *Id.* at 67.

274. *Id.*

direct liability.[275]

Thus, a parent corporation will be vulnerable to derivative liability for a subsidiary's acts only if the corporate form is used for wrongful purposes, such as to carry out fraud on the parent corporation's behalf, or when parent control renders the subsidiary a mere agent (or alter ego) of the parent.[276]

Relying on *Bestfoods*'s analysis of the alter ego and veil-piercing doctrines, the *Total* court found that the plaintiffs' evidence showed that Total was "an active parent corporation" whose unexceptional supervision and financial and other forms of "macro-management" of subsidiaries were insufficient to meet alter ego requirements.[277] Without evidence of direct control of the California subsidiary's day-to-day activities, or misuse of the subsidiary form for wrongful purposes, the court could not find that the California subsidiaries were alter egos of the parent.[278]

After disposing of the alter ego possibility, *Total* considered the agency standard for establishing jurisdiction over a parent.[279] Under Ninth Circuit corporate agency doctrine, contact is imputed to the parent "where the subsidiary [i]s 'either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself.'"[280] Alternatively, "if the parent and subsidiary 'are not really separate entities,' or one acts as an agent of the other, the local subsidiary's contacts with the forum may be imputed to the foreign parent corporation."[281] Much like the alter ego relationship, an agency relationship is characterized by corporate parent control of a subsidiary's internal affairs or daily operations.[282] Applying the above "but for" and agency sub-tests, *Total* found the California firms were not the mere agents of the Total parent.

In the final blow to the establishment of personal jurisdiction, the court held that Total's contractual relations with California-based Unocal did not constitute purposeful availment of the benefits and protections of California law.[283] The court found the following evidence compelling: (1) the contracts were entered into either by fax and telephone or at meetings in Asia, France, and Bermuda; (2) the law governing those contracts was that of England, Bermuda, or Burma; (3) the oil in the pipeline will go to

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275. *See id.* at 66.

276. *Id.* at 63-64.

277. *See Total*, 27 F. Supp. 2d at 1187-88.

278. *See id.* at 1188.

279. *Id.* at 1188-89.

280. *Id.* (quoting Gallagher v. Mazda Motor of America, Inc., 781 F. Supp. 1079, 1083 (E.D. Pa. 1992)).

281. El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 676 (D.C. Cir. 1996) (quoting I.A.M. Nat'l Pension Fund v. Wakefield Indus., Inc., 699 F.2d 1254, 1259 (D.C. Cir. 1983)).

282. *See* Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980).

283. *Total*, 27 F. Supp. 2d at 1185.

Thailand or Burma, and not the United States; and (4) the contracts have nothing to do with California, since they all relate to the Burmese pipeline.[284] In sum, *Total* reminds international human rights plaintiffs that, if a parent corporation avoids "hands-on" management of even a wholly owned subsidiary, it will avoid both liability for claims against the subsidiary and in personam jurisdiction imputed from subsidiary contacts with a forum.[285]

In an overwhelming majority of international human rights cases brought against corporations, the great difficulty of establishing jurisdiction over overseas subsidiaries has compelled victims to proceed against American parent corporations, thereby assuring personal jurisdiction.[286] This, however, presents its own problems for plaintiffs. If the subsidiary is the principal tort violator, then the plaintiff bears the burden of demonstrating the parent's direct involvement in the alleged misconduct.[287] This has proven "well nigh impossible."[288] Many such claims are dismissed even before trial for not pleading sufficiently specific allegations against the parent.[289] At trial, "[i]n no American case that has gone to decision on the merits" has the parent's direct involvement in the foreign tort been established.[290]

The alleged tort violators in *Forced Labor* are foreign parents, not foreign subsidiaries, but the difficulty remains of establishing the local U.S. subsidiary's involvement in the foreign tort violations. Nonetheless, the Japanese corporations in *Forced Labor* apparently made no use of entity law in the arguments they presented to the court.[291] This was understandable, since plaintiffs brought their claims primarily under CalCCP section 354.6, which seemed specifically to sanction veil-piercing from U.S.-based subsidiaries to Japanese parent corporations.[292]

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284. *Id.* For a similar Ninth Circuit purposeful availment case, based on contractual relations, see *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 816 (9th Cir. 1988) (not finding purposeful availment where (1) the contract was negotiated in England; (2) it made no reference to the United States as a place for dispute resolution; and (3) no authorized agents (were alleged to have) performed any part of the contract in California).

285. *See Bestfoods*, 524 U.S. 51; United States v. Jon-T Chems., Inc., 786 F.2d 686, 691 (5th Cir. 1985) ("[O]ur cases are clear that one-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying the alter ego theory to pierce the corporate veil.").

286. *See* Blumberg, *supra* note 253, at 500.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* Blumberg comments that there are human rights cases in Great Britain where direct involvement by the parent has been established. He cites as examples *Connelly v. RTZ Corp.*, 3 W.L.R. 375 (H.L. 1997), and *Lubbe v. Cape*, 1 W.L.R.1545 (H.L. 2000).

291. *See Forced Labor*, 164 F. Supp. 2d 1164.

292. *See* CalCCP § 354.6 (establishing that plaintiffs may bring a slave labor action against "any entity or successor in interest thereof . . . .either directly or through a subsidiary or affiliate."). This has been interpreted to allow "reverse veil piercing" from subsidiary to parent. *See* Jeong v. Onoda Cement Co., 2000 U.S. Dist. LEXIS 7985, *12-13 (C.D. Cal. 2000) (stating that the statute in essence created a

Nonetheless, piercing the veil of the California-based corporations to reach their Japanese parents appears to present great difficulties to the plaintiff in *Jae Won Jeong v. Onoda Cement Co., Ltd*, the case that remains in California state court,[293] and to the *Forced Labor* plaintiffs, even if their ATCA claims on appeal can overcome the foreign affairs power and statutes of limitations dismissal grounds. Future courts may conclude, as the state courts have, that CalCCP section 354.6 claims do not implicate the exclusive foreign affairs prerogative of the federal government because they concern only corporations with minimum contact to California which have committed torts against California citizens.[294] If this holding stands and plaintiffs overcome the foreign affairs doctrine obstacle, they may still face entity law problems. Under the entity law doctrine, only corporate entities with minimum contact to California would be the local subsidiaries, who did not commit the forced labor tort violations. This might compel state courts to either (1) admit that the case does concern the Japan-based parents who actually committed the tort violations, which would then implicate the federal foreign affairs prerogative; or (2) dismiss the action based on the entity law doctrine.

CONCLUSION

The *Forced Labor* decision is another indication that the Korean and Chinese forced laborers' search for redress against Japan's corporations and its government will not achieve success similar to that of the forced laborers of Nazi-occupied Europe.[295] Since the legal obstacles are similar, the contrast in outcomes is perplexing. The paradox may be explained, in part, by the federal government's differing, and heavily criticized,[296] attitude toward claims brought by Japan's victims.[297] In a Statement of Interest filed for a CalCCP section 354.6 action, State Superior Court Judge Lichtman commented that in cases related to the Nazi-era:

> [T]here was no Statement of Interest asserted by the federal government. . . . In light of the above, it struck this Court that the United States has issued its Statements of Interest in a somewhat disparate

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reverse veil piercing option allowing recovery from an American subsidiary or affiliate of a foreign parent company, whether or not the affiliate has any control of the parent "or had anything to do with the acts allegedly committed in WWII.") [hereinafter *Jeong 2000*].

293. *See* Jeong v. Onoda Cement Co., No. BC217805, 2001 WL 1772750 (Cal. Super. Ct. Sept. 14, 2001) (order denying defendants' motion for judgment on the pleadings) [hereinafter *Jeong 2001*]; Taiheiyo Cement Corp. v. Superior Court 105 Cal. App. 4th 398 (Ct. App. 2003).

294. *See Jeong 2001*, 2001 WL 1772750, at *8 (stating that the case "involves claims by private individuals against private companies doing business in or having contacts with California."); Taiheiyo Cement, 105 Cal. App. 4th at 419 (asserting that CalCCP section 354.6 does no more than create possible liability for "affiliates or subsidiaries of Japanese companies conducting business in California . . . for unpaid labor or personal injuries suffered in the past . . . .").

295. *See* Bazyler, *supra* note 2, at 31.

296. *See*, e.g., Iris Chang, *Betrayed by the White House*, N.Y. TIMES, Dec. 24, 2001, at A15.

297. *See* Bazyler, *supra* note 2, at 31-32.

> fashion. While, on the one hand, victims of the European Theatre can proceed to seek reparations against "the Nazi regime, its allies or sympathizers. . " yet on the other hand, victims of the Pacific Theatre may not. Facially, this policy, if it is a policy, appears to be legally unsupportable. This Court is greatly troubled by this approach.[298]

Michael Bazyler, a lawyer involved in much of the European forced labor litigation, summarizes the result of the contrasting U.S. government attitude as follows:

> [W]hile millions of aging Jewish and non-Jewish survivors, both in the United States and abroad, are finally receiving some measure of justice for the wrongs. . . committed against them during World War II, aging POWs and civilians who suffered at the hands of the Japanese industry are being denied the same treatment.[299]

Despite the U.S. government's stance and the discouraging federal court ruling, Korean and Chinese slave labor victims have achieved some of their goals outside of the U.S. judicial process. The U.S. lawsuits may have successfully raised public awareness of the injustices that many millions of WWII forced laborers in Asia endured.[300] Additionally, the international pressure and publicity generated by the U.S. lawsuits may have helped claimants make headway in Japan's court system and in direct negotiations with Japanese firms; this could lead to apologies and compensation more generous than the Japanese firms might otherwise have offered.[301] *Forced Labor*, which is still on appeal, also continues to shine an appropriately unflattering light on the many Japanese corporations that have not shouldered responsibility or straightforwardly apologized for, or even acknowledged, their slave labor practices during the WWII era.[302] Finally, the litigation draws attention to the Japanese government, whose apologies for the country's slave labor practices have been criticized for being unofficial or ambiguous.[303]

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298. *See* Bazyler, *supra* note 2, at n.94, (quoting from *Jeong 2001*, 2001 WL 1772750, at *10-11 (emphasis removed)). In *Jeong 2001*, Judge Lichtman declined to follow the views of the U.S. government in its Statement of Interest and refused to dismiss a California civil suit brought by one former Korean slave laborer under CalCCP section 354.6. *Jeong 2001*, 2001 WL 1772750, at *7-8. A federal district court had earlier dismissed a motion to remove the case to federal court. *See Jeong 2000*, 2000 U.S. Dist. Lexis 7985. The district court rejected the motion for diversity jurisdiction brought under alter ego, fraudulent joinder, preemption of state law, and Foreign Sovereign Immunities Act theories. *Id.* at *3-33.

299. *See* Bazyler, *supra* note 2, at 32.

300. *Id.*

301. On the other hand, much of the international publicity may not be reaching Japan. *See* F. T. McCarthy, *supra* note 20 ("Generally, the Japanese press lets its companies get away with . . . high-handed treatment [of the Chinese and Korean forced labor plaintiffs]: criticism of big Japanese companies by the mainstream media in Japan remains muted.").

302. Most of the Japanese corporations accused of using WWII-era forced labor continue either "to deny any responsibility or decline to comment." *See* MacIntyre, *supra* note 7.

303. In August 1995, then-Japanese Prime Minister Tomichi Murayama issued a statement that, although not officially approved by Japan's Diet, was the most significant assertion by the Japanese

Although CalCCP section 354.6 was declared an unconstitutional violation of an exclusive prerogative of the federal government by a federal district court, ATCA continues to provide non-citizen victims of human rights abuses with a right to sue. However, when more than ten years have passed since those wrongs have occurred, plaintiffs may need to plea a strong argument for equitable tolling. Without tolling, a brief unflattering spotlight on the past is all that will trouble defendants. *Forced Labor* makes it ever more apparent that such ATCA claims will be routinely dismissed on statutory limitations grounds.

However, the men and women who suffered as slave laborers do not speak of the need for viable civil actions, and rarely are they passionate about receiving monetary compensation from Japan's corporations.[304] Instead, victims ask persistently and passionately that the perpetrators offer a simple admittance of guilt and apology.[305] Fu Bo, a scholar who has interviewed scores of forced laborers in Manchuria, states that the real hope is to find out what actually happened during the war, and not to extract money from corporations: "No amount of compensation, however high, would be enough."[306] Oh Hun Kwon, a Korean victim of forced labor, expresses similar sentiments: "Before . my death, I am going to fight against what I have been through and do my best as a living witness to history."[307]

Such comments suggest that tort actions, including alien tort actions, may be inferior to alternate ways of dealing with the tragedy of widespread and government-sanctioned human rights abuses. South Africa and Chile, for example, have employed truth commissions for internal human rights crimes committed against citizens.[308] If the fundamental goals are apology,

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legislature:

> During a certain period in the not too distant past, Japan, following a mistaken national policy, advanced along the road to war, only to ensnare the Japanese people in a fateful crisis, and, through its colonial rule and aggression, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations. In the hope that no such mistake be made in the future, I regard, in a spirit of humility, these irrefutable facts of history, and express here once again my feelings of deep remorse and state my heartfelt apology. Allow me also to express my feelings of profound mourning for all victims, both at home and abroad, of that history.

Watanabe, *supra* note 20.

304. *See, e.g.*, Kaye, *supra* note 1.

305. *Id.*; *see also, infra*, notes 296-97 and accompanying text.

306. Macintyre, *supra* note 7.

307. *Japan Firms Sued for Korean Slave Labor, at* http://www.cnn.com/2001/WORLD/asiapcf/east/02/27/korea.slavelabor/index.html (last visited Sept. 4, 2002).

308. *See* Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73 (2001-2002) (providing a favorable perspective on South Africa's Truth and Reconciliation Commission (TRC)). *But see* Thomas Huber, *Holocaust Compensation Payments and the Global Search for Justice for Victims of Nazi Persecution*, AUSTRA. JL. POL. & HIST., Mar. 1, 2002, at 85 ("An opinion poll showed that two thirds of South Africans believe the commission had damaged race relations instead of reconciling the population."); Laurel Fletcher, *Book Review of Between Vengeance*

reconciliation, and historical truth, it may be time to apply this concept to international abuses such as Japan's WWII-era forced labor.

On the other hand, if the primary goal of the WWII-era Japanese forced labor lawsuits is to discourage future crimes against humanity, that "such cruelty against human rights should not be tolerated in the future," apologies and recognition of the truth may be less effective than restitution and retribution.[309] For these tasks, a viable ATCA is needed. Presently, ATCA claims are largely ineffective for victims of long past, historical wrongs, such as the Korean and Chinese slave laborers.[310] To remedy this situation, plaintiff advocates first need to become more familiar with the international law involved in ATCA human rights claims. For if the rulings in *Unocal II* and *III* are accurate predictors of future practice, the views of international tribunals will increasingly guide U.S. courts when they consider ATCA claims.[311] For example, if the persuasive force of international law were to turn the federal courts away from the statutory limitations approach taken in *Forced Labor* and toward the case-by-case approach of international law, the Korean and Chinese victims of WWII-era forced labor would be specifically aided. Time, in any case, is running out.

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and Forgiveness: Facing History After Genocide and Mass Violence, by Martha Minow (1998), 19 BERKELEY J. INT'L L. 428, 439-40 (2001) (book review) ("Minow suggests that the TRC may be a more therapeutically appropriate model [than a trial] for victims because it is designed to be a sympathetic forum for survivors wishing to testify. But it may turn out that what victims need to recover from their experiences is the knowledge that their torturers are behind bars. If given the choice, victims might choose to endure the discomfort of testifying in court if it meant that perpetrators could serve prison sentences. Under the rules of the TRC, South African police officers who tortured or murdered innocent civilians not only may avoid prison but may continue to serve in the police force.").

For an appreciation of recent truth commissions in Chile and El Salvador, see Mark Vasallo, Comment, *Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador*, 33 U. MIAMI INTER-AM. L. REV. 153, 180 (2002) ("In the end, the commissions for truth established by these nations varied in nearly every facet but one, their success.").

309. Joan Osterwalder, Slave Labor, City News Service, Sept. 17, 2001, *at* http://www.lexis.com/research (quoting Jae Wong Jeong).

310. In addition to the legal obstacles described in *supra* Parts III and IV, recall that even successful ATCA plaintiffs rarely collect monetary damages from human rights violators.

311. See *Unocal III*, 2002 WL 31063976, at *10-16.