NOTE

Involuntary Work Program: Imposing Liability on Immigration Detention Center Contractors

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ABSTRACT

Abhorrent conditions and human rights violations in U.S. migrant detention centers have garnered significant public outcry. Articles and activists have decried "kids in cages" and family separations at the southern border. Yet little attention has been paid to a longstanding administrative program that exploits detainees and benefits from their forced labor. Reports show that Immigration and Customs Enforcement's Voluntary Work Program ("VWP") is anything but voluntary. The program on its face endorses paying detainees one dollar for eight hours (or more) of work per day and in practice leaves detainees with little opportunity to refuse to participate. Coercion, direct orders, and desperation have provided detention centers with a cheap source of labor to sustain their operations while detainees await the conclusion of their immigration proceedings. This Note argues that the VWP violates international law and explores a theory of liability for forced labor under the Alien Tort Statute. Courts should find that the VWP is illegal under international standards and open the door to global and domestic pressure on Congress to abolish or reform this insidious program.

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INTRODUCTION

> [The officer] approach[ed] me [after my shift was over] and said I had to clean up since I we [sic] were the only porters on the list left, that we needed to clean-up and do the work. I can't remember what the other detainee answer [sic] to her, but I said 'I do not have to work because this is a 'volunteer work' and I am not obligated to work. She responded by saying 'well then I will right you up.'[sic][1]

Statements like the above by Robinson Martinez are found frequently in interviews with and legal complaints by noncitizens[2] who are or have been held in United States Immigration and Customs Enforcement ("ICE") detention.[3] Such statements are only the tip of an insidious administrative iceberg—ICE's Voluntary Work Program ("VWP").

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1 Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, From 1943 to Present*, 29 GEO. IMMIGR. L.J. 391, 396 (2015).

2 While statutory language generally utilizes the term "alien" to describe foreign nationals of various legal residency statuses present in the United States, this Note uses the term "noncitizen" unless in a quotation.

3 *See, e.g.*, EUNICE HYUNHYE CHO, TARA TIDWELL CULLEN & CLARA LONG, ACLU, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 8 (2020) (quoting noncitizen Caleb D. detained at Tallahatchie County Correctional Facility as saying "I've been working every day, but they haven't paid [me] yet. I'm afraid not to work because they might think I am rebelling").

The policies and practices surrounding noncitizen detention in the United States have garnered international attention in recent years,[4] particularly during the presidency of Donald Trump, whose public statements expressed contempt for many groups of noncitizens arriving in the United States.[5] Yet, an exploitative practice that has remained largely unnoticed by mainstream media commentators continues to this day and has done so uninterrupted since 1979.[6] Many private noncitizen detention centers follow the VWP[7] as set out in ICE's Performance-Based National Detention Standards ("PBNDS").[8] The VWP requires that ICE contractors offer detainees the opportunity to work while in ICE custody and mandates that detainees receive a minimum of one dollar per day as compensation for their labor.[9] While purportedly a voluntary program, reports from detainees indicate that it is quite the opposite.[10] Detainees like Mr. Martinez allege an environment where they face the direct threat of repercussion for failure to work, as well as coercive conditions, such as insufficient food supplies which they can pay to supplement at the commissary, that leave them little choice in the decision to work for whatever wage they can get.[11] Moreover, many report receiving no wages at all or waiting weeks at a time to receive payment.[12]

In the United States, where a tenet of the Constitution makes an explicit exception to the prohibition on slavery in the case of those serving time in prison for a criminal conviction,[13] the reports from Mr. Martinez and others like him may not raise many eyebrows initially. But the majority of ICE detainees have not been convicted of or charged with any crime—they are

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4 *See, e.g.*, *Trump Migrant Separation Policy: Children "in Cages" in Texas*, BBC (June 18, 2018), https://www.bbc.com/news/world-us-canada-44518942 [https://perma.cc/4NRZ-D38S].

5 *See, e.g.*, Amber Phillips, *'They're Rapists.' President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017, 1:43 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/ [https://perma.cc/CQ9G-D74F].

6 *See* Stevens, *supra* note 1, at 405.

7 *See, e.g.*, CORECIVIC, 2020 ANNUAL REPORT, at F-40 (2020), http://ir.corecivic.com/static-files/2d02c7d4-786a-4a48-8c1b-3e2522c511f3 [https://perma.cc/K66Z-EGE9].

8 U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, 405–09 (rev. ed. 2016) [hereinafter PBNDS 2011].

9 *Id.* at 407.

10 *See infra* Section I.B.

11 *See* Stevens, *supra* note 1, at 395–97; *see, e.g.*, CHO ET AL., *supra* note 3, at 42.

12 *See* CHO ET AL., *supra* note 3, at 8.

13 U.S. CONST. amend XIII, § 1.

merely awaiting the completion of their immigration hearing process.[14] Moreover, that these programs are implemented by private contractors with minimal and vague governmental standards opens the door to human rights abuses.[15] In an environment where detainees fear legal retribution, including deportation, for refusing to comply with basic orders,[16] they have little recourse for these abuses.[17] And although the federal government endorses the VWP[18] and the American public grows numb to stories of migrant abuses, these glaring human rights violations cause alarm when set against international standards and expectations.[19]

Fortunately, there is a federal statute that grants noncitizen plaintiffs a cause of action when they have suffered certain violations of international law. The Alien Tort Statute ("ATS") has been used in recent decades to hold human rights abusers accountable when they have not violated an American law per se, but rather have defied certain legal norms that are universally endorsed by the international community, otherwise known as customary international law ("CIL").[20]

This Note argues that the VWP violates the CIL norm prohibiting forced labor and articulates an ATS cause of action for ICE detainees against the private contractors who implement the VWP. Part I of this Note explains the VWP and the standards it imposes on contractors who run noncitizen detention centers. Part I then demonstrates through reports from detained noncitizens how the VWP is implemented in these centers and establishes that noncitizens are forced to labor through coercion and direct orders. Next, Part I articulates the elements of the ATS and how the statute has developed into the human rights tool it is today—ripe for use by noncitizens suffering from human rights abuses in detention centers. Then, Part I describes CIL, a critical element of the ATS. Part II of this Note argues that there exists a CIL

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14 *Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic*, TRAC IMMIGR. (Apr. 3, 2020), https://trac.syr.edu/immigration/reports/601/#about [https://perma.cc/KAM7-KN7E].

15 *See* PBNDS 2011, *supra* note 8, at 405–09.

16 *See, e.g.*, CHO ET AL., *supra* note 3, at 21 (reporting an instance where a detainee was told he could be deported if he did not sign a document, written in English, that he did not fully understand); *id.* at 38–40 (reporting instances where detainees were placed into solitary confinement as retaliation for speaking to the press or participating in a hunger strike).

17 *See id.* at 20 (highlighting the difficulty of obtaining legal counsel for immigrants in removal proceedings); *id.* at 25 (discussing the difficulty of asylum seekers to defend against deportation).

18 *See, e.g.*, *id.* at 57.

19 *See infra* Section II.A.

20 28 U.S.C. § 1350; *see also* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER, at i, 1 (2022).

norm prohibiting the use of forced labor, particularly in the private prison context. It studies how CIL is identified and how it has been applied in American courts. Part II then contends that the United States has recognized the norm against forced labor where it has been violated in other countries and has not sufficiently objected to this norm such that it is not bound by it. Part III of this Note poses the ATS as a means of redressing the VWP's violation of CIL. Finally, Part III conveys why the ATS provides a more viable solution than other options currently being utilized.

I. THE VWP AND THE DEVELOPMENT OF THE ATS AS A HUMAN RIGHTS TOOL

To provide readers with a clear picture both of how the VWP purports to function and how it operates in practice, this Part describes the standards the VWP sets for detention centers and recounts reports from detainees regarding the conditions they actually experience. Then, to lay the groundwork for establishing an ATS claim asserting that the VWP violates CIL, this Part provides background on how the ATS has developed as tool for addressing human rights abuses and explains how CIL norms are identified.

A. ICE Standards for the VWP

The VWP is run by ICE and, in most facilities, is administered by its detention-site contractors.[21] It is funded by congressional appropriations as authorized in Immigration Services Expenses.[22] This statute provides for the "payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed."[23] The last year in which an appropriations act authorizing the rate of one dollar per day to detained workers was passed was 1979.[24] Yet, ICE continues to authorize the VWP and provides for its implementation in its agreements with the companies with which it contracts to run detention centers.[25]

A description of the VWP does not appear in federal code or regulations but is outlined in the ICE operations manual PBNDS.[26] The PBNDS, written

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21 PBNDS 2011, *supra* note 8, at 405.

22 8 U.S.C. § 1555.

23 *Id.* § 1555(d).

24 *See* Stevens, *supra* note 1, at 405.

25 *See, e.g.*, Ndambi v. CoreCivic, Inc., 990 F.3d 369, 370 (4th Cir. 2021).

26 PBNDS 2011, *supra* note 8, at 405–09.

in 2011 and last updated in 2016, governs the standards for establishments exclusively housing ICE detainees.[27]

The majority of ICE detainees—about 80%—are held in privately run facilities.[28] A 2021 Government Accountability Office report found that in fiscal year 2019, ICE maintained contracts with 185 facilities holding ICE detainees.[29] PBNDS standards are integrated in agreements with major corporations, such as CoreCivic, GEO Group, and LaSalle Corrections, who contract with ICE to run these private detention centers,[30] and require that corporations such as CoreCivic and GEO Group implement the VWP in their facilities.[31] CoreCivic, the self-professed largest private prison owner in the country,[32] gains more revenue from its contracts with ICE than from any other governmental contracts.[33] And although President Biden signed an executive order in January of 2021 proscribing the renewal of Department of Justice contracts with privately operated prisons, noncitizen detention facilities were not affected by this order because ICE is part of the Department of Homeland Security, not the Department of Justice.[34] To put this in context, CoreCivic's revenue from ICE contracts consistently constitutes more than its contracts with the U.S. Marshals Service and Bureau of Prisons—both of which are run by the Department of Justice—combined.[35]

The PBNDS states that detainees must not be required to work, although all should be offered the opportunity to volunteer for work assignments within the detention center in furtherance of a purported goal of mitigating

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27 *Id.* at 405.

28 Lauren-Brooke Eisen, *Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts*, BRENNAN CTR. FOR JUST., (Aug. 27, 2021), https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts [https://perma.cc/8XYU-GPZH].

29 U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-149, IMMIGRATION DETENTION: ACTIONS NEEDED TO IMPROVE PLANNING, DOCUMENTATION, AND OVERSIGHT OF DETENTION FACILITY CONTRACTS 11–12 (2021).

30 *See, e.g.*, *Ndambi*, 990 F.3d at 370.

31 *Id.*; *see also* CORECIVIC, *supra* note 7, at 40.

32 CORECIVIC, *supra* note 7, at 29.

33 In fiscal year ("FY") 2020, 28% of CoreCivic's total revenue came from contracts with ICE, and ICE was its top revenue supplier within the federal government. *Id.* at 14. Consistently across FY 2018 through FY 2020, ICE remained 8 to 11 percentage points above the next highest federal agency contractor, U.S. Marshals Service, and well above the revenue provided by the Bureau of Prisons. *Id*.

34 *See* Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan. 26, 2021).

35 *See* CORECIVIC, *supra* note 7, at 14.

the negative consequences of detention such as idleness and low morale.[36] The standards also envision the use of detainee labor to sustain the facilities' functions, stating that "essential operations and services shall be enhanced through detainee productivity."[37] While the PBNDS does not outline the specific types of work detainees can perform, it does provide that detainees "may volunteer for temporary work details," which "generally last[] from several hours to several days . . . [and] may involve labor-intensive work."[38] However, generally, detainee labor is to be limited to a maximum of eight hours per day, forty hours per week.[39] ICE leaves the determination of wage rates to the discretion of the private contractors while mandating a minimum of one dollar per day.[40] This has remained the minimum rate since the 1979 appropriations act.[41] With the expectation that detainees will provide labor to keep the detention centers running and no indication from ICE that it plans to require higher wages,[42] private contractors have little incentive to pay more than the mandated minimum.[43]

B. The Not-So-Voluntary Work Program: Reports from Detainees

Unfortunately, the almost negligible, mandated compensation does not constitute the only circumstance characterizing the forced labor conditions ICE detainees endure. Detainees report cooking, cleaning, and maintaining the buildings and grounds at facilities while receiving far less than one dollar per day.[44] "I worked for a whole month in the kitchen but was paid only four dollars," stated a detainee at a center run by LaSalle Corrections.[45] Detainees also allege working in unsafe conditions without the proper tools and safety

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36 PBNDS 2011, *supra* note 8, at 405.

37 *Id.*

38 *Id.* at 407.

39 *Id.*

40 *Id.*

41 *See* Stevens, *supra* note 1, at 405, 431–32, 440, 465.

42 *See id.* at 428, 469.

43 CoreCivic reported in 2020 that it was approximately 1.8 billion dollars in debt and listed as a potential repercussion of that debt a need to move money away from operations and towards debt payments. *See* CORECIVIC, *supra* note 7, at 52. With a business model predicated on the expectation of almost free labor and an operations budget likely to be reduced, CoreCivic is unlikely to pay detainees fairly, absent legal action. *See id.* at 52, F-40. For discussion of the financial costs detention contractors would incur if they had to pay detainees fair wages for their labor, see Jonathan Booth, *Ending Forced Labor in ICE Detention Centers: A New Approach*, 34 GEO. IMMIGR. L.J. 573, 606–07 (2020).

44 CHO ET AL., *supra* note 3, at 43.

45 *Id.* at 8.

gear.[46] For example, one man reported that he alerted the detention officers to the need for special protective equipment to use certain cleaning chemicals, but he was told he would be fired if he refused to work and had to clean without them.[47] That same detainee was given a pair of gloves frequently used—and reused—by kitchen serving staff to handle highly concentrated bleach for another assignment.[48]

Moreover, many detainees "volunteer" to work for meager pay not out of a desire to increase morale or earn some extra cash as the PBNDS purportedly envisions, but rather to simply survive.[49] For example, a VWP participant stated that he joined the program to supplement the facility-provided meals that left him "continuously hungry" by spending his meager wages at the commissary to purchase food.[50] Others report that items such as feminine hygiene products, medicine, and toothpaste are not provided to detainees and are only available for purchase at the commissary.[51]

Others describe working out of fear of punishment rather than genuinely volunteering to do so.[52] One detainee reports that although he had not received any compensation for working every day, he continued to labor out of fear that if he did not work "they might think [he was] rebelling."[53] The PBNDS terms themselves discreetly indicate that the VWP is not intended to be entirely voluntary—it lists "encouraging others to participate in a work stoppage or refuse to work" as a "prohibited act" within the "High Offense Category."[54] Fear of facing repercussion for complaining about the working conditions is not unfounded. For example, a detainee in a LaSalle Corrections Center alerted a local news outlet that he had been working for weeks without receiving any pay.[55] In response, he was allegedly placed in solitary confinement for eight days.[56] Another detainee reported that he was told by an officer that if he refused to clean he would be written up.[57] This

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46 *See* Stevens, *supra* note 1, at 397.

47 *Id.*

48 *Id*.

49 *See, e.g.*, Ndambi v. CoreCivic, Inc., 990 F.3d 369, 373 (4th Cir. 2021) (acknowledging, in a non-ATS case, detainee reports of insufficient food and other necessities in a CoreCivic-operated detention center).

50 CHO ET AL., *supra* note 3, at 57.

51 Booth, *supra* note 43, at 591; CHO ET AL., *supra* note 3, at 54.

52 *See* CHO ET AL., *supra* note 3, at 8.

53 *Id*.

54 PBNDS 2011, *supra* note 8, at 225 (internal quotation marks omitted).

55 CHO ET AL., *supra* note 3, at 29.

56 *Id.*

57 *See* Stevens, *supra* note 1, at 396.

detainee also alleged that he was woken up at 3:00 in the morning and ordered to clean.[58] According to the ICE guidelines, detainees who refuse to "obey the order of a staff member or officer" are guilty of a "High Moderate Offense Category" violation punishable by, inter alia, criminal proceedings, transfer, and disciplinary segregation.[59]

The contractors running the detention centers rely on nearly free detainee labor to keep operations running.[60] According to one detainee, his detention center did not have enough workers to keep the facilities at the level of cleanliness and maintenance required, so they ordered him to do additional labor.[61] Many have reported working both day and night shifts,[62] which would clearly be in violation of the PBNDS standards that cap work days to eight hours a day unless it falls within the parameters of a "temporary work detail[]."[63]

If detainees are participating in a purportedly voluntary work program out of fear of punishment, lack of other means of accessing sufficient food and necessities, or because they were simply ordered to do so, their work is not voluntary at all. Rather, they are forced into participation by compulsion or circumstance.

C. An Evolving Legal Tool for Human Rights Abuses: ATS Federal Jurisprudence

Congress has not addressed the VWP since 1979 and ICE actively endorses the program through the PBNDS and its continued inclusion of the VWP as a term in its contracts with private detention corporations.[64] Therefore, this Note looks to a litigious solution to redress the utilization of administrative detainees as a cheap source of labor. This solution is provided through the ATS, which creates a cause of action within U.S. courts for plaintiffs who are victims of violations of CIL, as referred to as the law of nations. The ATS is one of America's oldest statutes, and in recent decades human rights lawyers have used it to sue private persons, governments, and corporations for human rights abuses forbidden by CIL.[65]

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58 *Id*.

59 PBNDS 2011, *supra* note 8, at 225–26 (internal quotation marks omitted).

60 *See supra* note 43.

61 *See* Stevens, *supra* note 1, at 396.

62 *See, e.g.*, *id.* at 395.

63 *See* PBNDS 2011, *supra* note 8, at 407.

64 *See id.* at 405–09.

65 *See, e.g.*, *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

The ATS states, in its entirety, the following: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[66]

This simple law, passed as part of the Judiciary Act of 1789, remained largely unused for two centuries.[67] It was not until 1980 that the Second Circuit's decision in *Filartiga v. Pena-Irala*,[68] often considered the first of the modern line of ATS cases,[69] applied the ATS to human rights violations. In *Filartiga*, the court addressed whether the torture and killing of the plaintiff's son in Paraguay by state officials constituted a violation of CIL.[70] The court referred to numerous international conventions as well as domestic constitutional provisions from around the world as evidence that state torture is a violation of CIL.[71]

In 2004, the Supreme Court decided *Sosa v. Alvarez-Machain*,[72] a case about a Mexican doctor, Humberto Alvarez-Machain, who was kidnapped by Mexican nationals hired by the Drug Enforcement Agency ("DEA") upon suspicion that Alvarez-Machain was responsible for torturing and killing a DEA agent in Mexico.[73] Alvarez-Machain brought an ATS suit against the Mexican nationals, four DEA agents, and the United States.[74] The defendants argued that the statute was merely jurisdictional and did not grant courts the ability to recognize causes of action absent additional authorization from Congress.[75] However, the Court ruled that while the ATS was merely jurisdictional in its terms, it was enacted to allow courts to hear a limited category of claims alleging a violation of CIL.[76] The violations of CIL recognized at the time of the ATS's passage were limited to three things: "[V]iolation of safe conducts, infringement of the rights of ambassadors, and piracy."[77] Yet new international norms develop over time, and the Court held that the ATS can support claims based on violations of the "present-day law

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66 28 U.S.C. § 1350.

67 *See* Doe v. Nestlé USA, Inc., 766 F.3d 1013, 1018 (9th Cir. 2014) ("For nearly two hundred years, the ATS was almost never invoked.").

68 630 F.2d 876 (2d Cir. 1980).

69 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

70 *See Filartiga*, 630 F.2d at 878.

71 *See id.* at 882–84.

72 542 U.S. 692 (2004).

73 *Id.* at 692.

74 *Id.*

75 *Id.* at 712.

76 *Id*.

77 *Id*. at 724.

of nations," so long as they allege violations that are as explicitly defined and widely accepted as the three recognized when the act was passed.[78]

Since *Sosa*, the ATS's reach has been further clarified. In *Kiobel v. Royal Dutch Petroleum Co.*,[79] the Supreme Court addressed a case where the alleged CIL violation—the Nigerian government's commitment of atrocities against its own nationals—occurred outside of the United States.[80] The Court ruled that the ATS presumptively does not apply to conduct that occurred overseas.[81] However, the Court explained three years later in *RJR Nabisco, Inc. v. European Community*[82] that the ATS may still be applicable where some conduct occurred abroad, so long as the conduct relevant to the "focus" of the ATS occurred in the United States.[83]

In *Jesner vs. Arab Bank, PLC*,[84] the Court filled a gap previously left unanswered: Whether foreign corporations can be liable under the ATS even if the relevant conduct occurred within the United States. The Court created a bright-line rule that foreign corporations, absent further action from Congress, cannot be held liable under the ATS, regardless of where the alleged CIL-violative conduct occurred.[85] Then, in *Nestlè USA, Inc. v. Doe*,[86] the most recent ATS case to reach the Supreme Court, the Justices were asked to answer whether U.S. corporations could be sued under the ATS for conduct that occurred abroad.[87] Here, the Court maintained the ATS's strong presumption against extraterritoriality and held that where the only domestic conduct is merely the "general corporate activity," this presumption is not overcome.[88]

In summation, the ATS has been construed to prohibit liability for foreign corporations generally,[89] for American defendants where the prohibited conduct occurred overseas,[90] and for claims that do not allege a

78 *Id*. at 725, 732.

79 569 U.S. 108 (2013).

80 *Id.* at 113.

81 *Id.* at 125.

82 136 S. Ct. 2090 (2016).

83 *Id.* at 2101.

84 138 S. Ct. 1386, 1393 (2018).

85 *Id*. at 1408.

86 141 S. Ct. 1931 (2021).

87 *Id.* at 1936.

88 *Id.* at 1936–37.

89 *See Jesner*, 138 S. Ct. at 1389.

90 *See Nestlè USA, Inc.*, 141 S. Ct. at 1934.

specific and sufficiently accepted violation of CIL.[91] There is, however, room for a claim by a non-U.S. citizen against an American defendant for conduct occurring *within* the United States in violation of *clearly* established CIL.

D. Binding Global Norms: Identifying Customary International Law

In order to prevail in an ATS claim, plaintiffs must establish that they suffered a clearly recognized violation of CIL.[92] International law is a topic often accompanied by furrowed brows and wringing hands in many legal circles. Without one overarching legislative body deliberating on and enacting statutes or one administration to enforce them, the typical lens through which domestic lawyers are accustomed to viewing the law becomes less useful.

The most obvious form through which international obligations come about is treaty law. Treaty law is formed when one or more states enter into a formal agreement, to which they both or all become bound.[93] Treaties into which the United States has entered are automatically incorporated into domestic law.[94] Notwithstanding any disputes in textual interpretation of terms, obligations and protocol created through treaties are relatively easy to identify as they are contained within the language of the treaty themselves. CIL is another component of the larger international legal framework. CIL consists of the established legal norms through which all nations are bound by virtue of their near universal acceptance.[95]

But without explicit treaty terms, how can states, practitioners, judges, or anyone with an interest in international law know what constitutes a binding international norm? CIL is understood to constitute "general practice as accepted as law,"[96] indicating both an element of widespread recognition

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91 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

92 28 U.S.C. § 1350; *see also supra* Section II.A.

93 For an example of a bilateral treaty regarding a border dispute, see Treaty Between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Nor.-Russ., Sep. 15, 2010, 2791 U.N.T.S. 3.

94 U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

95 *See Customary Law*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law [https://perma.cc/6CMZ-N3D5].

96 Statute of the International Court of Justice, art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S.

as well as the idea that states conform with such practice out of an understanding that the law requires them to, as opposed to conformity in service of their own interests or humanitarian aims. Thus, CIL contains an objective element, the widespread practice of states in conformity with a purported norm, and a subjective element, the notion that states are acting in conformity out of a sense of legal obligation.[97] The second element is referred to as *opinio juris*.[98] Courts look to a number of different sources to evaluate whether a principle or practice has reached the level of a binding international norm, including domestic and international judicial decisions, academic writings by experts in the field,[99] and voting records of international conventions or resolutions.[100] A widely ratified treaty can also constitute evidence of an international norm—a norm which then becomes binding even on states which are not party to the treaty.[101] Although CIL is binding,[102] it is not static, and norms can emerge over time as state practice and attitudes shift.[103]

Once an international norm is established, occasional state behavior inconsistent with that norm does not indicate the norm's nonexistence; rather, such behavior is generally viewed as a violation of the norm and

§ 102(2) (AM. L. INST. 1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

97 *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102(2) (AM. L. INST. 1987).

98 *See Opinio Juris (International Law)*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/opinio_juris_(international_law) [https://perma.cc/76TX-BEUD].

99 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." (quoting The Paquete Habana, 175 U.S. 677, 700 (1900))); *see also* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 142 (2d Cir. 2010) (quoting *Sosa* for the same proposition).

100 *See* Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389, 487 (1977).

101 *See Sosa*, 542 U.S. at 695 (referring to "binding customary international law" and a "binding customary norm").

102 *See id*.

103 *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 702 cmt. a (AM. L. INST. 1987) ("The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.").

evidence of the recognized rule.[104] Where states offer defenses of their noncompliance rooted in factual distinctions from the norm, such as claims that the conduct did not amount to the prohibited action, rather than in the law, or assertions that they are not prohibited from engaging in that conduct, that is further evidence of the existence of the norm.[105] However, states can, in principle, opt out of CIL under certain conditions.[106] According to the International Law Association, a widely respected international nongovernmental organization and consultant on international law to the United Nations,[107] if "*whilst* a practice is developing into a rule of general law, a State *persistently* and *openly* dissents from the rule, it will not be bound by it."[108] Thus, states must publicly assert their desire not to be bound by a particular norm under CIL while it is gaining recognition and *before* it is universally accepted, and they must not deviate from their dissent.

American courts have a long history of applying CIL domestically.[109] The *Charming Betsy* doctrine, named for a case in which the Supreme Court articulated that domestic statutes should be interpreted in light of CIL,[110] has become ingrained in U.S. jurisprudence.[111] Some statutes even explicitly incorporate principles of international law into federal law.[112] While there are debates within the international legal and academic communities regarding the extent to which CIL is automatically incorporated into

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104 *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 186 (June 27).

105 *Id*.

106 *See* Fisheries Case (U.K. v. Nor.), Judgement, 1951 I.C.J. 116, 137–39 (Dec. 18).

107 *See About Us*, INT'L L. ASSOC., https://www.ila-hq.org/index.php/about-us [https://perma.cc/Z7PT-GE6T].

108 INT'L L. ASS'N, COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L L., FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 27 (2000) (emphasis added), https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf [https://perma.cc/M4B5-JBQD].

109 *See, e.g.*, The Paquete Habana, 175 U.S. 677 (1900); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); *see also supra* Section I.C (discussing the line of Alien Tort Statute cases).

110 *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118.

111 United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) (citing the *Charming Betsy* statutory construction doctrine as "sustained by an unbroken line of authority").

112 *See* 28 U.S.C. § 1350; Torture Victims Protection Act of 1991, Pub. L. No. 102-256, § 3(a), 106 Stat. 73, 73 (1992).

domestic law absent congressional action,[113] they are outside the scope of this Note. Rather, this Note addresses the extent to which a statute that does expressly invoke CIL—the ATS—provides a valid tool for advancing a human rights claim under CIL. The Supreme Court in *Sosa* determined that CIL, as applicable in U.S. courts, is made up of norms that are "specific, universal, and obligatory" and that the traditionally relied upon sources for identifying such norms are the general practice of nations, the judicial decisions of domestic and international courts, and academic writings on the subject by renowned scholars.[114] While CIL is distinct from official treaties and accords, these formal agreements can function as evidence that CIL exists.[115] The United States Department of State's position on CIL is that "[a] rule of customary international law may be formed where state practice is 'both extensive and virtually uniform' and where States act under a sense of legal obligation (*opinio juris*)."[116]

II. THE BINDING INTERNATIONAL NORM AGAINST FORCED LABOR AND U.S. ACKNOWLEDGEMENT

A successful ATS claim requires asserting a violation of clearly established CIL.[117] This Part analyzes the international regime surrounding forced labor and asserts that there is an established CIL norm that forbids forced labor generally and imposes strong restrictions on forced labor in the prison and detention context. This Part further argues that despite the United States's notable absence from international treaties prohibiting forced labor, its statements and practices reflect a recognition of and conformity with a CIL norm against forced labor in certain circumstances, particularly when it occurs in other countries. Finally, this Part will conclude that the VWP is at

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113 For an example of an argument in favor of treating customary international law as domestic federal law in the United States, see Gary Born, *Customary International Law in United States Courts,* 92 WASH. L. REV. 1641 (2017).

114 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (quoting *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994)).

115 *See* Doe v. Reddy, No. C 02-05570 WHA, 2003 WL 23893010, at *8 n.3 (N.D. Cal. Aug. 4, 2003) ("For instance, the Convention on the Rights of the Child, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights have not been ratified by the United States. Nonetheless, '[t]he Universal Declaration of Human Rights is a resolution of the General Assembly of the United Nations. As such, it is a powerful and authoritative statement of the customary international law of human rights.'" (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992))).

116 *U.S. Response to Inter-American Commission on Human Rights on Juvenile Life Sentencing*, U.S. DEP'T OF STATE ARCHIVE (Apr. 2007) (quoting North Sea Continental Shelf Cases (Fed. Rep. Ger. v. Den. & Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20)), https://2001-2009.state.gov/s/l/2007/112681.htm [https://perma.cc/XE68-P726].

117 *See supra* Section I.C.

odds with established CIL governing forced prison labor, including the United States's purported understanding of CIL.

A. Identifying a CIL Norm Against Forced Labor

In order for ICE detainees to establish their ATS claim, they must first and foremost demonstrate that CIL—with sufficient clarity and widespread acceptance to meet the *Sosa* standards[118]—prohibits forced labor. To do so they will need to cite international practice, scholarly work, and the presence of treaties in conformity with a norm against forced labor.[119]

There are few practices as universally prohibited and reviled by the international community as slavery and forced labor.[120] The International Law Commission of the United Nations includes the prohibition of slavery amongst those norms that have reached the level of *jus cogens*, or peremptory principles of international law.[121] The Universal Declaration of Human Rights states that "[n]o one shall be held in slavery or servitude" and forbids slavery "in all [its] forms."[122]

Multilateral treaties have long been cited as evidence of CIL.[123] Slavery and forced labor are widely condemned in the international treaty framework.[124] The Convention Concerning Forced or Compulsory Labour, 1930 (No. 29) ("Forced Labor Convention"), ratified by 179 states, not

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118 *See supra* Section I.C.

119 *See supra* Section I.D.

120 *See, e.g.*, Susan Kang, *Forcing Prison Labor: International Labor Standards, Human Rights and the Privatization of Prison Labor in the Contemporary United States*, 31 NEW POLI. SCI. 137, 143 (2009) (noting that "[t]he prohibition against prison labor is a component in the norm against forced labor, which may be the oldest, strongest international norm within the whole human rights regime").

121 Dire Tladi (Special Rapporteur), *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)*, at 46–48, U.N. Doc. A/CN.4/727 (Jan. 31, 2019) (including slavery within a nonexhaustive list of *jus cogens*).

122 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 4 (Dec. 10, 1948).

123 *See* R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 275–76 (1965–66).

124 David Weissbrodt & Anti-Slavery Int'l, U.N. Off. of the High Comm'r for Human Rights, *Abolishing Slavery and Its Contemporary Forms*, at 11–12, U.N. Doc. HR/PUB/02/4 (2002) (distinguishing forced labor from slavery and including forced labor within a section on "the various forms of slavery and slavery-like practices").

including the United States,[125] seeks to eliminate the use of forced labor.[126] It defines "forced or compulsory labour [to] mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[127] The United Nations Office of the High Commissioner distinguishes the Forced Labor Convention's definition of forced labor from slavery "in that [forced labor] does not include a concept of ownership, [yet] it is clear that the practice imposes a similar degree of restriction on the individual's freedom—often through violent means, making forced labour similar to slavery in its effect on the individual."[128]

P29, Protocol of 2014 to the Forced Labour Convention, 1930 was adopted by the International Labour Convention Conference in 2014 and entered into force in 2016.[129] It obligates states to provide protection and appropriate remedies, including compensation, to victims of forced labor and to sanction the perpetrators of forced labor.[130] It also obligates state parties to develop a "national policy and plan of action for the effective and sustain[ed] suppression of forced or compulsory labour."[131] Another multilateral treaty, the Convention Concerning the Abolition of Forced Labour, 1957 (No. 105) is ratified by 175 states, including the United States.[132] This Convention followed the Forced Labor Convention and eliminated certain forms of forced labor still allowed under that

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125 *See* U.S. COUNCIL FOR INT'L BUS., ISSUE ANALYSIS: U.S. RATIFICATION OF ILO CORE LABOR STANDARDS (2007), https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf [https://perma.cc/D26Q-VQXY] (discussing the findings of the Tripartite Advisory Panel on International Labor Standards on the Forced Labor Convention regarding why the United States's established practice of private prison labor conflicts with the Forced Labor Convention).

126 *See* Convention Concerning Forced or Compulsory Labour art. 1, ¶ 1, *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932) [hereinafter Forced Labor Convention].

127 *Id.* art. 2, ¶ 1.

128 Weissbrodt & Anti-Slavery Int'l, *supra* note 124, at 12. *But see* Doe v. Reddy, No. C 02-05570 WHA, 2003 WL 23893010, at *8 (N.D. Cal. Aug. 4, 2003) (identifying forced labor as a "modern form" of slavery which violates international law "no less than historical chattel slavery").

129 *See* Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29), 53 I.L.M. 1227 (entered into force Nov. 9, 2016).

130 *See id*. art. 1, ¶ 1.

131 *Id*. art. 1, ¶ 2.

132 Convention Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959). Notably, this convention does not proscribe the use of private prison labor. *See id.*

convention.[133] In 1998, the International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, which obligates member states of the International Labor Organization ("ILO"), of which the United States is one, "to respect, to promote and to realize" the core values of the ILO, including the prohibition of forced labor.[134] The Declaration is a statement acknowledging that all ILO members, even those who did not ratify a given convention, still bear an obligation to promote and respect the principles of the ILO conventions.[135] Thus, the vast international treaty framework expresses a clear norm against forced labor and an expectation that states will abide by this prohibition.

While a CIL prohibition against forced labor is generally clear, the norm against forced labor within the custodial context comes with some caveats. Governments have long imposed work requirements upon inmates in penal institutions.[136] In light of that reality, the United Nations, in its Standard Minimum Rules for the Treatment of Prisoners ("The Nelson Mandela Rules"), sanctions the practice of prison labor under certain circumstances.[137] Under the Nelson Mandela Rules, prison labor should only be instituted in pursuit of rehabilitating and preparing inmates for a crime-free life outside of prison, and the work conditions must resemble the conditions workers would encounter outside of prison.[138] Moreover, the Forced Labor Convention does not define labor programs for criminal convicts in public prisons as constituting prohibited forced labor necessarily.[139] The ILO has clarified that *private* prisons may not engage in forced labor practices and

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133 *Id.*

134 INT'L LABOUR ORG., ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP 3 (2022), https://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-declaration/documents/publication/wcms_467653.pdf [https://perma.cc/F2CQ-F9VA].

135 *Id.* at 1.

136 *See Factbox: Ten Facts on Prison Labor Worldwide*, REUTERS (Apr. 11, 2019, 5:33 AM), https://www.reuters.com/article/us-brazil-slavery-global-factbox/factbox-ten-facts-on-prison-labor-worldwide-idUSKCN1RN0ZL [https://perma.cc/WE9Q-MGVK].

137 G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Dec. 17, 2015) [hereinafter The Nelson Mandela Rules].

138 *Id.* r. 98, ¶ 1 ("So far as possible the work provided shall be such as will maintain or increase the prisoners' ability to earn an honest living after release."); *id*. r. 99, ¶ 1 ("The organization and methods of work in prisons shall resemble as closely as possible those of similar work outside of prisons, so as to prepare prisoners for the conditions of normal occupational life.").

139 Forced Labor Convention, *supra* note 126, art. 2, ¶ 2(c).

that inmates must give free consent to any work programs.[140] It also considers "work imposed in semi-privatised prisons" to be forced labor.[141] Additionally, the ILO does not exclude administrative detention from its condemnation of private forced prison labor.[142] Of note, the ILO states that people serving in administrative detention or awaiting sentencing for criminal conviction cannot be required to work.[143] The ILO explicitly condemns the practice of forcing migrants and refugees awaiting the resolution of administrative processing to work.[144] Forced labor in public prisons thus is generally permissible, but forced labor in private prisons or administrative detention centers is not.

International bodies recognize certain indicators that help identify whether labor conducted in a custodial setting is forced or voluntary.[145] A critical element of voluntary labor is the worker's ability to consent.[146] Where "menace of any penalty, such as loss of privileges or an unfavourable assessment of behaviour which could jeopardize any reduction in his or her sentence" occurs, work is not voluntarily consented to.[147]

That a detained person's working conditions are similar to those customarily present outside of a custodial context is considered to be a strong indicator that the worker is able to consent to the work.[148] For example, detention center and private prison operators should use consent forms that set forth the wages and conditions of the work to be performed, pay wages similar to those paid to nonimprisoned workers employed in the same industry and of a similar skill level, permit workers to withdraw their consent, train workers to learn new skills throughout their labor, and offer

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140 *Q&As on Business and Forced Labour*, INT'L LABOUR ORG., https://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang—en/index.htm#Q3 [https://perma.cc/F8BQ-H6RP].

141 INT'L LABOUR ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 40 (2017), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf [https://perma.cc/X3VZ-QJKF].

142 *Id.* at 41. ("Forced labour in prison varies between a few weeks *for cases of people in administrative detention* to many years for long term sentences." (emphasis added)).

143 *Id.* at 42.

144 *Id*.

145 *See, e.g.*, *Q&As on Business and Forced Labour*, *supra* note 140; The Nelson Mandela Rules, *supra* note 137.

146 *Q&As on Business and Forced Labour*, *supra* note 140.

147 *Id.*

148 *Id*.

jobs they could pursue outside of prison upon release.[149] This last indicator aligns with the general purpose that custodial labor should function to prepare inmates for release rather than to enrich the prison.[150]

Additionally, the nature and conditions of the work must not be "afflictive."[151] To that end, workers' hours should comport with the law and the typical practices for free employees in the area.[152] Safety and health precautions governing the employment of free workers must also be observed in prisons.[153]

Finally, private prisons and detention centers must not financially exploit their inmates and detainees by placing profits over rehabilitation.[154] As stated in the Nelson Mandela Rules: "The interests of the prisoners and of their vocational training . . . must not be subordinated to the purpose of making a financial profit from an industry in the prison."[155] Moreover, these corporations must pay workers a fair wage for their labor.[156] Under these principles, a system such as the VWP which permits private corporations to save on employment and maintenance costs by relying on almost free labor to perform essential janitorial and other tasks, while feeding detainees such small amounts that they often are forced to spend their one-dollar wages on food at the commissary[157] would be prohibited.

In sum, while international law seems to permit truly voluntary work programs in detention centers, the voluntary nature of the labor must be assessed by reference to the workers' ability to consent, the nonhazardous conditions of the employment, and the payment of a fair wage. Detention centers that fail to meet these basic criteria are arguably forcing their detainees to labor in violation of established norms of CIL.

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149 *Id*.

150 *See* The Nelson Mandela Rules, *supra* note 137, r. 99, ¶ 2.

151 *Id.* r. 97, ¶ 1.

152 *Id.* r. 102, ¶ 1; *see Q&As on Business and Forced Labour*, *supra* note 140.

153 The Nelson Mandela Rules, *supra* note 137, r. 101, ¶ 1.

154 *See id.* r. 99, ¶ 2.

155 *Id.*

156 *Id.* r. 103, ¶ 1.

157 For a discussion of the allegations of detainees regarding the insufficient food provided at noncitizen detention centers, see *supra* Section I.B.

B. Does the United States Acknowledge a CIL Prohibition Against Forced Labor?

The United States's absence from the Forced Labor Convention, as one of only seven nonratifying nations worldwide, is notable.[158] But with the Convention's clear prohibition on forced labor imposed in privately run prisons, it is unsurprising that a country with approximately two million incarcerated people,[159] about 200,000 of whom are in privately run prisons,[160] would refrain from ratifying. Nevertheless, as this Section discusses, American practice and statements reflect a recognition of a norm against forced labor under certain circumstances.

Congress is not unfamiliar with the concept of forced labor and has condemned it in several instances. Through the Tariff Act of 1930 section 307, the United States Congress enacted a law prohibiting the importation of goods produced through the use of forced labor.[161] The Act defined forced labor as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily."[162] This language was modeled on the Forced Labor Convention,[163] which indicates the U.S. government's recognition of an international norm and its conformity therewith. Congress also included a definition of "forced labor" in the Trafficking Victims Protection Act ("TVPA"), prohibiting obtaining labor through threats or physical force.[164]

The Congressional-Executive Commission on China, a group of senators, representatives, and executive administration officials tasked by Congress since 2000 with monitoring human rights conditions in China,[165] held a roundtable discussing China's prison labor system and the need for better enforcement of section 307 to prevent the import of goods produced

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158 Forced Labor Convention, *supra* note 126.

159 *See* JACOB KANG-BROWN, CHASE MONTAGNET & JASMINE HEISS, VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN 2020, at 1 tbl.1 (2021).

160 *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/3NVL-RTCM].

161 19 U.S.C. § 1307.

162 *Id.*

163 *See* CHRISTOPHER A. CASEY, CATHLEEN D. CIMINO-ISAACS & KATARINA C. O'REGAN, CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 1 (2021).

164 18 U.S.C. § 1589. Limited scholarship has addressed the applicability of the TVPA to immigration detention centers. *See* Booth, *supra* note 43, at 575.

165 *About*, CONG.-EXEC. COMM'N ON CHINA, https://www.cecc.gov/about [https://perma.cc/DW5Z-ZLC7].

though this system.[166] The Commission explicitly referred to China's failure to abide by the Declaration on the ILO's Fundamental Principles and Rights at Work, stating "China has adopted like all members of the ILO, the [Declaration], which includes a guarantee for freedom from forced labor. The Commission remains troubled that China is not meeting its obligation under that particular Declaration, hence the roundtable today."[167] That the Commission referred to the Declaration's commitments[168] as obligatory and asserted that China failed to meet those obligations is further evidence of the United States's recognition of a CIL norm against prison labor that fails to meet the international community's standards and conditions.[169]

Federal courts have addressed the issue of forced labor as well, and many have explicitly identified a CIL norm prohibiting the practice. In *Licea v. Curacao Drydock Co.*,[170] a Florida district court stated:

> Forced labor constitutes a violation of a well-established, universally-recognized norm of international law. It is widely recognized as one of the handful of serious claims for which the ATS provides jurisdiction in U.S. district courts regardless of where it occurred. It is a brutal offense condemned by the civilized world. This Court is compelled to act strongly to punish and deter it.[171]

The *Licea* court found that a drydock corporation violated CIL's forced labor prohibition where Cuban citizens testified to being intimidated, threatened, and ordered to engage in dangerous and physically strenuous work such as cleaning, painting, and fixing oil ships without the appropriate protective equipment to do so.[172] The court recognized an "impossible dilemma" to which the plaintiffs were subjected—the choice between enduring harsh exploitation or risking losing their families and future livelihood by attempting to escape.[173] The court placed importance on the Cuban government's systemic use of forced labor and complicity in the

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166 *See Forced Labor in China: Roundtable Before the Cong.-Exec. Comm'n on China*, 109th Cong. (2005).

167 *Id.* at 1 (statement of David Dorman, Chairman, Cong.-Exec. Comm'n on China).

168 *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, *supra* note 134.

169 *See supra* Part II (discussing the international community's accepted standards and conditions for custodial labor).

170 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

171 *Id. at* 1366.

172 *Id.* at 1361.

173 *Id. at 1362.*

scheme[174] and the drydock company's financial enrichment on the backs of the laborers.[175]

A California district court in *Doe v. Reddy*[176] similarly stated that forced labor is "prohibited under the law of nations" and found that Indian plaintiffs who were enticed to the United States by extended family members with promises of job opportunities had sufficiently stated a claim of forced labor in an ATS suit where they were "forced to work involuntarily" and where "defendants reinforced their coercive conduct through threats, physical beatings, sexual battery, fraud and unlawful substandard working conditions."[177] *Licea* and *Reddy* indicate a recognition in U.S. jurisprudence of international prohibitions on forced labor, including labor obtained through threats and coercion.

U.S. foreign policy also seems to accept a prohibition against forced labor. The State Department recognizes human rights abuses perpetrated by the Cuban government and explicitly identifies its use of forced labor amongst prisoners, noting the prisoners' lack of sufficient food or water, dangerous conditions, lack of necessary protective equipment for certain tasks, subjection to physically strenuous assignments, and tendency to be punished if they refused to perform.[178] The United States's approach to goods produced through prison labor in China also displays a recognition that prison labor conditions must meet certain standards to be legal.[179] In order for a state to be free from the obligations imposed by a given CIL norm, it must consistently and openly oppose that norm.[180] However, as has been demonstrated in this Part, the three branches of the federal government have recognized that forced labor is a prohibited practice under international law where work is extracted through threat or force and the work is executed in unsafe conditions.[181] This posture is at odds with the practice of the VWP and warrants a solution that addresses the real experiences of detainees and brings U.S. immigration detention practices in line with international law.

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174 *Id.* at 1359–61.

175 *Id.* at 1357.

176 No. C 02-05570 WHA, 2003 WL 23893010 (N.D. Cal. Aug. 4, 2003).

177 *Id*. at *1, *9.

178 U.S. DEP'T OF STATE, CUBA 2021 HUMAN RIGHTS REPORT 42–43 (2021), https://www.state.gov/wp-content/uploads/2022/02/313615_CUBA-2021-HUMAN-RIGHTS-REPORT.pdf [https://perma.cc/K96S-MEL8].

179 *See generally* Jonathan M. Cowen, *One Nation's "Gulag" Is Another Nation's "Factory Within a Fence": Prison-Labor in the People's Republic of China and the United States of America*, 12 UCLA PAC. BASIN L.J. 190 (1993).

180 *See supra* text accompanying notes 106–108.

181 *See, e.g.*, *Reddy*, 2003 WL 23893010; *Licea v. Curacao Drydock Co.,* 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

III. A LITIGIOUS SOLUTION TO THE "INVOLUNTARY" WORK PROGRAM

The VWP continues to operate and remains endorsed by the federal government to this day.[182] ICE has not indicated any intention to overhaul the program and detention center contractors have no financial incentive to start paying detainees more.[183] This Part argues that noncitizen detainees could leverage the international standards that are demonstrably at odds with the VWP through an ATS claim and get the VWP declared as violative of international law.

A. An ATS Claim for ICE Detainees

The ATS, as currently construed by the Supreme Court, requires noncitizen plaintiffs to show that they suffered a tort prohibited by CIL and that this tort sufficiently touches and concerns the United States to overcome the presumption against extraterritoriality.[184] While claims against foreign corporations will not be heard, Supreme Court jurisprudence has left open the possibility that claims of CIL-violative torts conducted by U.S. corporations, so long as this conduct is not mere general corporate activity, can overcome this presumption.[185]

As noncitizens,[186] ICE detainees can meet the first element of bringing an ATS claim, which provides a cause of action to "alien[s]" only.[187] Additionally, detainees likely can easily overcome the presumption against extraterritoriality.[188] Although the corporate defendant in *Nestlé* was merely engaging in general corporate activities in the United States while the alleged trafficking and forced labor occurred in the Ivory Coast,[189] detention operators such as CoreCivic, GEO Group, and LaSalle Corrections with whom ICE contracts are all U.S. corporations running facilities located

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182 *See* PBNDS 2011, *supra* note 8.

183 *See supra* notes 42–43 and accompanying text.

184 *See supra* Section II.A.

185 *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935–37 (2021) (deciding on grounds of extraterritoriality rather than ruling on the petitioner's argument that corporations are not liable under ATS); *id*. at 1940 (Gorsuch, J., concurring) ("The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding.").

186 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"); *see also* 8 U.S.C. § 1101(a)(22) (defining "national of the United States" as a U.S. citizen or someone who "owes permanent allegiance to the United States").

187 28 U.S.C. § 1350.

188 *See supra* Section I.C.

189 *Nestlé USA, Inc.*, 141 S. Ct. at 1937.

within the United States.[190] While the Supreme Court has narrowed the applicability of the ATS with respect to foreign corporate defendants, it has repeatedly declined to hold that American corporations cannot be liable under the ATS.[191]

Most importantly, the detainees will then need to prove that they have suffered a tort prohibited by CIL—specifically, forced labor. While CIL can be difficult to show, numerous courts have utilized the method discussed in Section II.A of identifying a CIL norm through the widespread practice of states as indicated in treaty agreements, scholarly work, and executive statements.[192] U.S. courts have repeatedly held that there is a CIL prohibition against forced labor where the labor is extracted through coercion and threats and where the work is conducted in hazardous conditions.[193] *Licea* suggests that noncitizen detainees can successfully argue that they are subjected to forced labor. In *Licea*, the court held that plaintiffs were subjected to forced labor where they were caused to engage in physically demanding work through intimidation, threats, and orders and were required to clean, paint, and repair oil ships, often without the appropriate protective equipment.[194] Noncitizen detainees' reports of working upon officers' orders and being required to handle dangerous chemicals without protective gear—despite requests—closely resemble the *Licea* facts.[195] Additionally, as in *Reddy*, where the court found that work extracted in substandard conditions by threat of punishment was forced labor under CIL,[196] ICE detainee allegations of extended workdays, day and night shifts back-to-back, hazardous materials, and threats from officers[197] would likely state a claim of forced labor.

Moreover, where the *Licea* court recognized as additional coercive factors the Cuban government's complicity in the scheme and the country's

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190 *Find a Facility*, CORECIVIC, https://www.corecivic.com/facilities [https://perma.cc/WG5E-JR2V]; *Our Locations*, GEO GROUP, INC., https://www.geogroup.com/LOCATIONS [https://perma.cc/EN98-2MLU]; *Our Locations*, LASALLE CORRECTIONS, https://lasallecorrections.com/locations/ [https://perma.cc/2L7F-PX2K].

191 *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1412 (2018); *Nestlé USA Inc.*, 141 S. Ct. at 1937.

192 *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 131–32 (2d Cir. 2010).

193 *See, e.g.*, Doe v. Reddy, No. C 02-05570 WHA, 2003 WL 23893010 (N.D. Cal. Aug. 4, 2003); *Licea v. Curacao Drydock Co.,* 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

194 *Licea,* 584 F. Supp. 2d. at 1361–62.

195 *See supra* Section I.B.

196 *Reddy*, 2003 WL 23893010, at *9.

197 *See supra* Section I.B.

history of forced labor systems,[198] ICE's tacit endorsement of the VWP[199] and the agency's failure to prevent exploitation of detainees simply waiting out their administrative hearing process in a system where corporate contractors openly depend on detainee labor to sustain their operations would likely encourage a court to find that the VWP is coercive.[200] And the U.S. government's policy of condemning forced labor practices, particularly in the prison and detention context overseas,[201] indicates the United States's acknowledgement that forced labor by state detainees violates CIL.

B. Why Use the ATS to Address ICE's Forced Labor Problem

No plaintiff has attempted to utilize the ATS to combat the forced labor that immigration detention centers extract under the VWP.[202] However, the ATS has been increasingly relied upon by victims of human rights abuses seeking redress and offers ICE detainees a viable solution to hold detention center contractors accountable for their exploitative practices.[203] The global community condemns forced labor and has come to expect and demand certain standards for workers in custody.[204] The ATS is a unique statutory tool to bring these international norms to bear in the immigration detention space here in the United States.

Detainees have sought legal recourse against detention center contractors for their work practices in lawsuits brought under other federal statutes, such as the TVPA and the Fair Labor Standards Act ("FLSA").[205] FLSA cases present an issue for ICE detainees because the FLSA only protects people defined as "employees" under the statute.[206] In a recent FLSA case alleging that a private detention center failed to pay detainees the minimum wage, the Fourth Circuit Court of Appeals held that immigration detainees are not "employees" of the centers at which they are detained and

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198 *See Licea,* 584 F. Supp. 2d. at 1361.

199 PBNDS 2011, *supra* note 8.

200 *See supra* Section II.A (discussing international norms against the enrichment of private detention corporations at the expense of detainees).

201 *See, e.g.*, CUBA 2021 HUMAN RIGHTS REPORT, *supra* note 178, at 42–43.

202 *But see* Jama v. INS, 22 F. Supp. 2d 353, 353 (D.N.J. 1998) (alleging in an ATS suit that plaintiffs subject to sexual harassment and humiliation in detention were centers in violation of a CIL norm against cruel and degrading treatment).

203 *See supra* Section I.C.

204 *See supra* Section II.A.

205 *See, e.g.*, Barrientos v. CoreCivic, Inc., 951 F.3d 1269, 1269 (11th Cir. 2020); Ndambi v. CoreCivic, Inc., 990 F.3d 369, 371 (4th Cir. 2021).

206 29 U.S.C. § 203(e); *see, e.g.*, *Ndambi*, 990 F.3d at 371.

thus are not afforded FLSA protection.[207] Significantly, in that same case, the court responded to the plaintiffs' argument that the detention center contractor did not provide necessities such as adequate food and thus should be provided an adequate wage to afford such items in the commissary by stating that the FLSA is not designed to remedy inadequate custodial conditions.[208] This type of reasoning leaves a door open for an ATS suit alleging the violation of CIL norms against forced labor, because CIL norms *do* address the conditions owed to workers in custody.[209]

TVPA cases may be better suited than FLSA cases to address the VWP's labor practices.[210] Pertinently, the TVPA prohibits the knowing obtainment of labor from someone through force, threats of force, or threats of abuse of the legal process.[211] Several plaintiff groups have brought TVPA suits against major detention contractors such as CoreCivic, but none have reached a ruling on the merits of whether the VWP violates the TVPA.[212] However, the TVPA only forbids labor obtained by force, threat, or coercion,[213] but does not proscribe the withholding of wages or the payment of unfairly low wages. The TVPA thus is insufficient to address the full extent of the VWP's deficiencies.[214] Plaintiffs could address *both* the unfair wages and coerced labor under an ATS claim, so long as they can establish that such practices are clearly proscribed by CIL.[215]

An ATS victory for ICE detainees could result in the awarding of monetary damages, and numerous ATS cases have provided plaintiffs with compensatory and punitive awards.[216] A monetary award would be a start in

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207 *Ndambi*, 990 F.3d at 371, 375; *see also* Alvarado Guevara v. INS, 902 F.2d 394, 396 (5th Cir. 1990) (holding that immigration detainees are not within the population of workers in "American industry" that the FLSA was intended to protect).

208 *Ndambi*, 990 F.3d at 373.

209 *See supra* Section II.A (discussing the need for detainees' work conditions to be similar to those outside of the custodial system).

210 *See generally* Booth, *supra* note 43, at 578 & n.29, 606–07.

211 *See* 18 U.S.C. § 1589.

212 *See, e.g.*, Barrientos v. CoreCivic, Inc., 951 F.3d 1269, 1275 (11th Cir. 2020); Gonzalez v. CoreCivic, Inc., 986 F.3d 536, 537–38 (5th Cir. 2021).

213 18 U.S.C. § 1589(a); *see Barrientos*, 951 F.3d at 1271 (holding that detention contractors may be liable if they obtain labor from detainees "through the illegal coercive means *explicitly* listed in the TVPA" (emphasis added)).

214 *See supra* Sections I.A–.B (discussing the PBNDS' endorsement of paying detainees merely one dollar per day of work and detainee reports of withheld wages).

215 *See supra* Section I.C (articulating the jurisprudence governing ATS claims).

216 *See, e.g.*, *In re* Estate of Ferdinand Marcos, 94 F.3d 539, 543 (9th Cir. 1996) (awarding $766 million in compensatory damages and $1.2 billion in punitive damages); Abebe-Jira v. Negewo, 72 F.3d 844, 845 (11th Cir. 1996); Arce v. Garcia, 434 F.3d 1254, 1256 (11th Cir. 2006).

remedying one of the glaring aspects of forced labor—the lack of payment for work or the payment of unfair wages.[217] Courts will consider a number of factors when determining the amount of damages to grant, including the egregiousness of the defendant's conduct and the likelihood of deterring similar acts by others.[218]

ATS victories have also resulted in declaratory relief.[219] ICE detention centers inherently operate in an international context as citizens of foreign nations travel to the United States, are kept in substandard conditions, and then are often sent back to the country from which they arrived.[220] A finding of liability for CoreCivic, GEO Group, LaSalle Corrections, or any other detention center contractor would be a public declaration that the VWP violates international law. The concept of "naming and shaming" human rights abusers is a commonly used tool in international politics and refers to publicly identifying that an individual or state is engaging in human rights violations and condemning that practice with the purpose of convincing the shamed party to change its conduct.[221] An ATS claim would necessarily center the international standards that govern prison and detainee labor and would highlight the gap between the United States's statements condemning exploitative labor within other countries' prison systems[222] and the practices permitted within its own detention centers.[223] A judicial declaration that ICE contractors have violated CIL could lead to international pressure on Congress to abolish the VWP or to substantially overhaul it such that it conforms to international standards requiring fair wages, safe working conditions, and adequate training,[224] as well as to better oversee the provision of adequate food at detention centers so that detainees are not compelled to work in order to survive.[225] With such standards in place, the VWP would no longer be voluntary in name only.

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217 *See* Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 150, 159–160 (Leval, J., concurring) ("United States courts, acting under the Alien Tort Statute . . . have been awarding compensatory damages to victims of human rights abuses committed in violation of the law of nations.").

218 *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1255, 1364 (S.D. Fla. 2008).

219 Doe v. Liu Qu, 349 F. Supp. 2d 1258, 1334 (N.D. Cal. 2004) (granting declaratory relief on the basis that the plaintiffs had suffered torture in violation of the ATS).

220 *See supra* Section I.B; CHO ET AL., *supra* note 3, at 6–8.

221 *See* James C. Franklin, *Human Rights Naming and Shaming: International and Domestic Processes*, *in* THE POLITICS AND LEVERAGE IN INTERNATIONAL RELATIONS 43, 44–45 (H. Richard Friman ed., 2015).

222 *See supra* Section II.B.

223 *See supra* Section I.B.

224 *See supra* Section II.A.

225 *See supra* text accompanying notes 49–51.

CONCLUSION

Thousands of noncitizens are spending their days confined in detention centers while awaiting the completion of an administrative process without being convicted of any crime.[226] These centers depend on the labor of detainees to maintain their facilities' operations,[227] and yet they pay the laborers almost negligible wages or nothing at all.[228] This labor is cloaked under a guise of choice,[229] but noncitizen detainees' participation in the "voluntary" program is anything but voluntary.[230] Detainees claim to be working under orders or threat of punishment and do so in unsafe conditions.[231]

While detainees have sought recourse through media attention[232] and TVPA[233] and FSLA[234] claims, the VWP has not been abolished or reformed.[235] The ATS offers an opportunity to show that the VWP places noncitizens into forced labor dynamics and as such violates international law.[236] An acknowledgement of the United States's endorsement of and complicity in CIL violations could result in major global pressure to overhaul or eliminate the VWP and provide detainees with legitimate opportunities to earn wages, stay occupied, and await their hearings with dignity.

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226 *See* Booth, *supra* note 43, at 583–84.

227 *See supra* Section I.A (discussing the PBNDS's endorsement of utilizing detainee labor in detention center operations and CoreCivic's financial reliance on this model).

228 *See supra* Section I.B.

229 *See* PBNDS 2011, *supra* note 8, at 405–09 (characterizing the VWP as providing "opportunities" for work).

230 *See supra* Section I.B.

231 *See id.*

232 *See supra* text accompanying note 55.

233 *See supra* text accompanying notes 212–216.

234 *See* Ndambi v. CoreCivic, Inc., 990 F.3d 369, 371 (4th Cir. 2021).

235 *See supra* Part III.

236 *See supra* Section III.A.