No. 10-56739

United States Court of Appeals for the Ninth Circuit

JOHN DOE I; JOHN DOE II; JOHN DOE III, individually and on behalf of proposed class members; GLOBAL EXCHANGE,

Plaintiffs-Appellants,

– v. –

NESTLE USA INC.; ARCHER DANIELS MIDLAND COMPANY; CARGILL INCORPORATED COMPANY; CARGILL COCOA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, NO. 2:05-CV-05133-SVW-JTL
THE HONORABLE STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE

BRIEF OF *AMICUS CURIAE* UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus* United States Council for International Business (the "USCIB") makes the following disclosure.

The USCIB is a membership organization, not a publicly held corporation. No publicly held corporation owns 10 percent or more of any stock in USCIB.

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The United States Council for International Business ("USCIB") is an independent business advocacy group with a membership comprising over 300 global corporations, professional firms and industry associations (the USCIB collectively with its members are referred to herein as *amicus curiae*).[1] One of the USCIB's primary objectives is to advance the global interests of American business both at home and abroad. Among other things, the USCIB is the American affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the Organisation for Economic Cooperation and Development and the International Organisation of Employers (IOE). As such, the USCIB routinely and officially represents U.S. business positions both domestically and abroad, including before foreign governments.

Of particular importance here, the USCIB is the U.S. employer constituent of the International Labour Organization, a specialized agency of the United Nations responsible for drafting and overseeing treaties governing international labor standards, which are referred to as ILO Conventions. The ILO is a tripartite organization comprised of governments, workers' organizations and employers' organizations, making it the only tripartite United Nations agency that brings these

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

constituencies together to jointly shape policies and programs. Additionally, a USCIB senior executive sits on the ILO Governing Body, which is composed of 28 government representatives, 14 workers' representatives, and 14 employers' representatives

The USCIB believes it can offer a valuable perspective to this Court as it considers the issues on appeal. USCIB is intimately involved in the development and promulgation of the ILO Conventions, which plaintiffs have relied upon in their attempt to demonstrate the existence of a well-defined and universally-accepted legal standard concerning the imposition of liability upon private actors for aiding and abetting labor violations, and respectfully submit that its unique knowledge of the history, development, and operation of the ILO Conventions will be helpful in assisting the Court in its consideration of the legal effect of those conventions.

The USCIB also has an interest in assisting the court in its determination of the legal standards governing the jurisdictional reach of the Alien Tort Statute, 28 U.S.C. §1350, and, more specifically, whether, under that statute, a private right of action for violations of customary international law alleged to have occurred in foreign countries can lie against private business entities. As discussed herein, the USCIB contends that the ILO Conventions, including the eight Core Conventions, were not intended to bind private employers, corporations, or individuals, and thus

do not create a norm of "customary international law" for which private parties such as Defendant-Appellees should be held liable under the ATS. Further, USCIB agrees with the conclusions and decision of the district court below and those of the Second Circuit court in *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111 (2d Cir. 2010), both of which concluded that, absent legislative action on the issue, corporations are not proper defendants under the ATS.

SUMMARY OF ARGUMENT

The district court properly dismissed Appellants' ATS claims against Defendants-Appellees for failure to show a violation of international law for which Defendants-Appellees could be held liable. Indeed, none of the four ILO Conventions upon which Appellants relied in attempting to establish a violation of international law imposes any obligation on private parties. Rather, the plain text of each of the ILO Conventions relied upon by Plaintiffs-Appellants expressly provides that the only obligations imposed by those Conventions are directed toward sovereign governments. Notwithstanding the evolving understanding of international labor relations and the differing goals of each ILO Convention at the time of its drafting, every one of those Conventions leaves the development and implementation of specific mechanisms for liability and enforcement of that Convention's labor standards in the hands of ratifying Member States and through national law. The ILO has taken this approach intentionally, given its view that

labor standards must necessarily reflect the political, cultural, and economic differences among nations, and its further view that forced labor must be combated through careful, country-specific legislation and enforcement, rather than through an international law regime. This intent is reflected in, and corroborated by, each Convention's drafting history, which demonstrates that the drafters of the ILO Conventions repeatedly considered and rejected proposals to use the ILO Conventions to regulate private conduct directly, finding that any attempt at direct regulation of private parties would not only create difficulties in achieving widespread ratification, but would also be unduly intrusive upon employer-employee relations, which the ILO has recognized are widely-divergent among nations. In sum, not only do the ILO Conventions ***not*** provide for the sort of liability Appellants seek to impose upon Defendant-Appellees, the drafters of those Conventions specifically considered and rejected it.

Appellants' reliance upon the ILO Conventions to establish a claim against Defendant-Appellees under the ATS is thus misplaced and contrary to the history and context of the Conventions, which *amicus curiae* respectfully submit must be considered in determining precisely what those Conventions stand for among the international community. Nearly a century's worth of that history reflects the ILO's general recognition that the optimal way to achieve the widespread protection of important labor rights is to leave the implementation of labor

standards up to each sovereign nation, and that the "internationalization" of the scope of liability for violations of labor standards is highly undesirable. Through this appeal, Appellants essentially invite this Court to adopt a course of action that has been expressly rejected by the ILO in the drafting and adoption of each of the relevant labor Conventions. As explained by the following arguments, this Court should decline that invitation and affirm the district court's well-reasoned decision.

ARGUMENT

I. The Defendant's Identity and Juridical Status Are Inseparable Components of an ATS Cause of Action

As *Sosa* requires there to be a basis in international law for imposing liability for a certain act upon a certain type of defendant, it is simply improper to view the issue of whether ATS liability may be imposed upon Defendant-Appellees as a mere "remedial" matter to be supplied by federal common law. To illustrate, many federal causes of action are inextricably tied to the identity of the defendant or class of defendants who may be held liable for specified conduct, for example those supplied by Congress through legislation such as the Federal Tort Claims Act and Title VII of the Civil Rights Act. Such statutory schemes each grew out of a particular historical context, and were aimed specifically at regulating conduct by a particular class of defendants in order to redress certain wrongs believed to be primarily within the control of that particular class of

defendants. *See, e.g., Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (recognizing that Title VII of the Civil Rights Act was directed at employers); *Griggs v. Duke Power Co*., 401 U.S. 424, 429-30 (1971) (describing the purpose of Title VII of the Civil Rights Act as the achievement of equality of employment opportunities and the removal of barriers that have operated in the past to favor an identifiable group of white employees over other employees); *Feres v. U.S.*, 340 U.S. 135, 139 (1950) (explaining that Congress' general purpose in enacting the FTCA was to provide a remedy to those who suffered due to negligent behavior of governmental employees).

Accordingly, courts have frequently recognized that the juridical status of the defendant may determine whether a cause of action arising from such statutes even exists, and that dismissal ***for failure to state a cause of action*** may be warranted solely by virtue of the defendant's juridical status, regardless of whether a violation of a statutory standard of conduct was adequately pled. *See, e.g., McCloskey v. Mueller*, 385 F. Supp. 2d 74, 78 (D. Mass. 2005) *aff'd*, 446 F.3d 262 (1st Cir. 2006) (dismissing claims against F.B.I. under Federal Tort Claims Act upon finding that the Act does not allow claims against individual U.S. agencies for personal injuries or death caused by federal employees acting within the scope of their employment); *King v. Rell*, CIV.A. 3:06-CV-1703V, 2008 WL 792818 (D. Conn. Mar. 20, 2008) *aff'd in part, question certified sub nom. Gross v. Rell*, 585

F.3d 72 (2d Cir. 2009) (dismissing claim under the Americans with Disabilities Act against the Governor of Connecticut on 12(b)(6) grounds, stating that, "[t]he Governor is not a proper defendant and has no power or responsibility to address the alleged wrongs Gross suffered, and the motion to dismiss must be granted."); *Chao v. Diversified Transfer & Storage, Inc*., CV-07-15-BLG-RFC, 2008 WL 234262 (D. Mont. Jan. 25, 2008) (denying defendant's motion for summary judgment, which was treated as a 12(b)(6) motion to dismiss, upon finding that the defendant did not qualify as a proper defendant under the Fair Labor Standards Act because as a matter of law it was not an employer of the plaintiff); *Hall v. Glenn O. Hawbaker, Inc.*, 4:06-CV-1101, 2006 WL 3250869, at *8-9 (M.D. Pa. Nov. 8, 2006) (dismissing plaintiff's claims under Employee Retirement Income Security Act ("ERISA") on 12(b)(6) grounds, finding that certain defendants were not proper under the civil enforcement statute, which only allowed claims for benefits against the employee benefit plan itself); *Moffat v. Unicare Health Ins. Co. of the Midwest*, 352 F. Supp. 2d 873, 879 (N.D. Ill. 2005) (dismissing plaintiff's ERISA claims against an alleged "plan administrator" on 12(b)(6) grounds, finding that ERISA claims are "generally [ ] limited to a suit against the Plan" itself); *Lehman v. Mid Am. Aviation Services, Inc.*, 05-2489-JAR-JPO, 2006 WL 1794760, at *3 (D. Kan. June 26, 2006) (dismissing plaintiff's claims of sexual harassment on 12(b)(6) grounds because plaintiff did not identify defendant as her "employer"

within the meaning of Title VII as required by statute); *Martin v. Reno*, 96 CIV. 7646 (BSJ), 1999 WL 527932, at *12 (S.D.N.Y. July 22, 1999) (dismissing plaintiff's Title VII discrimination claim against the Department of Justice pursuant to Rule 12(b)(6), noting that "[i]t is thus well-settled that defendants other than the head of the department or agency may not be sued under Title VII."). As discussed below, the ILO Conventions relied upon by Appellants were adopted with a specific purpose and were intended to prompt action by the only parties with the ability to carry out that purpose: sovereign states. If the ILO Conventions establish ***any*** international norm, it is that sovereign states – not private parties or business entities – are the only actors equipped to delegitimize and combat the use of forced labor.

A. There is No Need To Apply Federal Common Law to Determine Who May Be Liable For International Labor Violations

The use of federal common law in judicial decision-making is reserved for limited circumstances, and the ILO Conventions, by prescribing specifically who is responsible for combating forced labor, render its use inappropriate to determine that question in this case. Federal common law exists solely as a "necessary expedient" to be resorted to only in "a 'few and restricted' instances" in the absence of a federal statute. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). Because the judiciary is not suited to develop national policy, it has been hesitant to apply

federal common law except when absolutely necessary. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (noting concerns regarding the appropriate division of responsibility between Congress and the federal judiciary). The limited instances where courts have resorted to federal common law involve issues not addressed by legislation or where there is a conflict between a federal policy or interest and the use of state law. *City of Milwaukee*, 451 U.S. at 313; *see*, *e.g.*, *Clearfield Trust Co. v. U.S.*, 318 U.S. 363, 367-68 (1943) (creating federal common law to govern transactions in the commercial paper of the United States in view of the desirability of a uniform rule in that area); *Tunstall v. Bhd. of Locomotive Firemen & Enginemen, Ocean Lodge No. 76*, 323 U.S. 210, 213 (1944) (deriving a federal right to bring a suit alleging the existence of a discriminatory contract under the Railway Labor Act).

The question of whether the ILO Conventions impose any obligations on private parties to prevent the use of forced labor does not require resort to federal common law, as the ILO Conventions specifically address that question. Indeed, as discussed below, the express terms of the ILO Conventions and the documentation surrounding their development and promulgation (the "*travaux préparatoires*") leave no question that the ILO Conventions bind only one class of parties: the sovereign governments of ratifying nations. Ratifying nations, in turn, are obligated to create ***domestic*** implementing legislation. Accordingly, because

the ILO Conventions that Appellants rely upon unambiguously address the scope of their application, there is no need to look to federal common law.

1. The Plain Text and Drafting History of Each ILO Convention Is Clear in Its Scope of Application

Appellants have identified several ILO Conventions as critical constituent pieces of an "international norm" against forced child labor.[2] Each of these conventions, however, clearly reflects an intent on the part of the ILO that the obligations run exclusively to the sovereign governments who, through ratification, have agreed to be bound by them. Those ratifying nations are then required by the ILO Convention to enact domestic implementing legislation that would, in turn, address the scope of liability for forced labor violations, including what types of parties should be liable for such violations.

a. Forced Labour Convention ("Convention 29")

Article 1 of Convention 29 makes clear that the obligations set forth in the Convention are to be imposed only upon state governments. It states that "[e]ach

[2] Appellants cite the Convention Concerning Forced or Compulsory Labour, No. 29, June 28, 1930, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029; Convention Concerning the Abolition of Forced Labour, No. 105, June 25, 1957, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105; Convention Concerning Minimum Age for Admission to Employment, No. 138, June 26, 1973, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138; and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No. 182, June 17, 1999, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182.

Member of the International Labour Organization which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period."[3] Convention Concerning Forced or Compulsory Labour art. 1, No. 29, June 28, 1930, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029 (emphasis supplied). Further, Article 23 reflects the ILO's understanding that the Convention's general directives would have to be implemented by each ratifying Member State through domestic legislation providing for more specific regulations and mechanisms for enforcement, by mandating that in order "[t]o give effect to the provisions of this Convention the competent authority shall issue ***complete and precise regulations governing the use of forced or compulsory labour***." *Id*. at art. 23 (emphasis supplied). The Convention avoids providing any specific prescriptions concerning the enforcement of domestic implementing laws, insisting only that "regulations governing the employment of forced or compulsory labour are strictly applied," *id*. at art. 24, and that "it shall be an obligation on any ***Member ratifying this Convention*** to ensure that the penalties imposed by law [for the illegal exaction of

[3] As explained on the ILO's website, the ILO's "Members" are sovereign states. *See Tripartite Constituents*, International Labour Organization, http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm (last visited Oct. 7, 2011) (noting that the ILO's "tripartite structure makes the ILO a unique forum in which the governments and the social partners of the economy of its ***Member States*** can freely and openly debate and elaborate labour standards and policies") (emphasis supplied).

forced or compulsory labour] are really adequate and are strictly enforced." *Id*. at art. 25 (emphasis supplied). Further provisions evidencing the drafters' indisputable intention to confine the Convention 29's obligations to sovereign governments are evident throughout the text of the Convention. *See id*. at art. 3, 4(1) (stating that the "competent authority," or "authority of the metropolitan country or highest central authority in the territory concerned," shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations"); *id*. at art. 4(2) ("…the Member shall completely suppress such forces or compulsory labor from the date on which this Convention comes into force for that Member"); *id*. at art. 1 (requiring progressive abolishment of "[f]orced or compulsory labour exacted as a tax" and "forced or compulsory labour to which recourse is had for the execution of public works by chiefs who exercise administrative functions"); *id*. at art. 26(1) ("Each Member of the International Labour Organisation which ratifies this Convention undertakes to apply it to the territories placed under its sovereignty, jurisdiction, protection, suzerainty, tutelage or authority, so far as it has the right to accept obligations affecting matters of internal jurisdiction . . .").

That the general directives of Convention 29 were aimed at governments and required country-specific implementation is further confirmed by the *travaux préparatoires*. Deliberations concerning the ILO's adoption of Convention 29

began on June 12, 1930 when the Committee on Forced Labour, composed of 45 government, employer and employee delegates, began its work on a Forced Labour Convention (No. 29). *See* International Labour Conference, 14th Session, *Record of Proceedings*, Appendix V, at 681 (1930).[4] The Committee's agreed purpose was that "a Convention should be adopted and that the Convention should lay down the principle of the suppression of forced or compulsory labour in all its forms." *See id*., at 688. However, as noted by the Committee Reports, the difficulties in establishing universal and workable standards became clear to the delegates from the beginning. *See* International Labour Conference, 12th Session, *Forced Labour Report and Draft Questionnaire*, at 3 (1929)[5] (noting that "[f]orced labour occurs for the most part in areas where administration has not reached the point of efficiency attained in more developed countries, and from which exact information is either non-existent or not easily obtainable"). The Committee also recognized that because forced labor may result from a variety of local factors, the general principles espoused by the Committee could only be effectively implemented through country-specific government action. The Committee Report remarks that:

> [I]t might be well to point out that the whole tendency of an administrative policy might be such as to lead to demands for forced labour. Such demands might, for example, result from a policy of forcing economic

[4] Referenced in the attached Motion for Judicial Notice as Exhibit A.

[5] Referenced in the attached Motion for Judicial Notice as Exhibit B.

> development at too rapid a pace, outdistancing the capacities of the population and the available supply of voluntary labour. Similarly, the arrival of white settlers or the granting of concessions to aliens leads inevitably to demands which voluntary labour may not be able to satisfy.
>
> It might then be accepted as a fundamental principle that:
>
> The general policy of an Administration should be based, so far as the economic development of a country is concerned, upon considerations of the amount of labour available, the capacities for work of the population, and the evil effects which too sudden changes in their working habits may have on their social conditions.

See id., at 257.

b. Abolition of Forced Labour Convention of 1957 ("Convention 105")

Similarly, in the text of Convention 105, the obligation to comply with the directives set forth in the Convention is clearly confined to ratifying sovereign governments at the outset. *See* Convention Concerning the Abolition of Forced Labour art. 1, No. 105, June 25, 1957, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105 ("Each ***Member of the International Labour Organisation*** which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour . . .") (emphasis supplied); *id*. at art. 2 ("***Each Member of the International Labour Organisation*** which ratifies this Convention undertakes to take effective measures to secure the immediate and

complete abolition of forced or compulsory labour as specified in Article 1 of this Convention.") (emphasis supplied).

The drafting history of Convention 105 also indicates that it was not intended to foster national legislation rather than directly regulate the conduct of private actors. In negotiating the provisions of Convention 105, the members of the Committee on Forced Labour recognized that the general purpose of the Abolition of Forced Labour Convention to be adopted at the 40th Session of the International Labour Conference was to prohibit and eradicate situations where the power of the State was used to exact forced labor as a means to punish certain social or political opinions, or as regular part of national economic development programs. *See* International Labour Conference, 40th Session, *Proceedings of the 39th Session of the Conference Relating to Forced Labour*, Report IV(1), at 21 (1957)[6] (noting that Mr. Brown, Government delegate from Canada, expressed concern that the Committee had allowed itself to be diverted from its primary purposes, and that certain amendments, such as that considering whether forced labor should be permitted as punishment for participation in strikes, could be construed as inconsistent with the general text of the Convention and would only serve as a deterrent to ratifications).

[6] Referenced in the attached Motion for Judicial Notice as Exhibit C.

In fact, the Committee Reports show that proposed amendments purporting to directly regulate the conduct of private parties were considered and rejected. Specifically, the Committee rejected an amendment proposed by the United States Government delegate which would have prohibited the international trade of products of forced labor (an addition which would undoubtedly have served as a more direct form of regulation on private business activity). *See* International Labour Conference, 40th Session, *Record of Proceedings*, Appendix VII (1957)[7] (noting that, in view of the doubts expressed to the practicability of the U.S. Government member's proposal for a provision prohibiting products of forced labor in international trade, the proposal would not be renewed). The Committee also rejected the addition of a clause that would have prohibited forced labor resulting from an employer's perpetual deferral of payment to a later date, as such an addition was viewed by some delegates as an improper intrusion upon the field of employee-employer relations. *See* International Labour Conference, 40th Session, *Proceedings of the 39th Session of the Conference Relating to Forced Labour*, Report IV(1), at 15-16 (1957) (noting that Mr. Sharp, the Government delegate from Australia, objected that the clause "clearly related" to the field of employer-employee relations).

[7] Referenced in the attached Motion for Judicial Notice as Exhibit D.

c. Minimum Age Convention of 1973 ("Convention 138")

The Minimum Age Convention, adopted by the ILO in 1973, requires that "[e]ach ***Member for which this Convention is in force*** undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons." Convention Concerning Minimum Age for Admission to Employment art. 1, No. 138, June 26, 1973, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138 (emphasis supplied). Rather than prescribe a specific and universal standard concerning the minimum legal age for all workers in any sovereign state, the Convention leaves such determinations up to each state government, requiring that each ratifying Member State "shall specify, in a declaration appended to its ratification, a minimum age for admission to employment or work within its territory and on means of transport registered in its territory . . ." *Id*. at art. 2. Here again, it is established in the first two articles of the Convention that the duty to comply with the Convention's standards runs exclusively to ratifying states. Of particular importance here, Convention 138's text provides expressly that liability determinations must be left to the ratifying states themselves. *See id*. at art. 3(2) ("The types of employment or work to which paragraph 1 of this Article applies

shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, where such exist."); *id*. at art. 5(1) (providing that a Member State "whose economy and administrative facilities are insufficiently developed" may initially limit the scope of application of the Convention); *id*. at art. 5(2) ("Each Member which avails itself of the provisions of paragraph 1 of this Article shall specify, in a declaration appended to its ratification, the branches of economic activity or types of undertaking to which it will apply the provision of the Convention."); *id*. at art. 7(3) ("The competent authority shall determine the activities in which employment or work may be permitted under paragraphs 1 and 2 of this Article and shall prescribe the number of hours during which and the conditions in which such employment or work may be undertaken."). Most notably, Article 9 of the Convention expressly provides that "***[n]ational laws or regulations*** or the competent authority ***shall define the persons responsible for compliance with the provision giving effect to the Convention***." *Id*. at art. 9(2) (emphasis supplied).

The Report on the Committee of Minimum Age corroborates that these provisions were included to address concerns voiced by several government and employer delegates that the Convention must permit flexibility by allowing national governments to tailor their domestic legislation in a way that produces the best results for that nation. *See* International Labour Conference, 57th Session,

Record of Proceedings, Appendix, at 538 (1972)[8] (noting the Government members' concern for the need for flexibility and their recognition that developing countries would find a minimum age fixed at a very high level impossible to apply, as well as the Employers members' shared concern that "the new Convention should prescribe general but essential rules, and should be capable of receiving a large number of ratifications" and that the Convention "should take special account of conditions in developing countries").

d. Worst Forms of Child Labour Convention of 1999 ("Convention 182")

Convention 182 was drafted by the Committee on Child Labour as a "complement" to Convention 138, which the Committee intended to remain as the ILO's "basic standard." *See* Report of the Committee on Child Labour, International Labour Conference, 86th Session, ¶¶ 1, 7, 9 (1998).[9] Although the drafters of Convention 182 recognized the current need for "new international standards which would place priority on immediate action to stop the most intolerable or extreme forms of child labour," debate among the Committee during the drafting process continued to reflect a concern that the Convention permit flexibility in each ratifying nation's implementation of the Convention. *See id.* at ¶¶ 5, 10 (noting that while some replies had proposed that concrete criteria for

[8] Referenced in the attached Motion for Judicial Notice as Exhibit F.

[9] Referenced in the attached Motion for Judicial Notice as Exhibit G.

hazardous work be included in the Convention, others argued for the need for flexibility at the national level and opposed a more detailed definition in the Convention).

Like the preceding ILO Conventions discussing forced labor and child labor, the opening paragraph of Convention 182 expressly requires that "[e]ach Member which ratifies this Convention shall take immediate and effective measures" to implement the goals of the Convention, namely, "the prohibition and elimination of the worst forms of child labour." Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 1, No. 182, June 17, 1999, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182. The Convention is clear that its general directives must be implemented in a country-specific manner by the government of each ratifying Member State. *See id*. at art. 6 ("Each Member shall design and implement programmes of action to eliminate as a priority the worst forms of child labour."). The Convention also leaves the enforcement of domestic implementing laws up to each ratifying state, urging simply that "[e]ach Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions." *Id*. at art. 7(1).

* * *

In sum, both the text and drafting history of the ILO Conventions are unambiguous in terms of who they bind. As the drafters of each of these ILO Conventions recognized, it is simply impossible to develop a "one-size fits all" approach to labor abuses; each ILO Convention was thus drafted as an action-forcing mechanism to require states to develop national laws and enforcement paradigms that would, in a manner appropriate to each ratifying state, achieve the ILO's broad prescriptive guidelines. Stated differently, each Convention was specifically intended to foster a variety of national responses to meet a common goal, rather than to impose a single legal standard that would apply uniformly. Because the ILO Conventions clearly and specifically apply only to states, there is no need – and it would, in fact, be improper – to resort to federal common law to determine whether those ILO Conventions impose any standard of conduct or permit the imposition of liability upon private parties, since the ILO Conventions themselves quite plainly do not do so.

2. The ILO Conventions Do Not Establish a Norm That Defendant-Appellees May Be Liable For

As demonstrated above, the ILO Conventions do not impose liability or any standard of conduct on non-state parties such as Defendant-Appellees, but rather delegate specific decisions on the scope of liability to national decision-makers, who must then implement the broad principles embodied in the ILO Conventions through national law in a manner that reflects each individual nation's public

policies, legal system, and business and cultural norms. The ILO Conventions do not address the scope of liability for forced labor violations, because that matter was not considered by the drafters of the respective ILO Conventions to be an appropriate subject for uniform treatment. Rather, the ILO Conventions intended for matters such as the scope of liability to be defined at the national level in a country-specific manner through domestic implementing legislation. Stated simply, the ILO Conventions very specifically do not create international law; they force the adoption of country-specific national law in pursuit of a common purpose.

In this sense, the ILO Conventions can be distinguished from other treaties, many of which provide for comprehensive schemes to regulate conduct directly. As noted by the district court, such treaties include the United Nations International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. 3(1), 26 U.S.T. 765, 973 U.N.T.S. 3 (providing that any ship "owner" is liable for damages resulting from an oil spill caused by that ship), and the Convention on Civil Liability For Oil Pollution Damage From Offshore Operations, Dec. 17, 1976, art. 5, *reprinted at* 16 I.L.M. 1450 (providing for the extension of liability to any person "whether corporate or not."). The policy reason for directly regulating private conduct by treaty is clear in environmental spill cases: every member of the international community has an equal and identical

interest in preventing environmental damage caused by primarily by the negligence of private companies.

Labor relations, on the other hand, are often highly dependent on an individual nation's level of economic development, as well as its social and cultural norms. It is, thus, highly undesirable to impose a universal standard of liability upon private parties for violations of labor standards, as determining the scope of liability for violations of labor standards requires a more careful and unique calibration of a nation's individual history, labor market and practices, legal system, and political and business culture. In its adoption of various labor-related treaties, the ILO has long recognized the paramount importance of Member States' ability to adapt and modify general treaty principles to reflect national law and practice. This "federalist" approach reflects the fact that countries have diverse cultural and historical backgrounds, legal systems, and levels of economic development, and each of the ILO Conventions were formulated in a manner that leaves flexibility to member states. *See How International Labour Standards are created*, International Labour Organization, http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm (last visited Oct. 7, 2011). Due to the innumerable economic, legal, political and cultural differences among states, the ILO recognizes that, while certain rights relating to industrial relations should be regarded as

inviolable, the most effective way to promote the widespread acceptance and protection of such rights is to leave the calibration of economic, political and cultural factors to each individual nation in determining how to implement such protections. Simply put, the principles set forth by the ILO Conventions best serve as "targets for harmonizing national law and practice in a particular field," *see* *How International Labour Standards are used*, International Labour Organization, http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm (last visited Oct. 7, 2011), and the ILO has long recognized that dictating form over function would be counterproductive to its goal of promulgating the recognition of general principles which safeguard certain labor rights.[10]

II. Asserting ATS Jurisdiction Over Defendant-Appellees Would Contradict the Express Purpose of the ILO Conventions

Asserting jurisdiction in this case would effectively and inappropriately internationalize labor law by allowing U.S. courts to superimpose their own

[10] Although the ILO Conventions relied upon by Appellants and discussed herein are not the most recent proclamations by the ILO, as noted by Defendant-Appellees, the Roadmap for Achieving the Elimination of the Worst Forms of Child Labour by 2016 (drafted during the 2010 Hague Global Child Labour Conference, and which builds on Conventions 138 and 182) similarly reflects the ILO's recognition that labor standards must be established in a country-specific manner. *See* Roadmap for Achieving the Elimination of the Worst Forms of Child Labour by 2016, ¶¶ 8.1.1-8.1.6, http://docs.minszw.nl/pdf/135/2010/135_2010_1_26367.pdf (Referenced in the attached Motion for Judicial Notice as Exhibit E.

judgments about the scope and applicability of forced labor standards in a manner that would undermine the localized approach that the ILOs were specifically designed to foster.

Federal court decisions construing the ATS have historically and consistently counseled U.S. courts to resist interpreting the ATS in a manner that permits federal courts to "sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring). Doing so would raise unprecedented "prospects of judicial interference with foreign affairs." *Id*. at 812. The *Tel-Oren* court further explained:

> What little relevant historical evidence background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking conflict with other nations. *The Federalist No. 80* (A. Hamilton). A broad reading of section 1350 runs directly contrary to that desire.

Id. at 812. More than 20 years later, the *Sosa* court likewise found that U.S. courts should avoid adopting "rules that would go so far as to claim a limit on the power of foreign governments over their own citizens." *Sosa v. Alvarez-Machain*, 542 U.S. 694, 727 (2004). In so finding, the court reasoned that:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the

> power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. . . .Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.

Id. at 728-729 (citations omitted).

Even where, as here, the alleged violations are conducted by private actors – not the foreign government itself[11] – the rationale set forth in these decisions applies with equal force, and particularly in connection with any attempt to use the ILO Conventions as purported building blocks of a "universal" standard the imposition of liability on private parties for aiding and abetting forced labor. As the Second Circuit recently stated in *Kiobel*:

> [The ATS] was rooted in the ancient concept of comity among nations and was intended to provide a remedy for violations of customary international law that "threaten[] serious consequences in international affairs. . . ." Unilaterally recognizing new norms of customary international law – that is, norms that have not been universally accepted by the rest of the civilized world – would potentially create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute was enacted to promote.

Kiobel, 621 F.3d at 140 (citations omitted).

[11] *But see* Complaint, ¶¶ 47 – 48, 67, 73, 77 (allegations that the government of the Ivory Coast was complicit in permitting forced labor to exist).

The theory of liability that Appellants have endorsed in this case illustrates the *Kiobel* court's concerns with unmistakable clarity. Through its adoption of the ILO Conventions, the ILO has sought to respect national institutions and to guide them, through a flexible, aspirational regime designed to foster country-specific approaches, to combat forced labor. Appellants would have the district court undo the ILO's 80 years of work on these issues by imposing, literally by judicial fiat, a permissive common law rule that would permit claimants to bypass the national rules developed under the ILO and bring their claims to the U.S. courts for adjudication under the newly-minted "universal" standard.

In addition to representing an invitation to the most blatant form of forum-shopping, a U.S. court's announcement of a "universal" rule of private party liability for aiding and abetting forced labor would trample on the ability of each signatory state to address its obligations under the ILO Conventions in a manner and through specific legal provisions appropriate to that state. Signatory states' implementation of law and regulations to meet their obligations under the ILO Conventions, together with their decisions on how (and against whom) to enforce those laws and regulations, are unquestionably matters that the ILO Conventions firmly entrust to the governmental and political organs of ratifying states; it is equally clear that a U.S. court's development of a common law rule of liability that, by virtue of the ATS, could be used as a basis of liability for conduct

occurring in the territorial jurisdiction of a member state, would impermissibly interfere with member states' sovereign prerogative to address such conduct. Courts have routinely, and recently, held that they are ill-equipped to address such matters, which implicate the foreign affairs powers reserved to Congress and the Executive. *Cf. Spectrum Stores, Inc. v. CITGO Petroleum Corp.*, 632 F.3d 938, 943 (5th Cir. 2011).

In sum, the ILO Conventions place sole responsibility for their implementation in the hands of ***national*** actors, and rely entirely upon the promulgation and application of ***national*** law. Any recognition by a federal court of a "universal" rule would upend this carefully-calibrated system and impermissibly ***internationalize*** the law relating to forced labor, while directly impinging on the right and ability of ILO Convention to adopt appropriate national (or sub-national) laws concerning the scope and extent to which private parties may be held liable (if at all) for aiding and abetting wrongful labor practices. In addition, recognition of such a "universal" rule would throw open the courthouse doors to claimants who may find the national laws adopted under the ILO Conventions too restrictive to suit their claims.

III. Allowing ATS Claims Against Corporations for Aiding and Abetting Labor Standards Will Have Significant Negative Implications For U.S. Corporations Doing Business Overseas

Recognition of a claim against corporations for aiding and abetting labor violations under the ATS will have significant negative implications for U.S. corporations doing business abroad. Such a rule would require U.S. firms operating abroad to confront a series of bad options, each with crippling implications: carefully police the human rights and labor records of the countries in which they do business and/or from which they purchase commodities, withdraw from any market with a reputation for weak domestic labor enforcement, or confront potential class action litigation brought by foreign plaintiffs and based upon the actions of suppliers in foreign nations. The burden to U.S. businesses that rely on foreign suppliers or who operate in foreign markets would be significant, and far greater than Congress anticipated when it adopted the ATS to address the right of passage, ensure the safety ambassadors, and combat maritime pirates.

Amicus curiae does not argue with the notion that it would be honorable and ethical for a business to use its economic leverage to encourage improvements in foreign labor practices; through its participation in the ILO, it has promoted this goal for over 80 years, and with good results. This case, however, demonstrates the marked difference between such efforts, which U.S. businesses have long supported, and the use of a jurisdictional statute such as the ATS to transform U.S.

businesses into virtual overseers or guarantors with respect to the labor practices in developing nations. Holding U.S. companies, whose central focus is *business* – not politics or government or human rights – responsible for policing such activities would make it virtually impossible for United States businesses to properly evaluate the legal risks inherent in operating abroad. Thus, the practical effect of broadening the ATS to encompass claims against corporate defendants for secondary liability for violations of international norms would likely be that U.S. companies would withdraw from any marketplace with questionable human rights practices. The long-term effect of the chill on international business would be a limited choice of business partners for U.S. companies, leading them to replace their lost business partners with new partners in jurisdictions that likely command a higher price, resulting in higher prices charged to the end consumer. The worldwide market would also suffer through the developing countries' lost opportunities to improve their own economies, develop businesses and grow their industries, which, in the end, is the best instrument for creating improved human rights records.

CONCLUSION

Amicus curiae respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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