

UNOCAL REVISITED: ON THE DIFFERENCE BETWEEN SLAVERY AND FORCED LABOR IN INTERNATIONAL LAW

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INTRODUCTION

The *Unocal* case has been one of the most significant moments in American human rights litigation since the resurrection of the 1789 *Alien Tort Statute* (ATS)¹ in the 1980 *Filartiga* case.² Victims of alleged corporate human rights violations had attempted for two decades to obtain reparations. Finally, in *Unocal*, the plaintiffs, Burmese villagers from the region of Tenasserim, eventually received financial payments from the corporate respondents. Even though there was no final condemnation by a court in the case – a compensation fund was created by an extrajudicial settlement, the courts' previous decisions being vacated – the agreement was preceded by a strong vote of Ninth Circuit judges in favor of the plaintiffs,³ which impelled the parties to settle.

Consequently, the case cleared the way for a new era of corporate social responsibility for activities far away from American soil. In an unprecedented manner, American judges held a western multinational enterprise civilly responsible for crimes committed in a South-East Asian country in agreement and through cooperation with the local government. The western companies involved in the affair, the California-based Unocal and the French Total, subsequently not only agreed to create various social projects for the people affected by their pipeline construction, but they have also developed permanent public relations campaigns to present their social and human rights activities to

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¹ Alien Tort Statute, 28 U.S.C. § 1350 (2000).

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

³ *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

the public⁴ – an effort that is nowadays done by many multinational enterprises.

On a more theoretical level, the federal judges in the case developed the legal grounds for the fight against forced labor. Through their consideration of international law when applying the ATS, the judges employed the concept of *jus cogens*, which is commonly said to prohibit slavery.⁵ The appellate court equated forced labor with slavery, and condemned Unocal by stating that both are one practice forbidden by *jus cogens*, that is peremptory international law.⁶

This article expresses doubt on the ultimate usefulness of the approach taken by the appellate court in *Unocal* (and by many authors writing on forced labor issues) on this last point. By simply treating forced labor as identical to slavery, and therefore as prohibited by *jus cogens*, the judges have done a potential disservice to the dissemination of international law as a legally meaningful and universally accepted juridical device. First, it is doubtful that the international proscriptions of slavery and forced labor were historically and legally identical, allowing the interchangeable use of both terms from a judicial point of view. There has been a broad reception of questions relating to the prohibition of forced labor in customary international law and international treaties. Moreover, there is a general common sense that the proscription of slavery is part of *jus cogens* (in addition to its prohibition by “normal” international law). Thus, lawmakers have employed the notions of “slavery” and “forced labor” in the same context with different meanings. In order to embrace distinct but overlapping hypotheses of involuntary labor, the terms have been given a different substance. This given legal distinction could have been left untouched in the present case; as stated by Circuit Judge Reinhard in his concurring opinion, it may have been possible to hold Unocal liable without equating forced labor with slavery and without taking recourse to its pretended proscription by *jus cogens*.⁷

⁴ Unocal, which is today Chevron, and Total explain their views on the events in Myanmar on their websites. See Chevron, Myanmar: Strengthening Community Responses to Disease, <http://www.chevron.com/globalissues/humanrights/myanmar> (last visited June 7, 2010); Total, Total in Burma: The Yadana Pipeline Project, <http://burma.total.com> (last visited June 7, 2010).

⁵ For the Ninth Circuit’s view, see 395 F.3d at 945; for the district court’s decision, see 110 F. Supp. 2d 1294, 1304.

⁶ The Ninth Circuit Court stated that globally, “forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation.” 395 F.3d at 945.

⁷ *Id.* at 953. “I also believe that there is no reason to discuss the doctrine of *jus cogens* in this case. Because the underlying conduct alleged constitutes a violation of customary international law,

And indeed, a careful examination of some of the legal questions raised in the present case shows how it is in the interest of the promotion of human rights to make prudent use of international law, especially within domestic jurisdictions. Any judicial action needs to be founded on legitimate grounds to be commonly regarded as valid, and thus to contribute sustainably to the rule of law. Therefore, the precise and accurate use of international law in form of treaties and custom is imperative in transnational contexts. The adoption of the concept of *jus cogens* by international judges, on the other hand, is very new and did so far not lead to a substantial case law.⁸ Its precocious and extensive application by domestic judges may therefore contribute to its own weakening. The multitude of courts in different countries is not bound by a common supreme court. Instead of strengthening the international rule of law, domestic jurisdictions could hence contribute to the fragmentation of those peremptory norms through diverging interpretations – with the extreme hypothesis of a multitude of different nationalized norms of *jus cogens*. Such a weakening of the clout of *jus cogens* ultimately involves the risk of its trivialization.

After all, the American federal judge has to keep in mind the preciousness of the ATS, which is unique in the legal world and highly debatable for its extra-territorial impact. A careful and convincing instrumental use of the Statute is not only necessary for judgments to persist in front of the Supreme Court, but also to preserve its mere existence. Part I of this article reconsiders the reasoning of the two *Unocal* courts proscribing forced labor as slavery. Part II puts this in contrast with the development of the notions of slavery and forced labor in international law. The article concludes that publicly forced labor has

the violation was allegedly committed by a governmental entity, and Unocal's liability, if any, is derivative of that governments entity's, *jus cogens* is irrelevant to any issue before us." *Id.* "In fact, whether or not forced labor is a modern variant of slavery is of no legal consequence in this case, because there is no requirement that plaintiffs state a *jus cogens* violation in order to obtain jurisdiction under the ATCA. It is true that a cause of action against non-state actors for conduct in which they engage *directly* exists only for acts that constitute *jus cogens* violations . . . (referring to *Kadic v. Karadzic*, 70 F.3d 232, 234 (2d Cir. 1995)). Here, however, if Unocal is held liable, it will be because the Myanmar military committed legal acts and Unocal is determined to be legally responsible for that governmental conduct under a theory of third-party liability – not because Unocal itself engaged in acts transgressing international law." *Id.* at 964.

⁸ For the first and only time, the International Court of Justice referred explicitly to the concept in its 3 February 2006 decision on Armed Activities on the Territory of the Congo (DRC v. Rwanda), saying that the fact that *jus cogens* was at stake in a dispute would not be a sufficient basis to establish the jurisdiction of the Court. Armed Activities on the Territory of the Congo (DRC v. Rwanda), 2006 I.C.J. 4, ¶ 64 (Feb. 3), available at <http://www.icj-cij.org/docket/files/126/10435.pdf>. For a further discussion, see *infra* p. 227.

not really been abolished in international law. Therefore, it is necessary to find a legal means independent of the history of the abolition of slavery to achieve the abolition of forced labor. To be successful in this quest, it is important to avoid confusing the political human rights discourse with the international law on human rights.

I. THE PROHIBITION OF FORCED LABOR AS *JUS COGENS* ACCORDING TO THE RULINGS IN *UNOCAL*

Both decisions in the *Unocal* case relied on the assumption that forced labor is a modern form of slavery. Even though the conclusions of the two courts differed in their outcome for the parties, neither of them raised any doubt regarding forced labor as covered by slavery.

A. THE DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

The district court granted Unocal's motion for summary judgment, holding that "because [the] showing is insufficient to establish liability under international law, Plaintiff's claim against Unocal for forced labor under the *Alien Tort Statute* fails as a matter of law." Nevertheless, the Court clearly accepted the plaintiffs' arguments that qualified forced labor as a modern form of slavery, and thus a crime establishing individual liability under the ATS.⁹

The plaintiffs had invoked the International Labour Organization's (ILO) work on Myanmar and engagements the country had taken by ratifying a number of ILO conventions. First, Myanmar, who has been a member of the ILO since 1948, has ratified (among 20 other ILO conventions) the 1930 Forced Labour Convention (No. 29), which – quoting the court – "prohibits the use of forced labor and defines forced labor as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily' [Article 2]."¹⁰ However, as we shall see later, the Convention is much more ambiguous than the chosen quotation

⁹ The judgment refers to *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring). The succinct reasoning of the court, quoted and commented in this paragraph, can be found in *John Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (2000).

¹⁰ 110 F. Supp. 2d at 1308.

indicates because the second paragraph of the same Article 2 offers large exemptions for publicly organized forced labor.

The second argument was the repeated investigations of Burma/Myanmar by the different organs of the ILO during the last four decades.¹¹ The court eminently alluded to the establishment of a Commission of Inquiry in 1996, which for two years “[investigated] allegations concerning Burma’s non-compliance with Convention 29.”¹² The district court summarized that “this report acknowledges that the definition of slavery has historically been a narrow one, but then states that the term ‘slavery’ now encompasses forced labor.”¹³ The court quoted the following statement of the Commission:

In international law, the prohibition of recourse to forced labour has its origin in the efforts made by the international community to eradicate slavery, its institutions and similar practices, since forced labour is considered to be one of these slavery-like practices. ... Although certain instruments, and particularly those adopted at the beginning of the nineteenth century, define slavery in a restrictive manner, the prohibition of slavery must now be understood as covering all contemporary manifestations of this practice.¹⁴

The last sentence shows that the Commission’s judgment is a purely tautological assumption. It is not contestable that the prohibition of slavery must be understood as covering all contemporary manifestations of this practice, unless one would read texts regarding the abolition of slavery and serfdom in a strictly originalistic and textualistic manner.

¹¹ *Id.* Beginning in the 1960s, the ILO Committee of Experts on the Application of Conventions and Recommendations repeatedly requested clarifications from the Burmese/Myanmar government on the pre-independence Village and Town Acts, which contained the possibility of publicly forced labor and remained in force, although Burma/Myanmar alleged their non-application; a similar criticism was repeatedly made against the 1974 People’s Council Act, which in the view of the ILO international experts also provoked criticism regarding the Forced Labour Convention. In 1991, the Committee noted comments of the International Confederation of Free Trade Unions, indicating that “the practice of compulsory portering was widespread”, involving further human rights violations. In his 1993 report to the UN Commission on Human Rights, the Special Rapporteur on the Situation of Human Rights in Myanmar gave additional testimony of forced labor and related human rights violations. For a brief overview on the history of international examinations of forced labor practices in Myanmar, see Int’l Labour Org. [ILO], *Forced Labor in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance of Myanmar of the Forced Labour Convention, 1930 (No. 29)*, Part 8 (July 2, 1998) [hereinafter *1998 Commission Report*].

¹² 110 F. Supp. 2d at 1308.

¹³ *Id.*

¹⁴ *Id.* (quoting *1998 Commission Report*, *supra* note 11, ¶ 198).

However, the Commission did not justify its assertion that all forced labor is slavery.

The Commission also explained, “Since 1945, many States have prohibited forced [labor] at the constitutional level. Moreover, several international human rights instruments explicitly prohibit this form of denigration of the individual. These instruments do not define forced [labor]; reference should therefore be made to the relevant Conventions and resolutions of the ILO.”¹⁵ The fact that there is no genuine definition of forced labor might be simply explained by the nature of the term. As we shall see later in the example of the International Covenant on Civil and Political Rights, forced labor could be seen as a purely technical description of a certain condition (such as a forced purchase or forced relocations). Why would there be a need to replace this – admittedly large – description by another one, if not to make something else of it (such as slavery)? Moreover, the district court did not discuss the legal relevance of the Commission’s report. Even though the Commission’s conclusions were not based on written law, the judgment did not discuss whether the report’s outcome could claim authority as reflected customary international law.

After all, the court delivered another illustration of the inconsistency of its classifying forced labor as a slavery-like violation of *jus cogens*: When rebutting Unocal’s “public service argument,”¹⁶ it stated that “there is ample evidence in the record linking the Myanmar government’s use of forced labor to human rights abuses.”¹⁷ This formulation implies that forced labor by itself is not a human rights abuse.

B. THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Like the district court, the court of appeals relied on the assumption that the alleged forced labor practices were slavery and hence a violation of *jus cogens*. It concluded that this international law had to

¹⁵ 1998 Commission Report, *supra* note 11, ¶ 202.

¹⁶ The Supreme Court stated with regard to a Florida statute forcing residents to work on roads and bridges for ten hours a day for six days a year (or to pay three dollars), that was challenged under the Thirteenth Amendment, that “it must be taken as settled that, unless restrained by some constitutional limitation, a state has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public.” *Butler v. Perry*, 240 U.S. 328, 330 (1916).

¹⁷ 110 F. Supp. 2d at 1308.

be applied in the present case, and not domestic rules: “Where, as in the present case, only *jus cogens* violations are alleged.... it may, however, be preferable to apply international law rather than the law of any particular state, such as the state where the underlying events occurred or the forum state. The reason is that, by definition, the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid.”¹⁸ However, the same opinion previously had stated that “our case law strongly supports the conclusion that forced labor is a modern variant of slavery.”¹⁹ It then offered a recital of U.S. constitutional case law, showing that “courts have included forced labor in the definition of the term ‘slavery’ in the context of the *Thirteenth Amendment*.”²⁰ It seems quite astonishing that, while demanding the sole application of international law where *jus cogens* violations are alleged, the same court referred to the sole authority of domestic constitutional law in order to fill the respective norm of *jus cogens*; that is the prohibition of slavery, with substance.²¹ Yet, the court did not entirely neglect reasoning in international law. The opinion referred to some ATS-specific precedents in order to place its decision in a linear jurisprudential development:

In *World War II Era Japanese Forced Labor Litig.*²² ... the District Court for the Northern District of California recently implicitly included forced labor in the definition of the term “slavery” for purposes of the [ATS]. There, the district court concluded that “given the Ninth Circuit’s comment in *Matta-Ballesteros*,²³ ... that slavery constitutes a violation of *jus cogens*, this court is inclined to agree with the [District Court for the District of New Jersey’s] conclusion

¹⁸ John Doe I v. Unocal, 395 F.3d 932, 948 (2002).

¹⁹ *Id.* at 946.

²⁰ *Id.* The Thirteenth Amendment provides that “neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1. The Court quotes *Pollock v. Williams*, 322 U.S. 4, 17 (1944) (“the undoubted aim of the Thirteenth Amendment [...] was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States”); *Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968) (finding that the Thirteenth Amendment reaches private action); and *U.S. v. Booker*, 655 F.2d 562, 565 (1981) (“notwithstanding this limited purpose, the statute [§ 1583] should be read as expressing the broad and sweeping intention of Congress during the Reconstruction period to stamp out the vestiges of the old regime of slavery and to prevent the reappearance of forced labor in whatever new form it might take”).

²¹ 395 F.3d at 946. “[I]t has been held that forced labor of certain individuals amounts to involuntary servitude and therefore is violative of the [T]hirteenth [A]mendment.” *Id.* (quoting *Weidenfuller v. Kidulis*, 380 F. Supp. 445, 450 (E.D. Wis. 1974)).

²² 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

²³ 71 F.3d 754 (9th Cir. 1995).

[in *Iwanowa v. Ford Motor Co.*²⁴] that forced labor violates the law of nations.”²⁵

To this, however, it needs to be added that the *Iwanowa* court avoided to qualify forced labor as a violation of *jus cogens*; in fact, while referring to an exhaustive jurisprudence (such as the district court’s *Unocal* decision), it stated that “the case law²⁶ and statements of the Nuremberg Tribunals unequivocally established that forced labor violated customary international law.”²⁷ District Judge Greenaway did not see the need to go any further than establishing a violation of the law of nations, even though he enumerated and examined different dispositions of *jus cogens* and referred to “slavery” and “forced labor” in a rather interchangeable manner.

With regard to the *World War II Era Japanese Litigation* case, it is important to add that, while the opinion might implicitly include forced labor in the definition of slavery, the same opinion also states in the preceding paragraph that “it remains unclear ... whether all *jus cogens* norms meet the ‘specific, universal and obligatory standard’ required to be actionable under section 1350.”²⁸ Since the Supreme Court adopted this standard in its 2004 *Sosa* decision,²⁹ it is imperative to revisit the contested notion of forced labor by taking a look at the available international law on slavery and forced labor, and to examine the extent to which this international law has really been respected by the U.S. federal courts in *Unocal*.

II. THE PROSCRIPTION OF SLAVERY AND FORCED LABOR IN INTERNATIONAL LAW

The problem that arises from the two decisions in *Unocal* as well as from other ATS litigation is that the interrelation between forced labor and slavery remains uncertain. Luckily, there is no doubt that both are proscribed in the majority of states around the world. However, there is a

²⁴ 67 F. Supp. 2d 424 (D.N.J. 1999).

²⁵ 395 F.3d at 947.

²⁶ Apart from *Kadic*, *Siderman de Blake*, and *Tel-Oren*, the judges refer to a set of German reparation cases: LG Bremen, 1O2889/90 (1998); *Krakauer v. Federal Republic of Germany*, LG Bonn, 1O134/92 (1997), rev'd on other grounds; OLG Cologne (1998), 7U222/97 (1998). 67 F. Supp. 2d at 441.

²⁷ *Id.*

²⁸ *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001).

²⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

need to investigate how far international law really has developed towards proscribing both slavery and forced labor, and specifically how it makes use of both terms. Starting from the assumption that slavery naturally is forced labor, but forced labor might not automatically be a slave's labor, we shall see that both practices have been banned morally, as well as legally, on a more or less global scale, but to a different degree. Any sort of forced labor cannot be called slavery, and it would be negligent not to draw a line around practices one qualifies as slavery.

A. THE OLD FIGHT AGAINST SLAVERY

1. DEFINING SLAVERY: FROM SOCIAL SCIENCES TO LAW

Slavery has existed as long as civilization. Indigenous civilizations in Europe, Asia, Oceania, the Americas, and Africa, have been victims as well as perpetrators of slavery.³⁰ In approximate terms, slavery can simply be defined as the most extreme form of bondage, as opposed to freedom.³¹ The problem is in determining where it *really* exists, and when it starts. It is necessary to distinguish it from other forms of forced labor, as compulsion is part of any private relationship, and even more so of relationships between individuals and the state.

As sociologist Orlando Patterson tellingly noted, "almost every scholar who has written on the subject of slavery has felt it necessary to agonize over the problem of defining its true nature."³² Different approaches have been taken in modern times to define slavery, most obviously the legalistic tradition of the nineteenth century, which conceived it as a property relationship between slave and master, as in Herman Nieboer's classical definition: "Recapitulating, we may define a slave in the ordinary sense of the word as a man who is the property of another, politically and socially at a lower level than the mass of the people, and performing compulsory labour."³³ Nieboer's use of the notion of property should not be understood as strictly legal. He seems to use the word property in a more figurative sense, as he refers to Jhering's

³⁰ See generally ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982). For a concise "world history" of slavery, see EGON FLAIG, *WELTGESCHICHTE DER SKLAVEREI* (2009).

³¹ David Trenchard, *Slavery*, in *THE ENCYCLOPEDIA OF LIBERTARIANISM* 470 (Ronald Hamowy ed., 2008).

³² Orlando Patterson, *Slavery*, 3 *ANN. REV. SOC.* 407, 430 (1977).

³³ H.J. NIEBOER, *SLAVERY AS AN INDUSTRIAL SYSTEM: ETHOLOGICAL RESEARCHES* 4 (Martinus Nijhoff ed., 1900).

saying that “the master’s potestas may be called property.”³⁴ In Patterson’s rephrasing of Nieboer, slavery would hence be the “condition in which a human being is owned by another or by a group of persons.”³⁵

This leads to a second tradition, which was introduced by sociologist Edvard Westermarck.³⁶ He saw the “essence of slavery” when “the master has a right to avail himself of the working power of his slave, without previous agreement on the part of the latter.”³⁷ In contrast to the legalistic approach, Westermarck noted that in many societies where slavery clearly existed, the owner did not have exclusive property rights over the slave, and that “custom or law [could] grant the latter a certain amount of liberty.”³⁸ He hence concluded that “the chief characteristic of slavery is the compulsory nature of the slave’s relation to his master.”³⁹ This view, which is shared by many modern anthropologists, seems to reduce the essence of slavery – from a legalistic perspective – to the presence of forced labor. However, sociologists writing on slavery begin their observations with a different premise, which differs from both the juridical abstraction on the one side and anthropological relativity on the other: the existence of a “slaveholding class.”⁴⁰ This presupposes that there are numerous slaves and numerous masters, the slave-master relation becoming a constitutive element of society.

To amount to slavery, personal bondage hence needs to reach the status of a social institution, where the bondage of the slave is definite, and the enslavement of parts of the population (native or displaced persons) is a defining element of social relations. As opposed to the momentary appearances of forced labor, slavery must be regarded as a social institution that organizes, yet divides, societies. It has some durability and economic function and is hence a constitutive element of a given society. While it is true that in some societies, notably in ancient Rome, slaves held various key functions, such as teachers, writers, or commercial agents for their masters – and at times were even liberated – Patterson has underlined that their “social death” persisted because they

³⁴ *Id.* at 5.

³⁵ Patterson, *supra* note 32, at 431.

³⁶ See EDVARD WESTERMARCK, *THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS*, 610-715 (MacMillan and Co. Ltd. 1924) (1906), *quoted in* Patterson, *supra* note 32, at 431.

³⁷ WESTERMARCK *supra* note 36, at 670.

³⁸ *Id.*

³⁹ *Id.* at 671.

⁴⁰ Patterson, *supra* note 32, at 432.

had an institutional marginality, which resulted in a potential discontinuity of their status which was absolute and omnipresent, and on which they had no influence.⁴¹ Historian Egon Flaig adds with reference to comparative studies of slavery⁴² that this difference – between the situation of the slave and of the rest of the population within one society – is much more important than the differences between the legal slavery regimes of the most diverse cultures.⁴³

In his *Anthropology of Slavery*, Claude Meillassoux presented four criteria to identify slaves as “unborns and dead on probation” (*non-nés et morts en sursis*).⁴⁴ To secure the existence of slavery as a lasting institution within society, slaves are constantly alienated from other humans through desocialization, depersonalization, desexualization, and decivilization.⁴⁵ Meillassoux also underlines the decisive quality of slavery being a social institution, criticizing the strictly “individualist” approach of law, which would create the “fiction of a slave-object.”⁴⁶ Alienation, as much as it may define a slave, can also be experienced by others within a society. Hence the presence of slavery depends on the institutionalized alienation of an entire slave class.

In general, forced labor might sometimes converge with the described features of slavery, but not always and not regularly. Even historical examples of extremely repressive, or even genocidal forced labor systems, such as the Soviet Gulags or the German concentration camps, have been shown to represent slavery only in a “metaphorical” sense,⁴⁷ even if the sufferings of the victims were worse than those of many slaves. On the other hand, it is true that actual slavery reportedly

⁴¹ PATTERSON, *supra* note 30, at 45.

⁴² See, e.g., SLAVERY: A COMPARATIVE PERSPECTIVE: READINGS ON SLAVERY FROM ANCIENT TIMES TO THE PRESENT (Robin W. Winks ed., 1972).

⁴³ Thus, he also defends the possibility of addressing slavery globally, despite the differences between various slavery regimes throughout human history. FLAIG, *supra* note 30, at 22.

⁴⁴ CLAUDE MEILLASSOUX, ANTHROPOLOGIE DE L'ESCLAVAGE: LE VENTRE DE FER ET D'ARGENT 99 (1986).

⁴⁵ *Id.*

⁴⁶ *Id.* at 10. He details:

“En l’occurrence, le droit entérine et dissimule à la fois les rapports sociaux organiques en les sanctionnant sous les formes les plus aptes à la préservation des avantages de ceux pour lesquels il est conçu et énoncé. En exprimant le rapport esclavagiste comme individuel, le droit fixe les limites dans lesquelles il veut voir s’exercer l’autorité du maître sur l’esclave; le rapport individuel masque et neutralize, en l’occurrence, le rapport de classe. [...] Or, au plan individuel auquel nous restreint le droit, la définition de l’esclave, en raison de cette référence idéologique implicite, débordé nécessairement par quelques côtés vers l’homme ou la femme libre.”

⁴⁷ See, e.g., FLAIG, *supra* note 30, at 13, 16.

persists along the Sahel, in particular in Mauritania, where the law is frequently more developed than the social reality.⁴⁸

It is difficult to situate the forced labor as it was practiced by the Burmese military junta in relation with Unocal's pipeline project within the above discussed frame of the phenomenon of slavery as described by sociologists and historians, with a slave and a slaveholding class. It quickly becomes clear that the phenomenon of state-practiced forced labor, such as in *Unocal*, is different. The state being the sovereign – or rather exercising the sovereignty of the people and its will (in a democratic society) – there naturally is some sort of a logical and necessary slave-master relationship between rulers and ruled, at least from an abstract point of view. Therefore it is useful to examine how these different social realities are reflected in the actual international legal regimes on slavery and forced labor. The sociological and historical understanding of slavery as presented in the preceding paragraph can make the development of international law in this field more intelligible.

2. THE ABOLITION OF SLAVERY IN INTERNATIONAL LAW

Slavery was the first human rights issue to be addressed on an international scale, under this denomination.⁴⁹ The history of the abolition of slavery has mostly been a European and American one, at least in how it is reflected in the formation of the international law abolishing slavery.⁵⁰ In order to better understand this international law, we shall therefore preliminarily consider how the political discourse on slavery developed, and how it resulted eventually in the legal abolition of slavery.

Probably being the first in invoking the notion of a human right in the context, Bishop Bartolomé de las Casas wrote to the India Council in 1552 that the enslavement of Native Americans violated “the rules of human rights” and that slavery in general, against Native Americans and

⁴⁸ See, e.g., U.S. Dep't of State, Background Note: Mauritania, <http://www.state.gov/r/pa/ei/bgn/5467.htm> (last visited May 12, 2010).

⁴⁹ See, e.g., Renée Colette Redman, *The League of Nations and the Right to Be Free from Enslavement: The First Human Right to Be Recognized as Customary International Law*, 70 CHI.-KENT L. REV. 759 (1994); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550 (2008).

⁵⁰ See, e.g., FLAIG, *supra* note 30, at 199.

black Africans, was a crime.⁵¹ In 1492, Pope Pius II had already qualified the enslavement of black Africans willing to convert to Christianity as a “great crime,”⁵² and in 1537 Pope Paul III had prohibited the enslavement of all peoples that were yet to be discovered by Christians in his bull *Sublimis Deus*.⁵³ In the North American colonies, Quakers and other protestant groups called for the abolition of slavery starting in the second half of the 17th century.⁵⁴ In 1794, under the impression of the enduring (and finally successful) slave rebellion in its colony Saint-Domingue (nowadays Haiti), revolutionary France declared for the first time the abolition of slavery on the entire French territory.⁵⁵ The stage was thus prepared for a legal abolition of slavery, which commenced in the fight against the slave trade. Most importantly on the national level, the British as the rulers of the seas banned the slave trade within the Empire in the 1807 Act for the Abolition of the Slave Trade,⁵⁶ followed by the United States.⁵⁷ Since the slave trade was the most obvious international aspect of slavery, its abolition also became rapidly the subject of numerous international agreements.

⁵¹ He openly regretted his statements 30 years earlier, in which he had recommended the purchase of black slaves in order to protect the Native Americans. B. de las Casas, *Obras Completas*, vol. X, Madrid 1992, 236, and vol. V, Madrid 1994, 2324, reprinted in FLAIG, *supra* note 30, at 164.

⁵² A. QUENUM, *LES ÉGLISES CHRÉTIENNES ET LA TRAITE ATLANTIQUE DU XVE AU XIXE SIÈCLE* 79 (1993), reprinted in FLAIG, *supra* note 30, at 164.

⁵³ POPE PAUL III, *SUBLIMUS DEI* (May 29, 1537), available at <http://www.papalencyclicals.net/Paul03/p3subli.htm> (English translation) (last visited May 12, 2010).

⁵⁴ See, e.g., THOMAS E. DRAKE, *QUAKERS AND SLAVERY IN AMERICA* 4 (1950); AM I NOT A MAN AND A BROTHER? *THE ANTISLAVERY CRUSADE OF REVOLUTIONARY AMERICA 1688-1788*, at 5 (Roger Bruns ed., 1977).

⁵⁵ However, slavery is re-established in the French colonies from 1802 on, under the reign of Napoleon I; it is only re-abolished in 1848 (and even persists in some French-African colonies beyond that date). Martinez, *supra* note 49, at 564; Mark W. Janis, *Dred Scott and International Law*, 43 COLUM. J. TRANSNAT'L L. 763, 771 (2005).

⁵⁶ The law was voted on March 25, 1807 and came into force on May 1, 1807. Slavery was banned in the 1833 Slavery Abolition act; the last country to abolish the western slave trade was Brazil in 1831. Martinez, *supra* note 49, at 560, 563; Sarah Richelson, *Trafficking and Trade: How Regional Trade Agreements Can Combat the Trafficking of Persons in Brazil*, 25 ARIZ. J. INT'L & COMP. L. 857, 868 (2008).

⁵⁷ An Act to Prohibit the Importation of Slaves into Any Port of Place within the Jurisdiction of the United States, from and after the First Day of January, in the Year of Our Lord One Thousand Eight Hundred and Eight, 9th Cong. (1807).

(a) The Proscription of the Western Slave Trade

Between 1815 and 1957 alone, some three hundred agreements are said to have addressed the abolition of slavery or the slave trade.⁵⁸ Hence, treaties on international law and human rights regularly identify the ban of the slave trade and slavery as the first internationally realized protection of a human right,⁵⁹ as the starting point of a “transnational moral campaign” in a situation where the slave trade was the “globalizing industry of [the] time.”⁶⁰ Also on the multilateral international level, the first step in abolishing slavery was the ban of the slave trade, which was successively realized among all European powers in the first half of the nineteenth century, in particular with the Congresses of Vienna (1815) and Verona (1822).⁶¹ However, the slave trade went on, to the United States until the Civil War and to the Americas and elsewhere in general. Against the continuing trafficking, the British were the leading force in seriously trying to implement the newly achieved international common sense.⁶² A series of bilateral treaties was reached with a number of countries between 1815 and 1841 to declare slavery an act of piracy, which would allow the Royal Navy to seize foreign vessels equipped for the slave trade.⁶³ The peak of these solely Western agreements were the General Act of the Berlin Conference of 1885, which extended the prohibition of the slave trade to the entire Congo Basin,⁶⁴ and the 1890 General Act of the Brussels

⁵⁸ A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT'L L. REV. 809, 827 (2005).

⁵⁹ *Id.*; ANTONIO CASSESE, INTERNATIONAL LAW 376 (2d ed. 2005). *But see* GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 31-32 (1998).

⁶⁰ MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 162 (Amy Gutmann ed., 2001).

⁶¹ Redman, *supra* note 49, at 769.

⁶² Between 1817 and 1871, British antislavery courts might have freed almost eighty thousand slaves. Martinez, *supra* note 49, at 553.

⁶³ Redman, *supra* note 49, at 772. The British enumerated treaties with Portugal, Spain, the Netherlands, and France, but also with Brazil, Haiti, Uruguay, Venezuela, Ecuador, Bolivia, Chile, the Persian Gulf Arab States, Mexico, Texas, and Sweden, and the first multilateral treaty to proclaim slave trade an act of piracy, the Treaty of London of 1841 between Austria, Great Britain, Prussia, Russia, and France.

⁶⁴ Art. 9 of the Act reads:

“Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations, which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a market or means of transit for the trade in slaves,

Conference, which was aimed at “putting an end to the crimes and devastations engendered by the traffic in African slaves.”⁶⁵ Yet, the treaties made before 1914 did not universally call for the abolition of slavery as an institution, and even their attempts to end the slave *trade* were related to particular cases and conflicts and without any universalistic aspiration (although they addressed all of what was conceived by Europe and the United States being “civilized nations”).⁶⁶

One exemplary, significant backlash in the pre-First World War abolition of slavery was the story of the Independent State of the Congo, the creation of which had been a result of the Berlin Act and has been famously described in popular historic literature.⁶⁷ This formally sovereign entity was *de facto* under the autocratic rule of the “great philanthropist” Leopold, King of the Belgians.⁶⁸ Seen as having “a regime in full conformity with the requirements of European culture ... thanks to the generosity and the political genius of King Leopold,”⁶⁹ the Congo State eventually became an “unprecedented system of wealth-extraction and servitude,” of which Leopold directly owned more than ninety percent.⁷⁰ The introduction of a performance-related labor tax “turned much of the population into full-time slave laborers,” and the death toll among the Congolese in relation to those measures during the period of the Congo State has been ciphered in millions.⁷¹

Prudent discussions of the events from an international law perspective began only after 1908, when the Congo State had been

of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.”

The convention was signed by the United Kingdom, France, Germany, Austria, Belgium, Denmark, Spain, by the United States of America (not ratified), Italy, the Netherlands, Portugal, Russia, Sweden, and by the Ottoman Empire. General Act of the Conference of Berlin, Feb. 26, 1885, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1920/17.html> (last visited Mar. 25, 2010).

⁶⁵ General Act for the Repression of the African Slave Trade, Preamble, July 2, 1890, available at http://internationalcriminallaw.com/International_Crimes/CrimesAgainstHumanity/Slavery/GenAct_repress_slavetrade1909.pdf.

⁶⁶ *Id.* art. 1, §1.

⁶⁷ See, e.g., ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1998).

⁶⁸ Leopold was frequently called “*grand philanthrope*” and “*homme de génie*.” SOCIÉTÉ ROYAL BELGIQUE DE GÉOGRAPHIE, BULLETIN 412 (Vol. 10 1886).

⁶⁹ MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 157 (2001) (quoting F. de Martens, who describes the unfortunate fate of the Congo Basin under Leopold’s rule).

⁷⁰ *Id.*

⁷¹ *Id.* at 157-58.

transformed into a public Belgian colony.⁷² While the appearance of the Congo State in its concrete form seems to be a rather singular phenomenon, its lessons with regard to slavery and forced labor were significant: Where slavery has been officially abolished, new forms of the old slavery – more or less obvious and more or less official – are likely to appear, or the slavery is likely to be substituted with a system of forced labor. This change is what is often discussed as “modern forms of slavery,” and it is reflected in the treaty making of the *interbellum*, when finally “all forms of slavery” were abolished multilaterally, on quite a global scale.

(b) The League of Nations and the 1926 Slavery Convention

The first global treaty prohibiting slavery in general terms was the Convention to Suppress the Slave Trade and Slavery, adopted on September 25, 1926.⁷³ It was the result of years of negotiations and fact finding within the League of Nations, one major point of discussion being precisely the relationship between slavery and forced labor. The aim of the negotiators had been to bring about the “disappearance from written legislations or from customs of the country of everything which admits the maintenance *by a private individual* of rights over another person of the same nature as the rights which an individual can have over things.”⁷⁴ Thus, the concept of slavery discussed among the members of the League of Nation followed the legalistic tradition of sociology, with slavery as a social relationship between private individuals, based on property rights.

Tellingly, the Spanish delegation insisted, that “the question of forced labour in so far as such labour was not slavery in the real sense of the word must be left untouched;”⁷⁵ and even defendants of a more embrative notion of slavery, like the British Lord Robert Cecil,⁷⁶

⁷² *Id.* at 164.

⁷³ Convention to Suppress the Slave Trade and Slavery, League of Nations, Sept. 25, 1926, 60 L.N.T.S. 253, available at <http://www.unhcr.org/refworld/docid/3ae6b36fb.html> [hereinafter Slavery Convention of 1926].

⁷⁴ Redman, *supra* note 49, at 780 (quoting *Slavery Convention: Report Presented to the Assembly by the Sixth Committee*, League of Nations Doc. A.104 1926 VI.B.5, at 2 (1926)).

⁷⁵ *Id.* at 781.

⁷⁶ Lord Cecil was the winner of the 1937 Nobel Peace Prize for his roles as an architect of the League of Nations and founder of the International Peace Campaign. The Nobel Prize in Peace 1937: Robert Cecil, Nobelprize.org, http://nobelprize.org/nobel_prizes/peace/laureates/1937/chelwood-bio.html (last visited June 1, 2010).

acknowledged that in “less advanced” civilizations, public services had to be performed by forced labor.⁷⁷ As a result, the notions of slavery and forced labor were treated differently, and even put in a hierarchical order by the preamble of the Convention, which stated “that it is necessary to prevent forced [labor] from *developing into* conditions *analogous* to slavery” (formulation repeated in Art. 5, see below).⁷⁸ This formulation was emblematic for the future treaty making on slavery and forced labor, as it distinguished between both, but left the relation between them quite unclear. Not only did it say that forced labor is less than slavery, but also that it can only develop into something *analogous to* slavery. It thus seems that the authors of the text wrote it under the assumption that forced labor as publicly ordered service can never be identical to slavery as a private relation between individuals. The term slavery would hence *ab initio* exclude cases of slavery-like conditions, such as the historic example of the above-mentioned Congo State or the Soviet Gulags, and also its contemporary apparitions like Myanmar’s systematic use of forced labor in the 1990s.

In Article 2(b), each party to the Convention engages itself “[in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage] to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.”⁷⁹ For these purposes, Article 1 defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁸⁰ Finally, the Slavery Convention even explicitly legalized the use of publicly forced labor under certain conditions. Article 5 of the Convention reads as follows:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.

It is agreed that:

⁷⁷ Redman, *supra* note 49, at 781.

⁷⁸ Slavery Convention of 1926, *supra* note 73, at Preamble (emphasis added).

⁷⁹ *Id.* Art. 2(b).

⁸⁰ *Id.* Art. 1.

(1) Subject to the transitional provisions laid down in paragraph (2) below, compulsory or forced labour may only be exacted for public purposes.

(2) In territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence.

(3) In all cases, the responsibility for any recourse to compulsory or forced labour shall rest with the competent central authorities of the territory concerned.⁸¹

In 1930, by a Resolution of the Assembly of the League of Nations, a Commission was built to investigate allegations made against Liberia for violation of the Slavery Convention.⁸² The Commission respected the clear grammatical frame of Article 5 when it did not legally condemn the use of forced labor for the construction of a network of roads, almost exclusively leading to military stations.⁸³

Even though one might conclude that “the League’s work in eliminating slavery also convinced the world that the rights of individuals are properly part of international law,”⁸⁴ the states remained quite free in practicing their own publicly forced labor. On the other hand, the Convention served as a basis for a rapidly growing international law in the field of human and social rights, with the International Labour Organization (created in 1919) having survived as a specialized agency of the United Nations until today.

B. A MORE RECENT COMBAT AGAINST PUBLIC FORCED LABOR

As the preceding paragraphs have shown, the abolition of slavery as a matter of international law never universally and totally encompassed the generality of forced labor. Quite to the contrary,

⁸¹ *Id.* Art. 5.

⁸² See *Report of the International Commission of Enquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia*, League of Nations Doc. C.658 M.272 1930 VI, at 48-49 (1930).

⁸³ *Id.*

⁸⁴ Redman, *supra* note 49, at 800.

slavery-related treaties such as the 1926 Slavery Convention even created exceptions for the legal use of publicly forced labor, as opposed to slavery. Therefore, it is necessary to consider how far the abolition of publicly forced labor has been a directly envisaged target, and to what extent this legal battle was successful.

1. A POTENTIALLY UNIVERSALISTIC APPROACH TO FORCED LABOR

In the aftermath of the Second World War, several global⁸⁵ and regional⁸⁶ attempts were made to create universal human rights standards that would also address the issue of forced labor. The newly created United Nations offered the platform for two major frameworks that were aimed to henceforth determine the legal phrasing in human rights matters. Both contained forced labor-specific dispositions and would therefore offer to any (international or domestic) lawyer the grounding of a human rights based argument.

First, the Universal Declaration of Human Rights, proclaimed by the United Nation's General Assembly on December 10, 1948,⁸⁷ prescribed in its Article 4 that "no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."⁸⁸ It has been shown how the legislative history of Article 4 establishes that "servitude" was intended to "embrace the various functional equivalents of slavery, such as the traffic in women, forced labor and debt bondage."⁸⁹

⁸⁵ There are several universal conventions other than the two mentioned in this paragraph. *See, e.g.*, International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, art. II(e), 28 U.N. GAOR, U.N. Doc. A/9233/Add.1 (1973); Convention on the Rights of the Child arts. 32, 34, 36, Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 11, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

⁸⁶ *See, e.g.*, Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Sept. 3, 1953, 213 U.N.T.S. 221 (prohibiting slavery *and* "forced or compulsory labor"); Organization of American States, American Convention on Human Rights arts. 6.1, 6.2, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (art. 6.1 prohibits "slavery or to involuntary servitude" while art. 6.2 prohibits "forced or compulsory labor"); Organization of African Unity, African Charter on Human and Peoples' Rights art. 5, Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

⁸⁷ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

⁸⁸ *Id.* art. 4.

⁸⁹ MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 496 (1980).

Second, the International Covenant on Civil and Political Rights⁹⁰ provides the prohibition of slavery and forced labor in its Article 8:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) [correctional service];

(ii) [military or national service];

(iii) [cases of emergency or calamity];

(iv) *Any work or service which forms part of normal civil obligations.*⁹¹

It has been established with regard to the legislative history of Article 8 that "even if the definition of 'slavery' has a more 'limited and technical' connotations [sic], 'servitude' is a 'more general idea covering all possible forms of man's dominion of man.'"⁹² However, again there is some uncertainty to the extent that publicly ordered forced labor is concerned. The Convention not only offers exceptions regarding the

⁹⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1976). Myanmar is one of only 23 members of the United Nations to have neither ratified nor signed the Covenant. See United Nations Treaty Collection, Chapter IV: Human Rights: International Covenant on Civil and Political Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en&clang=_en (last visited June 1, 2010).

⁹¹ *Id.* art. 8.

⁹² Rassam, *supra* note 58, at 810 n.2 (quoting Annotations on the Text of the Draft International Covenants on Human Rights, 10 U.N. GAOR, Annexes (Agenda Item 28) 33, U.N. Doc. A/2929 (1955)).

penal system of a country, the national service and cases of emergency, but it also contains the general exception of paragraph 3(c)(iv) which permits “any work or service which forms part of normal civil obligations.”⁹³

The following part will show that the clear distinction between slavery and forced labor, and the relativity of the latter’s prohibition which is expressed in the Covenant, create some difficulties for the international lawyer who argues that forced labor as a whole has been abolished universally.

2. THE LIMITS OF (TOO) SPECIFIC TREATIES ON FORCED LABOR

As the abolition of slavery was rapidly realized by the end of the 19th century in all major economies, the focus passed soon to the problem of forced labor, which had in many cases economically replaced slavery as a systematic and quasi-institutional form.⁹⁴ The main steps in this process were taken through the International Labour Organization (ILO). Among the 182 Conventions elaborated under the auspices of the ILO, two rather early ones successively generalized the international proscription of forced labor in 1930 and 1957. In 1930, the Convention concerning Forced or Compulsory Labour (No. 29, in force since May 1st 1932) obliged in its first article “each Member of the International Labour Organization which ratifies this Convention [to undertake] to suppress the use of forced or compulsory [labor] in all its forms within the shortest possible period.”⁹⁵ The Convention, ratified by Burma/Myanmar on March 4, 1955, still upholds certain forms of publicly forced labor, but in a much more restricted manner than the 1926 Slavery Convention. Its Article 2 reads as follows:

1. For the purposes of this Convention the term forced or compulsory labour shall 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.

⁹³ International Covenant on Civil and Political Rights, *supra* note 90, art. 8.

⁹⁴ See, e.g., *Report of the International Commission of Inquiry into the Existence of Slavery and Forced Labor in the Republic of Liberia*, *supra* note 82. In 1930, the first multilaterally imposed investigation by an international commission on the alleged existence of slavery and forced labor took place in Liberia.

⁹⁵ Int’l Labour Org. [ILO], *Forced Labour Convention*, 1930, art. 1, C29 (June 28, 1930) [hereinafter *Forced Labour Convention*, 1930].

2. Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include--

- (a) [compulsory military service];
- (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- (d) [cases of emergency];
- (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.⁹⁶

Thus, the cases of forced labor for public purposes were limited to a fairly precise number of five hypotheses. Relevant for a treaty-based discussion with regard to Myanmar's systematic use of forced labor today would be paragraph 2(b), allowing "any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country."⁹⁷ It seems that both sides in *Unocal* could have made an argument out of this, for and against qualifying the Myanmar system of forced labor as a "normal civic obligation" of the citizens of that fully self-governing country.

In 1957, the Convention concerning the Abolition of Forced Labour (No. 105) was established, and it has been ratified as of today by 169 States, including the United States, but not Myanmar. The mere fact this Convention was still written twenty-seven years after the 1930 Forced Labour Convention indicates that the latter was not regarded as sufficient for the abolition of that practice. The new text's key provision is Article 1:

⁹⁶ Slavery Convention of 1926, *supra* note 73, art. 2.

⁹⁷ *Forced Labour Convention, 1930*, *supra* note 95, art. 2.

Each Member of the International Labour Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour--

(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;

(b) as a method of mobilising and using labour for purposes of economic development;

(c) as a means of labour discipline;

(d) as a punishment for having participated in strikes;

(e) as a means of racial, social, national or religious discrimination.⁹⁸

For the first time, a worldwide convention prohibited publicly forced labor in a truly general and far-reaching dimension. The most important disposition in this regard, and for the *Unocal* situation, is Article 1(b), which proscribes forced labor “as a method of [mobilizing] and using [labor] for purposes of economic development.”⁹⁹ Thus, cases like the forced labor practiced by the Government of Myanmar in order to clear forests, build streets, and construct helipads, appear to be condemned by the Convention’s unambiguous text. The reference in the Convention to the “economic development” of a country can be seen as an attempt to parallel the socio-economic literature on slavery, which underlines that “the occurrence or non-occurrence of slavery in a society is dependent on the economic state of that society.”¹⁰⁰ This new systemic awareness expressed by the Convention is not only decisively enlarging the prohibition of publicly forced labor, but it also leads the focus to an important cause of such forced labor, which is its economic “usefulness” under certain circumstances.

Regrettably, this most advanced convention also suffers from a lack of universalism. Its modest aspiration, stipulated in the preamble, is “[to adopt] further proposals with regard to the abolition of certain forms

⁹⁸ Int’l Labour Org. [ILO], *Abolition of Forced Labour Convention*, C105, art. 1, C105 (June 25, 1957) [hereinafter *Abolition of Forced Labour Convention*].

⁹⁹ *Id.* art. 1(b).

¹⁰⁰ Willemina Klosterboer, *Involuntary Labor since Abolition*, in *SLAVERY: A COMPARATIVE PERSPECTIVE* 193, 194 (Robin W. Winks ed., 1972).

of forced or compulsory labour constituting a violation of the *rights of man* referred to in the Charter of the United Nations and enunciated by the Universal Declaration of Human Rights.”¹⁰¹ These explanations imply the supplemental character of the Convention (“*further proposals*”), supplementing what is understood as “the rights of man.” Another symptom of the lacking universalistic aspiration of the Convention is Article 5, which allows for the denunciation of the convention after ten years.¹⁰² Besides, the Convention as a whole conceives the general abolition of forced labor only as a contractual potentiality, and hence as simply facultative. At no point does it allow the conclusion that it might be the simple reiteration of a pre-existing, *human right*.

After all, as of today the Convention has not been ratified by Myanmar, nor by important countries of the region, such as China, Japan, and South Korea; Singapore (1979) and Malaysia (1990) have even denounced it.¹⁰³

To conclude on the state of written international law, even though the propositions made by the 1957 Convention go quite far and would be a decisive step if they were adopted by more countries, treaty making and legal commitments concerning the abolition of forced labor have not yet reached any ground sufficient to speak of a global abolition of forced labor in the context of international codifications.

Furthermore, the here described treaty making and its perpetuated distinction between slavery and forced labor make it more difficult to invoke the prohibition of forced labor on other grounds, namely on those of customary international law or downright *jus cogens*, which we shall examine below. Sadly enough, it can be argued that in

¹⁰¹ *Abolition of Forced Labour Convention*, *supra* note 98, Preamble.

¹⁰² Article 5 of the *Abolition of Forced Labour Convention* stipulates in its first paragraph: “A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.” *Id.* art. 5.

¹⁰³ The U.S. ratified it only in 1991, and did not ratify Convention 29 (it ratified 14 ILO Conventions altogether); during the 2002 Conference of the ILO, the U.S. was even accused of violating Article 1(d) of Convention 105 by punishing unlawful strikes with some form of obligatory work or service. Paul Germanotta, *Forced Labor of Public Employees in the United States*, GLOBAL POLICY FORUM, Oct. 31, 2002, <http://www.globalpolicy.org/socecon/labor/2002/1031ilo.htm>; Ratifications of Fundamental Human Rights Conventions by Country, ILOLEX, <http://www.ilo.org/ilolex/english/docs/declworld.htm> (last visited June 1, 2010).

written international law that “the right to be free from forced labor[, unlike slavery,] is derogable.”¹⁰⁴

3. CUSTOMARY INTERNATIONAL LAW ON FORCED LABOR

While treaty law such as the above mentioned is binding for its signatories only,¹⁰⁵ customary international law is the main source of universal rules in international law. It is traditionally defined as “evidence of a general practice accepted as law”¹⁰⁶ or, quoting the Third Restatement on Foreign Relations Law, as “[resulting] from a general and consistent practice of states followed by them from a sense of legal obligation [*opinio juris*].”¹⁰⁷ The authors of the latter definition add that “‘Practice of states’ ... includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states.”¹⁰⁸ Because it exists in a fragmented international legal system where it is supposed to be applied regardless of a diversity of cultures and political systems, customary international law can be criticized as an “indeterminate and manipulable theory” that “cannot function as a legitimate source of substantive legal norms in a decentralized world of nations without a broad base of shared values.”¹⁰⁹

Despite this harsh critique and the presence of a growing number of human rights related international treaties, “custom occupies a central role in legal argument about matters as diverse as litigation under the Alien Tort Statute in the United States ... and interpretation of the subject matter jurisdiction of the International Criminal Tribunals.”¹¹⁰ Furthermore, and on a more theoretical level, Martti Koskeniemi shows that – apart from what he calls the “apologist,” or ascending argument that is made in international law in general – custom in particular proposes simultaneously and alternatively the concept of *utopia*, that is a

¹⁰⁴ Rassam, *supra* note 58, at 836.

¹⁰⁵ Vienna Convention on the Law of Treaties, art. 26, Jan. 27, 1980, 1155 U.N.T.S. 331.

¹⁰⁶ Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 3 Bevans 1179, 59 Stat. 1031.

¹⁰⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(2) cmt. b (1987).

¹⁰⁸ *Id.*

¹⁰⁹ See J. Patrick Kelly, *The Twilight Of Customary International Law*, 40 VA. J. INT’L L. 449, 451 (2000).

¹¹⁰ HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 224 (2d ed. 2000).

descending argument using normativism and naturalism.¹¹¹ Hence, the use of customary international law in particular must make value choices, accept the reality of conflict, and be realistic about the fact that international law cannot provide absolute certainty.¹¹²

Thus, the question arises what the elements are by which a necessary value choice in favor of a legal condemnation of Myanmar's forced labor practices could be justified. It appears that in the *Unocal* case, as in a lot of other cases, reference to custom is only made in a rather declaratory manner. This is explicable to the extent that an active practice related to forced labor would primarily be the practice of forced labor. It is much harder to establish the absence of a certain practice, and it is even more difficult to establish that the abstinence from that practice contains the *opinio juris* of a state to regard the concerned practice as illegal.

The additional problem of publicly forced labor is that it is usually a purely domestic issue. Unlike the slave trade, for example, the assault on the victims happens in most cases on a domestic level, and in their home country. The direct perpetrators are rarely foreigners, which makes the number of exemplary cases (such as maybe the *Unocal* case) even smaller. Thus, except for the common treaty making described above, there hardly is any legal practice among states in international relations that would focus on forced labor.

Furthermore, as shown above, the treaty making concerning forced labor has rather defined lists of legal and illegal cases of forced labor, but has never clearly expressed the aim of a universal and general prohibition of that practice in all its forms. Nor have the relevant ILO Conventions been signed by a totality of the international community. Confronted by this unfortunate shortcoming, the legal literature on forced labor issues often takes recourse to the work done by the different bodies and *ad hoc* commissions¹¹³ of the ILO over the last ninety years. The organization includes some 182 member states and has adopted 188 labor-related conventions as well as 199 recommendations.¹¹⁴ However, it seems doubtful that non-binding texts of organs of international

¹¹¹ MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 346, 350 (1989).

¹¹² Lea Brilmayer, Book Review, 85 AM. POL. SCI. REV. 687, 688 (1991) (reviewing MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989)).

¹¹³ The ILO has installed ten such Commissions, starting in 1930 with the Liberia Commission, and most recently with the Myanmar Commission.

¹¹⁴ An exhaustive and updated list of all ILO Conventions and Recommendations is available on the organization's website, www.ilo.org.

organizations can claim to reflect international custom, especially if a party to which they are applied did not positively participate in the elaboration of such documents.

4. THE WORK WITHIN THE ILO

Yet, the work of international organizations, and the work of the ILO with its Special Action Programme to combat Forced Labour in this particular case, has raised international attention for problems such as forced labor in Myanmar and has tempted to improve domestic legal standards.¹¹⁵ Generally, the work within the ILO has contributed to a detailed examination of questions surrounding slavery and forced labor. One of its recent publications gives a well arranged summary of the different hypotheses compulsory labor, which is especially interesting with regard to the *Unocal* case of publicly ordered forced labor:

Abduction and slavery is a key form of forced labour[labor], which continues to haunt the “modern” economy. [...]

The inappropriate use of public works and prison labour[labor] is another category of forced [labor]. The former category may be subject to contention, especially where the voluntary [labor] performed by people is for short durations and/or sporadic. For example, village communities do come together to meet emergency and/or pressing socio-economic needs, such as building dams, during a limited amount of time as well as being involved in seasonal agricultural tasks based on reciprocity. Such practices are commonly found in predominantly agricultural communities and in countries that have a strong agrarian base – such as Africa or Asia. Clearly, these occurrences, which are based on particular cultural systems of self-help and reciprocity, ought not to be conflated together with situations of forced [labor].

However, participation in public works under threat or force by the military, for prolonged periods of time, or without adequate remuneration (i.e. minimum wages), is considered a form of forced [labor]. Examples of forced [labor] situations where threat or force is

¹¹⁵ For example, a new constitution, on which a referendum was held in Myanmar in May 2008, “contains in article 359 a provision which states that forced labour is illegal. The Constitution does not, however, come into effect until after elections which the Government has scheduled for 2010.” Int’l Labour Org. [ILO], *Report of the Liaison Officer, Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)*, ¶ 10, GB.303/8/2, 303rd Session of the ILO Governing Body, Geneva, Switz. (Nov. 2008).

used to extract [labor] from communities are noted in previous work by the ILO – with Myanmar being a case in point. ...¹¹⁶

In contrast with much of the existing literature on the subject, the report explicitly refrains from using the terms of slavery and forced labor in an interchangeable manner.¹¹⁷ Besides slavery and publicly forced labor, the study enumerates a non-exhaustive list of other forms of forced labor: peonage and serfdom systems, debt bondage, the case of domestic workers in forced labor situations, as well as internal and international trafficking.¹¹⁸

There is hence a variety of forms of forced labor, and all of them might exist under slavery-like conditions. Some of them might even be nothing else but a modern form of slavery (e.g. a systematic and institutionalized use of debt bondage) – but most are not. In international custom and treaties, publicly forced labor has obtained a distinct, different treatment throughout the history of the abolition of slavery. From a legal point of view, the abolition of forced labor as such and of publicly forced labor in particular, is still conditional and incomplete.

5. SLAVERY, FORCED LABOR AND *JUS COGENS*

While the *Unocal* courts did not base their reasoning on the previously described international treaties on slavery and forced labor, they clearly used *jus cogens*, to qualify the oil company's activities as prohibitive. Traditionally, there was a lack of hierarchy among different norms of international law, because the ultimate criterion for the binding character of any rule had to be deduced from state sovereignty.¹¹⁹ However, the call for a set of internationally binding rules or principles beyond the influence of nation states lead to Article 53 of the Vienna Convention on the Law of Treaties, which incorporates the idea of *jus cogens* under the name of "peremptory norms of general international law:"

¹¹⁶ Kanchana N. Ruwanpura & Pallavi Rai, *Forced Labour - Definitions, Indicators, Measurement 4* (Int'l Labor Office, Working Paper No. 18, 2004), available at <http://digitalcommons.ilr.cornell.edu/forcedlabor/1>.

¹¹⁷ *Id.* at 1, n. 2.

¹¹⁸ *Id.* at 3-6.

¹¹⁹ See CASSESE, *supra* note 59, at 198 (explaining that "in classical international [law] there did not exist any hierarchy of sources or rules of international law, at least as between the two primary law-creating processes, that is, custom and treaty. [...] States did not intend to place limitations on their sovereign powers that they had not expressly and implicitly accepted").

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹²⁰

Identifying *jus cogens* as a sort of *lex naturalis*, Jimenez de Aréchaga critically commented that “[the Convention’s] description of *jus cogens* fails to apprehend its real essence, since the definition is based on the legal effects of a rule and not on its intrinsic nature; it is not that certain rules are rules of *jus cogens* because no derogation from them is permitted; rather, no derogation is allowed because they possess the nature of rules of *jus cogens*.”¹²¹ The insertion of the concept of peremptory norms in the Vienna Convention was mainly the achievement of developing countries and the socialist states. According to the representative of Sierra Leone, the former saw that it would provide “a golden opportunity to condemn imperialism, slavery, forced labor, and all practices that violated the principle of the equality of all human beings and of the sovereign equality of states;”¹²² the latter saw in *jus cogens* “a political means of crystallizing once and for all the ‘rules of the game’ concerning peaceful coexistence between East and West.”¹²³ It was only in 2006 that the International Court of Justice for the first time expressly and concretely confirmed the existence of “*jus cogens*” with regard to the prohibition of genocide.¹²⁴ Yet, the court has never based a decision on the grounds of *jus cogens*, let alone argued about the material substance of *jus cogens*.

The identification and the modification of concrete norms of *jus cogens* is problematic, as it presupposes some sort of customary or written process with a double *opinio juris* (towards that rule and towards its peremptory character), and as it is unclear how to deal with potential ‘persistent objectors’ to a particular rule, be it only a handful of states.

¹²⁰ Vienna Convention on the Law of Treaties, *supra* note 105, art. 53.

¹²¹ E. Jimenez de Aréchaga, *International Law in the Past Third of a Century*, in 159 RÉCUEIL DES COURS DE L’ACADÉMIE DE LA HAYE 1, 64 (1978).

¹²² See CASSESE, *supra* note 59, at 199-200.

¹²³ *Id.*

¹²⁴ Armed Activities on the Territory of the Congo (DRC v. Rwanda), 2006 I.C.J. 4, at 30 (Feb. 3), available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (noting that in this case, “the fact that a dispute relates to compliance with a norm having [*jus cogens*] character, which is assuredly the case with regard to the prohibition of genocide, cannot for itself provide as a basis for the jurisdiction of the Court to entertain that dispute”).

Besides, in no other domain of international law is the challenge of democratic legitimacy more relevant than here. As for the United States, the American Law Institute has proposed a short list of acts that violate *jus cogens*: genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination,¹²⁵ which has been reflected in numerous ATS cases, starting with *Filartiga* and the prohibition of torture.¹²⁶

And yet, even with the careful consolidation of the theory of *jus cogens* in the International Court of Justice's practice, the preceding parts of this paper have shown that there is no indication that a prohibition of forced labor in general, and of publicly forced labor in particular, might have reached a status of *jus cogens*. No *opinio juris* has been manifested in a universal manner in this regard, and what has been said above indicates a quite different common sense among international law makers: forced labor as such is not automatically a case of slavery.

CONCLUSION

In matters of forced labor, the discrepancy between human rights as a discourse, and human rights as international law has created some confusion. It is certainly legitimate to address events like the ones that occurred in Myanmar under the eyes of *Unocal* as what they are for politically thinking citizens: the enslavement of villagers by their own government. And it is important to see that thus realized, 'cheap' infrastructural construction work may become part of the economic calculations of a private enterprise. The profit of such metaphorical enslavement may hence be shared by local governments as well as domestic and foreign companies. However, international law contains a different story, a story of a historically developed and stepwise refined set of conventions on slavery and forced labor. In these texts, international lawmakers have distinguished slavery from forced labor, and they have long been hesitant to categorically prohibit publicly forced labor. Only the sparsely ratified 1957 Abolition of Forced Labour Convention prohibits forced labor for public works that serve the economic development of a country exclusively (as opposed to, for

¹²⁵ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

¹²⁶ See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

example, the military service or emergency service in times of natural disasters).

A confusion of the political human rights discourse with the international law on human rights is problematic. While it might prove efficient in some litigation, especially in ATS cases, and might even be absorbed by judges, like in the *Unocal* case, it comes along with some risks. Already, the practical employment of *jus cogens* by domestic judges could contribute to its fragmentation on the international level, for every national jurisdiction might then develop its own notions of *jus cogens*. Moreover, this fragmentation being a nationalist one, it is likely to result in accusations of imperialism where statutes such as the ATS have an extra-territorial effect. Notions of *jus cogens*, which do not comply with the global development of international custom and treaty work, might also create false expectations with those who would want to invoke them. It is improbable that a domestic supreme court will accept a human rights related *jus cogens* that would be more extensive than the very limited number of commonly agreed rules as they are reflected, for example, in the Third Restatement on Foreign Relations Law (this applies especially for the United States since the Supreme Court's *Sosa* decision).¹²⁷

A political human rights discourse is always on the verge of becoming a legal argument, and has to be formulated responsibly. The gap between the convincing, moral but non-legal argument, on the one side, and the legal argument that has lost its credibility because it invokes morality and is not based on binding law, is a very tight gap. In the worst case, the overstretching use of *jus cogens* norms such as slavery could provoke a backlash for the cause of human rights and cause a destructive suspiciousness between countries, who are after all the creators of international law.

In the domestic context of the United States, the most important risk that might result from an expansive interpretation of *jus cogens* in ATS litigation could be the risk of eliminating the *Alien Tort Statute*'s very existence. The Statute offers some reason for critique: from the politicization of international litigation, to the privatization of human rights litigation, to the self-implication by the American judge in matters of history.¹²⁸ These features, in combination with the extra-territorial

¹²⁷ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

¹²⁸ See, e.g., Horatia Muir Watt, *Privatisation du Contentieux des Droits de l'Homme et Vocation Universelle du Juge Américain*, 55 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 883 (2003) (Fr.).

effect of the Statute, create a permanent tension towards both the American executive and legislative branches of government, and the interests of foreign countries (even though they are themselves largely protected through their immunity). In this context, proponents of the ATS must carefully consider the consequences of their interpretations of international law within ATS litigation.¹²⁹

On the other hand, on a political and academic level, the adventurous jurisprudence of domestic jurisdictions on human rights-related issues could also be seen as a source for impulses and inspiration for an international law that is not able to formulate (in a world of around two hundred countries) universal rules that everyone formally agrees upon. This becomes even more useful in the light of Meron's remark that "as a matter of fact, states do not conclude agreements to commit torture or genocide or enslave peoples. Many of the examples of *jus cogens* commonly cited in legal literature are really *hypothèses d'école*."¹³⁰

Coming back to the concrete problem described in this paper, the deficient proscription of forced labor in international law, it might make sense to consider the rethinking of a forced labor proscription through an independent approach: an approach that is independent from the notion of slavery, and its entire legal history, which has not proven very useful in justifying the prohibition of publicly forced labor. This does not mean that the abolition of slavery should be completely forgotten from now on. Quite to the contrary, new interpretations of it will be needed as new forms of slavery continue to appear. These new forms of slavery have to be addressed as such, also legally. But it is impossible to define a new notion of "slavery" – encompassing all forms of forced labor – as a new subject matter, and yet continue referring to the old history of international law on slavery, such as the legal aspects of the pre-twentieth century abolitionist movement.

Promising beginnings towards an emancipation of the notion of forced labor have already been made, such as the 1998 Declaration of Fundamental Principles and Rights at Work,¹³¹ which does not mention

¹²⁹ It is true that such a fear may also be exaggerated, as it is an old observation that the "[e]xcessive use of case-law method tends to obscure the systematic unity of international law." Georg Schwarzenberger, *The Inductive Approach to International Law*, 60 HARV. L. REV. 539, 570 (1947). So far, peremptory norms in international relations "have largely remained a potentiality." CASSESE, *supra* note 59, at 210.

¹³⁰ Theodor Meron, *On A Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 14 (1986).

¹³¹ Int'l Labour Conf., 86th Session, Geneva, Switz., June 2-18, 1998, *ILO Declaration on Fundamental Principles and Rights at Work* (June 19, 1998).

the words “slave” or “slavery,” but only refers to forced labor in general. Other good examples are ILO documents like the working paper cited above,¹³² which contain precise and unsparing descriptions of the technicalities of forced labor in its various forms. The proliferation of treaties prohibiting contemporary forced labor and trafficking – and their interpretations by court decisions – must not become an inflation, consolidating misperceptions on the relation between slavery and forced labor, but should create a productive and legally inspiring utopia to abolish the latter.

¹³² See Ruwanpura & Rai, *supra* note 116.