No. 10-3675

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Boimah Flomo, *et al.*,
Plaintiffs/Appellants

v.

Firestone Natural Rubber Co., *et al.*,
Defendants/Appellees

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 1:06-cv-00627
The Honorable Jane Magnus-Stinson, Presiding Judge

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS, BOIMAH FLOMO, ET AL.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-3675

Short Caption: Boimah Flomo, et al. v. Firestone Natural Rubber Company

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Jeselskis Law Offices, LLC; Conrad & Scherer, LLP; Schonbrun DeSimone Seplow Harris and Hoffman, LLP; Valorem Law Group (withdrawn); Macey, Swanson, & Allman (withdrawn).

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Attorney's Signature: /s/ Terrence Collingsworth Date: 11/23/2010

Attorney's Printed Name: Terrence Collingsworth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and Seventh Circuit Local Rule 34(f), Appellants hereby request oral argument before this Court. Appellants believe the issues raised in this appeal concerning the Alien Tort Statute, 28 U.S.C. §1350 ("ATS"), whether corporations are liable under the ATS, whether the worst forms of child labor constitute a sufficiently defined international norm actionable under the ATS, and the appropriate standards for evaluating these issues present important legal and public policy questions. The resolution of these issues will be facilitated if the Court has the opportunity to question the parties and hear their elaboration on the issues presented.

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I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. §1350, the Alien Tort Statute ("ATS"); 28 U.S.C. §1331, federal question jurisdiction; and 28 U.S.C. §1367, supplemental jurisdiction for claims asserted under state and/or Liberian law.

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291, as these are appeals from final orders dismissing the case with prejudice on October 19, 2010, and orders subsumed within the Court's final judgment, entered on October 19, 2010. Notice of Appeal was timely filed on November 17, 2010.

II. STATEMENT OF THE ISSUES

1. Did the District Court err in determining that corporations are not liable under the ATS?
2. Did the District Court err in finding that the "worst forms of child labor" are not sufficiently defined to satisfy *Sosa v. Alvarez-Machain* and that an international norm prohibiting them, if it exists, is defined exclusively by International Labor Orgnaization ("ILO") Convention 182?

3. Did the District Court err when it determined that June 2003 is the beginning of the liability period?

4. Did the District Court improperly apply Fed. R. Civ. P. 56 when it determined that Plaintiffs did not present sufficient evidence of the "worst forms of child labor"?

5. Did the District Court err by requiring exhaustion of remedies under the ATS?

6. Did the District Court abuse its discretion in denying Plaintiffs' motion to amend the complaint?

III. STATEMENT OF THE CASE

On November 17, 2005, twenty-three child laborers and their guardians, who worked on the Firestone Rubber Plantation in Liberia, West Africa, filed a class action complaint against the Firestone Defendants[1] in the Central District of California. Dkt.2. The case was transferred to the Southern District of Indiana and assigned to then-District Judge Hamilton.

[1] Bridgestone Americas Holding Inc., Bridgestone, Firestone North American Tire, LLC, BFS Diversified Products, LLC, and Firestone Natural Rubber Company ("FNRC"). All but FNRC were dismissed with Plaintiffs' consent. Dkt.585.

On June 26, 2007, the District Court denied Firestone's Motion to Dismiss Count II of Plaintiffs' complaint, which alleged violations of the worst forms of child labor. *Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988 (S.D. Ind. 2007). The Court denied Firestone's Motion for Reconsideration on August 31, 2007. Dkt.50.

On April 25, 2008, Plaintiffs moved to amend their complaint to add common law claims under Indiana law. The Court denied this motion on July 11, 2008, indicating Liberian law was the appropriate law giving rise to the additional claims. *Roe I v. Bridgestone Corp.*, 2008 WL 2732192, at *2 (S.D. Ind. July 11, 2008).

After denying class certification, and pursuant to the Court's scheduling order, Dkt.193, on April 30, 2009, Plaintiffs sought leave to amend their complaint to add claims under Liberian law. Dkt.206. The District Court denied this motion thirteen months later on June 15, 2010. A1-5.[2]

After Judge Hamilton was elevated to the Seventh Circuit, the case was reassigned, first to Judge Lawrence, and then to Judge Magnus-Stinson. Dkt.546.

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[2] References to the required short appendix are: A__.

On October 5, 2010, relying on the Second Circuit's recent decision, *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), the District Court granted Firestone's Motion for Summary Judgment, which was filed on April 30, 2009. A6-19. The District Court denied as moot Firestone's Motions for Summary Judgment on secondary liability and punitive damages. Dkts.606, 607. On October 19, 2010, the District Court entered a supplemental opinion addressing additional grounds for granting summary judgment, A20-41, and also a final judgment on that date. A42.

IV. STATEMENT OF FACTS

A. The Firestone Liberia Plantation.

The Firestone Plantation in Liberia was founded in 1926 by Harvey Firestone. Dkt.2, Cmpl. ¶37. Historical papers and the media recount that the Plantation began as a system of slavery in which Firestone seized "native" land from Liberia, forced laborers to work at gunpoint, and purchased laborers from local tribal chiefs. *Id.* ¶¶60-61; *see also id.* ¶¶41-43.

According to its website, Firestone Natural Rubber Company ("FNRC") is the parent company of Firestone Liberia. "The company

operates a 118,000 acre rubber growing and processing facility and employs more than 6,500 employees who harvest and process natural rubber and latex." http://www.bridgestone-firestone.com/about_bg_index.asp?id=about/opcobg (last visited 01/25/2011).

B. The Tappers' and Children's Work on the Firestone Plantation.

Virtually every guardian of the twenty-three child Plaintiffs was born on the Firestone Plantation and grew up as a child laborer assisting the "tappers" who extract latex from the rubber trees. FNRC's system of child labor was passed from generation to generation. Dkt.230, Ex. 2,[3] 13:16-17; 22:14-17; Ex. 4, 15:2-8; 8:5-11; Ex. 7A, 188:7-190:1; 202:19-204:6; Ex. 7, 156:24-158:9; Ex. 8, 16:21-25; Ex. 10, 10:14-20; 24:21-24; 123:15-24; Ex. 11, 90:15-91:5; Dkt.230-58, Cisco Decl. ¶¶3-4; Dkt.230-57, Kweme Decl. ¶3.

Tappers and their children begin their day before dawn, most around 4:00 a.m., and regularly do not finish until late afternoon. Dkt.230, Ex. 4, 57:23-60:5; Ex. 1, 24:8-12; Ex. 2, 54:13-22; 60:11-17;

[3] Citations to exhibits in the record are identified by docket number. For example, Dkt.230, Ex.__.

39:17-18; Ex. 3, 54:14-16; 55:23-25; 58:23-59:21. Each tapper is assigned three or four "farms," or "tasks," of trees, and he taps one or more tasks each day. Dkt.296-26, Zayzay ¶4. Until recently, each "task" contained approximately 750 trees. *See infra* §IV.E.

Tappers and their children must walk from the housing camps to their "tasks," which can take up to an hour. Dkt.230, Ex. 1A, 72:14-21; Ex. 2A, 89:6-11; 7B, 180:14-181:18. Every day, tappers must "tap" an entire task of trees, which consists of "cutting the tree with a special horned-knife for the latex to flow," Dkt.230-57, Kweme ¶11, and returning to collect and carry the liquid latex to the collection tank in buckets weighing forty-five or seventy pounds when filled. Dkt.230, Ex. 6, 46:13-47:8, 101:24-102:1; Dkt.296-23, Zaza Decl. ¶14. Tappers transport the latex by hanging two buckets on a stick that lays across their shoulders. Dkt.296-24, Cisco Decl. ¶11 Because of FNRC's daily quota, tappers must make *at least* two trips from their tasks to the collection tank to deposit the latex. Dkt.230, Ex. 11, 173:3-174:1; Dkt.296-23, Zaza Decl. ¶14. Tappers' pay is reduced by half or more if they do not turn in the required amount of latex. Dkt.230, Ex. 6, 41:4-17; Ex. 2A, 121:19-122:13.

Tappers are also required to "clean" or "wash" the cups, which means they collect the coagulated latex ("cup lump") that accumulated overnight from the task of trees tapped the day before. Dkt.230-57, Kweme Decl. ¶11. The children performed this job and consistently describe it: they take a bucket, place it on their head, and go from tree to tree collecting the cup lump. Dkt.230, Ex. 10A, 22:12-25; Ex. 10B, 33:5-25. When all the cup lump is collected, the children walk thirty minutes or more to collection areas where the cup lump is cut and weighed by Firestone headmen. Dkt.230, Ex. 6, 48:24:49:5; Ex. 10B, 33:5-39:7; Dkt.296-26, Zayzay Decl. ¶4.

Tappers were also responsible for "slashing" or cutting the overgrowth in their tasks with sharp cutlasses or slashing irons. Dkt.296-26, Zayzay Decl. ¶3. King Check Hong, Firestone's Agricultural Operations Manager, testified that until 2007, a tapper had to slash each of his three or four tasks twice per year and slashing one task took approximately fifteen "man-days" of six or seven hours per day. Dkt.296, Ex. TT, 101:4-102:18. Slashing thus totaled ninety, six or seven-hour-long days per year, in addition to the tappers' other duties,

such as laying panel, applying fungicides and other chemicals, scraping cups, and ring weeding. Dkt.230, Ex. 6, 51:2-52:12, Ex. 2B, 41:1-23.

As recently retired Firestone headmen confirm, during the time period at issue, double tapping in which the tapper was required to tap an additional half or whole task was *frequently* imposed. Dkt.230, Ex. 9, 52:4-15; 39:15-40:7; Dkt.296-26, Zayzay Decl. ¶¶10-11.[4] Double tapping meant tapping 1,125 trees or more in a day, in addition to the tappers' other job duties. Dkt.230, Ex. 3, 64:8-65:17.

Consistent with Firestone's long-established system, Plaintiffs' guardians testified that their work was too much for them to complete alone and required the help of their children. Dkt.230, Ex. 4, 37:13-21.[5] Paying other helpers was not economically feasible; Plaintiff Daniel Flomo testified in his deposition he could not "stop applying chemicals,[6] washing cups, and collecting with [his] father," "because that is our livelihood. Without that, we can't survive." Dkt.230, Ex. 7A, 147:1-25.

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[4] *See also* Dkt.230, Ex. 3, 64:8-65:17, 68:17-23; Ex. 4, 56:22-57:16; Ex. 6, 38:16-39:25; Ex. 7, 50:5-16; Ex. 8B, 41:16-42:6; Ex. 10, 79:4-10.
[5] *See also* Dkt.230, Ex. 1A, 86:12-19; Ex. 2, 59:15-60:17; Ex. 3, 55:22-25; Ex. 5, 112:1-4; Ex. 6, 94:9-12; Ex. 7, 281:9-282:6; Ex. 8B, 31:18-21; Ex. 9 34:23-36:12; Ex. 9A, 43:23-44:5; Ex. 10A, 19:22-21:19; Ex. 10B, 41:8-17; Ex. 11, 275:10-276:6.
[6] Material safety data sheets show the chemicals used are hazardous. Dkt.230, Ex. 24.

C. All Plaintiffs Performed Hazardous Work on the Firestone Plantation.

Every Plaintiff[7] started working on the Plantation between five and twelve years old collecting and transporting cup lump; most also applied chemicals, slashed, scraped cups, and did ring weeding. Dkt.230, Ex. 1A, 72:14-73:4, 59:3-24, 61:8-14; Ex. 1B, 39:22-24, 43:5-8, 49:3-13, 45:4-22; Ex. 1, 54:19-55:9; Ex. 2A, 42:15-43: 6, 44:19-46:5; 49:12-17, 50:20-23, 51:12-14, 52:7-53:14, 54:4-16; Ex. 2B, 32:1-37:17; 41:1-23; 45:21-48:10. They all worked long hours. Dkt.230, Ex. 1A, 72:19-73:2. They used sharp tools, including cutlasses, and handled toxic chemicals without any safety equipment or enclosed shoes. Dkt.230, Ex. 3A, 216:8-10; Ex. 10B, 44:2-6; Ex. 1A, 102:1-8; 103:1-23. They walked long distances carrying heavy buckets in the Liberian heat. Dkt.230, Ex. 1A, 72:14-21; Ex. 11, 173:3-174:1. Most bear scars of injuries sustained while working. Dkt.230, Ex. 2A, 119:19-122:13; Ex. 2B, 34:22-37:17; Ex. 3A, 216:19-220:22; Ex. 4A, 25:4-26:2; Ex. 9A, 104:17-111:15; Ex. 11A, 135:16-141:21. Firestone headmen described

[7] All twenty-three named Plaintiffs testified concerning the hazardous work they did on the Firestone Plantation. Plaintiffs provide examples of evidence because space limitations do not allow citation to every instance in the record. *See also* Dkt.295, at 17-33.

the hazardous work children performed on the Plantation. Dkt.296, Ex. gg, 229:11-20; Dkt.296-23, Zaza Decl. ¶¶7, 9, 15; Dkt.296-26, Zayzay Decl. ¶¶12-13.

Other evidence of child labor on the Plantation includes pre-litigation film and photograph footage of Plaintiffs Daniel and Boimah Flomo carrying heavy buckets of latex. Dkt.230, Ex. 7, 93:13-97:16; Dkt. 296, Ex. XX. Typical of all child Plaintiffs, both children have cleaned cups (collected and transported liquid and coagulated latex), laid panel, slashed, and applied chemicals and stimulant. Dkt.230, Ex. 7, 81:13-87:25; 92:25-93:7; Ex. 7A, 142:13-150:11. Both boys were young when they began working. Dkt.230, Ex. 7A, 142:13-150:11; Ex. 7, 80:20-25, 85:17-86:25.

Another typical Plaintiff, Samuel Varnie, started working when he was approximately ten years old. Ex. Dkt.230, 8B, 27:7-18; 28:16-25; 29:11-22; 60:24-62:1. Once when Samuel was transporting a full bucket of liquid latex on his head to the tank, a headman told Samuel to climb the ladder to pour the latex in the tank. When he did so, Samuel fainted from the strong scent of ammonia. Dkt.230, Ex. 8, 26:11-27-27:24. Plaintiff Saah Foryor, Jr., who began working when he was

approximately six years old, was injured when, with no Firestone-provided gloves or masks, chemicals dropped in his eyes, causing burning for weeks. Dkt.230, Ex. 1A, 102:1-103:23; Ex. 1B, 59:15-19.

D. Limited Access to Education on the Plantation Ensured that Child Labor Continued.

There was a severe shortage of schools on the Plantation: as late as 2004, Firestone only operated fifteen schools for the approximate 240 square-mile Plantation. Dkt.230, Ex. 27. Firestone admits that it did not operate a high school on the Plantation until 2006, post-litigation, Dkt.230, Ex. 20 (Request No. 58), and some schools were being used as security command posts, instead of for learning. Dkt.297, Ex. WW; Dkt.296, Ex. BB, 243:14-245:10.

Some Plaintiffs never attended a Firestone school, or their start was delayed because they did not have registration cards. Dkt.230, Ex. 5A, 70:18-20; Ex. 11A, 44:4-45:4. If a child is not born in a Firestone hospital, Firestone's process for obtaining birth certificates to get registration cards was prohibitively expensive and difficult. Dkt.230, Ex. 4, 46:12-24; Ex. 11, 127:22-128:10; Ex. 11A, 44:4-21.

Many Plaintiffs' education was interrupted, delayed, or negatively impacted because of their work. For instance, Saah, Jr. testified, "the

work is too much for my father. He alone can't do that." "When you help your father, you wouldn't be serious in school because of the job." Dkt.230, Ex. 1A, 57:10-21. Boimah Flomo stopped going to school in 2003 because the tapping work was too hard. Dkt.230, Ex. 7, 87:11-90:10.

E. Firestone's Production System Requires Child Labor Because the Workload is too Much for One Tapper.

Five days before Plaintiffs filed this suit, Dan Adomitis, the President of FNRC, admitted in a CNN interview that "each tapper will tap about 650 trees a day where they spen[d] perhaps a couple of minutes at each tree." Dkt.230, Ex. 17, at 1-2. As CNN calculated, 650 trees a day, at two minutes per tree equals more than twenty-one hours of work each day – just to tap the trees. *Id.*; Dkt.230-57, *Kweme* Decl. ¶¶11-12. Long after bringing this suit, guardians had approximately 750 trees in their tasks. Dkt.230, *e.g.,* Ex. 3, 51:17-22; Ex. 4, 54:25-55:19; Dkt.230-58, Cisco Decl. ¶12. These numbers reveal, and retired headmen confirm, that Firestone's system assumed tappers could not satisfy their quotas without the assistance of children. Dkt.296-25, Karamo Decl. ¶9; Dkt.296-26, Zayzay Decl. ¶4.

F. Firestone Had No Policy Prohibiting Child Labor until 2000, and Then it Failed to Enforce That or the Later "Zero-Tolerance" Policy.

The present and former Presidents of FNRC concede that Firestone did ***not*** have a written policy prohibiting the use of child labor prior to June 20, 2000. Dkt.531, Ex. 2, 71:18-72:7; Ex. 12, 33:25-34:10; 35:18-45:9; Dkt.495-1, at 14-16. Firestone Liberia's current and past supervisors confirmed children openly worked on the Plantation. Dkt.297, Ex. VV; Dkt.296, Ex. aa, 68:20-22; Dkt.296-26, Zayzay Decl. ¶¶3, 14-15; Dkt.296-23, Zaza Decl. ¶¶10-12; Dkt.296-25, Karamo ¶¶6-8; Dkt.531, Ex. 6, 32:4-35:20; 46:1-47:13; Ex. 8, 99:7-100:10; Ex. 10, 60:22-62:9.

Firestone's first policy, issued in June 2000, entitled, "Elimination of Worst Forms of Child Labour on the Estates," admits "tapping, cup cleaning, latex/cup lump collection, slashing, ring weeding, and Difolatan and stimulant applications" are "some of the intolerable forms of Child Labour on the [Plantation]." Dkt.230, Ex. 15. John Samuels, a former Employee Relations Manager in Liberia, told Ed Garcia, the Plantation's former President and Managing Director between 1999 and

2004, that Samuels wrote the policy, in part, because "[s]ome children were working in the field." Dkt.531, Ex. 38, 124:9-22.

During his tenure, Garcia provided regular written weekly updates to the President of FNRC. Dkt.531, Ex. 19, 45:13-46:15; 100:6-21. In a September 2000 weekly report, Garcia informed John Schremp, then-President of FNRC: "We are attempting to enforce the policy against tappers who use their children for afternoon tasks. ***This practice has been going on for many years.***" Dkt.297, Ex. VV (emphasis added). Samuels admits Firestone conducted no training or "awareness campaigns" for supervisors or tappers regarding the 2000 policy. Dkt.531, Ex. 38, 158:22-159:7.

Firestone issued no other policies or statements concerning child labor on the Plantation until July 2005, when Firestone President Charles Stuart admitted "it has been observed that employees, especially tappers, occasionally ***still*** use their children to assist them in carrying out various tasks in their areas of assignment." Dkt.230, Ex. 14 (emphasis added).

Months later, on November 23, 2005—a week *after* this lawsuit was filed—FNRC issued a "zero tolerance" policy. Dkt.230, Ex. 16.

Every guardian and Plaintiff testified the earliest they heard of any prohibition of child labor, if ever, was after Plaintiffs filed their lawsuit. Dkt.230, Ex. 4A, 30:17-20 (2006); Ex. 9, 54:18-55:24 ("after we have complained of suing Firestone to the human rights people"); Ex. 11, 91:7-25 (policy issued after the suit).

No guardian or plaintiff heard of any trainings regarding the 2005 policy. Dkt.230, Ex. 4A, 61:2-4; Ex. 7, 223:2-15; Ex. 7A, 219:3-12; Ex. 11, 101:16-102:16. Retired headman, John Zayzay, attested that supervisors in his division were not enforcing the policy because the job was too big for one person to complete. Dkt.296-26, Zayzay Decl. ¶15.

G. Firestone Supervisors Encouraged Children to Work.

The guardians and Plaintiffs consistently testified that headmen, overseers, and superintendents saw and encouraged children to work *without taking any action to stop the child labor* so their guardians could complete their tasks "because their production was going down." Dkt.230, Ex. 7, 256:6-260:23; *see also* Ex. 7B, 169:13-173:2; Ex. 9A, 115:6-118:22. Firestone supervisors taught Plaintiffs how to perform

their jobs. Dkt.230, Ex.3, 109:15-111:19; Ex. 6B, 29:24-25; 31:3-9;[8] *see also* Ex. 8B, 40:4-41:10; Ex. 10, 96:4-97:21; Ex. 1A, 75:6-77:20; 79:11-12. Plaintiff Elijah Peter testified that when he dropped latex from the bucket he was carrying on his head, the headman told him not to "waste" the latex. Dkt.230, Ex. 11A, 134:13-135:10.

H. Firestone Deliberately Failed to Take Steps to Stop Child Labor, Despite Notice.

Outside sources consistently reported to Firestone that child labor existed on the Plantation. For example, a 2005 independent investigation conducted by the Government of Liberia ("GOL") revealed tappers on the Plantation admitted children were still working there. Dkt.533, Ex. 52, at DEFS 7186-87. Also in 2005, a local non-governmental organization, Save My Future Foundation ("SAMFU"), issued *The Mark of Modern Slavery*, a report addressing child labor on the Firestone Plantation, including witness accounts and discussing the correlation between the tappers' heavy workloads and children working to meet the quota. Dkt.296, Ex. XX; *see generally* Dkt.295, at 18-23.

[8] Headmen regularly weighed latex and cup lump children brought to the tank. Dkt.230, Ex. 2A, 72:7-18; Ex. 10, 84:6-85:20; 86:14-20; Ex. 10B, 36:4-38:5.

The President of Firestone Liberia, Charles Stuart, failed to investigate the allegations in the 2005 SAMFU report, even though the authors sent a letter asking for his response. Dkt.296, Ex. XX, Ex. BB, 144:1-146:13. Upon learning about the lawsuit, Dan Adomitis, President of FNRC, said Stuart should just go about his job and "there were folks who would deal with [what was now a legal matter]"; Stuart took no action with regard to the specific allegations in the complaint. Dkt.296, Ex. BB, 88:21-89:3; 98:10-99:11. Firestone's only response was a lawyer-driven investigation that took place several months after Plaintiffs and their guardians were deposed and nearly three years after the complaint was filed. Dkt.296, Ex. II, 142:1-146:2, 147:1-148:10.

In May 2006, the U.N. Mission in Liberia issued a report, "*Human Rights in Liberia's Rubber Plantations: Tapping into the Future*," which reported that a representative of Firestone management admitted that Firestone did not effectively monitor compliance with policies against child labor, and U.N. investigators personally spoke with a number of children between ten and fourteen years old who were working on the Plantation. Dkt.230, Ex. 18, at 45. In 2007, the GOL informed Charles Stuart that it continued to receive reports of child labor on the

Plantation. Dkt.531, Ex. 28. In January 2009, the United Steel Workers wrote to Adomitis, President of FNRC, explaining that the underlying systems leading to child labor had not been altered and that child labor remained on the Plantation. Dkt.532, Ex. 56.

V. SUMMARY OF ARGUMENT

On October 5, 2010, the District Court, relying on the Second Circuit's *Kiobel* decision, ruled that corporations cannot be sued under the ATS. A6-19. *Kiobel* stands in stark contrast to the overwhelming number of courts explicitly or implicitly holding that corporations are liable under the ATS. Indeed, *Kiobel* is not settled or final law, and a request for rehearing *en banc* has been pending since October 15, 2010. The District Court erred in upending the great weight of precedent establishing corporate liability under the ATS.

Additionally, on October 19, 2010, despite more than three years of extensive fact and expert discovery collecting substantial evidence, and multiple trips to Liberia, the District Court disregarded the law of the case doctrine and "revisited" the Court's previous determination that Plaintiffs' allegations of performing hazardous child labor stated viable claims for "law of nations" violations under *Sosa v. Alvarez-*

Machain, 542 U.S. 692 (2004). The District Court became perhaps the only court to interpret the *Sosa* standard to require that both the United States and Liberia, as the country in which the injuries occurred, must have ratified the relevant international conventions, and that any conventions on which the norm rests must be self-executing. ATS jurisprudence from every circuit rejects the District Court's reasoning on both these points. Moreover, the ATS' standard for "law of nations" violations does not require explicit statutory sources, but instead looks to customary international law ("CIL") to determine if a particular norm is specific, universal, and obligatory. Similarly, based on the same flawed reasoning, the Court incorrectly determined the liability period for Plaintiffs' ATS claims began in June 2003, the date when Liberia ratified ILO Convention 182.

The District Court also improperly applied Fed. R. Civ. P. 56 when it impermissibly weighed evidence and failed to draw reasonable inferences in favor of the Plaintiffs. The totality of the evidence demonstrates that the children performed hazardous labor; that Firestone deliberately perpetuated a system of production on the Plantation that required child labor; and that Firestone knew about the

child labor, actively encouraged it, and did nothing to try to stop it until well after this litigation began.

Moreover, without citation to relevant authority, the District Court determined that an exhaustion requirement exists under the ATS, and it grafted the standards announced in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), onto such claims brought under the ATS. Even if such an exhaustion requirement exists, the circumstances of this case preclude its application because the Defendants never raised an affirmative defense, and any remedies in Liberia are unavailable and inadequate.

Finally, the District Court abused its discretion by denying Plaintiffs leave to amend their complaint, reasoning that Plaintiffs waited too long even though they filed their motion by the Court's deadline. Further, discovery remained open for at least another ten months, and trial was more than two years away. There was no prejudice to Firestone, and the District Court cited none.

VI. STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *See Cyrus v. Town of Mukwonago*, 624 F.3d 856, 861 (7th Cir. 2010). Summary

judgment is appropriate when there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. *Id.* (citation omitted). A court must resolve all ambiguities and draw all inferences against the moving party. *Goelzer v. Sheboygan County, Wis.*, 604 F.3d 987, 992 (7th Cir. 2010). Where circumstantial evidence is presented, summary judgment must be denied if there is any question as to the inferences to be drawn. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520, 531 (7th Cir. 2008).

The denial of a motion for leave to amend the complaint is reviewed for an abuse of discretion. *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792 (7th Cir. 2004); *Pugh v. Tribune Co.*, 521 F.3d 686, 698 (7th Cir. 2008). An abuse of discretion is established absent evidence of undue delay, bad faith, undue prejudice to the opposing party, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

VII. ARGUMENT

A. The District Court Erred in Determining that Corporations Are Not Liable under the ATS.

The District Court's conclusion that corporations are exempt from liability under the ATS and its adoption of the non-binding majority holding in the Second Circuit's recent *Kiobel* decision goes against

overwhelming authority.[9] More than a century ago, the Supreme Court noted that the ATS drafters understood that corporations are subject to liability under the ATS. *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 106 (1897) (referencing the Judiciary Act of 1789, of which the ATS is a part, "the words 'citizens' and 'aliens' . . . have always . . . include[d] corporations"). More recently, the Supreme Court confirmed that "[the ATS] by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

The *Kiobel* panel majority is the first circuit decision to hold that corporations are immune from ATS liability. Sharply disagreeing, Judge Leval noted in his concurring opinion in *Kiobel* that virtually all courts to address the issue have held that the "law of nations" does not exempt corporations from civil liability. 621 F.3d at 161 & nn. 12, 14 (collecting cases). *Kiobel's* decision conflicts with several prior decisions in the Second Circuit exercising jurisdiction over ATS claims against corporations. *See Presbyterian Church of Sudan v. Talisman*, 582 F.3d

[9] Should this Court agree with *Kiobel*, Plaintiffs would seek leave to amend, adding claims against individual corporate officers Dan Adomitis, Ed Garcia, and Charles Stuart, among others.

244, 261 n.12 (2d Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring) ("[W]hether corporations may be held liable under the [ATS is] indistinguishable from the question of whether private individuals may be."); *Wiwa v. Royal Dutch Petroleum, Co.*, 226 F.3d 88, 91-92 (2d Cir. 2000).

The Eleventh Circuit, relying on *Argentine Republic*, has held explicitly that "[t]he text of the [ATS] provides no express exception for corporations . . . and the law of this Circuit is that this statute grants jurisdiction for complaints . . . against corporate defendants." *Romero v. Drummond Co., Inc.,* 552 F.3d 1303, 1315 (11th Cir. 2008) (cited by *Sinaltrainal v. Coca-Cola, Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009)); *see also Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1242 (11th Cir. 2005). The *Kiobel* majority ignored this highly relevant precedent.

1. Federal common law determines whether corporations are liable.

Writing for the majority, Judge Cabranes reasoned that, based on international law, corporate liability is not available for ATS claims. *Kiobel*, 621 F.3d at 118-20. Judge Leval, however, drawing on the text

and history of the ATS and the Supreme Court's decision in *Sosa,* concluded that even if international law applies, it assumes each State will establish the parameters of liability, and civilized nations universally permit corporate liability. *Id.* at 153, 170-74 (Leval, J., concurring).

In this case, the District Court concluded that the Supreme Court has "already rejected Plaintiffs' argument [that federal common law governs the issue of liability]." A12. This is objectively erroneous, however, because the Supreme Court in *Sosa* explicitly held that although jurisdiction under the ATS requires a violation of an international norm, federal common law supplies the contours of an ATS cause of action. 542 U.S. at 725, 730-31. *Sosa* endorsed the Second Circuit's ATS jurisprudence, which recognized that "[t]he law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available." *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring), cited by *Sosa,* 542 U.S. at 724, 731. International law says little about how to enforce international norms,

as it purposefully leaves implementation, such as rules of civil liability, to the States. *Kiobel*, 621 F.3d at 152 (Leval, J., concurring); *Tel-Oren,* 726 F.2d at 777-82 (Edwards, J., concurring).

Sosa did not hold, or even suggest, that international law determines who is liable under the ATS. If international law defined all aspects of an ATS action, *Sosa's* holding that the ATS allows federal courts to recognize causes of action *at federal common law* would be meaningless. *See* 542 U.S. at 724. Holding that corporations cannot be liable under the ATS conflicts with *Sosa* and, as Judge Leval reflected, is "illogical, internally inconsistent, [and] contrary to international law." *Kiobel*, 621 F.3d at 174.

As discussed in *Kiobel,* the District Court relied on *Sosa's* footnote 20 to support its conclusion that corporate liability is determined by international law. *Compare Kiobel*, 621 F.3d at 127-28 (Cabranes, J.), *with id.* at 163-64 (Leval, J., concurring). In this footnote, however, the Supreme Court made the non-controversial point that some international norms include a state action requirement, while others do not, but it treated corporations and natural persons synonymously as

private parties subject to ATS liability. 542 U.S. at 732, n.20; *see also Kiobel*, 621 F.3d at 165 (Leval, J., concurring).

There is no question that corporate liability is available under federal common law. *See, e.g.*, 1 William Blackstone, *Commentaries*, at 469 n.5, *475 (1765) ("Blackstone") (among the capacities of a corporation is "[t]o sue and be sued . . ."); *see also Exxon Shipping Co. v. Baker*, 555 U.S. 471 (2008); *Bank of Augusta v. Earle*, 38 U.S. 519, 520 (1839) ("[b]y the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its Courts . . ."); *Kiobel*, 621 F.3d at 162 & n.15 (Leval, J., concurring).

2. Corporate liability also is an established norm of international law.

Even if international law must be applied, corporate liability is an established concept under international law. Numerous international treaties recognize corporations' international obligations and liability for violations of the law of nations. *See, e.g.*, Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S. 195 (the requirement that States provide remedies for acts of racial discrimination has been repeatedly applied to corporate acts); Concluding Observations of the Committee on the Elimination of Racial

Discrimination, ¶30, Feb. 2008, CERD/C/USA/CO/6. Human rights treaties do not distinguish between juristic and natural individuals; neither is exempt from responsibility.

Entities within the U.N. human rights system have emphasized corporate accountability and the role of States in redressing harms caused "by private persons *or entities*." U.N. Comm. on Human Rights [UNHCR], Gen. Cmt. No. 31, ¶8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("UNHCR Gen. Cmt. No. 31") (emphasis added). International law obligates States to provide civil remedies, based on domestic law, against corporations for serious human rights abuses. *See, e.g.,* G.A. Res. 60/147, Principles 3(c) & 15, U.N. Doc. A/RES/60/147 Annex, Principles 3(c) & 15 (Mar. 21, 2006). If a State were to recognize violations of international law committed by natural persons but not by corporations, it would likely breach its own international obligations to protect human rights. *See, e.g.*, UNHCR, Gen. Cmt. No. 31. The Special Representative of the U.N. Secretary-General has emphasized that international legal principles direct corporations to respect human rights and avoid complicity in violations. *See* UNHCR, Human Rights Resolution 2005/69: Human Rights and Transnational Corporations

and other Business Enterprises, G.A., U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005); *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, John Ruggie, ¶¶73-74, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008). Such official statements further demonstrate consensus regarding corporate liability for violations of international law.

Furthermore, the uniform recognition across domestic legal systems that corporations may be subject to liability confirms the international consensus that corporations, as legal personalities, share legal responsibilities, which is a proposition that qualifies as a general principle of international law. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250-51 (2d Cir. 2003); Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 ("the ICJ Statute"); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (THIRD) §102(1)(c) (1987). Every legal system in the world contains features of tort law holding corporate entities responsible for injuries they cause. *See, e.g., First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 628-29, n.20 (1983) (citation

omitted); *Kiobel,* 621 F.3d at 169-70 (Leval, J., concurring); Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts,* 6 Nw. U. J. Int'l Human Rts. 304, at *67 (2008).

a. Offenses against the "law of nations" are not limited to criminal acts.

The District Court found that the lack of explicit corporate liability in international *criminal* law suggests a lack of *civil* liability under international law and the ATS as well because a corporation's mental state cannot be ascertained, it cannot suffer the punitive impacts of criminal liability, and permitting corporate liability will lessen the deterrent effect for individual actors because Plaintiffs will sue the "deeper-pocketed corporate employer." A13-14.[10]

This conclusion belies history and international legal precedent. In the 1700s, the term "offenses against the law of nations" included *any* violation of that law without regard to whether it was criminal. *See* 4 Blackstone at *66-*68; *Sosa*, 542 U.S. at 721 (federal courts were open

[10] The District Court misstated that Plaintiffs' theories of liability were limited to secondary liability. A14 n.4. Plaintiffs also contend that FNRC is directly liable for its deliberate perpetuation of, and refusal to take effective measures against, child labor. *See* Dkt.530, at 22-27.

for prosecution of a tort action regardless of whether it imposed criminal or civil liability) (quoting *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). Additionally, the differential treatment between natural and juridical persons in *Bivens* actions has no application here. A15 (citing *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)). No court has ever held that the ATS exists only to deter natural individuals in the way *Bivens* suits do. *See infra* §VII.E. ATS suits serve a plethora of tort goals: compensation for victims, punishment of wrongdoers, and deterrence to direct and indirect actors. *Tachiona v. Mugabe*, 169 F.Supp.2d 259, 312 (S.D.N.Y. 2001) ("Were liability in [ATS and TVPA] cases to be limited so as to permit recovery only from the particular natural individuals who actually commit the underlying wrongful acts, the result would effectively nullify the purposes of the [ATS and TVPA]"), *rev'd in part on other grounds*, 386 F.3d 205 (2d Cir. 2004); *see also In re Agent Orange Product Liability,* 373 F.Supp.2d 7, 58 (E.D.N.Y. 2005), *aff'd* 517 F.3d 104 (2d Cir. 2008).

Furthermore, punitive damages are designed to punish tortious conduct, even when it is committed by a "huge corporation." *Mathias v. Accor Economy Lodging, Inc.,* 347 F.3d 672, 676 (7th Cir. 2003); *see*

also, In re Agent Orange, 373 F.Supp.2d at 88; Int'l Commission of Jurists, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity & International Crimes, 3 Civil Remedies 5 (2006), *available at* http://icj.org/IMG/Volume_3.pdf ("[W]hen the legal accountability of a company entity is sought . . . the law of civil remedies will always have the ability to deal with the conduct of companies, individuals and state authorities."). As noted by Judge Leval, when it is "the corporation, and not its personnel, [that] earned the principal profit from the violation of the rights of others . . ." imposing a penalty on individual personnel–who may not have personally profited from the corporation's malfeasance–defeats the ATS' twin purposes of compensation and punishment. *Kiobel*, 621 F.3d at 169.

b. The limited mandate of international criminal tribunals has no bearing on civil liability.

The District Court erred in concluding that since international criminal tribunals, such as Nuremberg, did not address corporate liability, international law does not permit civil corporate liability. A13-15. International criminal tribunals operate under limited mandates for limited purposes, i.e., adjudicating certain *crimes* in conjunction with

domestic measures that provide *civil* tort remedies. *See Kiobel*, 621 F.3d at 163, 166-70 (Leval, J., concurring). Moreover, actions have been taken against corporations for violations of international law outside of the tribunals. *See, e.g.*, Report on the Crimea Conference, U.S.-U.S.S.R U.K., Feb. 11, 1945, *available at* http://www.ena.lu/; (creating a framework for action against corporations); Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945) (directing dissolution of I.G. Farben).

The District Court cites no basis for exempting corporations from civil tort liability under the ATS based on the scope of international criminal tribunals because there is none.

3. Corporate liability under the TVPA also has no bearing on corporate liability under the ATS.

The District Court erroneously held that if there is no corporate liability under the Torture Victim Protection Act ("TVPA"), the same must be true under the ATS. A16. Although a few courts have interpreted the use of the word "individual" in the TVPA to mean that

only natural persons and not corporations can be defendants,[11] other courts have expressly held the TVPA allows suits against corporations or have not applied that limitation to the ATS. *See, e.g.*, *Sinaltrainal*, 578 F.3d at 1264 n.13; *Drummond*, 552 F.3d at 1315; *Aldana*, 416 F.3d 1242; *cf. Mujica v. Occidental Petrol. Corp.*, 381 F.Supp.2d 1164, 1178 n.13 (C.D. Cal. 2005) (declining to extend its TVPA determination regarding corporations to claims under the ATS); *Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362, 380-81 (E.D. La. 1997) (same).

Contrary to the District Court's suggestion, A16, Congress' enactment of the TVPA in 1991 did not narrow the scope of the ATS, passed in 1789. In drafting the TVPA, Congress could have given U.S. citizens the right to sue for violations of the law of nations to the same extent as aliens under the ATS. Instead, Congress chose to limit causes of action available to both U.S. citizens and aliens under the TVPA to torture and summary execution, while leaving the ATS unaltered. *See* S. Rep. No. 102-249, at 5 (1991) (quoted in *Sinaltrainal*, 578 F.3d at 1263-64); *see also* 28 U.S.C. §1350, note.

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[11] The word "individual" does not necessarily mean only natural persons; it is also used to mean an "individual" corporate entity. *See Clinton v. City of New York*, 524 U.S. 417, 428, n.13 (1998).

B. The District Court Erred in Finding that the Worst Forms of Child Labor are not Sufficiently Defined to Satisfy *Sosa* and that an International Norm Prohibiting them, if it exists, is Defined Exclusively by ILO Convention 182.

When denying FNRC's motion to dismiss the child labor claims, Judge Hamilton held that "[i]t would not require great 'judicial creativity' to find that even paid labor of very young children in these heavy and hazardous jobs would violate international norms [under the *Sosa* standard]." *Roe I*, 492 F.Supp.2d at 1022.

More than eighteen months later, in its motion for summary judgment, Firestone renewed its argument that there is no international norm prohibiting child labor. Dkt.208. Disregarding the law of the case doctrine, Judge Magnus-Stinson reconsidered Judge Hamilton's prior ruling, and determined that Article 3(d) of ILO 182 is not sufficiently specific, universal, or obligatory and ILO 182 is a non-self-executing convention that cannot form the basis for an ATS claim. A34-36. Both conclusions are erroneous because the District Court misconstrued the nature of CIL and the scope of the inquiry *Sosa* requires.

1. Plaintiffs' claims arise under CIL, which is not exclusively defined by one source.

Affirming over two decades of precedent, the Supreme Court confirmed in *Sosa* that the ATS allows causes of action for violations of CIL norms that are "specific, universal and obligatory." 542 U.S. at 724, 732. "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators . . ." *Id.* at 734 (citation omitted).

Every court to evaluate CIL, pre and post-*Sosa*, has found that it is deduced from a wide variety of sources evidencing the custom and practice of nations. *See, e.g.*, *id.* at 735; *Pfizer*, 562 F.3d at 176; *Presbyterian Church of Sudan,* 582 F.3d at 255; *Flores,* 414 F.3d at 252.

"[T]reaties that the United States has neither signed nor ratified . . . may evidence a [CIL] norm for ATS purposes . . ." and demonstrate international consensus as to its subject matter. *Pfizer,* 562 F.3d at 181, n.11 (2d Cir. 2009) (citation omitted); *see also Wiwa v. Royal Dutch Petroleum Co.*, 626 F.Supp.2d 377, 381-2 (S.D.N.Y. 2009); *Khulumani*, 504 F.3d at 276 (citing the Rome Statute as persuasive evidence of CIL, despite the U.S.' lack of ratification, because it had "been signed by 139

countries and ratified by 105, including most of the mature democracies in the world"); *see also* Dkt.230-56, Steinhardt Decl. ¶¶39-41.

Courts analyzing CIL often look to international documents that, by their nature, cannot be ratified, or were enacted by international bodies to which the United States does not belong. For example, the Second Circuit has relied on declarations of the World Medical Association as evidence of an international prohibition of nonconsensual medical experimentation. *Pfizer,* 562 F.3d at 181; *see also Filartiga v. Pena-Irala,* 630 F.2d 876, 882-83 (2d Cir. 1980); *Al-Quraishi v. Nakhla,* 728 F.Supp.2d 702, 723, 756 (D. Md. 2010) (referencing, *inter alia,* U.N. declarations); *In re South African Apartheid Litig.*, 617 F.Supp.2d 228, 250-51, 259-63 (S.D.N.Y. 2009).

A court also may consider authoritative sources interpreting a treaty's provisions. *See, e.g.*, *Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Fed'n*, 361 F.3d 676, 689 n.13 (2d Cir. 2004); *Xuncax v. Gramajo*, 886 F.Supp. 162, 189 (D. Mass. 1995). State legislation and practice are the "oldest and the original source" of CIL. *Flores,* 414 F.3d at 248 n.22; *see also* RESTATEMENT OF FOREIGN RELATIONS LAW, §102; *Sosa,* 542 U.S. at 714, 725. Although State

practice may be memorialized in a treaty, in which case its evidentiary weight increases as more countries ratify, implement, and abide by its principles, *Flores,* 414 F.3d at 256-57, general principles need not be formally reflected in an international agreement to be considered CIL. REST. §102. For example, four years prior to the passage of the Convention Against Torture ("CAT"), the Second Circuit found that torture violated CIL because the nations of the world had renounced torture in principle and no nations claimed the right to practice torture. *Filartiga*, 630 F.2d at 883-84.

2. There is a clear consensus under CIL defining the worst forms of child labor.

Plaintiffs' claims are not dependent upon a single source of law. The District Court erred by viewing ILO 182 as the sole source of CIL and by parsing the adequacy of ILO 182's application to this case.[12] Despite *Sosa's* direction, 542 U.S. at 734, the District Court failed to

[12] The District Court relied on Judge Hamilton's earlier ruling, stating he had "rejected" Plaintiffs' argument that ILO 182 "was but the latest manifestation of an international consensus." A27, A38. The prior ruling referred to ILO 182 as a "key source" in international law concerning child labor to clarify "which practices under the label 'child labor' are the subjects of an international consensus." *Roe I*, 492 F. Supp.2d at 1021-22. The Court was not contending that an international consensus on child labor is exclusively established by ILO 182.

reference the declarations of Plaintiffs' two distinguished experts on international child labor norms.

Plaintiffs' experts agree that the circumstances of Plaintiffs' work on the Plantation falls squarely within specific definitions of hazardous and prohibited child labor under multiple international conventions and interpreting guidelines, referenced below. *See* Dkt.295, at 4-9; Dkt.230-52, Swepston Corrected Decl., ¶¶6-36; Dkt.230-55, Swepston Supp. Decl. ¶¶6-19; Dkt.230-59, Leary Decl. ¶28. Defendants presented no expert opinions on this issue.

In 1997, in its annual Report on Human Rights, the U.S. Department of State ("DOS") declared, "[a]n international consensus exists, based on several key [ILO] Conventions, that certain worker rights constitute core labor standards," including "freedom from forced and child labor." Dkt.230-59, Leary Decl. ¶20. At the time the DOS made this unequivocal statement, the sole operative ILO Convention on child labor was the 1973 ILO Minimum Age Convention (ILO 138). Dkt.230-55, Swepston Supp. Decl., ¶9. This convention alone "evidences the international consensus on this subject." *Id.* ¶15. At least 157 nations have ratified ILO 138, showing a high degree of

universality.[13] *See* ILO Ratifications, *available at* http://www.ilo.org/ilolex/english/docs/declworld.htm (01/25/2011).

Tracking key language of ILO 138, the 1989 U.N. Convention on the Rights of the Child ("CRC"), provides that all parties acknowledge the "right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." CRC art. 32, Nov. 20, 1989, 1577 U.N.T.S. 3; Dkt.295, at 7-8 (citing Dkt.230-55, Swepston Supp. Decl. ¶¶13, 15). Liberia ratified the CRC in 1993. *Id.* ¶¶13-14.

The Worst Forms of Child Labor Convention (ILO 182), adopted in 1999, and ratified by Liberia and the United States, reaffirms the long-standing consensus on the prohibition of the worst forms of child labor. ILO 182 did not change the standard of ILO 138, but rather provided tougher implementation requirements and added to "the immediacy of" preventing children from engaging in the worst forms of child labor.

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[13] Every country's acceptance is not required for a norm to become part of CIL. Torture is unquestionably a violation of the law of nations, even though many countries have not ratified the CAT. *See Filartiga,* 630 F.2d at 880.

Dkt.230-55, Swepston Supp. Decl.¶18.[14] Indeed, ILO 182 states one of its purposes is "to complement [ILO 138 and its Recommendation] which remain fundamental instruments on child labor . . ." *Id.* Thus, ILO 182 provides additional evidence of a universal norm and improves enforcement of a consensus that existed since at least the adoption of ILO 138. At least 173 nations have ratified ILO 182. *See* Ratifications.

Recommendation 190, which was adopted at the same time as ILO 182, supplements, clarifies, and expands upon the obligations outlined in ILO 182. It provides additional guidance regarding the worst forms of child labor by listing considerations in defining work that is likely to harm the health, safety, or morals of children. Dkt.230-52, Swepston Corrected Decl. ¶30 & n.6.

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[14] Contrary to the District Court's conclusion, ILO 182's encouragement that each country implement domestic legislation prohibiting child labor does not lessen the consensus that exists. *See Kadic*, 70 F.3d at 246 ("leav[ing] to each nation the task of defining the remedies that are available for international law violations"). Nor, as the District Court said, does ILO 182, art. 3(d) "expressly indicate[ ] that local law supplies its contours." A31. Although States' practices can indicate international consensus, one country's domestic laws alone do not supply the contours of the international norm particularly when Liberia is not a "prominent player in the community of States," such that its conflicting practices or customs could preclude a principle of international law from "qualify[ing] as a *bona fide* customary international law principle." *Flores*, 414 F.3d at 257 n.33.

The District Court requested proposed jury instructions "defining . . . what, exactly, a 'worst' form of child labour is . . ." Dkt.573, at 1. Plaintiffs submitted instructions citing to all of the above authorities and more. *See* Dkt.581, at 3 (collecting sources). Under international law, a worst form of child labor is defined as work that, by its nature or the circumstances in which it is carried out, is hazardous or is likely to harm the health, safety, physical or mental, spiritual, moral or social development of children. *Id.* at 2 (collecting sources); Dkt.295, at 4-9. Relevant considerations are whether the work involves: dangerous tools; manual handling or transport of heavy loads; unhealthy environments, exposure to hazardous substances or temperatures; difficult conditions such as long hours; and interference with the child's education. *Id.* The age at which such *hazardous* work is prohibited, as confirmed by Plaintiffs' experts, is eighteen. Dkt.230-55, Swepston Supp. Decl. ¶¶8, 12, 20 (citing relevant conventions).

Consistent with the views of Plaintiffs' experts, the international consensus identifying prohibited child labor was so well known that Firestone acknowledged it in the 2000 policy in which it identified every

job the Plaintiffs performed as "intolerable" "worst forms of child labor." Ex. 15.

3. The contours of the worst forms of child labor are sufficiently defined to satisfy *Sosa,* and the claims are ripe for jury determination.

"[F]undamental diversity of political systems and established orthodoxies" mean that international law is not codified in a single place with particularized expressions. *Tachiona v. Mugabe*, 234 F.Supp.2d 401, 425 (S.D.N.Y. 2002). The District Court rejected Plaintiffs' claims because Article 3(d) of ILO 182 does not identify the exact job or work prohibited, such as "cup cleaning." A30-33. Courts have widely held that "categorical specificity" is not required before an international norm is cognizable under the ATS. *Bowoto v. Chevron Corp*., 557 F.Supp.2d 1080, 1093-95 (N.D. Cal. 2008) (denying summary judgment of CIDT claims even though "[t]here is no widespread consensus regarding the elements of [CIDT]"); *see also, e.g., Xuncax,* 886 F.Supp. at 187 ("[i]t is not necessary that every aspect of what might comprise a standard such as '[CIDT]' be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law"); *Khulumani*, 504 F. 3d at 275-76

(aiding and abetting is discernable even if "its precise contours . . . remain somewhat uncertain"); *Wiwa*, 626 F.Supp.2d at 384 ("although . . . there is not universal agreement on every element of a claim based on crimes against humanity, this limited inconsistency does not frustrate the Court's jurisdiction to hear such claims"); *Nakhla*, 728 F.Supp.2d at 755-60 (CIDT sufficiently defined although outer limits may not be).

Despite explicit guidance in Plaintiffs' proposed jury instructions, the District Court concluded that "Plaintiffs essentially threw up their hands, proposing that the jury simply sort out international law and decide for itself what conduct makes a corporation an enemy of all mankind." A35. It also claimed that juries should not be asked "to make the kind of line drawing decisions best left to the political branches." *Id.* Such statements show a miscomprehension of the ATS. "[U]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the [ATS], which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Kadic*, 70 F.3d at 249.

Juries are often tasked with drawing difficult lines in ATS and related cases. *See, e.g.*, *Daliberti v. Republic of Iraq*, 97 F.Supp.2d 38, 45-46 (D.D.C. 2000) (fact finder may decide issue whether pain suffered was "torture"); *Nakhla*, 728 F.Supp.2d at 732 ("it is a conventional task of courts to draw upon this law to determine the standards which will ultimately guide a jury"); *Doe I v. Unocal Corp*., 395 F.3d 932, 971 (9th Cir. 2002) ("a reasonable jury" could draw conclusions about "forced labor."); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1287 n.3, 1293 (11th Cir. 2002) (upholding jury instructions that "mirrored the language of the most recent indicia of customary international law on [command responsibility]"); *United States v. Belfast*, 611 F.3d 783, 822-23 (11th Cir. 2010).

Additionally, U.S. law is replete with examples of difficult judgment calls juries routinely make. In employment discrimination cases, juries must consider factors such as severity, frequency, and subjective and objective reasonableness to determine whether the environment is hostile, even though "[i]t is challenging to precisely define" because there is "no single description." *Gentry v. Export Packaging Co.*, 238 F.3d 842, 850-51 (7th Cir. 2001).

Consistent with *Sosa's* mandate and the role the U.S. judicial system assigns to juries generally, Judge Hamilton's original refusal to dismiss the child labor claims was correct: a ***"finder of fact"*** should determine whether a particular task is "inherently dangerous or . . . dangerous or harmful to a child of a certain age," "how frequently, and whether that task was performed with Firestone's outright or tacit approval" in order to determine whether the work is "illegal child labor under international law." *Roe I v. Bridgestone Corp.*, 257 F.R.D. 159, 172 (S.D. Ind. 2009) (emphasis added). Indeed, Plaintiffs provided substantial evidence that the circumstances surrounding the children's work violate CIL and do not fall within any exceptions. Dkt.230-52, Swepston Corrected Decl. ¶¶17-22, 25, 31, 38; *see* Dkt.295, at 23-29, 39-30; Statement of Facts ("SOF") §IV.C.

4. The District Court failed to give proper weight to ILO 182 because it is not self-executing.

While Appellants demonstrated above that ILO 182 is but one of several CIL sources, the District Court found that ILO 182, as a non-self-executing convention, could not support ATS claims because *Sosa* also "refused to permit the International Covenant on Civil and Political Rights ["ICCPR"] to establish a binding international norm for

ATS purposes because . . . it was not self-executing and so [it] did not itself create obligations enforceable in the federal courts.'" A34. The District Court misconstrued *Sosa*, which held that while the ICCPR may not alone support a claim for arbitrary arrest, it should be considered in conjunction with other sources of international law in determining whether the "prohibition of arbitrary arrest has attained the status of binding [CIL]." 542 U.S. at 735; *see also Pfizer*, 562 F.3d at 180-81; *Nakhla*, 728 F.Supp.2d at 758.

In *Pfizer*, the Second Circuit rejected the same reasoning the District Court used in this case. There, the lower court had separately analyzed "whether each source of law referencing the norm is binding and whether each source expressly authorizes a cause of action to enforce the norm." 562 F.3d at 176 (non-self-executing treaties, although not directly enforceable, may provide the best evidence of established CIL under the ATS). The Second Circuit clarified that *Sosa* requires a "more fulsome and nuanced inquiry," and "[c]ourts are obligated to examine" the norm's acceptance "in the world community" and "whether States universally abide by the norm out of a sense of mutual concern." *Id*. A treaty's ratification by the U.S. or self-executing

nature does not dispose of this inquiry. *Id*.; *Flores*, 414 F.3d at 257; *Bowoto*, 557 F.Supp.2d at 1091 ("[T]reaties that are not self-executing may be used as evidence of customary law and do not undermine the viability of a claim under the ATS."); *In re Estate of Marcos Human Rights Litig*., 25 F.3d 1467, 1475 (9th Cir. 1994); *Filartiga*, 630 F.2d at 881-82; *cf. Medellin v. Texas*, 552 U.S. 491, 504-05 (2008) (non-self-executing treaties articulate obligations that the U.S. must uphold).

For all these reasons, ILO 182, although not self-executing, is still persuasive evidence of the international consensus prohibiting the worst forms of child labor and the District Court erred in finding it insufficient.

C. The District Court Erred when it Determined that June 2003 is the Beginning of the Liability Period.

The District Court based its determination that the liability period in this case should begin in June 2003 exclusively on Liberia's ratification date of ILO 182. Again, this is erroneous because international consensus is not defined by one source, but rather an amalgam of sources that together demonstrate internationally binding customary norms. Ratification, additionally, is not singularly determinative, as a norm of international law may be defined in

reference to a treaty that even the United States has failed to ratify. *See infra* §VII.B.1. Moreover, one country, by ratification or otherwise, does not unilaterally determine CIL, nor is Liberia a "prominent player in the community of States," such that it defines CIL. *Flores*, 414 F.3d at 257 n.33.

As citation to international instruments supports, and Appellants' experts confirm, an international consensus defining the "worst forms of child labor" has existed at least since the time ILO 138 came into force. *See supra* §VII.B. Alternatively, even if Firestone could only be liable from the time when Liberia ratified the relevant instruments, Firestone has been obligated to prevent the kind of hazardous child labor supported by the evidence in this case since at least 1993 when Liberia ratified the CRC. Dkt.230-55, Swepston Supp. Decl. ¶20. Indeed, in its 2000 policy statement, Firestone clearly identified work on the Plantation that was "intolerable" and the "worst forms of child labor," which means that Firestone knew that international law prohibited specific work occurring on the Plantation even before Liberia ratified ILO 182. Dkt.230, Ex. 15.

D. The District Court Improperly Applied Fed. R. Civ. P. 56 When it Determined that Plaintiffs Did Not Present Sufficient Evidence of the "Worst Forms of Child Labor."

Judge Hamilton noted in the original order denying dismissal of the child labor claims: "[t]he allegations that defendants are encouraging and even requiring parents to require their children as young as six, seven, or ten years old to do this heavy and hazardous work may state a claim for relief under the ATS." *Roe I*, 492 F.Supp.2d at 1022. In support of Judge Hamilton's clear articulation of Plaintiffs' theory of liability, Plaintiffs submitted nearly 16 pages of material facts demonstrating that every named Plaintiff had performed hazardous work against their will; Firestone implicitly and explicitly encouraged its tappers to use children to complete their work; Firestone acted deliberately in designing and perpetuating a production system built on forced child labor; and tappers could not complete their jobs without the assistance of children. Dkt.295, at 17-33; SOF §IIV.A-H.

1. The District Court failed to draw reasonable inferences in Plaintiffs' favor, weighed certain evidence, and disregarded evidence.

a. Evidence that Firestone dictates the jobs and quotas that require children to work – *not the fathers.*

The District Court stated it was undisputed that the fathers set the children's work hours, assignments, and the age at which they worked. A23. Plaintiffs, however, cited to substantial evidence that Firestone's system of production required children to work because the tappers' job duties are too onerous for one person to complete. Dkt.295, at 16-33; SOF §IV.E. CNN's estimate of the quota, based on an interview with FNRC's President, was 21 hours of work per day to complete just the tapping of the trees. Dkt.295, at 18; SOF §IV.E. Firestone sometimes *required* extra work that increased or doubled the tappers' tapping workload. Dkt.230, Ex. 9, 39:15-19; 40:4-7; 51:24-52:15; Dkt.296-26, Zayzay Decl. ¶¶10-11; SOF §IV.B, E. This does not include additional duties, like slashing, chemical application, cup lump collection, or transportation of liquid latex and cup lump. *See* SOF §IV.B. *Firestone set these tapping quotas, not the fathers.*

Plaintiffs also presented evidence that many fathers worked with their children because the job was so onerous and the pay so low that a tapper could not afford adult helpers and have money left over so his family could eat. Dkt.230, Ex. 4, 37:13-21, Ex. 7A, 147:3-25 ("I did not stop because that is our livelihood. Without that, we can't survive."); *see also* SOF §IV.B. *Firestone determined how much a tapper is paid and how onerous the job was, not the fathers.*

Tappers begin tapping and cup cleaning in the early morning hours, and the coagulated cup lump must be collected from the night before. Dkt.230-57, Kweme Decl. ¶11; SOF §IV.B. From the housing camps, tappers and their children walk up to an hour to reach their "tasks" where they begin working. Dkt.230, Ex. 1A, 72:14-21; Ex. 2A, 89:6-11; SOF §IV.B. *The fathers do not determine the timing of the job, or where they live in relation to their assigned tasks. Firestone sets the terms of their jobs.*

Although the Court acknowledged that "[t]he parties have submitted conflicting evidence as to whether one tapper can physically complete all his work by himself so as to receive full pay," A24, it erroneously resolved the conflict in Firestone's favor and failed to draw

the inference that by making the workload too big for one person, Firestone assumed that children would work to make up the difference between what a single tapper could do and his actual job requirements. Child labor was an inevitable consequence of this system, and Judge Hamilton accepted this theory when he denied dismissal of Plaintiffs' child labor claims. *Roe I*, 492 F.Supp.2d at 1021-22.

b. Evidence presented that Firestone deliberately "wanted" child labor to continue.

The Court concluded that "at worst, the evidence submitted regarding FNRC's lackluster attempts to enforce the child-labor prohibition . . . demonstrates a mere indifference to the possibility of child labor. No evidence indicates that Firestone deliberately wanted Plaintiffs' fathers to use their young children . . .". A31.

Demonstrating that Firestone wanted child labor on the Plantation does not require direct admissions. Where circumstantial evidence is presented, summary judgment must be denied if there are any questions regarding inferences to be drawn. *Hasan*, 552 F.3d at 531. Juries are allowed to review circumstantial evidence that together with "unresolved questions of fact" forms a "mosaic" of evidence that is sufficient to survive summary judgment. *Id.*

Plaintiffs submitted evidence of Firestone's intent and purposeful conduct. Firestone supervisors actively encouraged the children to work by telling the children that if they do not help their father with the work, their father would not finish and would be "set down." Dkt.230, Ex. 1A, 86:12-19; *see also* Ex. 7A, 282:3-283:15; SOF §IV.G. Firestone supervisors, including upper-level superintendents, instructed children on how to perform their jobs. SOF §IV.G. Thus, in addition to "allowing" Plaintiffs to work, A31, Firestone explicitly encouraged–and pressured–them to work.

Despite this evidence, the District Court still concluded that Plaintiffs had not directed the Court to any evidence that "FNRC employees–other than Plaintiffs' fathers–specifically encouraged Plaintiffs to work during school hours, rather than before or after school." A32. The Court should have inferred from the evidence that the supervisors encouraged the children to work *at all hours*, including times when they should have been in school or preparing for school, or doing almost anything other than performing hazardous work for Firestone.

Plaintiffs also produced evidence that executives at FNRC received notice from the U.N., a local NGO organization, the media, and the Government of Liberia that the child labor continued unabated on the Plantation, but Firestone ignored the reports or blindly denied them without any investigation. Dkt.295, at 34-38; SOF §IV.H. The District Court similarly ignored Firestone's own memos and reports admitting that Firestone knew children were *still* performing dangerous, "intolerable," "worst forms of child labor" on the Plantation. SOF §IV.H.

FNRC executives admitted that there was no policy against child labor before 2000, and they conducted *no* trainings or education about this policy. *See* SOF IV.F. Even after the 2005 "zero-tolerance" policy, the Plaintiffs and guardians had never heard of any trainings or child labor events, and the 2005 policy was not being enforced. *Id.*[15]

Given all of this evidence, a reasonable jury could infer that Firestone *deliberately* "wanted" child labor to continue on the

[15] The District Court references one Plaintiff out of twenty-three who stated she had heard about a policy in 2001. This fact is in dispute, and credibility determinations are reserved to the jury, not the Court. *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001). The District Court also improperly weighed this testimony against evidence that the fathers did not know about any prohibition of child labor until well after the lawsuit was filed. Juries weigh evidence, not courts. *Abdullahi v. City of Madison,* 423 F.3d 763, 770 (7th Cir. 2005).

plantation. As one guardian testified, Firestone knew their profits depended on it, and without it, "their production was going down." Dkt.230, Ex. 7, 256:6-260:23; *see also* Ex. 7B, 169:13-173:2; Ex. 9A, 115:6-118:22. The evidence also shows that Firestone remained *deliberately* indifferent to the "intolerable" "worst forms of child labor" that it knew was occurring on the Plantation, which the District Court does not credit. SOF §IV.H. *See Gentry,* 238 F.3d at 851 (jury question when the issue is whether an employer is acting with reckless indifference that it may be violating the law and there is evidence it did not act in good faith to stop or investigate the sexual harassment); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 618-619 (8th Cir. 2000) ("deliberately downplay[ing] . . . [or] . . . contribut[ing] to the escalation of a hostile work environment . . . through its supervisors' conduct, displayed deliberate indifference").

The fact that Firestone now presents so-called attempts to enforce its policies as pretexts and post-hoc justifications for its bad conduct, motivations, and intentions, does not free it from facing a factfinder. *Hasan,* 552 F.3d at 530 (Defendant cannot "avoid trial by claiming [a] real reason for [an action] . . . when there is an issue of material fact as

to whether this proffered reason is merely a pretext."); *see also Gates v. Caterpillar, Inc.,* 513 F.3d 680, 691 (7th Cir. 2008) (pretext means a lie). Pointing to a paper policy as a complete solution to the child labor that it created and perpetuated is not legally sufficient to absolve Firestone of liability at summary judgment. *Gentry*, 238 F.3d 842 at 847-48 (notice of sexual harassment in violation of policy requires employer to prevent prohibited conduct); *Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Peurto Rico*, 554 F.3d 164, 176 (1st Cir. 2009) (employer must demonstrate "good faith compliance").

Not only does the District Court disregard Plaintiffs' evidence, it weighed evidence and ascribes *good intentions to Firestone*: rather than deliberately wanting children to work, "FNRC might have refused to even employ tappers who had school-aged children, or else refused to let families live on the Plantation with the tappers," which "would have saved FNRC the costs of operating a school system for the tappers' children." A31 n.9.

Weighing the evidence, as the District Court did, is impermissible. *Johnson v. Karnes*, 398 F.3d 868, 876 n.11 (6th Cir. 2005) (district court's discussion that there was "no evidence" to support an inference,

indicated the Court weighed evidence). This Circuit has warned courts to "be true to [their] task on summary judgment and leave the credibility determinations for the factfinder below." *Payne v. Pauley,* 337 F.3d 767, 771 (7th Cir. 2003). Moreover, summary judgment is particularly inappropriate where motive and intent are at issue, as they are in this case. *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 97-98 (7th Cir. 1985).

For all these reasons, Plaintiffs submitted substantial evidence that FNRC and Firestone Liberia deliberately encouraged child labor and maintained a system designed to perpetuate child labor.

2. The District Court erred to the extent it failed to consider Plaintiffs' statement of material facts.

Citing Local Rule 56.1(e), the District Court concluded that Plaintiffs failed to provide a "statement of material facts in dispute." A22. Plaintiffs substantially complied with the Local Rule by including a discrete section of material facts in dispute in their responsive brief. Firestone replied with more disputed facts and did not raise noncompliance or suggest they were prejudiced.

Despite this, the Court clearly disregarded much of Plaintiffs' evidence, and its strict application of the Local Rules was extreme and

without precedent. *See* Local Rule 56.1(i) (court may excuse noncompliance "in the interests of justice or for good cause"). Other district courts faced with similar circumstances have determined that the interests of justice greatly outweighed the drastic measure of excluding evidence, particularly when defendants are not prejudiced because a header was missing. *Shelton v. Family Dollar Stores of Indiana, LP*, 2007 WL 1597650, at *1 (S.D. Ind. June 1, 2007) (considering facts as disputed, although they appeared under an incorrect header in a "belated" submission, hindered defendants' ability to reply, and "ma[de] identification of the genuine issues of material fact more challenging"); *Bane v. Chappell*, 2010 WL 989898, at *2 n.1 (S.D. Ind. Mar. 16, 2010); *Nicholas v. Acuity Lighting Group, Inc.*, 2005 WL 280341, at *14 (S.D. Ind. Jan. 4, 2005) ("the interests of justice plainly call for some flexibility" in absence of prescribed header).

The circumstances of this case differ drastically from *Schmidt v. Eagle Waste & Recycling, Inc.*, 599 F.3d 626, 630 (7th Cir. 2010), which the Court cited, A22, because there the plaintiff was warned and failed to correct the non-compliance. Here, Plaintiffs substantially complied with the Local Rules and Defendants were not prejudiced. The District

Court erred in its "hyper-technical" application of the Local Rules. *See Schmidt*, 599 F.3d at 630-31.

E. The District Court Erred by Requiring Exhaustion of Remedies under the ATS.

The District Court determined that "Plaintiffs have previously maintained that FNRC's conduct is directly actionable under various Liberian common-law causes of action" and the failure to exhaust remedies in Liberia precludes "an ATS claim under *Sosa*." A36-37. To support its conclusion, the District Court relies upon cases brought under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). First, many courts have determined that there is no exhaustion requirement for ATS claims. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) ("[T]he exhaustion requirement does not apply to the [ATS]."); *Lizarbe v. Rondon*, 2010 WL 3735865, at *1 (4th Cir. Sept. 22, 2010) (same); *Nakhla*, 728 F.Supp.2d at 755-56 (same); *see also Jama v. U.S. I.N.S.*, 22 F.Supp.2d 353, 365 (D.N.J. 1998).

Second, the District Court cited no authority supporting its novel application of the *Bivens* standard to ATS cases, noting only in passing

that both actions "spring from federal common law."[16] A36. Rather, the District Court relied on Justice Scalia's partial concurrence in *Sosa* when he noted the analogy between ATS claims and those brought under *Bivens* is *"shaky authority at best*," but in his view federal common law supports neither. *Sosa*, 542 U.S. at 743 (Scalia, J., concurring in part) (emphasis added). *Sosa*'s majority holding, however, was clear: in ATS cases, "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* at 724; *see also* Dkt.230-56, Steinhardt Decl. ¶¶3-9.

Courts have recognized the inapplicability of the *Bivens* standard to ATS claims: "[s]ince ATS suits do not have the same limited purpose as *Bivens* actions, there is no basis for applying the same limiting principles." *Nakhla*, 728 F.Supp.2d at 753-55. *Bivens* empowers federal courts to fashion remedies for Constitutional violations that otherwise do not have remedies. *See Wilkie v. Robbins*, 551 U.S. 537, 554 (2007). Unlike in *Bivens*, a statute explicitly empowers courts to provide remedies for law of nations violations. Moreover, in ATS claims, rather

[16] This reasoning is perplexing since the Court found that *international* law controls the gateway question of corporate liability under the ATS.

than discouraging remedies in federal courts, the existence of substantive laws that are similar to the international norm demonstrates strong evidence of "state practice" that supports a finding of universal acceptance. *See Flores*, 414 F.3d at 248 n.22.

Even if the *Bivens* standard is applied to ATS claims, however, the "mere existence" of another remedy does not preclude a *Bivens* action because 1) "only remedies crafted *by Congress* can have such preclusive effect"; *and* 2) the alternative remedy must provide a "convincing reason" for the court to refrain from providing a *Bivens* remedy. *Pollard v. Geo Group, Inc.*, 607 F.3d 583, 595-96 (9th Cir. 2010) (emphasis in original), *amended on denial of rehearing en banc*, 2010 WL 5028447, at *15 (9th Cir. Dec. 10, 2010); *see also Wilkie*, 551 U.S. at 554 (alternate remedies exist where "Congress expected the Judiciary to stay its *Bivens* hand"). No such conflict with Congress exists, and Courts have construed the ATS "in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, [to be] express[ing] a policy favoring receptivity . . . to such suits . . . [that] should not be facilely dismissed on the assumption that the

ostensibly foreign controversy is not our business." *Wiwa*, 226 F.3d at 105-106 (2d Cir. 2000).

Moreover, where an exhaustion of remedies has been applied in ATS cases, the requirement is prudential, may be rebutted, and "should be approached consistently with exhaustion principles in other domestic contexts [in which] [t]he defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies." *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831-32 (9th Cir. 2008) (citing *Jones v. Bock*, 549 U.S. 199, 212 (2007) ("exhaustion [is] an affirmative defense.")); *see also, e.g.*, *In re Xe Servs. Alien Tort Litig.*, 665 F.Supp.2d 569, 594 (E.D. Va. 2009) (reasoning that "[i]t is . . . clear that neither domestic nor international law requires exhaustion of an unavailable remedy"); *In re South African Apartheid Litig.*, 617 F.Supp.2d at 281 n.320; *Doe v. Constant*, 354 Fed.Appx. 543, 545 (2d Cir. 2009).

The District Court's reliance on this Circuit's dicta in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) is also misplaced. A36. *Enahoro* considered, but did not decide, whether an exhaustion requirement exists under the ATS, but under the TVPA, the burden is on the

defendant to prove the availability of unexhausted remedies. 408 F.3d at 886 (citing *Sosa*, 542 U.S. at 733 n.21).

Even if there is an exhaustion requirement, Firestone never raised the exhaustion of remedies as an affirmative defense, Dkt.45, and Plaintiffs made clear that the judicial system in Liberia is largely dysfunctional, and thus provides an inadequate remedy. Dkt.2, ¶¶ 7-8; *infra* n.18 (noting current inadequacies of the judiciary). The District Court never acknowledged these factors, nor did it make any finding that the supposed alternative remedies were adequate.

For all of the above reasons, the District Court erred in applying an exhaustion of remedies requirement under the ATS to Plaintiffs' claims.

F. The District Court Abused its Discretion in Denying Plaintiffs' Motion to Amend the Complaint.

On April 25, 2008, Plaintiffs first sought leave to amend their complaint to add Indiana tort claims arising out of the same facts and conduct alleged in the Complaint. Dkt.112. Several months later, without referencing the merits of the state law claims, the District Court denied leave to amend on the ground that Liberian, not Indiana, law, applies to Plaintiffs' claims. *Roe I,* 2008 WL 2732192, at *2.

After the District Court denied class certification, *Roe I,* 257 F.R.D. at 159, the parties were ordered to submit a proposed updated case management plan ("CMP"). Dkt.173. Then-Magistrate Judge Magnus-Stinson took the parties' competing CMPs under advisement, but ordered that Plaintiffs file any motion for leave to amend *and* Defendants file any Rule 12(c) or Rule 56 motions no later than April 30, 2009. Dkt.193. Under the previous scheduling order, discovery remained open until February 2010, and the Court knew at least one more discovery trip to Liberia would occur. Dkt.191, at 25-26.

Complying with the Court's scheduling order, on April 30, 2009, Plaintiffs filed their Motion for Leave to File a First Amended Complaint and sought to add Liberian law claims for intentional and negligent infliction of emotional distress, unjust enrichment, negligence, and negligent retention, which arose out of the same facts and conduct previously alleged in Plaintiffs' complaint and paralleled common law claims Plaintiffs previously sought to add under Indiana law. Dkt.206.

1. The District Court abused its discretion because Plaintiffs' motion was not unduly delayed.

On June 15, 2010, more than one year after Plaintiffs sought leave to amend on April 30, 2009, the District Court denied amendment on

two main grounds: 1) although "technically timely," Plaintiffs delayed by filing on the amendment deadline, which was the same day Defendants filed their Rule 12(c)/56 motion; and 2) alternatively, the Court declined to exercise its supplemental jurisdiction. A1-3.[17]

Consistent with Supreme Court precedent, the Seventh Circuit has recognized that when amendments do not unfairly prejudice or surprise the opposing party, leave to amend should be granted as the case develops. *Jackson v. Rockford Housing Auth.*, 213 F.3d 389, 392-93 (7th Cir. 2000). In the absence of bad faith, undue prejudice to the opposing party, or futility, *see Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 666-67 (7th Cir. 2007), delay alone does not justify denying leave to amend, even after a deadline to amend has passed. *See Dubicz*, 377 F.3d at 792-93; *N.E. Controls, Inc. v. Fisher Controls Int'l LLC*, 373 Fed. Appx. 162, 166-67 (3d Cir. 2010) (abuse of discretion where untimeliness was only reason to deny leave five months after the deadline to amend).

Here, the District Court acknowledged Plaintiffs' motion was "technically" timely, "Plaintiffs filed their motion while fact discovery

[17]The District Court did not address the merits of Plaintiffs' proposed Liberian claims, and thus they are not addressed in this appeal.

was still open," and it was "Court congestion" that "delayed consideration until [June 15, 2010]." A2 n.2. Plaintiffs should not be punished when "[m]uch of the delay is attributable to the time [the court] spent in considering the motion." *Bamm, Inc. v. GAF Corp.*, 651 F.2d 389, 391-92 (5th Cir. Unit B July 1981); *see also United States v. Am. Bell Tel. Co.*, 167 U.S. 224, 246 (1897).

That Plaintiffs motion was timely is dispositive, and when a party files by a court-imposed deadline, there is no undue delay. *Traylor v. GTE North, Inc.*, 2005 WL 3210613, at *1-2 (N.D. Ind. Apr. 13, 2005) ("[T]he motion was timely filed pursuant to the schedule agreed to by the parties."); *Nat'l Credit Union Admin. Bd. v. Acacia Nat'l Life Ins. Co*, 1995 WL 408177, at *3-4 (6th Cir. July 10, 1995) (abuse of discretion when the district court denied leave to amend after specifically telling the moving party that it could file an amended counter-claim). Thus, the circumstances here are not like those in *Myers v. Mid-West Nat'l Life Ins. Co.*, 2008 WL 92746 (D. Colo. Apr. 4, 2008) (denying amendment almost one year after the deadline for amendment had passed), on which the District Court relied. A2.

The Court, therefore, erred because Plaintiffs' filed their motion consistent with the Court's scheduling order.

2. Defendants suffered no undue prejudice.

The District Court relied on *Cowen v. Bank United of Texas FSB*, 1995 WL 38978, at *9 (N.D. Ill. Jan. 25, 1995) for the proposition that Plaintiffs' motion to amend could be prejudicial when it is "juxtaposed with a summary judgment motion, on the grounds that it is unfair to require a party to litigate against changing legal theories." A1-2.

As *Cowen* itself noted, it is *not* the case that "a plaintiff may never amend his complaint once a defendant has moved for summary judgment." 1995 WL 38978, at *9.[18] Unlike in *Cowen*, Plaintiffs filed their motion pursuant to a court-established deadline simultaneously with Defendants' Rule 12(c)/56 motion, not after; discovery was still open; additional discovery trips to Liberia would occur; and the original trial date was two years away.

[18] In fact, courts have granted leave to amend *after* summary judgment motions were filed or partially ruled upon when there was no evidence it would cause overall delay or prejudice. *See Poling v. Morgan*, 820 F.2d 882, 886-87 (9th Cir. 1987); *Bamm,* 651 F.2d at 391-92.

Moreover, Defendants' vague allegations of prejudice or harm do not justify denying amendment. *See Dubicz*, 377 F.3d at 792-93 (non-specific allegations of prejudice resulting from memory and document losses insufficient); *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (abuse of discretion to deny leave to amend based on "pure speculation" of prejudice that was "not obvious from the record"). Additionally, Defendants were not prejudiced because the proposed amendment was based on the same underlying facts as the initial complaint, *see Poling*, 829 F.2d at 886-87; *Bamm*, 651 F.2d at 391-92, and the new claims were brought against the same actors for the same conduct as in the initial complaint. *Edwards*, 178 F.3d at 243. The amendment would not require additional discovery that would not otherwise occur. *Id.* at 243.

Given all the circumstances of this case, it was an abuse of discretion for the District Court to deny amendment where Plaintiffs' motion was timely filed pursuant to the court's order, long before discovery had closed, and without prejudice to the Defendant.

3. The District Court abused its discretion in denying supplemental jurisdiction over Plaintiffs' Liberian claims.

The District Court devotes one paragraph to explain its refusal to exercise supplemental jurisdiction over Plaintiffs' Liberian claims: "[t]he case is already complex even before the addition of foreign causes of action," there is a "lack of widely available Liberian legal materials," and "Liberia is presumably interested in enforcing its own laws." A2-3.

Although whether to exercise supplemental jurisdiction under 28 U.S.C. §1367 is a matter of discretion, courts "should consider and weigh . . . the values of judicial economy, convenience, fairness, and comity." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156,173 (1997) (citation omitted); *Wright v. Associated Ins. Cos.,* 29 F.3d 1244, 1251 (7th Cir. 1994). The District Court failed to make this determination and eschewed the values of efficiency and fairness. For example, it justified its conclusion that "[s]trides have been made in reestablishing the Liberian civil justice system following the civil war" by citing a website blog that is no longer accessible. A3 n.2 (citing blog website). Multiple recent reports, however, note the continued inability

of the Liberian judicial system to address human rights claims and on-going corruption.[19]

The court further referenced "significant logistical difficulties associated with litigating the legality of conduct one continent away from where it occurred." A3. In this case, however, the ATS and Liberian law claims arise out of the same facts and conduct in Liberia, and there would be no additional burden in taking discovery or administering the logistics of the case. In fact, failing to exercise supplemental jurisdiction actually impedes judicial economy and efficiency because the court has already expended considerable resources and was well-acquainted with the factual issues. *See Miller Aviation v. Milwaukee County Bd. of Supervisors*, 273 F.3d 722, 732 (7th Cir. 2001) (district court erred in remanding because it would

[19] *See, e.g.*, The Advocates for Human Rights, *Liberia Is Not Ready 2010: A Report of Country Conditions in Liberia And Reasons The United States Should Extend Deferred Enforced Departure For Liberians* 10-11, 30-34 (Dorsey & Whitney LLP) (2010), *available at* http://www.theadvocatesforhumanrights.org/uploads/liberia_is_not_ready_2010_2.pdf (the "justice system is functioning so poorly . . . businesses are forced 'to shun the courts and turn to politicians and other traditional fixers'" and noting the lack of legal training and adequate funding, and continuing corruption).

require a "'duplication of effort' by the state court that undermines the very purpose of supplemental jurisdiction-judicial efficiency").

Nor are the claims Plaintiffs sought to add novel, and they are substantially similar to their counterparts under U.S. domestic common law. *See Comm'r of Dep't of Planning and Natural Res. v. Century Alumina Co.*, 2008 WL 4809897, at *5-6 (D.V.I. Oct. 31, 2008) (tort claims, even those of first impression, did not present such novel issues as to justify denying supplemental jurisdiction).

Weighing in favor of exercising supplemental jurisdiction, Liberian law explicitly incorporates U.S. law as its own. Title 15, Gen. Constr. Law, Liberian Codes Revised Vol. 3, §40, p. 838. A45. Unless expressly modified by Liberian legislation, the "common law and usages of . . . the United States of America, as set forth in case law and in Blackstone's and Kent's Commentaries and in other authoritative treatises and digests" is Liberian law. *Id.* Thus, in the absence of developed Liberian law, the court would reference U.S. and Indiana common law. Moreover, federal courts frequently assess matters involving laws of other countries. *Cf. Manu Int'l, S.A. v. Avon Products, Inc.,* 641 F.2d 62, 68 (2d Cir. 1981) ("Proof of foreign law may be a

burden in this case, but it is not alone enough to push the balance of convenience strongly in favor of the defendant.").

Importantly and contrary to the values of fairness and justice, *Int'l Coll. of Surgeons*, 522 U.S. at 173, the District Court ignored the fact that Plaintiffs could not seek remedies in Liberia because they are inadequate and unavailable. *See supra* §VII.E. Thus, the court's denial of supplemental jurisdiction means Plaintiffs have no forum in which to bring their Liberian claims, which is an unjust result the court should have weighed. *See id.*; *cf. Williams v. Rodriguez*, 509 F.3d 392, 404 (7th Cir. 2009).

The District Court erred in refusing to exercise supplemental jurisdiction.

VIII. CONCLUSION

For all the reasons stated herein, Plaintiffs request that this Court reverse the District Court's grant of summary judgment and denial of their motion for leave to amend, and remand the case for further proceedings.

Respectfully Submitted,

/s/ Terrence Collingsworth

Dated: January 28, 2011

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CERTIFICATE OF COMPLIANCE

I, Terrence P. Collingsworth, hereby certify, pursuant to F.R.A.P. 32(a)(7), that Plaintiffs-Appellants' brief complies with the type-volume limitation of Rule 32(a)(7)(B), that it was prepared using Microsoft Word in Century Schoolbook 14-point font with footnotes in Century Schoolbook 14-point font, and that there are 13,998 words in the brief and its footnotes, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: January 28, 2011

/s/ Terrence Collingsworth
_____
Terrence P. Collingsworth

CIRCUIT RULE 31(e)(1) CERTIFICATION

I, Terrence P. Collingsworth, hereby certify, pursuant to Fed. R. App. P. 31(e)(1), that a digital version this brief was furnished to the Court at the time the paper brief was filed.

/s/ Terrence Collingsworth

Dated: January 28, 2011

Terrence P. Collingsworth

CERTIFICATE OF SERVICE

I, Susana Tellez, hereby certify that two (2) copies of the foregoing Brief of Plaintiffs-Appellants, Boimah Flomo, et. al., and one (1) copy of the brief in PDF format were served upon the following counsel of record via e-mail and Fedex Overnight, on this 28th day of January, 2011:

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I, Terrence P. Collingsworth, hereby certify that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

/s/ Terrence Collingsworth

Dated: January 28, 2011

Terrence P. Collingsworth

Appellants' Attached Required Short Appendix

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BOIMAH FLOMO, *et al.*, *Plaintiffs*,	)	
vs.	)	1:06-cv-00627-JMS-TAB
BRIDGESTONE AMERICAS HOLDING, INC., *et al.*, *Defendants.*	)	

ORDER

Presently before the Court is Plaintiffs' Motion to Amend the Complaint. [Dkt. 206.] The motion, filed approximately three-and-a-half years into this case and ten months after the Court first determined that Liberian law would control any non-federal causes of action in this alleged "worst form of child labor" case, [*see* dkt. 129], seeks to invoke the Court's supplemental jurisdiction, *see* 28 U.S.C. § 1367, to assert claims brought under Liberian law. [*See* dkt. 227-9 ¶9.]

Where, as here, a party seeks to amend a pleading within the time permitted under the case management plan, Federal Rule of Civil Procedure 15 obliges the party to obtain "the court's leave…[which the court] should freely give…when justice so requires." Fed. R. Civ. Pro. 15(a)(2).

Justice doesn't require leave in this case, for several reasons. First, Plaintiffs delayed filing their motion until the day the amendment deadline expired, the same day that Defendants moved for summary judgment. [*See* dkts. 206, 208.] While technically timely, as Defendants note, courts often find unduly prejudicial motions to amend pleadings juxtaposed with a summary judgment motion, on the grounds that it is unfair to require the other party to litigate against changing legal theories. *See Cowen v. Bank United of Texas FSB*, 1995 WL 38978, *9

(N.D. Ill. 1995). That unfairness is compounded when there has been significant delay, as there has been here—by waiting ten months since the Court ruled Liberian law would apply—in requesting leave to amend, *see, e.g.*, *Myers v. Mid-West Nat'l Life Ins. Co.*, 2008 WL 927646 (D. Colo. 2008) (finding a six-month delay between discovery of new evidence and motion to amend complaint based upon that evidence "significant delay"). Furthermore, permitting the amendment might necessitate re-opening fact discovery,[1] a consideration that also militates against granting the motion. *See Johnson v. Methodist Med. Ctr.*, 10 F.3d 1300, 1303-04 (7th Cir. 1993). And—perhaps most importantly—injecting new causes of action now would necessitate another round of motion practice with respect to the amended complaint, further jeopardizing the current trial date that is already well beyond that contemplated under the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482, a trial date that the Court intends to keep if reasonably possible.

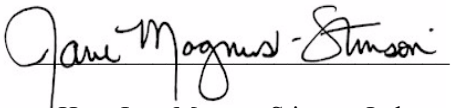
Even assuming, however, that amendment were appropriate, the Court would decline to exercise supplemental jurisdiction over the claims. *See* 28 U.S.C. § 1367(c); *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 173 (1997) (explaining that the supplemental jurisdiction statute codifies the long-standing practice that hearing claims not brought pursuant to original jurisdiction is a matter "of discretion, not of plaintiff's right" (quotation omitted)). In addition to the considerations already outlined, others compel the denial of the motion. The case is already complex even before the addition of foreign causes of action (which will be difficult for the Court to research because of the lack of widely available Liberian legal materials in this country). Strides have been made in reestablishing the Liberian civil justice system following

[1] The Court acknowledges that Plaintiffs filed their motion while fact discovery was still open. Court congestion has, however, delayed consideration of it until now.

the civil war.[2] Liberia is presumably interested in enforcing its own laws. And there are significant logistical difficulties associated with litigating the legality of conduct one continent away from where it occurred. The Court therefore concludes that "judicial economy, convenience, fairness, and comity," *Int'l College of Surgeons*, 522 U.S. at 173 (quotation omitted) would be best served by the adjudication of Plaintiffs' Liberian claims in Liberia.

The Motion to Amend the Complaint is **DENIED**.

06/15/2010



Hon. Jane Magnus-Stinson, Judge
United States District Court
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[2] http://www.judiciary.gov.lr/index.php?option=com_content&view=section&layout=blog&id=32&Itemid=108 (website of Liberian Supreme Court discussing, among other things, most recent appointments of trial court judges) (last visited June 15, 2010).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BOIMAH FLOMO, *et al.*, *Plaintiffs*,	)	
vs.	)	1:06-cv-00627-JMS-TAB
FIRESTONE NATURAL RUBBER COMPANY, *Defendant.*	)	

ORDER

Presently before the Court is Defendant Firestone Natural Rubber Company's ("FNRC") Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment. [Dkt. 208]. As filed, it sought judgment under either Federal Rule of Civil Procedure 12(c) or Rule 56. But because the motion relied upon materials outside the pleadings—an impermissible circumstance for any judgment entered under Rule 12(c)—the Court previously announced that it would treat the motion exclusively as one requesting summary judgment under Rule 56. [Dkt. 234 at 2 (converting request for judgment on the pleadings to request for summary judgment, as permitted under Fed. R. Civ. Pro. 12(d))].

BACKGROUND

Following the Court's ruling on Firestone's motion to dismiss, [dkt. 40], only one potential cause of action remains in this action: a cause of action authorized by the Alien Tort Statute (the "ATS"), 28 U.S.C. § 1350. That statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Court held that Plaintiffs—a group of Liberian children—could state a cause of action under international law by alleging (1) that an FNRC subsidiary named Firestone Liberia, Inc. ("Firestone Liberia"), formerly called

Firestone Plantations Company, was "encourag[ing] and even requir[ing] [Plaintiffs' guardians] to put their children to work" on the Liberian rubber plantation where the guardians were employees and (2) that the work that the Plaintiffs were being forced to do was so hazardous, oppressive, and injurious to their moral development as to constitute a prohibited "worst form" of child labor under ILO Convention 182, an international convention ratified by both the United States and Liberia (among many other countries). [*Id.* at 63, 67-69].

Because Plaintiffs couldn't obtain service on Firestone Liberia, it was dismissed. [Dkt. 69]. Plaintiffs' worst-form-of-child labor claim proceeds against FNRC because Plaintiffs contend that FNRC was responsible for the actions and inactions of its subsidiary, Firestone Liberia. [*See* dkt. 2 ¶¶73-75].

Through the present motion, FNRC has moved for summary judgment on several grounds. One of those grounds is that "international law does not impose liability on corporations" and, thus, Plaintiffs have no cognizable cause of action against FNRC. [Dkt. 209 at 31].

On September 17, 2010, while FNRC's motion for summary judgment remained under advisement, the Second Circuit handed down its opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 2010 U.S. App. LEXIS 19382 (2d Cir. 2010). There, in one of the few appellate decisions to interpret the ATS, the majority held that the ATS does not authorize subject-matter jurisdiction for a federal court to hear claims brought against corporations—only against individuals. *Id.* at *105.

Because the Seventh Circuit hasn't addressed the issue of corporate liability in claims brought under the ATS, the Court ordered supplemental briefing on this new, out-of-Circuit, appellate authority. The parties submitted their briefs on September 24. [Dkt. 597-98].

DISCUSSION

Because *Kiobel* frames the issue of potential corporate liability under the ATS as a jurisdictional one, the Court must first consider whether it has jurisdiction to decide whether Plaintiffs can state a claim against FNRC. After concluding that the Court does, in fact, possess jurisdiction, the Court will decide whether an ATS claim against a corporation fails to state a valid cause of action, thereby entitling FNRC to summary judgment on the merits.

A. Does the Court Have Jurisdiction to Hear an ATS Claim Filed Against FNRC?

The issue of subject-matter jurisdiction "refers to a tribunal's power to hear a case. It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quotation omitted). A court with subject-matter jurisdiction can tell the plaintiff that the plaintiff wins or loses under the law. A court without subject-matter jurisdiction may tell the plaintiff only that "you have selected the wrong forum for your dispute" and generally may not opine about the merits. *See, e.g.*, *T.W. v. Brophy*, 124 F.3d 893, 898 (7th Cir. 1997) (explaining that a dismissal for lack of jurisdiction is not a determination on the merits, thus permitting the plaintiff to re-file the same suit in any other forum where jurisdiction may be had).

There is, however, one small exception to the rule that the jurisdictional inquiry completely differs from a merits inquiry. If a claim theoretically within a court's jurisdiction is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a…controversy," *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974) (collecting cases)—in other words, if it is "wholly insubstantial and frivolous," *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)—a federal court will lack subject-matter jurisdiction over the claim.

As mentioned above, *Kiobel* held that the ATS doesn't confer jurisdiction upon the federal courts to hear claims filed under the ATS against corporations because, in its view, international law has never embraced the concept of corporate liability. The majority's opinion, however, resulted in a very spirited eighty-seven page concurrence from Judge Leval rejecting that holding as a misinterpretation of international law. Further, the majority's rule conflicts with the law in the Eleventh Circuit that courts not only have jurisdiction to decide whether corporations may be civilly liable under the ATS, but that corporations are, in fact, liable. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("The text of the Alien Tort Statute provides no express exception for corporations, see 28 U.S.C. § 1350, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants." (citation omitted)).

Given that neither the Seventh Circuit nor the Supreme Court has definitively resolved the issue, and given the significant conflicting authority on the issue from outside this Circuit, the Court cannot find Plaintiffs' theory of ATS corporate liability "wholly insubstantial and frivolous," *Bell*, 327 U.S. at 682-83, so as to deprive the Court of jurisdiction to consider the merits of their legal claim against FNRC.[1]

[1] The Court notes that when then District Judge, but now Circuit Judge, Hamilton ruled on FNRC's motion to dismiss, he didn't address the corporate liability issue, as the parties did not brief the issue for him. Because judges have an independent and affirmative obligation to ensure that they have jurisdiction over their cases even when the parties don't contest jurisdiction, *see, e.g.*, *Thomas v. Guardsmark, LLC*, 487 F.3d 531, 533 (7th Cir. 2007), his silence on the issue constitutes some evidence that the Court has already concluded that the corporate liability issue isn't a jurisdictional one. Of course his silence isn't automatically dispositive. *See Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." (citations omitted)).

B. Is FNRC Entitled to Summary Judgment Because It Is a Corporation?

Because the material facts relevant to the narrow issue of corporate liability are undisputed—that is, everyone agrees that FNRC is, in fact, a corporation—the Court must enter summary judgment in FNRC's favor if a corporation cannot be held liable for the actions of its employees in an action filed under the ATS. *See* Fed. R. Civ. Pro. 56(c) (specifying that summary judgment is available when "there is no genuine issue as to any material fact and…the movant is entitled to judgment as a matter of law").

As this Court has explained previously, "the Supreme Court gave its first [and only] detailed consideration to the scope of the ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)." [Dkt. 40 at 39]. There, the Supreme Court explained that the First Congress enacted the ATS to ensure that the federal courts would be available to hear civil actions alleging violations of international law if the states continued, as they did under the Articles of Confederation, to refuse to open their courthouse doors to aliens raising such complaints, a situation that was jeopardizing the diplomatic relations of the young nation. *See Sosa*, 542 U.S. at 716-17. *Sosa* held that the ATS permits federal courts to "recognize private causes of action for certain torts in violation of the law of nations" and already recognized at common law at the time of the First Congress: "violation of safe conducts, infringement of rights of ambassadors, and piracy." *Id.* at 724. In recognition of the constantly changing nature of international law, however, it also held that federal courts can recognize new federal common-law causes of action for violations of other international norms that are, among other things, as "specific, universal, and obligatory" as the original three international norms that existed at the time of the First Congress. [Dkt. 40 at 41 (explaining that *Sosa* cited with approval that test, formulated in the Ninth Circuit, and then applying it to Plaintiffs' claims here)].

Although *Sosa* permitted the courts to recognize new causes of action, it "posted many warning signs against judicial innovation under the ATS." [*Id.*]. For example, it explained that the federal courts are, under our Constitution, generally ill-equipped to make a "legislative judgment" about when "conduct should be allowed or not" and, even if the law should prohibit certain conduct, whether "to permit enforcement [of the law] without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727. Nonetheless, *Sosa* permits courts to recognize new causes of actions if violating a specific, universal, and obligatory international norm would render the perpetrator "*hostis humani generis*, an enemy of all mankind." *Id.* at 732 (quotation omitted). Thus, the Supreme Court declared that the door to new cognizable claims was only left "ajar subject to vigilant doorkeeping." *Id.* at 729.

Here, the Court has previously concluded that Plaintiffs' allegations of being forced by Firestone Liberia employees to perform "worst" forms of child labor could squeeze through the door that *Sosa* left ajar. [*See* dkt. 40]. In so holding, the Court implicitly assumed—because it was required to do so under the standard of review for a motion to dismiss—that the conduct of Firestone Liberia's employees conduct could be imputed to FNRC under the traditional common-law doctrine of *respondeat superior*.[2] Because that assumption has now been challenged, the Court must confront it directly.

FNRC argues, and the majority in *Kiobel* holds, (1) that the ATS requires federal courts to look to international law to decide whether corporations are civilly liable for the actions of

[2] Although FNRC didn't raise the issue of corporate liability in the original motion to dismiss, the Court doesn't deem that failure a waiver given the large number of claims at issue in Plaintiffs' Complaint that had to be addressed within limited briefing space. Further, the recent *Kiobel* opinion constitutes new authority unavailable at the time of the motion to dismiss. Indeed, the Court notes that Plaintiffs here haven't requested a finding of waiver, thus "waiving" any "waiver" that may have otherwise occurred, *see, e.g.*, *United States v. Morgan*, 384 F.3d 439, 443 (7th Cir. 2004) ("A waiver argument, after all, can be waived by the party it would help….").

their employees who allegedly commit human rights violations and (2) that international law clearly says that corporations are not liable.[3] [Dkt. 209 at 31]; *Kiobel*, 2010 U.S. App. LEXIS 19382 at *110-13 (explaining as to the second point that "[n]o corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights" and indeed "sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability" (original emphasis)).

For their part, Plaintiffs don't dispute that international law itself provides no direct basis for corporate liability. [*See* dkt. 295 at 22-23]. They argue instead that either federal common law always governs the issue or, alternatively as Judge Leval's concurrence concludes, that federal common law can fill in the gaps of international law in ATS actions. [*Id.*; dkt. 598 at 4-7]; *Kiobel*, 2010 U.S. App. LEXIS 19382 at *121 ("The position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position and leaves that question to each nation to resolve.") (Leval, J., concurring).

1. In Claims Filed Under the ATS, Does Federal Common Law Automatically Control the Extent of Corporate Liability?

As to whether federal common law or international law automatically controls the scope of liability for violations of "specific, universal, and obligatory" international norms, the Court concludes that *Sosa* has already rejected Plaintiffs' argument. After articulating the test for when courts can recognize new causes of action filed under the ATS, the Supreme Court noted in *Sosa* that "[a] related consideration [to whether the norm meets the test *Sosa* identified] is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator

[3] As FNRC notes, even if federal common law were to govern the issue, it is possible that Plaintiffs' claim could still fail. Sometimes federal common law doesn't recognize *respondeat superior* at all. *See, e.g.*, *Correctional Servcs. Corp. v. Malesko*, 534 U.S. 61, 69-72 (2001) (explaining that *Bivens* actions can only be brought against individual defendants).

being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20 (emphasis added). Plaintiffs' argument that federal common law provides the scope of liability in ATS claims—no matter what international law may say on the matter—impermissibly conflicts with the plain language of *Sosa*. Indeed, even Judge Leval would reject it. *See Kiobel*, 2010 U.S. App. Lexis 19382 at 196 ("[I]f we found that international law in fact exempts corporations from liability for violating its norms, we would be forced to accept that answer whether it seemed reasonable to us or not.") (Leval, J., concurring).

2. Does International Law Direct American Courts Adjudicating Claims Under the ATS to Apply Federal Common Law?

The majority and concurring opinions in *Kiobel* thoroughly review the arguments for and against importing federal common-law concepts of corporate liability to an action brought under the ATS. The Court will not repeat all those arguments here. Generally speaking, the Court finds that the approach of the *Kiobel* majority—no corporate liability under the ATS unless and until international law (or Congress) affirmatively approves the doctrine—better comports with the mandate in *Sosa* that ATS liability only attaches after a consensus exists that a defendant's conduct violates international law. Indeed, the Seventh Circuit caselaw already indicates that trial courts must be especially vigilant in their "doorkeeping" function for ATS claims. *Cf. Enaharo v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005) (suggesting that it may find exhaustion-of-remedies a condition of ATS claims). The Court finds the analysis of the *Kiobel* majority especially compelling for at least the following three reasons.

a. The Lack of Corporate Liability in International Criminal Law

Much of the dispute between the majority and Judge Leval in *Kiobel* concerns the relevance of the fact that international tribunals don't impose criminal liability on corporations but insist instead that the individual wrongdoers be prosecuted. The majority views that fact as evi-

dence of a lack of consensus about the propriety of corporate liability for violations of international law. *Kiobel*, 2010 U.S. App. LEXIS 19382 at *57-72 (chronicling international tribunals that have held individuals criminally accountable for violations of international law and failing to find a single counterexample).

Judge Leval discounts the relevance of that fact because criminal law serves punitive ends, which in his view makes it unfair to subject corporations to criminal violations. As he explains, a corporation "exists solely as a juridical construct and can form no intent of any kind, [so] it is an anomaly to view a corporation as criminal." *Id.* at 168 (Leval, J., concurring) (footnote omitted). Furthermore, the only form of punishment available for corporations is a monetary fine, but "its burden falls on the corporation's owners or creditors (or even possibly its customers if it can succeed in passing on its costs in increased prices), [and thus] may well fail to hurt the persons who were responsible for the corporation's misdeeds." *Id.* at 173 (Leval, J., concurring). And, perhaps most importantly for Judge Leval, "criminal prosecution of the corporation can *undermine* the objectives of criminal law by misdirecting prosecution away from those deserving of punishment." *Id.* (Leval, J., concurring) (original emphasis).

Judge Laval's concurrence, however, proves too much; each of his points cautions against recognizing corporate liability here. As to his first point, Plaintiffs haven't argued that liability for causing a "worst" form of child labor is a strict liability offense. [*See, e.g.*, dkt. 295 at 8 (calling Firestone's actions "deliberate[]")]. To label FNRC an "enemy of all mankind," this Court must be able to assess FNRC's mental state, an "anomaly" for Judge Leval.[4] But Plaintiffs not only want the Court to determine FNRC's mental state, they also want the Court to find that

[4] More precisely, Plaintiffs ask the Court to find that FNRC is an "enemy of all mankind" because its subsidiary, Firestone Liberia, hired employees who in turn allegedly encouraged Plaintiffs' guardians to force Plaintiffs to perform hazardous work—an even more attenuated theory of responsibility than direct corporate liability.

FNRC's mental state can support an award of punitive damages. [Dkt. 530 at 24]. Using the ATS to "punish" a corporation rather than to merely "compensate" injured parties runs counter to internationally accepted norms, as Judge Leval understands them, because innocent third parties will be called upon to subsidize the malfeasance of any plantation employees who (allegedly) were responsible for Plaintiffs' plight. Finally, the Court notes that Plaintiffs made no attempt here to sue the low-level managers whom they claimed "encouraged" their guardians to put them to work in the fields. Permitting corporate liability under the ATS will lessen the deterrent effect of litigation for individual actors; few plaintiffs would sue an individual employee if the plaintiffs can sue the deeper-pocketed corporate employer instead. *Cf. FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (rejecting *respondeat superior* in *Bivens* actions) ("If we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under Meyer's regime, the deterrent effects of the *Bivens* remedy would be lost.").

b. The Lack of Corporate Liability Under the Torture Victim Protection Act

Deciding to permit civil corporate liability reflects a policy judgment—a policy judgment better made by a legislature than a federal court—that facilitating victim compensation is more desirable than deterring individual misconduct. To that end, the majority in *Kiobel* advanced a powerful argument to which Judge Leval had no response. It explained that its default rule of no ATS corporate liability absent affirmative international or congressional authorization comported with the Torture Victim Protection Act of 1991 (the "TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note), which Congress enacted to codify a classic (pre-*Sosa*) ATS claim. *Kiobel*, 2010 U.S. App. LEXIS 19382 at *25-26 n.23. The TVPA provides a cause of action for victims of torture committed by "[a]n individual" acting under color of foreign law.

Id. § 2(a). Requiring the defendant to be an "individual" precludes corporate liability—unlike the term "person" that Congress originally considered for the TVPA but rejected. [Dkt. 597-1 at 5 (a copy of the House committee markup of the TVPA) (receiving unanimous consent to change "person" to "individual" so as "to make it clear we are applying [the TVPA] to individuals and not to corporations")].

Because authorizing ATS suits has "such obvious potential to affect foreign relations," *Sosa* indicated that the courts "would welcome any congressional guidance." 542 U.S. at 731.[5] The only congressional guidance that the Court has found (albeit pre-*Sosa*) is guidance that considered but rejected corporate liability for former ATS human rights violations now codified under the TVPA.

c. The Availability of Civil Corporate Liability Outside the ATS

While Judge Leval correctly notes that nations regularly permit corporations to be sued in run-of-the-mill torts, *Kiobel*, 2010 U.S. App. LEXIS 19382 at *145 (Leval, J., concurring), he also notes that "most nations have not recognized tort liability for violations of international law," *id.* at *122. American citizens cannot sue under the ATS when their human rights are violated, whether by foreign corporations or domestic ones. *See Sierra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) (dismissing ATS suit filed by federal prisoners over low wages and collecting cases holding that U.S. citizens aren't "aliens" eligible to sue under the ATS). Recognizing corporate liability under the ATS would further exacerbate the disparate treatment between citizens and aliens in American courts and would promote forum shopping. *Cf. Filartiga v. Pena-*

[5] Plaintiffs note in passing that the Supreme Court permits corporations to sue under the ATS to recover damages for injury to their property, *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); when Congress authorized ATS suits "by an alien," it meant "by [] corporation[s]" too, *see Barrow Steamship Co. v. Kane*, 170 U.S. 100, 106 (1897) (explaining that references to "aliens" in the Judiciary Act "include corporations"). But because Congress made no express provision for suits against aliens, *Argentine Republic* is irrelevant here.

Irala, 630 F.2d 876 (2d Cir. 1980) (authorizing ATS suit by one citizen of Paraguay against another citizen of Paraguay). Inasmuch as recognizing new ATS causes of action involves comity considerations, *see Sosa*, 542 U.S. at 761 (Breyer, J., concurring), those considerations don't support the expansion of liability that Plaintiffs seek here.

CONCLUSION

Plaintiffs have sued a corporation under the ATS for an alleged violation of international law. The Court has jurisdiction to hear Plaintiffs' claim and concludes that Plaintiffs have failed to establish a legally cognizable claim because no corporate liability exists under the ATS. Accordingly, FNRC's motion for summary judgment, [dkt. 208], is **GRANTED**.

Final judgment will not, however, issue at this time. To permit effective appellate review of the large evidentiary record submitted in connection with the motion for summary judgment in this exceedingly complicated action, the Court deems it necessary to address several other arguments raised in FNRC's motion for summary judgment, which provide alternative bases for granting summary judgment in favor of FNRC. *See Stephenson v. Wilson*, 2010 U.S. App. LEXIS 17832, *2 (7th Cir. 2010) (criticizing district court for only addressing one issue raised in a complicated habeas petition because "if we reject the ground on which the court did rule, we must reverse and remand for consideration of the other grounds, while if those grounds for relief had been before us we might have agreed with one of them and thereby spared the parties a further proceeding in the district court, possibly followed by a further appeal"). Given the impending departure of counsel for an expensive, time-consuming, and potentially dangerous round of trial preservation depositions in Liberia, the Court elected to expedite its consideration of one dispositive issue, corporate liability, rather than further delay while finalizing its opinion addressing FNRC's other arguments. A comprehensive final opinion will be issued shortly.

10/05/2010

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BOIMAH FLOMO, *et al.*, *Plaintiffs*,	)	
vs.	)	1:06-cv-00627-JMS-TAB
FIRESTONE NATURAL RUBBER COMPANY, *Defendant.*	)	

SUPPLEMENTAL OPINION

This action began when a group of Liberian employees of a rubber plantation, and their children, sued various members of the Firestone corporate family over allegedly illegal working conditions. In response to a motion to dismiss, the Court dismissed all the claims, except for one: the children's claim that they had been subject to an internationally prohibited "worst" form of child labor, made actionable here via the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. [Dkt. 40]. That statute authorizes claims by aliens for a "violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

For various reasons, as the litigation wore on, the Defendants in this action were also whittled down to just Firestone Natural Rubber Company ("FNRC").[1] Recently, however, the Court entered summary judgment in favor of FNRC with respect to the remaining claim in this action. [Dkt. 604]. Relying on the comprehensive opinion recently issued by the Second Circuit Court of Appeals in *Kiobel v. Royal Dutch Petroleum Co*., 2010 U.S. App. LEXIS 19382 (2d

[1] Plaintiffs have argued that the actions and inactions of FNRC's subsidiary that operated the plantation are attributable to FNRC. The Court will assume without deciding that those actions and inactions are actually attributable to FNRC because that assumption doesn't alter the conclusion here. The Court notes that FNRC has filed a separate motion for summary judgment challenging the validity of that assumption, a motion which the Court has denied as moot. [*See* dkt. 607].

Cir. 2010), the Court held that international law, which governs ATS claims, doesn't recognize corporate liability. Thus, Plaintiffs cannot recover against FNRC because it is a corporation. Instead the proper cause of action, if any, lies directly against the individuals who allegedly subjected them to worst forms of child labor. In the Court's ruling on FNRC's motion for summary judgment, the Court indicated that it would, through a supplemental opinion, address several other alternative bases for entering summary judgment, bases which the Court couldn't address originally given the need for an expedited ruling before the parties' impending travel to Liberia. This is the supplemental opinion.

I. SUMMARY JUDGMENT STANDARD

A motion for summary judgment asks that the Court find that a trial based on the uncontroverted and admissible evidence would—as a matter of law—conclude in the moving party's favor and is thus unnecessary. *See* Fed. R. Civ. Pro. 56(c). When evaluating a motion for summary judgment, the Court must give the non-moving party the benefit of all reasonable inferences from the evidence submitted and resolve "any doubt as to the existence of a genuine issue for trial...against the moving party." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n.2 (1986). Nevertheless, "the Court's favor toward the non-moving party does not extend to drawing inferences that are supported by only speculation or conjecture." *Singer v. Raemisch*, 593 F.3d 529, 533 (7th Cir. 2010). The non-moving party must set forth specific facts showing that there is a material issue for trial and cannot rely upon the mere allegations or denials in the pleadings. Fed. R. Civ. Pro. 56(e); *Celotex*, 477 U.S. 317. The key inquiry is the existence of evidence to support a plaintiff's claims or a defendant's affirmative defenses, not the weight or credibility of that evidence, both of which are assessments reserved to the trier of fact. *See Schacht v. Wis. Dep't of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999).

II. MATERIAL FACTS

Before considering the evidentiary record in the light most favorable to Plaintiffs, the Court notes that Plaintiffs' response to the motion for summary judgment fails to comply with Local Rule 56.1(b). Among other things, that rule requires a "Statement of Material Facts in Dispute," which Plaintiffs failed to provide. Despite Plaintiffs' failure, the Court has tried to sort through the large evidentiary record (and the needlessly complicated citation methods that the parties employed). Nonetheless, the Court is entitled to "assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts: are specifically controverted in the opposing party's 'Statement of Material Facts in Dispute' by admissible evidence…." L.R. 56.1(e). To the extent that Plaintiffs' noncompliance with the Local Rules has obscured a dispute as to a material fact, that dispute has been forfeited and cannot preclude summary judgment. *See Schmidt v. Eagle Waste & Recycling, Inc.*, 599 F.3d 626, 630 (7th Cir. 2010) ("[A] district court may strictly enforce compliance with its local rules regarding summary judgment motions." (citation omitted)).

A. The Plaintiffs and Their Fathers

The child Plaintiffs here all claim to have been between six and sixteen when their fathers, as their guardians, filed this action in 2006. [*See* dkt. 557-1].[2] Plaintiffs' fathers work as "tappers" for an FNRC subsidiary, meaning that their primary job consists of harvesting latex from rubber trees. Plaintiffs live with their fathers on the Liberian rubber plantation, which is "situated on approximately 200 square miles of wooded land….There are tens of thousands of

[2] Some minors have since attained majority and now litigate in their own capacity. Another change in party representative occurred when DNA evidence established that the man purporting to be Johnny Myciaga's father in the Complaint turned out to have no biological relationship to "Johnny." Instead, evidence showed that "Johnny" goes by the name Joseph Fahn. His mother Nancy Fahn has substituted herself in as the guardian. [Dkt. 561]. For simplicity, the Court will refer to the guardians as "fathers."

people, both employees and non-employees, living on and around the Firestone farm." [Dkt. 144-2 ¶2].

B. The Tappers' Work

Tappers are paid based upon the amount of and quality of work actually performed, not the mere time spent working. [*See* dkt. 144-9 ¶12]. If a tapper collects his full quota of latex for the day, he receives a full day's pay, which as of the date of the Complaint was US$3.19 (an amount increased to US$3.38 in 2006). [Dkt. 2 ¶47; dkt. 2-29 at 45]. If a tapper doesn't complete his full quota, or performs sub-standard work, he receives only a half-day's pay. [Dkt. 144-9 ¶12]. Tappers also have the opportunity to perform extra work that, if completed, results in an extra half-day's pay. [*See id.*]. Since 1989, the tapper's work quota has been established through a collective bargaining process, [*see* dkt. 144-8 (attaching collective bargaining agreements)], although Plaintiffs contend that FNRC is not currently honoring the 2008 collective bargaining agreement that reduced the required work and increased tapper pay, [dkt. 230-58 ¶12].[3]

Plaintiffs' fathers have indicated to the Court that they desperately want to keep their jobs, otherwise they will "join the ranks of the starving unemployed." [Dkt. 2 ¶49]. For despite the nominally low wage in American dollars, a tapper's wage is relatively valuable in Liberia—one of the poorest countries on Earth and one with an 85% unemployment rate as of 2003. *See* https://www.cia.gov/library/publications/the-world-factbook/geos/li.html (last visited October 14, 2010). In 2007, the average take-home pay for a tapper was US$129.92 per month, [*see* dkt.

[3] Plaintiffs additionally complain that their union leadership wasn't very effective before 2007—before the membership decided to change its leadership in a contested labor election that went all the way to the Liberian Supreme Court. [*See id.*]. They don't indicate whether Liberian law required the members to ratify the collective bargaining agreements.

144-10 ¶15], while "many [Liberian] government salaries [were] less than $20 USD per month," [dkt. 2-41 at 4].

The parties have submitted conflicting evidence as to whether one tapper can physically complete all his work by himself so as to receive full pay. Consistent with the standard of review, the Court will, therefore, assume that quotas are too high for a tapper to receive full pay without assistance. That assistance may take the form of adult helpers. Given the high unemployment rate, at least one father was able to hire a worker to help him complete his quota at the rate of "20 cups of rice and US$20.00 each month." [Dkt. 144-16 at 324]. FNRC has asserted, and Plaintiffs haven't denied, that "[e]very father in this case admits that he had at least one adult to assist in the field—*i.e.* one of his wives, a hired 'helper' or both." [Dkt. 209 at 15 (footnote collecting evidentiary citations omitted)]. The assistance for Plaintiffs' fathers has also taken the form of unpaid child labor: They have directed, and in several instances continue to direct their children, Plaintiffs, to assist in them in the fields. [*See* dkt. 295 at 30-40 (collecting evidentiary citations)].

Some of the activities that tappers must either perform themselves or delegate are dangerous and physically demanding. [*See id.* at 30-36 (describing activities that Plaintiffs contend constitute "worst" forms of child labor)]. Others aren't: for example, washing out the cups that are used to collect latex from the trees. [*See* dkt. 144-17 at 68¶3].

FNRC has asserted that Plaintiffs' fathers set the hours Plaintiffs work, what days they work, what work they perform, and the age at which Plaintiffs first began working. [*See* dkt. 209 at 16]. Apart from arguing that the quota system itself necessarily required tappers to use their children and noting that a low-level field supervisor, called a "headman," once showed a Plaintiff how to scrape dried latex from a cup, wash the cup, and where to deposit the latex collected from

the cups, [*see* dkt. 230-22 at 13-14], Plaintiffs don't dispute the factual accuracy of that claim. [*See* dkt. 295 at 30]. No Plaintiff is on FNRC's payroll.

C. ILO Convention 182

In 1999, the United Nation's International Labor Organization promulgated an international agreement, effective in November 2000, that directed ratifying member states to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency." International Labor Organization Convention 182, Art. 1, *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm ("Convention 182") (last accessed October 14, 2010). While the United States ratified Convention 182 in February 1999, Liberia didn't ratify it until February 2003. http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182 (last accessed October 14, 2010).[4]

D. Policies Against Child Labor on the Plantation

Anticipating the effective date of Convention 182, even though Liberia hadn't yet ratified it, FNRC issued a policy in June 2000 that prohibited "the use of under-aged children" in work that might fall within the definition of "worst" forms of child labor, including "tapping, cup[] cleaning, latex/cup lump collection, slashing, ring weeding, difolatan and stimulant applications." [Dkt. 144-1 at 25]. FNRC has maintained, and Plaintiffs don't dispute, that the original policy was written broadly enough such that it prohibited "any and all" use of tappers' children, no matter how innocuous the work. [Dkt. 209 at 20]. In July 2005, management re-promulgated the policy. [Dkt. 144-4 at 18]. A few months later, in November 2005, management revised it to a "zero-tolerance" policy, unlike the previous policies that had called for graduated discipline. [*Id.* at 20].

[4] 172 countries have now ratified Convention 182. But several countries still haven't done so—including India, a country with over one billion people. *Id.*

Despite having had policies in place against child labor since June 2000, Plaintiffs have presented evidence that FNRC devoted little to no resources to enforcing those policies, at least until after this litigation began.[5] The earliest disciplinary reports for using child labor occurred only in the months right before this litigation began, [dkt. 144-8 at 253-78], and FRNC admits that it never terminated an employee for using child labor before January 2005, [dkt. 230-44 at 7]. At least some of Plaintiffs' fathers claim to not have even known about the prohibition until after the November 2005 zero tolerance policy was issued (and this litigation had already begun). [*See* dkt. 295 at 37-38 (collecting citations)]. Yet at least one Plaintiff admits that her father told her about the prohibition in 2001, [*see* dkt. 144-16 at 231 (testifying that her father told her about the policy when she was twelve); dkt. 557-1 (listing Plaintiffs' dates of birth)]. Another admits that a headman told her about the policy in 2003. [Dkt. 144-17 at 117].

Since this litigation began—and the zero tolerance policy has been more actively enforced—Plaintiffs who have helped their fathers have hidden when FNRC management passes by. [*E.g.*, dkt. 144-16 at 247 ("Q: All right. Did your father tell you to hide when you were pouring chemicals on the tree?....A: Yes, he tell me to hide. Q: From who? A: From Firestone people…because Firestone said they never wanted children to work on the farm.")].

III. DISCUSSION

Besides being entitled to summary judgment on the ground that the ATS doesn't recognize corporate liability, the Court finds that FNRC is also entitled to summary judgment because Plaintiffs have been unable to present evidence that, if admitted and credited, would establish the

[5] At one point during this litigation, Plaintiffs' guardians asked the Court to enjoin FNRC from enforcing the zero-tolerance policy against them if their discovery responses revealed that they were continuing to violate the policy by making their children work. [Dkt. 246]. The Court declined to do so because enforcing that policy would "achieve what is ostensibly the core goal of this litigation—protecting the Plaintiffs from the dangers of the worst forms of child labor (if they are, in fact, engaged in such work)." [Dkt. 352 at 5].

allegations that the Court previously held stated a claim for illegal worst forms of child labor. In the alternative, the Court concludes that Convention 182's Article 3(d) cannot form the basis of an ATS claim at all, thus revisting in part its earlier ruling on the motion to dismiss. Finally, to whatever extent any evidence could establish a violation of the ATS, the liability period would be limited to the period after June 2003, not back to 1995 as Plaintiffs have argued should apply.

A. The Allegations in the Complaint Compared to the Actual Proof

As the Court has explained on several occasions, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), places very strict requirements on the types of violations of international law that can support a claim under the ATS. *Sosa* permits ATS claims only for "violations of safe conducts, infringement of rights of ambassadors,…piracy," *id.* at 724, and for violations of international norms that are "specific, universal, and obligatory" enough so as to "render the perpetrator *hostis humani generis*, an enemy of all mankind," [dkt. 604 at 6 (quoting *Sosa*)]. With respect to that last category—the one that Plaintiffs claim applies here—the Supreme Court has directed the lower courts to exercise "vigilant doorkeeping." *Sosa*, 542 U.S. at 729.

When ruling upon the earlier motion to dismiss, the Court held that Convention 182 represented a specific, universal, and obligatory international norm for the purposes of *Sosa* because it had been broadly ratified, including by the United States and Liberia. Although Plaintiffs argued that Convention 182 was but the latest manifestation of an international consensus against child labor such that their claim shouldn't be limited to proving a violation of Convention 182, the Court rejected that argument. [Dkt. 40 at 66 (calling Convention 182 "the key source of international child labor standards" for this action)]. Plaintiffs' argument about a broader binding norm was impermissibly premised upon other international conventions that the United States had never ratified. [*See id.* at 54 ("It would be odd indeed if a United States court were to

treat as universal and binding in other nations an international convention that the United States government has declined to ratify itself.")].[6]

Convention 182 outlaws only "worst" forms of child labor, which it defined in four ways, only two of which Plaintiffs claimed apply here. Under Article 3(a), worst forms include "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict." Convention 182. And Article 3(d) stipulates that worst forms of child labor also include "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." *Id.*[7] That latter definition was intentionally vague. Recognizing that acceptable child labor norms may vary from country to country, ILO Convention 182 specified that an Article 3(d) worst form of child labor "shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned." *Id.* at Art. 4(1).

Accepting the Complaint's allegations as true—as the Court was required to do, [*see* dkt. 40 at 13-14]—the Court held that Plaintiffs may be able to establish a violation of Convention 182 and thus the ATS. But, based upon the evidentiary record presented to the Court here, Plain-

[6] To the extent that Plaintiffs again attempt to expand their claims beyond Convention 182, the Court rejects that attempt for the reasons previously stated.

[7] Articles 3(b) and 3(c) label as a worst forms of child labor activities related to sexual exploitation of minors and related to child drug trafficking or drug production.

tiffs haven't been able to come up with evidence to support their claims in several critical respects, as they needed to do to survive summary judgment.[8]

1. Article 3(a)

In their Complaint, Plaintiffs alleged that they lead a "slave-like existence," forced to help their fathers in the fields despite their young age, [dkt. 2 ¶64], in violation of Convention 182 Article 3(a).

At oral argument, however, Plaintiffs' counsel conceded that the only force in the evidentiary record here is "economic coercion" given the high quotas their fathers must meet to keep otherwise scare jobs in Liberia. [Dkt. 590 at 67]. No one associated with FNRC ever threatened Plaintiffs, or their fathers, with force if Plaintiffs didn't work. [*Id.*].

Plaintiffs' concession eliminates their forced labor claim. In rejecting Plaintiffs' fathers' own "forced" labor claims, the Court previously held that "pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives…is not forced labor under international law." [Dkt. 40 at 51 (quotation omitted)]. Plaintiffs' forced labor claim here depends upon the following argument: FNRC forced Plaintiffs' fathers to either meet high quotas or face termination, and Plaintiffs' fathers had no choice but to turn their children to work to help meet those quotas; therefore, FNRC forced Plaintiffs to work. But because FNRC didn't actually "force" Plaintiffs' fathers to work within the meaning of international law, Plaintiffs' argument fails. They cannot, therefore, establish a violation of Article 3(a).

[8] The Court notes that Plaintiffs continue to maintain here that "Plaintiffs' allegations…must be taken as true" in connection with this motion. [Dkt. 295 at 13]. Because the Court previously announced that it would treat FNRC's motion as entirely one for summary judgment even though it also partially sought judgment on the pleadings, [dkt. 234], Plaintiffs are incorrect. Fed. R. Civ. Pro. 56(e)(2) ("[A] party may not rely merely on allegations or denials in its own pleading [in response to a motion for summary judgment]").

2. Article 3(d)

With respect to Article 3(d), the Court previously found a potentially viable cause of action in that the Complaint included "allegations that [FNRC is] encouraging and even requiring parents to require their children as young as six, seven, or ten years old to do…heavy and hazardous work." [Dkt. 40 at 69]. That work was, Plaintiffs alleged, the "necessary and inevitable" consequence of the high production quotas, [*id.* at 68], and was keeping them out of school, [*id.* at 40].

In connection with the present motion, FNRC has argued, and Plaintiffs haven't disputed, that FNRC can only be held liable under Article 3(d) if it set up a quota system deliberately designed to cause Plaintiffs to perform work that would "likely…harm the[ir] health, safety or morals," Convention 182, Art. 3(d). [Dkt. 209 at 42 ("No court has ever found that negligence or recklessness makes one an enemy of all mankind for purposes of the ATS. Instead, every tort claim that has been recognized under the ATS has involved deliberate wrongdoing." (citations and footnote omitted))]; *see also* dkt. 295 at 8 (claiming that FNRC "deliberately created and implemented a plantation system…of exploitation based on forced child labor")].

Despite the allegations in the Complaint, Plaintiffs haven't come forward with any evidence suggesting that FNRC actually wanted any tapper to use his child in the fields at all, thereby precluding a finding of deliberateness. While Plaintiffs repeatedly accuse FNRC of having an informal policy in favor of child labor, the formal policies in the record, beginning with the one adopted in June 2000, specifically prohibit tappers from using their children to help with their work. [*E.g.* dkt. 144-1 at 25]. Indeed, for that reason, one Plaintiff testified that he knew that he needed to hide if he "hear[d] or [saw] a Firestone car approaching." [Dkt. 230-23 at 8]. FNRC obviously wanted the tappers to meet their work quotas—quotas established, since 1989, through

a series of collective bargaining agreements with the tappers' union. [*See* dkt. 144-8]. But at worst, the evidence submitted regarding FNRC's lackluster attempts to enforce the child-labor prohibition—which would have long ago caused Plaintiffs' fathers to "join the ranks of the starving unemployed," [dkt. 2 ¶49]—demonstrates a mere indifference to the possibility of child labor. No evidence indicates that Firestone deliberately wanted Plaintiffs' fathers to use their young children, as opposed to using adult children, their wives, or paid help.[9]

Even if some headmen or other managers "continued to allow children to work because the job was too big for one person" despite the formal prohibition on child labor, [dkt. 296-26 ¶15],[10] Plaintiffs haven't established that the "necessary and inevitable" consequence of FNRC's acquiescence was a worst form of child labor within the meaning of Article 3(d). As indicated previously, Article 3(d) expressly indicates that local law supplies its contours. The only Liberian law relating to child labor that either party has cited only places one restriction on employment of minors below sixteen years of age: Any work performed must not occur "during the hours when he is required to attend school." [Dkt. 2-31 at 5].[11] Thus, insofar as Plaintiffs complain that their fathers put them to work "very early" in the morning so they would have time to "return[] home to get ready for school," or put them to work on "Saturdays and Sundays," [dkt.

[9] Given the high rate of unemployment (i.e. a large supply of willing workers to choose from), FNRC might have refused to even employ tappers who had school-aged children, or else refused to let families live on the plantation with the tappers. Either outcome would have avoided the potential for child labor and would have saved FNRC the costs of operating a school system for the tappers' children. That outcome would have resulted in worse economic consequences for Plaintiffs, which may be why Plaintiffs' fathers have indicated that they want to keep their jobs, no matter how difficult they may be.

[10] The Court has significant doubts as to the admissibility of this particular statement in that it is premised upon what is "common knowledge," rather than on what the affiant himself apparently saw or heard. [*Id.*]. Because the statement, even if admitted, doesn't preclude summary judgment, the Court won't definitively resolve its admissibility.

[11] The law includes a civil fine for any employer who employs any child during school hours—and a fine for any parent who permits the child to work. [*Id.*].

295 at 46], Plaintiffs' work didn't violate Liberian law. Plaintiffs haven't directed the Court to any evidence that any FNRC employee—other than Plaintiffs' fathers—specifically encouraged Plaintiffs to work during school hours, rather than before or after school.

Because *Sosa* requires both specificity and universality, however, the Court previously indicated that merely establishing a violation of Liberian child labor law won't suffice for an ATS claim; the nature of the work and the age at which it was performed matter too. [*See* dkt. 40 at 68 (requiring any child labor to cross a "bright line" under international law)]. Nonetheless, Plaintiffs have taken the untenable position here that any "hazardous" work by any minor constitutes an internationally recognized "worst" form of child labor. Thus, Plaintiffs ask the Court to label every Indiana farmer who has a minor perform any hazardous work an enemy of all mankind, [dkt. 590 at 51 (contending that the work violates international law)], even though such work may be fully compliant with United States labor law. *See* 29 U.S.C. § 213(c)(2) (permitting minors under 16 to perform agricultural work that is not "particularly hazardous," subject to certain qualifications). The Court cannot, as Plaintiffs suggest, infer an actionable ATS claim, or a specific and universal international norm based on age alone, particularly when such claim would contravene Congress' policymaking judgment.

For present purposes, the Court will assume that there is some core international consensus about what constitutes a "worst" form of child labor beyond those specifically delineated in Convention 182 Article 3(a) to 3(c), even though Plaintiffs' own expert in international law denies the validity of that assumption. [*See* dkt. 580-1 at 30 ("Q: And I believe you testified earlier that there is, in fact, no agreement on how likely an injury has to be before it must be listed under article 3(d)? A: That's right.").] If any core exists, it would be represented by the lowest common denominator among all laws promulgated to comply with Article 3(d). *See United*

States v. Smith, 18 U.S. 153, 161 (1820) (noting that while various authorities define piracy somewhat differently, "all…concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy" and then applying that core agreement in a criminal prosecution for piracy).

Yet despite that assumption, summary judgment is still appropriate. FNRC's opening brief specifically argued that "plaintiffs certainly cannot establish that **every** element [of a tapper's job] constitutes the 'worst form' for a child of any age" under international law, [dkt. 209 at 17-18 (original emphasis)], and that Plaintiffs' fathers alone "told them which jobs to do," [*id.* at 16]. As to the first point, Plaintiffs only respond by saying that the activities that they performed were listed on FNRC's June 2000 anti-child labor policy. [*See* dkt. 590 at 50]. But that policy went well beyond Article 3(d) by prohibiting all child labor, not just its worst forms. What constitutes a worst form of child labor for *Sosa* purposes is a question of law, *see Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004), not a fact that can be established by an admission of a party opponent. Having young children wash cups may not be ideal, but—absent specific legal authority that Plaintiffs have been unable to provide—the Court cannot find it universally condemned. As to FNRC's second point, Plaintiffs haven't come forth with evidence that anyone other than Plaintiffs' fathers selected the activities that Plaintiffs would perform. [*See, e.g.*, dkt. 207-8 at 3 ("Q: And is your father the one who would tell you what to do? A: Yes.")]. Because not all of a tapper's work would qualify as a worst form of child labor if performed by a child and because FNRC played no role in selecting which types of work the tappers would assign their children, Plaintiffs cannot establish that FNRC deliberately set up a system that would result in worst forms of child labor, whatever that term may mean.

B. Revisiting Whether Article 3(d) Can Satisfy *Sosa*

FNRC also suggests that the Court's ruling on the motion to dismiss was in error with respect to Article 3(d).[12] Plaintiffs correctly point out that the Court could invoke the law-of-the-case doctrine and refuse to revisit its prior ruling—the law discourages piecemeal argumentation. But FNRC correctly argues too that the doctrine is technically inapplicable insofar as the issues weren't actually raised to the Court. *See Bone v. City of Lafayette*, 919 F.2d 64, 66 (7th Cir. 1990) ("Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default."). Further, whether originally presented or not, the law-of-the-case doctrine is a purely discretionary one designed to facilitate judicial economy. *See United States v. Harris*, 531 F.3d 507, 513 (7th Cir. 2008). Given that—but for the reasons outline above—the parties and the Court would be confronted with an incredibly expensive and prolonged trial, the Court will entertain FNRC's meritorious arguments.

With respect to *Sosa*'s requirement of a binding international norm, FNRC argues that "[t]he U.S. Senate ratified Convention 182 on the understanding that it was non-self-executing." [Dkt. 209 at 23 (citing S. Treaty Doc. No. 106-5, 1999 WL 33292717 at *13)]. Plaintiffs don't contend otherwise. In *Sosa*, the Supreme Court refused to permit the International Covenant on Civil and Political Rights to establish a binding international norm for ATS purposes because "the United States ratified the Covenant on the express understanding that it was not self-executing and so [the Covenant] did not itself create obligations enforceable in the federal courts." 542 U.S. at 735 (citation omitted). Because Convention 182 was also non-self-executing, it likewise cannot form a basis for an ATS claim.

[12] The Court remains confident that child slavery and other claims of truly "forced" child labor satisfy *Sosa*, whether framed under Convention 182 or otherwise. [*See* dkt. 40 at 44-47 (collecting cases finding ATS violations where the plaintiffs were held as slaves or near slaves)].

Article 3(d) also fails *Sosa*'s specificity and universality requirements. As indicated above, Article 3(d) directs each nation to decide what constitutes labor that will likely harm the "health, safety or morals of children." When first considering the motion for summary judgment, the Court itself struggled to articulate a definition of conduct that, if true, would always violate Article 3(d), no matter where the conduct occurred. To that end, the Court directed the parties to submit proposed jury instructions on that topic for the Court's consideration—because, if summary judgment were denied, a jury trial would be necessary, and the jury would need to be instructed.[13] Plaintiffs proposed that the jury be given a non-exhaustive list of five factors to use when considering each work activity that Plaintiffs claimed to have performed. [*See* dkt. 581 at 2]. Thus, apart from their argument—which the Court has rejected—that any hazardous work by a minor automatically qualifies as a violation of Article 3(d), Plaintiffs essentially threw up their hands, proposing that the jury simply sort out international law and decide for itself what conduct makes a corporation an enemy of all mankind.

While the Court has a great deal of respect for the men and women from this District who answer the call of jury duty, it is improper to ask the jury to make the kind of line drawing decisions best left to the political branches of their government; jury instructions should provide answers, not questions. How young is too young to perform weeding? How heavy is too heavy for a ten year old to lift? Those questions are practically impossible for a jury to answer regarding conduct here in this country. Those questions are actually impossible for the jury to answer regarding conduct occurring in one of the poorest countries on Earth, located a continent away, where inhabitants face perils unimaginable in this country—including, for example, having to

[13] Indeed, the specificity and universality problems in the context of jury instructions also constitutes a "practical consequence" that may suggest that no cause of action should lie absent legislative guidance. *See Sosa*, 542 US at 732-33.

worry that if children aren't taken into the fields with their parents that they will be kidnapped and impressed into military service. [*See* dkt. 144-16 at 180 (expressing fears over potential kidnapping of any children left alone in the homes while their fathers worked in the fields)]; http://www.state.gov/g/drl/rls/hrrpt/2003/27735.htm (last visited October 14, 2010) (describing child soldiers recruited to join militias). Indeed, those questions are impossible even for this judge, absent clear legislative guidance from Congress or international agreements—both of which are lacking here.

FNRC also raises another problems with Plaintiffs' attempt to invoke the ATS here: Plaintiffs have previously maintained that FNRC's conduct is directly actionable under various Liberian common-law causes of action, [*see* dkt. 206].[14] Inasmuch as an ATS claim is most closely related to a *Bivens* claim in that they both spring from federal common law, *see Sosa*, 542 U.S. at 743 (Scalia, J., concurring), the availability of other remedies may preclude the ability to invoke the ATS. *See Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008) (rejecting *Bivens* claim where plaintiff had "alternative remedies" to recover against the defendant); *Holly v. Scott*, 434 F.3d 287, 296-97 (4th Cir. 2006) (same). Furthermore, the Seventh Circuit has suggested in dicta—which although not technically binding still merits considerable deference—that a failure to exhaust alternative remedies is required by international law and, if not followed, would preclude reliance on the ATS. *See Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) ("It may be that a requirement for exhaustion is itself a basic principle of international law."). The Court finds no basis upon which to disagree with the Seventh Circuit's dicta.

[14] The Court has denied Plaintiffs leave to amend their Complaint to assert Liberian claims in part because Plaintiffs waited too long to file their motion to amend. [Dkt. 548].

Accordingly, the Court now concludes that a violation of Convention 182's Article 3(d) cannot give rise to an ATS claim under *Sosa*. FNRC is thus entitled to summary judgment on that claim.[15]

C. Potential Liability Period

Finally, assuming that any evidence in the record could establish a violation of the ATS, the parties disagree as to the appropriate period of potential liability. FNRC argues that international law doesn't permit Convention 182 to be applied retroactively. Thus, it contends that it cannot be held liable for conduct occurring before June 2003, the date when Liberia ratified Convention 182; or, in the alternative, for conduct occurring before November 2000, when Convention 182 became effective (for those countries that had already ratified the convention). [Dkt. 209 at 30]. For their part, Plaintiffs don't dispute the no-retroactivity principle. [*See* dkt. 295 at 15 n.8]. Instead, they contend that Convention 182 merely "affirmed a long-standing consensus prohibiting child labor, going back to at least the adoption of Convention 138 in 1973," [*id.*], where various member states agreed to prohibit all work by children under fourteen years of age (and in many cases by older children as well), *see* International Labor Organization Convention

[15] To facilitate any appellate review, the Court notes that FNRC has raised two other arguments that the Court rejects. FNRC incorrectly claims that an ATS claim requires a defendant to have acted "under color of law." The ATS provides a civil cause of action only against a defendant whose conduct makes the defendant, like the pirate, an enemy of all mankind. *Sosa*, 542 U.S. at 732. Such a miscreant commits an offense of "universal concern" and may thus be punished whether or not the action is performed under color of law. *See Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995) (summarizing international law and additionally noting that "[t]he Executive branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law"). Insofar as FNRC claims that the ATS is limited to violations of international law actually committed within the territorial jurisdiction of the United States, that view impermissibly constricts the longstanding—and likely original—understanding of the ATS. *See* 1 Op. Atty Gen. 57 (1795) (opining that the ATS would permit a cause of action against Americans assisting the French in raids against British shipping off the coast of Sierra Leon).

138 ("Convention 138"), Art. 2, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138. Based on 9th Circuit caselaw, therefore, they argue that FNRC's liability period goes back to 1995, ten years before they filed this action. [Dkt. 146 at 11 (citing *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir. 2003) (finding a ten-year limitations period for ATS claims)].

The Court agrees with FNRC that June 2003 would represent the proper liability period in this action, if there were any liability at all. As indicated above, when ruling on the motion to dismiss in this action, the Court was clear that the "key source of international child labor standards" in this action is Convention 182, [dkt. 40 at 66], if in fact there is any actionable international standard. Whatever may be said of the views of other countries with respect to the principles articulated in Convention 138, the United States has never ratified it, so it cannot form the basis of an international consensus for the purposes of *Sosa*.[16] Likewise with respect to Convention 182, no sufficient international consensus could exist to support an ATS claim for these Liberian Plaintiffs vis-à-vis this American Defendant until both the United States and Liberia ratified the convention, which didn't occur until June 2003.

IV. CONCLUSION

For the reasons stated in the Court's original ruling on FNRC's motion for summary judgment, [dkt. 604], and for those reasons stated above, summary judgment in favor of FNRC is appropriate.

Now that all claims in this action have been resolved, final judgment will issue. Given the undisputed present poverty of both the child Plaintiffs and their fathers, given the improbability that that poverty will materially improve in the future, and given the difficulties associated with collecting costs from litigants a continent away anyway, no costs will be taxed. *See Rivera*

[16] Liberia hasn't yet ratified Convention 138 either. http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C138 (last visited October 14, 2010).

v. City of Chicago, 469 F.3d 631, 634 (7th Cir. 2006) ("Since 1983, this Court has held that it is within the discretion of the district court to consider a plaintiff's indigency in denying costs under Rule 54(d)." (quotation and citations omitted)).

10/19/2010

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BOIMAH FLOMO, *et al.*,,	)	
Plaintiffs,	)	
	)	
vs.	)	1:06-cv-00627-JMS-TAB
	)	
FIRESTONE NATURAL RUBBER COMPANY,	)	
Defendant.	)	
	)	

FINAL JUDGMENT

The Court now enters **FINAL JUDGMENT** as follows:

- All Plaintiffs' claims against Defendants Daniel J. Adomitis and Charles Stuart are dismissed without prejudice.
- All Plaintiffs' claims against Defendants Bridgestone Corporation and Firestone Plantations Company are dismissed with prejudice.
- As to the remaining Defendants, the claims alleged in Counts One and Three through Twelve of the Complaint are dismissed with prejudice, and summary judgment is entered in favor of those Defendants for the claim alleged in Count Two of the Complaint.

Given the dispositions outlined above, Plaintiffs shall take nothing by way of their Complaint. No costs are taxed.

10/19/2010

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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both such numbers are included as well as all intermediate numbers.

§ 21. Effect of outlines, cross-references, headnotes, rubrics, and source notes.

In the construction of Liberian laws and statutes, including this Code, no outline or analysis of the contents of any title, part, chapter, subchapter, article, section, or either portion thereof, and no cross-reference, headnote, rubric, or source note to any section of such law or statute shall be deemed a part of such law or statute.

Chapter 3. NON-STATUTORY LAW

§ 40. Non-statutory law: derivation.

Except as modified by laws now in force and those which may hereafter be enacted and by the Liberian common law, the following shall be, when applicable, considered Liberian law:

(a) the rules adopted for chancery proceedings in England, and

(b) the common law and usages of the courts of England and of the United States of America, as set forth in case law and in Blackstone's and Kent's Commentaries and in other authoritative treatises and digests.[3]

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2 ***Cross reference***:
Time: construction of provisions as to, see Civil Procedure L., ch. 1, subch. C.

3 *Prior legislation*: L. 1860, 72 (4th); OBB 113, Judiciary, art. VI, sec. 7; Acts 1846, Act to amend the judiciary act, sec. 9, 2 Hub. 1653; 1828 Code, Digest, Art. XIV, 2 Hub. 1272, 1282; 1824 Digest, 14th, 2 Hub 1269; and 1825 Const., art. VI, 2 Hub. 1264.
Cross reference: Adoption of non-statutory general maritime law of the United States of

Chapter 9. EFFECT OF THE CODE

§ 100. Laws repealed. Subject to the provisions of sections 1, 11, 13, and 14-17 above, all legislative enactments from the time of the founding of the Colony of Liberia and prior to the Fourth Session of the Forty-Second Legislature, except local, special, and private acts, are hereby repealed, regardless of whether they are designated specifically among the statutes repealed in connection with the Titles of this Code; provided, however, that insofar as the provisions of this Code are inconsistent with any local, special, or private act passed prior to the enactment of the Code, the provisions of the Code shall be controlling. The following chapters enacted by the Fourth Session of the Forty-Second Legislature are also repealed:

Act to amend the act of the Legislature of 1890-91, page two, authorizing the Postmaster General to conclude with foreign postal administrations such money order conventions as shall be useful to the people of Liberia;

Act to amend the Internal Revenue Code as amended March 31, 1953 to repeal and abolish the general sales tax of three per centum;

Act to amend the luxury tax provisions of the Internal Revenue Code of 1937, as amended to February 13, 1953;

Act to amend an act entitled "An act declaring March 4 in each year being the Natal Day of President Joseph Jenkins Roberts a national holiday";

Act supplemental to an act relating to the military service of the *Republic of Liberia approved February 20, 1940, entitled:* "An act

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America, see Maritime L., sec. 30.