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## Piercing the Cocoa Veil: Ninth Circuit Allows Child Cocoa Slaves to Sue under the Alien Tort Statute in *Doe I v. Nestle USA*

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PIERCING THE CHOCOLATE VEIL: NINTH CIRCUIT ALLOWS CHILD  
COCOA SLAVES TO SUE UNDER THE ALIEN TORT STATUTE IN *DOE I*  
*V. NESTLE USA*

LINDSEY E. WILKINSON\*

“[H]umanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.”<sup>1</sup>

I. HARVESTING ACCOUNTABILITY FOR MULTINATIONAL CORPORATIONS

Multinational corporations (MNCs) have become increasingly susceptible to litigation for extraterritorial violations of international humanitarian law.<sup>2</sup> Until now, MNCs have generally avoided exposure to such litigation amid the uncertainty of a weak, ineffective international regulatory system.<sup>3</sup> With the Ninth Circuit at the forefront of the debate, it appears that the United States is no longer a safe harbor for corporate actors who aid and abet human rights violations through their global network of contractors and suppliers.<sup>4</sup>

In a globalized marketplace, MNCs wield tremendous power and economic influence. The transnational movement of goods and people “mak[e] borders and state controls increasingly antiquated.”<sup>5</sup> MNCs utilize business tactics to maximize productivity and profits.<sup>6</sup> MNCs outsource labor to countries with weak

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1. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

2. See Kathryn Manza, *Making Chocolate Sweeter: How to Encourage Hershey Company to Clean Up its Supply Chain and Eliminate Child Labor*, 37 B.C. INT’L & COMP. L. REV. 389, 393 (2014) (citing KARL SCHOENBERGER, *LEVI’S CHILDREN: COMING TO TERMS WITH HUMAN RIGHTS IN THE GLOBAL MARKETPLACE* 56–58 (2000)); see also Saman Zia-Zafri, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L L. & FOREIGN AFF. 81, 88 (1999) (“American courts, comfortable with the legal fiction that equates legal individuals (i.e., corporations) mutatis mutandis with natural individuals for purposes of civil liability, have expressed no conceptual difficulty using the [Alien Tort Claims Act] against private legal entities.”).

3. See generally Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015).

4. See *Doe v. Nestle USA (Nestle USA)*, 766 F.3d 1013, 1024 (9th Cir. 2014), cert. denied, 136 S.Ct. 798 (2016).

5. PETER ANDREAS AND ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 247 (2008); see also Permanent Subcommittee on Investigations, *Offshore Profit Shifting and the U.S. Tax Code—Part 2 (Apple, Inc.)* S. Hrg. 113-90, at 2 (2013), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf> [<https://perma.cc/4RD7-JF69>] (highlighting complex avoidance schemes used by U.S.-based multinational corporations to move profits to offshore tax havens and amass estimated \$1.9 trillion in profits).

6. See Manza, *supra* note 2, at 407 (describing how MNCs control their supply chains and avoid government regulation).

regulatory institutions.<sup>7</sup> This promotes inter-jurisdictional competition for foreign investment that drives race-to-the-bottom economic policies to the detriment of the social welfare in the targeted communities.<sup>8</sup> Because foreign investment tends to put power and money into the hands of corrupt officials, the standards of living in these countries, where labor remains inexpensive, fail to improve.<sup>9</sup>

The interests of the state are a reflection of its regulatory strength, type of government, and administrative institutions. In a global economy, government interests often overlap but do not always align.<sup>10</sup> In democratic countries with strong civil societies, legislators responded to popular demand for labor reforms with regulatory measures and governmental institutions.<sup>11</sup> In countries fraught with corruption, social welfare typically remains stagnant and labor conditions fail to improve.<sup>12</sup> In the United States, corporate lobbyists undermine legislative efforts to address MNCs' operations overseas, which increases corporate wealth to the detriment of foreign workers.<sup>13</sup> Non-governmental actors have tried for many years to make a multilateral regulatory framework to govern international labor standards.<sup>14</sup> However, these initiatives lack the power of the rule of law;

7. See Kemi Mustapha, Note, *Taste of Child Labor Not So Sweet: A Critique of Regulatory Approaches to Combating Child Labor Abuses by the U.S. Chocolate Industry*, 87 WASH. U. L. REV. 1163, 1169 (2010) (“[W]ith the advance of globalization, the concern is that corporations will take advantage of lenient regulations in foreign countries and commit violations of international human rights and labor standards in pursuit of profit making.”).

8. See, e.g., Regina E. Rauxloh, *A Call for the End of Impunity for Multinational Corporations*, 14 TEX. WESLEYAN L. REV. 297, 299 (2008) (discussing how “race-to-the-bottom” phenomenon occurs when countries try to compete for foreign investment).

9. See, e.g., Shang-Jin Wei, *Corruption and Globalization*, BROOKINGS INST., at 2-3 (Apr. 2001), <https://www.brookings.edu/wp-content/uploads/2016/06/pb79.pdf> [<https://perma.cc/6B3J-39GF>] (describing obstacles that countries face when corrupt government officials steal from international investment funds).

10. See Zia-Zafri, *supra* note 2, at 86 (“These interests, and the legal control of each country over a corporation, are not perfectly aligned . . .”).

11. See generally DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2013) (proposing that “pluralistic political institutions” and economic institutions enable growth at critical junctures).

12. See FREDERICK COOPER, *AFRICA SINCE 1940: THE PAST OF THE PRESENT* 92 (11th ed. 2009) (noting that post-colonial regimes “reinforced the externally dependent economy of the colonial era”).

13. See, e.g., *Norex Petroleum v. Access Indus.*, 631 F.3d 29, 32-33 (2d Cir. 2010) (“[W]hen a statute gives no clear indication of an extraterritorial application, it has none.” (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010))). For a further discussion in favor of corporate accountability, see Melvin L. Otey, *Why RICO’s Extraterritorial Reach is Properly Coextensive with the Reach of its Predicates*, 14 J. INT’L BUS. & L. 33, 45 (2015) (describing how international commerce and transnational competition produce “many of the same corruption problems that attend domestic business dealings”).

14. See, e.g., INT’L LABOR ORG., *ILO DECLARATION ON SOCIAL JUSTICE FOR A FAIR GLOBALIZATION* 3(2015), [http://www.ilo.org/wcmsp5/groups/public/—dgreports/—cabinet/documents/genericdocument/wcms\\_371208.pdf](http://www.ilo.org/wcmsp5/groups/public/—dgreports/—cabinet/documents/genericdocument/wcms_371208.pdf) [<https://perma.cc/A2BU-5AVZ>] (advocating Declaration on Social Justice for Fair Globalization, building upon Philadelphia Declaration of 1944 and Declaration on Fundamental Privileges and Rights); *ISO 26000—Social Responsibility*, INT’L ORG. FOR STANDARDIZATION, <https://www.iso.org/iso-26000-social-responsibility.html> [<https://perma.cc/954A-GQUA>] (last visited Jan. 29, 2018) (seeking to promote social responsibility standards, including contributions to sustainable development, respect for international norms of behavior, and respect for human rights).

absent enforcement by a competent judiciary, they are nothing but exalted voluntary measures.<sup>15</sup>

In *Doe I v. Nestle USA*,<sup>16</sup> the Ninth Circuit addressed whether a proposed class of child slaves could state a cause of action under the Alien Tort Statute of 1789 (ATS) against the chocolate candy company Nestle USA for violating the “law of nations” through its use of forced child labor on chocolate plantations in Africa.<sup>17</sup> The Ninth Circuit held that the international prohibition against slavery is “universal and may be asserted against the corporate defendants.”<sup>18</sup> The Ninth Circuit concluded that the plaintiffs made sufficient allegations to establish Nestle USA and its corporate suppliers knowingly and purposefully aided and abetted a violation of the universal prohibition against slavery to satisfy the mens rea standard of culpability for a corporate actor.<sup>19</sup> Rejecting the notion that corporations should receive blanket immunity for human rights violations, the Ninth Circuit utilized a “norm-by-norm” approach to liability.<sup>20</sup>

The Ninth Circuit concluded that the child cocoa slaves established a plausible cause of action under the ATS against corporate defendants for aiding and abetting forced child labor in violation of international law.<sup>21</sup> By contrast, the Second and Fourth Circuits have concluded that knowledge of human rights violations alone is insufficient, requiring the plaintiff to allege that the defendant purposefully intended to further the criminal conduct.<sup>22</sup>

This Article posits that corporations domiciled in the United States are not immune from liability for aiding and abetting violations of international law abroad. The ATS provides the district courts with the power to pierce the corporate veil based on the common law doctrine of respondeat superior and impose liability when plaintiffs establish a nexus of domestic conduct to infer a violation

15. See, e.g., Zia-Zafri, *supra* note 2, at 85, 85 n.11 (describing failed efforts of ILO’s monitoring of Unocal project with self-reporting of forced labor and slavery in connection with pipeline projects of French oil company Total and U.S. oil company Unocal).

16. 766 F.3d 1013 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016).

17. See *id.* at 1017–18; see also 28 U.S.C. § 1350 (2012).

18. *Nestle USA*, 766 F.3d at 1022. The court explained:

The prohibition against slavery applies to state actors and non-state actors alike, and there are no rules exempting acts of enslavement carried out on behalf of a corporation. Indeed, it would be contrary to both the categorical nature of the prohibition on slavery and the moral imperative underlying that prohibition to conclude that incorporation leads to legal absolution for acts of enslavement.

*Id.* (citation omitted).

19. See *id.* at 1024 (concluding that plaintiffs “satisfy the more stringent purpose standard” and, thus, also the less-stringent knowledge standard).

20. See *id.* at 1022 (reasoning that corporate actors were liable for aiding and abetting universal norms, which are applicable to all actors).

21. See *id.* at 1026–27.

22. See *Aziz v. Alcolac*, 658 F.3d 388, 401 (4th Cir. 2011) (“[F]or liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation.”); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247, 264 (2d Cir. 2009) (holding plaintiffs failed to show that oil company provided “substantial assistance” with purpose of facilitating human rights abuses).

of *jus cogens*, which are universally recognized as “sufficiently definite norms of international law.”<sup>23</sup>

Part II (A) of this Note discusses the history of the ATS from its enactment in 1789 and the subsequent recognition of violations of the law of nations as *jus cogens* norms of international law.<sup>24</sup> Part II(B) discusses doctrines of judicial restraint, including, but not limited to, the presumption against extraterritoriality, and decisions of the Supreme Court of the United States, such as *Jesner v. Arab Bank, PLC (Jesner)*,<sup>25</sup> in which a plurality of the Court voted to preclude ATS jurisdiction over a foreign corporation with a subsidiary in New York City.<sup>26</sup> Part II(C) discusses the circuit split on aiding and abetting liability.<sup>27</sup> Part III provides a factual background, procedural history, and legal analysis of the Ninth Circuit’s decision in *Nestle USA*.<sup>28</sup> Part IV discusses the significance of the Supreme Court’s denial of certiorari in *Nestle USA* and the future of human rights litigation against MNCs.<sup>29</sup> Finally, Part V concludes the Note.<sup>30</sup>

## II. THE ALIEN TORT STATUTE OF 1789 GRANTS DISTRICT COURTS ORIGINAL JURISDICTION TO DETERMINE “SPECIFIC, OBLIGATORY, AND UNIVERSAL” INTERNATIONAL LAWS

The ATS, as originally enacted in section nine of the Judiciary Act of 1789, stated: “[T]he district courts shall [ ] have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>31</sup> Upon the enactment of the Federal Rules of Civil Procedure, the ATS was codified at 28 U.S.C. § 1350 and, to this day, states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>32</sup> The statute confers jurisdiction when “an alien sues . . . for a tort . . .

23. *Kiobel v. Royal Dutch Petroleum (Kiobel II)*, 569 U.S. 108, 116 (2013). For a discussion of *jus cogens*, see *infra* notes 65–74 and accompanying text.

24. For a discussion of the history of the ATS, the law of nations, and customary international law, see *infra* notes 31–64 and accompanying text.

25. No. 16-499 (U.S. Apr. 24, 2018).

26. For a discussion of prudential doctrines of restraint and limits on ATS jurisdiction, see *infra* notes 75–93, the Executive branch policy limitations, see *infra* notes 93–96 and accompanying text, and for a detailed background and analysis of *Jesner v. Arab Bank, PLC*, see *infra* notes 98–113 and accompanying text.

27. For a discussion of the circuit split on the standard for aiding and abetting liability, see *infra* notes 114–22.

28. For a discussion of background and procedural history of *Doe I v. Nestle USA*, see *infra* notes 123–59. For a discussion of the Ninth Circuit’s decision to hold corporations accountable, see *infra* notes 160–76.

29. For a discussion of the impact of the Ninth Circuit’s decision in *Nestle USA* versus the Supreme Court’s recent decision in *Jesner v. Arab Bank, PLC*, see *infra* notes 177–86.

30. For a conclusion of the Note, see *infra* notes 187–93.

31. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77.

32. 28 U.S.C. § 1350 (2012); see also Anne-Marie Burley, *The ATS and Judiciary Act of 1789*, 83 AM. J. INT’L. L. 461, 461 n.1 (1989) (citation omitted); Kurtis A. Kemper, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350): Tort in Violation of Law of Nations or Treaty of United States*, 61 A.L.R. Fed. 2d 171, § 1 (2012).

committed in violation of the law of nations.”<sup>33</sup> This section will examine the history of the ATS, as the source for the district courts’ “explicit enumerated authority to define and punish international law violations.”<sup>34</sup>

Under the U.S. Constitution, the district courts have a constitutional obligation to uphold the United States’ international legal commitments.<sup>35</sup> Our Supreme Court has cautioned the courts against exercising ATS jurisdiction over tortious conduct arising outside of the court’s territorial jurisdiction.<sup>36</sup> For practical reasons, such as sovereignty and territoriality, this power is limited to a sufficiently definite violation of a treaty or norm of international law that implicates United States’ interests, domestic conduct, and satisfies traditional notions of personal jurisdiction over the defendant, such as where the corporate defendant has a principal place of business in or significant contacts with the United States.<sup>37</sup>

A. *The Original Transitory Torts: Violations of Safe Conducts, Infringement on the Rights of Ambassadors, and Piracy*

The history of the ATS demonstrates that Congress intended for the district courts to assure respect for the rights of foreigners and provide a remedy for violations of *jus cogens* committed by U.S. citizens.<sup>38</sup> Throughout the Constitutional Convention, Congress prioritized the protection of foreigners in the United States.<sup>39</sup> As such, the First Continental Congress intended for the district courts to serve as a forum for foreigners injured by American nationals to establish rapport among nations like Great Britain and France for protecting individual rights of visitors and respecting the rights of foreigners.<sup>40</sup>

33. *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (citation omitted).

34. Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2204, 2283 (2015).

35. See U.S. CONST. art. III, §2, cl. 1; see also U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”); Cleveland & Dodge, *supra* note 34, at 2231, 2238.

36. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (“[A]t the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”).

37. See Zia-Zafri, *supra* note 2, at 88 (discussing “a number of political, jurisdictional and practical limitations, drawn from international and domestic sources, constrain the ATCA’s applicability primarily to MNCs based in the U.S., or those MNCs that have significant contacts with the United States”).

38. Compare Thomas Weatherall, Note, *Lessons from the Alien Tort Statute: Jus Cogens as the Law of Nations*, 103 GEO. L.J. 1359, 1373 (2015) (citation omitted) (“[T]he establishment of a category of *jus cogens* norms demarcated the contemporary law of nations, which U.S. courts have ascertained with some confidence as norms of contemporary international law comparable in stature to the eighteenth-century law of nations.”), with Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 448 (2011) (“In 1789, every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens.”).

39. See *Sosa*, 542 U.S. at 715–16 (2004) (citing JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed., 1893)).

40. See Bellia & Clark, *supra* note 38, at 552 (“Recognizing the full historical context of the ATS is necessary if courts are to achieve the Supreme Court’s goal of faithfully interpreting the statute in accordance with the expectations of the First Congress.”).

Official recognition of the rights of foreigners began with an act designed specifically to protect ambassadors and diplomats.<sup>41</sup> The 1781 Resolution, passed by the First Continental Congress, recognized a private remedy for diplomatic offenses; the Resolution demarcated “an act of international politics, for the recommendation was part of a program to assure the world that the new Republic would observe the law of nations.”<sup>42</sup> In 1784, the Chavalier de Longchamps verbally and physically assaulted the Secretary of the French Legion in Philadelphia in the famous “Marbois-Incident.”<sup>43</sup> The way this incident was handled sparked ridicule from prominent members of the international community, “and concern over the inadequate vindication of the law of nations persisted through the time of the Constitutional Convention.”<sup>44</sup>

In the twenty-first century, the Supreme Court has acknowledged that the First Congress “intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”<sup>45</sup> In 1789, the First Continental Congress promulgated the ATS, with the intent to empower the district courts with original jurisdiction over a limited number of foreign tort claims by foreign citizens against citizens of the United States, recognizing that the “failure to redress . . . such torts violated the law of nations.”<sup>46</sup>

The prominent figures of the new Republic and the international community stressed the importance of protecting the rights of foreigners against torts committed by U.S. citizens in U.S. courts throughout the Constitutional era. In September 1794, several ships guided by three Americans along with a crew of French revolutionaries made their way ashore and attacked a British colony in Sierra Leone.<sup>47</sup> In response, Attorney General William Bradford (who prosecuted the Marbois Incident)<sup>48</sup> wrote a letter to the Secretary of State, expressing the need for courts to have extraterritorial jurisdiction to provide a civil remedy where foreigners were injured by American nationals abroad.<sup>49</sup> To many scholars, Bradford’s letter signified that ATS jurisdiction extended to extraterritorial

41. See *Sosa*, 542 U.S. at 720 (citing An Act for the Punishment of Certain Crimes Against the United States, § 8, 1 Stat. 118). (“Uppermost in the legislative mind appears to have been offenses against ambassadors[.]”).

42. *Id.* at 722 n.15.

43. See *Respublica v. De Longchamps*, 1 U.S. (Dall.)111, 111–12 (Phila. Ct. Oyer & Term. 1784); see also *Sosa*, 542 U.S. at 716–17 (describing Marbois Incident, Dutch Ambassador, and limits of nascent nation’s judicial system at time of Constitutional Convention).

44. *Sosa*, 542 U.S. at 717 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 25 (Max Farrand ed., 1911) (speech of Randolph, J.)).

45. *Id.* at 720. The *Sosa* Court also suggested that “the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations,” which the States could define in terms of positive, universal law. See *id.* at 721–22.

46. *Bellia & Clark*, *supra* note 38, at 446 (internal quotations omitted).

47. See Ishai Mooreville, *A Question of Sovereignty: The History Behind Attorney General Bradford’s 1795 Opinion on the Alien Tort Statute*, 40 SYRACUSE J. INT’L L. & COM. 217, 227–28 (2013) (noting that one ship was from Massachusetts and another from New York).

48. See *Sosa*, 542 U.S. at 721 (noting that it is unlikely that, at that time, Bradford “understood the ATS to provide jurisdiction over what must have amounted to common law causes of action”).

49. See generally William J. Bradford, *Breach of Neutrality*, 1 U.S. OP. ATT’Y GEN. 57 (1795). For a further discussion of Attorney General Bradford’s letter, see Mooreville, *supra*

torts committed by U.S. nationals against foreigners on foreign soil “in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.”<sup>50</sup>

As we understand the history of the ATS today, the most prominent figures of the new Republic believed a competent, powerful, and sophisticated judicial branch required original jurisdiction to adjudicate over such claims; under more specific, modern terminology, this would mean a degree of prescriptive jurisdiction to define and punish violations of those who aid and abet violations of the law of nations and treaties to provide a remedy for torts against foreigners.<sup>51</sup> The First Congress vested the district court with this power in the absence of the web of federal legislation that exists today.<sup>52</sup> They understood that punishing violations of international law would prevent the new Republic from becoming a safe harbor for “a torturer or other common enemy of mankind.”<sup>53</sup>

By the time of the Constitutional Convention in 1789, there were three principal “transitory torts” recognized under the law of nations: (1) violation of “safe conducts,” (2) “infringement of the rights of ambassadors,” and (3) “piracy.”<sup>54</sup> “During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law.”<sup>55</sup> Extraterritorial

note 47, at 234–35.

50. *Sosa*, 542 U.S. at 721 (internal quotations omitted) (quoting Bradford, 1 Op. Atty. Gen. at 59). As scholars have explained, “the ATS was originally intended to be limited to civil suits by aliens against American citizens only, but would have encompassed all acts committed by U.S. citizens extraterritorially or in United States territory.” Mooreville, *supra* note 47, at 234–35 (citing Bellia & Clark, *supra* note 38, at 520–521 n.356).

51. *See* Bellia & Clark, *supra* note 38, at 516 n.345 (noting that President George Washington’s neutrality proclamation declared that American citizens were “liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the powers at war with each other” (citation omitted)). For a further discussion of “prescriptive jurisdiction,” see Kathleen Hixson, Note *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT’L L.J. 127, 129–37 (1988).

52. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (“[W]e believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”).

53. *Kiobel II*, 569 U.S. 108, 127 (2013) (Breyer, J., concurring). The plurality explained:

[I]t would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

*Id.*

54. *See id.* at 119.

55. *Filartiga*, 630 F.2d at 886 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*\*263–64 (1st ed., 1765–69)). When the British Navy captured two Spanish and three French slave ships off the coast of what is now Nigeria, the British established an international commission that resulted in the liberation of almost 80,000 slaves by international tribunals. *See, e.g.*, Randall Lesaffer, *Vienna and the Abolition of the Slave Trade*, OXFORD UNIV. PRESS BLOG



causes of action expanded from the three original transitory torts to include war prizes and admiralty fraud.<sup>56</sup> The decisions of international tribunals post-World War II became recognized universally as authoritative sources of customary international law.<sup>57</sup>

### 1. *Law of Nations Against Slavery*

During 1814 and 1815, the anti-Napoleonic powers formed the Congress of Vienna and signed the Treaty of Vienna, in which they pledged to take steps to eliminate slavery.<sup>58</sup> In 1822, Justice Joseph Story deduced that the prohibition against slavery arose under the “law of nations.”<sup>59</sup> In the case of *La Jeune Eugenie*,<sup>60</sup> Justice Story identified the prohibition of slavery as an emerging legal norm.<sup>61</sup> He considered incorporating the Treaty of Vienna into the common law

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(June 8, 2015), <http://blog.oup.com/2015/06/vienna-abolition-slave-trade/#sthash.DaAsxEuT.dpuf> [<https://perma.cc/L7JU-WVTF>]

56. See, e.g., *Port v. United States*, 1860 WL 4869, at \*1 (Ct. Cl. 1860) (“This booty naturally belongs to the sovereign making war, no less than the conquests, for he alone has such claims against the hostile nation as warrant him to seize on their property and convert it to his own use.” (citation omitted)).

By 1904, it was well-established that “[t]he modern rule of the law of nations is certainly that [a] ship shall be subject to condemnation for carrying contraband goods.” *The Lucy*, 39 Ct. Cl. 221, 223 (1904) (citation omitted). The courts recognized the “well-known maxim that a person seeking relief in equity must come with clean hands is as potent in prize courts or in international tribunals as in courts of equity.” *Id.* at 225.

Fraud, deception, and improper attempts to deprive a belligerent of his belligerent rights tend to embroil friendly nations in dispute and misunderstanding; and it is for the welfare of the neutral as well as of the belligerent nation that a transaction stained with them be stamped as unlawful, without justification, and without redress.

*Id.*

57. See, e.g., *Khulumani v. Barclay Nat’l Bank*, 504 F.3d 254, 271 (2d Cir. 2007) (describing decisions of International Military Tribunal at Nuremberg post-WWII as authoritative sources of customary international law); *accord Flores v. S. Peru Copper*, 414 F.3d 233, 244 n.18 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 105 nn.39–40 (2d Cir. 2003).

58. See, e.g., Samuel J.M. Donnelly, *Reflecting on the Rule of Law, Its Reciprocal Relation with Rights, Legitimacy and Other Concepts and Institutions*, 32 SYRACUSE J. INT’L L. & COM. 233, 240 n.26 (2005) (citing Declaration of the Eight Courts (Austria, France, Great Britain, Portugal, Russia, Spain, and Sweden) Relative to the Universal Abolition of the Slave Trade, signed at Vienna); Lesaffer, *supra* note 55.

59. See *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 847 (Cir. Ct. D. Mass. 1822) (No. 15,551). Justice Story explained:

Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states.

*Id.* at 846.

60. 26 F. Cas. 832 (Cir. Ct. D. Mass. 1822) (No. 15,551).

61. See *id.* at 841 (establishing liability of nationals who cause harm “through the instrumentality of private agents in foreign countries, who would be ready to assume a nominal

as a document reflecting the “practice and custom” of sovereigns.<sup>62</sup> Justice Story felt he was “bound to consider the [slave] trade an offence against the universal law of society and in all cases, where it is not protected by a foreign government, to deal with it as an offence carrying with it the penalty of confiscation.”<sup>63</sup>

*La Jeune Eugenie* demonstrates that early constitutional scholars, such as Justice Story, believed the ATS provided jurisdiction to punish a violation of the law of nations according to the modern “practice and custom among sovereigns” and fashion a remedy in accord with the standards of the international community, where the court had in personam or in rem jurisdiction over the tortfeasor or the defendant’s assets.<sup>64</sup>

## 2. Conceptualizing the Law of Nations as *Jus Cogens*

In 1980, a Second Circuit panel held that foreign victims of torture could sue under the ATS in *Filartiga v. Pena-Irala*.<sup>65</sup> The court held that the ATS provided the district courts with jurisdiction to define violations of the law of nations under the common law.<sup>66</sup> The panel believed the ATS would fulfill “the ageless dream to free all people from brutal violence.”<sup>67</sup> Such idealism risked opening the floodgates of transnational litigation to human rights litigation on behalf of foreign tort victims; however, the Supreme Court rejected the Second Circuit’s approach to ATS jurisdiction and the notion of a federal common law in *Sosa v. Alvarez-Machain*.<sup>68</sup>

Many reasonable scholars call for judges to conceptualize the law of nations in terms of *jus cogens*.<sup>69</sup> *Jus cogens* are “‘peremptory norm[s]’ of international law . . . , define[d] as the ‘general and consistent practice of states followed by them from a sense of legal obligation.’”<sup>70</sup> *Jus cogens* are a form of natural law

ownership, no one, that has been much acquainted with the real business of this commerce, would be inclined to doubt or deny”).

62. *See id.* at 832 (discussing universal norm prohibiting slavery into federal common law).

63. *Id.* at 847. In that case, “American citizens were engaged in the traffic [of slaves],” [and Justice Story reasoned that it] is manifest, that they would conceal their interests under a foreign flag . . . [to] facilitate their designs, and favour their escape from punishment.” *Id.* at 841.

64. *See id.* (noting that slave ship landed in Massachusetts harbor and was moored under the jurisdiction of admiralty court).

65. 630 F.2d 876, 878 (holding that foreign torture victims could sue under ATS).

66. *See id.* The *Filartiga* court stated: “The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.” *Id.*

67. *Id.* at 890.

68. 542 U.S. 692, 732 (2004).

69. *See, e.g., Sosa*, 542 U.S. at 732 (citing *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994)) (recognizing that torture by state officials violates *jus cogens*); *see also Zia-Zafri*, *supra* note 2, at 91 (arguing that law of nations “strongly resemble *jus cogens* norms”). For a further discussion of *jus cogens*, see generally Weatherall, *supra* note 38, at 1373.

70. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. K

that reflect fundamental rights of human beings applicable universally, everywhere, at all times, and apply to all actors.<sup>71</sup> The prohibitions defined as *jus cogens* include the universal prohibition of crimes against humanity, torture, genocide, slavery, apartheid, war crimes, and terrorism.<sup>72</sup> Importantly, *jus cogens* are limited to “the most serious violations of contemporary international law recognized and accepted by the international community as a whole.”<sup>73</sup> Judicial discretion to adjudicate violations of *jus cogens* derives from the state’s authority and obligation to uphold universal law “without regard to territoriality or the nationality of the offenders.”<sup>74</sup>

### B. The “Charming” Doctrines of Judicial Restraint

In 1804, in the case of *Murray v. Schooner Charming Betsy*,<sup>75</sup> Justice Marshall created the Charming Betsy Doctrine, holding that “an act of Congress ought never to be construed to violate the law of nations if any other possible

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(AM. LAW INST. 1987) (internal citations omitted). “[T]he supremacy of *jus cogens* extends over all rules of international law; norms that have attained the status of *jus cogens* ‘prevail over and invalidate international agreements and other rules of international law in conflict with them.’” *Id.* at 716 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. K (AM. LAW INST. 1987)). Officially, the term *jus cogens* refers to “a peremptory norm of general international law [that] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, United Nations art. 53, May 23, 1969, 1155 U.N.T.S. 332, 345 (entered into force Jan. 27, 1980).

71. See Weatherall, *supra* note 38, at 1362 (noting that these obligations exist beyond consent of states).

The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts—are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*. In the words of the International Court of Justice, these norms, which include “principles and rules concerning the basic rights of the human person,” are the concern of all states; “they are obligations *erga omnes*.”

*Id.* at 1372 (quoting *Siderman de Blake*, 965 F.2d at 715). If the obligation of international law is *erga omnes*, the obligation for a state to make reparation may flow from a shared resource or multilateral human rights convention. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 901 Reporters’ Notes 1 (AM. LAW INST. 1987). According to the *Restatement (Third) of Foreign Relations*:

The obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative, or judicial) that caused the violation; abstention from further violation; or performance of an act that the state was obligated but failed to perform.

*Id.* § 901 cmt. c.

72. See Weatherall, *supra* note 38, at 1375–76.

73. *Id.* at 1379 (citation omitted).

74. *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a), (2) (AM. LAW INST. 1987)).

75. 6 U.S. (2 Cranch) 64 (1804).

construction remains.”<sup>76</sup> This “canon stems from a separation of powers principle that prevents judicial encroachment into the foreign affairs prerogatives of the political branches;” however, others strongly disagree with that interpretation.<sup>77</sup> Some scholars recognize that “this rationale sees the canon as preserving the Constitution’s express apportionment of foreign relations powers to the Executive and the legislature.”<sup>78</sup> Regardless, in *The Nereide*,<sup>79</sup> Justice Marshall clarified that *absent* a specific Congressional enactment, United States courts are “bound by the *law of nations*[,] which is a part of the law of the land.”<sup>80</sup>

### 1. *The Presumption Against Extraterritoriality*

Prudential doctrines of judicial restraint in transnational litigation derive from the principle of “comity” among nations, a principle based on mutual respect for the sovereignty of other nations and restraint from interfering outside territorial or physical jurisdictional bounds.<sup>81</sup> The hurdles foreign litigants must overcome in transnational cases include: (1) jurisdiction, (2) sufficiency of the pleading to establish an actionable claim, (3) certifying a class, (4) statutes of limitation, and (5) motions to dismiss, particularly on the basis of forum non conveniens.<sup>82</sup> In addition, there are several doctrines the court will consider: (1) international comity, (2) citizenship of the parties, (3) the nature of the conduct in question bearing on U.S. interests, (4) foreign policy interests of the United States (political question, act of state, and foreign affairs doctrines), and (5) U.S. public policy interests.<sup>83</sup>

In *Sosa*, the Supreme Court explicitly enumerated five factors that courts should carefully consider before asserting ATS jurisdiction: (1) limit the number of actionable international norms; (2) refrain from “exercising innovative authority” to create federal common law; (3) interpret legislation only to the extent Congress has demonstrated intent to give the law extraterritorial effect; (4) consider

76. *Id.* at 118 (citing Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801)) (reversing foreign ship owner’s claim for damages against own agent who brought cargo into United States due to conflict with federal law).

77. Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1216 (2008).

78. *Id.* at 1219 (citation omitted).

79. 13 U.S. (9 Cranch) 388 (1815).

80. *Id.* at 423 (emphasis added) (“Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.”).

81. See, e.g., *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014) (“International comity is a doctrine of prudential abstention, one that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.” (quotation and citation omitted)).

82. See, e.g., Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT’L L.J. 749, 750 n.5 (2007) (noting obstacles foreign litigants face when filing suit in United States).

83. See *Mujica*, 771 F.3d at 605-07 (listing various factors to consider before exercising ATS jurisdiction); see also *Doe v. Exxon Mobil*, 69 F. Supp. 3d. 75, 90–92 (D. D.C. 2014) (discussing “abstention on the basis of international comity” and foreign affairs preemption, which “holds that in certain cases where state laws implicate foreign affairs, those laws may be preempted, even absent any conflict with federal law.”).

the potential for “collateral consequences” for the *foreign relations* of the United States; and (5) abstain from the use of “judicial creativity” in defining norms given the consensus that the ATS is “only jurisdictional.”<sup>84</sup> “[W]hether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts.”<sup>85</sup>

Foreign plaintiffs must overcome the presumption against extraterritoriality if the claim arose from acts that occurred abroad by raising a strong inference that the actor committed a violation of a “specific, universal, and obligatory” international legal norm.<sup>86</sup> The mere *existence* of prudential factors does not divest the court’s power to remedy violations of universal law; absent express legislative mandate, ATS jurisdiction must be exercised with caution over a norm that satisfies the *Sosa* inquiry.<sup>87</sup>

## 2. *Kiobel v. Royal Dutch Petroleum: Displacing the Presumption*

In general, there is a presumption against applying a U.S. statute to conduct that occurs in the territory of a foreign sovereign absent express legislative authorization.<sup>88</sup> The Supreme Court’s 2013 decision in *Kiobel v. Royal Dutch Petroleum*<sup>89</sup> (*Kiobel II*) affirmed that plaintiffs cannot overcome the canon of the presumption against extraterritorial jurisdiction where their allegations do not establish a nexus of domestic conduct.<sup>90</sup> The Court declined to assert jurisdiction because Congress did not intend to extend protection of the relevant legislation to the foreign litigants in that case.<sup>91</sup>

The Court held that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>92</sup> Notably, *Kiobel II* did not foreclose the possibility of liability of corporate actors where a nexus of domestic

84. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–28 (2004).

85. *Id.* at 732–33 (footnote omitted).

86. See *id.* at 732; see also *In re Est. of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.” (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980))).

87. See, e.g., *Morrison v. Nat’l Australia Bank*, 561 U.S. 247, 266 (2010) (noting that presumption against extraterritoriality “is not self-evidently dispositive, but its application requires further analysis”). In *Morrison*, the Supreme Court held that legislative preemption precluded extraterritorial application of Securities Exchange Act § 10(b) to sales outside the territorial jurisdiction of the United States because the focus of the legislation was the “domestic” sales of securities. See *id.* at 268.

88. See *Kiobel II*, 569 U.S. 108, 116 (2013) (recognizing appropriate “judicial caution” is warranted “in light of foreign policy concerns”).

89. 569 U.S. 108 (2013).

90. See *id.* at 124–25 (describing that domestic conduct must be sufficiently definite and have been accepted by civilized nations).

91. See *id.* at 124. In order to displace the presumption against extraterritorial application of domestic legislation, the plaintiff(s) must establish specific violations through conduct, which “can be said to have been the focus of congressional concern.” *Id.* at 1670 (Alito, J., concurring) (internal quotations and citations omitted).

92. *Id.* at 124–25 (citing *Morrison*, 561 U.S. at 265–74 (2010)). For a further discussion of *Morrison*, see *supra* note 87.

conduct can be established that satisfies modern notions of due process. Due process concerns are satisfied if the court has territorial jurisdiction over the acts, in personam jurisdiction over the defendant, or “the defendant’s conduct substantially and adversely affects an important American national interest.”<sup>93</sup>

### 3. *Tone at the Top? Executive Branch May Influence Judicial Discretion on Matters of Foreign Affairs*

Since, under the U.S. Constitution, the President has the power to conduct foreign relations, several presidential administrations have advised courts on the country’s policies in foreign relations in ATS cases.<sup>94</sup> For example, in *Filartiga*, “the Carter Administration filed an amicus brief strongly supporting jurisdiction under the Alien Tort Statute.”<sup>95</sup> Conversely, in *Sosa*, the Bush Administration filed an amicus brief stating an opposing position, suggesting the judicial branch did not have authority under the ATS to create or authorize any particular right of action without further congressional action.<sup>96</sup> Notwithstanding executive pressure, historically, the ATS has “enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”<sup>97</sup>

### 4. *Jesner v. Arab Bank, PLC: High Court Limits Jurisdiction over Foreign Corporations, Raising Red Flags for Four Justices*

In *Jesner*, the Second Circuit affirmed dismissal of ATS claims brought by foreign victims of terrorism against a corporation.<sup>98</sup> The Supreme Court granted certiorari on the sole issue of “[w]hether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.”<sup>99</sup> At oral argument, petitioners maintained that principles from traditional tort law establish respondeat superior

93. *Id.* at 127 (Breyer, J., concurring); *see also, e.g., Nestle USA*, 766 F.3d 1013 (9th Cir. 2014), *cert. denied*, 136 S.Ct. 798 (2016).

94. *See* Burley, *supra* note 32, at 463 (summarizing how presidents have influenced the development of modern alien tort statute case law).

95. *Id.* (citing Memorandum for the United States as Amicus Curiae, *Filartiga v. Penarala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090)). “Eight years later, . . . the Reagan Administration” took the opposite position, to “effectively renounce[] the Carter administration’s position and outline[] a much narrower interpretation of the Alien Tort Statute.” *Id.* at 463, 463 n.12 (citing Brief for United States as Amicus Curiae, *Trajano v. Marcos*, No. 86-0297 (D. Haw. July 18, 1980)).

96. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

97. *Id.*

98. *See In re Arab Bank (Jesner)*, 808 F.3d 144, 157 (2d Cir. 2015), *reh’g en banc denied*, 822 F.3d 34 (2d Cir. 2016), *cert. granted sub. nom., Jesner v. Arab Bank, PLC*, 137 S.Ct. 1432 (2017). In *Jesner*, petitioners are aliens, plaintiffs, family members, or estate representatives of those injured, captured or killed by terrorists overseas, who claim that respondent, a Jordanian bank, financed and facilitated activities of such terrorist organizations. *See Jesner*, 808 F.3d at 147.

99. Petition for Writ of Certiorari at i, *Jesner v. Arab Bank, PLC* (No. 16-499); *Jesner v. Arab Bank, PLC*, SCOTUSBLOG, <http://www.scotusblog.com/wp-content/uploads/2016/10/16-499-cert-petition.pdf> [<https://perma.cc/4KKS-K947>] (last visited Jan. 12, 2018).

liability of corporate actors.<sup>100</sup> They raise the legitimate concern shared by amici that “a categorical bar against corporate liability would itself create foreign relations problems along the lines the ATS was designed . . . to solve.”<sup>101</sup> According to petitioners, the common law doctrine of the presumption against extraterritoriality as applied in *Kiobel II* adequately takes into account foreign relations issues.<sup>102</sup> Moreover, a bar to corporate liability would foreclose causes of action by foreign litigants seeking monetary relief against a corporation for violations of international law in a manner that was not intended by the First Continental Congress in enacting the ATS in 1789.<sup>103</sup>

The parties disagree over whether corporate liability under international law is a norm, which must meet *Sosa*’s “specific, universal, and obligatory” criteria.<sup>104</sup> Petitioners maintain that corporate liability is not subject to the *Sosa* analysis because liability is determined by the common law doctrine of respondeat superior, a rule they maintain is “shared by the vast majority of civilized legal systems.”<sup>105</sup> At oral argument, Justice Kagan cogently observed that “a norm is just a standard of conduct and [does not] have anything to do with enforcement of that standard[.]”<sup>106</sup>

The respondent contends that if the Court decides to conceptualize corporate liability under the “specific, universal, and obligatory” standard espoused in *Sosa*, then there is no such norm that imposes liability on corporations for violations of international law.<sup>107</sup> However, Justice Sotomayor questioned this reasoning, asserting that the “norm is the conduct,” that is the obligation to not finance terrorists, engage in piracy, slavery, genocide, or other prohibited crimes against humanity.<sup>108</sup> Justice Breyer pointed out that, as a matter of common sense, the prohibition of a particular act by treaty ratified by the United States would naturally extend “to the perpetrator being sued . . . such as a corporation or individual[.]”<sup>109</sup>

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100. See Transcript of Oral Argument at 3, *Jesner v. Arab Bank, PLC* (2018) (No. 16-499), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-499\\_n24m.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-499_n24m.pdf) [<https://perma.cc/J223-VBBM>] (arguing that “corporations can be held liable in civil actions for torts”); *id.* at 25–26 (describing how traditional tort law imposes respondeat superior liability).

101. *Id.* at 4.

102. See *id.* at 4–5 (maintaining that existing common law doctrine of the presumption against extraterritoriality is sufficient without needlessly limiting corporate liability).

103. See *id.* at 7–8. Chief Justice Roberts referred back to the “Marbois Incident” and asked if extending liability from individuals to corporate defendants would increase “foreign entanglements.” *Id.* at 7. In response, petitioners referred to the brief filed by Comparative Law Scholars and pointed to several other jurisdictions that permit similar suits for violations against the law of nations that occur in other parts of the world. *Id.* at 8–9. For a further discussion of the Marbois Incident, see *supra* notes 43 and accompanying text.

104. See *id.* at 24–25 (according to Justice Kennedy, holding corporations liable seem to be a norm “in the sense that it tells corporations what they must do [and] how they run their business”).

105. *Id.* at 25–26.

106. *Id.* at 26.

107. See *id.* at 41.

108. See *id.* at 42.

109. *Id.* at 43. Justice Breyer pointed to the International Convention for the Suppression of the Financing of Terrorism, which “says that states must take necessary measures to

In a 5-4 plurality decision issued on April 24, 2018, five of the nine Supreme Court Justices agreed in principle that “absent further action from Congress it would be inappropriate for courts to extend ATS liability to *foreign* corporations.”<sup>110</sup> Concurring in part and concurring in the judgment, Justice Alito argued that “[c]reating causes of action under the Alien Tort Statute against foreign corporate defendants would precipitate exactly the sort of diplomatic strife that the law was enacted to prevent.”<sup>111</sup> Also concurring in part and concurring in the judgment, recently appointed Justice Neil Gorsuch noted that the “practical consequences” of creating a new cause of action “would likely involve questions of foreign affairs and national security—matters that implicate neither judicial expertise nor authority.”<sup>112</sup>

Justice Sonia Sotomayor delivered the dissenting opinion, joined by Justice Ruth Bader Ginsberg, Justice Stephen G. Breyer, and Justice Elena Kagan in full; the dissent strongly critiqued the reasoning employed by the plurality decision and maintained that corporate liability for violations of the law of nations is well-established in the common law, stating:

The text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the

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enable a legal entity located in its territory or organized under its laws to be held liable,” and concluded “[t]hat sounds like a corporation. And it sounds like the relation is the same as the international norm to the individual who struck the French ambassador in the street.” *Id.* at 44.

110. *Jesner v. Arab Bank*, No. 16-499, at \*19 (U.S. Apr. 24, 2018) (plurality opinion) (emphasis added); *see also id.* at \*20 (plurality opinion) (advocating a heightened separation of powers doctrine to avoid judicial matters that risk encroaching on foreign affairs reserved to the other branches without explicit authorization from Congress).

111. *Id.* at \*1 (Alito, J., concurring in part and concurring in the judgment).

112. *Id.* at \*4 (Gorsuch, J., concurring in part and concurring in the judgment). Further, Justice Gorsuch opined:

It is for Congress to “define and punish . . . Offences against the Law of Nations” and to regulate foreign commerce. And it is for the President to resolve diplomatic disputes and command the armed forces. Foreign policy and national security decisions are “delicate, complex, and involve large elements of prophecy” for which “the Judiciary has neither aptitude, facilities[,] nor responsibility.”

*Id.* at \*\*4-5 (citations omitted) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948)). *Compare with* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (“Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.”). In 2004, the Court addressed the separation of powers issue as follows:

Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts.

*Sosa*, 542 U.S. at 731 n.19 (citations omitted).



ATS. Nothing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged.<sup>113</sup>

### C. Circuits Split on the Standard of Corporate Aiding and Abetting Liability

Today, foreign tort plaintiffs have the burden of overcoming the presumption against extraterritoriality to establish jurisdiction over a cause of action for aiding and abetting torts outside the United States' territorial jurisdiction (extraterritorial causes of action).<sup>114</sup> The Fourth, Ninth, Eleventh, and D.C. Circuits have recognized secondary liability for corporate actors for aiding and abetting violations of international law.<sup>115</sup> Notably, the Second Circuit did not foreclose corporate liability by applying legislative preemption principles to dismiss claims arising under the Trafficking Victims Protection Act (TVPA).<sup>116</sup>

However, there is a circuit split regarding the specific intent requirements for extraterritorial criminal acts.<sup>117</sup> The Second and Fourth Circuits require the plaintiff's allegations to raise the inference that the defendant acted "with the purpose of facilitating the commission of that crime."<sup>118</sup> Relying on the Rome Statute of the International Criminal Court, these cases hold that "a purpose standard alone has gained 'the requisite acceptance among civilized nations for application in an action under the ATS.'"<sup>119</sup>

On the other side of the circuit split, courts have tried to draw on the aiding and abetting standard from customary international law according to the actual

113. *Id.* at \*1 (Sotomayor, J., dissenting).

114. *See* Weatherall *supra* note 38, at 1380, 1384 (discussing *Kiobel II*'s "presumption against extraterritorial application of the ATS").

115. *See Aziz v. Alcolac*, 658 F.3d 388, 396 (4th Cir. 2011) (joining its sister circuits in recognizing that *Central Bank v. First Interstate Bank* did not foreclose corporate aiding and abetting liability under ATS); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 19 (D.C. Cir. 2011) (holding that secondary or aiding and abetting liability for violations of international law "is well established in customary international law"); *see also Sinaltrainal v. Coca-Cola*, 578 F.3d 1252, 1258 n.5 (11th Cir. 2009) (recognizing aiding and abetting liability), *abrogated by* *Mohamed v. Palestinian Authority*, 566 U.S. 449 (2012).

116. *See Aziz*, 658 F.3d at 392.

117. *Compare id.* at 396 (citing *Presbyterian Church of Sudan v. Talisman Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (adopting *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring)), *with Doe I v. Unocal Corp.*, 395 F.3d 932, 950–51 (9th Cir. 2002) (adopting knowledge standard). To summarize the Second Circuit's decision in *Khulumani*, the court applied the presumption against extraterritoriality and declined to give extraterritorial effect to legislation for torts that occurred outside of the United States. *See Khulumani*, 503 F.3d at 263. In *Khulumani*, the majority required the district court to perform a case-by-case analysis and address the extent of any foreign policy concerns. *See id.* In *Talisman*, the court concluded that the Rome Statute imposed a clear purpose standard that requires proof that a defendant provided practical assistance, "which has substantial effect on the perpetration of the crime." *See Talisman*, 582 F.3d at 259 (relying on the Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999).

118. *Talisman*, 582 F.3d at 258 (quoting *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring)); *see also Aziz*, 658 F.3d at 399–400.

119. *Aziz*, 658 F.3d at 401 (quoting *Talisman*, 582 F.3d at 259).

standards applied by international tribunals.<sup>120</sup> The D.C. Circuit, for instance, requires a plaintiff to offer proof that the defendant knowingly provided a specific direction that caused a violation of the law of nations.<sup>121</sup> The Ninth Circuit declined to definitively answer the question, but noted—in dicta—that knowledge of violations of international norms could form the basis of a cause of action.<sup>122</sup>

### III. THE NINTH CIRCUIT’S DECISION IN *NESTLE USA*: A GAME-CHANGING VICTORY FOR CHILD SLAVES OR BITTERSWEET COLLAPSE OF THE CHOCOLATE EMPIRE?

Seventy percent of the world’s supply of cocoa is cultivated in the African country known as the Ivory Coast (“Côte d’Ivoire”).<sup>123</sup> The “endemic” use of child labor is partly due to a societal expectation within farming families.<sup>124</sup> However, modern cocoa plantations submit children to hard labor, hazardous chemicals, and dangerous equipment.<sup>125</sup> Ivorian and Malian children harvest cocoa beans under conditions prohibited by the Worst Forms of Child Labor Convention.<sup>126</sup>

120. See *Doe VIII v. Exxon Mobil Corp.*, No. 01-1357, 2015 WL, 504218, at \*9, 2015 BL 223859, at \*13-14 (D.D.C. July 6, 2015) (discussing decisions from military tribunals created to adjudicate legal norms in wake of World War II).

121. See *id.*; see also *Doe VIII v. Exxon Mobil Corp.*, II, 527 Fed. Appx. 7 (D.C. Cir. 2013) (mem.); *Doe v. Exxon Mobil*, 69 F. Supp. 3d 75 (D.C.C. 2014) (holding actors accountable for injuries clearly in violation of domestic and foreign law).

122. See, e.g., *Nestle USA*, 766 F.3d 1013, 1026 (9th Cir. 2014) (“These allegations are sufficient to satisfy the *mens rea* required of an aiding and abetting claim under either a knowledge or purpose standard.”), *cert. denied*, 136 S.Ct. 798 (2016); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (directing federal courts to apply legal norms in ATS litigation that are accepted by “civilized nations”).

123. See *Nestle USA*, 766 F.3d 1013, 1023 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016). “With the United States importing 20% of Côte d’Ivoire’s exports of cocoa products, and that number representing almost half of the United States’ supply, child labor likely produced much of the chocolate products that United States’ consumers enjoy.” Mustapha, *supra* note 7, at 1164–65 (citations omitted).

124. See Erika George, *Incorporating Rights: Child Labor in African Agriculture and the Challenge of Changing Practices in the Cocoa Industry*, 21 U.C. DAVIS J. INT’L L. & POL’Y 59, 65 (2014) (“Cocoa cultivation is often a family business. By some estimates, over 90 percent of all cocoa comes from approximately three million small family farmers who depend on cocoa cultivation as their primary source of income.” (citations omitted)).

125. See *id.* (noting that “[o]f the 819,921 children identified by the U.S. Department of Labor study as working in Côte D’Ivoire’s cocoa sector, 50.6 percent of them reported injuries from dangerous activities” (citations omitted)).

126. See Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor art. 3, June 17, 1999, S. Treaty Doc. No. 106-5, 1999 U.S.T. LEXIS 170 [hereinafter ILO Convention 182]; see also *Ratifications of C182—Worst Forms of Child Labour Convention, 1999 (No. 182)*, INT’L LAB. ORG., [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312327](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312327) [<https://perma.cc/2THY-72UA>] (last visited Feb. 3, 2018) (noting that United States is one of 181 countries that has ratified which binds signatories to take immediate actions

*A. Chocolateering: Domestic Candymakers Lobby to  
Postpone Child Labor Reform—Efforts that Threaten to Melt the Chocolate  
Industry’s Sweet Façade*

The Chocolate Manufacturers Association has taken strident efforts on Capitol Hill to indefinitely postpone reforming its labor practices, despite dissent by the media, consumers, political leaders, and even shareholders.<sup>127</sup> In an effort to impact consumer choice and incentivize the industry to reform, the media publicized the chocolate industry’s “complicity in child labor practices on West African cocoa farms.”<sup>128</sup> These reports prompted Congressman Elliot Engle to propose an amendment to the 2002 Agriculture Appropriations Bill of the Food and Drug Administration Act that would have enabled a “slave-free” label for chocolate made without forced labor.<sup>129</sup>

In response, the Chocolate Manufacturers Association hired two former Senate majority leaders, Bob Dole and George Mitchell, to lobby legislators against the labeling requirement.<sup>130</sup> The debate led to a compromise known as the “Harkin-Engel Protocol”—a voluntary enforcement mechanism adopted by the Senate, with the main effect of postponing any potential considerations of mandatory reforms until International Labor Organization (ILO) Regulation 182 enters into force in 2020.<sup>131</sup>

On the day after Halloween in 2012, a representative class of Hershey Chocolate shareholders filed a “books and records action” against Hershey Corporation.<sup>132</sup> This action was “relate[d] to the undisputed and unfortunate endemic use of child labor on cocoa farms in West Africa.”<sup>133</sup> The purpose of the inspection was to procure evidence that “Hershey is aware of child labor within its supply

to prohibit and eliminate worst forms of child labor).

127. See generally Manza, *supra* note 2.

128. Mustapha, *supra* note 7, at 1166; see also Manza, *supra* note 2, at 396 (“Starting in 2001, the media began to uncover the overwhelming use of illicit labor practices in West African cocoa farms.” (citation omitted)). “Media reports on the ‘unlawful and disturbing labor practices’ on West African cocoa farms began to circulate in 2001, attracting the attention of Congress, according to the complaint.” Iulia Flip, *Hershey Co. Sued for Info on Child Labor*, COURTHOUSE NEWS SERV. (Nov. 5, 2012), <https://www.courthousenews.com/hershey-co-sued-forinfo-on-child-labor/> [<https://perma.cc/WEP8-83RS>].

129. See Mustapha, *supra* note 7, at 1166–67 (citing H. Amend. 142 to Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act 2002 H.R. 2330, 107th Cong. (2001)); see also Manza, *supra* note 2, at 396 (noting proposed amendment that “would require labels on cocoa products that signified whether the supply chain was ‘slave-free.’” (citation omitted)).

130. See Mustapha, *supra* note 7, at 1167.

131. See George, *supra* note 124, at 69–70; see also Master’s Report, *La. Mun. Police Emps.’ Ret. Sys. v. Hershey Co.*, No. 7996, 2013 WL 4549659, 2013 Del. Ch. LEXIS 273, at \*9 (Del. Ch. Aug. 16, 2013) [hereinafter *Hershey Derivative Litigation Master’s Report*]. For a further discussion of ILO Regulation 182, see *supra* note 14 and *infra* note 175.

132. See *La. Mun. Police Emps.’ Ret. Sys. v. Hershey Co. (Hershey Derivative Litigation)*, No. 7996, 2013 WL 6120439, at \*1 (Del. Ch. Apr. 16, 2013) (noting that shareholders’ purpose was to demand inspection of breaches of fiduciary duty by Hershey directors relating to unlawful child labor on cocoa farms in West Africa); see also Del. Code. Ann. tit. 8, § 220 (2010) (establishing standard for books and record action).

133. *Hershey Derivative Litigation*, 2013 WL 6120439, at \*2.

chain, but will not take action to end its reliance on ill-gotten cocoa until 2020.”<sup>134</sup> Hershey moved to dismiss the action, arguing that the shareholders failed to state a proper purpose.<sup>135</sup> Upon the advice of a special master, the Delaware Chancery Court dismissed the shareholders’ action for failing to assert a credible basis that Hershey had incorporated unlawful child labor into its business strategy to infer any violations of foreign or domestic law.<sup>136</sup>

### B. *Facts and Procedural History of Nestle USA*

In the U.S. District Court for the Central District of California, Global Exchange, a San Francisco-based human rights organization, filed suit on behalf of a proposed class of Malian children between the ages of twelve and fourteen years old who were forced to work for up to eighty-four hours each week on cocoa plantations in Côte d’Ivoire.<sup>137</sup> Plaintiffs alleged that Nestle USA, Inc. (Nestle), Archer Daniels Midland Company (ADM), Cargill Incorporated Company, and Cargill Cocoa (Cargill) (collectively defendants) aided and abetted “violations of international law norms that prohibit slavery; forced labor; child labor; torture; and cruel, inhuman, or degrading treatment.”<sup>138</sup> They asked the district court for injunctive relief for violations of the Worst Forms of Child Labor Convention, the TVPA, as well as monetary damages for claims under state tort law, including unjust enrichment and unfair business practices.<sup>139</sup>

#### 1. *Specific Allegations of Aiding and Abetting Forced Child Labor*

Plaintiffs claimed that the “[d]efendants had first hand knowledge of the widespread use of child labor on said farms.”<sup>140</sup> According to the plaintiffs, Nestle exerts a high degree of control over cocoa production in Côte d’Ivoire.<sup>141</sup> They alleged that Nestle aided cocoa agriculture by providing financial and technical farming assistance through “money, supplies, and training . . . knowing that their assistance would necessarily facilitate child labor.”<sup>142</sup> With regard to Nestle’s

134. *Id.* at \*3.

135. *See id.* at \*5.

136. *See id.* at \*12. The special master found the evidence, articles, and sources too attenuated to infer a credible basis of wrongdoing. *See Hershey Derivative Litigation Master’s Report*, 2013 Del. Ch. LEXIS 273, at \*7–8.

137. *See Doe I v. Nestle, S.A. (Nestle I)*, 748 F. Supp. 2d 1057, 1076 (“The plaintiffs . . . allege that they were forced to work ‘cutting, gathering, and drying’ cocoa beans for twelve to fourteen hours a day, six days a week.” (quoting First Amended Complaint at ¶¶ 57–59, *Doe v. Nestle S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal 2010) (No. 205-cv-5133))).

138. *Id.* at 1064.

139. *See id.* at 1064–65 (alleging that Defendants aided and abetted torture); *see also id.* at 1114–15 (alleging defendants received direct benefit from forced labor practices and owe restitution to former child slave plaintiffs).

140. Complaint at ¶ 44, *Nestle I*, 748 F. Supp. 2d 1057 (C.D. Cal 2010) (No. 205-cv-5133).

141. *See Nestle I*, 748 F. Supp. 2d at 1065 (describing high degree of control that Nestle maintains over agriculture in Cote D’Ivoire).

142. *Id.* at 1066 (quoting Complaint at ¶ 52, *Nestle I*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. 205-cv-5133)).

cooperative suppliers, they alleged that defendant ADM exerts a high-degree of control over the agricultural production and frequently interacts with Ivorian farmers,<sup>143</sup> and that defendant Cargill operates a cocoa processing plant that failed to report forced labor practices in breach of its ISO certification.<sup>144</sup> The plaintiffs maintained that the Northern District of California was a proper venue because the foreign judicial system would not provide effective relief, partially because of high rates of corruption in Côte d'Ivoire and lack of an effective legal forum in Mali.<sup>145</sup>

The issue before the district court was whether these allegations raised legitimate inferences that defendants knowingly aided and abetted forced child labor through their control over the cocoa market.<sup>146</sup> Plaintiffs pointed to domestic conduct, such as the chocolate manufacturers' lobby, arguing that the defendants obtained a direct benefit from postponing labor reform to sustain their "ongoing, cheap supply of cocoa by maintaining exclusive supplier/buyer relationships with local farms and/or farmer cooperatives in Cote d'Ivoire."<sup>147</sup> Nestle and its cooperative suppliers did not specifically deny the allegations that a nexus of conduct in the United States facilitated the flow of money, equipment, and training to Ivorian farmers, with the knowledge that such assistance would facilitate the farmers' use of forced child labor, child labor, torture, and cruel, inhuman, and

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143. See *id.* at 1065 (discussing ADM Cocoa's direct contact with Ivorian farmers and power to influence production processes).

144. See *id.* at 1066 (describing Cargill's ISO certification for "cocoa buying stations in Daloa and Gognoa").

145. See *id.* at 1064. In the complaint, plaintiffs stated the following reasons for bringing suit in the California district court:

(1) there is no law in Mali allowing civil damages for their injuries caused by non-Malian cocoa exporters (as all Defendants are American, European, or Ivorian corporations); (2) no suit can be brought in Cote d'Ivoire because "the judicial system is notoriously corrupt and would likely be unresponsive to the claims of foreign children against major cocoa corporations operating in and bringing significant revenue to Cote d'Ivoire"; (3) Plaintiffs and their attorneys would be subjected to possible harm in Cote d'Ivoire on account of general civil unrest and "the general hostility by cocoa producers in the region"; and (4) *the United States has provided an appropriate forum for these claims through the [ATS] and the Torture Victim Protection Act, 28 U.S.C. § 1350.*

*Id.* (emphasis added) (internal citations omitted).

In addition, Cote D'Ivoire's level of public corruption is extremely high. The 2014 Corruption Perceptions Index examined public sector corruption in 175 countries; 92% of Sub-Saharan African countries scored in the bottom fiftieth percentile, making it the most corrupt continent in the world. The CPI gave each country a score ranging from 0 (highly corrupt) to 100 (very clean). The 2014 CPI for La Côte D'Ivoire was 32. Out of all 175 countries, La Côte D'Ivoire tied for 115th; it was perceived as less corrupt than Nigeria (136th), and more corrupt than Ethiopia or Mali (110th). See *Corruption Perceptions Index 2014*, TRANSPARENCY INT'L SECRETARIAT (2014), [https://issuu.com/transparencyinternational/docs/2014\\_cpibrochure\\_en/12](https://issuu.com/transparencyinternational/docs/2014_cpibrochure_en/12) [<https://perma.cc/GCL3-V4KW>] (providing statistics that rank 160 countries and territories based on how corrupt they are perceived to be).

146. See *Nestle I*, 748 F. Supp. 2d at 1063 (citation omitted).

147. *Id.* at 1064 (citation and internal quotations omitted).

degrading treatment in violation of international legal norms.<sup>148</sup> The plaintiffs argued that the defendants' conduct taken as a whole led to the "overwhelming conclusion" that the defendants had likely committed a violation of international law.<sup>149</sup>

## 2. District Court's Analysis

The district court granted the defendants' Rule 12(b)(6) motion to dismiss, finding that the plaintiffs failed to establish corporate liability for violations of international law.<sup>150</sup> The court recognized that the plaintiffs raised the legitimate inference that the "[d]efendants knew or should have known of the labor violations on the Ivorian farms."<sup>151</sup> However, the court rendered the following conclusions: Congress did not intend protections under the TVPA to extend to plaintiffs in this case,<sup>152</sup> the ATS did not provide jurisdiction for aiding and abetting for "ordinary commercial transactions[;]"<sup>153</sup> and "the aider and abettor's assistance must bear a causative relationship to the specific wrongful conduct committed by the principal."<sup>154</sup> The court found the plaintiffs' allegations failed to establish that Defendants acted with the requisite *actus reus* and *mens rea* required by international law.<sup>155</sup> Further, the court concluded that no international norm existed to establish corporate liability.<sup>156</sup> According to the district court, the defendants' "tacit encouragement" of child labor practices and "specific wrongful acts[;]" such as "Ivorian farmers' acts of whipping, beating, threatening, confining, and depriving plaintiffs" did not give rise to a corporate aiding and abetting violation of the law of nations.<sup>157</sup>

The plaintiffs vehemently opposed the district court's ruling in *Nestle USA*

148. *See id.*

149. *See id.* at 1109 (summarizing plaintiffs' arguments urging district court to consider allegations collectively as establishing a violation of international norms).

150. *See id.* at 1143 ("[P]laintiffs must bear the burden to show that international law *does* recognize corporate liability.").

151. *Id.* at 1110.

152. *See id.* at 1144.

153. *See id.* at 1109 ("However, even viewing Plaintiffs' allegations collectively rather than separately, the overwhelming conclusion is that Defendants were purchasing cocoa and assisting the production of cocoa. It is clear from the caselaw [sic] that ordinary commercial transactions do not lead to aiding and abetting liability." (emphasis omitted)); *see id.* at 1067 (reasoning that "*Sosa* sharply circumscribed the availability of private causes of action that are cognizable in federal courts under [the ATS]" (emphasis omitted)).

154. *Id.* at 1081 (emphasis omitted) (citation omitted).

155. *See id.* at 1110 (reasoning that plaintiffs conceded at oral argument that they "cannot . . . allege that Defendants acted with the purpose and intent that their conduct would perpetuate child slavery on Ivorian farms"). *See id.* at 1109-10 (reasoning that defendants were primarily engaged in "ordinary commercial transactions" in their "purchasing cocoa and assisting the production of cocoa" and did not establish that their "conduct ha[d] a substantial effect on the perpetration of the specific crime" viewing plaintiff's allegations individually).

156. *See id.* at 1143 (concluding that "no court ha[d] yet identified a sufficiently well-defined and universally recognized international law norm establishing corporate liability in the first place").

157. *Id.* at 1111 (citing Complaint at ¶¶ 57-59, *Nestle I*, 748 F. Supp. 2d 1057 (C.D. Cal 2010) (No. 205-cv-5133)).

that no court had established an international norm establishing corporate liability.<sup>158</sup> The plaintiffs appealed to the Ninth Circuit to establish the ATS allowed for jurisdiction over a corporate actor for aiding and abetting violations of international law.<sup>159</sup>

*C. Victory Is Sweet: Ninth Circuit Focused on Holding Nestle Accountable*

The Ninth Circuit Court of Appeals reversed and vacated the district court's decision.<sup>160</sup> The Ninth Circuit remanded to give the plaintiffs an opportunity to amend their complaint.<sup>161</sup> Of particular significance, the Ninth Circuit did not foreclose corporate liability for violations of universal law and found that the presumption against extraterritorial application of legislation does not bar suits brought against corporate actors for violations of the law of nations.<sup>162</sup>

*1. The Prohibition Against Slavery Applies to State Actors and Non-State Actors: There Is No Exception for Corporate Offenders*

To determine whether corporate liability exists for a particular norm, the Ninth Circuit instructed the lower courts “to apply customary international law to determine the nature and scope of the norm underlying the plaintiffs’ claim,”<sup>163</sup> and courts must determine if the prohibition applies to state actors or private actors or if the norm alleged is universal such that it would apply to all actors at all times.<sup>164</sup> Although the plaintiffs argued that the “knowledge that the aider and abettor’s acts would facilitate the commission of the underlying offense,” the Ninth Circuit did “not decide whether a purpose or knowledge standard applie[d] to aiding and abetting ATS claims.”<sup>165</sup> Rather, the Ninth Circuit concluded that

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158. See *id.* 1145 (“It appears to the [District] Court that Plaintiffs hold a very different view of the legal principles discussed in this Order. If that is the case, Plaintiffs would be well-advised to consider filing an appeal rather than filing an amended complaint.”). For a further discussion of *Jesner*, see *supra* notes 98–113 and accompanying text.

159. See *Nestle USA*, 766 F.3d 1013, 1018 (9th Cir. 2014) (noting that proposed class of child plaintiffs declined to amend their complaint and went straight to circuit court).

160. See *id.* at 1028 (declining to apply *Kiobel IP*’s “amorphous touch and concern test”).

161. See *id.* (observing that *Morrison*’s focus is used to discern Congress’s intent when passing statutes, reasoning that it “cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms”). For a further discussion of *Morrison*, see *supra* note 87 and accompanying text.

162. See *id.* at 1022.

163. *Id.* at 1022.

164. See *id.* at 1020 (citing *Sarei v. Rio Tinto*, 671 F.3d 736, 760, 765 (9th Cir. 2011)).

165. *Id.* at 1023–24. Plaintiffs argued that the “knowledge standard has also been embraced by contemporary international criminal tribunals.” *Id.* at 1023; see also *Khulumani*, 504 F.3d at 277–79 (Katzmann, J., concurring) (noting that international criminal tribunal decisions have applied knowledge standard). But see *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2d Cir. 2009) (holding that defendant must act purposefully to satisfy the mens rea for aiding and abetting under ATS based on application of international law). The *Talisman* court concluded that ATS permits accessorial liability for violations of international law, but only if the attendant conduct was purposeful. See *Talisman*, 582 F.3d at 259. See also *Aziz v. Alcolac*, 658 F.3d 388, 399–400 (4th Cir. 2011) (holding same).

the plaintiffs raised the reasonable inference that the defendants acted with the purpose of facilitating child slavery by providing financial assistance to the farming operations, maximizing revenue, and reducing production costs.<sup>166</sup> The Ninth Circuit remanded to the trial court with instructions to look to *domestic tort law* to determine whether recovery from the corporation is permissible.<sup>167</sup> Of particular significance, the Ninth Circuit recognized that a violation of the prohibition against slavery is a violation of universal customary law that may be asserted against corporate actors.<sup>168</sup>

## 2. Critical Analysis: The Dark Chocolate Truth

The Ninth Circuit subsequently granted Nestle USA's petition for rehearing en banc, and the Ninth Circuit judges ultimately denied relief. Nestle USA and its cooperative suppliers petitioned the Supreme Court of the United States for certiorari, which the Court denied in January 2016.<sup>169</sup> In this case, the district court failed to allow plaintiffs' claims to survive summary judgment, which is a necessary prerequisite to remedy the rights of foreigners and embrace basic principles of human dignity protected by universal law as intended by the First Continental Congress.<sup>170</sup> The Ninth Circuit's decision and denial of certiorari clarifies that the ATS provides a basis for jurisdiction over tort claims of foreign victims asserted against corporate actors for violations of universal law. The Ninth Circuit's decision in *Nestle USA* confirmed that the prohibition of slavery is a universal norm of international law that applies to state and private actors.<sup>171</sup>

The Ninth Circuit did not foreclose the possibility of a knowledge standard to establish aiding and abetting liability, which can be drawn from international tribunals.<sup>172</sup> According to the International Criminal Tribunal for Rwanda, the actus reus of aiding and abetting is established by "all acts of assistance in the

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166. See *Nestle USA*, 766 F.3d at 1024–25 (noting defendant's control over cocoa market in Ivory Coast).

167. See *id.* at 1022 (holding court should apply "domestic tort law to determine whether recovery from the corporation is permissible").

168. See *id.* ("We conclude that the prohibition against slavery is universal and may be asserted against the corporate defendants in this case.").

169. 136 S. Ct. 798 (2018).

170. See generally *Nestle I*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

171. See *Nestle USA*, 766 F.3d at 1020 (adopting corporate liability analysis from *Sarei* to conclude that "norms were universal or applicable to all actors, and, consequently, applicable to corporations" (citation omitted) (internal quotations omitted)).

The Supreme Court has focused on the main object of ATS that is the conduct of the states; indeed, many prohibitions only apply to state action, and "an important issue in ATS litigation can be determining whether the norm asserted by the plaintiff is applicable to both state actors and private actors." See *id.* (citing *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 165 (2d Cir. 2010)).

172. See *id.* at 1023-1024 (declining to decide whether purpose or knowledge standard applied because plaintiffs' allegations met more stringent purpose standard).



form of either physical or moral support’ that ‘substantially contribute to the commission of the crime.’<sup>173</sup> Under the standards applied by international tribunals, “[i]t is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime.”<sup>174</sup> *Nestle USA* joins a trend of similar human rights victories toward enhanced accountability for corporations and global labor standards.<sup>175</sup> In *Doe v. Unocal Corp.*, the Universal Declaration of Human Rights was held out as evidence that forced labor or slavery is a *jus cogens* violation of the law of nations.<sup>176</sup>

#### IV. IMPACT: FOSTERING ACCOUNTABILITY FOR GLOBAL CORPORATIONS

In a globalized economy, where MNCs have a growing tendency to cause international friction, the courts need guidance on the scope of extraterritorial jurisdiction to remedy violations of the law of nations under the ATS. *Kiobel II* indicates that “mere corporate presence” is a relevant factor to determining jurisdiction under the ATS, but it is not dispositive to rebutting the presumption against extraterritoriality.<sup>177</sup>

Recent cases highlight the potential for different results depending on venue. The Fifth Circuit upheld dismissal of claims brought pursuant to the Trafficking Victims Protections Reauthorization Act (TVPRA) and state common law.<sup>178</sup>

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173. *Unocal*, 395 F.3d at 950 (quoting Prosecutor v. Musema, No. ICTR-96-13-T 45, ¶ 126 (Rwanda Jan. 27, 2000)). Under Article 2(2)(e) of the Rome Statute, the Tribunal had power to prosecute genocide, which by definition included “forcibly transferring children of the group to another group.” *Musema*, No. ICTR-96-13-T 52, at ¶ 150. Under Article 3(c) and (f), it could prosecute enslavement and torture. *See id.* at 6, ¶ 3. Article 6 incorporates a broad definition of individual criminal responsibility, which extends to government officials, subordinates, and supervisors. *Id.* at 9, ¶ 5.

174. *Unocal*, 395 F.3d at 950 (citing Prosecutor v. Furundžija, IT-95-17/1 T (Dec. 10, 1998), reprinted in 38 I.L.M. 317, ¶ 245 (1999)).

175. *See, e.g.*, David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842, 1876 (2014) (noting that ILO Convention 182 prohibits child labor); REPORT OF THE AUGUST 2011 HUMAN RIGHTS DELEGATION TO HERSHEY, PA. 11 n.27 (Sept. 2, 2011), [https://www.brandeis.edu/ethics/pdfs/international\\_justice/Hersheys.pdf](https://www.brandeis.edu/ethics/pdfs/international_justice/Hersheys.pdf) [<https://perma.cc/MZY4-LFH5>] (noting goal of eliminating employment discrimination); *see also* ILO Declaration on Fundamental Principles and Rights at Work art. 2, June 1998, 37 I.L.M. 1237, [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_467653.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_467653.pdf) [<https://perma.cc/5SLG-BTE7>] (advocating signatories’ “respect, to promote and to realize” by virtue of their participation “the elimination of discrimination in respect of employment and occupation.”).

176. *See, e.g.*, *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002) (reasoning that forced labor has achieved status of *jus cogens* violation recognized in Universal Declaration of Human Rights). For a further discussion of *jus cogens*, *see supra* notes 65–74.

177. *See Doe v. Drummond*, 782 F.3d 576, 594–95 (11th Cir. 2015) (noting that *Kiobel II* recognized that citizenship is relevant factor to ATS jurisdiction, but is not dispositive); *see also In re Arab Bank*, 822 F.3d 34, 36 (2d Cir. 2016) (*en banc*) (Jacobs, J. concurring), *cert. granted sub. nom.*, *Jesner v. Arab Bank, PLC*, 137 S.Ct. 1432 (2017).

178. *See Adhikari v. Kellogg Brown & Root Inc.*, 845 F.3d 184, 190 (5th Cir. 2017) (holding that Congress did not intend the TVPRA to apply retroactively and extraterritorially at time of alleged conduct in 2004), *cert. denied*, 138 S. Ct. 134 (2017).

However, the D.C. Circuit reasoned that the extraterritorial nature of the plaintiffs' TVPA claims did not prevent the court from considering their merits.<sup>179</sup> The D.C. Circuit and Ninth Circuit have applied the standards of international tribunals to determine whether the allegations state a claim for violating the law of nations.<sup>180</sup> Assessing congressional intent behind the reach of a statute and whether corporate conduct abroad sufficiently touches and concerns the United States will most likely dominate alien tort litigation for many years to come.<sup>181</sup>

It is not clear from existing case law what distinctions the court must make between legislation and causes of action arising under the law of nations due to competing interpretations from *Sosa* and *Kiobel II*.<sup>182</sup> The *Jesner* Court does not help this confusion; the plurality vacillates over the justiciability of ATS claims against foreign corporations and obfuscates the proper role and application of the law of nations in the modern era. The plurality acknowledges that corporate liability has been determined with reasonable certainty by several circuit courts and acknowledged the Ninth Circuit's decision in *Doe I v. Nestle USA*.<sup>183</sup> According to the four Justices who dissented, however, "the plurality fundamentally misconceives how international law works and so misapplies the first step of *Sosa*."<sup>184</sup> By assuming that no norm of corporate liability based on international

179. See *Drummond*, 782 F.3d 576, 602 (11th Cir. 2015) (finding that legislative history of TVPA supported "Act's intended extraterritoriality").

180. See *Nestle USA*, 766 F.3d at 1028–29 ("[S]ince the focus test turns on discerning Congress's intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms."); *Doe VIII v. Exxon Mobil Corp.*, No. 01-1357, 2015 WL, 504218, at \*8–10, 2015 BL 223859, at \*13–14 (D.D.C. July 6, 2015) (applying cases from the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) to aiding and abetting liability).

181. For a further discussion of the impact of *Kiobel II*, see, e.g., Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After Kiobel*, 92-Nov MICH. B.J. 44, 46 (2013) (describing impact that *Kiobel II* decision will have on ATS litigation).

182. See *Jesner v. Arab Bank*, No. 16-499, at \*6 (U.S. Apr. 24, 2018) (plurality opinion). Should district courts attempt to interpret legislation's extraterritorial effect uniformly across the circuits? Does the standard for the exercise of jurisdiction depend on the sufficiency of the allegations that touch and concern the United States or the definiteness of the violation of the law of nations alleged? See, e.g., *Nestle USA*, 766 F.3d 1013, 1021 (9th Cir. 2014) ("[I]ssue of corporate liability has been more thoroughly examined in the circuit courts, which have disagreed about whether and under what circumstances corporations can face liability for ATS claims." (citations omitted)), *cert. denied*, 136 S. Ct. 798 (2016). Cf. *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013, 1018 n.2 (S.D. Tex. 2015) (disagreeing with *Nestle USA* that *Kiobel II*'s "touch and concern" test was not same as *Morrison*'s "focus test" (citation omitted)), *aff'd* 845 F.3d 184 (5th Cir. 2017).

183. See *Jesner*, No. 16-499 at \*6 (citing circuit court opinions).

184. *Jesner*, No. 16-499 at \*2 (Sotomayor, J., dissenting). With regard to the plurality's inquiry into a "categorical question [of] whether corporations may be sued under the ATS as a general matter[.]" Justice Sotomayor opined:

International law imposes certain obligations that are intended to govern the behavior of states and private actors. Among those obligations are substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture . . . .

Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and

tribunals, the *Jesner* plurality failed to consider that “[n]o international tribunal has been created and endowed with the jurisdiction to hold natural persons civilly (as opposed to criminally) liable.”<sup>185</sup> Moreover, it is well-established, as a matter of customary international law, that many civilized nations, including England, France, the Netherlands, and Canada allow corporate liability for international-law violations.<sup>186</sup>

## V. CONCLUSION

The Ninth Circuit’s approach to establishing ATS jurisdiction over a corporate actor offers moral guidance. The district courts should embrace the ATS as a basis for deterring MNCs from violating international law and for compensating victims for corporate violations of international law. The ATS provides the courts with jurisdiction to impose liability on a corporate actor for a violation of universal law committed against foreigners abroad.<sup>187</sup> As noted by one scholar, “given the paucity of statutory guidance, any *judicial construction* of the law of nations for purposes of the ATS—*made necessary by congressional silence*—would similarly constitute a judicially imposed limitation.”<sup>188</sup> When courts self-impose limitations on their prescriptive jurisdiction through superficial legislative deference and tolerance of defendants’ “reverse” forum-shopping, they disenfranchise foreign victims.<sup>189</sup> The judiciary must ensure the respect for the

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remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems . . . .

Again, the question of who must undertake the prohibited conduct for there to be a violation of an international-law norm is one of international law, but how a particular actor is held liable for a given law-of-nations violation generally is a question of enforcement left up to individual states.

*Id.* at \*\*2-3, 8 (internal citations omitted).

185. *Id.* at 9.

186. *Id.* at 12 (“Finally, a number of states, acting individually, have imposed criminal and civil liability on corporations for law-of-nations violations through their domestic legal systems.”) (citations omitted)

187. See Motion for Int’l. Law Scholars for Leave to File as Amici Curia in Supporting Appellants, *Doe I v. Nestle USA, Inc.*, 2011 WL 3436966, at \*1–2 (9th Cir. July 29, 2011) (No. 10-56739) (arguing that District Court “erred by suggesting that international law does not allow for the imposition of civil liability on corporations”). Nine of the world’s leading scholars of international law and human rights wrote in an amici brief that:

Contrary to the District Court’s decision, international law extends liability to corporations and other non-state actors. A diverse array of treaties reveals the accepted understanding within the international community that corporations can be held liable for violations of international law. To suggest that international law does not recognize corporate liability is contrary to established law, practice, and reason.

*Id.* at \*3.

188. Weatherall, *supra* note 38, at 1382–83 (emphasis added and omitted).

189. See, e.g., Roger Alford, *Reverse Foreign Shopping*, OPINIO JURIS (Nov. 11, 2008),

rights of foreigners who are injured by American nationals to promote justice and eschew the creation of a forum that is a safe harbor for tortfeasors.

The *Jesner* plurality diverges from the jurisprudence in this field by advocating for a heightened separation of powers limitation. Notably, however, *Jesner* “made no finding” with respect to ATS jurisdiction over corporations domiciled in the United States.<sup>190</sup> It is clear that corporate presence alone cannot rebut the presumption against extraterritoriality; whenever a court exercises extraterritorial jurisdiction, it should recognize the interests of foreign tort victims and aim to deter illegal corporate conduct, while considering countervailing factors, including credible evidence of a legitimate conflict with foreign policy or national security interests.<sup>191</sup> When confronted with a motion to dismiss ATS claims on the basis of forum non conveniens, the court cannot disregard plaintiffs’ allegations without applying the conflict of laws principles of the forum, considering international treaties, universal law, the availability of any alternative forum, comity, and deterring corporate misconduct in the interest of justice.<sup>192</sup>

It is important in a globalized multilateral system for federal courts to embrace ATS jurisdiction to remedy violations of *jus cogens*, especially when one considers the crippling corruption that exists in countries with ineffective political and legal systems, legislative inaction, and present unlikelihood of any multilateral global regulatory framework.<sup>193</sup> To accomplish the intent of the First Continental Congress, to create a strong, independent judicial branch with original jurisdiction, human rights lawyers can remove the veil that disguises inhumane acts aided and abetted by corporate misconduct. The history and present confirm the need for the district courts to provide a forum for foreigners injured by ignoble corporations that violate the law of nations.

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<http://opiniojuris.org/2008/11/11/reverse-forum-shopping/> [<https://perma.cc/S86J-B3HC>] (noting obstacles plaintiffs face when defendants engage in “reverse foreign shopping”); Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1370 (2004) (describing myriad conflicts of law issues that pose issues particularly for plaintiffs suing in “a legal regime where parties have the choice of alternative forums”).

190. See, e.g., Volterra Fietta, *Jesner et al. v. Arab Bank, PLC – The United States Supreme Court decides that foreign corporations may not be sued under the Alien Tort Statute*, LEXOLOGY (Apr. 26, 2018), <https://www.lexology.com/library/detail.aspx?g=88d8a9e2-b41e-4940-851f-383b1feaa353> [<https://perma.cc/ZC4K-DFRG>] (noting that “the [*Jesner*] Court held that foreign domiciled corporations are not proper defendants in ATS cases but made no finding with respect to US domiciled corporations”).

191. See, e.g., *Mujika v. AirScan Inc.*, 771 F.3d 580, 615 (9th Cir. 2014) (granting motion to dismiss based on legitimate conflict with national interests).

192. See *id.* at 596–99 (discussing standards of adjudicatory comity and prudential international comity); see also *id.* at 605 (noting that *Kiobel II* does not address those two doctrines). For a further discussion of forum non conveniens, see Baldwin *supra* note 82 and accompanying text.

193. See Christina P. Skinner, *RICO and International Legal Ethics*, 40 YALE J. INT’L L. ONLINE 20, 22 (Fall 2014) (“Even if there were a coherent international ‘code of conduct,’ there is no supranational regulatory body to credibly enforce it.” (citation omitted)).