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## Doe v. Nestle, S.A.: Chocolate and the Prohibition on Child Slavery

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# DOE V. NESTLE, S.A.: CHOCOLATE AND THE PROHIBITION ON CHILD SLAVERY

Megan M. Coppa\*

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## I. INTRODUCTION

West Africa is presently home to approximately 1.5 million acres of cocoa farmland, which subsequently produces 70% of the world's current chocolate supply.<sup>1</sup> Côte d'Ivoire, also known as the Ivory Coast, is one of the largest cocoa producing countries within West Africa.<sup>2</sup> Between 1995 and 2011, the annual production of cocoa beans on the Ivory Coast increased by approximately 600,000 tons and by an additional 40% in the 2013–2014 season.<sup>3</sup> This increase was attributed to the expansion of cocoa farmland in response to land scarcity in traditional production areas.<sup>4</sup> The Ivory Coast has faced, and still faces, significant deforestation and land degradation due to the large infestation of pests and diseases, early aging of unshaded trees, lack of access to credit and agricultural inputs, and lack of land ownership; conditions that have produced several virus outbreaks.<sup>5</sup>

The increase of farmland and the need to control the deteriorating conditions have always created a demand for farm workers.<sup>6</sup> Regrettably, more than 1.5 million cocoa farm workers in West Africa are currently children.<sup>7</sup> These child workers are exposed to hazardous dust, flames, smoke, and chemicals, are required to utilize dangerous tools that they are not properly trained to use, and are subject to various forms of physically demanding work.<sup>8</sup> In the early 2000s, the Ivorian government ratified the International Labour Organization's Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

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<sup>1</sup> Marius Wessel & P.M. Foluke Quist-Wessel, *Cocoa Production in West Africa, a Review and Analysis of Recent Developments*, 74–75 NJAS – WAGENINGEN J. LIFE SCI. 1, 2 (2015).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> SLAVE FREE CHOCOLATE, <http://www.slavefreechocolate.org/> (last visited May 12, 2021).

<sup>8</sup> *Cocoa Campaign – Background*, INT'L LAB. RTS. F., <https://laborrights.org/industries/cocoa> (last visited May 12, 2021); phbalancedfilms, *Contrasts: Things Kids Like*, YOUTUBE, at 1:40 (Mar. 27, 2013), [https://www.youtube.com/watch?v=4a7p33UJ-Aw&feature=emb\\_title](https://www.youtube.com/watch?v=4a7p33UJ-Aw&feature=emb_title).

(Convention 182).<sup>9</sup> Convention 182 provides that each member ratifying the Convention “shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency” and further specifies all forms and uses of child labor incorporated therein.<sup>10</sup> There are presently 187 countries that have ratified Convention 182.<sup>11</sup> In addition to Convention 182, United States Congressman Eliot Engel and former United States Senator Tom Harkin introduced the “Harkin-Engel Protocol.”<sup>12</sup> The Harkin-Engel Protocol, also known as the “Cocoa Protocol,” is an international agreement that applies Convention 182’s purpose specifically to child labor occurring on cocoa farms.<sup>13</sup> The Harkin-Engel Protocol is enforced through a designated timeline of goals and standards which are to be met by all corporations operating in any participating region and who knowingly receive their cocoa beans from farms that utilize child labor.<sup>14</sup>

Although Convention 182 and The Harkin-Engel Protocol have resulted in a decrease of child labor, it remains to exist on the Ivory Coast, with food and beverage companies as the most common culprits.<sup>15</sup> Specifically, in 2005, several international food and beverage companies failed to meet Harken-Engel Protocol deadlines on the Ivorian cocoa farms that they utilized.<sup>16</sup> As a result, the International Labor Rights Forum

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<sup>9</sup> Alfred Babo, *Child Labor in Cocoa-Growing Communities in Côte D’Ivoire: Ways to Implement International Standards in Local Communities*, 21 U.C. DAVIS J. INT’L L. & POL’Y 23, 25 (2014).

<sup>10</sup> Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour arts. 1, 3, June 17, 1999, 2133 U.N.T.S. 161.

<sup>11</sup> *Ratifications of C182 – Worst Forms of Child Labour Convention, 1999* (No. 182), INT’L LAB. ORG., [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312327](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312327) (last visited May 11, 2021).

<sup>12</sup> *The Harkin-Engel Protocol*, SLAVE FREE CHOCOLATE, <https://www.slavefreechocolate.org/harkin-engel-protocol> (last visited May 11, 2021).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see SLAVE FREE CHOCOLATE, *supra* note 7, which highlights that “companies—including but not limited to Mars, Nestlé, Hershey, Cargill, Cadbury, and Barry Callebaut—have admitted accountability” of their involvement with child labor in cocoa production.

<sup>16</sup> *Doe v. Nestle, S.A. (Nestle I)*, 748 F. Supp. 2d 1057, 1064–67 (C.D. Cal.

(ILRF), an organization that combats our world's problems of worker's rights and labor standards, decided to take legal action against these companies.<sup>17</sup> The ILRF partnered with several law firms across the nation, bringing forth causes of action under the Alien Tort Statute (ATS), the Torture Victim Protection Act (TVPA), and other state-related claims.<sup>18</sup> At the time of publication, this lawsuit has endured sixteen years of litigation due to the various interpretations of the ATS during its pendency.<sup>19</sup> The ILRF has refused to back down from this suit despite being sent back to the pleadings stage several times.

Part II of this case note discusses the ATS, its legislative history, and the various noteworthy case law that has interpreted the statute over time. Part III will discuss the scope of aiding and abetting liability for violations of international law and part IV will discuss the procedural history and legal reasoning behind the decisions of *Doe v. Nestle, S.A.* over the past sixteen years of litigation. Finally, this note will conclude with a personal analysis and prediction regarding the next steps of this case.

## II. THE ALIEN TORT STATUTE

Interestingly, the Alien Tort Statute “lacks a legislative history.”<sup>20</sup> Many legal scholars have referred to the statute's historical origins as “murky” and have found it difficult to

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2010).

<sup>17</sup> See *Nestle Still Doesn't Get It*, INT'L LAB. RTS. F.: NEWS BLOG (Jan. 18, 2007), <https://laborrights.org/blog/200701/nestle-still-doesnt-get-it>, which demonstrates the ILRF's involvement in the Nestle child labor issue in the Ivory Coast. For a full factual background of the lawsuit, see generally *Nestle I*, 748 F. Supp. 2d at 1064–67.

<sup>18</sup> See *Nestle I*, F. Supp. 2d at 1062–63. The other state-related claims consisted of unjust enrichment, unfair competition, and other state-law prohibited activities. *Id.* at 1063; see CAL. BUS. & PROF. CODE § 17200 (West 2020).

<sup>19</sup> The initial lawsuit was filed on July 14, 2005, and the case has yet to be resolved at the time of this article's publication. *Nestle I*, 748 F. Supp. 2d at 1063; see *Cargill, Inc. v. John DOE I*, 141 S. Ct. 184 (2020); and *Nestle U.S.A., Inc. v. John DOE I*, 141 S. Ct. 188 (2020), wherein certiorari has been recently granted.

<sup>20</sup> William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”*, 19 HASTINGS INT'L & COMP. L. REV. 221, 222 (1996).

determine First Congress's exact intentions.<sup>21</sup> As a result, scholarly inquiry is all we have to rely on. Pre-ATS, the States retained full and independent sovereignty "in all matters not expressly delegated to Congress," which left Congress only with the power to recommend certain actions be taken by the States.<sup>22</sup> This posed great difficulty in the area of international law because Congress's lack of authority left them simply hoping that State governments would comply with our nation's commitments under international law.<sup>23</sup>

One of Congress's many concerns regarded violations of the law of nations.<sup>24</sup> At the time, the principal offenses against the law of nations were violations of safe-conduct, infringement of the rights of ambassadors, and piracy.<sup>25</sup> Not only did Congress wish to prevent these offenses from occurring but it was also important that they maintain the nation's reputation and commitments to foreign countries at such early stages of our country's establishment;<sup>26</sup> commitments State governments often ignored.<sup>27</sup> When the new Constitution was enacted, Congress was finally given the power to do what it could only previously recommend to the States regarding violations of the law of nations.<sup>28</sup> Soon thereafter, Oliver Ellsworth, a member of the Continental Congress, drafted the Judiciary Act, which incorporated these recommendations.<sup>29</sup> The Act included a provision, called the Alien Tort Clause, which granted federal jurisdiction over torts in violation of the law of nations.<sup>30</sup> Simply put, the Alien Tort Clause was designed to provide aliens with the opportunity to bring suit in federal court, rather than state court.<sup>31</sup> It was a likely motive of First Congress to provide a

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<sup>21</sup> *Id.*

<sup>22</sup> Dodge, *supra* note 20, at 229–30.

<sup>23</sup> STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE 1 (2018).

<sup>24</sup> *Id.*

<sup>25</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67.

<sup>26</sup> MULLIGAN, *supra* note 23, at 1.

<sup>27</sup> See *id.*, regarding the States' refusal to comply with the 1783 Treaty of Peace with Great Britain, which required the elimination of any legal burdens that prevented British citizens from collecting pre-Revolutionary War debts.

<sup>28</sup> Dodge, *supra* note 20, at 231.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See *id.*

federal forum to aliens due to the apprehension of possible hostility by State courts toward aliens and their claims, and it further allowed for a uniform interpretation of the law of nations.<sup>32</sup>

The Alien Tort Clause was first revised when the clause transitioned to Section 563 of the Revised Statutes of 1873.<sup>33</sup> It was again revised when the clause became Section 24 of the Judiciary Act of March 3, 1911.<sup>34</sup> It was revised for a final time in 1948 as Section 1350 of Title 28 of the United States Code and was renamed the Alien Tort Statute.<sup>35</sup> Mostly, these revisions simply clarified and tightened the statute's language, without any substantive changes.

The ATS was not invoked for nearly two hundred years. Thus, with no legislative history or precedent, the statute has been identified to have various theories derived by the many legal scholars who have attempted to understand and interpret the statute over time. The modern theory of the ATS is that courts should interpret international law as it presently exists among the nations of the world, not as was in 1789.<sup>36</sup> Alternatively, the originalists theory is that modern human rights should be excluded from the scope of the ATS and that the statute should be limited to torts ordinarily in violation of the law of nations at the time the statute was written, such as piracy and torts against ambassadors.<sup>37</sup> A similar theory considers eighteenth-century "prize law," a prevalent area of law during the enactment of the ATS, to be the extent of the statute's scope.<sup>38</sup> This theory interpreted the ATS as being designed

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<sup>32</sup> See Dodge, *supra* note 20, at 235–36, which highlights the writings of John Jay and Alexander Hamilton in *The Federalist*. THE FEDERALIST NO. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>33</sup> Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 449 (1995).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* The Alien Tort Statute presently states: "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of the nations or a treaty of the United States." 28 U.S.C. § 1350.

<sup>36</sup> See Dodge, *supra* note 20, at 221–22.

<sup>37</sup> *Id.* at 222–24.

<sup>38</sup> *Id.* at 223.

exclusively over a subcategory of prize law cases, such as suits for torts committed during the capture of vessels, with the exclusion of issues involving the vessel's status as a "prize."<sup>39</sup> In short, suits for a tort *only*.<sup>40</sup> There is also the theory that the statute simply provides a federal forum to foreigners and for foreign affairs.<sup>41</sup> Similarly, a final theory provides that the statute was designed to preclude the denial of justice to aliens in order to avoid any possible causes of war.<sup>42</sup>

A cause of action brought under the ATS did not enter U.S. courtrooms until 1980. The subsequent portion of this case note will describe how U.S. courts have interpreted cognizable causes of action under the ATS, as well as the ATS's scope concerning corporate liability and extraterritorial application.

#### A. Claims That are Actionable Under the ATS

##### 1. *Filartiga v. Pena-Irala* (2d Cir. 1980)

*Filartiga v. Pena-Irala* was the first case wherein a court analyzed and permitted international citizens to bring suit under the Alien Tort Statute.<sup>43</sup> Dr. Joel and Dolly Filartiga brought suit against a Paraguayan law enforcement official, Americo Pena-Irala, for the wrongful death of their seventeen-year-old son by use of torturous conduct.<sup>44</sup> After being unable to justly pursue this matter in Paraguay because of the defendant's power position, plaintiffs brought suit in federal district court while both parties temporarily resided in the United States on visas.<sup>45</sup> Initially, the matter was dismissed for lack of subject matter jurisdiction.<sup>46</sup> However, on appeal, the Second Circuit reversed, holding that deliberate torture committed by an official authority violated the unanimously accepted norms of human rights under international law and, regardless of a party's nationality, they should be provided a means to seek

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<sup>39</sup> Dodge, *supra* note 20, at 223.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 222–24.

<sup>42</sup> *See id.* at 235.

<sup>43</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>44</sup> *Id.* at 878.

<sup>45</sup> *Id.* at 878–79.

<sup>46</sup> *Id.* at 878.

justice.<sup>47</sup> The court further concluded that the ATS provides alien parties with federal jurisdiction whenever an alleged torturer is found and process is served in the United States.<sup>48</sup>

The Second Circuit highlighted the universal interest in protecting fundamental human rights and interpreted the ATS as a federal platform for the adjudication of rights already acknowledged by international law.<sup>49</sup> The *Filartiga* decision was “a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”<sup>50</sup> Ultimately, the *Filartiga* decision clarified that the ATS provided for jurisdiction over (1) tort actions; (2) specifically brought by aliens; and (3) for violations of the law of nations only.<sup>51</sup>

## 2. *Sosa v. Alvarez Machain* (S. Ct. 2004)

Twenty-four years after the *Filartiga* decision, the Supreme Court set forth requirements for bringing an action under the ATS in the decision of *Sosa v. Alvarez-Machain*.<sup>52</sup> Plaintiff, Alvarez-Machain, claimed he was wrongfully captured and arbitrarily detained in Mexico by the defendant, Sosa, a bounty hunter operating as a United States agent.<sup>53</sup> Sosa, who was acting under the direction of the Drug Enforcement Agency, captured Alvarez in Mexico and brought him to the United States to be tried for the murder of a DEA agent.<sup>54</sup> After Alvarez was acquitted, he subsequently sued the United States for false arrest under the Federal Tort Claims Act and sued Sosa separately under the ATS.<sup>55</sup> In his suit against Sosa, Alvarez alleged violations of the United Nations Universal Declaration of Human Rights (Declaration), the International Covenant on Civil and Political Rights (Covenant), and customary

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<sup>47</sup> *Id.* at 880.

<sup>48</sup> *Id.* at 878.

<sup>49</sup> *Id.* at 884–85, 887, 890.

<sup>50</sup> *Id.* at 890.

<sup>51</sup> *Kiobel v. Royal Dutch Petroleum Co. (Kiobel I)*, 621 F.3d 111, 116 (2d Cir. 2010) (discussing *Filartiga*, 630 F.2d at 890).

<sup>52</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>53</sup> *Id.* at 698.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

international law for arbitrarily detaining him.<sup>56</sup>

The Supreme Court explained the ATS by expressly holding that any ATS claim must be based on a universally recognized, specifically defined rule of international law that is capable of imposing obligations on international parties.<sup>57</sup> In applying this holding to Alvarez's suit, the Court determined that his arguments were based on definitions provided under the Declaration and the Covenant, which were neither binding nor imposed enforceable obligations on the federal court as a matter of international law; the Declaration and the Covenant were concluded as simply a set of principles.<sup>58</sup> Moreover, the Court reasoned that arbitrary arrest was not a prohibited customary law and it did not rise to the level of a specifically defined, binding international norm actionable under the ATS.<sup>59</sup>

The *Sosa* court established that not all international norms are automatically actionable under the ATS because the ATS is limited to a "narrow set of common law actions" derived from international law.<sup>60</sup> The Supreme Court further developed a two-part analysis for determining the scope of this "narrow set" of actions.<sup>61</sup> The two-step test requires the norm to be: (1) internationally accepted; and (2) defined with specificity.<sup>62</sup> Additionally, the Court firmly added that courts have no Congressional obligation to pursue and define new, and likely debatable, law of nations violations.<sup>63</sup> Simply put, the Supreme Court held that the ATS was not designed to open federal courts for just any international law violation and it further cautioned

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<sup>56</sup> *Id.* at 734–35; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 9 (Dec. 10, 1948) ("No one shall be subjected to arbitrary arrest, detention or exile."); International Covenant on Civil and Political Rights art. 9, ¶¶ 1, 5, Dec. 16, 1966, 999 U.N.T.S. 171 ("No one shall be subjected to arbitrary arrest or detention; no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; . . . and anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.").

<sup>57</sup> *Sosa*, 542 U.S. at 725–26.

<sup>58</sup> *Id.* at 734–35.

<sup>59</sup> *Id.* at 734–38.

<sup>60</sup> *Id.* at 721.

<sup>61</sup> *Id.* at 725–26.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 728, 732.

that it was not a statute for broad and evolving interpretation.<sup>64</sup>

3. *Khulumani v. Barclay National Bank* (2d Cir. 2007)

Three years after *Sosa*, *Khulumani v. Barclay National Bank* was decided. This lawsuit incorporated several plaintiffs, approximately fifty corporate defendants, and hundreds of “corporate Does.”<sup>65</sup> Plaintiffs contended that defendants knowingly and actively collaborated with the South African government to uphold an apartheid system, which favored and benefited the minority white population over the majority black African population in all areas of life.<sup>66</sup> Plaintiffs brought suit in federal district court under the ATS claiming that the defendant corporations aided and abetted various international law violations such as: apartheid; torture; extrajudicial killing; cruel, inhuman, and degrading treatment; denationalization; unfair and discriminatory forced labor practice; and many more.<sup>67</sup> Defendants were both domestic and foreign corporations.<sup>68</sup> The district court recognized the probable international conflict that would arise with South Africa from these proceedings and, as a result, dismissed the complaint in its entirety.<sup>69</sup> One ground in support of dismissal was the failure to establish subject matter jurisdiction because the scope of ATS did not include aiding and abetting liability.<sup>70</sup>

On appeal, the Court considered the aiding and abetting claim, as well as a significant preliminary question of whether the proper legal standard should be derived from domestic law or international law.<sup>71</sup> The *Khulumani* court recognized that international law was well-familiarized with the realm of aiding and abetting liability, as it is an area of law commonly addressed by many international tribunals.<sup>72</sup> The *Khulumani* court

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<sup>64</sup> *Id.*

<sup>65</sup> *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 259.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 260–61.

<sup>72</sup> *Id.* at 270 (Katzmann, J., concurring). Aiding and abetting liability has been authorized and applied as far back as the war crime trials following World

determined that domestic and international law should not be intertwined when international law provides a suitable definition or means of remedy to maintain uniformity amongst international disputes.<sup>73</sup> Thus, *Khulumani* established that, so long as aiding and abetting claims meet the two requirements of *Sosa*, they can be brought under the ATS and are to be considered under the international law standard of aiding and abetting.<sup>74</sup>

## B. Corporate Liability Under the ATS

### 1. *Kiobel v. Royal Dutch Petroleum Co.* (2d Cir. 2010)

In 2010, the Second Circuit decided *Kiobel v. Royal Dutch Petroleum* (*Kiobel I*), wherein Nigerian citizens who resided in the United States brought suit in federal court under the ATS, claiming that certain Dutch, British, and Nigerian corporations aided and abetted the Nigerian Government in committing violations of human rights through oil exploration and production.<sup>75</sup> The district court dismissed a majority of the plaintiffs' claims and an interlocutory appeal occurred.<sup>76</sup> In 2010, there was still a great deal of unmarked territory regarding ATS jurisprudence.<sup>77</sup> Of the many unanswered questions, *Kiobel I* presented the Second Circuit with one: whether corporations could be sued under the ATS.<sup>78</sup> To answer this question, the court looked for guidance in various international tribunals, searching for other nation's conclusions on the issue, which was found to be nonexistent.<sup>79</sup> As a result, the court dismissed the complaint for plaintiffs' failure to properly allege a claim under the ATS, holding that corporations

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War II and has been accepted on a recurring basis ever since. *Id.* Such liability is “recognized in numerous international treaties, most notably the Rome Statute of the International Criminal Court, and in the statutes creating the International Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”).” *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 261–62.

<sup>75</sup> *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), 621 F.3d 111, 117 (2d Cir. 2010).

<sup>76</sup> *Id.* at 124.

<sup>77</sup> *Id.* at 117.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 118.

could not be sued under the ATS.<sup>80</sup>

2. *Sarei v. Rio Tinto, PLC* (9th Cir. 2011)

Approximately one year after *Kiobel I*, the Ninth Circuit addressed the issue of corporate liability under the ATS in *Sarei v. Rio Tinto, PLC*.<sup>81</sup> Rio Tinto, an international mining company headquartered in London, opened a mine in Papua New Guinea (PNG) with the assistance of the PNG government.<sup>82</sup> Certain mining activities resulted in significant pollution of PNG waterways and atmosphere, which threatened the health of PNG's residents.<sup>83</sup> Residents attempted to close the mine but Rio Tinto with the support of the PNG government, remained open.<sup>84</sup> This dispute led to a ten-year civil war, resulting in thousands of deaths of PNG residents and serious health issues to those who survived.<sup>85</sup> In response, numerous PNG residents brought suit in federal district court under the ATS against the mining company for claims of: war crimes; racial discrimination; violation of the rights to health, life, and security of the person; cruel, inhuman, and degrading treatments; international environmental violations; and a consistent pattern of gross human rights violations.<sup>86</sup> This matter went before the Ninth Circuit's en banc panel twice.<sup>87</sup> The plaintiffs' second appeal, under the direction of the court, regarded only claims for genocide, crimes against humanity, war crimes, and racial discrimination.<sup>88</sup>

*Kiobel I* was not binding on the Ninth Circuit, so the court took it upon themselves to address the issue, determining that two inquiries needed to be made: (1) whether the ATS barred all corporate liability, and if it did not, was such liability limited to individuals; and (2) if the ATS did not bar corporate liability,

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<sup>80</sup> *Id.* at 120.

<sup>81</sup> *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1121–27 (C.D. Cal. 2002).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1120.

<sup>87</sup> *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc).

<sup>88</sup> *Sarei*, 671 F.3d at 743.

whether the international norm in question recognized corporate liability.<sup>89</sup> Concerning the first inquiry, the en banc panel adopted the view expressed by Judge Leval in his concurring decision of *Kiobel I*, which stated that no opinion of domestic or international law supported the conclusion that claims actionable under the ATS only applied to natural persons and not corporations, “leaving corporations [completely] immune from suit and free to retain profits earned through such acts.”<sup>90</sup> The panel further supported this view because the ATS maintained no language nor legislative history to suggest a bar of corporate liability or an intention of liability solely of natural persons.<sup>91</sup> Thus, the panel concluded there was no basis to hold that such a limitation existed.<sup>92</sup>

The second inquiry required the court to analyze the specific international norms included in plaintiffs’ claims—genocide and war crimes.<sup>93</sup> Relying on *Sosa*, the Ninth Circuit noted that each norm allegedly violated in an ATS claim must be specific, universal, and obligatory to be actionable under the ATS.<sup>94</sup> The panel then concluded that both genocide and war crimes met the *Sosa* standard.<sup>95</sup> Furthermore, because international law recognized both corporate liability and aiding and abetting liability for both the norms of genocide and war crimes, plaintiffs adequately alleged those claims.<sup>96</sup> Appropriately, the panel remanded those issues for further proceedings.<sup>97</sup>

Contrary to the Second Circuit’s holding in *Kiobel I*, the Ninth Circuit stated that the absence of precedent regarding corporate liability under the ATS did not automatically imply that it was a legal impossibility.<sup>98</sup> Ultimately, the en banc panel

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<sup>89</sup> *Id.* at 747.

<sup>90</sup> *Sarei*, 550 F.3d at 747 (quoting *Kiobel v. Royal Dutch Petroleum Co. (Kiobel I)*, 621 F.3d 111, 153 (2d Cir. 2010)).

<sup>91</sup> *Id.* at 747–48.

<sup>92</sup> *Id.* at 748.

<sup>93</sup> *Id.* at 744.

<sup>94</sup> *Id.* at 743.

<sup>95</sup> See *id.* at 758–67, for the court’s full discussion on genocide and war crimes.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 770.

<sup>98</sup> *Id.* at 761.

established three principles regarding corporate liability under the ATS:

First, the analysis proceeds norm-by-norm; there is no categorical rule of corporate immunity or liability. Second, corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations. Third, norms that are “universal and absolute,” or applicable to “all actors,” can provide the basis for an ATS claim against a corporation. To determine whether a norm is universal, [it is] consider[ed], among other things, whether it is “limited to states” and whether its application depends on the identity of the perpetrator.<sup>99</sup>

### 3. *Jesner v. Arab Bank, PLC* (S. Ct. 2018)

Seven years after *Sarei*, the Supreme Court addressed corporate liability under the ATS in *Jesner v. Arab Bank, PLC*; specifically, foreign corporations.<sup>100</sup> In *Jesner*, petitioners brought suit under the ATS against defendant, Arab Bank, who purportedly permitted certain bank officials to utilize and transfer funds to terrorist groups in the Middle East, resulting in acts of terrorism that led to certain deaths and injuries.<sup>101</sup> Initially, the district court granted judgment on the pleadings in favor of Arab Bank and plaintiffs subsequently appealed.<sup>102</sup> At that time, both the district court and the Second Circuit were bound by their previous decision of *Koibel I*, which barred corporate liability under the ATS.<sup>103</sup> As a result, the Second Circuit affirmed the district court’s decision.<sup>104</sup> Certiorari was then granted to determine whether the Judiciary had the authority to determine and enforce foreign corporate liability under the ATS without the authorization from Congress.<sup>105</sup>

The Supreme Court upholds a strong position of respect

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<sup>99</sup> *Doe I v. Nestle U.S.A., Inc. (Nestle II)*, 766 F.3d 1013, 1022 (9th Cir. 2014) (citing *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 747–48, 760–61, 764–65 (9th Cir. 2011) (en banc)).

<sup>100</sup> *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1389–90 (2018).

<sup>101</sup> *Id.* at 1393.

<sup>102</sup> *Id.* at 1386.

<sup>103</sup> *Id.* at 1395.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1394.

toward Congress and the Court’s precedents do not support the authority of the Judiciary to extend or create causes of action in domestic law.<sup>106</sup> Furthermore, Congress preserves the responsibility and capacity to weigh in on foreign policy concerns.<sup>107</sup> The *Jesner* case caused over a decade of political tensions with Jordan—a critical ally of the United States—because Jordan found the litigation to be disrespectful to its sovereignty.<sup>108</sup> Additionally, Jordan was “a key counterterrorism partner,” particularly during the universal movement against the Islamic State in Iraq and Syria.<sup>109</sup> The Court stressed that this was the exact foreign apprehension that First Congress sought to avert when enacting the ATS.<sup>110</sup> Therefore, because ATS litigation with foreign corporations has such a critical effect on both foreign relations and the separation of powers, the Court found it “inappropriate for courts to extend ATS liability to *foreign* corporations.”<sup>111</sup>

### C. Extraterritorial Application of the ATS

#### 1. *Morrison v. National Australian Bank, Ltd.* (S. Ct. 2010)

Our courts are often presented with the issue of whether a federal law applies extraterritorially. In 2010, the Supreme Court developed a solution to this problem by outlining a two-part analysis called the “focus test.”<sup>112</sup> In *Morrison v. National Australian Bank Ltd.*, foreign investors brought a class action against Australian National Bank for securities fraud involving foreign transactions under Section 10(b) of the Securities Exchange Act of 1934.<sup>113</sup> The issue was whether the Securities Exchange Act provided a cause of action for misconduct related to securities traded extraterritorially on foreign exchanges.<sup>114</sup> The Supreme Court developed the “focus test” as a means of

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<sup>106</sup> *Id.* at 1402.

<sup>107</sup> *Id.* at 1402–03.

<sup>108</sup> *Id.* at 1406.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1390.

<sup>111</sup> *Id.* at 1403 (emphasis added).

<sup>112</sup> *See generally* *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

<sup>113</sup> *Id.* at 250–53.

<sup>114</sup> *Id.* at 250–51.

statutory interpretation to determine whether statutes without extraterritorial application can be applied to conduct that occurs both domestically and abroad.<sup>115</sup> Both parts of the “focus test” require an inquiry into congressional concern—first, a court must determine whether the statute was meant to apply extraterritorially and, second, a court must determine the focus of congressional concern in passing the statute.<sup>116</sup> In *Morrison*, the Court explained that the focus of the Securities Exchange Act was the purchase and sale of securities and applied only to domestic exchanges and transactions.<sup>117</sup> Thus, the Act was not meant to apply extraterritorially and plaintiffs did not have an actionable claim.<sup>118</sup> Ultimately, *Morrison* established the “presumption against extraterritoriality,” which provides that a statute cannot be applied extraterritorially if there is no clear indication of such application.<sup>119</sup>

2. *Kiobel v. Royal Dutch Petroleum (Kiobel II)* (S. Ct. 2013)

Following the Second Circuit’s decision in *Kiobel I*, the Supreme Court granted certiorari on the issue of extraterritoriality. Specifically, whether our courts can address ATS claims for law of nations violations occurring outside of the United States.<sup>120</sup> In *Kiobel II*, the defendant corporations asserted the presumption against extraterritoriality standard established in *Morrison*.<sup>121</sup> The Court highlighted that the importance of the presumption against extraterritoriality was to guarantee that the Judiciary did not inaccurately adopt a certain interpretation of domestic law that carried “foreign policy consequences not clearly intended by the [legislative] branch.”<sup>122</sup>

By 2013, the Supreme Court had consistently cautioned

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<sup>115</sup> *Id.* at 264–65.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 266–67.

<sup>118</sup> *Id.* at 266–68.

<sup>119</sup> *Id.* at 255.

<sup>120</sup> *See generally* *Kiobel v. Royal Dutch Petroleum Co. (Kiobel II)*, 569 U.S. 108 (2013).

<sup>121</sup> *Id.* at 115.

<sup>122</sup> *Id.* at 116.

other courts to consider foreign policy concerns when determining what claims could be brought under the ATS.<sup>123</sup> This caution was based on the principle that United States law does not rule the world.<sup>124</sup> Ultimately, the Court affirmed that the language of the ATS did not indicate extraterritorial application.<sup>125</sup> The Court pointed out that nothing immediately before nor after the passage of the ATS provided support for the notion that Congress enacted the ATS with the expectation of actions arising from conduct occurring abroad.<sup>126</sup> Furthermore, there is no indication that the ATS was enacted to have the United States regulate the world on international norms.<sup>127</sup>

In *Kiobel II*, plaintiffs' allegations concerned conduct that occurred outside of the United States.<sup>128</sup> It was acknowledged that some of the alleged conduct "touched and concerned" territory of the United States; however, such conduct "must do so with sufficient force to displace the presumption against extraterritorial application."<sup>129</sup> "[M]ere corporate presence" was not enough to satisfy that burden.<sup>130</sup> Thus, *Kiobel II* established that: (1) the ATS does not overcome the presumption against extraterritorial application; and (2) that *all* relevant conduct alleged in an ATS claim against a foreign corporation must take place in the United States to be actionable.<sup>131</sup>

### III. SCOPE OF AIDING AND ABETTING LIABILITY FOR VIOLATIONS OF INTERNATIONAL LAW

Aiding and abetting liability for violations of international law is a well-known area of law in the Nuremberg Tribunals, the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR), the Rome Statute of the International Criminal Court, the Special Court for Sierra

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 115.

<sup>125</sup> *Id.* at 118.

<sup>126</sup> *Id.* at 120–21.

<sup>127</sup> *Id.* at 123.

<sup>128</sup> *Id.* at 124–25.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 125.

<sup>131</sup> *Id.* at 124–25.

Leone, and the United States.<sup>132</sup>

### A. *Actus Reus*

The ICTY has constructed the most appropriate governing rule of the *actus reus* component of aiding and abetting violations of international law.<sup>133</sup> This rule states that:

[A]n aider and abettor carries out acts *specifically directed* to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime. The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.<sup>134</sup>

In 2013, the ICTY clarified this rule, explaining that the “specifically directed” requirement of aiding and abetting is directed to “the ‘link’ between the assistance provided and the principal offense, and requires that ‘assistance must be ‘specifically’—rather than ‘in some way’—directed towards the relevant crimes.”<sup>135</sup> United States’ courts have since adopted and implemented this rule.<sup>136</sup> Specifically, the district court for the Southern District of New York indicated that an aider and abettor’s assistance “must bear a causative relationship to the specific wrongful conduct committed by the principal.”<sup>137</sup> While aider and abettor assistance need not be the “but-for” cause, it must have an actual effect on the principal actor’s commission

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<sup>132</sup> *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270–71 (2d Cir. 2007) (Katzmann, J., concurring).

<sup>133</sup> *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgment, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007), [https://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](https://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf).

<sup>134</sup> *Id.* (emphasis added) (footnote omitted).

<sup>135</sup> *Doe I v. Nestle U.S.A., Inc. (Nestle II)*, 766 F.3d 1013, 1026 (9th Cir. 2014) (quoting *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, ¶¶ 27, 37 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), [https://www.icty.org/x/cases/perisic/acjug/en/130228\\_judgement.pdf](https://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf)).

<sup>136</sup> *See id.*; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Doe v. Nestle, S.A. (Nestle I)*, 748 F. Supp. 2d 1057, 1080 (C.D. Cal. 2010); *S. Afr. Apartheid Litig. v. Daimler, A.G.*, 617 F. Supp. 2d 228, 257–59 (S.D.N.Y. 2009).

<sup>137</sup> *Nestle I*, 748 F. Supp. 2d at 1081.

of a *specific* crime.<sup>138</sup> Generalized assistance cannot sufficiently sustain a claim of aiding and abetting; instead, two elements must be met: (1) the assistance must be specifically directed or bear a direct causative relationship to a specific wrongful act; and (2) the assistance must have a substantial effect on that wrongful act.<sup>139</sup> To determine if these elements are met, a context-specific, “fact-based inquiry” is required.<sup>140</sup>

When a plaintiff alleges aiding and abetting conduct in the form of tacit approval and encouragement, such as plaintiffs in *Doe v. Nestle, S.A.*, the identification of the *actus reus* component is not so clear-cut.<sup>141</sup> Tacit approval and encouragement is a theory of liability dating as far back as the era of the Nuremberg Trials.<sup>142</sup> Under modern case law, tacit approval and encouragement liability requires “the combination of a position of authority and physical presence at the crime scene[, which] allow[s] the inference that non-interference by the accused actually amounted to tacit approval and encouragement.”<sup>143</sup> Additionally, it must still be shown that such approval and encouragement was substantial, which, under the circumstances of this specific allegation, “requires . . . the ‘principal perpetrators [to be] aware of [the encouragement]’ because otherwise, the [approval] and encouragement would not have had any effect (let alone a substantial one) on the principal offense.”<sup>144</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1081–82.

<sup>140</sup> *Id.* at 1081.

<sup>141</sup> *Id.* at 1081–82.

<sup>142</sup> *Id.* See, for example, *United States v. Ohlendor (The Einsatzgruppen Case)*, in 4 TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 570–72 (William S. Hein & Co., Inc. 1997), which discusses the lack of the defendant’s specific participation in the crimes at issue, but highlights his general involvement and high-ranking position in the organization which did commit such crimes, heavily contradicting the defendant’s argument of unawareness of the crime.

<sup>143</sup> Prosecutor v. Orić, Case No. IT-03-68-A, Judgment, ¶ 42 (Int’l Crim. Trib. for the Former Yugoslavia July 3, 2008), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf>.

<sup>144</sup> *Nestle I*, 748 F. Supp. 2d at 1082 (quoting Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment, ¶ 277 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007), <https://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf>).

### B. *Mens Rea*

There has been an ongoing worldwide debate as to whether the appropriate *mens rea* for aiding and abetting violations of international law is knowledge or purpose.<sup>145</sup> The knowledge standard dates back to the Nuremberg Tribunals in 1946.<sup>146</sup> Additionally, in 1998, the ICTY concluded that the proper standard is knowledge.<sup>147</sup> Even more recently, in 2013, the Appeals Chamber of the Special Court for Sierra Leone affirmed the knowledge standard.<sup>148</sup> The proper articulation of this standard would be: “[t]he requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.”<sup>149</sup> More specifically, the aider and abettor must know or have reason to know that her acts or omissions assisted in the furtherance of the principal actor’s commission of the crime.<sup>150</sup>

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<sup>145</sup> Compare Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶ 127 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007), [https://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](https://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf) (applying knowledge standard), and Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 205 (May 21, 1999), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict95-1-trial-judgements/en/990521.pdf> (applying knowledge standard), with *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011) (applying purpose standard).

<sup>146</sup> See *Zyklon B Case*, in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93–102 (1947), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-1.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf) [hereinafter *Zyklon B Case*], which assesses the defendant’s guilt based on his provision of poisonous gas to Nazis knowing of its ultimate unlawful purpose.

<sup>147</sup> Prosecutor v. Furundzija, IT-95-17/1-T, Judgment, ¶ 249 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>, *aff’d*, Case No. IT-95-17/1-A, Judgment, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000), <https://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf>.

<sup>148</sup> Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 483 (Sept. 26, 2013), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>.

<sup>149</sup> Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶ 127 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007), [https://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](https://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf); see Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Judgment, ¶ 370 (July 7, 2006), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict99-46-trial-judgements/en/060707.pdf>; Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 45 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004), <https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>.

<sup>150</sup> Prosecutor v. Orić, Case No. IT-03-68-A, Judgment, ¶ 43 (Int’l Crim.

The conclusion of knowledge as the *mens rea* standard for aiding and abetting violations of international law poses a problem for claims brought under the ATS. This is because the knowledge standard is less-stringent and fails the Supreme Court’s *Sosa* requirements of universality and definiteness.<sup>151</sup> The International Court of Justice has refrained from making a determination as to whether the proper standard of aiding and abetting violations of international law is knowledge or purpose when considering crimes of genocide; however, Nuremberg-era precedents support the purpose standard.<sup>152</sup> Moreover, the Second and Fourth Federal U.S. Circuits have adopted the purpose standard in reliance on the Rome Statute of the International Criminal Court, which is further in support of the purpose standard.<sup>153</sup>

#### IV. *DOE V. NESTLE, S.A.*

##### A. The Pleadings Stage

On July 14, 2005, the International Labor Rights Forum (ILRF) filed suit in the United States District Court for the Central District of California against several multi-billion dollar international companies, such as: Nestle, S.A.; Nestle, U.S.A.; Nestle, Ivory Coast; Archer Daniels Midland Co.; Cargill, Inc.; Cargill Cocoa; Cargill West Africa, S.A.; and ten other “Corporate Does.”<sup>154</sup> This class action was filed on behalf of plaintiffs: John Doe I, John Doe II, John Doe III, and Global

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Trib. for the Former Yugoslavia July 3, 2008), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf>.

<sup>151</sup> *Id.*

<sup>152</sup> See Application of the Convention on the Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, ¶¶ 421–24 (Feb. 26), <https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>, where the court declined to decide whether the crime of aiding and abetting genocide required the sharing of or simply knowing of the principal’s criminal intent.

<sup>153</sup> *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399–401 (4th Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); Rome Statute of the International Criminal Court art. 25, ¶ 3(c), July 17, 1998, 2187 U.N.T.S. 3.

<sup>154</sup> *Doe v. Nestle, S.A. (Nestle I)*, 748 F. Supp. 2d 1057, 1063 (C.D. Cal. 2010).

Exchange.<sup>155</sup> Does I–III are Malian children who were forced to labor on the Ivory Coast cocoa fields, and their class status extended to all similarly situated Malian children.<sup>156</sup> The ILRF chose to sue in the United States not only because it was probable that this lawsuit would elicit a potentially harmful response in Africa but, because of the infamously corrupt judicial system in Cote D'Ivoire, it was assumed that any claims brought against corporations which brought significant revenue into the country would likely be ignored.<sup>157</sup> Further, no law existed in Mali allowing civil damages for injuries caused by non-Malian parties.<sup>158</sup>

Plaintiffs' complaint asserted allegations regarding the aiding and abetting of slavery, forced labor, child labor, torture, and cruel, inhuman, or degrading treatment in the continuance of exclusive supplier/buyer relationships with farmers in Cote d'Ivoire who utilized child slave labor.<sup>159</sup> Plaintiffs proclaimed that the exclusive contractual agreements defendants had with the Ivorian farmers allowed them to dictate the terms of production and supply, which included labor conditions.<sup>160</sup> Specifically, that defendants maintained strong control over the Ivorian farmers through their provision of ongoing financial support, including advanced payments and personal spending money to keep their loyalty as exclusive suppliers; farming supplies, including fertilizer, tools, and other equipment; training in particular growing and fermentation techniques and general farm maintenance, including appropriate labor practices to increase the quality and quantity of cocoa beans.<sup>161</sup> Furthermore, defendants' oversight of the farms required training and quality control visits numerous times per year.<sup>162</sup>

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<sup>155</sup> *Id.* Global Exchange is a San Francisco-based human rights organization that promotes international social justice. *See Our Vision & Mission*, GLOB. EXCH., <https://globalexchange.org/about-us/mission/> (last visited May 12, 2021). Global Exchange brought only one cause of action, so "plaintiffs" refers solely to the "Does." *Nestle I*, 748 F. Supp. 2d at 1063 n.1.

<sup>156</sup> *Nestle I*, 748 F. Supp. 2d at 1063–64.

<sup>157</sup> *Id.* at 1064.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1064–65.

As such, plaintiffs asserted that defendants maintained first-hand knowledge of the child slave labor occurring on such farms because of their ongoing presence there.<sup>163</sup>

In December of 2005, three of the defendant corporations—Archer Daniels Midland Company, Nestle, U.S.A., and Cargill, Inc.—moved to dismiss ILRF’s complaint.<sup>164</sup> Defendants challenged plaintiffs’ allegations regarding their alleged knowledge of the purported child slave labor and argued that the farmers were the perpetrators of the criminal acts of which they were not involved.<sup>165</sup> The defendant corporations argued that, according to *Sosa*, corporate liability did not come within the scope of claims actionable under the ATS, nor did the international norm of child labor come within the narrow class of international law norms cognizable under the ATS.<sup>166</sup> Defendants further proclaimed that to impose the unreasonable obligation of corporations to oversee and prevent any wrongful act committed in the production of goods would be not only outrageous and overly burdensome to corporations but seriously detrimental to the global economy.<sup>167</sup>

The district court held that plaintiffs’ complaint failed to allege specific conduct amounting to the assistance or encouragement of child slave labor by the defendants nor were there sufficient allegations of any conduct that had a *substantial* effect in the commission of the supposed crime.<sup>168</sup> The court further determined that the complaint failed to assert that defendants maintained the required *mens rea* in assisting the Ivorian farm owners’ wrongful acts.<sup>169</sup> Accordingly, plaintiffs

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<sup>163</sup> *Id.* at 1066.

<sup>164</sup> *See generally* Notice of Mot. And Mot. of Defs. Archer-Daniels-Midland Co.; Nestle, U.S.A.; and Cargill, Inc. to Dismiss Pls.’ Compl. Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim for Which Relief Can Be Granted, *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. CV-05-5133-SVW), 2005 WL 4134362 [hereinafter *Defs. Mot. to Dismiss 2010*].

<sup>165</sup> *Defs. Mot. to Dismiss 2010*, *supra* note 164, at 6.

<sup>166</sup> *Id.* at 7.

<sup>167</sup> *Id.* at 2.

<sup>168</sup> *Nestle I*, 748 F. Supp. 2d at 1098 (relying on *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgment, ¶ 127 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007), [https://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](https://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf)).

<sup>169</sup> *Id.*

were given the opportunity to amend their complaint to add the necessary factual support to their aiding and abetting claims, which they did in July of 2009.<sup>170</sup> Shortly thereafter, defendants moved to dismiss the amended complaint and asserted that plaintiffs still had not alleged conduct sufficient to hold them liable for aiding and abetting under the ATS.<sup>171</sup> The matter then proceeded for oral argument.

#### B. *Nestle I* (C.D. Cal. 2010)

Following oral argument, on September 8, 2010, the United States District Court for the Central District of California issued the first of many decisions in this matter; five years after the initial complaint was filed.<sup>172</sup> At that time, the district court was bound by *Sosa*, and, because all named defendants were corporations, the court dismissed the ATS claims.<sup>173</sup>

##### 1. The Aiding and Abetting Claim: *Actus Reus* Component

Plaintiffs described three types of activities to support their aiding and abetting allegations: (1) financial assistance; (2) provision of farming supplies, technical assistance, and training; and (3) failure to exercise economical leverage.<sup>174</sup> Alternatively, defendants interpreted those allegations as five separate categories: (1) financial assistance; (2) providing farming supplies and technical farming assistance; (3) providing training in labor practices; (4) failing to exercise economic leverage; and (5) lobbying the United States government to avoid a mandatory labeling scheme.<sup>175</sup> Because the burden to plead sufficient facts to the court was on the plaintiffs, the court adopted their interpretation and addressed each activity separately.<sup>176</sup>

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<sup>170</sup> *Id.* at 1063; Pls. First Am. Class Action Compl. for Inj. Relief and Damages, *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. CV-05-5133-SVW), 2009 WL 2921081 [hereinafter Pls.' First Am. Compl.].

<sup>171</sup> *Nestle I*, 748 F. Supp. 2d at 1063; Defs. Mot. to Dismiss 2010, *supra* note 164, at 12.

<sup>172</sup> *Nestle I*, 748 F. Supp. 2d at 1057.

<sup>173</sup> *Id.* at 1125, 1130, 1144–45.

<sup>174</sup> *Id.* at 1098.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

a. Financial Assistance

Plaintiffs maintained the position that defendants provided the Ivorian farmers with monetary incentives, including advanced payments and personal spending money, to build loyalty, to retain an exclusive buyer/supplier relationship, and to keep the cost of cocoa beans cheap.<sup>177</sup> Plaintiffs submitted that this ongoing financial support provided the farmers with enticements to employ slave labor.<sup>178</sup> The court determined that the defendants' ongoing financial support was merely part of a commercial transaction, which, without more, could not satisfy the *actus reus* requirement of aiding and abetting under international law.<sup>179</sup> The court reasoned that plaintiffs did not explicitly assert that defendants provided large sums of money to the Ivorian farmers in furtherance of or in encouragement of child labor, forced labor, or the like.<sup>180</sup> The four corners of plaintiffs' complaint only supported that the defendants' payments to the Ivorian farmers were simply in exchange for cocoa beans, to secure future cocoa supplies, and to maintain the farmers' loyalty as exclusive suppliers.<sup>181</sup> Thus, the allegation concerning financial assistance was unsuccessful.<sup>182</sup>

b. Providing Farming Supplies, Technical Assistance, and Training

With regard to the provision of farming supplies, technical assistance, and training, plaintiffs submitted that the defendant corporations conducted training and quality control visits several times per year, provided technical assistance in crop production, and provided technical assistance regarding new strategies to deal with crop infestation and income generation.<sup>183</sup> Specifically, the corporations provided the farmers with the knowledge, tools, and support they needed to maintain

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1099 (quoting Pls.' Suppl. Mem. of Points and Authorities in Resp. to Ct.'s Order Dated June 11, 2009 and in Further Opp'n to Mot. to Dismiss at 14–15, Doe v. Nestle, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. CV-05-5133-SVW), 2009 WL 2921078 [hereinafter Pls.' Suppl. Mem.]).

<sup>179</sup> *Id.* at 1099–100.

<sup>180</sup> *Id.* at 1100.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (quoting Pls.' First Am. Compl., *supra* note 170, ¶¶ 34, 36–38).

successful farms.<sup>184</sup> This included providing research and schooling regarding the latest and best cocoa farming techniques.<sup>185</sup> Plaintiffs asserted that this support demonstrated that defendants “provid[ed] . . . the necessary means . . . to carry out slave labor” because their actions provided “logistical support and supplies essential to continuing the forced labor and torture.”<sup>186</sup>

Unfortunately, the district court found plaintiffs’ arguments fruitless.<sup>187</sup> Similar to the court’s reasoning concerning financial assistance, plaintiffs’ allegations needed to be specifically directed to the assistance or encouragement of the commission of a particular crime, or they needed to assert conduct that had a “substantial effect” on the specific crimes of forced labor, child labor, torture, and cruel, inhumane, and degrading treatment.<sup>188</sup> The court explained that sufficient allegations would have been the defendants’ provision of guns and whips that were used to threaten, intimidate, or force the child slave labor, or providing the farmers with training on how to utilize guns and whips, or how to deprive children of food and water and other means of psychological abuse and torture.<sup>189</sup> Those types of specific allegations are required to adequately give rise to the aiding and abetting of international law violations.<sup>190</sup> Plaintiffs’ complaint merely asserted that the defendant corporations assisted the Ivorian farmers in the act of growing crops and managing their business.<sup>191</sup> The complaint was ultimately silent of any substantial assistance in forced labor, child labor, torture, or cruel, inhumane, and degrading treatment.<sup>192</sup>

### c. Failure to Exercise Economic Leverage

Lastly, plaintiffs contended that, because defendant

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<sup>184</sup> *Id.* (quoting Pls.’ First Am. Compl., *supra* note 170, ¶¶ 40–41).

<sup>185</sup> *Id.* (quoting Pls.’ First Am. Compl., *supra* note 170, ¶¶ 40–41).

<sup>186</sup> *Id.* (quoting Pls.’ Suppl. Mem., *supra* note 178, at 17–18).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1100–01.

<sup>189</sup> *Id.* at 1101.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1102.

<sup>192</sup> *Id.*

corporations obtained economic leverage over the Ivorian region and their exclusive supplier/buyer agreements with the farmers, they each maintained the ability to control and/or limit the use of forced child labor by the supplier farms from which they purchased their cocoa beans.<sup>193</sup> The district court analyzed these allegations under the “omissions, moral support, and tacit approval and encouragement” theory, which fell outside the definitive scope of aiding and abetting liability under international law and was ultimately an undefined area of law.<sup>194</sup> The court looked to legal authority from the ICTY and ICTR, and, although it found conclusions regarding omissions, moral support, and tacit approval and encouragement under aiding and abetting, the court felt that this area of law was “too unclear to satisfy *Sosa’s* requirements of definiteness and universality.”<sup>195</sup> Nevertheless, the court did note four significant observations regarding this area of law:

First, one must attempt to distinguish omissions, moral support, and tacit approval and encouragement from the concept of “command responsibility,” which “holds a superior responsible for the actions of subordinates. . . .”<sup>196</sup> Second, an “omission” or “failure to act” only gives rise to aiding and abetting liability “if there is a *legal duty* to act. . . .”<sup>197</sup> Third, it must be emphasized that aiding and abetting by way of “moral support” and “tacit approval and encouragement” is a rare breed (and, in fact, a non-existent breed for purposes of the Alien Tort Statute).<sup>198</sup> [Finally,] it is important to note that all of the “moral support” cases involve a defendant who held formal military, political, or administrative

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<sup>193</sup> *Id.* (citing Pls.’ First Am. Compl., *supra* note 170, ¶ 48).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1103; *see, e.g.*, Prosecutor v. Kayishema, No. ICTR-95-1-A, Judgment, ¶¶ 201–02 (June 1, 2001), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-95-1/appeals-chamber-judgements/en/010601.pdf> (affirming the trial court’s finding of guilt via tacit encouragement based on defendant’s position of authority and failure to oppose the crime).

<sup>196</sup> *Nestle I*, 748 F. Supp. 2d at 1104 (quoting *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996)).

<sup>197</sup> *Id.* (quoting Prosecutor v. Mrksic, Case No. IT-95-13/1-A, Judgment, ¶ 134 & n.481 (Int’l Crim. Trib. for the Former Yugoslavia May 5, 2009), <https://www.icty.org/x/cases/mrksic/acjug/en/090505.pdf>).

<sup>198</sup> *Id.* at 1105.

authority.<sup>199</sup>

In other words, the responsibility for international law violations could extend beyond the principal actor to anyone with higher authority who authorized, tolerated, or knowingly ignored those acts.<sup>200</sup> However, for purposes of the ATS, liability was only recognized “in cases where the duty to act arises from an obligation imposed by criminal laws or the laws and customs of war.”<sup>201</sup> Aside from establishing the four important points listed above, the court concluded that the *actus reus* of “moral support” and “tacit approval and encouragement” were not adequately well-defined and universally accepted, as required by *Sosa*, to be an actionable norm under international law.<sup>202</sup>

Plaintiffs attempted to argue that defendants’ conduct should have been viewed as a whole because despite the conduct being unactionable individually, it rose to an actionable level when viewed in totality.<sup>203</sup> The court overwhelmingly concluded that plaintiffs’ allegations only provided that the defendants were purchasing and assisting in the production of cocoa.<sup>204</sup> All that plaintiffs demonstrated to the court was simple commercial transactions between the defendant corporations and the Ivorian farmers.<sup>205</sup> Much more was required to show, both individually and as a whole, that defendants’ had “a material and direct effect” on the forced labor, child labor, torture, or cruel, inhuman, and degrading treatment by the Ivorian farmers.<sup>206</sup> As a result, the *actus reus* component was not met.<sup>207</sup>

## 2. The Aiding and Abetting Claim: *Mens Rea* Component

Despite plaintiffs’ failure to adequately allege the *actus reus* component of aiding and abetting liability, the court

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<sup>199</sup> *Id.*; see, e.g., Kayishema, No. ICTR-95-1-A ¶¶ 201–02, 293–94.

<sup>200</sup> *Hilao*, 103 F.3d at 777.

<sup>201</sup> *Nestle I*, 748 F. Supp. 2d at 1105.

<sup>202</sup> *Id.* at 1109.

<sup>203</sup> *Id.* at 1109–10.

<sup>204</sup> *Id.* at 1100.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

nevertheless continued to consider the *mens rea* component. Plaintiffs' *mens rea* allegations asserted that the defendants' long-term relationship with the farmers, which included occasional physical contact, reflected an awareness of the labor problems that were present.<sup>208</sup> Furthermore, plaintiffs asserted that defendants made public representations of their concern regarding the child labor epidemic and took affirmative actions to reduce it on the farms they worked with.<sup>209</sup> Plaintiffs' ultimate contention was that, based on those efforts and actions, defendants knew or reasonably should have known that child-labor abuse occurred on the Ivorian farms, arguing knowledge as the proper standard.<sup>210</sup>

The court disagreed with plaintiffs' position regarding the knowledge standard and stated that plaintiffs needed to show that defendants "intended and desired to substantially assist the Ivorian farmers" in acts contributing to the child slave labor, which their allegations did not.<sup>211</sup> Even under the *mens rea* standard of knowledge, the court could not wholly conclude that defendants maintained first-hand knowledge that their actions specifically contributed to the child slave labor that occurred.<sup>212</sup> The court specified that plaintiffs' allegations failed to raise a claim of reasonable inference that the defendants knew or should have known that their provision of money, training, tools, and tacit encouragement further assisted the criminal acts committed by the Ivorian farmers.<sup>213</sup> Further, plaintiffs did not demonstrate that defendants either knew that their conduct would substantially assist, or that defendants intended for their conduct to substantially assist, torturous child slave labor.<sup>214</sup> Plaintiffs' allegations, and their conceivable inferences, only indicated that defendants knew about the universal problem of

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<sup>208</sup> *Id.* (citing Pls.' First Am. Compl., *supra* note 170, ¶¶ 34, 38).

<sup>209</sup> *Id.* (citing Pls.' First Am. Compl., *supra* note 170, ¶¶ 45–46, 51, 54–55).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1111.

<sup>212</sup> *Id.* (relying on Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007), [https://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](https://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf)).

<sup>213</sup> *Id.*

<sup>214</sup> *See id.*

child labor on certain cocoa farms in Cote d'Ivoire.<sup>215</sup> Consequently, the absence of adequate allegations of defendants' purpose or intent in assisting the specific crimes asserted against them, the *mens rea* component was similarly not satisfied.<sup>216</sup> Accordingly, defendants' motion to dismiss the claims of aiding and abetting were granted for failure to state a claim upon which relief could be granted.<sup>217</sup>

### 3. The Agency Theory Claim

As an alternative theory, plaintiffs attempted to hold defendants liable under an agency theory, asserting that the defendants were principals of the Ivorian farmers.<sup>218</sup> The court quickly terminated this argument.<sup>219</sup> Most significantly, the court emphasized that plaintiffs' contentions erroneously relied on domestic agency law because international law provided a more appropriate body of law.<sup>220</sup> The court stressed that, per *Sosa*, domestic law is only to be utilized when international law is silent on the topic.<sup>221</sup> Furthermore, even if domestic agency law was appropriate, plaintiffs cited case law regarding agency relationships completely unrelated to the relationships between defendants and the Ivorian farmers in the case at bar, and were thus deficient.<sup>222</sup>

### 4. The Torture Victim Protection Act Claim

In addition to their ATS claim, plaintiffs alleged that defendant corporations aided and abetted acts of torture under the Torture Victim Protection Act (TVPA).<sup>223</sup> The TVPA forbids "[any] individual who, under actual or apparent authority, or color of law, of any foreign nation [to] subject[] an[other] individual to torture."<sup>224</sup> Because the TVPA is a statutory cause of action, the court acknowledged the appropriate analysis was

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 1111–13.

<sup>220</sup> *Id.* at 1111–12.

<sup>221</sup> *Id.* at 1112.

<sup>222</sup> *Id.* at 1111–12.

<sup>223</sup> *Id.* at 1113–14.

<sup>224</sup> *Id.* at 1118 (quoting 28 U.S.C. § 1350 note § 2(a)(1)).

to be derived from federal law—unlike the ATS, which is analyzed under international law—and is thus a matter of statutory interpretation.<sup>225</sup> However, the court refrained from conducting such an analysis and, instead, granted the defendant’s motion to dismiss the TVPA claim for the same reason it dismissed plaintiffs’ other claims: failure to establish plausible allegations of torture or any action under color of law, as required for a finding of liability under the TVPA.<sup>226</sup> The fact that Congress had not extended TVPA liability to corporations further supported this decision.<sup>227</sup>

### 5. The State-Law Claims

Lastly, plaintiffs asserted four claims under California law: breach of contract, negligence, unjust enrichment, and unfair business practices.<sup>228</sup> Due to an analogous Ninth Circuit decision, plaintiffs abandoned the breach of contract and negligence claims.<sup>229</sup> With regard to the unjust enrichment claim, plaintiffs alleged that the farm’s reliance on forced labor greatly reduced labor costs, which allowed defendants to receive benefits by purchasing cocoa beans for such significantly low prices.<sup>230</sup> The court also noted relevant case law that established that the lack of a prior relationship between a plaintiff and a defendant precluded claims of unjust enrichment because the relationship was too attenuated to support such a claim.<sup>231</sup> In the case at bar, plaintiffs did not identify any relevant authority

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<sup>225</sup> *Id.* at 1115–16.

<sup>226</sup> *Id.* at 1120.

<sup>227</sup> *Id.* at 1116.

<sup>228</sup> *Id.* at 1120.

<sup>229</sup> *Id.* at 1120–21; see *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 685 (9th Cir. 2009), wherein the court held that corporations have no legal duty under the common law principles of negligence when it comes to the substandard labor principles of their suppliers.

<sup>230</sup> *Nestle I*, 748 F. Supp. 2d at 1121 (quoting Pls.’ First Am. Compl., *supra* note 170, ¶¶ 90–91).

<sup>231</sup> *Id.* “The fact that one person benefits another is not, by itself, sufficient to require restitution.” *First Nationwide Sav. v. Perry*, 15 Cal. Rptr. 2d 173, 176 (Cal. Dist. Ct. App. 1992). “The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it.” *Id.* See, for example, *Wal-Mart Stores, Inc.*, 572 F.3d at 685, where the court concluded that, because the plaintiff was not an employee of the defendant, the plaintiff had no place to assert unjust enrichment based on the defendant’s alleged substandard labor practices.

to support their allegation that the long-term exclusive relationships between the defendant corporations and the Ivorian farmers were adequate to fulfill the “prior relationship” condition required for unjust enrichment claims.<sup>232</sup> Accordingly, this claim was dismissed.<sup>233</sup>

Concerning the unfair business practice allegation, plaintiffs claimed that defendants “engaged in fraudulent and deceptive business practices by making materially false misrepresentations and omissions” to create the impression that they were addressing the problem of child slave labor when, in fact, they were not.<sup>234</sup> Plaintiffs further argued that defendants engaged in unfair business practices by utilizing and supporting forced child labor.<sup>235</sup> Ultimately, the court determined that plaintiffs did not express any theory, or provide any legal authority, through which the child slave plaintiffs were injured by defendants’ specific California-based conduct, nor was it explained how the alleged conduct—such as the false and misleading statements—adversely affected the child slave plaintiffs.<sup>236</sup> Accordingly, this claim was also dismissed.<sup>237</sup>

After this devastating loss and a full complaint dismissal, plaintiffs appealed to the Ninth Circuit in June of 2011.<sup>238</sup>

### C. First Appeal – *Nestle II* (9th Cir. 2014)

The Ninth Circuit addressed three issues in this appeal:

1. Did the district court err in determining that private corporations are not subject to civil tort liability under the ATS?
2. Did the district court err in failing to apply the federal common law standard for civil aiding and abetting liability to Plaintiffs’ ATS claims?
3. Even if international law applied to Plaintiffs’

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<sup>232</sup> *Nestle I*, 748 F. Supp. 2d at 1122.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (quoting Pls.’ First Am. Compl., *supra* note 170, ¶ 96).

<sup>236</sup> *Id.* at 1122–23.

<sup>237</sup> *Id.* at 1123.

<sup>238</sup> *See generally* Appellants’ Opening Br., *Doe I v. Nestle U.S.A., Inc. (Nestle II)*, 766 F.3d 1013 (9th Cir. 2011) (No. 2:05-cv-05133-SVW-JTL), 2011 WL 2617616.

aiding and abetting claims, did the district court use the correct international law standard?<sup>239</sup>

Plaintiffs consistently maintained their position that the defendant corporations aided and abetted slave labor “by providing financial and non-financial assistance to cocoa farmers in the Ivory Coast.”<sup>240</sup> In opposition, defendants argued three main points: (1) there is no specific, universal, and obligatory norm preventing corporations from aiding and abetting slave labor; (2) plaintiffs’ complaint, again, failed to allege the *actus reus* and *mens rea* elements of the aiding and abetting claim; and (3) plaintiffs’ complaint improperly sought extraterritorial application of federal law contrary to *Kiobel II*.<sup>241</sup>

### 1. The Alien Tort Claim

Between 2010 and 2014, from the dismissal of plaintiffs’ amended complaint to the decision of their appeal, the *Kiobel I*, *Kiobel II*, and *Sarei* decisions were published.<sup>242</sup> *Sarei*, a decision from the Ninth Circuit’s own en banc panel, and *Kiobel II*, a Supreme Court decision, were thus both binding precedent on this appeal. In applying the norm-by-norm analysis adopted in *Sarei*, the *Nestle II* court concluded that the prohibition against slavery is a universal norm; however, it could not be asserted against the defendant corporations because the scope of the ATS did not (at this time) extend to corporations.<sup>243</sup> Notwithstanding this conclusion, the court acknowledged that corporations were not exempt from acts of enslavement and the prohibition of slavery applied to all actors—both state and non-state—because it would be a contradiction to the humanitarian and moral nature of the prohibition to conclude that corporations are immune from liability of any form of slavery.<sup>244</sup> Therefore, the Ninth Circuit reversed the district court’s order and remanded the case for further proceedings consistent with

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<sup>239</sup> *Id.* at 3–4.

<sup>240</sup> *Doe I v. Nestle U.S.A., Inc. (Nestle II)*, 766 F.3d 1013, 1020 (9th Cir. 2014).

<sup>241</sup> *Id.*

<sup>242</sup> See discussion *supra* Parts II(B)(i)–(ii), II(C)(ii), for further information on these cases.

<sup>243</sup> *Nestle II*, 766 F.3d at 1022.

<sup>244</sup> *Id.*

its opinion.<sup>245</sup>

The Ninth Circuit refrained from addressing defendants' extraterritoriality argument because, although *Kiobel II* had just been decided, too much was still left unanswered.<sup>246</sup> It is common practice for courts to allow plaintiffs to amend their complaints when changes in the law occur.<sup>247</sup> Accordingly, the Ninth Circuit directed plaintiffs to amend their complaint in light of the *Kiobel II* decision, which required plaintiffs to add allegations of activity that occurred within the United States to overcome defendants' extraterritoriality argument.<sup>248</sup> The Ninth Circuit recognized that such an amendment would be possible because, based on the record before them, certain conduct underlying plaintiffs' claims had occurred in the United States.<sup>249</sup> However, plaintiffs' current complaint failed to adequately explain such conduct to sufficiently fulfill those allegations.<sup>250</sup> For the district court to effectively and fully consider the accuracy of plaintiffs' counter-arguments on remand, it was justified to allow amendment of their complaint.<sup>251</sup>

## 2. The Aiding and Abetting Claim: *Mens Rea* Component

On appeal, plaintiffs maintained their *mens rea* argument that the standard for an aiding and abetting claim was knowledge.<sup>252</sup> Although the circuits remained divided as to the appropriate standard, the Ninth Circuit acknowledged the history of the knowledge standard in other international tribunals.<sup>253</sup> The court decided that it was not necessary for

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<sup>245</sup> *Id.* at 1029.

<sup>246</sup> *Id.* at 1027–28.

<sup>247</sup> *Id.* at 1028.

<sup>248</sup> *Id.* at 1028–29.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 1023.

<sup>253</sup> *Id.*; see generally *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 483 (Sept. 26, 2013), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>; *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgment, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007),

them to decipher which standard was appropriate because plaintiffs' allegations nevertheless satisfied the more rigorous standard of purpose.<sup>254</sup>

The Ninth Circuit read plaintiffs' allegations in their favor and determined that a logical inference arose that the defendant corporations would likely supersede basic human welfare for increased revenues and intend to pursue any and all opportunities to reduce their costs for purchasing cocoa.<sup>255</sup> The court felt that, driven by such a goal, it was probable that defendants encouraged child slavery because it was the cheapest form of labor available and would thus be most profitable, as plaintiffs alleged.<sup>256</sup> Therefore, plaintiffs' allegations did properly explain how the defendants benefited from the use of child slavery, how child slavery furthered defendants' operational goals, and how defendants acted with purpose to further child slavery.<sup>257</sup> Moreover, the court recognized that the defendants' control over the Ivory Coast cocoa market further supported that they acted with purpose to facilitate child slavery because they did not use their control to stop it and continued to offer support and provide supplies that further enabled it.<sup>258</sup> The Ninth Circuit indicated that defendants maintained the means to prevent or decrease child slavery and, because they did not do so, their purpose in continuing child slavery was demonstrably supported.<sup>259</sup> Despite these conclusions, the court recognized that doing business with child slave owners did not solely establish a purpose to support child slavery.<sup>260</sup> But, specifically, it was defendants' support of the use of child slavery to minimize production costs that clearly translated to the use of child slavery in order to pursue a goal of profitability—

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[https://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](https://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 205 (May 25, 1999), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-95-1/trial-judgements/en/990521.pdf>; *Zyklon B Case*, *supra* note 146.

<sup>254</sup> *Nestle II*, 766 F.3d at 1024.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 1024–25.

<sup>259</sup> *Id.* at 1025.

<sup>260</sup> *Id.*

something that could only be done with purpose.<sup>261</sup> The *mens rea* requirement was therefore satisfied and the district court's decision on this issue was reversed.<sup>262</sup>

### 3. The Aiding and Abetting Claim: *Actus Reus* Component

The parties agreed, and as required by international law, that the assistance an aider and abettor provides to a principal actor must be substantial.<sup>263</sup> However, the parties did not agree on whether such assistance must be “specifically directed” towards the commission of the crime.<sup>264</sup> After reviewing the relevant international case law which supported and opposed the “specifically directed” requirement, the Ninth Circuit determined that “there [was] less focus on specific direction and more of an emphasis on the existence of a causal link between the defendants and the commission of the crime.”<sup>265</sup> Despite this revelation, the court declined to adopt a particular *actus reus* standard for aiding and abetting under the ATS.<sup>266</sup> Instead, the Ninth Circuit remanded the matter and held that plaintiffs should be afforded the opportunity to amend their *actus reus* claims and their ATS claim in light of two recent international decisions which further defined the *actus reus* standard for violations of international law, as discussed *supra* in Part III.A.<sup>267</sup>

After *Nestle II* was decided in September of 2015, defendants submitted a Petition for a Writ of Certiorari to the

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<sup>261</sup> *Id.* at 1025–26.

<sup>262</sup> *Id.* at 1026.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1026–27; see *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 390 (Sept. 26, 2013), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>, which explains that the aiding and abetting of violations of international law require a direct and specific link between the assistance and the commission of the crime; and *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, ¶¶ 27, 126 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), [https://www.icty.org/x/cases/perisic/acjug/en/130228\\_judgement.pdf](https://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf), which explains that aiding and abetting conduct must have a substantial effect on the commission of the crime.

United States Court of Appeals for the Ninth Circuit to determine:

1. Whether a defendant is subject to suit under the ATS for aiding and abetting another person's alleged violation of the law of nations based on allegations that the defendant intended to pursue a legitimate business objective while knowing (but not intending) that the objective could be advanced by the other person's violation of international law. 2. Whether the "focus" test of *Morrison v. National Australian Bank, Ltd.*, 561 U.S. 247, 248 (2010), governs whether a proposed application of the ATS would be impermissibly extraterritorial under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). 3. Whether there is a well-defined international-law consensus that corporations are subject to liability for violations of the law of nations.<sup>268</sup>

The petition was denied on January 11, 2016.<sup>269</sup> At that point, this matter had been pending for six years, and the ILRF was preparing its third complaint.

#### D. *Nestle III* (C.D. Cal. 2017)

To sufficiently file a comprehensive amended complaint, plaintiffs moved for a limited jurisdictional discovery exchange in March of 2016, which was granted by the district court.<sup>270</sup> Subsequently, plaintiffs were faced by a second motion to dismiss premised on two main arguments: (1) the ATS could not be applied extraterritorially, which plaintiffs assert by including conduct that occurred outside the United States; and (2) plaintiffs still did not sufficiently allege the *actus reus* component of their aiding and abetting claim.<sup>271</sup> In rendering a decision, the court applied the *Morrison* "focus test" to the claims at issue, notwithstanding the Ninth Circuit's prior rejection of the test.<sup>272</sup>

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<sup>268</sup> Pet. for a Writ of Cert. at i, *Nestle U.S.A., Inc. v. Doe*, 136 S. Ct. 798 (2016) (No. 15-349), 2015 WL 5530188.

<sup>269</sup> *Nestle U.S.A., Inc. v. Doe I*, 577 U.S. 1062 (2016).

<sup>270</sup> See generally Mot. to Allow Pls. to Conduct Jurisdictional Disc., *Doe I v. Nestle, S.A.*, 766 F.3d 1013 (9th Cir. 2014) (No. 2:05-cv-05133-SVW-MRW), 2016 WL 1546527.

<sup>271</sup> Defs. Mot. to Dismiss 2010, *supra* note 164, at 3–18.

<sup>272</sup> *Nestle v. Nestle, S.A. (Nestle III)*, No. CV 05-5133-SVW-MRW, 2017

The court specified that the conduct at issue in this case was forced child labor and that the “focus” was defendants conduct that aided and abetted such forced child labor on the Ivorian Coast.<sup>273</sup> The court conducted a further analysis by first isolating the relevant conduct that was alleged to constitute defendants’ aiding and abetting of forced child labor and then by determining if all relevant conduct took place outside the United States.<sup>274</sup> The court reasoned that, if the answer to the latter question was yes, the case was to be dismissed.<sup>275</sup> However, “[i]f *some* relevant conduct took place in the United States, it must ‘touch and concern’ the United States with ‘sufficient force to displace the presumption against extraterritoriality.’”<sup>276</sup> The court then addressed plaintiffs’ allegations concerning defendants’ conduct that “touched and concerned” the United States with sufficient force to displace the presumption against extraterritoriality.<sup>277</sup> This was done in five separate parts:

- (1) U.S. based decision-making; (2) the provision of funds originating in the U.S.; (3) the U.S. companies furnishing “additional supplies” and “extensive training” to cocoa fanners [sic] in Cote d’Ivoire; (4) publishing statements in the U.S. that Defendants are against child slavery; and (5) lobbying efforts in the U.S. against a bill that Plaintiffs allege “would have required Defendants’ import cocoa to be “slave free.”<sup>278</sup>

Because certain conduct by the defendants took place within the United States, the court was required to analyze further.<sup>279</sup> In doing so, the court determined that the first three allegations were all ordinary activities of international businesses and did not “touch and concern” the United States with any weight more than mere citizenship.<sup>280</sup> These particular allegations only

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WL 6059134, at \*1 (C.D. Cal. Mar. 2, 2017).

<sup>273</sup> *Id.* at \*3.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co. (Kiobel II)*, 569 U.S. 108, 125 (2013)).

<sup>277</sup> *Id.* at \*4.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

showed that defendants maintained business relationships with foreign parties and nothing suggested that defendants planned or directed the underlying violations in any way.<sup>281</sup>

The court likewise did not agree with plaintiffs' fourth allegation.<sup>282</sup> Plaintiffs alleged that defendants published false assurances to consumers, which deluded them of the reality that defendants were actually supporting child slave labor.<sup>283</sup> Specifically, these publications stated that defendants were against child labor and that they held their suppliers to high standards, including compliance with the prohibition of child labor.<sup>284</sup> The court determined these allegations were not relevant conduct under the "focus test" because they did not adequately explain how the statements were fraudulent, and the court therefore deemed them conclusory.<sup>285</sup> As mentioned, the allegations did not show that the alleged publications assisted the defendants in committing forced child labor in any way, nor did plaintiffs provide any legal authority to support that publications that inform the public of an international human rights violation translates to the aiding and abetting of that violation.<sup>286</sup>

Plaintiffs' fifth allegation asserted that defendants conduct "touched and concerned" the United States by the millions of dollars spent within the United States "lobbying to destroy a bill that . . . would have required Defendants' imported cocoa to be 'slave free.'"<sup>287</sup> However, similar to plaintiffs' first four claims, plaintiffs did not plausibly allege how such lobbying efforts specifically aided and abetted the Ivorian farmers to sufficiently displace the presumption.<sup>288</sup> As such, the court determined that plaintiffs' allegations were not relevant conduct under the "focus test."<sup>289</sup>

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<sup>281</sup> *Id.* at \*5.

<sup>282</sup> *Id.* at \*5–6.

<sup>283</sup> *Id.* at \*5.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at \*5–6.

<sup>287</sup> *Id.* at \*6

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

Finally, the court concluded that the only nexus between plaintiffs' claims and the United States was the fact that defendants were United States corporations, which was not a sufficient factor.<sup>290</sup> The court did not find, nor did plaintiffs provide, any case law to support the argument that the large size of defendant corporations was to be considered a relevant factor under this, or any, ATS test.<sup>291</sup> The court ultimately found that plaintiffs' complaint sought a barred extraterritorial application of the ATS.<sup>292</sup> As a result of this finding, the court did not reach the merits of plaintiffs' *actus reus* claims.<sup>293</sup> Defendants' motion to dismiss was granted without leave to amend.<sup>294</sup> The court did not grant plaintiffs leave to amend their complaint because plaintiffs were already given ample opportunities, among other procedural aspects, to adequately adjust their complaint.<sup>295</sup> The court determined that further amendment would not serve any fruitful purpose.<sup>296</sup> Nevertheless, plaintiffs refused to back down, and again appealed to the Ninth Circuit.<sup>297</sup> By that time, litigation had entered its twelfth year.

#### E. Second Appeal – *Nestle IV* (9th Cir. 2019)

Since the Ninth Circuit decided *Nestle II*, the Supreme Court published the *Jesner* decision, which created a shift in the “legal landscape” of the ATS and required portions of the *Nestle II* decision to be reconsidered.<sup>298</sup> The decision was divided into four main parts: (1) corporate liability post-*Jesner*; (2) the extraterritorial ATS claim; (3) the aiding and abetting claim; and (4) plaintiffs standing to bring such claims.<sup>299</sup>

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<sup>290</sup> *Id.* at \*7–8.

<sup>291</sup> *Id.* at \*8.

<sup>292</sup> *Id.* at \*1.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at \*9.

<sup>295</sup> *Id.* at \*8.

<sup>296</sup> *Id.*

<sup>297</sup> *Doe v. Nestle, S.A. (Nestle IV)*, 929 F.3d 623, 639 (9th Cir. 2018).

<sup>298</sup> *Id.* at 639, 642.

<sup>299</sup> *Id.* at 639–42.

### 1. Corporate Liability Post-*Jesner*

In *Nestle II*, the Ninth Circuit held that the prohibition of slavery was universal, and thus “applicable to all actors, including corporations.”<sup>300</sup> However, since then, the Supreme Court explicitly held in *Jesner* that *foreign* corporations could not be sued under the ATS.<sup>301</sup> Accordingly, *Nestle II*’s holding was null as to the foreign defendant corporations but upheld as applied to the domestic defendant corporations.<sup>302</sup>

### 2. The Extraterritoriality Claim

Defendants main argument was that the court was required to use the “focus test,” and the court agreed.<sup>303</sup> With regard to the first step in the extraterritoriality analysis, as established in *Kiobel II*, the ATS maintained a presumption against extraterritoriality, and nothing in the statute rebutted that presumption.<sup>304</sup> The next step in the analysis, the court determined, necessitated an inquiry into “a domestic application of the statute,” which required a look into its focus.<sup>305</sup> Defendants asserted that conduct occurring within the United States was immaterial because the focus of extraterritoriality should be on the location where the principal offense or injury occurred, rather than where the aiding and abetting took place.<sup>306</sup> The court disagreed and held that “[t]he focus of the ATS is not limited to principal offenses.”<sup>307</sup> The court then proceeded to determine whether there was any domestic conduct relevant to plaintiffs’ ATS claim.<sup>308</sup> In doing so, the court concluded that the conduct mentioned in plaintiffs’ complaint was both specific and domestic because it “paint[ed] a picture of overseas slave labor that defendants perpetuated from headquarters in the United States.”<sup>309</sup> Thus, the court held that

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<sup>300</sup> *Id.* at 639 (quoting *Doe I v. Nestle U.S.A., Inc. (Nestle II)*, 766 F.3d 1013, 1022 (9th Cir. 2014)).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 640.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 640–41.

<sup>306</sup> *Id.* at 641.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 642.

<sup>309</sup> *Id.*

this “narrow set of domestic conduct [was] relevant to the ATS’s focus.”<sup>310</sup>

### 3. The Aiding and Abetting Claim

The Ninth Circuit decided it was unnecessary to rule on the aiding and abetting claim in light of the way *Jesner* shifted the legal framework of ATS liability, which affected plaintiffs’ complaint.<sup>311</sup> Plaintiffs conceded, however, and the Ninth Circuit agreed, that it remained problematic that the complaint discussed the remaining defendants as a single perpetrator.<sup>312</sup> Moreover, because of *Jesner*, it was not possible, based on the current record, that any culpable conduct actionable under the ATS could be connected to the defendants.<sup>313</sup> Just as the court stated in *Nestle II*, “[i]t is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law . . . .”<sup>314</sup> Despite the acknowledged delay this decision presented, the court nevertheless determined it was best to allow plaintiffs to amend their complaint to remove the foreign defendants and to specify which potentially liable party was responsible for what culpable conduct.<sup>315</sup>

### 4. Plaintiffs’ Standing to Bring Their Claims

Defendants argued that plaintiffs’ lacked Article III standing because they failed to allege an actual and specified injury that was connected to the disputed conduct and could be redressed by a positive judicial outcome.<sup>316</sup> The court rejected this argument, discussing the appropriate remedies such as compensatory damages or sanctions, which would reduce the risk of forced child labor continuing.<sup>317</sup> The court further highlighted that plaintiffs satisfactorily alleged traceability to the challenged conduct—specifically, concerning their

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<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* (quoting *Doe I v. Nestle U.S.A., Inc. (Nestle II)*, 766 F.3d 1013, 1028 (9th Cir. 2014)).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

allegations against Cargill.<sup>318</sup> Thus, despite the deficient allegations against Nestle, the court acknowledged the sufficiency of the claims to be re-pleaded.<sup>319</sup>

Ultimately, the Ninth Circuit reversed the district court's decision of *Nestle III* and remanded the matter back to the district court with permission for plaintiffs to amend their complaint per the *Jesner* decision and its opinion.<sup>320</sup>

#### F. Petition for Certiorari – *Nestle V* (2020)

After the Ninth Circuit decided *Nestle IV*, Nestle U.S.A., Inc. filed a Petition for Writ of Certiorari on September 25, 2019, including the following questions presented:

1. Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. §1350, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity.
2. Whether the Judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations.<sup>321</sup>

Plaintiffs, now respondents, filed an opposition on December 12, 2019, and petitioners filed their reply shortly thereafter on December 23, 2019.<sup>322</sup> On January 13, 2020, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States on this matter.<sup>323</sup> On July 2, 2020, the Supreme Court granted Nestle U.S.A., Inc.'s petition, consolidating it with a similar petition filed by Cargill, Inc.<sup>324</sup>

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 642–43.

<sup>320</sup> *Id.* at 643.

<sup>321</sup> Pet. for a Writ of Cert. at i, Nestle U.S.A., Inc., v. Doe I, 141 S. Ct. 188 (2020) (No. 19-416), 2019 WL 4747982.

<sup>322</sup> See generally Br. in Opp., Nestle U.S.A., Inc. v. Doe I, 141 S. Ct. 188 (2020) (No. 19-416), 2019 WL 6840721; Reply Br. in Supp. of Cert., Nestle U.S.A., Inc. v. Doe I, 141 S. Ct. 188 (2020) (No. 19-416) 2019 WL 7212365.

<sup>323</sup> Nestle U.S.A., Inc. v. Doe I, 140 S. Ct. 912 (2020). As of January 5, 2020, twenty-five amicus briefs had been filed in connection with these petitions.

<sup>324</sup> Nestle U.S.A., Inc. v. Doe I, 141 S. Ct. 188 (argued Dec. 1, 2020);

This case had then entered its fifteenth year of litigation.

#### V. ANALYSIS AND CONCLUSION

The Supreme Court should affirm the decision of the Ninth Circuit, allowing this case to be remanded so that plaintiffs can properly amend their complaint to be consistent with all prior decisions. For purposes of the final portion of this case note, the questions granted by the Supreme Court will not be addressed. Plaintiffs' success on remand will rely solely on their ability to construct a plausible complaint that lists each domestic corporation's culpable U.S. conduct that is specifically linked to the furtherance of the commission of forced labor, child labor, torture, or cruel, inhumane, and degrading treatment. By removing the foreign defendants, plaintiffs have averted any future defenses regarding corporate liability under the ATS. In *Nestle II*, the Ninth Circuit held that plaintiffs satisfied the purpose standard with regard to the *mens rea* component of their claim, and, in *Nestle IV*, the Ninth Circuit held that the narrow set of domestic conduct provided by plaintiffs was relevant to the ATS's focus. Accordingly, the final challenge plaintiffs must overcome is satisfying the *actus reus* component of their aiding and abetting claim in conjunction with the ICTY's *Taylor* and *Perišić* decisions, as recommended by the court.

Concerning financial assistance, plaintiffs must show, or at least create the plausible inference, that the financial assistance provided by defendants to the Ivorian farmers was unrelated to a commercial purpose. Asserting a noncommercial purpose can be accomplished through a showing of a gratuitous gesture on behalf of the defendants to specifically incentivize the farmers to keep cocoa costs down. If plaintiffs can show that the most logical way to keep cocoa costs down is through the use of forced child labor or the like, they have ascertained the link between the financial assistance and the commission of the crime. Additionally, plaintiffs could show additional steps taken by the defendants in providing such financial assistance to try and convey the inference that more than the average contractual payments were being made to the farmers in reliance on continued low cocoa costs by use of forced child labor.

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Cargill, Inc. v. Doe I, 141 S. Ct. 184 (argued Dec. 1, 2020).

While certain farming supplies—such as chemicals, fertilizers, and power tools—may be dangerous, they are not criminal. Supplies must be specifically designed for an unlawful purpose to support a close causal link to the principal crime.<sup>325</sup> For the defendants' to be found liable for aiding and abetting the Ivorian farmers of child labor, forced labor, torture, or cruel, inhuman, and degrading treatment, as plaintiffs contend, they must show that such crimes were perpetrated with the supplies provided by defendants, that defendants provided such supplies to further the criminal acts, and that the supplies had a substantial effect on the criminal behavior. Plaintiffs must establish which materials were used by the Ivorian farmers in the commission of such crimes and whether those materials were supplied by defendants. Plaintiffs allege that these child workers are tortured and subjected to cruel, inhuman, and degrading treatment; thus, it is probable that some sort of instruments are involved to implement such conduct. If plaintiffs can show that defendants supplied any tools or chemicals not regularly used in the normal course of cocoa bean farming and can only logically be inferred as a means of threat and/or intimidation, they will have a better shot at successfully alleging this claim.

With regard to technical assistance and training, plaintiffs similarly must show that such technical assistance and training were provided by defendants for the direct purpose of assisting in the furtherance of the farmers' forced labor, child labor, torture, or cruel, inhuman, and degrading treatment. Instances where courts have found the provision of training and technical assistance to have had a substantial effect on a particular criminal act occurred when such training and assistance was customized to facilitate criminal acts.<sup>326</sup> Plaintiffs must show that the Ivorian farmers were trained by defendants to utilize forms of torturous labor, or the like, for some benefit that incentivized them or motivated them to continue utilizing it. If

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<sup>325</sup> See, for example, *Zyklon B Case*, *supra* note 146, which discusses the defendant's supplying of poison gas used to kill people.

<sup>326</sup> See, for example, *S. Afr. Apartheid Litig. v. Daimler, A.G.*, 617 F. Supp. 2d 228, 228 (S.D.N.Y. 2009), wherein a database was specifically customized to further criminal conduct.

plaintiffs can show that defendants trained the farmers to only employ children, maintain an inhuman work environment, and/or use forceful and degrading techniques, their complaint will raise the inference of a direct link between defendants' training and the criminal acts that had a substantial effect.

Alternatively, plaintiffs may also succeed with an allegation that defendants failed to correct the inhuman working conditions by omitting to correct or properly train the farmers to preserve a healthy and suitable work environment, especially if they can show that the defendants knew how awful the farms' working environments actually were. For plaintiffs to successfully allege that technical assistance had a substantial effect or direct link to the crime at issue, they must prove that defendants customized or required the use of some form of software or database which provided the farmers with information on keeping cocoa bean costs low and that the only way the farmers knew or were able to sustain such low costs, as directed by the software or database, was through the use of child slave labor.

Lastly, the district court concluded in *Nestle I* that moral support and tacit encouragement and approval, the theory under which plaintiffs' claim of failure to exercise economic leverage falls, is not well-defined and universally accepted as required by *Sosa* to be actionable. However, this conclusion should be reconsidered. The court concluded four noteworthy points regarding this area of law. First, there is a convincing argument that defendants did maintain a legal duty to act. Defendant corporations were all obligated to comply with both Convention 182 and The Harken-Engel Protocol. Furthermore, notwithstanding the illegality of slavery in the United States, child labor is heavily regulated. Therefore, multi-billion-dollar companies, such as defendants, should be legally obligated to refrain from maintaining any exclusive buyer/supplier relationships with businesses or farms that knowingly or recklessly use any form of labor not lawfully permitted within the United States. If defendants threatened to end to their buyer/supplier relationship with the Ivorian farmers due to the farmers' failure to comply with Convention 182 and/or the guidelines outlined in the Harkin-Engle Protocol, it is probable

that the farmers would have reconsidered in order to sustain such an economically advantageous business relationship to them. Thus, defendants should be considered to have a legal duty to end, or attempt to end, their business relationships with the Ivorian farmers for their continued use of child slave labor and, because they did not, they should be liable for aiding and abetting same.

Second, just because aiding and abetting by way of moral support and tacit encouragement and approval is rare or even non-existent with regard to the Alien Tort Statute, that does not mean the court should refrain from holding defendants liable. Our courts have expanded the scope of the ATS since *Filartiga* in 1980 and they should continue to do so today, especially when a universal prohibition is at issue, such as the issue involved in the case at bar. If the Ninth Circuit explicitly stated that the absence of precedent regarding corporate liability under the ATS did not automatically imply that it was a legal impossibility, the same standard should thus apply with aiding and abetting by way of moral support and tacit encouragement and approval.

In contrast with the court's conclusions, I believe plaintiffs satisfy the tacit approval and encouragement theory since there is a strong argument that defendants held a position of administrative authority over the Ivorian farmers. Plaintiffs have previously alleged that defendants participate in numerous site visits to the Ivorian farms, which, with sufficient proof, should fulfill the requirement of a physical presence if evidence can be brought to prove that a high quantity of visits occurred each year. Moreover, it is unquestionable that defendants maintain a position of administrative authority over the Ivorian farmers because they provide all the necessary supplies to keep the farms up and running, they maintain substantial economic leverage over the farmers, and they have great influence over the cocoa farm industry as a whole on the Ivory Coast.

Defendants or defendants' agents cannot successfully argue that they were unaware of the farms' labor uses if they or their agents were physically present on the farms via their site visits. Such presence clearly would have made them aware of the apparent labor conditions. Further, the Ivorian farmers were

obviously aware of such a presence, making them conscious of defendants' knowledge of the labor conditions utilized on the farms. Thus, a plausible conclusion can be made that the farmers inferred defendants' approval of these conditions due to their non-interference with the farm's labor conditions during or after these site visits occurred. Ultimately, with the appropriate amendments, plaintiffs should likely finally have their day in court, and the global prohibition on child slavery will be one step closer to success.