Comment On Nestlé USA, Inc. v. Doe: Ivory Coast Cocoa Farming Child Slaves, the Alien Tort Statute, And the "Craven Watchdog"

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INTRODUCTION

On 17 June, 2021, the Supreme Court published its decision in the case of *Nestlé USA, Inc. v. Doe*.[1] The case was on appeal from the Court of Appeals for the Ninth Circuit.[2] It was originally brought in the United States

[1] 141 S. Ct. 1931 (2021).

[2] Doe v. Nestlé, S.A., 929 F.3d 623, (9th Cir. 2019). The procedural history of this case is unusually complicated, in large part due to contemporaneous developments in related areas of case law. The original claim was first filed in 2010 as Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010), in which the District Court held for the defendants on a motion to dismiss. This opinion was subsequently vacated and remanded by the Ninth Circuit Court of Appeals in Doe v. Nestlé USA, Inc., 738 F. 3d 1048 (9th Cir. 2013). The Circuit Court reasoned that the plaintiffs should have an opportunity to amend their complaint in light of recent developments from Supreme Court case law suggesting that corporations can face liability under the Alien Tort Statute, citing dicta in Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013). Nestlé USA, Inc., 738 F.3d at 1049. The Ninth Circuit Court of Appeals then withdrew this opinion in Doe v. Nestlé USA, Inc., No. 10-56739, 2014 U.S. App. LEXIS 17426 (9th Cir. Sep. 4, 2014), replacing it with John Doe I v. Nestlé *USA*, 766 F.3d 1013 (9th Cir. 2014). The Ninth Circuit's replacement opinion maintained the reversal and vacation of the District Court's dismissal and instructed the plaintiffs to flesh out their allegations that some of the culpable conduct occurred in the United States in light of the 'touch and concern' test developed in *Kiobel*, 569 U.S. at 125 (Alito, J., concurring) (*see also* Kennedy, J., concurring). Prior to the District Court's rehearing of the case, the Supreme Court denied a petition for certiorari, Nestlé U.S.A., Inc. v. Doe, 577 U.S. 1062 (2016). The California Central District Court then, seven years after their first ruling, issued an opinion after rehearing the case, Nestlé v. Nestlé S.A., and again dismissed the case, finding that the plaintiffs' Alien Tort Statute claim was still barred by the doctrine of extraterritoriality. No. CV 05-5133-SVW-MRW, 2017 U.S. Dist. LEXIS 221739 at *11 (C.D. Cal. Mar. 2, 2017). While recognizing that "the focus of the ATS is the conduct that violates international law, which the ATS seeks to regulate by giving federal courts jurisdiction over such claims," (internal quotations omitted) (quoting Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 197 (5th Cir. 2017), the District Court characterized the domestic conduct of Nestlé as "ordinary business conduct" insufficient to displace the presumption against extraterritoriality. *Nestlé*, 2017 U.S. Dist. LEXIS 221739, at *13-14. The Ninth Circuit Court of Appeals then once again took up the case in Doe v. Nestlé, S.A., 906 F.3d 1120 (9th Cir. 2018), reviewing the District Court's dismissal for lack of jurisdiction on a de novo basis. *Id.* at 1123. The Ninth Circuit once

District Court for the Central District of California.[3] Six individuals from Mali ("Plaintiffs" or "Respondents") claimed that they were trafficked into the Ivory Coast[4] and held as child slaves, forced to work on cocoa farms[5] that sold cocoa to Nestlé USA, Inc. ("Nestlé").[6] The Plaintiffs argued that Nestlé,[7] which provided financial and technical support to the cocoa farms, despite not owning them, should be held liable under the Alien Tort Statute[8] for aiding and abetting child slavery in violation of customary international law.

With Justice Thomas writing for the Court, the majority reversed the opinion of the Ninth Circuit Court of Appeals,[9] holding that Plaintiffs failed to overcome the presumption against extraterritorial application of the Alien Tort Statute, as developed in *Kiobel v. Royal Dutch Petroleum Co*.[10] because Plaintiffs did not establish that "the conduct relevant to the statute's focus occurred in the United States . . . even if other conduct occurred

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again reversed and remanded the District Court's opinion, instructing the plaintiffs to amend their complaint "to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case," rather than the foreign corporations, which are not amendable to liability under the ATS. *Id.* at 1127. It was at this point in the procedural history of the case that the Supreme Court granted certiorari (Nestlé USA, Inc. v. Doe, 141 S. Ct. 188 (2020) and heard the case, ending the back-and-forth between the California Central District Court and the Ninth Circuit Court of Appeals.

[3] *Nestlé*, 2017 U.S. Dist. LEXIS 221739.

[4] The Ivory Coast (Côte d'Ivoire) has ratified all key international provisions concerning child labor. *2020 Findings on the Worst Forms of Child Labor - Côte d'Ivoire*, BUREAU OF INTERNATIONAL LABOR AFFAIRS (Sept. 2020), https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2020/Cote-d-Ivoire.pdf. The relevant provisions include: ILO C. 138, Minimum Age; ILO C. 182, Worst Forms of Child Labor; UN CRC; UN CRC Optional Protocol on Armed Conflict; UN CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography; Palermo Protocol on Trafficking in Persons. *Id.* at 3.

[5] The issue of child slavery on cocoa farms on the West African coast, and particularly in Ivory Coast, is a perennially recurring issue, recognized by several multilateral institutions and national governments, including the United States. *See, e.g., Child Labor and Slavery in the Chocolate Industry*, FOOD EMPOWERMENT PROJECT (Oct. 28, 2021), https://foodispower.org/human-labor-slavery/slavery-chocolate/; *see also* BUREAU OF INTERNATIONAL LABOR AFFAIRS, *supra* note 4. During the ten-year period starting in 2008-2009, data indicated that the prevalence of child slavery in western Africa increased, despite attracting more global, and domestic attention. *Id.* at 1.

[6] The plaintiffs alleged that they were forced to work fourteen hours per day, six days per week, with little food. They alleged that they were beaten and whipped by overseers, not permitted to leave the plantation, and tortured if they were caught trying to escape. The plaintiffs testified that they had seen other child slaves being tortured by the overseers. *John Doe I*, 766 F.3d at 1017.

[7] The plaintiffs were originally listed as defendants Nestlé USA, Inc, Archer Daniels Midland Company, Cargill Incorporated Company (Cargill, Inc.), and Cargill Cocoa. *Id.*, at 1013. While this case was on appeal, the Supreme Court ruled in Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) that foreign corporations cannot be held liable under the Alien Tort Statute. As such, all defendants except for Nestlé, USA and Cargill, Inc. were dismissed for want of jurisdiction prior to the case reaching the Supreme Court's docket. *Nestlé USA, Inc*, 141 S. Ct. at 1936.

[8] "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

[9] The Ninth Circuit Court of Appeals held that the plaintiffs should have the opportunity to amend their complaint to better substantiate their claims that Nestlé in specific committed legally culpable domestic behavior by failing to put an end to their support to farms that they knew were guilty of using child slavery in cocoa cultivation. *Nestlé, S.A.*, 929 F.3d at 643.

[10] 569 U.S. 108.

abroad," as required by *RJR Nabisco, Inc. v. European Community*.[11] In short, the Court ruled that because the actual provision of training, tools, and cash occurred in the Ivory Coast,[12] the tortious conduct was beyond the scope of the Alien Tort Statute. Couching it in terms of "mere corporate presence,"[13] the majority opined that the actions taken by *Nestlé*'s corporate office in the United States in signing off on this arrangement when they "knew or should have known" that the farms were exploiting the children for slavery, did not suffice to render the corporation liable for aiding and abetting child slavery.[14]

This splintered opinion is the latest in a relatively short line of cases[15] concerning the liability of domestic parties for torts committed abroad in violation of the law of nations.[16] The fact that this case resulted in one majority opinion encapsulating only two of Justice Thomas's three sections, while generating in total two opinions, two concurrences, and one dissent, coupled with the relatively short jurisprudential history of the statute,[17] suggests that the Court still has much work to do in fully fleshing out the judicial approach to claims brought under the Alien Tort Statute. Unfortunately, the majority in this case missed an opportunity to shift their jurisprudential approach to align more closely with the intent of the founders in passing the Alien Tort Statute. Nonetheless, the Court finally

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[11] RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 337 (2016).

[12] Because Nestlé USA operates out of the United States and the cocoa farms are in the Ivory Coast, Nestlé's domestic interactions with the cocoa farmers are necessarily limited to the making of operational decisions. In other words, it would not make sense for Nestlé to provide the farmers with tools, cash, and training in the United States, as the farms are in Ivory Coast. As such, nor does it make sense for the Court to limit their definition of harm to the direct provision of aid to the farms, which, by definition, must take place on the farms.

[13] *Nestlé USA, Inc.*, 141 S. Ct. at 1937 (quoting from *Kiobel*, 569 U.S. at 125).

[14] The parties disputed whether aiding and abetting amounts only to secondary liability for a tort under U.S. law, or if it was a tort in and of itself. *Nestlé USA, Inc.*, 141 S. Ct. at 1936. The Court, however, did not deem it necessary to answer this question because they found that even if the question were to be resolved in favor of the plaintiffs, their complaint would still be "impermissibly seeking extraterritorial application of the ATS." *Id.* at 1937.

[15] This line of cases starts with Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784) which provided the impetus for the legislature to pass the Alien Tort Statute, *see* Breyer, *infra* note 36. The other noteworthy cases, discussed later, include: Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), *Kiobel*, 569 U.S. 108, and *Jesner*, 138 S. Ct. 1386.

[16] The law of nations is a feature of the Anglo-American legal tradition. The doctrine originated in late sixteenth century England in response to expanding transnational commerce contacts. As a doctrine of common law, the tenets of the law of nations were transferred to the American colonies and subsequently formally adopted along with the entirety of English common law upon the establishment of the United States. Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952) Legal commentators at the time opined that the law of nations was a universal law binding on all of mankind. *See* Edward Dumbauld, *Hugo Grotius: The Father of International Law*, 1 J. PUB. L. 117, 118, 120, 126 (1952). Because, at the time of its development, there was not yet a distinction between public and private law in the English tradition, the law of nations was said to apply equally to states and private individuals. Dickinson, *supra*, at 27.

[17] The Alien Tort Statute was passed in 1789, as part of the Judiciary Act drafted by the First Congress. It laid almost entirely dormant for nearly two hundred years. *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. L. 245, 246 (2004).

moved towards adopting a position long advocated by legal scholars, suggesting that corporations, and not just private individuals, can be held liable for torts against the law of nations[18] under the Alien Tort Statute.[19]

THESIS

The current approach of the judiciary to litigation under the Alien Tort Statute evinces a broader, ongoing issue concerning the separation of powers and foreign affairs. The Supreme Court's approach - developed predominantly through *Sosa v. Alvarez-Machain*[20] ("Sosa"), *Kiobel v. Royal Dutch Petro. Co.*[21] ("Kiobel"), *RJR Nabisco, Inc. v. European Cmty.*[22] ("RJR Nabisco, Inc."), and *Jesner v. Arab Bank*, PLC[23] ("Jesner"), and later applied in Nestlé – stands in contrast not only to the legislative purpose of the Alien Tort Statute, as reflected in the intent of its drafters and their understanding of the role in the United States' legal system, but also to broader constitutional principles governing the separation of powers. This is particularly the case as applied to the role of the federal government in international affairs, as the country's foreign affairs powers developed over the centuries since the Alien Tort Statute was passed in 1789. At the root of the matter two truisms lie, memorialized in our jurisprudential history: it is emphatically the job of the courts to say what the law is and the law of nations is part of the domestic law of the United States.[24] The Supreme Court's recent approach to Alien Tort Statute litigation discounts these foundational principles of American jurisprudence in favor of deference to

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[18] Legal scholars often use the terms 'law of nations' and 'customary international law' interchangeably. Here, the term 'law of nations' will be used for the sake of consistency.

[19] While this suit was on appeal, in *Jesner*, the Court held that "it would be inappropriate for courts to extend Alien Tort Statute liability to foreign corporations absent further action from Congress." 138 S. Ct. at 1390. The Court reasoned that, as the Alien Tort Statute was passed in order to "promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable," it would be counterintuitive to impose liability when doing so would harm the relations between the United States and another sovereign nation — there, the Kingdom of Jordan. *Id.* The Court cited diplomatic tensions between the U.S. and the Kingdom of Jordan over the *Jesner* litigation, in which the plaintiffs' jurisdictional theory was premised on "the relatively minor connection" between the ultimate harm in Jordan and the alleged conduct in the U.S. that supposedly contributed to the harm. *Id.* at 1406. The Court did not, however, comment on the possibility of imposing new causes of action in regard to domestic corporations in specific under the Alien Tort Statute. *Id*.

[20] 542 U.S. 692.

[21] 569 U.S. 108.

[22] 579 U.S. 325.

[23] 138 S. Ct. 1386.

[24] Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see, e.g.,* Dickinson, *supra* note 16, at 26 ("It is an ancient and salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land."); *see Thomas Jefferson to John Jay and Chief Justices of the Supreme Court, July 18, 1793, infra* note 30 (President Washington asking the Justices of the Supreme Court for an interpretation of the law of nations to ensure that he was acting within all relevant legal frameworks).

the coordinate branches[25] in the form of an insurmountably high bar to overcome the judicially developed presumption against extraterritoriality and a misplaced presumption that the founding drafters did not intend for the Alien Tort Statute to contemplate judicially created causes of action beyond the "three principle offenses against the law of nations"[26] identified by Blackstone prior to the passage of the Statute.[27] This ahistorical reading of the founding generation's understanding and expectations of the law of nations has allowed the Court to effectively sanction crimes against humanity under the lightly disguised and often inappropriate auspices of deference to the executive department in relation to foreign affairs.

LEGISLATIVE AND JURISPRUDENTIAL HISTORY

The Alien Tort Statute was enacted part of the Judiciary Act of 1789.[28] The early passage of the Statute evinces its importance in the eyes of the Founders. The passage of the Alien Tort Statute must be understood

[25] "Aliens harmed by a violation of international law must rely on legislative and executive remedies, not judicial remedies, unless provided with an independent cause of action." *Nestlé USA, Inc.*, 141 S. Ct. at 1937. This section of Justice Thomas's opinion, Part III, Section A, was joined only by Justice Gorsuch and Justice Kavanaugh, and thus, this section represents only a plurality of the Court's opinion, rather than a majority. *But see Nestlé USA, Inc.*, 141 S. Ct. at 1951 *(Alito, J. dissenting) ("*To be sure, Part III of Justice Thomas's opinion and Part II of Justice Gorsuch's opinion make strong arguments that federal courts should never recognize new claims under the ATS.") (conceding that he would not have reached the issue). *Compare Nestlé USA, Inc.*, 141 S. Ct. 1931 (Alito, J. dissenting) (finding a disinclination among Justices Thomas, Gorsuch, Kavanaugh, and Alito in recognizing new claims under the Alien Tort Statute) *with infra* note 30 (noting the [F]ounders' understanding of the role that the law of nations would play in American jurisprudence) and *infra* note 31 (Justice Marshall's comment in the Antelope, discussing the evolution of the law of nations over time). The position of Justice Thomas and his contemporaries is particularly striking given their recognition in *Sosa* of the effect that *Erie* had on the capacity of federal courts to create new causes of action. *Sosa*, 542 U.S. at 726 (denying the existence of federal general common law (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)). Despite *Erie*'s abrogation of federal general common law, the *Nestlé* Court, as in *Sosa*, "suggested that a limited, residual amount of federal general common law remained to recognize causes of action for violations of international law." *Nestlé USA, Inc.*,141 S. Ct. at 1938 (citing *Sosa*, 542 U.S. at 726, 729). Thus, despite citing precedent recognizing that federal courts can still recognize new causes of action under the Alien Tort Statute in a post-*Erie* world, and then laying out the requirements for doing so, Justice Thomas maintained his stance that "[The Court] cannot create a cause of action that would let [the plaintiffs] sue the petitioners." *Nestlé USA, Inc.*, 141 S. Ct. at 1937. *See Nestlé USA, Inc.*, 141 S. Ct. at 1938, ("To guide our reasoning in the future…rather than defer to Congress.").

[26] *Sosa*, 542 U.S. at 723.

[27] These three principle offenses, identified by Blackstone, according to the Court, extend only to violations of safe conducts, infringement of the rights of ambassadors, and piracy. *Nestlé, USA, Inc.*, 141 S. Ct. at 1944 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

[28] The Judiciary Act of 1789, Ch. 20 1 Stat. 73 officially titled "An Act to Establish the Judicial Courts of the United States," divided the nation into judicial districts, imposing a system of lower courts pursuant to Article I, Section 8 of the Constitution while establishing and limiting the jurisdictional grants of the same. The concurrent passage of the judiciary and the ATS should suggest the priority that the founders placed upon this grant of jurisdiction to the federal courts for violations of the law of nations that harm foreigners.

considering wide-ranging legislative[29] and executive[30] actions, leaving no doubt that the founding generation intended for the United States not only to follow but also to enforce the evolving[31] law of nations.[32]

While the precise reasoning for the First Congress's passing of the Alien Tort Statute is subject to debate, scholarly consensus has coalesced around certain points.[33] Under the Articles of Confederation, the international reputation of the United States suffered as the federal government was unable to enforce the nation's international treaty obligations, and the states were unwilling.[34] The practical reason for the enactment of the statute seems to have been an intent by the Founders to send a message to the European powers that the United States was a safe location for investment and diplomacy.[35] While the passage of the statute can be seen as a suggestion of the lofty moral goals that the Founders had for the nation, its primary

[29] The passage of the Alien Tort Statute was far from the only congressional act that indicated the institutions of the early United States government were obligated to follow and enforce the law of nations. *See, e.g.,* other examples including the Piracy Act, Pub. L. No. 15-77, 3 Stat. 510 (1819) (defining piracy according to the law of nations).

[30] Thomas Jefferson's letter to the Justices of the Supreme Court, drafted jointly with Alexander Hamilton and at the behest of President George Washington, is perhaps the best evidence of the early executive branch's intention to follow customary international law. The letter was written in the context of the position of the United States as a neutral nation to both parties of the French-English War. The Washington administration, in the form of twenty-nine separate questions, asked the Supreme Court to interpret the rights and obligations of the United States, pursuant to treaties executed with each of the belligerents during the time of the Articles of Confederation, under the law of nations as a third-party neutral nation. *See, e.g.,* Thomas Jefferson Letter to John Jay and Chief Justices of the Supreme Court (July 18, 1793) (on file with the Library of Congress) ("1. Do the treaties between the US, & France give to France or her citizens a right, when at war with a power with whom the US. are at peace, to fit out originally in & from the ports of the US, vessels armed for war, with or without commission?"; "These questions depend for their solution on the construction of our treaties, on the laws of nature & nations, & on the laws of the land…"). The Washington administration's eagerness to ensure that their treaty interpretations complied with the law of nations suggests that founders both saw it as essential that the executive branch comply with the law of nations, and that they presumed that the courts of the United States would apply the law of nations when dealing with foreign parties.

[31] Justice Marshall's comment in *The Antelope,* 23 U.S. 66, 121 (1825), is clear evidence that the founding generation presumed that the law of nations was undergoing constant positive development, driven by agreement among the nations of the world. "Throughout Christendom, this harsh rule has been exploded, and war is no longer considered as giving the right to enslave captives. But this triumph of humanity has not been universal."

[32] Stephen P. Mulligan, *The Rise and Decline of the Alien Tort Statute*, LSB10147 CONGRESSIONAL RESEARCH SERVICE, 7-5700 (2018) ("International law during the Founding era was understood to place an affirmative obligation on the United States to redress certain violations of international legal rights.").

[33] *See, e.g.,* Geert Van Calster, *The Role of Private International Law in Corporate Social Responsibility*, 7 ERASMUS L. REV. 125, 126 (2014) ("Though there has been some debate over the original intention of Congress in creating the statute…"); Hufbauer & Mistrokostas, *supra* note 17, at 247 (calling the history of the Alien Tort Statute "veiled"); MARTIN FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS 231 (Princeton University Press, Oxford, 2019) ("Scholarship has since shed light on the statute's origins.").

[34] *See* Mulligan, *supra* note 32, at 1-2.

[35] Of key concern at the time was the ability of the United States to prosecute offenses in piracy, offenses against the ambassadors of other nations, and violations of safe conducts. The law of nations dealt specifically with offenses in these areas at the time. *See Nestlé USA, Inc.*, 141 S. Ct. at 1938 (2021) (quoting *Sosa*, 542 U.S. at 726, 729); *see also* Wayne Wood, *The Cost of Progress: Ensuring the Tax Deductibility of International Corporate Social Responsibility Initiatives*, 4 GLOBAL BUS. L. REV. 1, 9 (2013).

purpose was more likely strategic: to bolster trade relations and enhance the nation's legitimacy on the international stage.[36]

After its passage in 1789, the Alien Tort Statute laid in disuse for nearly 200 years.[37] It was not until the 1980's that plaintiffs began bringing claims under the statute against "war criminals, dictators, and terrorists for torture, slavery, genocide, and other egregious acts."[38] Despite its long period of desuetude, historical evidence, largely related to piracy and slavery, supports the conclusion that the founding generation intended for the statute to apply beyond the shores of the United States.[39]

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[36] Two events are credited with directly precipitating the passage of the Alien Tort Statute, both involving ambassadors. In the first, an angered French army officer assaulted the French consul general in the streets of Philadelphia. The French government was infuriated when officials in Pennsylvania refused their extradition requests. The federal government, operating under the Articles of Confederation, was powerless to order Pennsylvania to accede to the requests from France for extradition, despite recognizing that the assault was a violation of the law of nations. STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 135 (2015). In the second instance, a New York City police officer entered the home of the Dutch ambassador and arrested one of his servants on the premises, in clear violation of the established law of nations. The Dutch government complained, and unlike in the French case, the government of New York arrested the police officer. Despite New York's compliance with the Dutch request, the federal government was just as powerless to punish the violation of the law of nations as in the French case. Two years later the federal government, now operating under the Constitution, passed the Alien Tort Statute. *Id.* at 136.

[37] Van Calster, *supra* note 33, at 126; Wood, *supra* note 35, at 9; Mulligan, *supra* note 32, at 2. Hufbauer & Mitrokostas, *supra* note 33, at 248, together identify twenty-one instances between 1789 and 1980 in which plaintiffs attempted to use the law. Of these twenty-one instances, in only two did courts uphold jurisdiction under the statute. *Id*.

[38] Wood, *supra* note 35, at 9.

[39] In 1794, American citizens acting in consort with French privateers, raided Sierra Leone, then a British colony. In response to the British ambassador's complaints, the United States Attorney General, William Bradford, wrote that, while the Americans could not be criminally punished, as their actions had taken place outside of the criminal jurisdiction of the United States, there might be some recourse to be had via the recently passed Alien Tort Statute. While Bradford did not explicitly refer to the Alien Tort Statute by name, he did use the language of the act:

> There can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

Breach of Neutrality, 1 OP. ATT'Y GEN. 57 (1795) (emphasis in original). It is worth noting that the Supreme Court has "generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application." *See, e.g.,* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173-74 (1993); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989). Thus, Bradford's suggestion of the hypothetical applicability of the Alien Tort Statute to the Sierra Leone raiders should not depend on whether the offense, or similar offenses, took place on the high seas or within the sovereign territory of another nation-state; for purposes of the extraterritoriality analysis, the two are analogous. But see *Kiobel*, 569 U.S. at 121, in which the Court suggested that the distinction between the high seas and the sovereign territory of another nation state only fails to make a difference in extraterritorial analyses when the alleged violator of the statute in question is a pirate. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, PUBLIC WRONGS, BOOK IV 380 (William Curry, Am. Bar Ass'n 2009) (1796):

> The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society ; A pirate being, according to Sir Edward Coke, *hostis humani generis*; as therefore he has renounced all the benefits of society and government, and has reduced himself to the savage fate of nature, by declaring war against all mankind, all mankind must declare war against him.

The Alien Tort Statute experienced a 'rebirth' as a result of *Filártiga v. Peña-Irala*, a Second Circuit decision authorizing aliens to bring claims under the modern law of nations in domestic U.S. federal courts.[40] Subsequently, the Supreme Court stemmed the expansion of claims under the Alien Tort Statute in *Sosa*, the first case that it heard under the statute.[41] The case had the effect of raising the bar that plaintiffs would be required to overcome in order for the Court to recognize their claims under the modern law of nations, justified in large part on a fear that if the bar were too low, courts might interfere with foreign affairs.[42] The Sosa case did not, however, suggest what exactly must be done to sustain a modern tenet of the law of nations in federal court.

The Court further limited the utility of the Alien Tort Statute in *Kiobel*,[43] the next major case in which foreign plaintiffs sued a foreign defendant

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The differentiation, then, is premised on the assumption that pirates do not belong to the sovereign jurisdiction of any nation, and, as a common enemy of mankind, are reasonably subject to the criminal jurisdiction of any nation that might apprehend them. *Filártiga*, 630 F.2d at890 contains similar language, equating the defendant there (a torturer) with a *hostis humani generis* ("for purposes of civil liability, the torturer has become like a pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."). The usage of *hostis humani generis* in *Filártiga*, equating modern day torturers to the pirates familiar to the First Congress, suggests that the nature of the offense dictates that there should be few concerns with comity in the extraterritorial prosecution of violators of the law of nations.

[40] *Filártiga*, 630 F.2d 876. Paraguayan nationals filed suit against another Paraguayan national in the Federal District Court for the Eastern District of New York alleging that the defendant tortured and killed plaintiff's family member for his political actions and beliefs, violating the law of nations. The District Court dismissed the suit for want of subject matter jurisdiction, and the Court of Appeals reversed, finding that jurisdiction was proper, and that claims can be brought under the modern law of nations. For a commentary on the rebirth of the Alien Tort Statute starting with *Filártiga*, see Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519, 535 (2021); *see also* Mulligan, *supra* note 32, at 2.

[41] In *Sosa*, 542 U.S. 692, a Mexican national sued another Mexican national for kidnapping and torturing him (with approval from the US Drug Enforcement Agency). The Ninth Circuit Court of Appeals affirmed the District Court's award to the plaintiff of damages under his Alien Tort Statute claim. The Supreme Court, however, reversed, holding that the Alien Tort Statute was not a grant to courts to create new causes of action, but that it instead was intended "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 719-20. The Court went on to conclude that there was "no [historical] basis to suspect that Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724. The Court emphasized that any claim based on the present-day law of nations must rest on "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized." *Id.* at 725. The Court was not satisfied that Alvarez had met the burden to establish that his claim of arbitrary arrest had the recognition of the law of nations. *Id.* at 735-37. Factored into the Court's mathematics of recognizing modern violations of the law of nations was the effect that recognizing such claims would have on the foreign relations between the United States and the offending nation. *See id.* at 727.

[42] The Court in *Sosa* did not discuss in detail exactly how and why it might be undesirable, from a foreign affairs perspective, for a federal court to recognize that a foreign actor had violated a universally accepted tenet of the law of nations. Nor did the Court appear to consider how doing so might even *aid* the foreign affairs missions of the United States.

[43] *Kobel*, 569 U.S. 108. In *Kiobel*, Nigerian nationals living in the United States filed suit in federal district court under the Alien Tort Statute, alleging that certain Dutch, British, and Nigerian corporations aided and abetted the Nigerian Government in committing violations of the law of nations against plaintiffs in Nigeria. *Id.* at 111-12. Specifically, the plaintiffs alleged that the defendant corporations provided food, transportation, and compensation to the Nigerian Government, and allowed Nigerian

under the statute. After holding that the presumption against extraterritorial application applied to the Alien Tort Statute, the Court indicated that where the relevant conduct "touches and concerns" the United States, liability is possible.[44] The Court did not elaborate on what might qualify under the "touch and concern" standard, other than that "mere corporate presence" will not suffice.[45] The Court did, however, imply that the Alien Tort Statute might contemplate liability for corporations by explaining that general corporate presence would not overcome the presumption against extraterritoriality.[46]

The Supreme Court next considered the Alien Tort Statute in *Jesner*.[47] The Court in *Jesner* limited its disinclination to allow corporate liability

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military and police forces to use the property of the corporations to launch brutally violent attacks against protesting residents of Ogoniland. *Id.* at 113. The Court heard the case in order to answer whether and under what circumstances courts may entertain extraterritorial application of the Alien Tort Statute and whether the law of nations recognizes corporate liability. *Id.* at 112-14. The Court cited Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247, 255 (2010) for the canon that, without a clear indication otherwise, the presumption is that statutes have no extraterritorial application, finding such a canon necessary to "help ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 569 U.S. at 116. In concluding that the presumption against extraterritoriality applies to the Alien Tort Statute, the Court expressly stated that the foreign policy concerns "are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are 'specific, universal, and obligatory.'" *Id.* at 117 (citing *Sosa*, 542 U.S. at 732). The Court went on to cite then recent complaints by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom over extraterritorial applications of the Alien Tort Statute. *Id.* at 124. In closing, the Court held that in order to overcome the presumption against extraterritorial application, the claims must "touch and concern the territory of the United States." *Id.* at 124-25. Mere "corporate presence" does not qualify under this standard. *Id.*

[44] *Id.* at 124-25.

[45] *Id.* at 125

[46] *Id*.

[47] *Jesner*, 138 S. Ct. 1386. In this case, several thousand foreign nationals who were injured, killed, or captured by terrorist groups in Israel, the West Bank, and Gaza from 1995 to 2005 alleged that Arab Bank aided and abetted the terrorist groups by knowingly providing financing and facilitating martyrdom payments to the families of the terrorists. *Id*. at 1393. While the acts of terror were carried out in the Middle East, the plaintiffs alleged that the New York branch of the Arab Bank was used to clear dollar-denominated transactions facilitating currency exchanges. *Id*. at 1394. The Court was explicit in pointing out that these transactions were entirely mechanical, subject to regulations in both the United States and in Jordan, and that the volume and speed of these transactions does not render them realistically subject to human review on an individual level. *Id.* at 1395. In a fractured opinion citing foreign relations concerns, the Supreme Court held that foreign corporations cannot be held liable under the Alien Tort Statute for torts that occurred abroad. *Id.* at 1407. The Court likewise supported this holding with the contention that, "It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute." *Id.* at 1405. The Court did not examine this argument beyond this single sentence. At the same time, the Court seemed worried that, if corporate liability were permitted, plaintiffs would ignore individual perpetrators and focus instead on corporations. *Id.* The Court did not examine this supposition in depth, encouraging the inexplicable inference that such a result would be negative in all instances. Relatedly, the Court made the point that if liability for foreign corporations under the Alien Tort Statute were recognized, we might then reasonably expect for our own corporations to be hailed into foreign courts for violating the law of nations themselves. *Id.* The Court did not attempt more than a surface level analysis of this last fear, imagining only the potential drawbacks of such an arrangement (worry of "immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees"). *Id.* The Court did not comment on the desirability of forcing domestic corporations to comply with the law of nations, regardless of the

under the Alien Tort Statute to foreign corporations,[48] leaving the door open to a case alleging liability for domestic corporations in suits brought by aliens for a tort committed against them while abroad. *RJR*, on the other hand, did not involve Alien Tort Statute litigation. While *RJR* did not involve the Alien Tort Statue directly, its treatment of the presumption against extraterritoriality in the Racketeer Influenced and Corrupt Organizations Act (RICO) remains instructive.[49]

Such was the status of the Alien Tort Statute doctrine with respect to claims brought by foreigners for torts committed against them in the territory of another country when *Nestlé* was filed. In sum, plaintiffs in these actions faced several hurdles. Under *Sosa*, the Alien Tort Statute is strictly jurisdictional and does not, by its own terms, list the causes of action available for violations of the law of nations.[50] However, the Court recognized that Congress could not have intended for the statute "to sit on a shelf awaiting further legislation."[51] Allowing that 'general common law'[52] would have provided for those limited causes of action, the Court instead developed a test requiring plaintiffs to plead a norm of the law of nations that is "specific, universal, and obligatory."[53]

After establishing that a norm is widely accepted as a tenet of the law of nations, the plaintiff still must overcome the presumption against extraterritoriality as established in *Kiobel*, which remains evidently

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potential enforcing body. Such an arrangement seems to be consistent with the original legislative intent behind the passage of the Alien Tort Statute.

Justices Gorsuch and Thomas, in separate concurring opinions, indicated that they would have been in favor of further restricting the ability of courts to recognize new causes of action under the statute. *Id.* at 1408 (Thomas, J., & Gorsuch, J., separately concurring). Sotomayor, J., joined by Ginsburg, J., Breyer, J., and Kagan, J., dissenting, argued that nothing in the test, history, or purpose of the Alien Tort Statute implies that corporate tortfeasors should be treated any differently than natural-person tortfeasors. *Id.* at 1419.

[48] *Id.* at 1403 (majority opinion).

[49] *RJR Nabisco, Inc.*, 579 U.S. 325. In *RJR*, the European Community filed suit alleging that RJR violated RICO by participating in a "global money-laundering scheme in association with various organized crime groups." *Id.* at 332. In short, the factual allegations supporting the original plaintiffs' legal complaint — that RJR engaged in "numerous acts of money laundering, providing material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act" in violation of RICO — stemmed from a scheme in which Colombian and Russian drug traffickers sold smuggled drugs into Europe, channeled the funds through a complex system of transactions involving black-market money brokers, cigarette importers, and wholesalers, and then used the funds to pay for large shipments of RJR cigarettes. *Id.* at 332. The Court considered whether RICO could apply to extraterritorial conduct, as RJR insisted it could not. *Id.* at 334.

[50] *Jesner*, 138 S. Ct. at 1397 (citing *Sosa*, 542 U.S. at 713-14).

[51] *Id*.

[52] *Tompkins*, 304 U.S. 64 complicated matters by holding that federal courts do not have authority to derive 'general common law,' as the founders would have had to have expected them to do in order to recognize new causes of action reflecting developments in the law of nations without further legislative guidance.

[53] *Sosa*, 542 U.S. at 732 (borrowing language from *In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)). The Court here used several examples of phraseology to articulate the test in *Sosa*, but clearly adopted this wording in *Jesner*, 138 S. Ct. at 1399 (adopting wording from *Sosa*, 542 U.S. at 732).

unrebutted by the wording and history of the statute.[54] Under *Kiobel*, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[55] The Court made clear that when corporations were involved, "mere corporate presence" does not qualify to defeat the presumption against exterritoriality.[56] While the Court did not provide any indication of the exact sort of contacts that could qualify to defeat the presumption, Justice Breyer's concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, provides potential insight into the Court's thinking on the matter.[57]

The Court has clarified that each element of the presumption against extraterritoriality is subject to concerns over foreign relations - specifically, concerns about encroaching into legislative and executive arenas.[58] The Court has yet to delve further into the alleged foreign policy concerns that might emerge when attempting to hold domestic companies liable for their involvement in torts committed in violation of the law of nations against foreigners, including an analysis of whether, and under what circumstances, such liability, or the threat of such liability, might be desirable. Instead, the Court has cited the geopolitical circumstances of the early United States to suggest that the Founders could not have intended for the statute to charge

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[54] For an argument that the history of the statute *does* serve to rebut the presumption against extraterritoriality, *see* Flaherty, "Restoring the Global Judiciary," Flaherty, *supra* note 33, at 184. Flaherty reasons that Congress did not include language sufficient to rebut the presumption against extraterritoriality because the substance of the statute clearly indicated that it must apply extraterritorially. *Id.* Relatedly, Flaherty makes the point that "pirates who seized ships technically violated the sovereign territory of the state whose flag the ship was flying." *Id.* Thus, any action against pirates, as was specifically contemplated by the legislative history of the Alien Tort Statute, implicates foreign affairs concerns.

[55] *Kiobel*, 569 U.S. at 124-25 (2013).

[56] *Id.*

[57] Justice Breyer first indicated that he would not have applied the presumption against extraterritoriality, suggesting instead three areas where he would find jurisdiction:

> where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Id. at 127. The third element of Justice Breyer's test readily comports with the presumption against extraterritoriality established in case law. *Id.* Justice Breyer proceeded to conclude that under his proposed standard, the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction.

[58] *See Jesner*, 138 S. Ct. at 1398 (discussing the *Sosa* test); *Kiobel*, 569 U.S. at 124 ("The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches."); *Nestlé USA, Inc.*, 141 S. Ct. at 1938-39 ("To limit this stress on the separation of powers, our precedents have made clear that the second step of *Sosa* — which applies in any context where a plaintiff asks a court to create a cause of action — is extraordinarily strict. A court "must" not create a private right of action if it can identify even one sound reason to think Congress might doubt the efficacy or necessity of the new remedy.") (internal quotation marks omitted) (quoting *Jesner*, 138 S. Ct. at 1402)).

the U.S. federal courts with a duty to enforce the law of nations against the world's perpetrators for actions across the globe.[59]

ANALYSIS

Applying a realist, outcome-determinative perspective to the Court's decision in *Nestlé* aids in illuminating the Court's evisceration of the efficacy of the Alien Tort Statute in disabling offenses against the law of nations attributable to parties under the nominal jurisdiction of U.S. courts, assuming this to be the purpose of the statute.[60]

In *Nestlé*, the Court overturned the Ninth Circuit's holding[61] that the activities engaged in by *Nestlé*'s corporate office[62] in the United States in financing, advising, and supplying the cocoa farms in Ivory Coast established a nexus between the domestic activity and the tort committed abroad sufficient to impose aiding and abetting liability on *Nestlé USA*.[63] In overturning this finding by the Ninth Circuit, the Supreme Court effectively sanctioned the modern-day equivalent of the exact conduct that the Alien Tort Statute was passed to eliminate - violations of the law of nations committed against foreign nationals by domestic parties that hamper foreign relations. The necessary implication of this finding is that domestic corporations will be immunized from liability under the Alien Tort Statute for torts committed against the law of nations, provided that they maintain themselves, at least, one step removed from a foreign tortfeasor. By failing to delve into agency law, the Court has not indicated where, if at all, the line might be drawn between domestically culpable behavior and the autonomous actions of an international tortfeasor.

In attempting to protect the judicially created presumption against extraterritoriality, first applied to the Alien Tort Statute in *Kiobel*,[64] the Court raised the bar to overcome the same to such an extent so as to render

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[59] *See infra* note 75. At the time of the passage of the Alien Tort Statute, the United States clearly did not have the sort of international leverage that it does today, whether measured diplomatically, by trade volume, or militarily.

[60] *See Jesner*, 138 S. Ct. 1386; Hufbauer & Mistrokostas, *supra* note 17, at 247.

[61] The Ninth Circuit Court of Appeals, in their final opinion on the matter prior to the Supreme Court's granting of certiorari, reversed the lower court's dismissal and instructed the plaintiffs to plead with specificity only the culpable domestic behavior of the domestic corporations. *Nestlé, S.A.*, 906 F.3d at 1127, teeing the case up for a ruling on the merits.

[62] *Nestlé*'s dealings with the cocoa farms included exclusive dealing contracts, in which the cocoa farms were required to sell their products only to Nestlé. The Ninth Circuit remarked that, "Every major operational decision regarding Nestlé's United States market is made in or approved in the United States." *Id*. at 1123.

[63] The plaintiffs likewise alleged that Nestlé "knew or should have known" that the cocoa farms were trafficking child slaves to fulfill Nestlé's cocoa demand. *Id.*

[64] "We therefore conclude that the presumption against extraterritoriality applies to claims under the [Alien Tort Statute], and that nothing in the statute rebuts that presumption." *Kiobel*, 569 U.S. at 124.

the statute effectively unenforceable in the modern context,[65] contrary to the judicially recognized legislative intent for the statute to have effect.[66] The failure of the Supreme Court to examine agency law to determine if liability for the torts of the farms could be transposed onto Nestlé on the basis of the respondeat superior or servant-master doctrines[67] somewhat constrains a full counterfactual analysis. As required for dismissals for failure to state a cause of action under the rules of civil procedure,[68] taking as true the non-conclusory factual pleadings of the plaintiffs that Nestlé financed, supplied, advised, and maintained exclusive dealing contracts with these cocoa farms with full knowledge of their participation in child slavery trafficking and failed to exert economic pressure to end these practices, the Court so limited the scope of culpable domestic corporate conduct as if to suggest that the American judiciary will sign off on clear violations of the law of nations by American corporations, provided that the corporation is at least one step removed from the foreign tortfeasor - even if that step is more illusory than it is actual.[69]

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[65] In the modern context of globalization and intense commercial activity, it follows that there are more opportunities for corporations (a relatively recent legal phenomenon) to commit tortious behavior than there were when the Alien Tort Statute was passed, especially overseas. Marketa Evans remarks that while the concept of corporate social responsibility might function as "a way for businesses to promote a positive image in the community and reap reputational or goodwill spinoffs," the companies are not likely to make analogous efforts to practice good corporate social responsibility in the international context in the face of weak governance. Marketa D. Evans, *New Collaborations for International Development: Corporate Social Responsibility and Beyond*, 62 INT'L J. 311, 313 (2007). Evans specifically cites fragile and unenforceable regulations and a lack of government capacity as playing a role in enabling corporations to in effect set their own norms of behavior. *Id.* This is particularly relevant in the context of Nestlé's practices in Ivory Coast, as the U.S. Department of Labor has cited a lack of government capacity as contributing to the country's ongoing child slavery issues. See *infra* note 89. In *Jesner*, the Court alluded to the need for Alien Tort Statute litigation to reflect modern issues by allowing liability for corporations: "Modern ATS litigation has the potential to involve large groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations." *Jesner*, 138 S. Ct. at 1398 (2018). This statement is a reflection on the development undergone in commercial spheres since the passage of the Alien Tort Statute.

[66] "We held in *Sosa*, however, that the First Congress did not intend the [Alien Tort Statute] to be 'stillborn.'" *Kiobel*, 569 U.S. at 115.

[67] *See* A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981), for a case in which one contracting party (a purchaser) exercised such a level of control and provided such extensive financial and operational assistance to the other contracting party (a farm) to render the farm an agent and the purchaser a principal, legally answerable for the agent's torts, despite contractual language attempting to prevent such a relationship. The difference, of course, is that in *Cargill*, both parties were domestic. *Id.*

[68] FED. R. CIV. P. 12(b)(6).

[69] This proposition is highlighted by the practicalities of litigation and pleading in the United States court system. The dispute in the *Nestlé* case was jurisdictional, which means that the parties had not yet had an opportunity to conduct discovery. Thus, there was an enormous disparity between the information possessed by the plaintiffs and that of Nestlé. The plaintiffs defined the culpable domestic actions of Nestlé, USA as making "major operational decisions." *Nestle USA, Inc.*, 141 S. Ct. at 1935. The Supreme Court was not satisfied with the level of detail in the plaintiffs' pleadings, analogizing the same to allegations of "mere corporate presence," which the Court had found insufficient to overcome the presumption against extraterritoriality in *Kiobel*. *Id.* at 1937 (citing *Kiobel*, 569 U.S. at 125). Despite the contrary conclusion from the Ninth Circuit (*Nestlé, S.A.*, 906 F.3d at 1124-1126), the Supreme Court failed to consider the effect that discovery might have on substantiating the plaintiffs' allegations of

The fact that the specific torts in question - the trafficking of child slaves and the aiding and abetting of the same - have been solidly recognized as clear violations of the law of nations should further raise alarm.[70] In short, this should have been an easy case, ideally suited to correct a much-criticized tenet of the existing case law and announce that the Alien Tort Statute contemplates liability for domestic corporations, as was suggested by the concurrence written by Justice Gorsuch and joined with respect to Part I by Justice Alito[71] and with respect to Part II by Justice Cavanaugh[72] as well as the separate dissent by Justice Alito.[73]

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culpable conduct. Without the presence of additional pre-discovery evidence, such as an internal whistleblower, it was likely impossible for the plaintiffs to plead with any greater level of detail.

[70] A historical accounting of the status of the law of nations at the time of the passage of the Alien Tort Statute strongly suggests that slave trafficking was, if not already, then at the very least, on the precipice of being recognized as an offense against the law of nations. If slave trafficking were to have been deemed an offense under the law of nations in 1789, then there should be no disputing the claim that child-slave trafficking is an established offense against the law of nations in the twenty-first century. For an analysis of aiding-and-abetting liability under international law*, see, e.g.,* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 268-77 (2d Cir. 2007) (Katzmann, J., concurring). To better understand the role that the development of the law of nations played in U.S. courts, an analysis of United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551) and *The Antelope*, 23 U.S. 66 is appropriate. The former was decided by Justice Story while riding circuit in Massachusetts. An American captain, suspecting a French ship of trafficking in slavery off the western coast of Africa, seized the ship and returned it to Boston in anticipation of receiving a prize. Congress had outlawed domestic participation in the international slave trade, but this provision obviously could not apply to French nationals operating outside of the reach of US domestic law. The French government, intervening on behalf of the French schooner, argued that, because the nations were not at war, the ship must be returned to the jurisdiction of the French courts. *La Jeune Eugenie*, 26 F. Cas. at 842. Justice Story, however, held that "in an American court of judicature, I am bound to consider the international slave trade an offence against the universal law of society and in all cases, where it is not protected by a foreign government, to deal with it as an offence carrying with it the penalty of confiscation." *La Jeune Eugenie*, 26 F. Cas. at 847. Justice Story's holding thus can leave no room for doubt that the judicial branch saw it as their duty to enforce the law of nations against foreign parties in a time of peace without express instructions from either of the other branches of government, without concern for foreign policy implications, and without worry of creating new causes of action invocable by foreign nationals. Contrasting this case with the opinion in *The Antelope*, written a few years later by Chief Justice Marshall, produces interesting results. The facts of the case, at least for present purposes of comparison, were the same: a foreign ship, suspected of participating in the international slave trade, was captured by an American ship. *The Antelope*, 23 U.S. at 68-69. Contrary to Justice Story's reading of customary international law, Chief Justice Marshall ruled that while it can "scarcely be denied" that the international slave trade was "contrary to the law of nature" the practice had not yet risen to the level to be a violation of the law of nations. *The Antelope*, 23 U.S. at 120-21. It is important to note that Chief Justice Marshall's conclusion seems to have been driven by his finding that while the Christian nations had seemingly converged on the matter of outlawing the practice, Africa had yet to do so. Two further implications are clear from the comparison of these two cases. The first, clearly evinced by Chief Justice Marshall's approach to the matter in *The Antelope*, is that customary international law is not a static concept, instead progressing along with humanity, as a collective body. The second implication is that the Court was willing to be a driver of the development of customary international law, adopting and enforcing new concepts as, or even before, they emerged with clarity across all of humanity.

[71] "Nothing in the [Alien Tort Statute] supplies corporations with special protections against suit." *Nestlé USA, Inc.*, 141 S. Ct. at 1941; "When the First Congress passed the [Alien Tort Statute], a "tort" meant simply an "injury or wrong" whoever committed it." *Id*. (Gorsuch, J., concurring).

[72] "The real problem with this lawsuit and others like it thus isn't whether the defendant happens to be a corporation." *Id.* at 1942.

[73] Justice Sotomayor's concurrence with respect to Parts I and II of Justice Thomas's opinion did not touch on corporate liability. *Id.* at 1943-44. However, taken that her disagreement with Justice Thomas's

As demonstrated in Justice Thomas's majority opinion in *Nestlé*, the Supreme Court's Alien Tort Statute jurisprudence, by virtue of (1) the high bar set to overcome the judicially imposed presumption against extraterritoriality and (2) hesitation to recognize new causes of action under the Statute, circumvents both the First Congress's intent to apply the separation of powers in foreign relations as in domestic affairs, as well as their intent for the US courts to apply the law of nations as if it were domestic law at the expense of allowing the executive continued and near unilateral discretion in foreign affairs.[74] While an argument from the realist school of international relations can be made that the fledgling nation needed a strong executive to handle foreign affairs in a decisive, unilateral manner, such conditions no longer exist.[75] Had the Supreme Court remained faithful to the purpose of the Alien Tort Statute and underlying principles of the separation of powers, they would have affirmed the Ninth Circuit's opinion instead of giving domestic parties a license to be complicit in torts against the law of nations, provided that those domestic parties only bankroll the parties directly committing the offenses overseas.

MISAPPLIED POLICY RATIONALE

Nestlé exposes the flawed logic of the Court's current approach to Alien Tort Statute litigation. To avoid turning the presumption against extraterritoriality into a "craven watch-dog,"[76] the U.S. Supreme Court finds itself instead with a Cerberus-hellhound of a gatekeeping doctrine. That the effect of the high burden necessary to overcome the presumption is to allow U.S. corporations to be complicit in enabling crimes against humanity serves to reinforce the analogy. The Court is hiding behind the prudential

approach in Part III of his opinion largely stems from what Justice Sotomayor calls Justice Thomas's ahistorical reading of the Alien Tort Statute, Justice Sotomayor can fairly be presumed to be in favor of allowing domestic corporate liability under the Alien Tort Statute.

[74] Flaherty has defined 'gateway doctrines' as "tend[ing] to follow the general pattern of marked yet incomplete judicial retreat in the face of growing assertions by the political branches, the executive especially." Flaherty, *supra* note 33, at 174. In addition to the presumption against extraterritoriality, other gatekeeping or gatekeeping doctrines developed by the Supreme Court and used in foreign affairs include the 'state secrets' doctrine (*see, e.g.,* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007)), the 'political question' doctrine (see, e.g., Zivotofsky v. Clinton, 566 U.S. 189 (2012) (Breyer, J., dissenting)), and the 'act of state' doctrine (see, e.g., First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972)).

[75] The Court in *Kiobel*, 569 U.S. at 123 (2013) cited Justice Story's opinion in *La Jeune Eugenie*, 26 F. Cas. at 847 (commenting that, "No nation has ever yet pretended to be the *custos morum* of the whole world.") for the proposition that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms." It is worth pointing out that it is not logically necessary for the United States to attempt to act as the *custos morum* of the whole world in order to hold domestic corporations liable for violating the law of nations, even if the effects of those violations are felt most acutely overseas.

[76] "As we made clear in *Kiobel*, a plaintiff does not plead facts sufficient to support domestic application of the ATS simply by alleging "mere corporate presence" of a defendant." *Nestlé USA, Inc.*, 141 S. Ct. at 1937 (citing *Kiobel*, 569 U.S. at 125). The term "craven watchdog" is quoted from *Morrison*, 561 U.S. at 266, which is cited in *Nestlé USA, Inc.*, 141 S. Ct. at 1937.

presumption against extraterritoriality to sanction international human rights abuses by domestic corporations while attempting to maintain face by making comments such as "United States law governs domestically but does not rule the world"[77] and then attempting to shift blame onto the coordinate branches.[78]

The context of the legislative history of the Alien Tort Statute, including the impetus for its passage, coupled with the joint legislative, executive, and judicial approach to ending the international slave trade around the time of the passage of the Statute - even in the face of resistance (official or otherwise) from abroad - lends support to the contention that the judiciary of today should hesitate to raise the bar when requiring plaintiffs to plead facts sufficient to support domestic application of the statute for injuries sustained extraterritorially. To further limit possible application of the statute in overly cautious deference to the legislative and executive branches is to create conflict with the judiciary's primary function to "say what the law is."[79]

The foreign relations concerns that the Court cited throughout the line of aforementioned cases is misplaced in the context of litigation under the Alien Tort Statute; the substantive content of the statute, in addition to what we know of the reason for its passage, forecloses any other conclusion.[80] The Alien Tort Statute authorizes federal courts to impose liability for torts committed in violation of the law of nations. The law of nations, while lacking a precise definition, is largely understood to include only those concepts commonly held by all "learned" nations of the world.[81] By

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[77] *RJR Nabisco, Inc.*, 579 U.S. at 335 (2016) (*quoting* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

[78] *See, e.g., Kiobel*, 569 U.S. at 125 ("If Congress were to determine otherwise, a statute more specific than the ATS would be required.").

[79] "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 178. By passing the Alien Tort Statute and authorizing alien plaintiffs to sue for violations of the law of nations, the legislature has instructed the judicial department to analyze fact patterns accordingly. The judiciary should not attempt to retroactively shirk this duty to say what the law is by use of a gatekeeping doctrine, even if purportedly in protection of foreign relations concerns.

[80] In attempting to justify deference to the other branches in cases considering extraterritorial application of the ATS, the Court motioned to — but did not discuss in depth — Justice Kavanaugh's dissent in Doe v. Exxon Mobil Corp., 654 F.3d 11, 77-78 (D.C. Cir. 2011), in which he cited recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom. The objections of foreign nations to being held liable under the law of nations — laws by which they have at least implicitly agreed to abide — should not be used to influence domestic jurisprudence in the face of permissive legislation.

[81] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 66-67:

> THE law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world;[a] in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance frequently occur between two or more independent states, and the individuals belonging to each.[b] This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can ; and, in time of war, as little harm as possible, without prejudice to their own real interests.[c] And, as none of these states will allow a superiority in

necessary inference, imposing liability for a violation of a commonly held tenet of the law of nations, such as the ban on trafficking child slaves,[82] cannot impede the foreign relations functions of any country, the United States included.

The reason for establishing the law of nations was to elucidate those actions that, if prosecuted, should not result in impaired foreign relations (perhaps with the exception of a purposeful violator). The necessary corollary of that statement is that the nation prosecuting such behavior stands to improve their foreign relations status, at least in the eyes of third-party nations, if not also in the judgement of the nation where the ultimate harm occurs. To suggest that the imposition of liability in such instances would impair foreign relations is to suggest that countries ought to exercise discretion when imposing liability to halt such violations of the law of nations. While such a suggestion is perhaps plausible in very narrow instances,[83] it does not apply here. The legislature made an abundantly clear value judgment by passing the Alien Tort Statute; they believed that the United States stood to gain more than it would lose in allowing foreign citizens to sue for violations of the law of nations in federal courts.[84]

The argument that courts should hesitate to cite foreign relations concerns in deferring to the coordinate branches by raising use of prudential

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> the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

[82] The Court of Appeals conveniently laid out and accepted the plaintiffs' contention that a ban on child slavery is a tenet of the modern-day law of nations. Using the analogous term "customary international law" the Court of Appeals cited Justice Katzmann's concurrence in *Khulumani*, 504 F.3d at 331 to explain that in determining the content of the modern-day law of nations, courts can "look to the sources of law identified by the Statute of the International Court of Justice…," *Id.* at 267, including "international conventions, international customs, the general principles of law recognized by civilized nations, judicial decisions, and the works of scholars." *John Doe I*, 766 F.3d at 1019 (internal quotations omitted). The Appeals Court likewise included a citation to the Restatement (Third) of Foreign Relations Law § 102 (1987) which identifies similar sources. *Id*. The Appeals Court signed off on the plaintiffs' claim that aiding and abetting child slavery is a violation of the law of nations, demonstrated by invocation of three sources: decisions of the post-World War II International Military Tribunal at Nuremburg; decisions issued by the International Criminal Tribunals for Rwanda and the Former Yugoslavia; and a recent decision issued by the Special Court for Sierra Leone (Prosecutor v. Taylor, Case No. SCSL-03-01-A (SCSL Sept. 26, 2013). *Id.* at 1020. The defendants did not contest the claim by plaintiffs that aiding and abetting child slavery is a violation of the law of nations; instead, the defendants only contested the applicability of the norm to corporations, arguing that the law of nations only applies to individuals. *Id.*

[83] Removed from the contextual background of this analysis, one can imagine that in the absence of a treaty, a court of one country might be hesitant to impose liability over tortfeasors belonging entirely to the jurisdiction of another "learned" nation's competent judicial system for a tort occurring entirely within that jurisdiction, committed against a citizen of that nation. *See* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). This, however, is not the factual situation at hand.

[84] Judiciary Act of 1789, ch. 20, 1 Stat. 73.

gatekeeping mechanisms is significantly strengthened in context of the factual situation presented in *Nestlé*. *Nestlé* was not one of the narrow cases in which it might be appropriate for the judiciary to exercise discretion in favor of the executive or legislative branches. The infraction did not occur in a manner to entirely avoid implicating parties otherwise subject to the jurisdiction of American court; were the action to have been instituted solely against the cocoa farms, without naming Nestlé USA, that would have been the case. The Court's worries of harming American foreign relations are unfounded when liability is contemplated for a domestic tortfeasor for harms occurring abroad against aliens, committed in violation of a central tenet of the law of nations.

The specific infraction of the law of nations in *Nestlé* further lends support to the argument that the imposition of liability over Nestlé USA will not risk harming foreign relations to the extent where it is necessary to defer to the coordinate branches in seeking further authority. By definition, the law of nations recognizes very few tenets; common cross-cultural accord is rare, especially among nations with widely divergent legal, developmental, and theological histories. The elevation of a proposition to the status of a law of nations stands as a considerable global achievement worthy of protection. The ban on the trafficking of slaves likely reached this venerable position long ago.[85] It is plausible that some practices, widely abhorred domestically, or even more commonly among those nations with a similar legal history to the United States, might still lack the kind of international recognition necessary to elevate them to the status of a practice of customary international law. The ban on international child slave trafficking is by no means one of these quasi-recognized tenets of the law of nations, instead having gained at least informal global recognition by American courts long ago; today, it undoubtably enjoys formal recognition.[86] Even if it were not the case that a ban on trafficking in child slaves did not yet enjoy great enough international consensus to reach the level of a law of nations, enforceable by the United States under the Alien Tort Statute, the fact that a domestic company is allegedly actively contributing to the practice renders liability appropriate and desirable.

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[85] *See supra* note 70, discussing the recognition of the international slave as violative of the law of nations. The differing opinions of Justice Story and Chief Justice Marshall suggest that the practice was then on the cusp of gaining enough international condemnation to qualify it as a violation of the law of nations. This was over two hundred years ago. Conceding that the law of nations undergoes unidirectional development as international consensus builds, no argument that the practice is still yet to gain admittance to the central tenets of the law of nations can stand any level of scrutiny.

[86] *See supra* note 70. In addition to evidence from case law in the late eighteenth and early nineteenth centuries, modern evidence unequivocally and formally indicates that there is a tenet of the law of nations that bars the use of child slavery. *See John Doe I*, 766 F.3d at 1020 (Court recognizing that both parties have agreed that the use of child slavery is barred by the modern-day law of nations).

CONCLUSION

Legal scholars and justices have concluded that at least some of the purpose behind the passage of the Alien Tort Statute was an attempt to demonstrate to the European powers that the United States is not a pariah nation but is instead willing to uphold commonly agreed upon tenets of international law, and thus is an attractive target of diplomatic and trade relations.[87] The decision in Nestlé works to achieve the opposite of the Alien Tort Statute's legislative purpose. By refusing to impose liability, the Court allows foreign nations and corporations to conclude that the United States sanctions these sorts of violations of the law of nations, or at the least, that courts will look the other way when domestic corporations have some level of plausible deniability. While the negative human rights implications from disallowing Alien Tort Statute claims are evident, scholars likewise highlight the potential negative trade implications from increased Alien Tort Statute litigation.[88] The negative diplomatic consequences are clear. Trade implications should be manifest as well, in the form of unfair competition claims. By using slave labor, *Nestlé* takes advantage of artificially low labor costs, competing unfairly against companies from abroad, and straining, rather than improving, trade relations.[89] The Court should make better use

[87] *See, e.g.,* Wood, *supra* note 35, at 4.

[88] *See*, *e.g.,* Hufbauer & Mitrokostas, *supra* note 17, at 257. Hufbauer and Mitrokostas suggest that "balancing the ATS liability hazards of their [foreign direct investment] in *all* potential target countries taken together against the benefits of continued operations in the United States, might chose to divest from the United States." *Id.* While Hufbauer and Mitrokostas touch upon an important unintended side-effect of giving the Alien Tort Statute an increased bite, it is hard to classify their suggestion as anything but pessimistic speculation. For example, the decision of multinational corporations to remain in the United States will necessitate a cost benefit analysis; as such, despite increased risk of liability, the multinational corporations might still judge the benefits of US corporate citizenship to be worth it, especially when factoring in the cost of moving to another jurisdiction. Further, Hufbauer and Mitrokostas fail to identify the potential for the US to enact responsive litigation. For example, to further entice multinational corporations to maintain their US presence in the face of Alien Tort Statute litigation risk, legislators could pass legislation increasing the benefits of staying, perhaps in the form of tax incentives. Further, Hufbauer's and Mitrokostas's concerns are premised on shaky logic; for the multinational corporations to decide to remove themselves from the US on the basis of litigation fears, there must be some other near equally attractive jurisdiction that will not enforce either the law of nations or some equivalent domestic law forcing corporations to practice corporate social responsibility in their dealings abroad. *See* Van Calster, *supra* note 33, at 129-31 for an analysis of the corporate social responsibility legal regime in the European Union.

[89] The increased trade leverage of the United States today, in comparison with that in 1789, can function in one of two ways in this context. The United States could use its position to aid in the enforcement of tenets central to the law of nations, or the United States could use its leverage to avoid liability for domestic infractions of the same without realistic fear of reprisal by other nations. The U.S. Department of Labor has recognized that in Ivory Coast, "gaps exist within the operations of enforcement agencies that may hinder adequate enforcement of child labor laws." BUREAU OF INTERNATIONAL LABOR AFFAIRS, *supra* note 4, at 3. Further, Ivory Coast does not have enough enforcement and investigatory officers, nor sufficient funding, to render their policies against child labor exploitation effective. *Id*. at 5. The United Nations has indicated that a key element in securing the global protection of human rights, labor rights, and environmental protection is the extraterritorial application of domestic law. Van Calster, *supra* note 33, at 125. *But see* Hufbauer, *supra* note 17, at 246 (identifying an alternative response by multinational corporations to increased prosecution under the Alien Tort Statute in which they significantly curtail their investment in developing countries to avoid expensive

of their next Alien Tort Statute case to advance, rather than hinder, the development of customary international law.

litigation rather than altering their practices to conform with global standards while maintaining their current investment levels). Hufbauer and Mitrokostas conservatively calculated the potential for US foreign direct investment offset at $55 billion, with a resultant $10 billion reduction in US exports. *Id*. at 256. The Court in *Nestlé* has implicitly sanctioned the latter option by dismissing the case under the guise of an evidently insurmountable presumption against extraterritoriality, absolving the judicial department of responsibility and shifting the ball into the court of the legislature and executive departments, despite the contrary purpose behind the passage of the Alien Tort Statute as evidenced by the intent of the First Congress. *See, e.g.,* Hufbauer & Mistrokostas, *supra* note 17, at 247-48. ("From what its veiled history suggests, the law was apparently intended to show European powers that the new nation would not tolerate flagrant violations of the 'law of nations,' especially when the victims were foreign ambassadors or merchants.").