Corporate Accountability, Extraterritoriality and Child Slavery: Lessons From *Nestlé v. Doe*

Introduction

> *'Human rights are inextricably linked to our shared future and a key element of the just transition to regenerative food systems. By respecting and advancing them in our value chain, we are building a foundation that contributes to a resilient future for our planet and its people.'*[1]

This is the first statement displayed on the Nestlé website under 'Sustainability' and 'Human rights.' However, its turbulent past with human trafficking and child slavery across its multiple supply chains in Western Africa indicates otherwise. In 2005, six Malian children alleged that they were trafficked into the Ivory Coast to work on cocoa farms for Nestlé and Cargill's chocolate and confectionery business.[2] They worked fourteen hours a day, received minimal food and no shelter.[3] The Plaintiffs argued that Nestlé worked with farm owners to establish a supply chain while providing the necessary resources such as money, fertilizer and tools for cocoa production, aiding and abetting child enslavement in the Ivory Coast.[4] However, in an 8 – 1 majority, the Supreme Court dismissed the suit against Nestlé in 2021, citing the absence of a jurisdictional nexus based on the presumption against extraterritoriality.[5] This decision aligns with the Supreme Court's recent trend of excessively restrictive judgements on corporate accountability against human rights violations, creating a shield against liability for large corporations.

The plaintiffs filed an action under the Alien Tort Statute (ATS), which provides jurisdiction to district courts '[over] 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.'[6] Since the 1980s, the ATS has been a vehicle for litigation against foreign human rights violations. foreign soil. In *Filártiga v. Peña-Irala*, a Paraguayan minor was tortured and killed by another Paraguayan citizen residing in the United States.[7] The Second Circuit ruled that torture fell within the ambit of the ATS, describing the defendant as 'an enemy of all mankind.'[8] This progressive interpretation was replicated in 1996 when the

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1. NESTLÉ, INC., https://www.nestle.com/sustainability/human-rights (last visited Oct. 20, 2022).
2. Nestlé USA, Inc. v. Doe I, 141 S. Ct. 1931, 1935 (2021).
3. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1017 (9th Cir. 2014).
4. Nestlé USA, Inc. v. Doe I, 141 S. Ct. at 1937.
5. *Id.* at 1936.
6. 28 U.S.C. § 1350.
7. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
8. *Id.* at 890.

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Unocal Corporation was found guilty of extending its support to Myanmar's military coup.[9] The corporation 'directly or indirectly subjected the villagers to forced labor, murder, rape and torture when the Defendants constructed a gas pipeline through the Tenasserim region.'[10]

In 2004, the Supreme Court shifted to a more restrictive construction of the ATS caused by diplomatic tensions due to an increasing number of extraterritorial suits against foreign entities.[11] In *Sosa v. Alvarez-Machain*, the 'violation of the law of nations' under the ATS was restricted to three categories of transboundary torts: violations of safe conduct, infringements on the rights of ambassadors, and piracy.[12] In *Jesner v. Arab Bank*, foreign corporations were precluded from the jurisdiction of the ATS.[13] Finally, *Kiobel v. Royal Dutch Petroleum Co.* laid down the presumption against extraterritoriality as a precondition for a suit under the ATS.[14] A combined reading of the restrictions outlined in the above cases has significantly raised the burden of proof under the ATS, creating a paradigm shift since *Filártiga*. The Supreme Court's decision in *Nestlé* reiterates this shift by further restricting ATS jurisdiction against corporations, stating that 'general corporate activity' is insufficient to disprove the presumption against extraterritoriality.[15]

I. Corporate Accountability

There is an absence of clarity in the Supreme Court's position on corporate accountability. The decisions in *Kiobel* and *Jesner* indicate a precautious stance on the extension of liability to corporations. In *Kiobel*, the Second Circuit stated that 'corporate liability is not a discernible—much less universally recognized—norm of customary international law.'[16] *Jesner* followed with identical reasoning, stating that 'charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach.'[17] This conclusion emanates from the Nuremberg Trials, which established that '[c]rimes against international law are committed by men, not by abstract entities. . . .'[18] This statement was referenced by the

9. Doe v. Unocal, 395 F.3d 932, 936 (9th Cir. 2002).

10. *Id*. at 937.

11. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

12. *Id.* at 724.

13. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402–03 (2018).

14. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013). The presumption against extraterritoriality is defined as a principle where domestic statutes do not apply to foreign jurisdictions unless there is an express and affirmative indication to the contrary. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (AM. L. INST. 2018).

15. Nestlé USA, Inc. v. Doe I, 141 S. Ct. 1931, 1937 (2021).

16. Kiobel v. Royal Dutch Petroleum, Nos. 06-4800-cv, 06-4876-cv, slip op. at 2 (2d Cir. Sept. 17, 2010).

17. *Jesner*, 138 S. Ct. 1386, 1400 (2018).

18. Judge Philippe Kirsch, President of the International Criminal Court, Applying the Principles of Nuremberg in the ICC, Keynote Address at the "Judgement at Nuremberg" Conference (Sept. 30, 2006).

Second Circuit and the Supreme Court in *Kiobel*[19] and *Jesner*[20] *respectively* to imply that corporate accountability did not fall within the walls of international law. The absence of cases against corporations by international tribunals was perceived as evidence of its unenforceability. However, this notion is entirely misguided.

I.G. Farbenindustrie (*I.G. Farben*) was a German conglomerate that supplied the Zyklon B gas used to kill over a million prisoners at *Auschwitz.*[21] The Allies dissolved the corporation after World War II during the Nuremberg Trials and the members behind it were subsequently sentenced.[22] As opposed to prosecution against the corporation itself, criminal proceedings were initiated against individual members after *I.G. Farben's* dissolution.[23] This was justified as protective measures so that 'Germany will never again threaten her neighbors or the peace of the world.'[24] It was not because the Court lacked the jurisdiction to act against corporations. Rather, corporate accountability in Germany's legal framework at the time was an unknown concept.[25] The Nuremberg judgement ordered for its dissolution so that *I.G. Farben* would no longer threaten global peace.[26] However, *Kiobel* and *Jesner* misinterpret the intentions behind Nuremberg to arrive at the conclusion that a cause of action does not arise against corporations under international law.[27] The Nuremberg case against *I.G. Farben* is simply an extension of 'piercing the corporate veil,' where the individuals behind the atrocities could not hide behind the juristic personality of the corporation. Although the Supreme Court in *Nestlé* did not distinguish between individual persons and corporations under the ATS, it failed to adequately address the requirement to trace corporate liability under international law as a norm of conduct, once again leaving the door open for future judgements to adopt the *Kiobel* standard.[28]

II. The Presumption Against Extraterritoriality

The narrow interpretation of the presumption against extraterritoriality

19. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 119 (2d Cir. 2010).

20. *Jesner,* 138 S. Ct. 1386, 1402 (2018).

21. Allie Brudney, The I.G. *Farben* Trial: Evidentiary Standards and Procedures and the Problem of Creating Legitimacy, 61 HARV. INT'L L.J. 245, 253 (2020), https://harvardilj.org/wp-content/uploads/sites/15/61.1-Brudney.pdf.

22. *Id.* At 256.

23. Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How* Kiobel *Undermines The Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. ONLINE 119, 131 (2010), https://harvardilj.org/wp-content/uploads/sites/15/2010/11/HILJ-Online_52_Giannini_Farbstein1.pdf.

24. *Id.* at 123.

25. *Id.*

26. *Id.*

27. *Id.* at 122.

28. *See* Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring the TVPA as a Promising Tool for Corporate Accountability,* COLUM. HUM. RTS. REV. , Nov. 9, 2021, at 10, https://hrlr.law.columbia.edu/files/2021/11/11_9-Nestle-HRLR-Online.pdf..

is another restriction on the human rights of underrepresented communities. While the rationale behind this presumption was to restrict the 'abundance of litigation' post *Filártiga,* the high threshold of what is and is not 'conduct' on foreign soil has placed an undue burden on plaintiffs alleging violations of customary international law by domestic corporations.[29] In the existing framework, the victim must rebut this presumption by proving that a corporation's conduct was relevant to the territorial extent of the United States.[30] However, there is no uniform way to determine this.

Kiobel laid down the 'touch and concern' test where 'claims [that] touch and concern the United States' would displace the presumption against extraterritoriality.[31] *Morrison v. National Australian Bank* substantiated the 'touch and concern' test with the 'focus' test, which stated that when 'conduct relevant to the focus of the provision occurred in the United States, then the application of the provision is considered domestic and is permitted.'[32] Finally, *RJR Nabisco Inc. v. European Community* merged *Kiobel's* 'touch and concern' test and *Morrison's* 'focus' test to establish a two-step framework.[33] Here, the court examines whether the statute provides a clear rebuttal to the presumption against extraterritoriality and further inquires whether the conduct relating to the focus of the provision took place within the United States.[34]

The majority in *Nestlé* held that the Plaintiffs failed to satisfy the *Nabisco* test, with the Court ruling that the operational and financial decisions made by Nestlé in the United States were insufficient to establish a nexus with child slavery in the Ivory Coast. However, the focus of the tort was not the act of child slavery itself. Instead, the Court should have examined Nestlé's *aiding and abetting* of child enslavement in the Ivory Coast as a violation of customary international law. This interpretation would have satisfied the *Nabisco* test because the conduct of Nestlé's complicity in child slavery occurred within the jurisdiction of the United States.

A. Aiding and Abetting

Secondary liability is an actionable claim under international law and the ATS.[35] The Nuremberg Principles state that 'complicity in the commission of a crime . . . against humanity . . . is a crime under international law.'[36] The International Law Commission's Draft Code of Crimes Against the Peace and

29. *See* Stephen P. Mulligan, *The Rise and Decline of the Alien Tort Statute,* CONGRESSIONAL RESEARCH SERVICE (2018) https://sgp.fas.org/crs/misc/LSB10147.pdf.

30. *See* Desirée LeClercq, *Nestlé United States, Inc. v. Doe. 141 S. Ct. 1931,* 115 AM. J. INT'L. L. 694, 695 (2021).

31. *Kiobel*, 133 S. Ct. at 1669.

32. Roberson, *supra* note 28, at 11.

33. RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2101 (2016).

34. *Id.*

35. Roberson, *supra* note 28, at 14.

36. Int'l Law Comm'n, Principles of Int'l Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle VII, Rep. of the Int'l Law Comm'n on the Work of Its Second Session, U.N. Doc. A/1316 (1950).

Security of Mankind also list 'complicity' as a crime.[37] There are two elements in establishing complicity in the commission of a crime: *mens rea* and *actus reus.*[38]

Since the ATS focuses on 'tort[s] [only] committed in violation of the *law of nations or a treaty of the United States*,'[39] it is necessary to examine the elements of complicity using international law. In *Prosecutor v. Tadić*, *mens rea* was defined as 'knowledge that the acts performed by the aider and abettor assist[ed] the commission of a specific crime by the principal.'[40] This knowledge may be inferred from the aider's and abettor's broader awareness[41] and relevant circumstances.[42]

The Ivory Coast is responsible for 40% of global cocoa production.[43] It is estimated that 800,000 children work on cocoa farms in the Ivory Coast.[44] Furthermore, child slavery in Ivory Coast and Ghana has risen by 14% in the last decade because of the increased demand for cocoa-based products.[45] Earlier this year, Nestlé initiated a program to grant up to 500 Swiss francs ($543) annually to families engaged in cocoa farming in the Ivory Coast and school enrolment for their children.[46]

The timing of its welfare initiatives amidst public outcry in light of the above statistics is implicative of its knowledge of the principal crime, i.e. child slavery. Nestlé also regularly sent its employees from its U.S. Headquarters to Ivorian cocoa farms to inspect its infrastructure and operation.[47] This implies that Nestlé possessed the requisite knowledge of the engagement of child laborers in their cocoa farms to satisfy the *mens rea* in aiding and abetting child slavery.

Concerning the actus reus of complicity, the Extraordinary Chambers in the Courts of Cambodia required acts or omissions to have a 'substantial

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37. Int'l Law Comm'n, Draft Code of Offences against the Peace and Security of Mankind, art. 2(13)(iii), Rep. on the Work of Its Sixth Session, U.N. Doc. A/2693 (1954).

38. *See generally* Oona A. Hathaway et al., *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593 (2019).

39. 28 U.S.C. § 1350.

40. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgement, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

41. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgement, ¶ 162-64 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

42. Prosecutor v. Lukić and Lukić, Case No. IT-98-32/1-T, Trial Judgement, ¶ 902 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009).

43. *Ivorian Cocoa: A Bittersweet Disposition*, GRO INTELLIGENCE (Nov. 11, 2014), https://gro-intelligence.com/insights/ivory-coast-cocoa-production.

44. Humphrey Hawksley, *Cocoa farms in Ivory Coast still using child labour*, BBC NEWS (Nov. 10, 2011), https://www.bbc.com/news/av/world-africa-15686731.

45. SANTADARSHAN SADHU ET AL., NORC FINAL REPORT: ASSESSING PROGRESS IN REDUCING CHILD LABOR IN COCOA PRODUCTION IN COCOA GROWING AREAS OF CÔTE D'IVOIRE AND GHANA 62 (2020).

46. Silke Koltrowitz & Maytaal Angel, *Nestle to give cocoa farmers cash to keep children in school*, REUTERS (Jan. 27, 2022), https://www.reuters.com/business/sustainable-business/nestle-pay-cocoa-growers-keep-children-school-2022-01-27/.

47. Doe v. Nestle, S.A., 906 F.3d 1120, 1126 (9th Cir. 2018).

effect on the commission of [a] crime . . . .'[48] The International Criminal Tribunal for Rwanda clarified that 'substantial effect' need not be in the form of a causal relationship with the principal crime.[49]

The Ninth Circuit discovered that Nestlé provided 'kickbacks' or 'personal spending money' to the farm owners outside their ordinary business contracts to ensure that Nestlé received cocoa at competitive prices that required the employment of child labourers.[50] These decisions were made by Nestlé's corporate offices in the United States.[51] However, the majority opinion described this as 'general corporate activity' within the United States, insufficient to create jurisdiction under the ATS.[52] It failed to consider that the operational and financial decisions by Nestlé had a discernible effect on the commission of the principal crime because of the incentives provided to the farm owners to supply cocoa at low prices.

Nestlé 's conduct within the United States had a material impact on the employment of children in cocoa farms, satisfying the actus rea in aiding and abetting child slavery. The Court should have used this reasoning to conclude that Nestlé violated norms of international conduct on aiding and abetting from within the United States. This would have unequivocally rebutted the presumption against extraterritoriality by satisfying *Nabisco's* two-step test and *Morrison's* focus test.

Conclusion

The restrictive construction of the ATS threatens the fundamentality of customary international law and human rights. Congress enacted the Act in 1789 to uphold the United States' obligations to the international community. However, with an increasing number of businesses outsourcing their supply chains to foreign countries, corporate accountability must be enforced against global human rights transgressions. The imposition of arbitrarily narrow restrictions on the ATS impedes this process. The Supreme Court's decision in *Nestlé* was a missed opportunity to 'pierce the corporate veil' and keep businesses accountable for their actions. Instead, it has set forth a dangerous precedent.

48. Prosecutor v. Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgement ¶ 533 (Extraordinary Chambers in the Cts. of Cambodia July 26, 2010).

49. Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-A, Appeals Judgement, ¶ 2083 (Int'l Crim. Trib. for Rwanda Dec. 14, 2015).

50. Doe v. Nestle, S.A., 906 F.3d at 1126.

51. *Id.*

52. Nestlé USA, Inc. v. Doe I, 141 S. Ct. 1931, 1937 (2021)..