Commentary

Nestle v. Doe: Supreme Court Deals Setback to Forced Child Laborers, but US Corporations Lose Bid for Alien Tort Statute Immunity

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Introduction

Although the Alien Tort Statute (ATS) has been a part of US law since the Judiciary Act of 1789, only since 1980 has it been used to advance claims over human rights violations that occur outside the United States.¹ In recent years, however, courts have become increasingly unreceptive to ATS suits, especially those against corporate defendants, and have significantly limited the circumstances under which courts can assert jurisdiction. Although Doe v. Nestle² did not, as was feared, signal the death knell for ATS cases against corporate defendants, it nevertheless further limited the circumstances under which courts can assume jurisdiction.

The Nestle case concerns children from Mali who were trafficked and forced to work on cocoa plantations in Cote D’Ivoire. In their 2005 lawsuit, the plaintiffs alleged that Cargill and Nestle, which buy cocoa from plantations in Cote D’Ivoire, aided and abetted that forced labor by providing financial resources, training, and tools to the plantations despite knowing that forced child labor was used on those plantations. In 2018, the Ninth Circuit Court of Appeals,

¹ The watershed case was Filártiga v. Peña-Irala, 630 F.2d 876 (2nd Cir. 1980).
² Doe v. Nestle, 906 F.3d 1126 (9th Cir. 2018).
citing the Supreme Court’s *Kiobel v. Royal Dutch Petroleum* decision, found that the plaintiffs’ claims “touch and concern” the United States because the violations were allegedly perpetrated from the corporate headquarters in the United States. However, the Supreme Court found that all of the activity occurred in Cote D’Ivoire. The operational decision-making by Nestle and Cargill that took place in the United States was insufficient to establish the domestic application of the ATS.

In reaching this conclusion, the Court appears to have abandoned its *Kiobel* “touch and concern” test and instead applied the two-part test set forth in *RJR Nabisco v. European Cmty* to determine whether a statute can be applied extraterritorially. The test requires a court to determine, first, whether the statute gives a clear, affirmative indication that rebuts this presumption against extraterritoriality, and second, if not, whether “the conduct relevant to the statute’s focus occurred in the United States.” As to the first prong, the Court found that the ATS does not “evince a ‘clear indication of extraterritoriality’” and thus cannot give “extraterritorial reach” to any cause of action judicially created under the ATS. As to the second prong, and without determining the ATS’s focus, the Court ruled that the plaintiffs had not pleaded sufficient enough facts to make the connection between domestic conduct and the actions abroad, because general corporate activity was not found to be clear and specific enough to prove applicability of the ATS in this case.

The Court’s departure from *Kiobel* in favor of *RJR* will likely make future claims against both individuals and corporations for human rights violations more difficult to sustain because the Court will now insist that relevant conduct take place in the United States. Indeed, had this been the standard forty years ago, ATS human rights litigation would likely never have taken off. In the end, the Court’s decision in *Nestle* does not end this case but essentially requires them to start over after sixteen years of litigation. It left it to the plaintiffs to seek leave to amend their complaint to assert additional facts that establish that relevant conduct related to their claims of trafficking for forced labor took place in the United States.

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3 *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124–25 (2013). In *Kiobel*, the Court applied a presumption against extraterritoriality, holding that ATS claims must “touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application and mere corporate presence in the United States is not enough.”

4 *Doe v. Nestle*.


6 *Nestle*, 593 U.S. ___ (2021), 5
The Court did not address several important ATS issues.

In light of the split of opinion among the circuit courts of appeal, it was widely expected that the Supreme Court would finally decide whether the ATS even applied to corporations. In 2018, when it last had the opportunity to do so, the Court issued a limited ruling, finding in *Jesner v. Arab Bank* that the ATS did not apply to foreign corporations. Although much of the oral argument in *Nestle* also turned on the question of corporate liability, the Court decided the case on other grounds. However, in dicta, five of the nine justices appear to support ATS liability for US-based corporations. Thus, were the issue to come before the Court again, corporations would likely not be exempt from such lawsuits. In a concurring opinion, Justice Gorsuch found that “nothing in the ATS supplies corporations with special protections against suit. The statute specifies which plaintiffs may sue (‘alien[s]’). It speaks of the sort of claims those plaintiffs can bring (‘tort[s]’ in ‘violation of the law of nations or a treaty of the United States’). But nowhere does it suggest that anything depends on whether the defendant happens to be a person or a corporation.”

Because the Court did not reach the merits of the claims, it also did not clarify which torts are cognizable under the ATS. In *Sosa v. Alvarez – Machain*, the Court had recognized an implied, federal common law cause of action for violations of international law. Three justices, led by Justice Thomas, critiqued *Sosa*, holding that only the “historical torts” recognized in 1789 could be actionable under the ATS, namely, “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” Fortunately, this view did not attract a majority. Justice Sotomayor issued a withering critique of Thomas’s opinion on this point, finding among other reasons that “There is nothing so mysterious about a law’s international origins that would prevent courts – bodies specifically tasked with, and particularly capable of, interpreting and applying laws – from ably adjudicating a suit for damages arising out of a tort ... committed in violation of the law of nations.” In any case, it is clear that the claims in this case, namely, slavery, forced labor, and trafficking would be cognizable ATS claims because these prohibitions are well entrenched in human right law.

The Court also did not decide whether claims of aiding and abetting tortious conduct, as alleged in *Nestle* (and indeed in most such cases against

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8 See *Nestle*, 5, slip op. 2, slip op. 1.
10 Forced child labor violates several of the fundamental conventions of the International Labour Organization (ILO), including the Forced Labour Convention, 1930 (No. 29) and the Worst Forms of Child Labour Convention, 1999 (No. 182).
 corporate defendants) are cognizable under the ATS. Respondents argued that aiding and abetting is a freestanding tort which is a violation of international law, and that domestic conduct can aid and abet an injury that occurs overseas. Nestle argued that aiding and abetting is not a tort at all but instead secondary liability. The Court did not reach the issue, finding that even if the dispute was resolved for the respondents the court did not have jurisdiction because the relevant acts took place in Cote D’Ivoire and only “general corporate activity” took place in the United States. It will remain for future cases to determine whether aiding and abetting is a tort, and whether standards are derived from domestic or international law.

To conclude, the Supreme Court has not rejected the possibility of holding corporate actors liable for human rights violations throughout their supply chain under the ATS, but it has set a high bar for corporate liability for human rights violations to be found justiciable under the ATS. The Court requires plaintiffs to rebut the presumption against extraterritoriality through “sufficient connections between the actions of the corporate actor domestically” to the harm caused abroad. To do so, plaintiffs must show actions and conduct within the United States beyond “general corporate activity” of US corporations in managing and conducting their business operations outside the United States.

Beyond ATS, plaintiffs can still seek redress under other statutes. The Torture Victims Protection Act (TVPA) and the Trafficking Victims Protection Reauthorization Act (TVTPRA) still provide avenues to holding individuals liable for torture, extrajudicial killing, and human trafficking, respectively. However, the TVPA is not available against corporations. Additional avenues to consider for forced labor complaints include Section 307 of the Tariff Act of 1930 (Section 307), which makes it illegal to import goods “mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor.” Soon after the judgment in this case, Corporate Accountability Lab and IRA Advocates submitted new evidence to the U.S. Customs and Border Protection (CBP), the agency in charge of enforcing Section 307 petitions, requesting a withhold release order (WRO) ensuring that cocoa from Cote D’Ivoire is seized at the border and not allowed to enter the US market.

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11 The TVPA allows civil suits in the United States against individuals (not corporations) who have committed or aided and abetted in acts of torture or extrajudicial killing. See 106 Stat. 73.
12 The TVTPRA allows victims of trafficking to seek civil remedies for personal injury against the perpetrator. See 18 U.S. Code § 1595.
13 See 19 U.S. Code § 1307.
The CBP has issued WROs in cases where enough evidence has been presented of forced labor being prevalent in the supply chain of a particular company or region.\textsuperscript{15} Import bans for goods made with forced labor is a growing trend in other countries and regions, including the European Union, which is considering such regulations.\textsuperscript{16} Although import bans lessen the incentive to use forced labor by ensuring that such goods never make it to market, such bans do not provide redress to those directly harmed as the ATS could.

The growing body of laws requiring mandatory corporate human rights due diligence raises the question of how much longer corporations will be able to deny their knowledge of such violations, and thus further opens the door to liability under the ATS. Although general corporate activity may not be enough to incur liability, knowledge and due diligence of their supply chain would seem to imply more than general corporate activity and could be used to prove "sufficient relevant connections." It is yet to be seen what the scope will include but given the explosion of laws around the world focused on mandatory human rights due diligence, import bans for goods made with forced labor, and a convergence towards regulation and the liability of corporations,\textsuperscript{17} the ATS should not be fully discounted among the legislation to use in holding corporations accountable for the harm they cause.

\textsuperscript{17} See Vedanta Resources PLC & Anor v. Lungowe & Ors (2019), UKSC 20 (10 April 2019); Okpabi & Others v. Royal Dutch Shell Plc & Another (2021), UKSC 3.