Furthermore, in the *Kenya* situation, the Pre-Trial Chamber held that the standards under Article 15(3) and 53(1) should not be dissociated. The same threshold is found irrespective of the trigger mechanisms because both provisions specify the procedure to open an investigation.[39] This seems to reflect the best textual interpretation and the right policy balance.

In sum, the Appeals Chamber went too far in providing the widest possible discretionary powers to the prosecutor. Its decision is at odds with the limits set out by the ICC Statute and comes at the expense of legitimacy and practicality.

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United States Supreme Court—jurisdiction—forced labor—international human rights law—International Labor Organization—multinational corporations

NESTLÉ UNITED STATES, INC. v. DOE. 141 S. CT. 1931. *At* https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf.
United States Supreme Court, June 17, 2021.

On June 17, 2021, the United States Supreme Court reversed and remanded a suit filed against Nestlé USA and Cargill under the Alien Tort Statute (ATS)[1] for lack of jurisdiction. This case has already garnered attention over the nature of the dispute (child slaves in Africa), the Supreme Court's treatment of jurisdiction under the ATS, and the finding shared by five of the nine Supreme Court justices that domestic corporations can potentially be sued under the ATS. This analysis focuses on the child slavery and global supply chain aspects of the decision.

The case was brought by six Malian nationals, all former child slaves who had been forced to harvest cocoa in the Ivory Coast, otherwise known as Côte d'Ivoire (Respondents). Their working conditions were perilous. They were forced to work for up to fourteen hours per day, six days per week, in hazardous conditions. They were starved and beaten, slept in locked rooms, and spent their days frightened that their overseers would maim them to keep them from leaving.

Respondents filed suit under the ATS, alleging that Nestlé and Cargill bore some responsibility for their injuries by aiding and abetting violations of international law prohibitions of slavery, forced labor, child labor, torture, and cruel, inhuman, or degrading treatment. They argued that the companies, which are major global chocolate producers, provided their enslavers with financial support, supplies, and training. Although Nestlé and Cargill "knew or should have known" that the cocoa farms were exploiting child slaves, those companies allegedly "continued to provide those farms with resources" (p. 1935). The Respondents were motivated to file suit in the United States because: (1) Mali contains no law allowing for civil damages for their injuries; (2) the Ivory Coast judicial system is notoriously corrupt;

[39] Kenya Decision, *supra* note 21, para. 21.
[1] 28 U.S.C. § 1350.

(3) Respondents worried that cocoa producers in the region would retaliate against them; and (4) the United States offers a legal basis for suit under the ATS. They argued that there were sufficient domestic connections to assert jurisdiction under the ATS because Nestlé and Cargill allegedly made "all major operational decisions from within the United States" (*id.*). Their case wound its way through U.S. federal courts for twelve years before the Supreme Court dismissed it.

The *Nestlé* decision is a complicated one. Rather than employing the conventional decisional architecture (majority opinion, concurrence, dissenting opinion), *Nestlé* is divided into three Parts, with different justices joining in on different Parts, two concurrences, and one dissent (Alito). Parts I and II form the majority opinion and center solely on whether the Respondents' suit sufficiently pleads a domestic application of the ATS.

Examining the question of domestic application, the majority opinion (written by Justice Thomas) applied the *Nabisco*[2] "two-step framework" (p. 1936). Under step one, the Court examines the reach of the jurisdiction-conferring statute. Recalling *Kiobel*,[3] the Court reaffirmed that the ATS fails to "evince a 'clear indication of extraterritoriality'" and thus that the Respondents had failed to rebut the presumption that the statute applies only domestically. Under step two of the framework, plaintiffs must establish that the conduct "relevant to the statute's focus occurred in the United States" (*id.*).

Assuming *arguendo* that the ATS encompasses claims of aiding and abetting forced labor overseas, the majority decided that "[n]early all the conduct" that gave rise to the aiding and abetting allegation—such as the provision of training, fertilizer, tools, and cash to the abusive farms—occurred in the Ivory Coast (p. 1937). The majority held that the Ninth Circuit erred by allowing the suit to proceed on the ground that "every major operational decision by both companies" had been carried out or approved in the United States. The majority explained that such "general corporate activity—like decision-making—cannot alone" satisfy the second step of the extraterritoriality framework (*id.*).

Because the majority found that the Respondents failed to establish that the relevant conduct occurred in the United States, it found it unnecessary to take up the Trump administration's assertion that the "conduct relevant to the . . . focus" of the ATS could never involve aiding-and-abetting causes of action (pp. 1936–37). Nor did it adjudicate the Respondents' retort that the focus of the ATS is conduct that violates international law, including U.S.-based aiding and abetting of forced labor overseas.

In Part III, however, Justice Thomas (joined by Justices Gorsuch and Kavanaugh) agreed with the administration's position, arguing that the ATS only provides private rights of action for "three historical violations of international law" enumerated in *Sosa* (p. 1937).[4] Those three violations consist of "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[5] Noting that the ATS "is a jurisdictional statute creating no new causes of action," the three justices opined that Congress had only established one new cause of action: the Torture Victim Protection Act of 1991, which authorizes civil suits against individuals by

[2] RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 337, 136 S. Ct. 2090 (2016).
[3] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 133 S. Ct. 1659 (2013).
[4] Sosa v. Alvarez-Machain, 542 U.S. 692, 724, 124 S. Ct. 2739 (2004).
[5] *Id.* at 724.

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victims of torture and extrajudicial killings (pp. 1937–38).[6] Going even further, Justices Gorsuch and Kavanaugh (through a joint concurring opinion) would have overruled *Sosa*, in which the Court had suggested that the "door" to future causes of action is "ajar subject to vigilant doorkeeping" (p. 1943). The justices would have closed that door to ensure that the Court did not seize "power we do not possess" (*id.*).

In a separate concurring opinion, Justice Sotomayor (joined by Justices Breyer and Kagan) rejected Justice Thomas's narrow interpretation of *Sosa* (p. 1944). An interpretation limiting the ATS's reach to the three historical international law violations would, she contended, effectively "overrule *Sosa* . . . in all but name" (*id.*). The concurring justices explained that "the domestic and international legal landscape has changed in the two centuries since Congress enacted" the ATS (*id.*). Slave traders, they argued, are as much "an enemy of all mankind" as torturers are. Rather than limit private causes of action to the three torts that existed over two hundred years ago, the justices argued that Congress intended for the ATS to establish federal jurisdiction over "actionable torts under international law and to provide injured plaintiffs with a forum to seek redress" (p. 1946). The justices concluded by finding it untenable that "international law permitted the aiding and abetting of forced labor" (p. 1949).

Up to this point, nothing in the Supreme Court's opinion is remarkable. The justices maintained long-entrenched positions regarding their respective interpretations of the ATS and private causes of action. Far more remarkable is the agreement among five of the justices, although not set forth in a majority opinion, that domestic corporations can potentially be sued under the ATS (*id.* n. 4).[7] Here again, the justices ignored the Trump administration's argument, which had strenuously objected to corporate liability.[8] Rather, as argued by Justices Gorsuch and Alito, "[t]he notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding" (p. 1940). Examining the text and history, the justices concluded that "[n]othing in the ATS supplies corporations with special protections against suit . . . nowhere does it suggest that anything depends on whether the defendant happens to be a person or a corporation" (p. 1941). Justice Alito would have decided the case solely on corporate liability, reasoning that "if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation" (p. 1950). Corporate status, according to Justice Alito, "does not justify special immunity."

* * * *

The facts of the *Nestlé* case are heartbreaking. They expose grave human rights atrocities committed against children in the Ivory Coast. The legal question is whether claims based on those facts can be litigated in U.S. courts. The Supreme Court has observed that it serves as a gatekeeper for extraterritorial adjudication. Decisions about where, when, and how widely to open that gate supposedly rest with Congress. Yet, for the ATS, Congressional intent with

[6] 106 Stat. 73, note following 28 U.S.C. § 1350.

[7] *See* William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (June 18, 2021), at https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality.

[8] Brief for the United States as Amicus Curiae Supporting Petitioners, Nestlé USA, Inc. v. John Doe I, 2020 U.S. S. Ct., Nos. 19–416, 19–453, at 17–18.

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respect to extraterritorial corporate conduct is unclear. *Nestlé* demonstrates that there is sufficient ambiguity to enable the justices to maintain considerable discretion over whether plaintiffs can litigate international human rights claims in the United States.

In *Nestlé*, the Supreme Court exercised that discretion by creating an aperture to hear international human rights cases and then promptly closing it. Five of the justices (in dicta) found that domestic corporations are just as liable for their international torts under the ATS as natural persons. The majority held, however, that even when "every major operational decision by . . . companies is made in or approved in the U.S.," domestic jurisdiction under the ATS is lacking (p. 1937). The discussion that follows explores the tension between those findings.

That tension will ring familiar to rights advocates cognizant of *Jam v. International Finance Corp.*,[9] where the Supreme Court held that international organizations were not immune from suit under the International Organizations Immunities Act.[10] The Court in *Jam* clarified that a suit under the Act must have a "sufficient nexus" to the United States.[11] As in *Nestlé*, the suit in *Jam* was dismissed for failing to establish that nexus.[12]

In both cases, the justices failed to appreciate the inherently global reach of multinational businesses and international organizations, and, thus, the transnational nature of the torts that they commit while headquartered in the United States.[13] To understand this global reach, it is first helpful to understand the nature of the torts that violate international law. In the case of *Nestlé*, the main tort at issue was child slavery—which is undisputedly prohibited under international law. Convention No. 182 on the Worst Forms of Child Labor is the only treaty adopted by the International Labor Organization (ILO) that has achieved universal ratification.[14] Under that Convention, ratifying states (including the United States) commit to eliminate, inter alia, "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children. . . ."[15] The ILO's supervisory system examines whether states are complying with the Convention, but the treaty leaves it to governments to determine how to ensure "effective implementation and enforcement," including whether to create domestic causes of action.[16] Recognizing the transnational nature of child labor, the Convention calls on states parties to "assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance for social and economic development. . . ."[17]

[9] Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 759 (2019).

[10] International Organizations Immunity Act, 22 U.S.C. § 288a(b) (2018).

[11] *Id.* at 772 (clarifying that the "gravamen" of the lawsuit must be based upon commercial activity in the United States).

[12] Jam v. Int'l Fin. Corp., 442 F. Supp. 3d 162 (D.C. Dist. Ct. 2020) (holding that the gravamen of the suit took place abroad, where the conduct that "actually injured" the plaintiffs took place).

[13] *See, e.g.*, Desirée LeClercq, *A Rules-Based Approach to* Jam*'s Restrictive Immunity: Implications for International Organizations*, 58 HOUS. L. REV. 55, 77–79 (2020) (describing the nexus between the activities of international organizations in the United States and the programs they support in developing countries for purposes of establishing U.S. federal court jurisdiction).

[14] ILO Worst Forms of Child Labour Convention, 1999 (No. 182).

[15] *Id.* Art. 3(a).

[16] *Id.* Art. 7(1) ("Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.").

[17] *Id.* Art. 8.

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Despite universal ratification of ILO Convention No. 182, child labor is on the rise, in part owing to the opaque transactions of global supply chains. According to a recent ILO report, 160 million children were in child labor globally as of 2020, an increase of over 8 million since 2016.[18] The increase is especially significant in sub-Saharan Africa, where there "are now more children in child labour . . . than in the rest of the world combined."[19] In the Ivory Coast in particular, child labor in the cocoa sector is increasing monthly.[20] Cocoa farms in the country produce more than one third of the world's cocoa. The farms benefit from lax domestic regulation and enforcement, thereby profiting from cheap labor, including the labor of young children. Cocoa farms depend on manufacturers such as Nestlé and Cargill, located at the end of this supply chain, for purchases and remittances.

Multinational corporations invest considerable resources in their overseas investments and partners. To address the reputational (and perhaps moral) costs of investing in countries and doing business with operations that may abuse human rights such as fundamental labor rights, corporations subscribe to various voluntary corporate codes of conduct. For instance, as mentioned in an amicus curiae brief in *Nestlé*, in 2001, the "eight largest actors in the cacao industry, including Nestlé, signed [the Harkin-Engel Protocol], promising to eliminate the 'worst forms of child labor' and forced labor on West African cocoa farms."[21] As part of that initiative, the firms develop corporate compliance programs to promote respect for human and labor rights.[22] They hire auditors to assess work sites and use that information to assuage concerns of stakeholders and investors.[23] Decisions concerning those audits, reports, and discussions among corporations take place as a part of the companies' business operations in the United States.[24]

Voluntary corporate codes of conduct have failed, however, to ensure respect for human and labor rights in supply-side countries such as the Ivory Coast. Major news outlets have exposed the continuing use of child slaves on cocoa farms.[25] Acknowledging the failure of these private initiatives, various governments and courts have begun to introduce and impose corporate liability for human rights abuses along the supply chain. The European Union is proposing new rules for mandatory corporate human rights due diligence,[26] and courts in the

[18] ILO/UNICEF, *Child Labour: Global Estimates 2020, Trends and the Road Forward* 8 (2021), *available at* https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—ipec/documents/publication/wcms_797515.pdf.

[19] *Id.*

[20] *Id.* at 55.

[21] Brief of the Grant & Eisenhoffer ESG Institutes as Amicus Curiae in Support of Respondents, Nestlé USA, Inc. v. John Doe I, 2020 U.S. S. Ct., Nos. 19–416, 19–453, at 18.

[22] *See, e.g.*, Nestlé, *Compliance*, *available at* https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate_social_responsibility/2011-csv_compliance.pdf; Cargill, *Empowering Cocoa Growing Communities in West Africa*, *at* https://www.cargill.com/sustainability/community-wellbeing/empowering-cocoa-growing-communities?gclid=CjwKCAjwt8uGBhBAEiwAayu_9WN0l60XpX_a5_oMqJhW993BpYxHrOvgCM0W0CYiev_8ES2ZZHjZ_BoCXfEQAvD_BwE.

[23] *But see* Sarosh Kurvilla, Private Regulation of Labor Standards in Global Supply Chains 36–44 (2021) for a discussion of how auditors, including Nestlé auditors, are pressured by audit consultants to skew evidence in favor of good working conditions.

[24] *See* Nestlé, *Compliance*, *supra* note 22, at 249 (discussing internal governance scheme "across all Nestlé businesses.").

[25] *See, e.g.*, Peter Whoriskey & Rache Siegel, *Cocoa's Child Laborers*, Wash. Post (June 5, 2019), *at* https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa; Matt Percival, *From Bean to Bar: Why Chocolate Will Never Taste the Same Again*, CNN World (Feb. 28, 2014).

[26] European Parliament Resolution of 10 March 2021 with Recommendation to the Commission on Corporate Due Diligence and Corporate Accountability, 2020/2120(INL).

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Netherlands[27] and Canada[28] have recently held parent companies liable for the human rights violations of their subsidiaries.

The Supreme Court in *Nestlé* did not mention the momentum toward recognizing the link between parent companies and rights violations along supply chains. Nor did it give any weight to the corporate decisions made in the companies' U.S. headquarters. Those omissions may reflect the allegations in the complaint, which focused more on the "control" that Nestlé and Cargill exercised over the cocoa farms than it did on corporate decisions carried out in the United States.[29] But even if the details of the U.S. operations had been pled with sufficient specificity, the justices may well have remained unsatisfied with the jurisdictional nexus.

Although the Supreme Court has proven capable of allowing federal statutes to evolve from their origins—such as by restricting immunities of international organizations in *Jam* and suggesting that domestic corporations are liable in *Nestlé*—it has not allowed federal jurisdiction to evolve in response to the increasingly transnational nature of commercial processes.

To illustrate, in determining the scope of private causes of action under the ATS, Justices Sotomayor, Breyer, Kagan, Thomas, Gorsuch, and Kavanaugh all centered their arguments on the intention of the First Congress in 1789. Examining Congressional intent and the text, the justices stressed that the ATS did not *include* an express or "clear indication of extraterritoriality" (p. 1936). Because the ATS did not include such an indication, the majority applied a strict two-step test to determine the statute's extraterritorial reach.

By contrast, five of those justices agreed that domestic corporations can be defendants in ATS suits. Yet the text of the ATS makes no more mention of corporations than it does extraterritoriality. Did Congress intend for corporations to be covered by federal legislation in 1789? Given that multinational corporations did not become actors in the global economy until the 1880s, one hundred years after the ATS was enacted, that argument would be doubtful if not implausible. Instead of following the strict analysis they had just endorsed for determining extraterritorial application, the justices relied on the fact that neither the text nor legislative history *excluded* corporations from liability under the ATS. Because the ATS did not expressly exclude corporate liability, the majority of justices would have applied the ATS to Nestlé and Cargill (had the jurisdictional element been satisfied).

Consequently, the Court broadened ATS liability to include domestic corporations while shielding the corporations' transnational conduct from federal jurisdiction. This consequence is a setback for advocates and global victims. It also undermines the objectives of the First Congress. In her concurring opinion, Justice Sotomayor notes that the First Congress was ultimately concerned about the United States' failure to provide redress for "infractions of treaties" (p. 1945). Congress' intention in adopting the ATS, she points out, was to "avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen" (p. 1946). Nevertheless, by significantly limiting the ATS' extraterritorial reach, the Court has ensured that "infractions of treaties," such as Convention No. 182,

[27] Vereniging Milieudefensie, et al. v. Royal Dutch Shell, C/09/571932/HA ZA 19–379 (May 26, 2021).

[28] Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (Feb. 28, 2020).

[29] *See, e.g.*, Brief of Respondents in 19–453, Nestlé USA, Inc. v. John Doe I, 2020 U.S. S. Ct., Nos. 19–416, 19–453, at 12–15 ("From the United States, Petitioner had complete control over the farms' labor practices, knew that the farmers they were assisting were using and continued to use forced child labor and purposefully relied on the enslavement of children to increase profits by ensuring the flow of cheap cocoa beans.").

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and the injuries caused to foreign citizens by U.S. corporations, remain safely out of reach from suit.

Progressive protections against human rights abuses such as child labor may be elusive in a Supreme Court whose fidelities supposedly rest in centuries-old legislation. On the other hand, perhaps anchoring domestic jurisprudence to outdated conceptions of commercial behavior gives justices the space and security to evolve. Declaring actors such as international organizations and corporations liable under federal legislation is far less controversial when the implications of such declarations are inconsequential. Justices like Sotomayor may be playing the long-game here, waiting until the Supreme Court composition enables a more global-facing and equitable decision. Until then, however, the victims of fundamental human rights abuses will have to look elsewhere for justice.

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Infringement procedure—WTO law/GATS—national treatment—direct effect—EU Charter of Fundamental Rights

Case C-66/18. Judgment. *At* http://curia.europa.eu/juris/document/document.jsf?text=&docid=232082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1828103.
Court of Justice of the European Union, Grand Chamber, October 6, 2020.

On October 6, 2020, the Court of Justice of the European Union (CJEU) handed down its judgment in *Commission v. Hungary*.[1] It found that Hungary had violated the General Agreement on Trade in Services (GATS), as well as internal European Union law—specifically the EU Charter of Fundamental Rights (EU Charter).[2] The case arose out of Hungary's 2017 amendment to its higher education law. The amendment imposed two novel requirements on foreign universities operating in Hungary. It barred any non-EU university from operating unless its country of origin concluded a specific enabling treaty with Hungary. Moreover, it required that the foreign university actually provide educational services in its country of origin. While framed in general terms, it is hard to avoid the conclusion that the 2017 amendment was aimed at ending the operations of the Central European University (CEU) in Hungary.

Although presented as a trade dispute, the case was at its core a fundamental rights debate. The European Commission (Commission) and ultimately the CJEU used the GATS as a means to achieve a rule-of-law end. The CJEU held that the Commission has an unfettered prerogative to enforce member states' compliance with World Trade Organization (WTO) law. For the first time, the CJEU applied WTO law not just as a tool of interpretation, but, in at least one way, as purely internal EU law. Yet, the CJEU remained firm that other actions

[1] Case C-66/18, Commission v. Hungary, ECLI:EU:C:2020:792, Judgment (Ct. Just. EU Oct. 6, 2020).
[2] This case note focuses on the judgment's findings as to the GATS.