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IS EXTRATERRITORIALITY THE GOLDEN TICKET OUT OF CORPORATE LIABILITY? HOW THE MODERN-DAY WILLY WONKA'S CHOCOLATE FACTORY EVADED LIABILITY UNDER THE ALIEN TORT STATUTE IN *NESTLÉ V. DOE*

Alyaa Chace[*]

Only when the last tree has died, and the last river been poisoned, and the last fish been caught, will we realize we cannot eat money.[1]
-Cree Indian Proverb

ABSTRACT

The Alien Tort Statute ("ATS") was drafted as part of the Judiciary Act of 1789. It was intended to provide federal courts with the jurisdiction to hear civil actions brought by foreign plaintiffs for torts committed in violation of the law of nations or other United States treaty. After a two-hundred-year dormancy period, the Statute has since been revived and become a vehicle by which foreign plaintiffs seek redress for environmental and human rights offenses carried out on foreign soil, often at the hands of United States corporations. However, the Supreme Court continues to limit the reach of the Statute, imposing a hurdle of extraterritoriality, which prevents the Court from offering relief when the harms alleged have not *touched or concerned* U.S. soil. Regardless of whether these harms were orchestrated on U.S. soil and carried out by U.S. corporations, so long as the harms occurred on foreign soil, U.S. law cannot be invoked. This application

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[1] *The Last Tree*, N.Y. TIMES, Aug. 17, 1995, at A22.

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is antithetical to the statutory intent of the ATS and the modern practice of international law. It has resulted in decisions that favor corporate defendants, allowing them to bypass liability for even the most egregious rights violations. In contrast, the United Kingdom has circumvented this hurdle by focusing not on sufficient proximity, but on general impositions of tort law, particularly in evaluating whether parent corporations breached a duty of care rightfully owed to claimants. This Note analyzes the UK Supreme Court approach as a means of overcoming the extraterritoriality limitation of the ATS. Among other advantages, this approach will fulfill the Statute's intent, enabling plaintiffs to obtain redress and allowing federal courts the jurisdiction to condemn corporate defendants for atrocities carried out on foreign soil at the expense of foreign nationals and their land.

I. INTRODUCTION

Nemo bis punitur pro eodem delicto…in fact, some aren't punished at all.[2] Corporate liability under the Alien Tort Statute has been the subject of debate since the Statute's revival in 1976.[3] The ATS was passed as a part of the Judiciary Act of 1789 in an effort to cure the defects of the Articles of Confederation, which James Madison referred to as "an inadequate vehicle for guiding the fast-growing United States and its more than three million people through a treacherous world."[4] The ATS, presently codified in 28 U.S.C. § 1350, provides that, "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[5] or a treaty of the United States."[6] Foreign plaintiffs seeking redress in United States federal courts often depend on this Statute when bringing claims regarding human and environmental rights offenses carried out on foreign soil by corporate defendants.[7] In *Kiobel v. Royal Dutch Petroleum Co*,[8] the Supreme Court held that the ATS does not allow courts jurisdiction over actions brought for violations of the law of nations occurring in territories outside of the United States.[9] The Court held that any extraterritorial application of United States law goes against the legislative intent of the ATS.[10] The alleged offenses would have to "touch and concern" U.S. territory with "sufficient force" in order to overcome the extraterritorial limitation.[11]

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[2] WILLY WONKA AND THE CHOCOLATE FACTORY (Wolper Pictures 1971).
[3] Filartiga v. Pena Irala, 442 U.S. 901 (1979).
[4] JAMES MADISON, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES AND MADISON 5 (2005).
[5] "[The law of nations] was a species of universal law…which eighteenth century jurists did not hesitate to recognize as valid. It embraced three principal divisions: the law merchant, the law maritime, and the body of law between states which is *now called public international law*." EDWARD DUMBAULD, JOHN MARSHALL AND THE LAW OF NATIONS, 38 (1955) (ebook) (emphasis added) (citing to Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. PA. L. REV. 26, 27 (1952); 1 WILLIAM CROSSKEY, POLITICS AND THE CONSTITUTION OF THE UNITED STATES (1953).
[6] 28 U.S.C.A. § 1350.
[7] Stephen Mulligan, *The Rise and Decline of the Alien Tort Statute*, Legal Sidebar (Jun. 6, 2018), https://fas.org/sgp/crs/misc/LSB10147.pdf.
[8] 569 U.S. 108 (2013).
[9] *Id*.
[10] *Id*.
[11] *Id*.

The Court further narrowed the application of the ATS in 2018 in the case of *Jesner v. Arab Bank, PLC*.[12] Referencing its decision in *Kiobel*, the Court held specifically that corporations may not be sued under the ATS when the alleged violations took place outside the United States.[13]

The Court's decisions in *Jesner* and *Kiobel* foreclose corporate liability for actions occurring outside the United States under the ATS, notwithstanding alleged violations of the law of nations or United States treaties.[14] Generally, scholars agree that the Framers' intent in creating the ATS was to give federal courts jurisdiction over claims brought by foreigners seeking redress for certain violations of international law, particularly for violations of the law of nations.[15] At the time, the Framers were concerned with the national government's limited ability to enforce international law throughout the country.[16] Their concerns manifested in 1781 when the Continental Congress appealed states' punishment of violations of international law.[17] They began to realize the limitations of federal power that beset the Articles of Confederation in that, among other things, the government "possessed no domestic legislature or funding powers to implement treaties."[18] An attack on a French diplomat in 1784 further emphasized the need to expand governmental ability to enforce international law.[19] Justice Souter refers to this chain of events as "[t]he anxieties of the pre-constitutional period."[20] As a result, the ATS was subsequently drafted in 1789 as part of the Judiciary Act with the hope that it would provide some amount of jurisdiction over international law violations that existed at the time.

While it has been over two hundred years since the drafting of the ATS, debate continues to exist surrounding the Statute's application to tort claims involving U.S. defendants for acts occurring

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[12] 138 U.S. 1386 (2018).
[13] Stephen Mulligan, *The Rise and Decline of the Alien Tort Statute*, Legal Sidebar (Jun. 6, 2018), https://fas.org/sgp/crs/misc/LSB10147.pdf.
[14] *Id*. at 58.
[15] Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014).
[16] Julian G. Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 Sup. Ct. Rev. 153 (2004).
[17] *Id*. at 167.
[18] *Id*.
[19] *Id*.
[20] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

outside United States territory. While judicial interpretation regarding what constitutes an international violation has evolved relative to the world's changing standards of decency, the Court maintains a strong stance on the lack of extraterritorial reach of the Statute. The issue with the Court's originalist reading of the Alien Tort Statute is that it explicitly absolves corporations of accountability for violations of recognized international norms, so long as the violation occurs outside the "touch and concern" of United States soil. It is an incorrect application of international law to focus on the issue of proximity of the defendants' misconduct to the United States, and remand or dismiss a case based purely on an absolute extraterritorial prohibition.

This Note will argue that the Court's two-step framework established in *Jesner* for evaluating extraterritoriality issues under the ATS needs to be amended. As such, Part II of this Note will review the legislative history of the ATS including an analysis of the Framers' intent. Part III will discuss the reawakening of the ATS with a discussion of two hallmark cases, *Filartiga v. Pena Irala*[21] and *Sosa v. Alvarez-Machain*.[22] Part IV will focus on the application of the ATS in recent cases, including the extraterritorial limitation established in *Kiobel* and broad pardoning of corporate liability in *Jesner*. The final sections of this Note will focus on the Supreme Court case of *Nestlé USA, Inc. v. Doe* where the Court evaluated the companies' conduct and determined whether it was substantial enough to overcome the extraterritorial presumption established in *Kiobel*. Further, this Note will apply the analysis in the United Kingdom's Supreme Court case *Okpabi v. Royal Dutch Shell Plc.* to *Nestlé* to demonstrate how the extraterritoriality prohibition should be revised. The ATS was intended to be used as a way for plaintiffs to gain redress against defendants that have violated international law; in order for it to be exercised in the claimant-friendly way it was intended to be, the extraterritoriality limitation needs to be evaluated and ultimately, removed.

II. OVERVIEW OF THE ALIEN TORT STATUTE

The Alien Tort Statute, a U.S. federal law adopted in 1789 originally as part of the Judiciary Act, provides federal courts with the

[21] Filartiga v. Pena-Irala, 99 U.S. 2424 (1979).
[22] Alvarez-Machain, 124 U.S. at 2740.

jurisdiction to hear any civil action brought by a foreign plaintiff for a tort committed in violation of the law of nations or other United States treaty.[23] William Blackstone, a renowned English jurist of the eighteenth century, viewed the law of nations as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[24] Blackstone was a natural law jurist and held great influence at the time the ATS was drafted, especially over the founding generation.[25] Natural law jurists accept that, "law can be considered and spoken of both as a sheer social fact of power and practice, and as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them."[26] Essentially, natural law jurists will use principles of practical reason as a method of reaching substantive results both in law and in theory.[27]

In the eighteenth century, violations of the law of nations included violations of express safe-conducts, violations of the rights or immunities of ambassadors and other public officials, infractions to treaties to which the U.S. is a party, and piracy.[28] These categories of offenses were prevalent at the time, but this list was in no way considered to be exhaustive.[29] In fact, Congress encouraged States to conduct tribunals to decide whether certain offenses should be added as violations to the law of nations.[30] Instead of interpreting the statute on its face, or rather taking a "four corners" approach, natural jurists believed it was important to employ methods of practical reason to address evolving standards of decency should they arise.[31] There was an understanding that international issues that existed in the eighteenth century would change as society further advanced and evolved. The

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[23] William Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,*" 19 HASTINGS INT'L & COMP. L. REV. 221 (1996).
[24] *Id*. at 225-26. *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES *66-73.
[25] *Id*. at 225-27.
[26] *Natural Law Theories*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 5, 2007).
[27] Mark Murphy, *The Natural Law Tradition in Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2019 ed.), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/sum2019/entries/natural-law-ethics/.
[28] *See* Dodge, *supra* note 23, at 227.
[29] *Id*.
[30] *Id*.
[31] *Id*.

Alien Tort Statute was subsequently written to function as a means of redressing future offenses to the law of nations.[32]

Today, jurists take a rather positivist approach to interpreting the Alien Tort Statute. Legal positivists support a strict adherence to the textual interpretation of existing law.[33] However, this vastly differs from the modern practices of international lawyers and is largely condemned by traditional natural law theorists, including Blackstone. Leslie Green, a prominent analytical philosopher of law, articulated:

> No legal philosopher can be *only* a legal positivist. A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied…and also of the pivotal questions of what laws we should have and whether we should have law at all. Legal positivism does not aspire to answer these questions, though its claim that the existence and content of law depends only on social facts does give them shape.[34]

The focus on facticity is part of what makes legal positivism problematic. An institutional adherence to positivism fails to account for relevant moral and political considerations that very much contribute to the practice of law in modern society.

Today, Blackstone's language describing the law of nations is often alluded to in many decisions involving the Alien Tort Statute. In *Jesner v. Arab Bank*, the defendant was accused of financing terrorist organizations to carry out kidnappings, killings, and other violations of international human rights abroad.[35] In order to evaluate whether these acts would fall under the reach of the ATS, Justice Sotomayor established a two-part test. In Part One, the Court is asked to determine whether the violation of an international norm is one that is "accepted by the civilized world."[36] If the answer is yes, and the norm allegedly violated is "specific, universal, and obligatory," the federal court may

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[32] *Id*. at 228.
[33] *Natural Law Theories*, *supra* note 26.
[34] Leslie N. Green, *Legal Positivism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2003 Edition), Edward N. Zalta (ed.).
[35] Jesner v. Arab Bank, PLC, 138 U.S. 1386 (2018) (Sotomayor, J., dissenting).
[36] *Id.* at 1413.

recognize this as a cause of action.[37] This standard now clarifies what an international norm entails and moreover, what a violation of such norm involves. The standard, in a sense, refutes Justice Gorsuch's interpretation of Blackstone, which asserts the erroneous belief that the First Congress did not mean to consider a violation of the law of nations to arise under federal law, but under general common law.[38] Eighteenth century jurists regarded the law of nations as "part of the laws of [the United States], and of every other civilized nation."[39] At the time, there was no delineation between state and federal common law, and as such, the law of nations was considered "a binding part of both state and federal law."[40] For Justice Gorsuch to make this delineation today is a mishandling of Blackstone's interpretation of customary international law violations. This is problematic because it limits our understanding of violations of international norms, and in turn, limits the court's federal jurisdiction over these matters. Justice Sotomayor's two-part test pushes the needle forward by reinterpreting what an international norm constitutes and opening the door for the Court to access these causes of action.

A. Corporate Liability Under the ATS

In analyzing the text and legislative intent of the Alien Tort Statute, there exists no language that expressly excludes corporate defendants from the class of defendants included under the Statute.[41] In fact, "international law imposes obligations, including substantive prohibitions, that are intended to govern the behavior of states and private actors," including corporations.[42] The obligations include "substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture."[43] International law determines what substantive conduct violates the law of nations and it has not excluded corporations outside the scope of actors capable of committing these violations, thus capable of being

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[37] *Id.* at 1390.
[38] Filartiga v. Pena-Irala, 99 U.S. 2424 (1979).
[39] Stephens, *supra* note 15, at 1471 (quoting *Charge to the Grand Jury for the District of New York* (Apr. 4, 1790), in N.H. GAZETTE (Portsmouth 1790)).
[40] *Id.*
[41] *Id. See also* 28 U.S.C. § 1350
[42] *Id.* at 3.
[43] *Id.*

tried under the Alien Tort Statute. The only limitation that has been alluded to is a prohibition on filing suit against foreign corporations due to concerns regarding maintaining peaceful foreign relations, which will be further explained in this Note's discussion of *Jesner v. Arab Bank*.[44] Because ATS claims often cause friction between the United States and the nations where the alleged misconduct occurred, enforcement mechanisms regarding how to punish foreign defendants are often left to the foreign territory's discretion.[45] The Court attributes the responsibility to weigh foreign policy concerns to executive branches, not the judiciary.[46]

III. REAWAKENING OF THE ATS

After two hundred years, the Alien Tort Statute has reawakened from its dormancy. The Statute was "reborn" in 1979 in *Filartiga v. Pena-Irala*.[47] In this case, the Second Circuit held that the Alien Tort Statute granted federal courts jurisdiction over actions brought by foreign plaintiffs seeking damages for violations of international human rights law, including torture.[48] The case of *Filartiga v. Pena-Irala* involved two Paraguayan citizens, the family of seventeen-year-old Filartiga, who alleged that the defendant, Pena, an inspector general of police, kidnapped, tortured and murdered Filartiga in Paraguay in retaliation for his father's political beliefs.[49] After Filartiga's father commenced a criminal action in Paraguay, the courts had his attorney arrested and subsequently disbarred.[50] Filartiga's sister later came to the United States seeking political asylum, and while living in Washington D.C., she learned of Pena's presence in Brooklyn, NY.[51] She reported this information to the Immigration and Naturalization Service which arrested Pena and ordered his deportation.[52] While he was being held in Brooklyn, NY pending

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[44] Jesner v. Arab Bank, PLC., 138 U.S. 1386 (2018).
[45] *Id.* at 12.
[46] *Id. See also* Stephen Mulligan, *The Rise and Decline of the Alien Tort Statute*, Legal Sidebar (Jun. 6, 2018), https://fas.org/sgp/crs/misc/LSB10147.pdf.
[47] 630 F.2d 876 (2d Cir. 1980).
[48] *Id*.
[49] *Id*. at 878.
[50] *Id*.
[51] *Id*. at 878-79.
[52] *Id*. at 879.

deportation, Filartiga's sister commenced a civil action against Pena for the wrongful torture and death of her brother.[53]

The appellants relied on the Alien Tort Statute, specifically the provision that allows federal courts jurisdiction over civil actions for torts committed in violation of the law of nations, to establish federal jurisdiction for their claims.[54] Having examined customary international law, including applicable case law, the UN Charter of the Organization of American States, and the Universal Declaration of Human Rights, the Second Circuit held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[55] Therefore, because the law of nations, which is considered a part of federal common law, was violated, subject matter jurisdiction also existed.[56] Since this decision, the ATS's reach has expanded to cases involving torture, kidnapping, illegal detention, genocide, environmental violations, and war crimes.[57] The decision was aligned with Blackstone's and other natural law jurists' intentions of employing practical reasoning to ensure that future violations of customary law would be added to the "list" to account for evolving standards of decency.[58]

The decision in *Filartiga* reinstated the Alien Tort Statute as a vehicle for foreign plaintiffs to bring suits against defendants for human rights abuses. It recognized international law as part of the federal common law. However, just fourteen years later in *Sosa v. Alvarez-Machain*,[59] the Supreme Court began to place strict limitations on the Statute's reach, specifically in regard to extraterritoriality.[60] The Supreme Court held that the Alien Tort Statute did not allow for actions to be brought by private individuals for violations of the law of

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[53] *Id*.
[54] *Id*. at 880.
[55] *Id*.
[56] Julian G. Ku et al., *supra* note 16, at 157.
[57] Eric Engle, *The Alien Tort Statute and the Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles*, 14 WILLAMETTE J. OF INTL. L. AND DISPUTE RESOLUTION, no. 1, 2006, at 4, http://www.jstor.org/stable/26211233.
[58] *See* Dodge, *supra* note 23, at 227.
[59] 542 U.S. 692 (2004).
[60] Stephen Mulligan, *The Rise and Decline of the Alien Tort Statute*, LEGAL SIDEBAR (Jun. 6, 2018), https://fas.org/sgp/crs/misc/LSB10147.pdf.

nations that occurred outside of U.S. territory.[61] This case involved the abduction and murder of a U.S. Drug Enforcement Agency ("DEA") official by a Mexican drug cartel in 1985.[62] The DEA hired Mexican nationals to capture the defendant, who had participated in the murder, and bring him back to the United States to be tried.[63] The defendant filed multiple suits against the United States and the Mexican nationals, one of whom was Sosa, under the Alien Tort Statute.[64] The Court set forth a two-step framework, one similar in kind to the approach taken by Justice Sotomayor in *Jesner*, in its analysis: First, the Court determined whether the international norm violated was one "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[65] If yes, the Court would consider whether hearing the case would be an appropriate exercise of judicial discretion.[66] Because the Court did not recognize Alvarez-Machain's claims against the government regarding his capture as falling within the traditional categories specified within the law of nations (i.e. piracy and infractions against ambassadors), the Court did not even consider step two of the framework.[67] The Court stated that because the detention of the officer was for less than one day, and the officer was kept in the custody of law enforcement agents, there were no international norms violated under the ATS that would provide redress for his claims.[68]

The limitations imposed on the ATS in the holding in *Sosa* can be juxtaposed with the more expansive interpretation of international norm violations in *Filartiga*. *Sosa* insists that federal courts should not recognize violations of international norms that fall outside the substantive historical conduct specified in the text of the Statute at the time it was enacted.[69] In contrast, the Second Circuit in *Filartiga* creates an analogy between modern conduct and historical conduct by equating a modern torturer with a pirate who may have tortured a

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[61] *Id*.
[62] Sosa v. Alvarez-Machain, 124 U.S. 2739 (2004).
[63] *Id*.
[64] *Id*.
[65] Jesner v. Arab Bank, PLC, 138 U.S. 1386 (2018) (Sotomayor, J., dissenting).
[66] *Sosa*, 124 U.S. at 2727. *See also id*. at 1420.
[67] Sosa v. Alvarez-Machain, 124 U.S. 2739 (2004).
[68] *Id*.
[69] *Id*.

slave.[70] The strict adherence to the text of the ATS in *Sosa* is more restrictive and almost reverses the decision in *Filartiga* on the ground that the alleged conduct need be expressly condemned in the law of nations. While the Alien Tort Statute continues to allow plaintiffs to raise complex issues in federal court, judicial limitations on the Statute's reach continue to be narrowed, severely limiting foreign plaintiffs' success, and absolving liability of defendants for violations of the law of nations in many circumstances.

IV. JURISDICTIONAL LIMITATIONS OF THE ALIEN TORT STATUTE

A. Limits on Jurisdiction Based on Extraterritoriality

In *Kiobel v. Royal Dutch Petroleum*,[71] the Court limited the reach of the ATS strictly to conduct carried out on United States soil.[72] The alleged conduct must substantially "touch and concern" the territory of the U.S. in order for the Court to have jurisdiction over the action.[73] If the conduct occurred elsewhere, there could be no extraterritorial application of United States law; in other words, the action could not be brought under the ATS.[74] In *Kiobel*, petitioners filed a putative class action against Shell Petroleum Company of Nigeria for its alleged complicity in human rights crimes carried out by the Nigerian government.[75] Petitioners alleged unlawful detainment, torture, and murder of Nigerian nationals, some of whom were family members of petitioners.[76] The Second Circuit held that the Alien Tort Statute did not impose civil liability on corporations under any circumstance.[77] Like the Supreme Court later held in *Jesner*, the Second Circuit Court of Appeals in *Kiobel* concluded that in order for corporations to be held civilly liable under the ATS, Congress

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[70] Jesner v. Arab Bank, PLC, 138 U.S. 1386 (2018) (Sotomayor, J., dissenting) at 1421.
[71] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).
[72] *Id*. at 120-21.
[73] *Id*. at 125.
[74] *Id*.
[75] *Id*. at 108.
[76] *Id*.
[77] *Id*.

would need to explicitly make an exception.[78] The Supreme Court granted certiorari.[79]

The issues on certiorari were (1) whether under the ATS, corporations were immune from liability for violations of the law of nations, including torture, extrajudicial executions, or genocide; and (2) whether the ATS allows courts to recognize a cause of action for violations of the law of nations occurring in territories outside of the United States.[80] The Court first addressed the second issue regarding the extraterritorial application of United States law for violations of the law of nations. The Court unanimously held that the traditional interpretation of the Alien Tort Statute presumes that there be no extraterritorial application of U.S. law.[81] The Court relied on its decision in *Morrison v. National Australia Bank Ltd.*,[82] which provides that, "[w]hen a statute gives no clear indication of an exterritorial application, it has none."[83] Because the ATS does not expressly allow extraterritorial reach, the Court held that any claims brought under the ATS must allege conduct that has "touch[ed] and concern[ed]" United States territory with "sufficient force."[84] The decision in *Kiobel* reaffirmed the decision in *Sosa*, permitting federal courts to recognize common law violations of international law, but restricting any application of U.S. law extraterritorially.

In *Morrison*, the Court evaluated whether the extraterritorial application of a provision in the Securities and Exchange Act was a jurisdictional question or one on the merits.[85] This was determined by analyzing what conduct is expressly prohibited under the statute.[86] The Court stated that the ATS itself applied only to securities transactions involving domestic dealings.[87] In evaluating the language of the ATS, the Court found that the scope of the Statute did not

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[78] *Id*. *See generally* Jesner v. Arab Bank, PLC, 138 U.S. 1386 (2018)
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).
[83] *Id*.
[84] *Id*.
[85] Tyler Banks, *Corporate Liability Under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in Kiobel v. Royal Dutch Petroleum Co.*, EMORY INT'L. L. REV. (2017).
[86] *Morrison*, 130 U.S. at 2871.
[87] *Id.* at 2869.

provide a cause of action for misconduct dealing with *foreign* stock transactions.[88]

The holdings in *Sosa*, *Morrison*, and *Kiobel* strongly evince the Supreme Court's determination that the ATS does not allow jurisdiction over claims involving conduct occurring outside of the U.S.[89] However, this conclusion is fundamentally flawed. The Court takes the Statute's lack of express extraterritorial authorization as a prohibition on such application. A plain reading of the ATS specifies "any civil action" in its statutory language, not expressly limiting civil actions to those occurring domestically, like the Securities and Exchange Act. The argument can just as easily be made that this statutory language could also extend to conduct occurring outside of the U.S. so long as there is *a civil action* regarding a violation of customary international law.[90]

In *Jesner v. Arab Bank, PLC*.,[91] the Court relied on *Kiobel* as controlling precedent holding that the Alien Tort Statute does not allow claims against foreign corporations when all the relevant conduct takes place outside the United States.[92] The case was brought by foreign plaintiffs who accused the Arab Bank, headquartered in Jordan with a branch functioning within the United States, of financing terrorist organizations involved in the injuring, kidnapping, and killing of civilians abroad.[93] Petitioners claimed that the Bank used its New York branch to transfer money to terrorists and launder money for a Texas based charity with ties to Hamas.[94] The Court again excused corporate liability based partially on its reasoning that the Bank's activities did not "touch" U.S. territory with sufficient force so as to fall within the reach of the ATS.[95]

Like the defendants in *Morrison*, who were involved in conducting stock transactions, the Bank's activities in *Jesner* involved CHIPS transactions, an electronic payment system that enables

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[88] *Id*.
[89] *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010); *Kiobel*, 569 U.S. at 1660.
[90] *See* 28 USC § 1350.
[91] Jesner v. Arab Bank, PLC., 138 U.S. 1386 (2018).
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*. at 1429.

transactions and transfers to be carried out in U.S. dollars.[96] The transactions were carried out in the Arab Bank's New York branch and a charity in Texas was used to transfer funds directly to terrorists.[97] Petitioners sought millions in damages from a Jordanian Bank for attacks that were carried out by foreign terrorists in the Middle East.[98] The only way the extraterritorial hurdle could be overcome, according to the majority in *Jesner*, was if the corporation was incorporated in the United States or had its principal place of business in the United States.[99] The Court would then have personal jurisdiction which would permit the Bank to be held accountable under U.S. law.[100] However, because the Court found that the Bank's operations in New York and Texas were too limited to satisfy the substantial "touch and concern" requirement, the Court did not exercise personal jurisdiction over the claims.[101]

The Court also emphasized that this litigation affected diplomatic relations with Jordan, causing tension with a powerful ally.[102] Holding Arab Bank accountable could have damaging effects on Jordan's economy and the cooperative relationship that the U.S. holds with Jordan as a counterterrorism ally.[103] The Court used "judicial caution" in this case to guard against foreign policy concerns and disruptions to foreign relations that could have larger implications.[104] This is the fragile side of holding foreign corporate defendants liable and also demonstrates why suing foreign corporations under the ATS is nearly impossible. The Court treads on thin ice and seems to rely on the extraterritoriality limitation to hold that the foreign defendant in *Jesner* could not be given its due under the ATS.

This decision allowed a multinational corporation to be excused from even the most egregious harms and violations of international law merely because the acts did not take place on United

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[96] *Id*. at 1388.
[97] *Id*.
[98] *Id*.
[99] *Id*. at 1430 (quoting Daimler AF v. Bauman, 571 U.S. 117 (2014)).
[100] *Id*.
[101] *Id*. at 1429.
[102] *Id*. at 1390.
[103] *Id*.
[104] *Id*. at 1391.

States soil.[105] Although both international and domestic law would recognize these alleged harms as violations of the law of nations, the extraterritorial argument in *Kiobel* creates an insurmountable jurisdictional hurdle.

V. OVERCOMING THE EXTRATERRITORIAL LIMITATION WITH OKPABI V. ROYAL DUTCH SHELL PLC[106]

Many ATS cases brought in recent years involve foreign corporations acting in complicity with governments to carry out numerous rights violations. Most often, these corporate defendants are accused of aiding and abetting under the Alien Tort Statute. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[107] plaintiffs alleged that Talisman Energy Inc., a Canadian oil and gas producer extracting resources in Sudan, was complicit with the government of Sudan in commissioning genocide, war crimes, resource pillaging, and other crimes against humanity.[108] The district court denied Talisman's motion to dismiss on comity grounds for multiple reasons. The court found that the action required a determination of whether Talisman acted in violation of customary international law and that Canadian courts, as opposed to U.S. courts, were not able to evaluate civil suits for violations of international law.[109] Citing to the Supreme Court's ruling in *Sosa*, the district court also recognized that a cause of action imposing accessorial liability for violations of international law under the ATS was a viable cause of action and that plaintiffs would need to present sufficient evidence demonstrating that the corporation acted with the *purpose* of harming the affected civilians in Sudan.[110]

On appeal, the Second Circuit created a standard of *mens rea* for aiding and abetting liability in ATS actions.[111] The court held that

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[105] *Id*. at 1436.
[106] Okpabi & Others v. Royal Dutch Shell Plc & Another [2021] UKSC 3.
[107] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009). *See* J. Morrissey, Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute, *Minnesota Journal of International Law*, 2011, Vol. 20, pp. 144 *et seq*.
[108] *Id*. at 251.
[109] *Id*.
[110] *Id*. *See generally* Alvarez-Machain, *supra* note 66, at 2739 (emphasis added).
[111] J. Morrissey, Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute, *Minnesota Journal of International Law*, 2011, Vol. 20, pp. 145 *et seq*.

in order for plaintiffs to succeed on an aiding and abetting claim, they must show that the corporation had purpose, rather than mere knowledge, in working with the government to carry out these violations.[112] Otherwise, the court could not impose civil liability on foreign corporations.[113] The reason for the narrowness of this standard is explained in *Kiobel,* where the Supreme Court regarded aiding and abetting suits filed under the Alien Tort Statute as a means for plaintiffs to "use corporations as surrogate defendants to challenge the conduct of foreign defendants."[114] Essentially, the prevailing view amongst U.S. federal courts is that aiding and abetting is too vague of a cause of action under the ATS, and has resulted in the courts' creation of a standard of proof too high for plaintiffs to overcome.[115]

Notably, in *Okpabi v. Royal Dutch Shell Plc.*,[116] a United Kingdom Supreme Court case, the Court circumvented this hurdle involving corporate conduct in extraterritorial disputes by taking a completely different approach.[117] The case involved over 40,000 citizens of a farming and fishing community in the Niger Delta ("Claimants"), called the Ogale Community.[118] The Claimants alleged that numerous oil spills occurred as a result of the oil multinational's operations in the region.[119] "[T]hese oil spills…caused widespread environmental damage, including serious water and ground contamination," that contaminated the drinking water and disabled the community members from safely fishing, farming, and washing as needed.[120] The suit was brought against Royal Dutch Shell ("RDS") and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd. ("SPDC").[121] Claimants alleged that RDS should be held accountable for its subsidiary's actions, owing Claimants a duty of care which was ultimately breached when foreseeable environmental damages occurred in the Community.[122] Claimants

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[112] *Id*. at 151.
[113] *Id*.
[114] Jesner v. Arab Bank, PLC., 138 U.S. 1386 (2018).
[115] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).
[116] Okpabi & Others v. Royal Dutch Shell Plc & Another [2021] UKSC 3.
[117] *Id*.
[118] *Id*. at 2.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*. at 3.

maintained that since RDS exerted significant control and oversight over SPDC's operations and were responsible for promulgating defective safety policies that were implemented by SPDC in the Niger Delta, they should assume responsibility for SPDC's actions.[123]

In considering these claims, the UK Court referred to its decision in *Vedanta v. Lungowe*.[124] The Court wrote that focusing on sufficient proximity is not the correct approach because 'the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence'…It raises no novel issues of law and is to be determined on ordinary, general principles of the law of tort regarding the imposition of a duty of care.[125]

The Court further expanded on how to determine whether a duty of care arises in the context of a parent/subsidiary relationship: "[W]hether a duty of care arises: '…depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operation (including land use) of the subsidiary."[126] Essentially, it is insufficient for the Court to focus merely on control and proximity. Instead, the Court needs to evaluate "the extent to which the parent did take over or share with the subsidiary the management of the relevant activity."[127] In this case, the relevant activity was pipeline operation, which was the direct cause of the oil spillage and subsequent water contamination.

The UK Court, after applying this standard, found that the Court of Appeals erred in treating the parent's liability as a separate and distinct category of negligence.[128] Unlike the vague standard set forth in *Presbyterian*, which urges the Court to find that the corporation had purpose in aiding and abetting foreign governments, the standard in *Vedanta* and subsequent application in *Okpabi*,

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[123] *Id*. at 7-8.
[124] *Id*. (*Vedanta v. Lungowe* involved Zambian villagers suing Vedanta UK and its Zambia subsidiary for environmental damages occurring in the region as a result of Vedanta operations.).
[125] *Id*. (quoting Vedanta Resources PLC and Another v. Lungowe & Others [2019] UKSC 20).
[126] *Id*. (quoting Vedanta Resources PLC and Another v. Lungowe & Others [2019] UKSC 20 at para 49).
[127] *Id*. at 36.
[128] *Id*. at 38.

provides sufficient detail to determine the level of involvement the parent needed to meet in order to be held accountable for conduct carried out by its subsidiaries on foreign land.[129] In other words, the "not my backyard, not my problem" perspective is defeated, so long as plaintiffs can make a sufficient showing that the parent played a substantial role in managing, directing, and overseeing the actions that ultimately perpetuated the damages or harms. Not only does this give plaintiffs asserting aiding and abetting allegations a fighting chance, it also more importantly circumvents the extraterritorial limitation imposed on the ATS. Instead of focusing on proximity and applying the "touch and concern" standard, allowing claimants the chance to show whether a duty of care has been breached is not only more in line with customary tort law, but it also expands the jurisdictional reach of the ATS, as it was intended to be. This standard was introduced by the appellants' case which contended that a duty of care, under *Vedanta*'s interpretation of the duty, arose from RDS's exercise of substantial control and dominion over the management and monitoring of SPDC's operations.[130]

VI. APPLICATION OF THE *VEDANTA/OKPABI* DUTY OF CARE STANDARD TO *NESTLÉ V. DOE*

The recent United States Supreme Court case, *Nestlé USA, Inc. v. Doe I*,[131] presented the Court with another claim brought by foreign respondents under the Alien Tort Statute. The respondents in this case were former enslaved children from the Ivory Coast who were kidnapped and forced to work for fourteen hours a day without pay on cocoa plantations.[132] The petitioners, Nestlé USA, Inc., a multinational corporation, and Cargill, Inc., a domestic corporation, were involved in extensively sourcing and producing cocoa in the Ivory Coast. The respondents alleged that petitioners should be held liable under the ATS for aiding and abetting a system of child slave

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[129] *See* Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2d Cir. 2009), Vedanta Resources PLC and Another v. Lungowe & Others [2019] UKSC 20, and Okpabi & Others v. Royal Dutch Shell Plc & Another [2021] UKSC 3.

[130] *Id*. at 8 (citing specifically to RDS's responsibilities over SPDC, their rulemaking authority in enacting global health and safety policies, and their handling of SPDC's assets and facilities, among other things).

[131] Nestlé USA, Inc. v. John Doe I, No. 19-416, Slip Op. (S. Ct. 2021).

[132] *Id*. at 2.

labor in the Ivory Coast.[133] The companies have continued to reap the benefits of cheap cocoa in the Ivory Coast due to "a system built on child slavery to depress labor costs."[134] The U.S. District Court for the Central District of California granted the petitioners' motion to dismiss, holding that corporations could not be held liable under the ATS and that the respondents failed to prove that the conduct relevant to the Statute occurred in some capacity in the United States.[135] The U.S. Court of Appeals for the Ninth Circuit reversed the District Court's dismissal holding that aiding and abetting crimes fall within the ATS's scope.[136] The Court of Appeals further held that the narrow domestic conduct alleged by the respondents, specifically regarding the petitioners' spending of money in order to maintain ongoing business with the cocoa farms and U.S. employees' involvement in inspecting the operation of the farms in the Ivory Coast, were relevant to the allegations made under the ATS.[137] For these reasons, the court remanded the case to allow respondents the opportunity to amend their complaint to include details on whether the conduct that occurred outside the U.S. could be attached to the domestic corporation itself.[138]

There was an outpouring of amicus briefs on the issues during the time the Supreme Court case was pending. In a Brief for the National Confectioners Association, the World Cocoa Foundation, and the European Cocoa Association in support of petitioners, the authors wrote:

> The decision of the court of appeals represents the worst form of judicial intrusion into foreign relations under the Alien Tort Statute…if left to stand, [it] risks undoing the progress achieved under the collaborative framework the political branches chose to address forced child labor on overseas cocoa farms, and

[133] *Id*. at 4.
[134] *Nestlé USA, Inc. v. Doe I*, Oyez, https://www.oyez.org/cases/2020/19-416 (last visited May 6, 2022).
[135] Nestlé USA, Inc. v. John Doe I, No. 19-416, Slip Op. (S. Ct. 2021).
[136] Doe v. Nestle, No. 17-553435 (9th Cir. 2018).
[137] *Id*. at 3.
[138] *Id*.

> discouraging American companies from participating in future efforts[139]

Many cocoa manufacturers feared that if the respondents were able to overcome the presumption of extraterritoriality, many American companies would become vulnerable to ATS lawsuits. After all, both Nestlé USA, Inc. and Cargill Inc. maintain headquarters in the United States, which regularly manage corporate operations overseas.[140] The companies were laden with fear that respondents would succeed in proving that the conduct, while it had occurred on Ivory Coast soil, had been managed from U.S. based headquarters, touching, and concerning with sufficient force, United States territory.[141]

The Supreme Court ultimately held in an 8-1 opinion that the respondents improperly sought an extraterritorial application of the ATS.[142] The conduct related to aiding and abetting indicated a "mere corporate presence" relating more to general corporate activity than domestic conduct occurring in the U.S.[143] In deciding the case, the Court once again referred to *Kiobel*, stating that "the ATS does not expressly…evince a 'clear indication of extraterritoriality'" and that respondents "must establish that 'the conduct relevant to the statute's focus occurred in the United States…even if other conduct occurred abroad."[144] Essentially, even if the claimants alleged relevant conduct under the Statute, there would be no redress if they could not prove the conduct occurred within the United States. This holding is aligned with the Court's rulings in both *Kiobel* and *Presbyterian*, in that it quashes claimants at the gateway.[145] To arrive at this determination, the Court applied a two-step framework for analyzing the issues of extraterritoriality explaining that:

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[139] Brief for The National Confectioners Association, et al. as Amicus Curiae Supporting Petitioners at 2, Nestlé USA, Inc., v. John Doe I, No. 19-416 & 19-453 (U.S. Oct. 28, 2019).
[140] Nestlé USA, Inc. v. John Doe I, No. 19-416, Slip Op. (S. Ct. 2021) at 5.
[141] *See generally* Brief for The National Confectioners Association, et al. as Amicus Curiae Supporting Petitioners at 2, Nestlé USA, Inc. v. John Doe I, et al., No. 19-416 & 19-453 (U.S. Oct. 28, 2019).
[142] Nestlé USA, Inc. v. John Doe I, No. 19-416, Slip Op. (S. Ct. 2021) at 1.
[143] *Id.* at 2.
[144] *Id.*
[145] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) and Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).

> [F]irst, [they] presume that a statute applies only domestically, and [they] ask, 'whether the statute gives a clear, affirmative indication' that rebuts this presumption…Second, where the statute…does not apply extraterritorially, plaintiffs must establish that 'the conduct relevant to the statute's focus occurred in the United States.'[146]

Contrary to the duty of care standard applied in *Okpabi*, the Court limits its evaluation of the relevant conduct to only the conduct occurring in the United States, focusing on proximity and less on substantive actions.

While the Court stated that general corporate operations are insufficient to overcome the extraterritorial hurdle, its evaluation of these operations is lacking and overlooks the fact that both companies extensively managed and economically aided the cocoa plantations in the Ivory Coast from United States soil.[147] Henceforth, the standard for evaluating whether Nestlé USA and Cargill owed the Ivory Coast nationals a duty of care will be applied pursuant to the *Okpabi*/*Vedanta* standard.[148]

To reiterate, in *Okpabi*, the United Kingdom Supreme Court held the parent company accountable for actions carried out by its foreign subsidiary because they exercised substantial corporate control in creating the policies that were implemented by their Nigerian subsidiaries, which in turn breached their common law duty of care to protect Nigerian nationals against foreseeable harms arising out of oil extraction.[149] The UK Court determined that this conduct surpassed general corporate activity due to the extent to which the parent

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[146] Nestlé USA, Inc. v. John Doe I, No. 19-416, Slip Op. (S. Ct. 2021) at 4-5 (citation omitted).
[147] *Id*.
[148] *See generally* Nestlé USA, Inc. v. John Doe I, No. 19-416, Slip Op. (S. Ct. 2021) (Justice Alito, the only dissenter in this case, argued that if an ATS claim could be brought against a natural U.S. citizen, it should also be allowed to be brought against a domestic corporation. Justice Sotomayor partially concurred with Justice Thomas, except in his narrow application of the ATS that did not find applicable any tort that was not enumerated expressly in the statutory language itself, an application that Justice Sotomayor deemed in contravention with the ATS's intent and the Court's holding in *Sosa*. Justices Gorsuch and Kavanaugh agreed in a concurring opinion that the Court lacked discretion to create a new cause of action for extraterritorial claims under the statute, power that can only be exercised by Congress.).
[149] *Id*. at 3.

company delegated and managed its subsidiary from UK soil.[150] Nestlé USA and Cargill are both U.S. based companies that are involved with the purchasing, processing, and selling of cocoa in the Ivory Coast.[151] While they did not personally own cocoa farms in the Ivory Coast, they were extensively involved in managing and funding many of the farms located there.[152] "They . . . provided those farms with technical and financial resources — such as training, fertilizer, tools, and cash — in exchange for the exclusive right to purchase cocoa."[153] Moreover, respondents alleged that the petitioners "knew or should have known" that enslaved children were working the plantations.[154] The petitioners allegedly had "economic leverage over the farms but failed to exercise it to eliminate child slavery."[155]

The petitioners argued that a domestic parent company exercising oversight over its subsidies in the Ivory Coast was not enough to surmount the presumption of extraterritoriality under the ATS. The Court, after brief review, aligned its holding with the petitioners concluding that the conduct alleged was general corporate activity.[156] It regarded the conduct as mere decision making, which although were made and approved of in the United States, could not sufficiently overcome the extraterritorial application.[157]

In *Okpabi*, the Court made the important delineation between a parent that controls operations versus a parent that issues mandatory policies:

> [I]t is . . . important to distinguish between a parent company which controls, or shares control of, the material operations on the one hand, and a parent company which issues mandatory policies and standards which are intended to apply throughout a group of companies in order to ensure conformity with particular standards. The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of Page 36 a subsidiary (and, necessarily,

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[150] *Id.*
[151] *Id.* at 2.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* (citing to *Kiobel*, 569 U.S. 247, 266).
[157] *Id.*

> every subsidiary) such as to give rise to a duty of care.[158]

The Court referred to *Vedanta* as an example. In this case, the plaintiffs relied on group-wide policies and group guidelines to demonstrate the level of control exercised by the parent on the subsidiary.[159] The Court held that this was insufficient to show the parent company had substantial control over their subsidiary so as to overcome the presumption of extraterritoriality. These facts are distinguishable from the facts in *Nestlé USA* where the parent corporation did not merely implement policies, it actively managed and funded cocoa farms to gain exclusive rights over their cocoa production.[160] In a sense, the plantations were employed by the companies and the child slaves were effectively employees. As respondents contended, the companies were in a position of economic superiority. The cocoa farms were subsidized by the companies' funds and the companies, allegedly knowing of the child exploitation on these farms, did not withhold or abstain from funding or aiding the farms to stop the child exploitation. As the Court specified, control "depends on: 'extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise, or advise the management of the relevant operations…of the subsidiary."[161] The way in which the parent companies in the *Nestlé USA* case controlled the "subsidiary" was not in policy implementation. The parent company was supplying the farms with the resources they needed to operate in order to gain exclusive control over the cocoa manufactured therein. This not only supersedes general corporate activity, but is a tacit way of gaining control of an entity through economic superiority. The companies profited from the cheap labor and continued to fund a system of child exploitation to their own avail.

The holding in *Nestlé USA, Inc. v. Doe* is problematic in multiple ways. First, it narrows the extraterritorial limitation on the ATS by setting forth vague guidelines on what constitutes general corporate liability and what constitutes extensive control sufficient to

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[158] Okpabi & Others v. Royal Dutch Shell Plc & Another [2021] UKSC 3 at 35.
[159] *Id*. (citing to Vedanta Resources PLC and Another v. Lungowe & Others [2019] UKSC 20).
[160] Nestlé USA, Inc. v. John Doe I at 2 (Citation pending).
[161] Okpabi & Others v. Royal Dutch Shell Plc & Another [2021] UKSC 3 at 36.

overcome the presumption. However, in *Okpabi*, the Court is specific in explaining that implementation of operational policies is de facto management of a company and constitutes general corporate activity.[162] Nevertheless, in *Nestlé USA, Inc. v. Doe*, the Court classified privately funding and supplying entities to carry out the production of a globally consumed product as "general corporate activity."[163] This decision makes permissible violations of "international and domestic standards relating to the responsibilities of business enterprises in relation to human rights …."[164] It applies a vague standard, similar to the still undefined "touch and concern" standard, in order to sidestep resolving issues of accountability. This stands contrary to the purpose of the ATS, intended to be a claimant-friendly statute, capable of addressing these violations head-on. These arbitrary measures of general corporate activity and proximity to U.S. territory are inconsistent with not only the intentions of the ATS, but more generally, customary international law. In the literal sense, this is nothing short of a misappropriation of justice.

VII. CONCLUSION

Where does this leave us? After *Kiobel*, the Supreme Court's stance on extraterritorial application of U.S. law was established. The presumption against extraterritoriality could not be overcome unless plaintiffs could prove that the conduct at issue had touched and concerned the territory of the United States. Unless the Court expands on the holdings in *Kiobel*, *Jesner*, or more broadly, on the limitation on extraterritoriality, the results will remain the same. More cases alleging relevant misconduct under the Statute will continue to be dismissed simply because the conduct has occurred outside of United States soil.

While most of the corporations in cases brought under the Alien Tort Statute are "American" companies in all sense of identity, the misconduct they are implicated in usually occurs overseas, making it difficult to invoke United States law. If the U.S. federal courts were to invoke *Okpabi* and apply the standard set forth in *Vedanta*, the courts would have a more focused and detailed protocol for evaluating

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[162] *Id.*
[163] Nestlé USA, Inc. v. John Doe I at 5 (Citation pending).
[164] Okpabi & Others v. Royal Dutch Shell Plc & Another [2021] UKSC 3 at 18.

relevant corporate conduct and determining whether substantial control has been exercised; this would enable the Court to hold parent corporations liable for actions carried out by its agents or subsidiaries. It is likely that had the standard been applied in *Nestlé USA, Inc. v. Doe*, the actions of the parent companies may have been found to surpass general corporate activities. The conduct entailed more than decision-making and implementation of group principles; the companies' actions manifested an active purpose to supply cocoa farms in order to benefit from cheap labor at the expense of enslaved children. Not only does this *touch and concern* a U.S. domestic multinational with sufficient force, it also exposes a breach of customary international law. While this may not allow for all claims alleging violations occurring outside the United States to be brought against domestic defendants, it does pierce the corporate veil enough to offer foreign claimants a fighting chance.