Nestlé & Cargill v. Doe Series: Corporate Liability, Child Slavery, and the Chocolate Industry – A Preview of the Case

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The world's chocolate supply is undergirded by rampant practices of child labor under extremely hazardous conditions and, in some cases, slavery. According to the U.S. Bureau of International Labor Affairs, cocoa plantations in Côte d'Ivoire and Ghana combine to produce 60 percent of the world's cocoa. These plantations rely heavily on the labor of 2 million children working in hazardous conditions. Thousands of these child laborers are trafficked or forced into the work and may not be compensated for their labor, conditions amounting to slavery.

The international community has struggled to address this issue for years. In 2001, Congressman Eliot Engel (D-NY) and then-Senator Tom Harkin (D-IA) drafted legislation to require a "slave free" label for chocolate products sold in the United States. The chocolate industry lobbied successfully to defeat the proposal and instead negotiated the Harkin-Engel Protocol. This international agreement was signed by the Chocolate Manufacturers Association; the World Cocoa Foundation; Engel and Harkin, and then-Senator Herbert Kohl (D-WI); an ambassador from Côte d'Ivoire; representatives of various NGOs; and leaders of eight major chocolate corporations, including Nestlé (at pages 3-9, 16). It sought to compel the chocolate industry to eliminate the worst forms of child labor and forced labor as defined by International Labour Organization (ILO) Conventions 29 and 182. (The latter defines the "worst forms of child labor" as subjecting children to all forms of slavery and practices similar to slavery, trafficking, prostitution, pornography, the production and trafficking of illicit substances, and work that will harm their health, safety, or morals, which includes hazardous forms of agricultural work.) However, the industry failed repeatedly to meet the benchmarks introduced by the Protocol, in part because it relied on self-regulation.

In 2010, responding to the inefficacy of the Harkin-Engel Protocol, representatives of the United States, Ghana, and Côte d'Ivoire released a Framework of Action to Support Implementation of the Harkin-Engel Protocol. This public declaration committed the signatories to reduce child labor in the Ghanaian and Ivorian cocoa industries by 70 percent by 2020 and pledged $10 million from the U.S. Department of Labor and $7 million from the cocoa industry to achieve that goal. In support of the framework, the ILO entered into a partnership with eight companies in the chocolate and cocoa industry, including Nestlé and Cargill, to contribute $2 million toward the eradication of child slavery.

Despite these efforts, the problem is only worsening. Indeed, the U.S. Department of Labor's 2020 report identified a 14 percent increase in the prevalence of child labor in Ghanaian and Ivorian agrarian households from 2009 to 2019. This leap reflects the simple fact that business is booming: the report found that cocoa production in Côte d'Ivoire and Ghana

increased by over 60 percent over the same period. In light of these well-documented abuses and the lack of progress by the industry to eradicate child labor, victims have sought redress against U.S. corporations for their complicity in these human rights violations, culminating in the Nestlé/Cargill litigation.

The Litigation

The plaintiffs in *Nestlé* are former child slaves trafficked from Mali and forced to work on cocoa plantations in Côte d'Ivoire. (See here for more background and here for the court filings). They allege that Nestlé and Cargill both exert extensive control over cocoa plantations from corporate headquarters in the United States through their immense market power in the cocoa industry. Furthermore, the plaintiffs allege that the defendants provide the plantations with hands-on financial and technical assistance in order to profit off of cheap labor costs, despite knowing of the plantations' reliance on child slavery. Thus, the plaintiffs claim defendants aided and abetted the forced labor and seek to hold defendants liable for this harm under the ATS.

A district court dismissed plaintiffs' initial suit in 2010, after the court found plaintiffs had not alleged sufficient facts with respect to the defendants' conduct and *mens rea*. The court held further that the ATS does not allow for corporate liability, because corporate liability is not sufficiently established as an international law norm. The dismissal was vacated on appeal, and the plaintiffs filed an amended complaint. The district court dismissed the second complaint on the grounds that the focus of plaintiffs' claims was outside the United States and thus did not overcome the presumption against extraterritoriality established in *Kiobel*. The Ninth Circuit reversed again, holding that plaintiffs' claims against Nestlé and Cargill were sufficiently domestic to overcome the presumption against extraterritoriality, because the aiding and abetting conduct originated from the companies' U.S. headquarters. The Ninth Circuit also upheld corporate liability under the ATS in theory but remanded to permit the plaintiffs to file another amended complaint, at which point the defendants petitioned the Supreme Court for review.

Whether the Presumption Against Extraterritoriality Can Be Overcome

The ATS, enacted as part of the Judiciary Act of 1789, allows foreign nationals to bring suits in U.S. federal court for torts committed in violation of the laws of nations. In *Kiobel v. Royal Dutch Petroleum Co.*, the Court placed an additional limitation on the ATS by invoking the presumption against extraterritorial application of U.S. law, a principle of statutory interpretation premised on the idea that "United States law governs domestically but does not rule the world." In doing so, the Court set forth the requirement that the alleged conduct in an ATS case must "touch and concern the territory of the United States . . . with sufficient force to displace" this presumption. The Court separately held in *RJR Nabisco* that if a statute does not explicitly authorize extraterritorial application, courts should look to a statute's "focus" to determine whether the relevant conduct occurred in or sufficiently involved the United States to allow the suit to proceed.

In the present litigation, the chocolate companies (the petitioners before the Court) argue that the Court should apply the *RJR Nabisco* focus test to the ATS and deny the suit on the grounds that the statute's "focus" cannot redress conduct that took place in Côte d'Ivoire. Petitioners argue that the history of the ATS suggests its purpose is to allow foreign nationals redress for tortious injuries, making the "focus" of the ATS the place of the injury. Petitioners then argue that the place of injury in an aiding-and-abetting case is the locus of the primary tort, because aiding-and-

abetting liability is not a standalone wrong, but a mode of liability attached to the primary wrong. Thus, the argument goes, the place of injury in this case is Côte d'Ivoire, where the primary alleged wrong of forced labor occurred. Nestlé and Cargill also note that, in their view, the alleged secondary conduct of the companies – the assistance to the farmers, the inspection of the plantations, and the financing decisions – all occurred outside the United States, so the claims do not sufficiently touch and concern the United States. The briefs filed by the United States and U.S. Chamber of Commerce agree that the respondents' claims are impermissibly extraterritorial.

Respondents rebut this line of argument with a rival interpretation of the history of the ATS, insisting that one primary purpose is to hold U.S. defendants liable for violations of the laws of nations. As aiding and abetting forced labor constitutes a violation of the law of nations, and the acts of aiding and abetting occurred on U.S. territory through decisions made at the headquarters of U.S.-based corporations, the conduct sufficiently touches and concerns the United States, satisfying the *Kiobel* test. Respondents also point out that *Kiobel* directly deals with the ATS while *RJR Nabisco* does not, so it is incorrect for the petitioners to rely so heavily on the *RJR Nabisco* "focus" test. In short, respondents argue that aiding and abetting a law of nations violation is itself a violation of the law of nations, and that the aiding-and-abetting conduct originated in U.S.-based headquarters.

Respondents then argue that even if the Court chooses to apply the "focus" test, the focus of the ATS is not geographic. Instead, the focus is on allowing redress for international law violations so as to "avoid foreign entanglements," or diplomatic tensions that might arise if injured foreign nationals are unable to obtain remedy from U.S. defendants. Because such entanglements can arise from the failure to provide a forum for harms against foreign citizens regardless of the place of the injury, the focus of the ATS is not the place of injury as the petitioners would contend but rather the place where the disputed conduct occurred or was initiated.

Nestlé and Cargill lastly contend that policies underlying the presumption against extraterritoriality suggest the Court should bar the suit for a variety of reasons: allowing the suit would clash with U.S. foreign relations in West Africa; the suit invites the courts to override the U.S. government's attempt to address the issue of child slavery in the chocolate industry through the Harkin-Engel Protocol; and a victory for the plaintiffs would amount to an embargo on the Ivorian cocoa industry. Respondents, on the other hand, argue that the child slavery and forced labor claims advance Congress' policies toward the elimination of trafficking; do not implicate the actions of any foreign nations; and conform with – and indeed reinforce – the U.S. government's other attempts to constrain child labor in West Africa, including the Harkin-Engel Protocol but also the entire anti-human trafficking framework established by Congress.

Whether the ATS Provides for Corporate Liability

Beyond the question of extraterritoriality, the case raises the question of whether U.S. corporations can be held liable under the ATS. The Court previously held in *Jesner v. Arab Bank, PLC* that foreign corporations could not be held liable under the ATS, but this decision left open the possibility of causes of action against domestic corporations. In *Sosa v. Alvarez-Machain*, the Court announced a two-step test for determining whether a cause of action may proceed under the ATS: (1) the actionable violation must be of a "specific, universal, and obligatory" norm under international law, and (2) courts must consider the "practical consequences" of allowing the cause of action, which involves an assessment of any separation-of-powers and foreign policy implications.

Nestlé and Cargill argue under *Sosa*'s first prong that there is no "specific, universal, and obligatory" norm of corporate liability. In their view, international tribunals dating back to Nuremberg have limited liability to individual persons, not corporations, and there is no universal understanding of how corporate entities should be addressed under international law. Regarding *Sosa*'s second prong – the prudential considerations that courts should consider – petitioners urge that a decision as consequential as establishing corporate liability should be left to Congress. They cite to the *Jesner* plurality's finding that Congress's omission of corporate liability from the Torture Victims Protection Act of 1991 (TVPA) was "all but dispositive" on the question of foreign corporate liability and argue that the same logic applies to domestic corporate liability. Petitioners further draw attention to the foreign policy implications of subjecting multinational companies with U.S. affiliates to ATS suits without Congress' approval.

The *amicus* brief filed by Acting Solicitor General Jeffery Wall supports this analysis, emphasizing that the separation-of-powers and foreign policy concerns raised in *Jesner* with respect to foreign corporations also apply to domestic corporations. *Amicus* briefs submitted by Coca-Cola, the World Cocoa Foundation, and the Cato Institute similarly argue that a range of prudential concerns weigh against the application of corporate liability under the ATS.

By contrast, respondents argue first that the text and history of the ATS support the imposition of corporate liability, because the ATS broadly provides for "tort" liability, which has always included corporate liability. This is consistent with one historical purpose of the ATS: to mitigate the risk of foreign entanglements. The concern is that the United States risks diplomatic conflict if it does open up a forum for foreign nationals harmed by U.S. defendants to obtain remedy. As such, there is no evidence to suggest Congress meant to distinguish between foreign entanglements caused by corporations versus individuals; harms by committed any type of U.S. defendant raise the same concern. They further contend that the corporate/individual distinction is irrelevant to the *Sosa* test, because *Sosa* only requires that a norm against aiding and abetting forced child labor be established under international law, not a norm as to who bears such liability. In other words, *Sosa* treats nonstate defendants, whether corporations or individuals, the same, as long as the defendant allegedly violated a concrete norm.

If *Sosa* does require corporate liability to be established under international law, the respondents, supported by an *amicus* brief filed on behalf of Nuremberg Scholars, argue that international norms have always applied to corporations. This practice dates back to the punishment of corporations for violating the prohibition against slavery in the nineteenth century and continues into the present through treaties like the Worst Forms of Child Labor Convention. Regarding prudential concerns, respondents argue that extending liability in this case advances the policy toward the elimination of trafficking and slavery that Congress espoused through its passage of the Trafficking Victims Protection Reauthorization Act (TVPRA) and would therefore not offend either separation-of-powers or foreign policy considerations. (The plaintiffs' suit was filed before the passage of the TVPRA created a cause of action for labor violations and so had to proceed under the ATS). This interpretation of the TVPRA is supported in an *amicus* brief submitted on behalf of Members of Congress. Additionally, the *amicus* brief on behalf of former government officials supports the respondents' position that holding corporations liable for profiting off of human rights violations advances the foreign policy objectives of the United States and is indeed currently part of the Trump administration's foreign policy.

Whether Aiding and Abetting Liability is Cognizable Under the ATS

Though the argument is not raised by the petitioners or respondents, the Acting Solicitor General cites language from *Jesner* emphasizing the importance of "proper judicial discretion" to argue that aiding and abetting liability is not cognizable under the ATS. The United States suggests that allowing aiding-and-abetting liability when a statute is silent on secondary liability would amount to an improper "expansion of federal law." The United States urges the Court to not allow aiding-and-abetting liability unless Congress directs otherwise.

The *amicus* brief filed by international law scholars, former diplomats, and practitioners responds that the Court should decline to rule on secondary liability under the ATS because the question was not presented by the petitioners. Furthermore, all circuit courts of appeal to consider this issue have allowed claims of secondary liability against natural and legal persons, so there is no circuit split. If the Court should choose to consider aiding and abetting liability under the ATS, the brief argues that all of the sources reflecting the laws of nations for the purposes of the ATS establish aiding and abetting liability as a "specific, universal, and obligatory" norm. Finally, the brief concludes that prudential considerations weigh in favor of upholding aiding and abetting liability under the ATS.

Conclusion

The petitioners have asked the Supreme Court to close the door on corporate liability under the ATS after over a decade of seeking dismissal of the suit. The Acting Solicitor General agrees and would also eliminate secondary liability under the ATS, regardless of the identity of the defendant. As it weighs prudential concerns and the original intent behind the ATS, the Supreme Court will have to consider foreign policy and separation-of-powers considerations that suggest a cautious reading of the statute. Likewise, the Court must bear in mind the capacity of U.S.-based corporations to enable human rights violations all over the world, the difficulties courts face in holding individuals accountable for those actions, and the consequences of eliminating liability for such violations.