Nestlé & Cargill v. Doe Series: Mapping Amici Arguments

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Cases brought under the Alien Tort Statute (ATS) tend to attract a lot of "friends of the Court" briefs, and *Nestlé v. Doe*/*Cargill v. Doe* did not disappoint – seven *amici* filed briefs on behalf of the petitioners Nestlé USA, Inc. and Cargill, Inc., and a whopping eighteen filed on behalf of the respondents (Malian nationals alleging that petitioners aided and abetted child slavery abroad).

The *amici* briefs for petitioners advance four main arguments in support of the corporations: that there are no specific, universal, and obligatory norms of corporate or aiding and abetting liability in international law; that the separation of powers principle prohibits courts from extending liability in ATS suits to corporate defendants or to claims of aiding and abetting tortious conduct, absent express authorization from Congress; that the Court should read the presumption against extraterritoriality to bar most ATS suits where the tortious injury occurs outside the United States; and that the ATS is not the appropriate instrument to remedy the alleged human rights violations. Respondents' *amici* briefs contest each of these arguments, arguing that specific, universal, and obligatory international norms of corporate liability for aiding and abetting the conduct in question do exist; that no separation of powers concern blocks such a finding; that the ATS was understood at its enactment to provide extraterritorial jurisdiction over tortious actions committed abroad by U.S. persons; and that the ATS is specifically designed to remedy the kinds of harms alleged by the respondents.

Below, a closer examination at each of these arguments and a look at how respondent's *amici* reply. Several of these *amici* will publish subsequent posts in this Just Security series to elaborate on the arguments sketched below.

International Law Norms

The Alien Tort Statute is as old as the Constitution itself. Adopted by the First Congress as part of the Judicial Act of 1789, the ATS grants federal courts jurisdiction to hear suits brought by non-citizens for torts "committed in violation of the law of nations or a treaty of the United States." But while the "law of nations" (what we call today "international law") has evolved to encompass norms against war crimes and other abuses of human rights, the statute remains substantially unchanged, animating a torrent of litigation in the modern era around one core

question: can plaintiffs use the ATS to bring suits that, defendants argue, could not have been imagined by the law's drafters in 1789?

The seminal case addressing this question is *Sosa v. Alvarez-Machain* (2004), which the Court recently interpreted, in *Jesner v. Arab Bank* (2018), as requiring a two-step inquiry before concluding that particular causes of action are covered by the ATS. First, the claim has to be for the violation of a law of nations norm that is articulated with the same specificity and universality as the three paradigmatic law of nations norms of the late 18th century: the norm against piracy, the norm of safe passage, and the norm against harming ministers and ambassadors. All U.S. courts to address the issue have concluded that the modern prohibitions against genocide, war crimes, crimes against humanity, and slavery, for instance, meet that standard. Second, the Court must weigh the practical consequences of recognizing the new claim: does it interfere with Congress's prerogative to legislate what is right and what is wrong? And does it interfere with Congress and the executive's prerogative to make and execute foreign policy? (These second-step questions are considered under *Separation of Powers*, below).

In the Nestlé case, it is not norms of conduct that are at issue, but rather liability and extraterritoriality. The case asks: Can corporations be sued under the ATS? And if so, can they be sued for aiding and abetting tortious conduct by another that largely takes place abroad? On these questions, petitioners' *amici* urge the Court to follow the *Sosa* test as a guide: are there international law norms providing for corporate liability (in this case, extraterritorial aiding and abetting liability), and is it appropriate for courts to enforce them through the ATS?

On corporate liability, the Acting Solicitor General, along with *amici* law professors, Coca-Cola, and the CATO Institute, assert there is no norm of corporate liability in international law. Their primary evidence for this position is that the charters of many international criminal tribunals dating from the Nuremberg era exclude corporations from their jurisdictional reach (with the Special Tribunal for Lebanon as a notable exception).

On aiding and abetting liability, the Washington Legal Foundation and the CATO Institute assert that there is no norm of aiding and abetting liability in international law defined with the universality and precision that *Sosa* and *Jesner* demand. In particular, they assert there is no consensus about the *actus reus* and *mens rea* elements of aiding and abetting liability in international criminal law, much less in the civil tort context. And even while international law provides a cause of action for aiding and abetting war crimes, no war crimes were alleged in plaintiffs' complaint, according to the Washington Legal Foundation. Moreover, there is no specific international norm for holding corporations liable for aiding and abetting violations of the laws of nations, asserts the CATO Institute.

In response, U.C. Davis Law Professor William Dodge and international law professors assert as *amici* of respondents that the *Sosa* test has no bearing on the question of corporate liability. International law provides norms of conduct that sometimes apply variably to different actors (for example, the norm against torture requires some showing of State action or acquiescence, whereas the norm against slavery applies to all actors, regardless of whether a State was involved). But international law does not take a position on how norms are enforced. States and

tribunals may enforce universally applicable norms (such as the norm against slavery) through criminal or civil liability regimes that target individuals or corporations or both – the important thing is that the norm is enforced. It would be misguided to look for a norm of corporate liability when international law devolves the question to States, Dodge argues. EarthRights International adds in its brief that federal common law should govern, and the Constitutional Accountability Center asserts that corporate liability for wrongdoing is a longstanding norm in American jurisprudence.

In another *amicus* brief for respondents, international law professors, former diplomats, and practitioners assert that international law imposes clear liability for aiding and abetting conduct, through custom, treaties, and general principles of law. And scholars of the Nuremberg trials separately assert that these trials established a precedent in international law for bringing actions against corporations, including for the use of forced labor and slavery.

Separation of Powers Concerns

For all the disputes over the imposition of corporate secondary liability, *Nestlé* may turn instead on the second step of *Sosa*: weighing separation of powers concerns. The fractured opinions in *Jesner* showed a portion of the Court deeply dissatisfied with the holding in *Sosa*, which read the 231-year-old ATS to accommodate claims emerging out of an evolving and expanding field of international law. Justices Gorsuch and Alito wrote separately to argue that the Court's precedents in federal civil law ought to forbid the judiciary from recognizing new causes of action under the ATS, absent express statutory authorization from Congress. To do otherwise would violate the separation of powers principle and encourage courts to develop new law. Justice Thomas, in a terse separate concurrence, joined both Gorsuch and Alito's concurrences. And even the plurality opinion in *Jesner*, penned by Justice Kennedy and joined by Chief Justice Roberts and Justice Thomas – which purported to profess loyalty to the holding in *Sosa* – cast doubt on whether new causes of action could be read into the ATS. The plurality emphasized that even if a norm could be recognized as an actionable development of international law, *Sosa*'s second step – the consideration of the practical and judicial consequences of recognizing a new claim – would counsel strongly against any importation to the ATS without explicit Congressional approval. (It remains to be seen how the two newest Justices, Kavanaugh and Barrett, will address these issues. While Barrett has not adjudicated an ATS case, Kavanaugh expressed palpable skepticism in the one ATS case that appeared before him as a Circuit judge).

In light of this reading of the *Sosa* precedent, *amici* for petitioners universally argue the Court should leave it to Congress to extend or impose liability to areas where, they say, it does not already exist. *Amici* law professors assert corporate liability was not contemplated by the First Congress, which enacted the ATS. The Acting Solicitor General, CATO Institute, and U.S. Chamber of Commerce urge the Court to read the Torture Victims Protection Act (enacted as a note to the ATS in 1991) as limiting the ATS to suits against natural person defendants. They point to *Correctional Servs. Corp. v. Malesko* (2001), also cited in *Jesner*, where the Court closed the door on corporate liability claims in *Bivens* suits because it was "unnecessary to advance [the] purpose of holding individual officers responsible."

On aiding and abetting liability, the CATO Institute brief argues that the absence of aiding and abetting language in the text of the ATS was a deliberate choice by the First Congress to exclude such liability from the statute. And the Acting Solicitor General and other *amici* urge the Court to follow its holding in the Securities Act case *Central Bank of Denver v. First Interstate Bank of Denver* (1994): when a statute creates a private cause of action, the general presumption is that plaintiffs may only sue the principal tortfeasors, and not aiders and abettors, unless the statute explicitly states otherwise. Respondents' *amici* law professors, diplomats, and practitioners argue that the analogy to the Securities Act, a conduct-regulating statute, is inapt given that the ATS is a jurisdictional statute.

Whether the Court accepts *amicis'* characterization of corporate or aiding and abetting liability as "new" to the ATS could determine the holding in this case. Legal history professors, in reply as *amici* for respondents, assert that both forms of liability were understood to lie within the scope of the ATS at the time of its enactment, and they present new historical research to support these arguments.

But *amici* for petitioners advance prudential arguments as well. The Government warns that subjecting corporations to ATS suits would embroil courts in difficult and politically sensitive disputes that could implicate the conduct of foreign officials and trespass on the sovereignty of other nations. And the Government, Coca-Cola, Chamber of Commerce, and the World Cocoa Foundation caution that ATS suits against U.S. corporations undermine economic initiatives to promote development and human rights abroad – including the Harkin-Engel Protocol, a commitment by chocolate manufacturers to eliminate child labor from their supply chains. They assert ATS suits put U.S. corporations at a competitive disadvantage against foreign corporations not subject to ATS liability since the holding in *Jesner*. And they argue that ATS suits against domestic corporations are frequently *in terrorem*. These consequences, *amici* assert, should remind the Court to remain faithful to separation of powers principles: Congress is the appropriate body to weigh the consequences of expanding liability under the ATS, not the courts.

To these arguments, a bloc of 21 Congressional senators and representatives (20 Democrats and 1 Republican) and two former Secretaries of State and other ex-government officials reply as *amici* for respondents that the political branches have already expressed their policy choices on these matters. The Trafficking Victims Protection Act of 2000, they assert, provides as clear a statement as any that it is the policy of the United States to "to provide victims a civil remedy against the chain of persons responsible for human trafficking, from the labor recruiter to those who profit from forced labor." And several *amici* point out on behalf of respondents that, unlike in *Jesner,* no foreign government has filed an objection to this case, indicating that ATS suits against U.S. corporations do not raise diplomatic concerns. In fact, foreign States routinely assert jurisdiction over domestic corporations, regardless of where they operate, say foreign lawyers in their *amicus* brief.

The case has also attracted *amicus* briefs from Tony's Chocolonely and other slave-free cocoa and chocolate companies, who assert that the Harkin-Engel Protocol is strengthened by the ATS, not undermined by it. They say the Protocol was not meant to shield the cocoa industry from liability, and they assert that companies can cut slave labor out of their supply chains if they try.

They assert that immunizing corporations from ATS suits put companies committed to ethically sourcing their goods at a competitive disadvantage. And they insist that holding corporations liable will not deter initiatives and investments that promote sustainable, rights-based approaches to global economic development. Oxfam America and the economists Joseph Stiglitz and Geoffrey Heal also advanced these points in a separate *amicus* brief for respondents.

Presumption Against Extraterritoriality

The presumption against extraterritoriality and its application – or inapplicability – to this case is attracting considerable attention in the party briefs. The Court's precedent on extraterritoriality and the ATS remains unsettled. In *Kiobel v. Royal Dutch Petroleum Co.* (2013), the Court said ATS claims needed to "touch and concern" the United States with sufficient force to displace the presumption. In a later case, the Court suggested the extraterritoriality question was governed by a "focus" test, articulated in *Morrison v. National Austl Bank, Ltd.* (2010). The Acting Solicitor General and the Chamber of Commerce assert as *amici* for petitioners that plaintiffs cannot bring aiding and abetting claims when the "principle offense" occurs abroad, since it is the underlying tortious conduct that is the focus of the statute, and not the aiding or abetting.

Other *amici* for the defendants argue that the vague and permissive standard on extraterritorial ATS claims is interfering with U.S. foreign policy and harming business and investment abroad. Lower courts are adopting variable standards on extraterritoriality in the absence of a bright-line rule from the Supreme Court, *amici* say. *Amici* Coca-Cola and the World Cocoa Foundation argue U.S. corporations will simply eliminate their overseas supply chain oversight programs if litigants can use the programs against the corporations in ATS suits, as evidence of knowledge of tortious conduct. And the Acting Solicitor General asserts that plaintiffs fail to allege enough domestic conduct to satisfy pleading standards.

Law professors, legal history professors, and the Center for Justice and Accountability as *amici* for respondents counter that the rule proposed by petitioners would upset perhaps the most firmly established norm in ATS precedent: that U.S. courts have jurisdiction over defendants found in the United States in suits over violations of international law, no matter where the violation is alleged to have occurred. And EarthRights International asserts that the *Kiobel* "touch and concern" test does not incorporate the earlier "focus" test from *Morrison* – but even if it does, claims against U.S. defendants are at the heart of the focus of the ATS.

Mischief Rule

Lastly, petitioners' *amici* law professors urge the Court to interpret the ATS according to its original purpose: to remedy law of nations violations which, if left resolved, would give other countries just cause for war with the United States. They assert ATS suits over human rights violations have strayed far beyond the mischief the First Congress sought to cure and urge the Court to bar suits that do not implicate the international obligations of the U.S. to other nations.

Legal history professors, in reply as *amici* for respondents, assert that suits over human rights violations fall squarely within the scope of the statute's purpose. They point to new historical evidence that the First Congress and early jurists of the American republic recognized an

international obligation not to shelter fugitives to any “great crimes” in violation of the laws of nations – and that “great crimes” was a naturally evolving category that grew to include, among other things, participation in the international slave trade.