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A Regional Custos Morum? Corporate Liability Under International Law in North America After Nevsun Resources and Nestlé

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A REGIONAL *CUSTOS MORUM*? CORPORATE LIABILITY UNDER INTERNATIONAL LAW IN NORTH AMERICA AFTER *NEVSUN RESOURCES* AND *NESTLÉ*

Caroline Zrinka Dzeba[*]

ABSTRACT

This Note argues that recent approaches from the highest courts in the United States and Canada regarding corporate tort liability for international human rights abuses are converging to create a set of influential global norms. This comparative study closely examines the recent decisions in *Nevsun Resources v. Araya*, from Canada, and in *Nestlé v. Doe*, from the United States. This Note contends that these two decisions have the potential to clarify how customary international law should be applied in domestic civil courts to hold corporations liable for human rights abuses committed abroad.

In Part II, this Note traces the history of corporate liability for violations of international law, leading up to the present day. In Part III, this Note analyzes the legal arguments that successfully enable North American courts to hear tort liability cases against corporations accused of violating international human rights law, and the arguments that curry favor with judiciaries to constrain jurisdiction. Part IV discusses the outcome of the most recent supply chain human rights litigation pending before the Supreme Court of the United States, and examines the possibility that a set of principles is emerging due to transnational judicial dialogue between the two North American high courts. Finally, this Note concludes with recommendations for judicial participants, civil society actors, and corporate actors on navigating what promises to be a new era in international law.

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TABLE OF CONTENTS

I. INTRODUCTION[1]

With the vast increase of businesses operating principally or with subsidiaries in foreign countries over the past half century, the need to protect private citizens from corporate abuses has accordingly increased.[2] However, avenues to justice for these citizens have been

1. "Custos morum" is a Latin phrase meaning "a guardian of (public) morals." Chief Justice John Roberts, in his opinion for the Supreme Court of the United States in *Kiobel v. Royal Dutch Petroleum Co.*, rejected the suggestion that the United States should allow broad jurisdiction under the Alien Tort Statute by quoting Justice Story: "No nation has ever yet pretended to be the *custos morum* of the whole world." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 123 (2013).

2. ALEX NEWTON, THE BUSINESS OF HUMAN RIGHTS: BEST PRACTICE AND THE UN GUIDING PRINCIPLES 5 (2019).

limited. Domestic judiciaries have been unwilling or unable to pierce the corporate veil to find liability, and international law, even in its most powerful *jus cogens* form, has been difficult to enforce.[3] In this vacuum of accountability, international organizations have pushed for the adoption of standards directly addressing corporations' responsibilities,[4] and scholars have proposed mechanisms for victims to seek redress via arbitration[5] or through reparations at the International Criminal Court.[6] However, a powerful option emerged, or rather, was rediscovered, and gained popularity in the last quarter of the twentieth century: targeting corporations for tort liability in domestic courts. In the United States, beginning in the 1980s, the *ne plus ultra* for human rights activists the world over was the Alien Tort Statute,[7] a statutory grant of jurisdiction in American courts for foreigners seeking redress for violations of international law.[8] Ultimately, and perhaps unsurprisingly, political and corporate interests attacked the Alien Tort Statute.[9] After several decades of modest success in reaching redress for victims of human rights abuses, beginning with *Filártiga v. Peña-Irala* in 1980,[10] many observers worried that the Supreme Court of the United

3. *See generally* Jason MacLean & Chris Tollefson, *Foreign Wrongs, Corporate Rights, and the Arc of Transnational Law*, *in* CORPORATE CITIZEN: NEW PERSPECTIVES ON THE GLOBALIZED RULE OF LAW 31, 32 (Oonagh E. Fitzgerald ed., 2020) (describing the historical difficulty of enforcing international law to bring corporate defendants to account).

4. U.N. Off. of the High Comm'r for Hum. Rts., *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04, at 13 (2011) [hereinafter *Guiding Principles*].

5. *See* Claudia Annacker et al., *Alert Memorandum: The Launch of the Hague Rules on Business and Human Rights Arbitration*, CLEARY GOTTLIEB (Jan. 29, 2020), https://www.clearygottlieb.com/-/media/files/alert-memos-2020/the-launch-of-the-hague-rules-on-business-and-human-rights-arbitration.pdf [https://perma.cc/8XVH-Z7XY] [hereinafter *Launch of the Hague Rules*] (describing the best practices and emerging norms around arbitration in contexts where human rights issues are implicated).

6. *See generally* Hannibal Travis, *Reparations for Mass Atrocities as a Path to Peace: After Kiobel v. Royal Dutch Petroleum Co., Can Victims Seek Relief at the International Criminal Court?*, 40 BROOK. J. INT'L L. 547 (2015).

7. Alien Tort Statute, 28 U.S.C. § 1350.

8. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1470 (2014).

9. Travis, *supra* note 6, at 549–50.

10. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

States had decisively closed the door on Alien Tort Statute litigation with its 2013 decision in *Kiobel v. Royal Dutch Petroleum.*[11]

Kiobel certainly chilled the ability to bring tort claims for alleged human rights abuses in the United States, but there is a potential thaw on the horizon. This note argues that two decisions from North American high courts, *Nestlé v. Doe*[12] and *Nevsun Resources v. Araya*,[13] can clarify the application of customary international law via domestic tort proceedings in North America, and perhaps beyond. In *Nestlé v. Doe*, the Supreme Court of the United States declined to deny American courts the jurisdiction to litigate a human rights complaint from a foreign national against a domestic, American corporation.[14] Similarly, in *Nevsun Resources*, the Supreme Court of Canada held that due to the Canadian Constitution's incorporation of customary international law, Canadian domestic courts *are* a proper forum to hear human rights complaints from foreign nationals against Canadian parent corporations of foreign subsidiaries.[15]

These two decisions represent an inflection point for the role of domestic legal systems in applying customary international law to corporate persons. First, the cases provide a map from two North American judiciaries to their respective polities (and each other, through transnational judicial dialogue) of how to successfully bring such claims. Second, this clarification of the role of domestic courts can provide needed guidance to corporate actors in the absence of enforceable hard law. Increasing the efficacy of customary international law to hold corporations liable for human rights abuses committed abroad can become a powerful deterrent for corporations tempted to cut corners by directly engaging in, or aiding and abetting, harmful practices in foreign countries.[16]

In Part II, this Note traces the history of corporate liability for violations of international law leading up to the present. In Part III, this Note analyzes the legal arguments that successfully enable North American courts to hear tort liability cases against corporations accused

11. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

12. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

13. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, 183, [2020] 443 D.L.R. 4th (Can.).

14. Nestlé USA, Inc. v. Doe I, 141 S. Ct. 188 (2020); see also Doe I v. Nestlé USA, Inc., 766 F.3d 1013, 1028 (9th Cir. 2014), for the U.S. Court of Appeals for the Ninth Circuit ruling.

15. *Nevsun*, 2020 SCC 5 at 132.

16. *See* Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL'Y REV. 339, 357 (2012) (analogizing corporate liability to military command responsibility theory and *respondeat superior* in deterrent effectiveness).

of violating international human rights law, and the arguments that curry favor with judiciaries to constrain jurisdiction. Part IV discusses the latest Alien Tort Statute decision before the Supreme Court of the United States and examines the evidence that a set of principles is emerging due to transnational judicial dialogue between the two North American high courts. Finally, this Note concludes with recommendations on how judicial participants, civil society actors, and scholars can position their arguments to meet the standards that the North American high courts have indicated are necessary to secure domestic fora. In addition, this Note suggests that corporate actors would be well suited by minding these standards closely. Amid increasing calls from consumers and civil society for supply chain transparency, it will be easier to spot behavior that violates international human rights law, and corporate actors will understand to avoid liability by complying with clear, enforceable law.[17]

II. BACKGROUND

A. *Corporate Liability Under Customary International Law: A Brief History*

Corporate liability for human rights abuses is rooted in customary international law. Customary international law arises when an identifiable general practice by states is broadly accepted as law.[18] However, because of challenges with enforcement and consensus, customary international law is difficult to enforce on the domestic level.[19] In classical international law, States, not corporations, were the exclusive actors.[20] The more recent rise of corporate personhood in many jurisdictions, including the United States, suggests that just as natural persons can violate laws and be held accountable, so too can corporate persons.[21]

Corporate liability for human rights violations continued to develop within the rapid evolution of an international law and human rights

17. *See* Verónica H. Villena & Dennis A. Gioia, *A More Sustainable Supply Chain*, HARV. BUS. REV., Mar.–Apr. 2020, at 84, 86.

18. Noah A. Bialos, *The Identification of Customary International Law: Institutional and Methodological Pluralism in U.S. Courts*, 21 CHI. J. INT'L L. 1, 3 (2020).

19. *Id.* at 35.

20. MacLean & Tollefson, *supra* note 3, at 45.

21. *See* YEMEN ACCOUNTABILITY PROJECT, AIDING & ABETTING: HOLDING STATES, CORPORATIONS, AND INDIVIDUALS ACCOUNTABLE FOR WAR CRIMES IN YEMEN 46 (2020); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (holding that First Amendment protections in the United States apply both to natural persons and corporate persons).

regime after World War II. Before 1945, although there was a general consensus on the historical law of nations,[22] there was no definitive consensus on international human rights law.[23] The post-war tribunals conducted by the Allies, and the formation of the United Nations in 1945 changed this decisively.[24] The explosion of international law agreements and treaties immediately following World War II created a regime of international law in what international law scholars have called a Grotian moment: "an instance in which there is such a fundamental change to the international system that a new principle of customary international law can arise with exceptional velocity."[25] Here, the fundamental change to the international system was the carnage of World War II, and the new principle of customary international law was the establishment of the international human rights regime.[26]

In 1948, shortly after the establishment of the United Nations, its Member States signed onto the Universal Declaration of Human Rights ("UDHR").[27] While the UDHR was at the time a nonbinding expression of shared fundamental rights, it has since blossomed into a set of binding norms of international law, and become the de facto linchpin of the international human rights legal regime.[28] This new regime grew from and explicitly understood corporations' obligation to follow international law after several war crimes prosecutions of heads of corporations that provided arms, materiel, and other assistance to Axis powers during World War II.[29]

22. Stephens, *supra* note 8, at 1470.

23. *See generally* MICHAEL P. SCHARF, MILENA STERIO & PAUL R. WILLIAMS, THE SYRIAN CONFLICT'S IMPACT ON INTERNATIONAL LAW 19–29 (2020).

24. U.N. Charter. The very first sentence of the Charter reflects the desire "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." *Id.* at pmbl.

25. SCHARF, STERIO & WILLIAMS, *supra* note 23, at 23.

26. See *id.* at 19–28, for a review of the international human rights regime that emerged after World War II as a blend of treaty-based law and customary international law.

27. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

28. Stephens, *supra* note 8, at 1475.

29. Brief of Amici Curiae Nuremberg Scholars in Support of Respondents, Nestlé USA, Inc., v. Doe, 141 S. Ct. 1931 (2021) (Nos. 19-416, 19-453), 2020 WL 6322315; see also James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121, 123 (2014), for a discussion of World War II prosecutions by the Allied powers against corporations for pillage during the war.

Yet the understanding of corporate liability in the post-World War II era remains muddled, even among legal scholars. Strictly speaking, the International Military Tribunal at Nuremberg ("IMT") only tried and convicted individuals who acted on behalf of their employer corporations in aiding and abetting Nazi war crimes.[30] However, some scholars argue that the IMT imposed liability on corporate entities in addition to individual actors, even if the sanction was extrajudicial.[31] In the case of the largest corporation to profit from and prop up the Nazi regime, I.G. Farben, the IMT punished the chemical and pharmaceutical conglomerate "with the corporate death penalty—dissolution—for its participation in violations of international law."[32] As the discussion of current Alien Tort Statute litigation later in this Note will show, whether corporate liability is part of customary international law remains far from settled.[33]

Since the proliferation of human rights treaties and norms in the latter half of the twentieth century, the regimes backing and enforcing these norms have lost some of their standing on the world stage.[34] The International Criminal Court, for instance, was established with the rosy promise of an end to impunity, but has stalled due to States Parties' reluctance to relinquish their sovereignty.[35] The decline in these institutions' effectiveness coincided with the chipping away of the Alien Tort Statute, the American statute that brought customary international law into U.S. federal courts,[36] and which is the subject of the section below.

30. Robert C. Thompson et al., *Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 843 (2009).

31. Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L. L.J. ONLINE 120, 121 (2010).

32. *Id.*

33. *See generally* Transcript of Oral Argument, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (Nos. 19-416, 19-453), 2020 WL 632231 (2020) [hereinafter Nestlé v. Doe Transcript].

34. See Travis, *supra* note 6, at 569–70, for a discussion of the weakening of institutions such as the International Criminal Court and the trend toward impunity for States and other violators of international law.

35. *Id.* at 569.

36. Stephens, *supra* note 8, at 1467.

B. North American Approaches to International Law Tort Liability for Corporations

1. The United States: The Alien Tort Statute

The Alien Tort Statute ("ATS") is an American law that, since the late eighteenth century, has allowed foreign nationals to bring tort claims in American federal courts.[37] The Judiciary Act of 1789, which established the federal court system in the United States, included the provision to create federal jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . five hundred dollars, and . . . [a]n alien is a party" and over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[38] The ATS does not create any new cause of action—relying on cases in tort—but rather extends jurisdiction of those causes of action to foreigners.[39] Notably, aliens were held in a class distinct from ambassadors, indicating to some observers that the drafters wished to afford private citizens, not just those with diplomatic status, the opportunity to seek redress.[40]

Scholars have also suggested that the drafters intended the ATS to enforce the law of nations, and to define the torts that violated that law, as understood and promulgated at the time through the earlier writing of Grotius and Blackstone.[41] While the ATS was unique in its attention to international law tort violations, it was part of a concerted effort by the American Founders to vest the federal government, rather than the states, with the power to regulate foreign affairs for the new nation.[42] In contrast to the present controversy around the statute, at the time of the ATS' writing, jurists recognized the binding law of nations as the law of the United States.[43]

After its enactment, there was a nearly two-centuries-long gap in meaningful ATS jurisprudence in the United States, with the statute being mentioned just twenty-one times from 1789 to 1980.[44] Beginning

37. Alien Tort Statute, 28 U.S.C. § 1350.

38. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77–78 (1789).

39. Alien Tort Statute, 28 U.S.C. § 1350.

40. Travis, *supra* note 6, at 560–62.

41. Stewart, *supra* note 29, at 129–30.

42. Stephens, *supra* note 8, at 1470 ("In particular, courts and scholars generally agree that the Framers enacted the ATS in order to provide a federal court forum in which foreigners could seek remedies for at least some violations of international law.").

43. *Id.*

44. *Id.* at 1472–73.

in 1980 with the *Filártiga*[45] case, the ATS became the preferred litigation mechanism for human rights activists.[46] The ATS' grant of jurisdiction in tort litigation was unique in the world, and offered plaintiffs an easier pathway than criminal litigation, or any litigation in oft-compromised domestic judiciaries.[47] However, actual results were mixed. Since *Filártiga*, the statute has been invoked successfully only a few dozen times, and then not always ending with judgments but, typically, with settlements or limited enforceability.[48]

The *Filártiga* opinion noted that application of the law of nations was a federal concern, and the ATS sought to "implement the constitutional mandate for national control over foreign relations," but in the case's aftermath, the statute became the center of highly contested disputes over the role of international law in domestic courts.[49] To protect the executive branch's control over foreign policy, the Bush and Obama Administrations issued Statements of Interest to obtain exemptions from constitutional, treaty-based, or statutory law when government officials, government contractors, or important foreign policy interests became implicated in ATS cases.[50] Courts also began to invoke the presumption against extraterritoriality in ATS cases.[51] The presumption against extraterritoriality is a canon of judicial interpretation that states domestic laws are presumed not to apply outside U.S. territory, but previous jurists had understood the text of the ATS to explicitly rebut this presumption.[52] Scholars were perplexed by the judiciary's rejection of extraterritoriality, an abrupt about-face from its earlier jurisprudence.[53]

By the time *Kiobel* came before the Supreme Court of the United States, opposition to the ATS included powerful multinational

45. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

46. Stewart, *supra* note 29, at 130.

47. *Id.*

48. Stephens, *supra* note 8, at 1472–73; Mia Swart, *Requiem for a Dream?: The Impact of Kiobel on Apartheid Reparation in South Africa*, 13 J. INT'L CRIM. JUST. 353, 362–63 (2015).

49. Stephens, *supra* note 8, at 1473.

50. Travis, *supra* note 6, at 562; *see* Swart, *supra* note 48, at 360.

51. Travis, *supra* note 6, at 615 ("The doctrine of non-extraterritoriality has gutted the ATS, because the statute already had scant application to acts committed on U.S. territory as a result of U.S. sovereign immunity and the frequent decision by Congress to limit U.S. residents' remedies for domestic violations of the law of nations.").

52. JULIA RUTH-MARIA WETZEL, HUMAN RIGHTS IN TRANSNATIONAL BUSINESS: TRANSLATING HUMAN RIGHTS OBLIGATIONS INTO COMPLIANCE PROCEDURES 63–65 (2015).

53. *Id.* at 62.

corporations, government officials, and government contractors.[54] The decision in *Sosa v. Álvarez-Machaín*, the first ATS case to come before the Supreme Court, had already narrowed the statute and insisted it was to be applied with extreme caution due to foreign policy considerations.[55] The 2013 decision in *Kiobel* appeared to be the end for this jurisdictional approach to remedies for violations of international law. Just as quickly as the ATS had become a praised route to international justice for scholars and jurists, U.S. courts made it an impotent avenue to pursue human rights litigation in the United States.

2. Canada: Doctrine of Adoption Versus the Mining Industry

Canadian law accepts the doctrine of adoption, meaning that customary international law is automatically adopted into the corpus of Canada's common law.[56] In theory, this means that a breach of customary international law by a domestic corporation, wherever in the world it operates, gives rise to a claim in Canadian courts. In practice, however, Canadian corporations have opposed application of customary international law over their actions.

The mining industry in Canada opposes the doctrine of adoption with a particular ferocity. More mining companies operating internationally are domiciled in Canada than in any other country,[57] representing approximately 75% of all mining companies in the world.[58] After the release of the U.N. Guiding Principles on Business and Human Rights, civil society actors lobbied the Canadian government for greater regulation, but the extractive industry insisted that voluntary mechanisms provided the best governance model.[59] Efforts to hold extractive companies accountable were met with sharp criticism from the Canadian mining sector, "which argued that it would put Canadian

54. Travis, *supra* note 6, at 582–85, 595.

55. Stephens, *supra* note 8, at 1468; *See also* Nestlé v. Doe Transcript, *supra* note 33, at 67 (discussing the foreign policy implications that may be present in ATS litigation).

56. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, [2020] 443 D.L.R. 4th, para 127 (Can.).

57. Mona Paré & Tate Chong, *Human Rights Violations and Canadian Mining Companies: Exploring Access to Justice in Relation to Children's Rights*, 21 INT'L J. HUM. RTS. 908, 908 (2017).

58. Jolane T. Lauzon, *Araya v. Nevsun Resources: Remedies for Victims of Human Rights Violations Committed by Canadian Mining Companies Abroad*, 31 QUE. J. INT'L L. 143, 146 (2018).

59. Charis Kamphuis, *Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account*, 13 GERMAN L.J. 1459, 1466 (2012).

companies at a competitive disadvantage when doing business in developing countries."[60]

Canadian courts have frequently refused to hear human rights cases involving the business activities of Canadian companies or their foreign subsidiaries based on the *forum non conveniens* doctrine, which dictates that the host state is a more appropriate venue than the corporation's home state.[61] However, Canadian courts have recently shown greater inclination to hear these cases if victims' domestic legal systems refuse to hold corporations accountable. This was the situation in *Choc v. Hudbay*, a case arising in Guatemala where Guatemalan Mayan Q'eqchi' plaintiffs sued a Canadian mining company.[62] The plaintiffs did not bring their case in Guatemala due to concerns of corruption in their domestic judiciary.[63] *Choc v. Hudbay* was the first case in tort litigation that proceeded to the merits in Canada, with the Ontario Superior Court of Justice holding that the plaintiffs had a cause of action for a potentially novel tort claim against the company.[64]

While Canada's doctrine of adoption mirrors the ATS in that customary international law is incorporated into the state's domestic legal system, the Canadian system faces the additional hurdle of creating a cause of action.[65] The Supreme Court of the United States stated that "the common law would provide a cause of action for the modest number of international violations with a potential for personal liability at the time [of the ATS' writing]."[66] Scholars argue that Canadian tort law should adopt novel causes of action based on *jus cogens* norms of customary international law.[67] The Vienna Convention established that *jus cogens* norms are those "recognized by the international community of States as a whole as a norm from which no

60. Susana C. Mijares Pena, *Human Rights Violations by Canadian Companies Abroad:* Choc v. Hudbay Minerals Inc., 5 W.J. LEGAL STUD. 4–5 (2014).

61. *Id.* at 1.

62. Choc v. Hudbay Minerals Inc., [2013] O.N.S.C. 1414 (Can.); Maureen T. Duffy, *Opening the Door a Crack: Possible Domestic Liability for North-American Multinational Corporations for Human Rights Violations by Subsidiaries Overseas*, 66 N. IR. LEGAL Q. 23, 31 (2015).

63. Duffy, *supra* note 62, at 31.

64. *Choc*, O.N.S.C 1414, at para. 75.

65. *Id.*

66. Sosa v. Álvarez-Machaín, 542 U.S. 692, 694 (2004).

67. E. Samuel Farkas, Araya v. Nevsun *and the Case for Adopting International Human Rights Prohibitions into Domestic Tort Law*, 76 U. TORONTO FAC. L. REV. 130, 137 (2018).

derogation is permitted."[68] In *Nevsun Resources v. Araya*, the defendant corporation argued that corporations are not liable under international law.[69] The Supreme Court of Canada held, however, that although the classical understanding was that state actors are the only ones bound by *jus cogens* norms, modern international law *does* create liability for corporate actors.[70] With this holding, the Supreme Court of Canada signaled its willingness to create a new cause of action, and to adopt the view of scholars such as Jolane T. Lauzon, who urge that "impunity should not be an acceptable outcome and the lack of available legal tools should not prevent the courts from innovating on this matter."[71]

C. Twenty-First Century Developments in Corporate Liability

The earliest iteration of the international human rights regime focused on States as the primary, if not exclusive, actors capable of liability.[72] By the turn of the new century, however, a growing body of scholars and civil society actors recognized the influence of corporate actors in international relations.[73] Consequently, standards and practices to hold these new actors accountable emerged from the same bodies, including the United Nations, that had created international law designed for States just a generation prior. This subsequent development forms the normative context in which North American high courts must rule on issues of corporate liability. Nonbinding frameworks can provide an interpretive gloss reflecting on the domestic legal systems, creating customary international law at the margins.

1. The U.N. Guiding Principles on Business and Human Rights

In a globalized economy where a single company can operate nearly everywhere in the world, international standards are particularly promising as a means to restrain corporate conduct effectively and

68. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

69. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, [2020] 443 D.L.R. 4th 183, para. 105 (Can.).

70. *Id.* at para. 113.

71. Lauzon, *supra* note 58, at 169.

72. OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD xix (2017).

73. *See, e.g.*, Bialos, *supra* note 18, at 1, 4; Isabella D. Bunn, *Business and Human Rights: The Changing Landscape for U.S. Lawyers*, 41 HUM. RTS. 23, 23 (2015); Duffy, *supra* note 62, at 23; Dinah Shelton, *Challenging History: The Role of International Law in the U.S. Legal System*, 40 DENV. J. INT'L L. & POL'Y 1, 14–15 (2011).

consistently.[74] In 2011, the United Nations finalized the Guiding Principles on Business and Human Rights ("U.N. Guiding Principles"), as the norm of holding companies accountable grew in force.[75] The U.N. Guiding Principles, although nonbinding "recommendations," represent the proposition that the international community demands that companies should be held liable to international and domestic communities affected by their actions.[76]

The U.N. Guiding Principles and the accompanying framework are grouped under three pillars. *First*, States must protect against human rights abuses committed by a third-party corporate actor.[77] Failure to prevent, punish, and redress abuses, constitute a breach of the first pillar.[78] *Second*, businesses should "avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" through due diligence and remediation.[79] *Third*, victims must have greater access to remedies.[80]

The U.N. Guiding Principles improve upon their predecessor attempts, which were criticized by scholars for going excessively far, and clarify State human rights obligations with regard to threats posed by businesses.[81] However, they only identify a *social responsibility* of corporations to respect human rights, rather than a *binding obligation* with the force of law.[82] It is still States alone that are bound by the first pillar, and corporations that are rather more vaguely encouraged to respect the second pillar, a tacit acknowledgement that corporate responsibility is extralegal. Nevertheless, because the U.N. Guiding Principles emerged from national and international norms of human rights, scholars, observers, and the business sector itself are optimistic

74. NEWTON, *supra* note 2, at 4.

75. Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 900 (2017).

76. Neriah Yue, *The 'Weaponization' of Facebook in Myanmar: A Case for Corporate Criminal Liability*, 71 HASTINGS L.J. 813, 821 (2020).

77. Pierre Thielbörger & Tobias Ackermann, *A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?*, 24 IND. J. GLOB. LEGAL STUD. 43, 48 (2017).

78. *Id.*

79. *Guiding Principles*, *supra* note 4; *see also* NEWTON, *supra* note 2, at 6.

80. *Id.* at 7.

81. Thielbörger & Ackermann, *supra* note 77, at 45.

82. *Id.*

that they will only grow in normative force.[83] Because the U.N. Guiding Principles were adopted unanimously, writes Humberto Cantú Rivera, they "reflect a common concern and belief of states that the guidelines contained in the instrument are a globally accepted minimum for the respect of human rights by corporations."[84] As the acceptance of the soft law of the U.N. Guiding Principles deepens globally, these Principles are very likely to become customary international law themselves.[85]

While legal mechanisms for holding these actors accountable continue to develop in domestic courts, corporations expose themselves to significant reputational risk, if not legal liability, that can increase their willingness to comply with nonbinding standards.[86] Compliance with the nonbinding standards is as much motivated by financial incentives as reputational, as "[r]eputational losses invariably lead to financial losses" including loss of business, and costs to rectify damage and compensate victims.[87]

Additionally, it is significant that the U.N. Guiding Principles, and similar regional frameworks, were developed with the cooperation and participation of corporations as stakeholders.[88] States have also begun to adopt the standards promulgated by the U.N. Guiding Principles into their own domestic law.[89] The U.N. Guiding Principles may be

83. Veronika Haász, *The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles*, 14 HUM. RTS. REV. 165 (2013).

84. Humberto Cantú Rivera, *Corporate Accountability in the Field of Human Rights: On Soft Law Standards and the Use of Extraterritorial Measures*, *in* DUTIES ACROSS BORDERS: ADVANCING HUMAN RIGHTS IN TRANSNATIONAL BUSINESS 109, 131 (Bård A. Andreassen & Võ Khánh Vinh eds., 2016).

85. *Id.* at 130.

86. See NEWTON, *supra* note 2, at 67, 70 (arguing that "as multi-stakeholder initiatives and international frameworks have become more established and normative for business, the implications for corporations choosing not to implement them, or implement them poorly, have grown. While there may not be any *legal* implications for a corporation failing to implement multi-stakeholder initiatives relevant to their enterprise, the implications for a corporation's reputation can be significant.").

87. *Id.* at 71.

88. Mijares Pena, *supra* note 60.

89. *E.g.*, Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1) [Law 2017-399 of March 27, 2017 on the Duty of Diligence of Parent Corporations and Charitable Organizations of Category (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 27, 2017 (instituting corporate regulations influenced by the U.N. Guiding

considered, then, to be creating customary international law at the margins, by exposing corporations to reputational risk if they do not comply, which often has cascading effects leading to financial losses.[90] By creating this deterrent effect for private actors, even nonbinding principles and frameworks are approaching the force of customary international law.

2. The Hague Rules on Business and Human Rights Arbitration

In December 2019, the Center for International Legal Cooperation published the Hague Rules on Business and Human Rights Arbitration ("Hague Rules").[91] The Hague Rules, in modifying the Arbitration Rules of the United Nations Commission on International Trade Law, aim to create a non-state mechanism for the resolution of human rights claims that are confined to arbitration, or not candidates for litigation.[92] The publication of the Hague Rules further strengthened the growing consensus that corporations should be held accountable for their impacts on multiple stakeholders, including the people in countries in which they operate.[93] Notably, the Hague Rules explicitly disclaim that they impose new legal obligations on States, or abrogate existing obligations.[94]

There is likely a long road ahead before the international arbitration regime fully reflects the needs of victims of human rights abuses. Many host countries to multinational enterprises engage in bilateral investment treaties for private investment that prevent host States from any interference before or during investor activities, even when the host State may know of ongoing human rights abuses.[95] This restriction—coupled with the fact that many host countries are less-developed nations badly in need of the economic benefit from foreign

Principles into the domestic law of the French Republic). *See generally* Chiara Macchi & Claire Bright, *Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, *in* LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS: EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW 218–47 (Martina Buscemi et al. eds., 2020) (discussing States' adoption of domestic laws that developed after the establishment of the U.N. Guiding Principles, and arguing that domestic adoption is another method of transforming the soft law of the U.N. Guiding Principles into customary international law).

90. NEWTON, *supra* note 2, at 71.

91. CTR. FOR INT'L LEGAL COOP., THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION (2019) [hereinafter HAGUE RULES].

92. *Id.* at 1–2.

93. *Launch of the Hague Rules*, *supra* note 5, at 1.

94. HAGUE RULES, *supra* note 91, at pmbl., art. 5.

95. Paré & Chong, *supra* note 57, at 915.

investment—creates an imbalance of power that disincentivizes enacting and enforcing domestic human rights laws.[96]

III. ANALYSIS

A. The United States Approach: From Kiobel *to* Nestlé

1. *Kiobel*'s Antecedents

The *Kiobel* decision marked a turning point for victims of human rights violations' ability to seek tort claims in American courts for actions carried out in foreign countries. However, prior to that ruling, the ATS had been the source of jurisdiction for numerous foreign plaintiffs in some successful tort claims against companies.[97]

Filártiga holds the distinction of being the first successful case brought under ATS-created jurisdiction.[98] In that case, Dolly Filártiga, a Paraguayan applying for permanent political asylum in the United States, successfully brought a tort claim against a man alleged to have tortured and killed her brother in Paraguay.[99] The U.S. Court of Appeals for the Second Circuit held that U.S. federal courts had jurisdiction for the cause of action between an applicant for permanent political asylum, Filártiga, and another asylum seeker, the alleged torturer and murderer, despite the fact that the cause of action arose in Paraguay, not the United States.[100] *Filártiga* was a so-called "foreign-cubed" case: brought by a foreign plaintiff, against a foreign defendant, for a cause of action arising on foreign soil.[101] In announcing the opinion for the Second Circuit in that case, Judge Irving Kaufman noted that the jurisdiction conferred by the ATS was proper, and that the ancient law of nations that inspired the statute, as well as modern international treaties, were the law of the United States.[102]

96. *Id.*

97. *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Luke D. Anderson, *An Exception to* Jesner*: Preventing U.S. Corporations and Their Subsidiaries from Avoiding Liability for Harms Caused Abroad*, 34 EMORY INT'L L. REV. 997, 998 (2020) ("[F]ollowing *Filártiga v. Peña-Irala*, decided in 1980, the number of suits involving the ATS quickly increased.").

98. *Filártiga*, 630 F.2d at 890.

99. *Id.* at 878.

100. *Id.* at 878–80.

101. Duffy, *supra* note 62, at 34.

102. *Filártiga*, 630 F.2d at 890 ("Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all

In *Sosa v. Álvarez-Machaín*, the Supreme Court of the United States cautiously upheld the ATS' viability as a mechanism to secure jurisdiction for foreign nationals.[103] The plaintiff in that case, Humberto Álvarez-Machaín, alleged in part that his abduction in Mexico by the U.S. Drug Enforcement Agency ("DEA") was tortious arbitrary detention and he sought recovery under the ATS.[104] Álvarez-Machaín was suspected by the United States to have participated in the torture and murder of an undercover DEA agent in Mexico, and was consequently abducted by the DEA and brought to Texas to stand trial in U.S. federal court.[105] Ultimately, the case reached the Supreme Court, which held that recovery was not possible under the ATS because the claim arose under a norm that had not reached the force of customary international law: arbitrary detention.[106]

Though Álvarez-Machaín had argued that the prohibition on arbitrary detention was customary international law based on its presence in both the UDHR[107] and the International Covenant on Civil and Political Rights,[108] the Court found that neither formed part of American law.[109] The Court also voiced its concern that allowing causes of action under violations of customary international law in federal courts violated the doctrine, announced in *Erie Railroad Company v. Tompkins*, that there is no federal common law in the United States.[110] In its ruling in *Sosa*, the Court narrowed the ATS to causes of actions that were either considered violations of the law of nations at the time of the drafting of the Judiciary Act of 1789 or causes of action that constitute direct modern analogues.[111] This two-step test constricted the ATS' jurisdiction around the same time corporate and State interests began to voice their opposition to any overbroad application of the statute that might lead to liability for them.[112] Under the *Sosa* test,

mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.").

103. Sosa v. Álvarez-Machaín, 542 U.S. 692 (2004).

104. *Id.* at 698.

105. *Id.* at 697–98.

106. *Id.* at 735.

107. UDHR, *supra* note 27, at art. 9.

108. International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

109. Sosa v. Álvarez-Machaín, 542 U.S. 692, 735 (2004).

110. *Id.* at 729; Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

111. *Sosa*, 542 U.S. at 694.

112. Travis, *supra* note 6, at 562.

corporations could argue that because there was no international norm for corporate liability at the time of drafting of the ATS, modern causes of action against corporations for violations of international law were barred. While the Supreme Court of the United States reaffirmed corporate personhood in the controversial *Citizens United* decision,[113] shortly thereafter it began to retreat from holding corporate entities accountable under customary international law in federal courts through ATS claims, before ultimately reaching a turning point in *Kiobel*.[114]

2. *Kiobel*'s Central Holding and Consequences

In 2013, the Supreme Court, in its unanimous decision in *Kiobel v. Royal Dutch Petroleum Co.*, announced that the ATS contained a presumption against extraterritoriality, severely hampering the ability of plaintiffs to recover for tort offenses committed outside the United States.[115] The Court limited claims brought under the ATS to those that "touch and concern" the United States, significantly narrowing the scope of the statute.[116] In *Kiobel*, U.S. nationals, including named plaintiff Esther Kiobel, sued a foreign corporation, Royal Dutch Petroleum, for aiding and abetting violations of international law through its operations in Nigeria.[117] The Dutch oil corporation allegedly sought the Nigerian Government's help in silencing the protests of the Ogoni people, of which Kiobel and her late husband were part, against the continued environmental degradation of Ogoniland by its oil exploration and production activities.[118] The Nigerian military and police forces allegedly responded with atrocities including "beating, raping, killing, and arresting residents [of Ogoniland] and destroying or looting property."[119] Kiobel's late husband, part of the "Ogoni Nine," nine prominent activists against the corporation's oil operations in Nigeria, had been executed in these operations.[120]

113. Citizens United v. Fed. Election Comm'n., 558 U.S. 310, 326 (2010).

114. Tyler Becker, *The Liability of Corporate Directors, Officers, and Employees Under the Alien Tort Statute After* Jesner v. Arab Bank, PLC, 120 COLUM. L. REV 91, 97 (2020).

115. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

116. Anderson, *supra* note 97, at 998.

117. *Kiobel*, 569 U.S. at 112.

118. *Id.* at 113.

119. *Id.*

120. *Nigeria/Netherlands: Kiobel Witness Hearing Key Chance to Hold Shell to Account Over Human Rights Abuses*, AMNESTY INT'L (Oct. 8, 2019, 12:01 AM), https://www.amnesty.org/en/latest/news/2019/10/nigeria-netherlands-kiobel-witness-hearing-key-chance-to-hold-shell-to-account-over-human-rights-abuses/ [https://perma.cc/VVC4-B7HT].

In *Kiobel*, the Court found that because the defendant was a foreign corporation and the relevant conduct that created the cause of action took place in Nigeria, the case did not meet the standard that the claims should "touch and concern" the domestic territory enough to rebut the presumption against extraterritoriality.[121] The only domestic presence of Royal Dutch Petroleum, the defendant corporation, consisted of an office in New York City that dealt with potential investors in the company, rather than day-to-day oversight of extractive operations.[122]

Chief Justice Roberts, writing the Court's opinion in *Kiobel*, expressed the Court's hesitation to adopt customary international law in U.S. federal courts. Quoting Justice Story, who wrote "[n]o nation has ever yet pretended to be the *custos morum* of the whole world" nearly two centuries earlier, Roberts rebuffed the notion that the ATS drafters meant to create such a role for the United States.[123] Roberts also expressed concerns about the foreign policy implications of holding a foreign corporation liable in U.S. courts: "accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world."[124] The appropriate decision-makers in such situations, he opined, were the legislative and executive branches of the government.[125] Justice Alito, writing in a separate concurrence, also noted the *Sosa* test required domestic conduct that violated an international law that was in definite character and accepted among "civilized nations."[126]

Human rights activists criticized the decision as the culmination of decades of executive overreach into matters of international law, and a further attempt to detach the law of nations from domestic law due to sovereign immunity concerns.[127] Before the *Kiobel* ruling, no appellate court had challenged corporate liability under the ATS.[128] The decision underscored the vehement State and corporate resistance to

121. *Kiobel*, 569 U.S. at 112.

122. *Id.* at 139.

123. *Id.* at 123.

124. *Id.* at 124.

125. *Id.*

126. *Id.* at 127 (Alito, J., concurring).

127. Travis, *supra* note 6, at 554–55 ("[The central holding] conflicts with the original understanding of the law of nations as rules, enforceable under federal common law and the ATS, that limit executive power so as to promote peace.").

128. Giannini & Farbstein, *supra* note 31, at 121.

international law standards that might increase liability where before there had been relative, if not absolute, impunity.[129]

But *Kiobel* was not fatal for the ATS. The concurring opinion by Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, suggested a test for the sufficient force necessary for a claim to "touch and concern" the United States.[130] Breyer would find jurisdiction under the ATS if (1) the alleged tort occurs in the United States; (2) the defendant is an American national; or (3) the defendant "substantially and adversely affects an important American national interest," which included allowing the United States to harbor those who violate international law.[131] While Breyer did not agree with the majority's reasoning, he reached the same conclusion under the test he formed in his concurrence: there was not "sufficient force" in *Kiobel* to justify jurisdiction under the ATS.[132]

3. *Kiobel*'s Progeny

In 2018, another ATS case reached the high court, and the Supreme Court of the United States had the chance to clarify its *Kiobel* restriction. In *Jesner v. Arab Bank*, the Court held that foreign corporations could not be sued in U.S. federal courts, even when the plaintiff is a U.S. national.[133] Joseph Jesner and other plaintiffs sought damages under the ATS from Arab Bank, a Jordanian corporation with a branch in New York, for the bank's alleged complicity in terrorist acts that harmed American citizens and nationals abroad.[134] In *Jesner*, as in *Kiobel*, the Court was reluctant to wade into political waters by upholding a norm of international law that would allow foreign courts to penalize conduct occurring in other countries.[135] The Court was also wary of the foreign policy headache that might arise from ruling that actions outside U.S. territory violated international law.[136]

However, the winding road of *Nestlé v. Doe* suggests that there may still be hope for the Alien Tort Statute. *Nestlé v. Doe*, decided June 2021 before the Supreme Court of the United States, is the culmination of a long series of ATS litigation.[137] The plaintiffs, former child slaves,

129. Stephens, *supra* note 8, at 1470.

130. *Kiobel*, 569 U.S. at 127 (Breyer, J., concurring).

131. *Id.*

132. *Id.* at 140.

133. Jesner v. Arab Bank, 138 S. Ct. 1386, 1390 (2018).

134. *Id.* at 1388.

135. Anderson, *supra* note 97, at 1006; *Jesner*, 138 S. Ct. at 1405.

136. Nestlé v. Doe Transcript, *supra* note 33, at 67.

137. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

sued Nestlé and Cargill in U.S. federal court under the ATS after their enslavement on Nestlé's supplier cocoa farms in Côte d'Ivoire.[138] In 2019, the Court of Appeals for the Ninth Circuit held that the case could proceed to the merits, and that the plaintiffs did have standing as to the defendants, Cargill, who worked as a contractor for Nestlé, and Nestlé USA, Inc. the U.S. operations base for the multinational firm.[139] Cargill and Nestlé appealed the Ninth Circuit's decision, and the Supreme Court granted a writ of certiorari, combining the two cases.[140] Justices heard oral arguments in December 2020 and handed down a decision, discussed in greater detail below, in June 2021.[141]

B. Hudbay*,* Nevsun Resources*, and the Canadian Approach*

Canadian legal observers who had looked to the ATS as a potential model for international law tort claims in Canadian courts were disheartened, though not defeated, by the *Kiobel* decision.[142] They had cause to be optimistic, because the same year the U.S. Supreme Court ruled in *Kiobel*, the Ontario Superior Court of Justice ruled that a series of three cases brought by foreign plaintiffs, combined as *Choc v. Hudbay Materials*, could proceed to trial on the merits.[143]

1. *Choc v. Hudbay Materials*

In *Choc v. Hudbay Materials*, Guatemalan members of the Mayan Q'eqchi' indigenous group alleged that a Canadian mining company, which was later amalgamated into Hudbay Materials, was responsible for human rights abuses in eastern Guatemala.[144] The Mayan Q'eqchi' sought to reinhabit their native land in the El Estor region of Guatemala after earlier forcible evictions by nickel mining companies.[145] By 2007, Hudbay's predecessor company sought to exploit a land license from the Guatemalan government and evict the Mayan Q'eqchi' again.[146] The plaintiffs alleged that Guatemalan police, military, and

138. Doe I v. Nestlé USA, Inc., 766 F.3d 1013,1016 (9th Cir. 2014).

139. Doe v. Nestlé, S.A., 929 F.3d 623, 625 (9th Cir. 2018), *cert. granted sub nom.* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021); Cargill, Inc. v. Doe I, 141 S. Ct. 184 (2020), *cert. granted sub nom.* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

140. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

141. Nestlé v. Doe Transcript, *supra* note 33; Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

142. Duffy, *supra* note 62, at 36.

143. Choc v. Hudbay Minerals Inc., [2013] O.N.S.C. 1414 (Can.).

144. *Id.* at para. 4.

145. *Id.* at para. 10.

146. *Id.* at para. 5.

private security personnel violently conducted the next round of evictions, gang-raping eleven women.[147] Protests over the disputed land continued into fall 2009, when two other Mayan Q'eqchi' community leaders, Adolfo Ich and German Chub Choc, were killed and left paralyzed, respectively, in two violent attacks.[148]

In July 2013, the Ontario Superior Court of Justice held, over the defendant's motions to dismiss, that the plaintiffs did have a cause of action for a potentially novel tort claim against the company.[149] Hudbay did not appeal,[150] so with the court's holding, *Hudbay* become the first such case to proceed to the trial phase in Canada to be decided on the merits.[151]

2. *Nevsun Resources v. Araya*

The victory for human rights advocates in *Hudbay* carried momentum into the litigation of *Nevsun Resources v. Araya*.[152] As the Supreme Court for British Columbia deliberated the decision in *Nevsun Resources v. Araya* before it reached the Canadian Supreme Court, scholar E. Samuel Farkas noted that the violations in that case clearly met the standard for customary international law violation and should be considered a sufficient tort action in Canada.[153]

The plaintiffs in *Nevsun* brought their case in British Columbia, alleging, like the plaintiffs in *Hudbay*, they had been forced into labor for a domestically-headquartered corporation.[154] Over 1,000 plaintiffs, refugees and former Eritrean nationals, sought damages for breaches of domestic torts and breaches of customary international law, claiming that they were forced into labor as part of their conscription into the Eritrean military.[155] They alleged that they were made to work in the Bisha mine, a majority-owned subsidiary of Nevsun Resources, a Canadian company, and that their involuntary labor violated customary international law prohibitions on cruel, inhuman or

147. *Id.*

148. *Id.* at paras. 6–7.

149. *Id.* at para. 75.

150. Duffy, *supra* note 62, at 26.

151. Mijares Pena, *supra* note 60, at 13.

152. *Contra* Farkas, *supra* note 67, at 144.

153. *Id.* at 139–41.

154. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, paras. 3, 7, [2020] 443 D.L.R. 4th (Can.).

155. *Id.* at para. 4.

degrading treatment, slavery, forced labor, and crimes against humanity.[156]

Nevsun Resources responded by denying that the lower court of British Columbia, where the plaintiffs first brought their complaint, had jurisdiction to hear the case.[157] The corporation argued for the lack of jurisdiction in part because of Canada's act of state doctrine and partly because customary international law, it argued, did not create a cause of action in domestic courts.[158] When the lower court denied Nevsun Resources' motions, the corporation appealed to the Canadian Supreme Court.[159]

In a narrow majority, the Supreme Court of Canada held that the act of state doctrine was not part of Canadian common law.[160] In English common law, the common ancestor of American and Canadian common law, the act of state doctrine traditionally "holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state."[161] However, English and Canadian courts in the twenty-first century found the doctrine substantially diluted in several circumstances, including where there is a violation of international law.[162] This had the effect, in Canadian courts, of completely swallowing the act of state doctrine in favor of respect for public international law.[163]

The Court also held that private actors' violations of customary international law, as incorporated in Canadian common law, could create causes of action in Canadian courts.[164] The claims that the plaintiffs brought in *Nevsun*, of forced labor, slavery, and inhumane treatment, decisively fit into the body of norms of modern customary international law.[165] Justice Abella, writing the opinion for the Court, noted that in some States (like the United States), customary

156. *Id.* at paras. 3–6, 13 ("[Araya] says he was required to work 6 days a week from 5:00 a.m. to 6:00 p.m., often outside in temperatures approaching 50 degrees Celsius.").

157. *Id.* at para. 16.

158. *Id.*

159. *Id.*

160. *Id.* at para. 59.

161. *Id.* at para. 29.

162. *Id.* at paras. 37–44; 58 ("To now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles have received through considered analysis by Canadian courts.").

163. *Id.* at para. 45.

164. *Id.* at para. 127.

165. *Id.* at para. 75.

international law became part of domestic law through executive and legislative action.[166] In Canada, however, the doctrine of adoption operated to make customary international law domestic common law by adopting norms of international law into the domestic legal system.[167] The adoption doctrine in this form traced its roots as far back as Blackstone's writings.[168]

But Nevsun Resources argued that even if customary international law *did* create causes of action in Canadian courts, corporations are not liable.[169] In response, the Supreme Court of Canada held that under customary international law, private actors, as well as States, face liability.[170] Justice Abella conceded that Nevsun Resources had correctly interpreted classical international law, which, as discussed above, viewed States and not corporations as the primary actors.[171] However, she characterized the corporation's position as a misunderstanding of *modern* international law, in which "there is no longer any tenable basis for restricting the application of customary international law to relations between states."[172] Having found that Canadian courts have jurisdiction over domestic corporations in breaches of customary international law committed in a foreign State, the Supreme Court of Canada dismissed Nevsun Resources' appeal and allowed the tort case to proceed to the merits in the court of British Columbia.[173]

IV. DISCUSSION

A. Nestlé v. Doe*: Trying to Define 'Sufficient Force'*

Rather than slamming a door shut, the decision in *Kiobel* left a breadcrumb trail for potential plaintiffs under the ATS in the United States. This trail has most recently been followed by the plaintiffs in *Nestlé v. Doe*.[174] In *Kiobel*, the Court announced its wariness of the U.S.

166. *Id.* at para. 85 (citing Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996)).

167. *Id.* at para. 86.

168. *Id.* at para. 87 ("Blackstone's 1769 *Commentaries on the Laws of England: Book the Fourth*, for example, noted that 'the law of nations . . . is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land.'").

169. *Id.* at para. 104.

170. *Id.* at para. 107.

171. *Id.* at para. 104.

172. *Id.* at para. 107.

173. *Id.* at para. 6.

174. *See generally* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

judiciary interfering in the foreign policy powers delegated to the executive and legislative branches in the U.S. government, and found no explicit indication in the text of the ATS that it should apply to violations of the law of nations committed extraterritorially.[175] However, Chief Justice Roberts' opinion for the unanimous court noted that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[176] "Sufficient force" was left undefined.

In *Nestlé v. Doe*, by contrast, the Ninth Circuit began to elaborate the definition of "sufficient force," holding that sufficient connection to the domestic territory of the United States existed when there was significant contact between a U.S. corporation and its foreign subsidiary.[177] In that case, Judge Nelson noted that "[e]very major operational decision regarding [defendant Nestlé's] United States market is made in or approved in the United States" and defendant Cargill's business is "headquartered in [and] . . . centralized in Minneapolis and decisions about buying and selling commodities are made at its Minneapolis headquarters."[178] Although the Ninth Circuit found sufficient force in the connection between the United States and the cause of action, both Nestlé and Cargill successfully appealed the decision, and the Supreme Court of the United States granted certiorari to hear the case and determine its justiciability in U.S. federal courts.[179]

1. Oral Arguments in *Nestlé v. Doe*

In Supreme Court oral arguments, the Justices appeared to challenge both the presumption against corporate liability that the defendants sought to support, and to suggest that the defendants' presence in the United States touched and concerned the domestic territory with sufficient force. Justice Breyer plainly stated that he did not see why domestic corporations should be exempt from liability for violations of customary international law.[180] Justice Alito also expressed his skepticism that U.S. courts were an inappropriate forum rather indignantly:

> So suppose a U.S. corporation makes a big show of supporting every cause *de jure* but then surreptitiously hires agents in Africa

175. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115, 124 (2013).

176. *Id.* at 125.

177. Nestlé v. Doe, S.A., 929 F.3d 623, 638 (9th Cir. 2019), *cert. granted sub nom.* Nestlé USA, Inc. v. Doe I, 141 S. Ct. 1931 (2021).

178. *Id.* at 638.

179. *Id.* at 177.

180. Nestlé v. Doe Transcript, *supra* note 33, at 11–12.

> to kidnap children and keep them in bondage on a plantation so that the corporation can buy cocoa or coffee or some other agricultural product at bargain prices. You would say that the victims who couldn't possibly get any recovery in the courts of the country where they had been held should be thrown out of court in the United States, where this corporation is headquartered and does business?[181]

Justice Sotomayor echoed Justice Alito's argument to express dismay that a U.S. corporation should not be held liable for acts committed in the United States to aid and abet violations of international law.[182] Justice Kagan explicitly drew on the approach of several foreign States, including Canada, to the issue, and hinted that the corporate headquarters' presence in the United States met the sufficient force standard from *Kiobel*.[183]

Distinguishing *Nestlé* from *Jesner*, the Justices were not persuaded of any foreign policy consideration in the case that would warrant judicial restraint under *Sosa*. Chief Justice Roberts doubted that foreign states would take issue with U.S. courts addressing violations of customary international law by U.S. corporations.[184] Justice Kavanaugh also joined in this skepticism, which Deputy Solicitor General Curtis Gannon, appearing on behalf of the United States as amicus curiae for the defendants, conceded was well-founded.[185]

Finally, the Justices challenged the contention that aiding and abetting child slavery, the charge against the U.S. corporations, was not prohibited by customary international law. The defendants argued that while prohibition of child slavery was a universal norm under customary international law, prohibition of aiding and abetting child slavery, which the U.S. corporations were alleged to have done, was not.[186]

181. *Id.* at 13–14.

182. *Id.* at 43.

183. *Id.* at 44 ("[M]any of the countries around the world with the strongest rule of law systems do hold their own corporations civilly liable for the kinds of actions at issue here.").

184. *Id.* at 6.

185. *Id.* at 47.

186. *Id.* at 9.

2. The Predictive Value of Oral Arguments[187]

Academic analyses of oral arguments have yielded limited predictive trends. Empirical studies show that the more Justices asked side questions, the more likely they were to vote *against* that side.[188] More recently, the use of artificial intelligence aided research on the effect of questioning and speech patterns for different Justices.[189] The most recent series of oral arguments, which included *Nestlé v. Doe*, was historically unique: due to the distancing measures in place because of the coronavirus pandemic, arguments were entirely telephonic for the first time in the Supreme Court's history.[190] Consequently, before the Court issued its final decision, there was no certainty that the patterns that emerged in oral arguments before the pandemic would hold, due to the absence of verbal cues and in-person observations, and the addition of potential digital and telephonic interference.

However, observers could still make some predictions from the current state of the *Nestlé* litigation. First, analyzing oral arguments under the pre-pandemic formula, the questioning appeared to favor the respondent, arguing on behalf of the plaintiffs, with twenty-six questions; Justices asked the petitioner, the defendants, thirty-four questions.[191] Next, and more importantly for the future of ATS litigation, several themes emerged that hinted at the Justices' perspectives. To begin with, the Court appeared to be skeptical that domestic corporations should be exempt from liability for violations of customary international law.[192] In addition, the Justices seemed to imply that domestic corporations' operations in the United States do

187. This Note was first written before the *Nestlé* decision was published and still includes this analysis of the unique COVID-19 era of oral arguments before the U.S. Supreme Court. Further research into the predictive value of oral arguments before the high court under these circumstances may be of interest to scholars.

188. Adam Liptak, *When the Justices Ask Questions, Be Prepared to Lose the Case*, N.Y. TIMES (May 25, 2009), https://www.nytimes.com/2009/05/26/us/26bar.html [https://perma.cc/Q6BE-BAZY] ("The bottom line, as simple as it sounds . . . is that the party that gets the most questions is likely to lose."); *see also* Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241 (2009).

189. *See* Gregory M. Dickinson, *A Computational Analysis of Oral Argument in the Supreme Court*, 28 CORNELL J.L. & PUB. POL'Y 449 (2019).

190. Adam Liptak, *Virus Pushes a Staid Supreme Court into Revolutionary Changes*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2020/05/03/us/politics/supreme-court-coronavirus.html [https://perma.cc/57GX-U7D2].

191. *See* Nestlé v. Doe Transcript, *supra* note 33.

192. *See id.* at 6, 37.

sufficiently touch and concern the United States when operations in the territory aid and abet violation of customary international law abroad.[193] The Court also felt more comfortable applying the ATS when there are scant foreign policy implications of doing so, which is likely to be the case when the defendant is a U.S. corporation.[194] Though counsel for both sides struggled when addressing the Justices on this point, the Justices suggested that aiding and abetting a violation of customary international law, as the defendants were alleged to have done with child slavery in Côte d'Ivoire, is sufficient to come under the jurisdiction of the ATS.[195]

3. The Summer 2021 Ruling

Any analysis of an oral argument before a final decision is speculative, but before the Court ruled in *Nestlé v. Doe* the questions posed by the Justices revealed their willingness to apply the ATS *if* the circumstances warrant. When a domestic defendant acts in violation of customary international law, and there is no foreign policy consideration to warrant intervention from the executive or legislative branches, the U.S. judiciary is prepared to exercise its ATS jurisdiction over the matter. However, it was not prepared to do so in *Nestlé v. Doe*. Writing for the majority in an 8–1 decision, Justice Thomas concluded that the plaintiffs could not proceed to the merits on the case because the cause of action did not sufficiently touch and concern the United States, making any application of the ATS impermissibly extraterritorial.[196] Reversing the Ninth Circuit, the Supreme Court held that the types of decisions made by Nestlé USA and Cargill on the territory of the United States did not rise to international law violations.[197] General corporate activity and decision-making did not constitute aiding and abetting a violation of international law, so the corporations headquartered in the United States were not sufficiently connected to the forced labor actions in Côte d'Ivoire.[198]

193. *Id.* at 39.

194. *See id.* at 6.

195. *See id.* at 9.

196. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1993 (2021).

197. *Id.* at 1937.

198. *Id.*; *see also* Simon Baughen, *U.S. Companies Win Aiding and Abetting ATS Case in U.S. Supreme Court; But ATS Not Dead Yet*, INT'L MAR. & COM. L. (July 6, 2021), https://iistl.blog/2021/07/06/us-companies-win-aiding-and-abetting-ats-case-in-us-supreme-court-but-ats-not-dead-yet/ [https://perma.cc/A9AK-SYEB].

The decision may have brought an end to the proceedings for *Nestlé v. Doe*, but rumors of the ATS' death have been greatly exaggerated.[199] In the decision, only two other Justices joined Justice Thomas in the part of his opinion where he denied that the ATS created a cause of action for modern international law torts, arguing only that it created jurisdiction for violations of the three torts articulated in the text.[200] Justice Sotomayor, in a concurrence joined by Justices Breyer and Kagan, wrote that this view was "unmoored from both history and precedent,"[201] leading observers to conclude that the majority of the Supreme Court remains prepared to extend ATS jurisdiction to violations of customary international law not originally identified by the drafters of the ATS.[202]

Interestingly, and most relevantly for this analysis, the Court did *not* settle the very question for which certiorari was granted in *Nestlé v. Doe*, whether there is a reason to distinguish between corporate persons and natural persons as defendants in ATS cases.[203] Justice Alito, who had been vocal during oral arguments in his viewpoint that they should *not* be distinguishable, dissented from the majority for this reason.[204] Justice Gorsuch, in a concurring opinion, found "[t]he notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding" of the statute.[205]

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199. *See also* Cassens Weiss, *infra* note 219; Jimmy Hoover & Jennifer Doherty, *Supreme Court Rules for Nestle, Cargill in Child Labor Suit*, LAW360 (June 17, 2021, 10:41 AM), https://www.law360.com/articles/1395086/ [https://perma.cc/B4HH-RETV] (discussing the intentions of the plaintiffs' counsel to amend their briefings and continue litigation in a new phase of the court battle).

200. *Nestlé USA, Inc.*, 141 S. Ct. at 1937.

201. *Id.* at 1945.

202. Justine N. Stefanelli, *SCOTUS Judgment in Alien Tort Statute Case Issued Today* (June 17, 2021, 4:01 PM), AM. SOC'Y INT'L L., https://www.asil.org/ILIB/scotus-judgment-alien-tort-statute-case-issued-today [https://perma.cc/ZTD2-ME5P].

203. William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/ [https://perma.cc/M3UT-QNNB].

204. *Nestlé USA, Inc.*, 141 S. Ct. at 1950; Beth Van Schaack, *Nestle & Cargill v. Doe: What's Not in the Supreme Court's Opinion*, JUST SEC. (June 30, 2021), https://www.justsecurity.org/77120/nestle-cargill-v-doe-whats-not-in-the-supreme-courts-opinions/ [https://perma.cc/S8JN-DPNJ].

205. *Id.* at 1940; *see also* Amy Howe, *Justices Scuttle Lawsuit Against Nestlé, Cargill for Allegedly Aiding Child Slavery Abroad*, SCOTUSBLOG (June 17,

In the section below, this Note suggests how the ATS' survival in U.S. courts may be inextricably linked to the growing acceptance of corporate liability tort liability for international law violations in Canada and elsewhere, through transnational judicial dialogue.

B. Transnational Judicial Dialogue and a New Test for Liability

The mention of the ATS by the Canadian Supreme Court's *Nevsun Resources* majority opinion, and the American Supreme Court Justices' interest in foreign legal approaches to tort liability for corporations in *Nestlé v. Doe,* evoke a legal phenomenon recognized as transnational judicial dialogue.[206] Professor Melissa Waters has called this "the synergistic relationship between international human rights law and domestic courts participating in judicial dialogue" where "[i]nternational legal norms . . . provide courts with common reference points around which to shape a dialogue."[207]

Evidence for this transnational judicial dialogue between Canada and the United States recently emerged in three ways. First, there is direct reference to the other state's practice in court proceedings. Justice Abella, who wrote the opinion for the 5–4 court in *Nevsun Resources v. Araya*, referenced the ATS when analyzing current international standards.[208] In *Nestlé v. Doe* oral arguments, Justice Kagan was one of several justices noting foreign practices on tort liability, referencing Canada's approach to tort liability for corporations under customary international law.[209] Justice Breyer, who wrote in his concurring opinion in *Kiobel* that it would be beneficial for the United States to model foreign courts' approaches to tort liability for corporations, also reiterated this interest during oral arguments.[210] Transnational judicial dialogue also occurred through the amici and intervenors that provided legal submissions in each litigation in both countries. In both *Nevsun Resources* and *Nestlé*, Justices cited the research of international diplomats and foreign government leaders

2021, 1:36 PM), https://www.scotusblog.com/2021/06/justices-scuttle-lawsuit-against-nestle-cargill-for-allegedly-aiding-child-slavery-abroad/ [https://perma.cc/2X32-SYMK].

206. Melissa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 AM. SOC'Y INT'L L. PROC. 465, 466 (2010).

207. *Id.*

208. Nevsun Res. Ltd. v. Araya, 2020 SCC 5, para. 113, [2020] 443 D.L.R. 4th (Can.).

209. Nestlé v. Doe Transcript, *supra* note 33, at 44.

210. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 136 (2013); Nestlé v. Doe Transcript, *supra* note 33, at 37.

represented by Yale University Professor Harold Koh.[211] EarthRights International, an American nonprofit legal organization, wrote an amicus brief for the plaintiffs in *Nestlé* when the case appeared before U.S. Court of Appeals for the Ninth Circuit, and was an Intervener for the plaintiffs, presenting an explanation of the ATS to the Canadian judges, when *Nevsun Resources v. Araya* went to the Court of Appeal for British Columbia.[212] Finally, there is evidence that transnational judicial dialogue emerged as a result of the post-World War II international human rights legal regime, like the U.N. Guiding Principles, hardening into international *jus cogens* norms.[213]

As a result of this transnational judicial dialogue, the standard for tort liability for corporations appears to be approaching an average set of standards—in North America and beyond—that may determine a new test for corporate liability for human rights violations.[214] The majority reasoning in *Nevsun,* and the various opinions in the *Nestlé* decision, approach a common consensus that private actors—including corporations, as legal persons—can be held liable for tort violations in domestic courts whose laws include violations of customary international law. While *Kiobel* left vague the requirements of the defendants' connection to the domestic court in these cases, the decision of the Canadian Supreme Court and the Ninth Circuit's formulations suggest that two broad categories constitute sufficient force: (1) knowing or reckless violation of customary international law by a domestic corporation or subsidiary of the corporation and (2) control of the domestic corporation or subsidiary of the corporation over the action of the actor ultimately committing the violation. When

211. *See* Brief of Former Gov't Off. as *Amici Curiae* in Support of Respondents, Nestlé USA, Inc. v. Doe I, Cargill, Inc. v. Doe I (Nos. 19-416 & 19-453), 2020 WL 6292567; *Nevsun*, 2020 SCC 5 at para. 85.

212. *See generally* Brief of Amicus Curiae EarthRights Int'l in Support of Plaintiffs-Appellants at 2, Doe I v. Nestlé USA, Inc., 766 F.3d 1013 (9th Cir. 2015) (No. 10-56739), 2011 WL 2679957, at *2–3; *see generally* Factum of Intervener EarthRights Int'l, Araya v. Nevsun Res. Ltd., [2017] B.C.C.A. 401 (Can.).

213. Nestlé v. Doe Transcript, *supra* note 33, at 41; Nevsun Res. Ltd. v. Araya, 2020 SCC 5, para. 115, [2020] 443 D.L.R. 4th (Can.).

214. See Clare Connellan et al., *Okpabi v Royal Dutch Shell Plc: UK Supreme Court Allows Nigerian Citizens' Environmental Damage Claim to Proceed Against UK Parent Company*, WHITE & CASE LLP (Feb. 19, 2021), https://www.whitecase.com/publications/alert/okpabi-v-royal-dutch-shell-plc-uk-supreme-court-allows-nigerian-citizens [https://perma.cc/Z9Q8-QC23], for an example from the Supreme Court of the United Kingdom that illustrates the trend toward corporate accountability for parent companies, and a discussion of the corporate risk that parent companies should mitigate in international supply chains in the future to comply with these standards.

corporations meet these standards, domestic courts have the jurisdiction to hear tort claims rooted in customary international law.[215] In *Nestlé*, the complaint did not sufficiently allege the defendant companies' knowledge of the illegal conduct to trigger ATS application.[216] But even Justice Thomas, who favored the most restrictive interpretation, shied away from dealing the ATS a death blow.[217] It survives with an uncertain future—but in a markedly different international law context—where there is a trend toward corporate accountability.[218]

V. CONCLUSION

The latest decisions from the North American high courts impact the efficacy of customary international law to bring corporations to justice for human rights abuses. The legal trends in North America, coupled with the growing body of treaty law and norms emerging from multilateral actors like the United Nations, create a norm *against* corporate impunity which will make it more difficult for corporations to evade liability internationally and domestically. Regardless of the limited rulings against corporations, for practitioners, the writing is on the wall: multinational corporations must monitor their supply chains or they will face consequences that can include years of litigation.[219]

The shift that emerged from the Canadian Supreme Court in *Nevsun*, and the U.S. Supreme Court in *Nestlé*, will likely shape the way customary international law is upheld in domestic fora. To be

215. Nestlé v. Doe Transcript, *supra* note 33, at 24; *Nevsun*, SCC 5 at paras. 119–21.

216. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021); *Supreme Court Limits Extraterritorial Reach of The Alien Tort Statute*, GIBSON DUNN (June 17, 2021), https://www.gibsondunn.com/supreme-court-limits-extraterritorial-reach-of-the-alien-tort-statute/ [https://perma.cc/72AV-SC9J] ("Plaintiffs bringing suit under the ATS must establish a strong, domestic nexus for their claim. It is not sufficient for plaintiffs merely to allege general corporate decisionmaking in the United States.").

217. *Nestlé USA, Inc.*, 141 S. Ct. at 1936.

218. Kayla Winarsky Green & Timothy McKenzie, *Looking Without and Looking Within: Nestlé v. Doe and the Legacy of the Alien Tort Statute*, 25 ASIL INSIGHTS, July 15, 2021, at 1, 6.

219. *See* Debra Cassens Weiss, *Afternoon Briefs: SCOTUS Tosses Child Slavery Case; DOJ Drops Suit and Probe Over Bolton Book*, ABAJOURNAL.COM (June 17, 2021, 3:48 PM), https://www.abajournal.com/news/article/afternoon-briefs-scotus-tosses-child-slavery-case-doj-drops-suit-and-probe-over-bolton-book [https://perma.cc/NSJ5-DGYU] (noting the counsel for the plaintiffs in *Nestlé v. Doe* plan to file an amended complaint: the court battle is far from over for Nestlé and Cargill).

successful in litigating a tort claim against a corporation arising under international law in domestic courts requires a systematic explanation of not just the law's connection to the domestic judiciary, but also the defendant corporation's connection to the domestic fora.

These rulings also have massive implications for corporations. The North American high courts' willingness to allow tort liability suits against corporations, coupled with other nations' approaches toward codifying corporate liability in line with the U.N. Guiding Principles, should raise concerns for multinational corporations.[220] It is becoming more costly for corporations to take legally dubious shortcuts—knowingly or recklessly—in the court of public opinion *and* in domestic courts.[221] Amid increasing calls for transparency and accountability in supply chain management, corporations risk trapping themselves and their subsidiaries or agents in decades of litigation by neglecting these legal developments.[222] By poorly monitoring their supply chain, corporations also risk their reputational standing even if they manage, like Nestlé and Cargill, to win in court.[223] They provide consumers, who have greater access to supply chain information than ever before, an incentive to buy from other companies.[224]

220. See generally Macchi & Bright, *supra* note 89, for a discussion of how States incorporated U.N. Guiding Principles into domestic law.

221. Villena & Gioia, *supra* note 17. *See generally* Sabine Michalowski, *Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those That Trigger Corporate Complicity Liability*, 50 TEX. INT'L L. J. 403 (2015) (discussing of the *mens rea* required in various jurisdictions, including the United States, to trigger a finding of aiding and abetting liability).

222. *See* Rechtbank Den Haag 1 mei 2019, ECLI:NL:RBDHA:2019: 4233 (Neth.) (affirming jurisdiction for the plaintiffs in *Kiobel* to sue Royal Dutch Petroleum in the Netherlands, where the company is headquartered, as litigation in this case stretches into a third decade).

223. *E.g.*, Joseph Stiglitz & Geoffrey Heal, *Opinion: Savor Your Chocolate. Enjoy Your Dividends. Enslaved Children May Have Grown the Cocoa That Made It All Possible*, MARKETWATCH (July 13, 2021, 7:05 AM), https://www.marketwatch.com/story/savor-your-chocolate-enjoy-your-dividends-enslaved-children-may-have-grown-the-cocoa-that-made-it-all-possible-1162612387%E2%80%A6 [https://perma.cc/335N-X2RB].

224. *See e.g.*, PETER M. GERHART, TORT LAW AND SOCIAL MORALITY 206–08 (Cambridge Univ. Press, 2010). The supply chain disruptions of the coronavirus pandemic also brought to the fore a number of new services to monitor, and increase the transparency of, supply chains in real time. Consequently, companies may not be able to plead ignorance of any human rights violations in their supply chain, or their subsidiaries' supply chains. See, e.g., *Sustainability*, PROJECT44, https://www.project44.com/sustainability [https://perma.cc/6VQU-WG8W], for the socially conscious pledge of such a service.

Most importantly, it is past time for definite standards to emerge to support victims of human rights abuses. Arguments that host countries are the most appropriate forum for claims are persuasive only until matched with the reality that host countries with populations vulnerable to human rights abuses often lack the legal infrastructure to hold perpetrators accountable.[225] If the United States fails to hold accountable corporations that do business with human rights abusers in their supply chains, the State may be seen as a poor partner in treaties or trade.[226] Further, as many scholars and jurists have acknowledged, it is preferable to address violations of human rights law in criminal proceedings.[227] Nestlé and Cargill, despite the favorable ruling in summer 2021, still condemned the use of child slavery in their supply chains without acknowledging their own fault.[228] Judge Posner noted the absurdity of imagining war criminals like the Nazis charged with committing torts like "wrongful death, false imprisonment, intentional infliction of emotional distress, fraud, conversion, trespass, medical malpractice, or other torts," implying that the banal nature of these tort actions does not capture the severity of human rights abuses.[229] However, when the alternative to civil proceedings is not criminal proceedings, but impunity, it is even more important that victims are able to seek redress via tort proceedings in a foreign forum. Though no nation in the world has yet become a *custos morum*, the jurisprudence from North America suggests that a regional force may well be emerging.

225. Tara L. Van Ho, *'Band-Aids Don't Fix Bullet Holes': In Defence of a Traditional State-Centric Approach*, *in* THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY 111, 112 (Jernej Letnar Černič & Nicolás Carrillo-Santarelli eds., 2020); Thompson et al., *supra* note 30, at 842.

226. Oona Hathaway, *Oral Argument 2.0: Nestlé USA, Inc. v. Doe I*, OYEZ (2020), https://argument2.oyez.org/2020/nestle-usa-inc-v-doe-i/ [https://perma.cc/P5NE-PKXG].

227. *See* Kelly, *supra* note 16, at 340 (discussing the historical roots of criminal liability for corporations, and its present-day limitations with regard to corporations as legal persons, contrasted with corporate officers as individuals).

228. Vivienne Walt, *Big Chocolate Wins Its Child-Labor Case in Supreme Court*, FORTUNE (June 17, 2021, 1:35 PM), https://fortune.com/2021/06/17/child-labor-case-supreme-court-big-chocolate-nestle-cargill-scotus/ [https://perma.cc/857U-TRGA].

229. Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1018 (7th Cir. 2011).