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## NOTES

### WHAT SHOULD A SHOWING OF INTENT OR PURPOSE REQUIRE IN A CASE OF CORPORATE ACCESSORY LIABILITY FOR CHILD SLAVERY UNDER THE ALIEN TORT STATUTE?

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#### INTRODUCTION

Abdul has been working for three years.<sup>1</sup> He works six days a week for up to fourteen hours per day, but he has never earned wages for his work.<sup>2</sup> Instead, he occasionally receives scraps of food to eat, is locked in a small room at night, and is not permitted to leave the work premises.<sup>3</sup> He fears trying to leave as his friends have witnessed guards cut open the feet of workers who have attempted to escape, and he knows guards have forced failed escapees to drink urine.<sup>4</sup> Abdul bears machete scars on his legs, but his emotional scars likely go much deeper.<sup>5</sup> Abdul is ten years old and has never spent a day in school; instead, he works on a cocoa farm in Côte d'Ivoire (the Ivory Coast).<sup>6</sup> "Abdul is a . . . child slave."<sup>7</sup>

Abdul's story is similar to the circumstances alleged in the complaint filed by the plaintiffs in *Doe v. Nestle USA, Inc.*<sup>8</sup> The Ivory Coast is a country in western sub-Saharan Africa that produces seventy percent of the world's supply of cocoa;

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1. See generally David McKenzie & Brent Swails, *Child Slavery and Chocolate: All Too Easy to Find*, CNN (Jan. 19, 2012, 12:03 PM), <http://thecnnfreedomproject.blogs.cnn.com/2012/01/19/child-slavery-and-chocolate-all-too-easy-to-find/> [<http://perma.cc/4B6L-R32D>] (interviewing Ivorian child slaves named Abdul and Yacou).

2. See *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1017 (9th Cir. 2014) (describing the working conditions alleged by the plaintiffs).

3. *Id.*

4. *Id.*

5. See generally McKenzie & Swails, *supra* note 1.

6. *Id.*

7. *Id.*

8. 766 F.3d at 1017.

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hence, it plays a dominant role in the international chocolate industry.<sup>9</sup> According to a report by Tulane University, during the 2013-2014 Ivory Coast harvest season, there were over one million child laborers ages five to seventeen in the cocoa sector, evidencing the widespread use of child slavery in the cocoa industry.<sup>10</sup>

In *Nestle*, three alleged victims of child slavery from the Ivory Coast brought a class action suit under the Alien Tort Statute for aiding and abetting child slavery against Nestle USA Incorporated, Archer Daniels Midland Company (ADM), Cargill Incorporated Company, and Cargill Cocoa.<sup>11</sup> The complaint alleged the defendant corporations aided and abetted the use of child slavery on the Ivorian cocoa farms through their knowing financial assistance, technical assistance, and continued support to the cocoa farms.<sup>12</sup>

Since the Second Circuit's decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*<sup>13</sup> in 2009, disagreement has arisen among the United States courts of appeals as to the required mens rea necessary to support a claim of aiding and abetting liability brought under the Alien Tort Statute.<sup>14</sup> In *Talisman*, the Second Circuit applied a more stringent intent or purpose mens rea standard<sup>15</sup> as opposed to the knowledge mens rea standard courts had previously applied.<sup>16</sup> In *Nestle*, the Ninth Circuit concluded the more stringent intent or purpose mens rea standard was indeed satisfied and, therefore, the plaintiffs' stated claim for aiding and abetting slavery overcame the corporate defendants' motion to dismiss.<sup>17</sup>

However, an eight-judge dissenting opinion was published following the Ninth Circuit's denial of the defendants' petitions for rehearing and rehearing en banc.<sup>18</sup> Judge Bea's dissenting opinion argued that satisfaction of a purpose mens rea standard in *Nestle* would require the difficult showing that the defendant corporations engaged in the Ivory Coast cocoa trade with the actual intent that the plaintiffs be enslaved, as opposed to only trying to obtain the cheapest cocoa in

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9. *Id.*

10. SCH. OF PUB. HEALTH & TROPICAL MED., TULANE UNIV., 2013/14 SURVEY RESEARCH ON CHILD LABOR IN WEST AFRICAN COCOA GROWING AREAS 35 (July 30, 2015), [http://www.childlaborcocoa.org/images/Payson\\_Reports/Tulane%20University%20-%20Survey%20Research%20on%20Child%20Labor%20in%20the%20Cocoa%20Sector%20-%202015.pdf](http://www.childlaborcocoa.org/images/Payson_Reports/Tulane%20University%20-%20Survey%20Research%20on%20Child%20Labor%20in%20the%20Cocoa%20Sector%20-%202015.pdf) [https://perma.cc/E53S-A5YB].

11. 766 F.3d at 1016.

12. *Id.* at 1017.

13. 582 F.3d 244 (2d Cir. 2009).

14. *See Nestle*, 766 F.3d at 1023-24.

15. "Intent" and "purpose" are often used interchangeably to refer to the same, more stringent, mens rea standard.

16. 582 F.3d at 259.

17. 766 F.3d at 1024.

18. *Doe v. Nestle USA, Inc.*, 788 F.3d 946, 946 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc). A hearing "en banc" means "[w]ith all judges present and participating." *En banc*, BLACK'S LAW DICTIONARY (10th ed. 2014).

order to maximize profits.<sup>19</sup> The defendants' subsequent petition for writ of certiorari filed in September 2015 argued the same.<sup>20</sup> Nonetheless, under distinguishable and exceptional circumstances such as those presented in *Nestle*, should the courts have to look that far?

The purpose of this Note is to analyze whether, in a case with discernible facts like *Nestle*, a mens rea requirement should be judged to have been met when a defendant is providing indirect, continuing, knowing support for the use of child slavery. In a broader sense, should a mens rea requirement in such a case be judged to have been met, or not, partly with regard to the moral gravity of the circumstances presented? *Nestle* presents corporate defendants who "dominate the Ivorian cocoa market," "import most of the Ivory Coast's cocoa harvest into the United States," and "continue to supply money, equipment, and training to Ivorian farmers, knowing that these provisions will facilitate the use of forced child labor."<sup>21</sup>

Part I of this Note gives an overview of the Alien Tort Statute (ATS), the statute under which the plaintiffs' aiding and abetting claim was brought.<sup>22</sup> Part II discusses the circuit split over the mens rea standard for aiding and abetting liability under the ATS.<sup>23</sup> Part III briefly analyzes both sides of the debate over whether a knowledge or purpose mens rea standard should be applied in aiding and abetting claims brought under the ATS.<sup>24</sup> It also considers why, at least under the particular circumstances in *Nestle*, the corporate defendants' knowledge and support of the cocoa farms' ongoing use of child slavery for cost-cutting purposes should suffice as the mens rea requirement, even if a purpose mens rea standard is applied.<sup>25</sup>

## I. THE ALIEN TORT STATUTE

### A. History of the ATS

The claim brought by the plaintiffs in *Nestle* was brought under 28 U.S.C. § 1350, known as the Alien Tort Statute.<sup>26</sup> The ATS, enacted in 1789, provides "[t]he [U.S.] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>27</sup> The statute has been interpreted by courts to be merely

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19. *Nestle*, 788 F.3d at 949 (Bea, J., dissenting from denial of rehearing en banc).

20. Petition for a Writ of Certiorari at \*9-12, *Nestle*, 2015 U.S. S. Ct. Briefs LEXIS 3283 (Sept. 18, 2015) (No. 15-349) (denied on Jan. 11, 2016).

21. 766 F.3d at 1017.

22. *Id.* at 1016.

23. *See infra* Part II.

24. *See infra* Part III.

25. *See infra* Part III.D.1-2.

26. 766 F.3d at 1018.

27. 28 U.S.C. § 1350 (2012). "Customary international law" is often used synonymously with "the law of nations."

jurisdictional as it “allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law.”<sup>28</sup>

Nevertheless, in its more modern use, the ATS has been recognized “as an instrument for correcting human rights abuses.”<sup>29</sup> However, increased use of the ATS in such a role has generated inconsistent application of the statute by courts.<sup>30</sup> In recognition of this, in his 2015 publication of *The Court and the World*, Supreme Court Justice Stephen Breyer stated, “interpreting [the ATS] to help achieve its objective” of “help[ing] to protect basic human rights . . . has proved difficult, in large part because of the foreign implications of any interpretation.”<sup>31</sup>

Starting with its origination, the ATS was enacted as part of the Judiciary Act of 1789 in response to Congress’s “lack of legal authority” to “provide[] foreign citizens with a right of action in American courts so that they could sue for violations of the law of nations.”<sup>32</sup> For example in 1787, two years prior to the enactment of the ATS, the Dutch ambassador, a foreign official residing in the United States, was unable to bring a claim against a New York City police officer for “the unauthorized raiding of [his] home.”<sup>33</sup> Following this, in 1794, the ATS was further recognized as providing protection to foreign persons from unlawful action taken by Americans on foreign soil after the American attorney general claimed that he could not punish “a group of Americans [who] joined a fleet of French privateers in a raid on [a] British colony” because “the raid took place outside [of] the United States.”<sup>34</sup>

After 1794, the ATS was almost never invoked for 180 years until “the Second Circuit breathed life into the statute”<sup>35</sup> in 1980 in the case of *Filartiga v. Pena-Irala*.<sup>36</sup> In *Filartiga*, the Second Circuit construed the ATS to allow two Paraguayan citizens to bring a civil action suit against a Paraguayan police officer who had tortured and killed their son allegedly “in retaliation for his father’s political activities and beliefs.”<sup>37</sup> The Second Circuit seemingly expanded the scope of the ATS with its conclusion that the ATS should be construed “not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”<sup>38</sup> Following

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28. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

29. GEORGE P. FLETCHER, *TORT LIABILITY FOR HUMAN RIGHTS ABUSES* 20 (2008).

30. *See discussion infra* Part I.B-C, Part II.

31. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 134 (2015).

32. *Id.* at 136.

33. *Id.*

34. *Id.*

35. *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1018 (9th Cir. 2014).

36. 630 F.2d 876 (2d Cir. 1980).

37. *Id.* at 878.

38. *Id.* at 887.

*Filartiga*, the courts experienced a substantial influx in the amount of human rights cases, specifically torture claims, brought under the ATS.<sup>39</sup> Even further, the Second Circuit's reasoning in *Filartiga*, which recognized torture as a violation of the law of nations, soon served as a popular mode for bringing other ATS cases involving gross human rights abuse into the United States courts.<sup>40</sup>

The question of "what conduct [can] give rise to liability . . . under the ATS"<sup>41</sup> was addressed by the United States Supreme Court in the 2004 case of *Sosa v. Alvarez-Machain*.<sup>42</sup> In an effort to reach a middle ground interpretation, the Supreme Court recognized contemporary ATS claims should not be limited to causes of action based on the original "historical paradigms," but rather should recognize "claim[s] based on the present-day law of nations . . . accepted by the civilized world."<sup>43</sup> Even with the Supreme Court's cautionary guidance rendered in *Sosa* on recognizing new causes of action based on the "present-day law of nations,"<sup>44</sup> "federal courts have permitted plaintiffs to pursue ATS claims based on a broad range of misconduct, including genocide, war crimes, torture,"<sup>45</sup> and as in *Nestle*, aiding and abetting crimes against humanity, such as slave labor.<sup>46</sup>

#### B. Corporate Liability Under the ATS

As stated by Justice Breyer, following *Filartiga*, "the courts began to expand not only the categories of actions that might give rise to suit under the [ATS] but also the categories of those persons or entities who might be sued."<sup>47</sup> The debate still continues among courts whether corporations can be held liable under the ATS.<sup>48</sup> The Supreme Court has given scant guidance on this issue, but mentioned

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39. See BREYER, *supra* note 31, at 140.

40. See *id.* at 141.

41. See *id.* at 152.

42. 542 U.S. 692 (2004).

43. *Id.* at 715, 724-25, 732 (recognizing the historical paradigms to be "violation of safe conducts, infringement of the rights of ambassadors, and piracy").

44. *Id.* at 725. As a caution to federal courts creating new causes of action under the ATS, the Supreme Court also stated that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Id.* at 732.

45. *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1019 (9th Cir. 2014).

46. *Id.* at 1017; see, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *cert. granted*, 133 S. Ct. 1995 (2013) (permitting a claim for aiding and abetting genocide and war crimes); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885, 887-88 (2d Cir. 1980) (permitting plaintiffs to pursue their ATS claim because torture is prohibited by international law); see also BREYER, *supra* note 31, at 155 (finding the number and type of claims brought under the ATS increased following *Sosa*).

47. BREYER, *supra* note 31, at 142.

48. *Nestle*, 766 F.3d at 1021 ("The issue of corporate liability has been more thoroughly examined in the circuit courts, which have disagreed about whether and under what circumstances corporations can face liability for ATS claims."); see also BREYER, *supra* note 31, at 142-43.

in a footnote in *Sosa* that, in accepting a cause of action under the ATS, “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>49</sup>

The use of the words “such as a corporation”<sup>50</sup> in this footnote has permitted the inference by some courts that corporations can be held liable under the ATS.<sup>51</sup> Although there is no categorical rule of corporate immunity or liability under the ATS, some courts have held, like in *Nestle*, that ATS claims may be brought against a corporation.<sup>52</sup> In *Nestle*, the Ninth Circuit concluded, “The prohibition against slavery applies to state actors and non-state actors alike, and there are no rules exempting acts of enslavement carried out on behalf of a corporation.”<sup>53</sup>

### C. Aiding and Abetting Liability Under the ATS

In continuing to test how far liability under the ATS could stretch, courts later started to receive claims for accomplice liability under the ATS.<sup>54</sup> Several courts recognize “that an accomplice . . . who . . . aids and abets a violation of the law of nations . . . consequently can be made a proper defendant under the ATS.”<sup>55</sup> In *Nestle*, “the specific norms underlying the plaintiffs’ ATS claim are the norms against aiding and abetting slave labor.”<sup>56</sup> *Sosa* left open the question of whether the aiding and abetting standard should be drawn from domestic or international law.<sup>57</sup> However, as adopted by the Ninth Circuit in *Nestle*, this Note will presume the legal standard for aiding and abetting liability under the ATS is an international law inquiry, rather than an American common law inquiry, even though the ATS is a United States statute only.<sup>58</sup>

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49. 542 U.S. 692, 732 n.20 (2004).

50. *Id.*

51. See Angela Walker, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the mens rea standard for corporate aiding and abetting is knowledge*, 10 NW. U. J. INT’L HUM. RTS. 119, 119-20 n.8 (2011).

52. See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *cert. granted*, 133 S. Ct. 1995 (2013) (recognizing claims under the ATS against a corporation for genocide and war crimes); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated in part*, 527 F. App’x 7 (D.C. Cir. 2013) (unpublished opinion), *dismissed in part*, No. 01-1357, 2015 U.S. Dist. LEXIS 91107, at \*8 (D.D.C. July 6, 2015) (recognizing corporations can be held liable for torts committed by their agents in ATS litigation); see also Walker, *supra* note 51, at 120 (listing appellate courts who have held or assumed that corporations are proper defendants under the ATS).

53. 766 F.3d at 1022.

54. BREYER, *supra* note 31, at 143.

55. *Id.*

56. 766 F.3d at 1020.

57. See generally BREYER, *supra* note 31, at 145.

58. See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011), *cert. granted*, 133 S. Ct. 1995 (2013). For more information on this issue, see Charles Ainscough, *Choice of Law and Accomplice Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT’L L. 588 (2010).

On its surface, a claim for aiding and abetting under the ATS has two elements: a mens rea and an actus reus on behalf of the defendant.<sup>59</sup> The actus reus element, which requires the defendant to provide some sort of “practical assistance” to the principal that “has a substantial effect on the perpetration of the [violation],” has not been contested among the courts.<sup>60</sup> On the contrary, the mens rea element has been a source of dispute.<sup>61</sup> Absent a Supreme Court ruling as to the required mens rea for a claim of aiding and abetting brought under the ATS, confusion has emerged among the circuit courts of appeals as to which standard to apply.<sup>62</sup> Determining the proper mens rea standard is important as it determines the evidentiary burden on the plaintiff bringing the claim, which in turn either increases or decreases the amount of human rights claims that can be successfully brought under the ATS.<sup>63</sup>

The Second and Fourth Circuits have held an aiding and abetting ATS defendant must act with the *purpose* of facilitating the act, while other courts have held that satisfaction of a less stringent knowledge standard should suffice.<sup>64</sup> In *Nestle*, the Ninth Circuit concluded the more stringent purpose standard was satisfied,<sup>65</sup> but it has been disputed whether *Nestle* really meets the purpose standard that was laid out in two cases decided before it.<sup>66</sup>

## II. THE CIRCUIT SPLIT

### A. Doe v. Nestle USA, Inc.

As previously introduced, the plaintiffs in *Nestle* are former child slaves, ages twelve to fourteen, who were forced to work on cocoa farms in the Ivory Coast for twelve to fourteen hours per day, six days a week, and without pay.<sup>67</sup> The

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59. See, e.g., *Nestle*, 766 F.3d at 1023-26; see also 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, 409 (2015) (stating “complicity liability requires both an actus reus and a mens rea”).

60. See, e.g., *Doe v. Unocal Corp.*, 395 F.3d 932, 950 (9th Cir. 2002) (discussing different International Tribunals' definitions of actus reus).

61. See *Nestle*, 766 F.3d at 1023-24; see also Michalowski, *supra* note 59, at 414 (finding courts commonly focus on the mens rea element in complicity liability cases and bypass analysis of the actus reus element).

62. See Ryan S. Lincoln, *To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604, 605 (2010).

63. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260-61 (2d Cir. 2009).

64. See *Doe v. Exxon Mobil Corp.*, No. 01-1357, 2015 U.S. Dist. LEXIS 91107, at \*30-31 (D.D.C. July 6, 2015) (unpublished opinion) (emphasis added).

65. 766 F.3d at 1024.

66. See *Doe v. Nestle USA, Inc.*, 788 F.3d 946, 950 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc).

67. 766 F.3d at 1017.

plaintiffs alleged they were only given scraps of food to eat, “were beaten with whips and tree branches when the guards felt they were not working quickly enough,” were not allowed to leave the plantation, and “were forced to sleep in a small, locked room with several other children on the floor.”<sup>68</sup> One plaintiff “witnessed guards cut open the feet of children who attempted to escape” and another plaintiff “knew that the guards forced failed escapees to drink urine.”<sup>69</sup>

The aiding and abetting claim brought by the alleged child slaves in *Nestle* essentially rests on the corporate defendants’ indirect, continuing, knowing support of the Ivorian cocoa farmer’s using child slavery to harvest cocoa.<sup>70</sup> These defendant corporations do not own the cocoa farms themselves, but they dominate and “maintain an unusual degree of control over the [Ivorian] cocoa market because of their enormous buying power and the resources they provide to [the] plantations.”<sup>71</sup> The defendants “maintain and protect a steady supply of cocoa by forming exclusive buyer/seller relationships with Ivorian [cocoa] farms;”<sup>72</sup> thus, their contractual negotiations could presumably alter some conditions of production, even if higher prices resulted for chocolate consumers.<sup>73</sup>

Additionally, the defendants import a large majority of the cocoa harvested to the United States, offer financial assistance including “advanced payment for cocoa and spending money for the farmers’ personal use,” and provide technical farming assistance including “equipment and training in growing techniques, fermentation techniques, farm maintenance, and appropriate labor practices.”<sup>74</sup> In addition, the Ninth Circuit’s opinion found the defendants are “well aware of the child slavery problem in the Ivory Coast” due to published reports and the defendants numerous trips to the Ivory Coast for training and quality control visits.<sup>75</sup> Moreover, the defendant corporations have “actively lobbied against legislation”<sup>76</sup> to curb the use of child slave labor.<sup>77</sup>

The Ninth Circuit did not resolve the dispute whether a purpose or knowledge standard should apply to aiding and abetting claims brought under the ATS.<sup>78</sup> It concluded, however, that “the plaintiffs’ allegations satisfy the more stringent purpose standard, and therefore state a claim for aiding and abetting [child]

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68. Brief in Opposition at \*7, *Nestle USA., Inc. v. Doe*, 2015 U.S. S. Ct. Briefs LEXIS 4510 (Dec. 4, 2015) (No. 15-349).

69. *Nestle*, 766 F.3d at 1017.

70. *See generally id.* at 1016-17.

71. *Id.* at 1017; *see also* Brief in Opposition, *supra* note 68, at \*7-8.

72. *Nestle*, 766 F.3d at 1017.

73. *See* Petition for a Writ of Certiorari, *supra* note 20, at \*13 (stating the Ninth Circuit majority found that “[a]ccording to the complaint, [the corporate defendants] had enough control over the Ivorian cocoa market that they could have stopped or limited the use of child slave labor by their suppliers”).

74. *Nestle*, 766 F.3d at 1017.

75. *Id.*; *see also* Brief in Opposition, *supra* note 68, at \*8.

76. Brief in Opposition, *supra* note 68, at \*9.

77. *Nestle*, 766 F.3d at 1017.

78. *Id.* at 1024.

slavery.”<sup>79</sup> Accordingly, the court denied the corporate defendants’ 12(b)(6) Motion to Dismiss for failure to state a claim for which relief can be granted.<sup>80</sup> The court’s analysis hinged on the inference that “the defendants placed increased revenues before basic human welfare, and intended to pursue all options available to reduce their cost for purchasing cocoa.”<sup>81</sup>

In this instance, obtaining the cheapest price was accomplished through allegedly, calculatedly, and consciously choosing to support the illegal use of child slavery.<sup>82</sup> Additionally, the court explained that the costs saved by the defendant corporations “furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that the defendants acted with the purpose to facilitate child slavery.”<sup>83</sup> The Ninth Circuit relied on the actual, or at least consciously sought after, financial benefit derived by the defendants through their conduct to distinguish it from two earlier ATS cases discussed next, where it was determined the purpose mens rea standard was not met.<sup>84</sup>

#### B. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*

In 2009, the Second Circuit judged a purpose mens rea standard to not have been met to overcome the lower court’s grant of summary judgment in the case of *Presbyterian Church of Sudan v. Talisman Energy, Inc.*<sup>85</sup> In *Talisman*, Sudanese victims of alleged human rights abuses brought a claim under the ATS against Talisman Energy, Inc., a Canadian corporation.<sup>86</sup> Talisman held a twenty-five percent stake in the Greater Nile Petroleum Exporting Company (GNPOC), which conducted oil development operations in Sudan.<sup>87</sup> GNPOC’s operations took place amidst the Sudanese civil war, causing GNPOC to coordinate with Sudanese military forces for security while conducting resource development activities.<sup>88</sup> The plaintiffs alleged some of the GNPOC’s activities—building all-weather roads, upgrading air strips, and creating buffer zones around GNPOC facilities—aided and abetted the Government of Sudan in committing genocide, torture, war crimes, and crimes against humanity.<sup>89</sup>

The Second Circuit held the “mens rea standard for aiding and abetting liability in ATS actions [was] purpose”<sup>90</sup> and that Talisman’s knowledge of the Sudanese Government activities did not rise to the purpose standard as there was

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79. *Id.*

80. *Id.*

81. *Id.*

82. *See generally id.*

83. *Id.*

84. *See id.* at 1024-25.

85. 582 F.3d 244, 264 (2d Cir. 2009).

86. *Id.* at 247.

87. *Id.* at 249.

88. *Id.*

89. *Id.* at 249-50, 253.

90. *Id.* at 259.

insufficient evidence that “Talisman acted with the purpose to advance violations of international humanitarian law.”<sup>91</sup> The Ninth Circuit contrasted *Talisman* with *Nestle* by pointing out Talisman did not benefit from the underlying human rights atrocities carried out by the Sudanese military, but rather was harmed by the government’s genocidal conduct to the extent that it ultimately had to abandon its Sudanese venture, while Nestle continued its cocoa business.<sup>92</sup> The previously mentioned eight-judge dissenting opinion from the Ninth Circuit’s denial of rehearing en banc in *Nestle*, written by Judge Bea, suggested *Talisman* and *Nestle* are similar.<sup>93</sup>

However, the defendants’ amount of control in the actions taking place and the benefits received by the defendant from the actions seem utterly distinguishable. First, unlike in *Nestle* where the defendant corporations had exclusive buyer/seller relationships with the cocoa farmers and exercised great economic leverage in the relationship,<sup>94</sup> Talisman Energy was only a twenty-five percent stakeholder in the corporation responsible for the oil operations in Sudan.<sup>95</sup> The remaining shares of the GNPOC were held by entities from China, Malaysia, and Sudan, attenuating Talisman’s control and involvement in the activities.<sup>96</sup>

Further, the relationship in *Talisman* seems to be less of a symbiotic, negotiated, contractual relationship than the relationship in *Nestle* between the corporate defendants and the cocoa farmers.<sup>97</sup> The corporate defendants in *Nestle* were well aware through their “numerous visits to Ivorian farms” that their financial, technical, and continued support to the Ivorian cocoa farmers were directly resulting in the use of child slavery.<sup>98</sup> In *Talisman*, the court found the activities of the GNPOC would “generally accompany any natural resource development business or the creation of any industry.”<sup>99</sup> It seems implausible to think the same could be said about supporting the use of child slavery.

### C. *Aziz v. Alcolac, Inc.*

Additionally, in *Aziz v. Alcolac, Inc.*, the Fourth Circuit adopted the Second Circuit’s *Talisman* analysis for concluding that the mens rea standard for an ATS

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91. *Id.* at 264.

92. *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014).

93. *Doe v. Nestle USA, Inc.*, 788 F.3d 946, 950 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc).

94. 766 F.3d at 1017.

95. *See Talisman Energy, Inc.*, 582 F.3d at 261.

96. *Id.*

97. *Compare Talisman Energy Inc.*, 582 F.3d at 261 (explaining Talisman’s twenty-five percent stake in GNPOC), *with Nestle*, 766 F.3d at 1017 (describing the exclusive buyer/ seller relationships of the corporate defendants in *Nestle* and their exercise of great economic leverage in the market).

98. *See generally* 766 F.3d at 1017, 1024-25.

99. 582 F.3d at 260-61.

claim of aiding and abetting liability is purpose.<sup>100</sup> In *Aziz*, Alcolac Inc., a chemical manufacturer, sold thiodiglycol (TDG) to Saddam Hussein's Iraqi regime, which then used the TDG to manufacture mustard gas that was used as a chemical weapon to kill Kurdish enclaves during the late 1980s.<sup>101</sup> Alcolac Inc. allowed the shipment despite being specifically warned by the U.S. Department of State that TDG was subject to export restrictions.<sup>102</sup> An ATS claim was brought against Alcolac Inc. by individuals of Kurdish descent who were either victims of the attacks or family members of deceased victims.<sup>103</sup> The use of the mustard gas by the Iraqi regimes against the Kurdish people "left thousands dead, maimed, or suffering from physical and psychological trauma."<sup>104</sup>

The Fourth Circuit held that "for liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation."<sup>105</sup> In applying this standard, the court concluded:

[T]he Appellants' sole reference to Alcolac's intentional conduct . . . is an allegation that Alcolac placed [TDG] "into the stream of international commerce with the purpose of facilitating the use of said chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq."<sup>106</sup>

The Ninth Circuit distinguished *Nestle* from *Aziz* by suggesting the plaintiffs in *Aziz* "failed to allege that the defendants had anything to gain from the use of chemical weapons."<sup>107</sup> Furthermore, similar to the attenuated relationship in *Talisman*, Alcolac delivered the TDG shipments to NuKraft Mercantile Corporation, located in New York, who then facilitated the shipment to Europe and elsewhere through a Swiss Company, which then later reached Iraq.<sup>108</sup> Even though Alcolac Inc. knew that NuKraft would deliver these shipments overseas,<sup>109</sup> the relationship does not seem to compare to the exclusive buyer/seller relationships demonstrated by the defendants in *Nestle*, nor does Alcolac Inc. seem to exercise the amount of economic leverage as the corporate defendants in *Nestle*.<sup>110</sup>

In Judge Bea's dissent from the denial of rehearing en banc, in comparing *Aziz* to *Nestle*, he stated, "If selling chemicals with the knowledge that the chemicals will be used to create lethal chemical weapons does not constitute

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100. 658 F.3d 388, 398 (4th Cir. 2011).

101. *Id.* at 389-91.

102. *Id.* at 390.

103. *Id.* at 391.

104. *Id.*

105. *Id.* at 401.

106. *Id.*

107. *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014).

108. *Aziz*, 658 F.3d at 391.

109. *Id.*

110. *See Nestle*, 766 F.3d at 1024-25.

purpose that people be killed, how can purchasing cocoa with the knowledge that slave labor may have lowered its sale price constitute purpose that people be enslaved?”<sup>111</sup> Judge Bea rebutted the majority’s reply that “the defendants [in *Aziz*] had nothing to gain from the violations of international law” by stating that “the more Saddam Hussein used chemical weapons to kill his opponents, the more of Alcolac’s chemicals he would need and thus the higher the sales of Alcolac’s products; the higher their sales, of course, the higher their profit.”<sup>112</sup>

Regardless of whether Alcolac Inc. was receiving a direct financial benefit, Alcolac’s level of involvement in the activities that took place does not compare to the involvement of the corporate defendants in *Nestle*. The defendants in *Nestle* were financially, technically, and continuously supporting the violations of international law,<sup>113</sup> whereas in *Aziz*, the allegations concentrate on a single incident.<sup>114</sup> *Nestle* does not deal with a one-time cocoa purchase from the Ivory Coast where the cocoa happened to be harvested by child slaves, but rather numerous, continued purchases in addition to providing other forms of support while knowing child slavery was being used in the process.<sup>115</sup>

It should be noted that the distinguishing of *Talisman* and *Aziz* from *Nestle* is not to express disagreement with the decisions of Fourth and Second Circuit’s in these cases, but instead to establish how the facts and circumstances in *Nestle* are exceptional and perhaps deserving of an alternative type of analysis when it comes to the mens rea requirement. As stated in the respondent’s (Doe) Brief in Opposition to the defendant’s petition for a writ of certiorari, “this case has a unique factual context.”<sup>116</sup>

### III. THE MENS REA STANDARD OF KNOWLEDGE VERSUS PURPOSE: THE APPROPRIATE CIRCUMSTANTIAL FLEXIBILITY OF A PURPOSE STANDARD

#### *A. Recap of the Elements of the Aiding and Abetting Liability Claim in Nestle*

As previously noted, a claim brought under the ATS for aiding and abetting liability has two elements, an actus reus and a mens rea.<sup>117</sup> An actus reus is the defendant’s physical act of committing a crime.<sup>118</sup> The actus reus for aiding and abetting liability is established under customary international law as “established

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111. *Doe v. Nestle USA, Inc.*, 788 F.3d 946, 949 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc).

112. *Id.* at 949-50.

113. *See* 766 F.3d at 1017.

114. *See* 658 F.3d at 390-91.

115. *See generally* 766 F.3d at 1017.

116. Brief in Opposition, *supra* note 68, at \*7.

117. *See, e.g., Nestle*, 766 F.3d at 1023-26; *see also* Michalowski, *supra* note 59, at 409 (stating “complicity liability requires both an actus reus and a mens rea”).

118. *See Actus reus*, BLACK’S LAW DICTIONARY, *supra* note 18 (defining actus reus as “[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability; . . . the voluntary act or omission”).

by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided.”<sup>119</sup> International law requires that the defendant’s assistance be substantial, but “it need not be proved that there was a ‘cause-effect relationship.’”<sup>120</sup> In *Nestle* and several other aiding and abetting liability cases brought under the ATS, the actus reus element does not appear to be the cause of much dispute.<sup>121</sup> Specifically, in *Nestle*, the Ninth Circuit declined to adopt an actus reus standard and remanded the matter to the district court to allow the plaintiffs to amend their complaint in light of two international tribunal cases that were decided after the plaintiffs’ complaint in *Nestle* was dismissed.<sup>122</sup>

On the other hand, the mens rea element has become a source of confusion among the United States courts.<sup>123</sup> Mens rea is the defendant’s “guilty mind” or “[t]he state of mind that the [plaintiff] . . . must prove that a defendant had when committing a [violation].”<sup>124</sup> Confusion has emerged among the courts as to whether the proper mens rea standard in a claim brought under the ATS for aiding and abetting liability should be a knowledge standard, where the plaintiff would only have to prove that the defendant had “knowledge that the aider and abetter’s [sic] acts would facilitate the commission of the underlying offense,”<sup>125</sup> or whether the plaintiff should have to prove a higher purpose mens rea standard where the plaintiff must prove that the defendant had the “purpose of facilitating the commission” of the underlying offense.<sup>126</sup>

Recall that the purpose standard is the mens rea standard used by the Fourth and Second Circuits in *Aziz* and *Talisman*, where both circuits concluded that the plaintiffs failed to allege that the defendants’ mens rea rose to the level of purpose.<sup>127</sup> In *Nestle*, the Ninth Circuit did not decide which standard should apply, but concluded that regardless, the more stringent purpose standard was met.<sup>128</sup> The history behind both the knowledge mens rea standard and purpose mens rea standard is briefly analyzed in the following sections.

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119. See, e.g., *Nestle*, 766 F.3d at 1026.

120. *Doe v. Exxon Mobil Corp.*, No. 01-1357, 2015 U.S. Dist. LEXIS 91107, at \*28 (D.D.C. July 6, 2015) (unpublished opinion).

121. See Michalowski, *supra* note 59, at 414 (stating “[m]any courts that have had to decide corporate complicity cases under the ATS have largely bypassed the actus reus analysis and instead focused their efforts on the mens rea assessment”).

122. See 766 F.3d at 1026-27. The two cases include the case of *Prosecutor v. Perisic*, Case No. IT-04-81-A, Judgment (Feb. 28, 2013), decided by the International Criminal Tribunal for the former Yugoslavia, and *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment (Sept. 26, 2013) decided by the Special Court for Sierra Leone. See *Nestle*, 766 F.3d at 1026.

123. See *Nestle*, 766 F.3d at 1023-24.

124. *Mens rea*, BLACK’S LAW DICTIONARY, *supra* note 18.

125. *Nestle*, 766 F.3d at 1023.

126. *Id.* at 1024.

127. See *id.* at 1023-24; see also *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 390 (4th Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247-48 (2d Cir. 2009).

128. 766 F.3d at 1024.

*B. The Mens Rea Standard of Knowledge for Aiding and Abetting Liability Under the ATS*

A knowledge mens rea standard for aiding and abetting liability under the ATS allows liability to reach defendants who provide “‘knowing practical assistance’ to a party who commits a crime in violation of international law.”<sup>129</sup> The knowledge standard originated from the recognition of a knowledge mens rea standard by the International Military Tribunal at Nuremberg in 1945-1949.<sup>130</sup> The International Military Tribunal is an international court that was formed after World War II through the London Charter, which had the power to try and punish persons who, as individuals or as members of organizations, committed crimes against peace, war crimes, and crimes against humanity.<sup>131</sup> Additionally, the Tribunal could try and punish those who assisted in commission of such crimes.<sup>132</sup>

The knowledge standard was also illustrated in the *Zyklon B Case* in 1946 in which the defendants, German industrialists who owned a small chemical firm, were convicted for supplying poison gas (Zyklon B) to the Nazis *knowing* it would be used to kill concentration camp prisoners.<sup>133</sup> This knowledge standard was again followed in *The Flick Case* in 1952, where two individuals were convicted of aiding and abetting war crimes for contributing funds to the SS (political soldiers of the Nazi Party)<sup>134</sup> with *knowledge* of the crimes that were committed by that organization.<sup>135</sup> The Tribunal stated that “[o]ne who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”<sup>136</sup> The defendants in *Flick* were convicted without a showing by the prosecution that “any part of the money [donated by either of them] was directly used for criminal activities of the SS.”<sup>137</sup>

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129. Walker, *supra* note 51, at 138.

130. *See id.* at 142; *see also* Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 271 (2d Cir. 2007).

131. *See Khulumani*, 504 F.3d at 271.

132. *Id.*

133. *See Case No. 9, The Zyklon B. Case, Trial of Bruno Tesch and Two Others*, in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93-94 (1947) (British Military Court, Hamburg, Germany 1946), [http://www.worldcourts.com/imt/eng/decisions/1946.03.08\\_United\\_Kingdom\\_v\\_Tesch.pdf](http://www.worldcourts.com/imt/eng/decisions/1946.03.08_United_Kingdom_v_Tesch.pdf) [<http://perma.cc/45S6-P793>].

134. SS is an abbreviation for Schutzstaffel, which was the name of a group of elite corps of the Nazi Party founded by Adolf Hitler. *See SS*, ENCYCLOPEDIA BRITANNICA (Oct. 20, 2015), <http://www.britannica.com/topic/SS> [[perma.cc/LA4B-T3H9](http://perma.cc/LA4B-T3H9)].

135. *United States v. Flick* (“The Flick Case”), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1217-23 (1952) (Nuernberg Military Tribunal 1947).

136. *Id.* at 1217.

137. Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT’L L. 451, 477 (2012).

More contemporary tribunals, including the International Criminal Tribunals for Rwanda and the International Criminal Tribunals for the Former Yugoslavia, have also adopted the knowledge mens rea standard.<sup>138</sup> In 2007, in *Prosecutor v. Blagojevic*, the International Criminal Tribunal for the Former Yugoslavia held Blagojevic, the commander of a brigade, liable for aiding and abetting crimes against humanity for actions performed on part of the brigade.<sup>139</sup> Despite Blagojevic not performing the actions himself, the Tribunal stated that “[t]he requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.”<sup>140</sup>

More recently, in 2013, the Appeals Chamber of the Special Court for Sierra Leone further affirmed the knowledge standard in concluding “an accused’s knowledge of the consequence of his acts or conduct—that is, an accused’s ‘knowing participation’ in the crimes- is a culpable *mens rea* standard for individual criminal liability.”<sup>141</sup> Within the United States jurisdiction, in *Doe v. Exxon Mobil Corp.*, the D.C. District Court applied a knowledge mens rea standard and stated the following in regard to that standard:

A defendant is only liable for aiding and abetting if they know that their acts assist the commission of the principal offense. It is not required, however, that the defendant has certain knowledge that a particular crime will be committed using the assistance rendered. A defendant may still be liable so long as they are “aware that one of a number of crimes will probably be committed, and one of those crimes is committed.”<sup>142</sup>

All in all, the adoption of a knowledge mens rea standard for aiding and abetting liability claims brought under the ATS might not be a suitable standard for all cases, especially considering how it could open the door for accomplice liability claims brought against corporations that conduct business in or with a foreign country.<sup>143</sup> This concern was evidenced in *Talisman* as the Second Circuit adopted the more stringent purpose standard and placed emphasis on the distinction between acts that are “inherently criminal or wrongful” and acts that might ordinarily be taken in the normal course of business development.<sup>144</sup>

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138. See, e.g., *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 278 (2d Cir. 2007) (Katzmann, J., concurring).

139. Case No. IT-02-60-A, Judgment, ¶ 3 (May 9, 2007), [http://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf) [<http://perma.cc/2F95-MVCP>].

140. *Id.* ¶ 127.

141. *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014) (quoting *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 483 (Sept. 26, 2013), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf> [<http://perma.cc/7QXK-AH6F>]).

142. *Doe v. Exxon Mobil Corp.*, No. 01-1357, 2015 U.S. Dist. LEXIS 91107, at \*30-31 (D.D.C. July 6, 2015) (citations omitted).

143. Michalowski, *supra* note 59, at 415.

144. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 (2d Cir.

*C. The Mens Rea Standard of Purpose for Aiding and Abetting Liability  
Under the ATS*

Until 2009, courts commonly applied a knowledge mens rea standard for accomplice liability under the ATS.<sup>145</sup> Then, the Second Circuit in *Talisman* adopted a purpose mens rea standard instead, claiming that “[o]nly a purpose standard . . . has the requisite ‘acceptance among civilized nations’ for application in an action under the ATS” that *Sosa* demands.<sup>146</sup> Under a purpose standard, a plaintiff must allege that the defendant acted with the “purpose of facilitating” the violation of an international norm.<sup>147</sup> So, according to Judge Bea, in the case of *Nestle*, the plaintiffs would have to show Nestle “acted purposefully to bring about (or maintain) the use of slavery to produce cocoa” to meet the purpose mens rea standard.<sup>148</sup>

In *Talisman*, the Second Circuit adopted Judge Katzmann’s reasoning from his concurrence in *Khulumani v. Barclay National Bank Ltd.*<sup>149</sup> where he concluded:

[A] defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.<sup>150</sup>

Both Judge Katzmann’s concurrence and the Second Circuit’s *Talisman* opinion interpreted the Rome Statute of the International Criminal Court to provide for a purpose mens rea standard.<sup>151</sup> The Rome Statute was adopted at a United Nations conference in Rome in 1998 and went into effect in 2002.<sup>152</sup> The statute is the treaty that established the International Criminal Court, and it also established four core international crimes: genocide, crimes against humanity,

2009).

145. See Lincoln, *supra* note 62, at 608.

146. *Talisman Energy, Inc.*, 582 F.3d at 259 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

147. See *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1023-24 (9th Cir. 2014).

148. *Doe v. Nestle USA, Inc.*, 788 F.3d 946, 948 (9th Cir. 2015) (denial of rehearing en banc).

149. Walker, *supra* note 51, at 128.

150. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring).

151. *Talisman Energy, Inc.*, 582 F.3d at 259; see *Khulumani*, 504 F.3d at 276 (recognizing international criminal tribunals have occasionally turned to a knowledge standard but not the Rome Statute).

152. Heidi Bucheister, *International Criminal Court: An Overview*, BEYOND INTRACTABILITY (Dec. 2012), <http://www.beyondintractability.org/essay/international-criminal-court-overview> [<http://perma.cc/QD7U-3QXW>].

war crimes, and the crime of aggression.<sup>153</sup> In pertinent part, Article 25(3)(c) of the Rome Statute states that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . [f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission.”<sup>154</sup> The Second Circuit reasoned that because the statute uses the word “purpose,” the Rome Statute requires the heightened mens rea of purpose.<sup>155</sup>

Additionally, the Second Circuit relied on the Nuremberg trials case of *United States v. Ernest Von Weizsaecker*<sup>156</sup> (“The Ministries Case”) where the Tribunal “declined to impose criminal liability on a bank officer who was alleged to have ‘made a loan, knowing or having good reason to believe that the borrower w[ould] use the funds’” to commit a crime.<sup>157</sup> The Fourth Circuit in *Aziz* also adopted the purpose mens rea standard accepted in *Talisman*, agreeing with the Second Circuit that “*Sosa* guides courts to international law to determine the standard for imposing accessorial liability, given *Sosa*’s command that courts limit liability to ‘violations of international law with definite content and acceptance among civilized nations equivalent to the historical paradigms familiar when [the ATS] was enacted.’”<sup>158</sup>

*D. Do the Circumstances of Nestle Necessitate Additional Considerations  
When Analyzing a Purpose Mens Rea Standard?*

In Judge Bea’s dissent from the Ninth Circuit’s denial of rehearing en banc, he suggested “the panel majority . . . substituted sympathy for legal analysis.”<sup>159</sup> Judge Bea admitted that the plaintiffs, “alleged former child slaves of Malian descent, dragooned from their homes and forced to work as slaves on cocoa plantations,” are deserving of sympathy, but questioned the panel majority’s conclusion “that [the] defendant corporations, who engaged in the Ivory Coast cocoa trade, did so with the *purpose* that the plaintiffs be enslaved, hence aiding

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153. *Id.*

154. Rome Statute of the International Criminal Court, 37 I.L.M. 999, art. 25(c)(3) (1998).

155. *See generally Talisman Energy, Inc.*, 582 F.3d at 259-60.

156. 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 852-55 (1952) (Nuernberg Military Tribunal 1949), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-XIV.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf) [<http://perma.cc/2YXG-QYCT>].

157. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (quoting *United States v. von Weizsaecker*, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 308, 622 (William S. Hein & Co., Inc. 1997) (1949)).

158. *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011) (quoting *Talisman Energy Inc.*, 582 F.3d at 259).

159. *Doe v. Nestle USA, Inc.*, 788 F.3d 946, 946 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc).

and abetting the slavers and plantation owners.”<sup>160</sup> In making this point, Judge Bea stated:

Alcolac and Talisman undoubtedly knew that their actions were contributing to great evils: the use of poison gas in Alcolac’s case, and genocide in Talisman’s. Nonetheless, the Second and Fourth Circuit’s decisions absolved these companies of ATS aiding and abetting liability, because plaintiffs’ allegations did not make it plausible that defendants specifically intended Kurd or Southern Sudanese killings.<sup>161</sup>

At large, Judge Bea concluded that the Ninth Circuit’s determination that the corporate defendants’ actions in *Nestle* fulfilled the more stringent purpose mens rea standard laid out in *Talisman* and *Aziz* was incorrect, therefore creating a circuit split.<sup>162</sup>

It seems undeniably true that, in accordance with Judge Bea’s dissenting opinion, the rigid purpose mens rea standard applied by the Second and Fourth Circuits in *Talisman* and *Aziz* is not met by the corporate defendants in *Nestle*.<sup>163</sup> It does not appear that the plaintiffs in *Nestle*, as pointed out by Judge Bea, could allege “that the defendant corporations, who engaged in the Ivory Coast cocoa trade, did so with the *purpose* that [the] plaintiffs be enslaved.”<sup>164</sup> However, as distinguished in Part II, *Nestle* presents an exceptional set of actors and circumstances when compared with the facts presented in *Talisman* and *Aziz*.<sup>165</sup> Correspondingly, should the same mens rea analysis applied in *Talisman* and *Aziz* be applied to a case like *Nestle*? Or, should a case with distinguishable circumstances be afforded additional considerations in order to achieve justice and allow the courts to discourage the worst sorts of human rights abuses?

*1. Taking the Circumstances and Moral Gravity of the Matter into Consideration When Analyzing a Mens Rea Requirement.*—Recall the language of the ATS: “The [U.S.] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>166</sup> The “law of nations” as used in the ATS “refers to the body of law known as customary international law,”<sup>167</sup> which is a difficult inquiry in itself as “[c]ustomary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas.”<sup>168</sup>

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160. *Id.* at 946-47.

161. *Id.* at 951.

162. *Id.* at 947.

163. *See Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1025 (9th Cir. 2014) (stating “there is no allegation that the defendants supported child slavery due to an interest in harming children in West Africa”).

164. *Nestle*, 788 F.3d at 947 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc).

165. *See supra* Part II.

166. 28 U.S.C. § 1350 (2012).

167. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003).

168. *Id.*

Considering these gray areas and resting on the notion that “[a]ll international authorities agree that ‘*at least* purposive action . . . constitutes aiding and abetting liability,’”<sup>169</sup> the adoption of a purpose mens rea standard seems sensible for the analysis presented here. The debate between courts and scholars over whether a knowledge or purpose mens rea standard is appropriate for aiding and abetting liability under the ATS has already received its due devotion in other articles.<sup>170</sup>

Rather, this Note suggests that if the courts are going to adopt the more stringent purpose mens rea requirement, perhaps that mens rea requirement should be judged to have been met, or not, partly with regard to the moral gravity, or lack thereof, of the circumstances. In accordance with this idea, attention can be given to the analogy of former United States Supreme Court Justice Thurgood Marshall in his dissent in the case of *Jackson v. Metropolitan Edison Co.*, decided in 1974.<sup>171</sup> In *Jackson*, the petitioner brought suit against Metropolitan Edison Company, a privately owned Pennsylvania utility company that held a certificate of public convenience issued by the Pennsylvania Public Utility Commission (the Commission).<sup>172</sup> The issuance of the certificate of public convenience by the Commission made the utility company subject to “extensive regulation by the Commission.”<sup>173</sup>

The petitioner in *Jackson* brought suit against the utility company for terminating her electricity due to non-payment of her account without notice, a hearing, and an opportunity to pay the amounts found due.<sup>174</sup> Because the provision allowing the termination of her service without notice was allowed through a general tariff filed with the state public utility commission, the petitioner argued this was state action depriving her of property in violation of the Fourteenth Amendment’s guarantee of due process of law.<sup>175</sup> Five Justices supported the Court’s ruling that the state’s approval of the utility company’s business practices did not transform the termination into state action, dismissing the petitioner’s claim.<sup>176</sup>

Of the three dissenting Justices, Justice Marshall issued a dissent that has been cited for the suggestion that the scope and depth of responsibility for an action should increase as the moral weight and gravity of the circumstances increases.<sup>177</sup> Justice Marshall points out that “the State has granted its approval

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169. *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014) (quoting *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 765-66 (9th Cir. 2011)).

170. *See, e.g.*, *Lincoln*, *supra* note 62, at 610-16.

171. 419 U.S. 345, 365-74 (1974) (Marshall, J., dissenting).

172. *Id.* at 346.

173. *Id.*

174. *Id.* at 347.

175. *Id.* at 348.

176. *Id.* at 358-59.

177. *Id.* at 366-74; *see* *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1113 n.6 (1975) (“Several opinions, both in this circuit and elsewhere, have suggested that state action may be found more easily in cases of racial discrimination than elsewhere. If these statements are valid, more state action is required to qualify under 42 U.S.C. § 1983 in, for instance, a procedural due process case

to the company's mode of service termination—the very conduct that is challenged.”<sup>178</sup> Justice Marshall quoted from an earlier Supreme Court case that “the State has sufficiently ‘insinuated itself into a position of interdependence with [the company] that it must be recognized as a joint participant in the challenged activity.’”<sup>179</sup> In closing, Justice Marshall stated:

What is perhaps most troubling about the Court's opinion is that it would appear to apply to a broad range of claimed constitutional violations by the company. The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state-action analysis when different constitutional claims are presented. Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve. I cannot believe that this Court would hold that the State's involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of nondiscrimination. Yet nothing in the analysis of the majority opinion suggests otherwise.

I dissent.<sup>180</sup>

Admittedly, *Jackson* involves state action, which is not at issue in *Nestle*, and the language being focused on here is a dissent. However, the idea here is to grasp the broader logic and idea of Justice Marshall's dissent and analogize it to the situation in *Nestle*. Justice Marshall's dissent seems to relay that the State would bear more responsibility for approving a rate tariff that clearly discriminated on the basis of race than for approving a rate tariff that merely allowed customers slightly fewer days procedural notice than had previously been required.<sup>181</sup> In essence, Justice Marshall's dissent insinuates that the “denial of due process is perceived as a lesser evil than racial discrimination,” so that “where a less severe constitutional right is violated, a greater degree of state involvement appears to be required.”<sup>182</sup>

In applying this logic to *Nestle*, it seems to follow that a court should be able to more easily find a purpose or intent mens rea requirement to be met where the circumstances involve a matter of higher moral gravity, such as child slavery. Just as the court might more easily find state action where a party is engaging in racial

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than in one involving racial discrimination. Hence, state involvement that may be insufficient in a procedural due process case may be sufficient in a racial discrimination case.” (internal citations omitted).

178. *Jackson*, 419 U.S. at 366 (Marshall, J., dissenting).

179. *Id.*

180. *Id.* at 373-74 (citations omitted).

181. See *Eversole Mortuary*, 522 F.2d at 1112, 1113 n.6; see *supra* text accompanying note 177.

182. Melanie Vogl, *State Action and Public Utilities—Jackson v. Metropolitan Edison Co.*, 24 DEPAUL L. REV. 1023, 1037 (1975).

discrimination, a court might more easily find a mens rea requirement to be met where a party is sustaining the use of child slavery—a matter noticeably more morally grave than human rights violations—than might be presented in other ATS aiding and abetting liability cases.<sup>183</sup>

In a similar respect, the involvement between the state and the utility company does not seem far off from the situation in *Nestle*. Similar to the State “insinuat[ing] itself into a position of interdependence with [the utility company] that it must be recognized as a joint participant in the challenged activity,”<sup>184</sup> the chocolate companies in *Nestle* are participating, supporting, and providing assistance in nearly every aspect of the cocoa farmers' production process apart from actually enslaving the children.<sup>185</sup> Accordingly, it can be inferred from Justice Marshall’s dissent that moral and legal responsibility can and should attach more easily to a defendant, such as the defendant corporations in *Nestle*, who choose to symbiotically gain financially through a joint enterprise with the actual child-enslaving party.<sup>186</sup>

2. *Viewing the Defendant’s Intent as Means to Achieving an End.*—From another standpoint, allowing the courts to take into consideration the circumstances and moral gravity of a matter when determining whether a mens rea requirement is met could further the perception, as expressed by the Ninth Circuit in *Nestle*, that a defendant’s purpose or intent can be established through the means that defendant uses to accomplish its end or goal.<sup>187</sup> The Ninth Circuit’s opinion effectively demonstrates the view that a defendant’s intent can be satisfied through the means the defendant uses to achieve an end goal when the Ninth Circuit stated the following:

[T]he complaint is clear that the defendants’ motive was finding cheap sources of cocoa; there is no allegation that the defendants supported child slavery due to an interest in harming children in West Africa.

. . . Here, however, the defendants allegedly intended to support the use of child slavery as a *means* of reducing their production costs. In doing so, the defendants sought a legitimate goal, profit, through illegitimate *means*, purposefully supporting child slavery.

Thus, the allegations suggest that a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery.<sup>188</sup>

This idea is also expressed in Prosser's Handbook of the Law of Torts, which provides that intention in tort law "is not necessarily a hostile intent, or a desire

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183. *Id.* (inferring that in *Jackson*, “[d]anger lies in the absolute denial of state action recognition” so Justice Marshall’s dissent presents the “implication . . . that the Court has tacitly adopted a sliding scale of state action”).

184. *Jackson*, 419 U.S. at 366 (Marshall, J., dissenting).

185. *See generally* *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1017 (9th Cir. 2014).

186. *See generally* *Jackson*, 419 U.S. at 366 (Marshall, J., dissenting).

187. *See Nestle*, 766 F.3d at 1025-26.

188. *Id.* (emphasis added).

to do any harm.”<sup>189</sup> “Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction.”<sup>190</sup> Professor John Finnis has also analyzed the concept of achieving intent through means in his work regarding intention in tort law, where he states:

[O]ne intends not only one’s ultimate ends (say, protecting one’s property) but also all the means one has chosen to further those ends (say, injuring or killing poachers as a punishment, and as a deterrent to and disablement from future poaching). One’s chosen means are indeed one’s proximate ends, some more and some less proximate.<sup>191</sup>

Contrary to this, Judge Bea’s dissenting opinion only recognizes intent as an end.<sup>192</sup> His narrow view is that a defendant’s purpose or intent to aid and abet a party in committing a human rights violation can only be achieved if it is alleged that the defendant has the actual purpose to commit that violation (using child slavery).<sup>193</sup> However, the adoption of such a narrow view of satisfying an intent or purpose mens rea requirement would discredit the ATS’s modern role in helping protect basic human rights.<sup>194</sup> After all, what kind of message would be sent by a decision inferring that the use of child slavery is okay as long as it is only incidental to a party’s main objective? Likely not a morally sound one.

#### IV. POST-*NESTLE*

In September 2015, following the Ninth Circuit’s decision in *Nestle*, the corporate defendants filed a petition for a writ of certiorari.<sup>195</sup> The petition argued, among other things, that the Ninth Circuit’s ruling “creates a clean and clear split regarding the proper mens rea standard for aiding-and-abetting liability under the ATS.”<sup>196</sup> The United States Supreme Court subsequently denied the defendants’ petition in January 2016.<sup>197</sup> The Court’s announcement that it would not review the Ninth Circuit’s controversial decision in *Nestle* proved to be a disappointment to others beyond the three corporate defendants in *Nestle* and courts that will have

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189. See Keith N. Hylton, *Intent in Tort Law*, 44 VAL. U. L. REV. 1217, 1217 (2010) (quoting WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 31 (West, 4th ed. 1971)).

190. See *id.*

191. JOHN FINNIS, INTENTION AND IDENTITY: COLLECTED ESSAYS VOLUME II, at 201 (2011).

192. See *generally* Doe v. Nestle USA, Inc., 788 F.3d 946, 949 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc) (stating “[i]f selling chemicals with the knowledge that the chemicals will be used to create lethal weapons does not constitute purpose that people be killed, how can purchasing cocoa with the knowledge that slave labor may have lowered its sale price constitute purpose that people be enslaved?”).

193. See *generally* Nestle, 788 F.3d 946, 947 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc).

194. See *generally* FLETCHER, *supra* note 29, at 20.

195. See Petition for a Writ of Certiorari, *supra* note 20, at \*9-12.

196. *Id.* at \*22.

197. Nestle USA, Inc. v. Doe, 136 S. Ct. 798 (2016) (denial of petition for writ of certiorari).

to apply the ATS in the future.<sup>198</sup> For example, several business groups also sought clarity of the issues presented in *Nestle*: the U.S. Chamber of Commerce, the National Foreign Trade Council, the National Association of Manufacturers, the Organization for International Investment, and the Grocery Manufacturers Association, to name a few, submitted amicus briefs in support of the corporate defendants' certiorari petition.<sup>199</sup>

Although this Note narrowly focused on the required mens rea for accessory liability claims in ATS litigation, the Ninth Circuit's decision in *Nestle* is believed additionally to have created or widened circuit splits on two other issues that currently exist under the ATS: (1) "whether corporations are subject to liability under the ATS,"<sup>200</sup> and (2) the issue of extraterritoriality—"whether courts are required to dismiss ATS suits unless the conduct that is the 'focus of congressional concern'—that is, the human rights violation—occurred inside the United States."<sup>201</sup> In *Nestle*, the Ninth Circuit declined to resolve the extraterritoriality issue and instead remanded the matter to allow the plaintiffs to amend their complaint in light of the Supreme Court's extraterritoriality ruling in *Kiobel v. Royal Dutch Petroleum Co.*<sup>202</sup>

Aside from this, the Ninth Circuit's ruling against the corporate defendants on the presented issues has proved to be unsettling to some, as they fear the ruling could be viewed to "permit[] ATS lawsuits to proceed against American companies for allegedly tortious acts committed outside the United States by foreign governments or persons with whom the company does business, so long as the company intended to turn a profit."<sup>203</sup> Specifically, the defendant's petition for writ of certiorari states "the consequences of leaving the Ninth Circuit's ruling in place are severe," and that:

[b]y vastly expanding the scope of ATS liability, the decision below means that any company doing business in (or with) a country with a blemished human-rights record is subject to an ATS aiding-and-abetting suit. It will almost always be possible for a plaintiff to articulate some

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198. See generally *infra* note 199.

199. See Brief for National Confectioners Association, World Cocoa Foundation et al. as *Amici Curiae* Supporting Petitioners, *Nestle*, 2015 U.S. S. Ct. Briefs LEXIS 3722 (Oct. 21, 2015) (No. 15-349); Brief for Grocery Manufacturers Association as *Amicus Curiae* in Support of Petitioners, *Nestle*, 2015 U.S. S. Ct. Briefs LEXIS 3711 (Oct. 21, 2015) (No. 15-349); Brief of *Amici Curiae* The Chamber of Commerce of the United States of America, The National Foreign Trade Council et al., *Nestle*, 2015 U.S. S. Ct. Briefs LEXIS 3283 (Sept. 18, 2015) (No. 15-349).

200. U.S. Chamber of Commerce, *SCOTUS Decides Not to Review 9th Circuit's Controversial Doe v. Nestle Decision*, INSTITUTE FOR LEGAL REFORM (Jan. 12, 2016), <http://www.instituteforlegalreform.com/resource/scotus-decides-not-to-review-9th-circuits-controversial-doe-v-nestle-decision> [<https://perma.cc/6YM5-YXAY>].

201. *Id.*

202. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1027 (9th Cir. 2014).

203. U.S. Chamber of Commerce, *supra* note 200.

plausible connection between the benefits a company realizes from commercial activities in a developing country and abuses carried out by local actors on their own initiative.<sup>204</sup>

Apart from these concerns, for better or for worse, the ATS does and has the potential to play a large part in protecting against gross human rights violations, as is the case for *Nestle*.<sup>205</sup>

#### CONCLUSION

This Note presented a brief history of the ATS and how it developed into a vehicle for aliens to be able to bring claims involving violations of human rights, particularly for aiding and abetting liability, into United States courts.<sup>206</sup> Due to the variance in the types of human rights violations alleged in ATS aiding and abetting liability claims, the United States circuit courts of appeals have been inconsistent in determining the proper mens rea standard to apply to different cases to reach what seemingly would be the right result.<sup>207</sup> The Second and Fourth Circuits' adoption of an intent or purpose standard makes it more difficult for a plaintiff to be able to allege an aiding and abetting liability claim under the ATS, as compared with a less strict knowledge standard.<sup>208</sup> However, in *Nestle*, the Ninth Circuit concluded that the higher intent or purpose standard was met, even without a showing that the corporate defendants acted with the purpose to enslave the children, based on the allegations that “ a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery.”<sup>209</sup>

This Note has focused on the *Nestle* case due to the significance of its unique facts and circumstances.<sup>210</sup> *Nestle* presents big corporate actors, who exercise great economic leverage in the cocoa market, and who have become substantially intertwined with cocoa plantations who engage in the use of child slavery.<sup>211</sup> To

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204. See Petition for a Writ of Certiorari, *supra* note 20, at \*37.

205. FLETCHER, *supra* note 29 (stating “[i]n the contemporary resurgence of the Alien Tort Statute—in its modern use as an instrument for correcting human rights abuses—it is assumed that aliens may sue other aliens in federal court, provided they serve process on them in US territory”).

206. See generally *id.*

207. See Michalowski, *supra* note 59, at 414 (“Until October 2009, in line with the jurisprudence of the international criminal tribunals, most U.S. courts adopted a mens rea standard of knowledge that the act of the corporation would assist in the commission of the offense.”). Circuits applying the knowledge standard include *Doe v. Unocal Corp.*, 395 F.3d 932, 950-52 (9th Cir. 2002) and *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-59 (11th Cir. 2005). Then in 2009, the Second Circuit applied the more stringent purpose standard in *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009). See *supra* Part III.B-C.

208. *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014) (stating “the Second and Fourth Circuits . . . require[d] the heightened mens rea of purpose”).

209. *Id.* at 1026.

210. See *supra* notes 67-77 and accompanying text.

211. See 766 F.3d at 1017.

say that liability could not reach these corporations because they only expressed the purpose to maximize profits rather than enslave children did not seem to sit well with the Ninth Circuit, and likely, the general public. What really makes the situation in *Nestle* distasteful is the amount of involvement and support these large, market-dominating corporations provided to the cocoa farmers and operations, all while knowing what is taking place on the other side of the trade.<sup>212</sup>

In an effort to allow the ATS to play its part in protecting human rights, without going so far as to open up the flood gates for litigation against corporations doing business outside of the United States, this Note suggests that if the courts are going to apply the more stringent intent or purpose mens rea requirement, perhaps that mens rea requirement should be judged to have been met, or not, partly with regard to the moral gravity of the circumstances. This theory rests on a suggestion that the scope and depth of responsibility for an action should increase as the moral weight and gravity of the circumstances increase and the idea of intent being achieved through the means one uses to achieve its goal or purpose.<sup>213</sup>

The consistent application of an intent or purpose standard would help eliminate the unfair surprise implications for a defendant, and the opportunity to take the moral gravity of the situation into account would allow the courts the flexibility to discourage the worst sorts of human rights abuses. The gut feeling is that in cases like *Nestle*, there should be liability. But the harder question is: how do we get there?

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212. *See generally id.*

213. *See supra* Part III.D.1-2.