THE ROAD TO RECOVERY AFTER NESTLÉ: EXPLORING THE TVPA AS A PROMISING TOOL FOR CORPORATE ACCOUNTABILITY

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ABSTRACT

This paper presents the Trafficking Victims Protection Act ("TVPA") as a promising, yet underutilized, statute for litigators seeking justice for foreign victims of forced labor in global supply chains. It begins by outlining the current legal landscape of cases that may be successfully brought under the Alien Tort Statute ("ATS") in light of Nestlé USA Inc. v. Doe I, which was decided in June 2021 by the Supreme Court, and the series of earlier Supreme Court rulings that have narrowed the scope of the statute over the past fifteen years. Recognizing the limited recovery available under the ATS and the dearth of other statutory remedies under U.S. or international law for foreign forced labor cases, the article recommends the TVPA as a favorable alternative. The authors assess the future potential of TVPA litigation by examining the significant potential advantages of this relatively new statute and flagging the potential obstacles that practitioners may face.

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INTRODUCTION

Abducted from their homes in Mali and Burkina Faso and forced to work on cocoa farms in Côte d'Ivoire for twelve to fourteen hours per day, six to seven days per week, without pay or sufficient food, and subjugated to beatings, the plaintiffs in *Nestlé USA, Inc. v. Doe I* represent only a handful of the millions of victims of forced labor in the supply chains of multinational corporations ("MNCs").[1] An estimated 24.9 million people are victims of forced labor in the world today, 16 million of which are exploited for labor in the private sector, predominantly in the domestic service, construction, manufacturing, agriculture, and fishing sectors.[2]

Instances of forced labor started to increase following the 1980s expansion of global supply chains when U.S. companies began to shift domestic production to low-wage countries to increase their profit margins.[3] This new mode of production has resulted in a global race to the bottom, in which demand by MNCs for low prices at high volumes and quick turnaround times have pressured local suppliers to keep wages and labor standards low, either directly or indirectly by engaging third-party labor contractors or sub-contractors.[4] The presence of middlemen in the supply chain increases the likelihood of fraudulent recruitment practices, including worker-paid recruitment fees, misrepresentation of contract terms, and the destruction or confiscation of identity documents, which often lead to the trafficking of workers.[5] Once recruited, these workers earn low or no wages and suffer from physical and verbal abuse as well as dangerous working conditions that cause workplace injuries, long-term health effects, and even death.[6]

Unfortunately, the opacity of the global supply chain structure has created a shield of liability for MNCs that profit from forced labor. With

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1. Nestlé USA, Inc. v. Doe I, 141 S. Ct. 1931, 1931(2021); Doe 1 v. Nestlé USA, Inc. This case was consolidated earlier with *Cargill, Inc. v. Doe I*, No. 19–453. 929 F.3d 623, 623 (2019).

2. INT'L LABOUR OFF. & WALK FREE FOUND., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE, at 10–11 (2017) (ebook), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf [https://perma.cc/WPL6-ATAQ].

3. Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 455, 478 (2017).

4. *Id.*

5. *Id.*

6. Sally C. Moyce & Marc Schenker, *Annual Review of Public Health: Migrant Workers and Their Occupational Health and Safety*, 39 ANN. REV. PUB. HEALTH 351, 352 (2018), https://doi.org/10.1146/annurev-publhealth-040617-013714 [https://perma.cc/H7NC-JPVA].

production moved outside of the jurisdiction of domestic legal regimes,[7] MNCs have managed to avoid accountability under accomplice,[8] vicarious,[9] or joint employment[10] theories of corporate liability by arguing that they lacked the requisite intent or the sufficient control over the traffickers.[11] To address this gap in corporate accountability for human rights abuses in supply chains, advocates have pursued civil suits under the Alien Tort Statute ("ATS"), which grants federal jurisdiction for "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."[12] However, the prospect of using the ATS to sue MNCs for forced labor in their supply chains has diminished due to a series of Supreme Court rulings that have significantly narrowed the scope of the statute.[13]

Assessing the current legal landscape following *Nestlé*, this article aims to encourage practitioners to look beyond the ATS and consider filing claims under the Trafficking Victims Protection Act ("TVPA"), which is a promising, yet underutilized, statute in the realm of foreign forced labor cases.[14] Part II will analyze how the deleterious impact of the *Nestlé* decision

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7. *Id.*

8. Also known as the law of aiding and abetting, accomplice liability requires corporate intent to facilitate the trafficking acts committed by their contractors. Naomi Jiyoung Bang, *Unmasking the Charades of the Global Supply Context: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT'L L. 255, 273 (2013).

9. *Id.* Also known as *respondeat superior*, vicarious liability in the context of a principal-agent relationship requires that the corporation (i.e., the principal) had sufficient control or authority over their contractor (i.e., the agent). Restatement (Second) of Agency § 219 (1958).

10. Bang, *supra* note 8, at 279.

11. Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to*

Monitor and Eliminate Human Trafficking Violations, 69 VAND. L. REV. 499, 516 (2019).

12. 28 U.S.C. § 1350 (2012). Originally enacted as part of the Judiciary Act of 1789, the ATS became popularized as a tool for human rights litigation in 1980 with the successful case of *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

13. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402–04 (2018) (holding that, absent further action by Congress, the ATS does not apply to foreign corporations); Kiobel v. Royal Dutch Petroleum Corp. (Kiobel II), 569 U.S. 108, 117 (2013) (holding that the ATS does not apply to violations of the laws of nations occurring outside of the U.S.); Sosa v. Alvarez-Machain, 542 U.S. 692, 713–15 (2004) (holding that the ATS does not provide or define a cause of action for international law violations).

14. The scope of this article is limited to opportunities for civil litigation, in which foreign victims of forced labor can directly file lawsuits against corporations. The article does not cover tools available to other actors, such as the U.S. government or American consumers, to promote corporate accountability in global supply chains. Examples of potential tools include Section 307 of the Tariff Act of 1930, the Foreign Corrupt Practices Act of 1977, the False Claims Act, the 2016 Global Magnitsky Human Rights Accountability Act, due diligence and supply chain transparency laws, and state consumer protection

essentially forecloses most lawsuits by foreign victims of human trafficking.[15] Part III will then introduce the TVPA as an alternative to the ATS for foreign forced labor cases, illustrating the potential litigation advantages of the TVPA over the ATS and highlighting the legal issues that have arisen in TVPA litigation that remain to be determined by courts. Part IV will outline the key considerations for litigants seeking recovery under the TVPA.

I. LIMITED RECOVERY UNDER THE ATS

In recent decades, human rights attorneys have attempted to utilize the ATS against MNCs in foreign forced labor cases. For example, in 1996, Burmese villagers sued Unocal Corporation under the ATS for aiding and abetting the Myanmar military's actions, which included forced labor, murder, and rape.[16] In March 2005, this case ended in a historic settlement, in which plaintiffs would receive "direct compensation and 'substantial assistance' via funds for programs to improve living conditions, health care, and education."[17] Similarly, in July 2005, six Malian children trafficked to work on cocoa plantations in Côte d'Ivoire brought an ATS suit against cocoa exporters, including Nestlé USA, Inc. and Cargill Incorporated, for aiding and abetting child slavery through assistance to Ivorian farmers.[18] After more than a decade of protracted litigation, this case was heard before the Supreme Court in December 2020, and the Court issued its opinion in June 2021.

Over the years, a series of other Supreme Court cases—*Sosa v. Alvarez-Machain,*[19] *Kiobel v. Royal Dutch Petrol Co. (Kiobel II)*,[20] and *Jesner v. Arab Bank, PLC*[21]—has significantly limited the categories of cases that

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laws. *See generally* KIRK HERBERTSON, EARTHRIGHTS INT'L, STATES CAN LEAD ON BUSINESS AND HUMAN RIGHTS (2020), https://earthrights.org/wp-content/uploads/EarthRights-How-the-US-can-lead-on-business-human-rights-2020.pdf [https://perma.cc/36KZ-9S82] (concerning recent corporate abuses in U.S. supply chains, government's abilities to prevent human rights violations, and recommendations for increased accountability by MNCs).

15. *See Nestlé*, 141 S. Ct. 1931, 1931.

16. Doe v. Unocal, 395 F.3d 932, 936 (9th Cir. 2002).

17. Rachel Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 HUM. RTS. BRIEF 1, 14 (2005).

18. Doe v. Nestlé, S.A., 929 F.3d 623, 623 (9th Cir. 2019).

19. Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

20. Kiobel v. Royal Dutch Petroleum Corp. (Kiobel II), 569 U.S. 108, 124–25 (2013). In Kiobel I, the Supreme Court addressed the initial question as to whether corporations could be sued under the ATS. After oral argument raised the issue of whether foreign plaintiffs could bring cases against defendants in the United States, the Supreme Court later ordered reargument on the issue of extraterritoriality (Kiobel II).

21. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).

plaintiffs may bring under the ATS. Consequently, it has become increasingly challenging for foreign victims of forced labor seeking recovery from MNCs to bring successful ATS suits. The Court in *Nestlé* only added further restrictions to the kinds of suits that may be brought against corporations under the ATS, making it harder for most victims to prevail.

A. Settled Case Law: Requirements of an ATS Suit

There are five requirements for victims of forced labor abroad to bring a successful ATS suit against a MNC, three of which are relatively clear. First, plaintiffs may not file ATS suits against foreign corporations.[22] Second, under the first prong of the *Sosa* test, the plaintiffs must allege violations of a universally accepted and well-defined international law norm.[23] It is likely that slavery, forced labor, and human trafficking will qualify. [24] Third, plaintiffs must meet the second prong of the *Sosa* test by showing that recognizing this cause of action constitutes an appropriate exercise of judicial discretion and will not implicate public policy, foreign relations, or separation-of-powers concerns. [25] This factor should not pose a major challenge for plaintiffs in foreign forced labor cases against U.S. corporations as it is unlikely that holding domestic corporations liable in U.S. courts for violations of international law would offend other nations.[26]

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22. *See id.*

23. *See Sosa,* 542 U.S. at 724–25. Thus far, examples of crimes accepted as violations of international law include "torture, genocide, war crimes, crimes against humanity, summary execution, arbitrary detention, and disappearance." Pamela J. Stephens, *Spinning* Sosa*: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 32–33 (2007).

24. Neither defendant contested that child slavery is a violation of the law of nations, and none of the Supreme Court justices raised the issue during oral argument. *See also* Oona Hathaway, Nestlé & Cargill v. Doe *Series: The Prohibitions on Slavery, Forced Labor, and Human Trafficking Meet the* Sosa *Test*, JUST SECURITY (Nov. 23, 2020) (explaining how the prohibitions on slavery, forced labor, and trafficking meet the *Sosa* test, because of the prohibition as of *jus cogens* norm of international law, and this has extended to corporate conduct) https://www.justsecurity.org/73508/nestle-cargill-v-doe-series-the-prohibitions-on-slavery-forced-labor-and-human-trafficking-meet-the-sosa-test/ [https://perma.cc/SKH7-H54E].

25. *Sosa*, 542 U.S. at 724–25.

26. This was suggested by Chief Justice John Roberts and Justice Elena Kagan during the Supreme Court oral arguments for *Nestlé*. Transcript of Oral Argument at 6, 44–45, Nestlé USA, Inc. v. Doe I, 141 S. Ct. 188 (2020) (No. 19-416) [hereinafter Nestlé Transcript]; *see also Sosa*, 542 U.S. at 724–25 (opining that courts should require ATS claims to "rest on a norm of international character accepted by the civilized world"). In contrast, holding foreign corporations liable in U.S. courts may create tensions in foreign relations, as explained in the Supreme Court's opinion in *Jesner.* 138 S. Ct. at 1406–07.

The fourth requirement is proving application of the ATS is not impermissibly extraterritorial. In *Kiobel II*, plaintiffs had to demonstrate that the ATS claim "touch[es] and concern[s] the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[27] The fifth requirement of an ATS suit brought against a MNC is proving the elements of the secondary theory of liability that plaintiffs usually employ to hold the corporate defendant liable. Beginning with *Unocal*, most ATS suits brought against corporate defendants have employed an aiding and abetting theory of liability.[28] The only other way for plaintiffs to hold a corporation accountable would be "under narrow *respondeat superior* circumstances,"[29] to be discussed in Part II.D. Therefore, in addition to satisfying the *Sosa* and *Kiobel* tests, most plaintiffs suing U.S. corporations will have to prove that the corporate defendant aided and abetted the underlying primary violation by meeting the *actus reus* and *mens rea* standards for aiding and abetting. These standards have yet to be settled and will be discussed in Part II.C. It is also still undetermined what types of facts plaintiffs must demonstrate to sufficiently meet the requirements to overcome the presumption against extraterritoriality and successfully prove an aiding and abetting theory of liability against a MNC.

The fourth and fifth requirements to state a viable cause of action under the ATS are less clear and more challenging to meet than the first three, especially following *Nestlé.* The Supreme Court in *Nestlé* did not apply the *Kiobel* test or decide whether the application would be impermissibly

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27. Kiobel v. Royal Dutch Petroleum Corp. (Kiobel II), 569 U.S. 108, 124–25 (2018).

28. *See e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (adjudicating an ATS claim that was premised on theories of aiding and abetting liability); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (same); Aziz v. Alcolac, Inc., 658 F.3d 388 (4th Cir. 2011) (same); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated,* 527 F. App'x 7 (D.C. Cir. 2013) (same); Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014) (same); Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161 (2d Cir. 2013) (same); Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201 (2d Cir. 2016) (same). Aiding and abetting liability provides powerful grounds for ATS claims, as it fits within the limited purview of offenses delineated by *Sosa*. 542 U.S. at 720, 729 (finding offenses a court could recognize as within the common law, including three 18th century offenses: piracy, offenses against ambassadors, and violation of safe conducts); Doori C. Song, *U.S. Corporate Liability Under the Alien Tort Statute After* Jesner v. Arab Bank, PLC, 21 OR. REV. INT'L L. 1, 26–27 (2020). Specifically, aiding and abetting liability was both "accepted by the civilized world" and "defined with a specificity comparable to the features [of the three offenses]." *Kiobel*, 569 U.S. at 132 (Breyer, J., concurring); *see* Song, *supra*, at 28.

29. Beth Van Shaack, Nestlé & Cargill v. Doe *Series: In Oral Arguments, Justices Weigh Liability for Chocolate Companies*, JUST SECURITY (Dec. 7, 2020), https://www.justsecurity.org/73727/nestle-cargill-v-doe-series-in-oral-arguments-justices-weigh-liability-for-chocolate-companies/ [https://perma.cc/V7V4-965L].

extraterritorial. Instead, the Court added additional requirements that a plaintiff seeking a cause of action under the ATS must show prior to reaching the extraterritorial application analysis, which will be discussed in Part II.B.

B. *Nestlé* and the Questions of Corporate Liability and Extraterritoriality

Argued back and forth between the district and appellate courts over a span of fifteen years, the *Nestlé* case has raised several critical legal questions that remain unresolved. Originally filed in 2005 before the U.S. District Court for the Central District of California, the plaintiff's complaint was dismissed in 2010 on the basis that it failed to state a cause of action by inadequately alleging the requisite *actus reus* and *mens rea* for aiding and abetting under international law. The district court also ruled that corporations cannot be sued under the ATS because international law does not recognize corporate aiding and abetting liability for violations of international law.[30]

In 2014, the Ninth Circuit reversed the district court's decision, stating that the plaintiffs had sufficiently alleged the *mens rea* for aiding and abetting, and that corporate liability for aiding and abetting slavery is a specific, universal, and obligatory norm that violates international law.[31] The plaintiffs were given leave to amend their complaint to sufficiently plead the *actus reus*.[32] However, the district court again dismissed the plaintiffs' lawsuit in 2017, this time holding that the plaintiffs sought an impermissible extraterritorial application of the ATS, without ever reaching the question of an *actus reus* standard of aiding and abetting.[33] In 2018, the Ninth Circuit again reversed the district court's dismissal on the basis that the plaintiffs had successfully overcome the presumption against extraterritoriality[34] and,

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30. Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1128 (C.D. Cal. 2010).

31. Doe I v. Nestlé USA, Inc., 766 F.3d 1013, 1022, 1026 (9th Cir. 2014).

32. *See id.* at 1029.

33. Nestlé v. Nestlé, S.A., No. CV 05-5133-SVW-MRW, 2017 WL 6059134, at *1, 5 (C.D. Cal. Mar. 2, 2017).

34. Doe v. Nestlé, S.A., 906 F.3d 1120, 1125–26 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g,* 929 F.3d 623, 626 (9th Cir. 2019). According to the Court, "the allegations paint a picture of overseas labor that defendants perpetuated from headquarters in the United States," in which the defendants' conduct carried out on U.S. territory was "both specific and domestic" and, thereby, relevant to the ATS's "focus" test from *Morrison v. National Australia Bank Ltd.* and adopted in *RJR Nabisco, Inc. v. European Community*. *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 267 (2010); RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2101 (2016). See "focus" test discussed *infra* Part II.B.2.

declining to address the aiding and abetting claim, remanded to allow the plaintiffs to amend their complaint in light of *Jesner*.[35]

The briefs before the Supreme Court in June 2021 addressed two issues: (1) whether U.S. corporations can be held liable under the ATS; and (2) whether the aiding and abetting claim against the U.S. corporations brought under the ATS may overcome the presumption against extraterritoriality.[36] The question of whether aiding and abetting and other secondary theories of liability are cognizable under the ATS were not a question presented to the Supreme Court, although the issue was discussed at length during the oral arguments held in December 2020 and will be discussed below in Part III.C.

1. The Question of Domestic Corporate Liability

Of the two issues that were before the Supreme Court in *Nestlé*, the question concerning corporate liability for U.S. corporations was the most straightforward. It came down to whether the Supreme Court would extend its holding in *Jesner*, barring foreign corporations from being held liable under the ATS, to include U.S. corporations. Based on the *Nestlé* oral arguments, it seemed unlikely that the Supreme Court would bar outright domestic corporations from being sued under the ATS.[37] Many of the Supreme Court Justices questioned Neal Katyal, the attorney representing Nestlé and Cargill, about the reasonability of barring corporate liability under the ATS altogether. For example, Justice Stephen Breyer asked Katyal why a corporation, but not an average person, should be shielded from liability under the ATS.[38] Justice Elena Kagan posed a hypothetical to this end, asking how it would make sense to permit plaintiffs to sue ten individual slaveholders, but not a corporation that those same ten slaveholders

35. The Court explained that *Jesner* had "changed the legal landscape on which plaintiffs constructed their case." Thus, the Court remanded to allow plaintiffs to amend their complaint to specify whether domestic corporations also engaged in the aiding and abetting conduct on U.S. territory. *Nestlé*, 929 F.3d at 626; *see* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402–04 (2018) (holding that, absent further action by Congress, the ATS does not apply to foreign corporations).

36. This article discusses and refers to the two issues in reverse order in which they were presented before the Supreme Court. *Nestlé*, 929 F.3d at 639–40.

37. *See* Terry Collingsworth, Nestlé & Cargill v. Doe *Series: Meet the "John Does" – the Children Enslaved in Nestlé & Cargill's Supply Chain*, JUST SECURITY (Dec. 21, 2020), https://www.justsecurity.org/73959/nestle-cargill-v-doe-series-meet-the-john-does-the-children-enslaved-in-nestle-cargills-supply-chain/ [https://perma.cc/5243-QJLY].

38. *See* Nestlé Transcript, *supra* note 26, at 10–11.

formed.[39] Finally, Justice Neil Gorsuch asked why corporations should be exempt from liability under the ATS, considering that the statute originally permitted *in rem* jurisdiction against entities (in particular, pirate ships).[40] Overall, the justices seemed skeptical of completely shielding U.S. corporations from liability under the ATS.

This skepticism was reflected in the Court's opinion. While the majority opinion did not address the question of corporate liability, five justices disagreed with distinguishing between corporations and natural persons as defendants. Justice Gorsuch wrote, "[t]he notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding."[41] Justice Alito added in a dissenting opinion that "corporate status does not justify special immunity."[42] Justice Sotomayor, joined by Justice Breyer and Justice Kagan, agreed. None of the justices discussed the need for a "norm of corporate liability" under international law.

2. Overcoming the Presumption Against Extraterritoriality

Assuming there is corporate liability under the ATS, plaintiffs still must overcome the presumption against extraterritoriality. *Kiobel II* held that ATS claims must sufficiently "touch and concern" the United States, but did so without providing further explanation. As a result, there is ongoing debate whether the "focus" test from *Morrison v. National Australia Bank Ltd.*[43] was displaced by or refines the "amorphous" "touch and concern" test for extraterritoriality in ATS cases.[44] In *Morrison*, the Court applied the presumption against extraterritoriality to the Securities and Exchange Act of 1934 by holding that the "focus" of § 10(b) is on the "purchases and sales of securities"—which occurred in Australia in this case—and not on the

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39. *See id.* at 19. Justice Kagan also brought up an amicus brief from Oona Hathaway at Yale Law School Center for Global Legal Challenges that explained historic liability of slave ships, which were not individuals. *See id.* at 21–22.

40. *See id.* at 24. *In rem* jurisdiction permits the court to exercise its power over property even when it lacks personal jurisdiction against the owner. Thus, Justice Gorsuch is pointing out that the ATS was never limited to natural persons and asking why it would make sense to now exclude liability of legal persons. *See id.* at 21–22.

41. *Nestlé*, 141 S. Ct. at 1940.

42. *Id.* at 1950.

43. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

44. Doe I v. Nestlé USA, Inc., 766 F.3d 1013, 1029 (9th Cir. 2014) (holding that the "touch and concern" test did not incorporate the "focus" test); *see* Mastafa v. Chevron Corp., 770 F.3d 170, 184 (2d Cir. 2014) (holding that the "focus" test refines the "touch and concern" test); Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194 (5th Cir. 2017) (same); Balaco v. Drummond Co., 767 F.3d 1229, 1237–38 (11th Cir. 2014) (holding that the "focus" test restricts the "touch and concern test").

deceptive conduct.[45] Three years later, the Supreme Court cited, but did not specifically apply, *Morrison*'s focus test to the ATS, instead introducing its "touch and concern" test in *Kiobel II*.[46]

Morrison's focus test implies that as long as conduct relevant to "the focus of the provision occurred in the United States, then the application of the provision is considered domestic and is permitted."[47] The circuits are split on whether this focus test applies to the ATS,[48] with the Second and Fifth Circuits deciding it does;[49] the Fourth and Ninth Circuits applying the "touch and concern" test instead;[50] and the Eleventh and Ninth Circuits combining the two tests.[51]

i. The Two-Step *RJR Nabisco* Framework

In *Nestlé*, the Supreme Court did not apply the *Kiobel* test or the *Morrison* test individually. Instead, it followed the lower court's lead and applied a two-step framework for the presumption against extraterritoriality laid out in *RJR Nabisco, Inc. v. European Community*, which combines the two tests. In *RJR Nabisco*, the Supreme Court applied the presumption against extraterritoriality to the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), by integrating the *Morrison* focus test with *Kiobel II* to create a two-step framework for extraterritoriality issues in the RICO context.[52] The first step of this *RJR Nabisco* framework is to ask whether the presumption against extraterritoriality has been rebutted by verifying whether the statute gives a clear, affirmative indication that it applies extraterritorially.[53] If it does not (as in the case of the ATS), then the statute is not considered extraterritorial.[54] Courts must then turn to the

45. *Morrison*, 561 U.S. at 266.
46. *See* Kiobel v. Royal Dutch Petroleum Corp. (Kiobel II), 569 U.S. 108, 126 (2018).
47. Restatement (Fourth) of Foreign Relations Law, § 404 cmt. c (2012).
48. STEPHEN P. MULLIGAN, CONG. RSCH. SERV. R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER 12–16 (2018).
49. *See Adhikari*, 845 F.3d at 195; *Mastafa*, 770 F.3d at 184.
50. *See Doe I*, 766 F.3d at 1028; Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527 (4th Cir. 2014).
51. *See* Doe v. Drummond Co., 782 F.3d 576, 590 (11th Cir. 2015); Doe v. Nestlé, S.A., 929 F.3d 623, 624 (9th Cir. 2019).
52. 18 U.S.C. § 1962(b); RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2093–94 (2016).
53. *Id.* at 2100.
54. *Id.* ("When a statute gives no clear indication of an extraterritorial application, it has none.").

second step: to ask whether the case involves a domestic application of the statute by looking to the statute's "focus."[55]

When the Ninth Circuit applied *RJR Nabisco*'s two-step framework in *Nestlé* in 2019, it reversed the district court's dismissal of the case.[56] The Court found that the ATS's focus is on torts violating the law of nations, which may either constitute a direct violation or the aiding and abetting of another's violation.[57] Therefore, Nestlé and Cargill's domestic aiding and abetting conduct was relevant in determining whether the case involved a permissible domestic application.[58] Subsequently, the defendants in *Nestlé* argued before the Supreme Court that the "focus" of the ATS claim ought to be the primary tort, rather than the theory of secondary liability.[59] Under this interpretation, forced labor in Côte d'Ivoire would be the exclusive focus of the ATS, so the courts would be less likely to consider the statute's domestic application, notwithstanding the corporate defendants' planning and activities carried out from U.S. headquarters.

In June, the Supreme Court deemed it unnecessary to resolve the focus question because it was still up to the plaintiffs to "establish that 'the conduct relevant to the statute's focus occurred in the United States.'"[60] In Part II of the *Nestlé* majority opinion, with eight justices joining, the Supreme Court concluded that "nearly all the conduct that [the plaintiffs] say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast."[61] Plaintiffs had alleged that the defendants conducted their major decision making in the United States, but the Court concluded that "allegations of general corporate activity—like decision-making—cannot alone establish domestic application of the ATS."[62]

The Supreme Court's ruling reversed the Ninth Circuit's previous holding that the following "narrow set of domestic conduct" was sufficient to permit the case to proceed: (1) the defendants provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an

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55. *Id.* at 2101 ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.").

56. Doe v. Nestlé, S.A., 929 F.3d 623, 624 (9th Cir. 2019).

57. *Id.* at 640–41.

58. *Id*. at 642.

59. Brief of Petitioner, Nestlé USA Inc. v. Doe I, 141 S. Ct. 188 (2020) (Nos. 19-416) at 20.

60. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1934 (2021) (quoting RJR, 136 S. Ct. at 2090).

61. *Nestlé*, 141 S. Ct. at 1937.

62. *Id.*

exclusive supplier," which the Court inferred as "kickbacks" that fell "outside the ordinary business contract" and "given with the purpose to maintain ongoing relations with the farms so that defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave labor;" (2) the defendants sent employees from U.S. headquarters to Côte d'Ivoire to regularly inspect operations at the cocoa farms and report back to the U.S. offices; and (3) the defendants made the original financing decisions from U.S. corporate offices.[63] Thus, the Supreme Court has added a requirement that plaintiffs establish that relevant corporate conduct by the defendant extended beyond simple or routine decision-making occurred in the United States to prevail under the ATS. For most foreign victims of human trafficking, the substantive aiding and abetting often occurs far outside the United States (as was the case in *Nestlé*), making the ATS an unlikely avenue for successful lawsuits.

C. The Remaining Question of Aiding and Abetting Theory

The question of whether the *actus reus* alleged is sufficient to displace the presumption against extraterritoriality is distinct from whether it is sufficient to prove a theory of aiding and abetting liability. The issue of whether the ATS permits an aiding and abetting theory of liability was not directly before the Court in *Nestlé*, and neither were the requirements for alleging such a theory. However, it remains an important legal question to be answered, as underscored by the fact that seven Supreme Court justices, including Chief Justice Roberts[64] and Justices Thomas,[65] Sotomayor,[66] Alito,[67] Barrett,[68] Breyer,[69] and Gorsuch,[70] raised it during the *Nestlé* oral arguments. Without an aiding and abetting theory of liability under the ATS, plaintiffs will only be able to bring cases under *respondeat superior* theory,[71] the requirements of which very few foreign forced labor cases are likely to meet.[72]

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63. *See* Doe v. Nestlé, S.A., 906 F.3d 1120, 1126 (9th Cir. 2018).
64. *See* Nestlé Transcript, *supra* note 26, at 7.
65. *See id.* at 8, 56.
66. *See id.* at 16–17, 43.
67. *See id.* at 39–40.
68. *See id.* at 48.
69. *See id.* at 59–60.
70. *See id.* at 72–73.
71. *Respondeat superior* is a doctrine in tort law that makes a party (i.e., the master) legally responsible for the wrongful acts committed by their agents (i.e., the servant). For example, an employer may be held liable for the acts of employees performed within the course of their employment.
72. In response to Justice Alito's question of whether corporations would be held liable for "only a sliver of activity" if they cannot aid and abet, Curtis Gannon, who

In its June opinion, the Supreme Court did not issue a ruling regarding the question of secondary liability under the ATS, although Justice Sotomayor stated that it is "not tenable to argue that, at the time respondents were enslaved on Ivorian cocoa farms, international law permitted the aiding and abetting of forced labor."[73] Without a ruling, claims premised on forms of secondary liability—including aiding and abetting—remain potentially actionable under the ATS.

1. *Mens Rea*

The justices did not address the elements of complicit liability, although Justice Alito noted in his dissent that a number of questions would need to be resolved if the Court were to take up this issue, including the split over whether the operative *mens rea* standard should be purpose or knowledge.[74] There is an ongoing debate about whether it is sufficient for plaintiffs to show that the corporate defendant *knew* there was forced labor in their supply chains but aided and abetted the crime anyway; or must plaintiffs show that the defendants *purposefully intended* to facilitate the forced labor—a much higher bar?[75]

The knowledge standard would require corporate defendants to have provided "knowing practical assistance to a party who commits a crime in violation of international law."[76] Even this lower *mens rea* bar may be challenging to meet because it will require that plaintiffs prove *actual* knowledge, instead of constructive knowledge, of corporate defendants.[77] This was confirmed during the oral arguments in *Nestlé* when Justice Alito asked Plaintiffs' attorney Paul Hoffman whether simply showing that the defendants "should have known" about the alleged slave labor—which he equated to a recklessness *mens rea* standard—was sufficient for an aiding and abetting claim, or whether the plaintiffs must show that the defendants

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represented the U.S. government as *amicus curiae* in support of the defendants, acknowledged that eliminating the aiding and abetting theory of liability for corporations would "require the corporation to commit the actual tort or its agents to commit the actual underlying tort." *See* Nestlé Transcript, *supra* note 26, at 41.

73. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1949 (2021).

74. *See* Srish Khakurel, *The Circuit Split on Mens Rea for Aiding and Abetting Liability Under the Alien Tort Statute*, 59 B.C. L. REV. 2953 (2018).

75. "Purposeful intent" requires that the corporation "(1) knew that its assistance would be used by the perpetrator to commit the offense, and (2) engaged in bad faith conduct outside the ordinary course of business to assist that specific perpetrator." Song, *supra* note 28, at 29.

76. *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, 138 (2011).

77. Van Shaack, *supra* note 29.

had actually known.[78] Hoffman conceded that actual knowledge was required.[79]

While many scholars believe the former to be the correct standard, most U.S. courts have notably applied the latter, which requires that the corporation "(1) knew that its assistance would be used by the perpetrator to commit the offense, and (2) engaged in bad faith conduct outside the ordinary course of business to assist that specific perpetrator."[80] The bad faith element of purposeful intent would raise the bar considerably by requiring that the corporation took "deliberate steps" to assist in the trafficking and exploitation of workers or made efforts to "conceal and disguise" their assistance in the commitment of such crimes.[81]

D. The Viability of ATS Suits Post-*Nestlé*

As scholar William Dodge has noted, Nestlé "does seem to mark the end of the *Filartiga* line of ATS cases against individual defendants whose relevant conduct occurs outside the United States,"[82] including corporate actors aiding and abetting human trafficking abroad. The Court, by determining that corporate planning and oversight of foreign operations from U.S. headquarters is insufficient "relevant conduct" to sustain an ATS suit, has imposed a higher bar on plaintiffs than the more ambiguous "touch and concern" test. It has, therefore, significantly reduced the number of viable foreign forced labor cases.

Furthermore, beyond the questions presented in *Nestlé*, the *mens rea* of aiding and abetting theory may further limit the number of foreign forced labor cases, especially if the Supreme Court adopts the "purposeful intent" standard. Even if the lower "knowledge" standard is adopted, the only foreign forced labor suits that would be viable under the ATS would be ones brought against U.S. corporations that had actual knowledge of the alleged

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78 . Paul Hoffman: "Your Honor, I don't think that 'should have known' would . . . satisfy, but knowledge would satisfy the international standards for aiding and abetting, and we . . . contend that these defendants knew exactly what they were doing in that supply chain." Nestlé Transcript, *supra* note 26, at 62.

79. *Id*.

80. Song, *supra* note 28, at 44.

81. *See* Tabatha Halleck Chapman, *What Should a Showing of Intent or Purpose Require in a Case of Corporate Accessory Liability for Child Slavery Under the Alien Tort Statute?*, 50 IND. L. REV. 619 (2017).

82. William Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SECURITY, https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/ [https://perma.cc/6FBV-2SH6].

forced labor—a standard still difficult to meet.[83] This difficulty is illustrated by the exchange between Hoffman and Justice Alito during the *Nestlé* oral arguments. [84] After Hoffman could not point to allegations of actual knowledge in the complaint, Justice Alito remarked, "So, after 15 years, is it too much to ask that you allege specifically that the . . . defendants who are before us here specifically knew that forced child labor was being used on the farms or farm cooperatives with which they did business? Is that too much to ask?"[85] With such difficult pleading standards for the ATS, foreign victims of forced labor may benefit from access to an alternative avenue of relief.

II. A MORE PROMISING ALTERNATIVE: THE TVPA

Due to the Supreme Court's narrow reading of the ATS, it is likely that only a small number of plaintiffs will have standing to recover from a U.S. corporation under this statute. It is, therefore, imperative that practitioners find an alternative. First, this section will explain why civil litigation in the United States remains an essential tool in the broader campaign to seek corporate accountability for human rights abuses committed abroad. Next, it will survey potential alternatives to the ATS before providing an in-depth exploration of the TVPA as the most promising option.

A. The Continued Importance of Civil Litigation

Despite the outcome in *Nestlé*, the utility of civil litigation in the fight against exploitation in supply chains will not diminish. There are several reasons why civil litigation will remain an essential tool. To begin, it is an avenue to seek justice for corporate conduct that prosecutors do not pursue.[86] This is especially true in the labor trafficking context, considering that only about five percent of federal prosecutions of human trafficking in the United States are for forced labor,[87] and virtually none involve corporate

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83. *See* Nestlé Transcript, *supra* note 26, at 63–64.

84. *See id.* at 61–65.

85. *See id.* at 64.

86. Ezell, *supra* note 11, at 516.

87. The Department of Justice initiated 220 new federal human trafficking prosecutions in fiscal year 2019, 208 of which were for sex trafficking and 12 were for labor trafficking. OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSONS, 2020 TRAFFICKING IN PERSONS REPORT, U.S. DEP'T OF STATE, https://www.state.gov/reports/2020-trafficking-in-persons-report/. In 2019, there were a total of 575 active federal sex trafficking cases and 31 active forced labor cases. KYLEIGH FEEHS & ALYSSA CURRIER, 2019 FEDERAL HUMAN TRAFFICKING REPORT, THE HUM. TRAFFICKING INST. 3 (2020), https://www.tra

defendants.[88] In addition to offering remedies for past abuses, civil liability is critical in incentivizing businesses to prevent human rights abuses in their operations and contractual relations in the first place.[89]

Civil litigation is also critical because corporate social responsibility ("CSR") measures that call for self-regulation by MNCs,[90] which began in the 1990s, have thus far proven ineffective due to "lack of competence, slipshod methods and conflicts of interest" in conducting audits.[91] More recent efforts, such as the 2011 U.N. Guiding Principles on Business and Human Rights[92] and the 2011 OECD Guidelines for Multinational Enterprises,[93] which strive to create a more robust framework than CSR, have also failed to meaningfully shift corporate behavior, largely because these soft law measures are not legally binding on MNCs.[94] This explains the recent initiative to draft a legally

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ffickinginstitute.org/wp-content/uploads/2020/05/2019-Federal-Human-Trafficking-Report_Low-Res.pdf [https://perma.cc/UW28-68FR].

88. FEEHS & CURRIER, *supra* note 87, at 16.

89. EARTHRIGHTS INT'L, *supra* note 13.

90. For example, the adoption of corporate codes of conduct that set minimum labor standards and mandate compliance audits. *See e.g.*, VERITÉ, *Sample Code of Conduct Provisions* (describing specific samples for codes of conduct corporate policies that suppliers can incorporate to protect workers). http://helpwanted.verite.org/helpwanted/toolkit/brands/improving-codes-conduct-company-policies/tool-1 [https://perma.cc/25HP-KUKG].

91. *See* Mark Anner, Jennifer Bair & Jeremy Blasi, *Towards Joint Liability in Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J. 1, 5 (2013).

92. The U.N. Guiding Principles state that corporations have a responsibility to respect human rights. Special Representative of the Secretary-General, *Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, ¶ 6 (Mar. 21, 2011).

93. *See* OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3–4 (2011), https://doi.org/10.1787/9789264115415-en [https://perma.cc/Q6J9-JPLZ].

94. "Mounting data suggest that the majority of governments and business enterprises around the world have not yet begun, or seriously engaged in, the journey prescribed by the Guiding Principles almost 10 years after they were endorsed by UN member States. Too few States, business enterprises, financial institutions and international organizations have taken meaningful steps to effectively translate the Guiding Principles into practice . . . . In the private sector, beyond the leaders and pioneers, large sections of mainstream business remain unaware of their responsibility to respect human rights, and laggards are unwilling to change practice – even when lack of commitment and action is documented in publicly accessible benchmarks and rankings." U.N. WORKING GRP. ON BUS. & HUM. RTS., U.N. GUIDING PRINCIPLES AT 10 BUSINESS AND HUMAN RIGHTS: TOWARDS A DECADE OF GLOBAL IMPLEMENTATION 2, https://www.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/background_note.pdf [https://perma.cc/7GJT-YHB6].

binding treaty among states.[95] Corporations "are in the best position to monitor such activities," so incentivizing them to monitor themselves and prevent abuses will help minimize enforcement transaction costs.[96]

Finally, though advocates increasingly are exploring foreign law as a potential avenue for relief, civil litigation is unfortunately not a practicable option in many countries, where many victims suing a MNC in the country where the harm took place often face corrupt legal proceedings and a risk of reprisal.[97] This is evidenced by the fact that most cases dismissed in U.S. courts on *forum non conveniens* grounds are not refiled in foreign courts.[98]

B. A Dearth of Options for Civil Litigation or International Remedies

Foreign victims turn to U.S. courts for remedies as a last resort, but they currently have few grounds for their claims besides the ATS in domestic or international law.[99] Under U.S. federal law, for example, the TVPA does not permit suits against corporations, according to the Supreme Court's ruling in *Mohamad v. Palestinian Authority*.[100] Meanwhile, the Fair Labor Standards Act ("FLSA")[101], which prohibits forced labor in the United States, is not a viable option because (1) it does not create a private right of action, instead requiring the U.S. Department of Labor to bring an enforcement action; and (2) the Foreign Workplace Exemption, [102] significantly limited extraterritorial jurisdiction after *Vermilya-Brown Co.*

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95. *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Zero Draft")*, BUS. & HUM. RTS. RES. CTR. (2018), https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf [https://perma.cc/Y632-S42E].

96. Brief for Oxfam as Amicus Curiae at 11–12, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

97. EARTHRIGHTS INT'L, *supra* note 13, at 24.

98. "The reality is that human rights victims in these cases usually bring their cases to the United States as a last resort, when they have no meaningful or safe options available to pursue justice in their home countries." *Id.* at 30.

99. Due to this dearth of potential statutes, EarthRights International has recommended that Congress "create a federal private right of action that can be brought against corporations by victims of transnational human rights abuses." Suggestions include revising the ATS, expanding other existing human rights statutes, or adopting a human rights version of the FCPA. *Id.* at 46.

100. 566 U.S. 449, 456 (2012).

101. 29 U.S.C. § 203 (2018).

102. 5 C.F.R. § 551.212 (2007).

v. Connell, [103] only permitting very narrow facts involving forced labor committed overseas.[104]

RICO appears to be a more viable alternative, as it permits civil lawsuits against both individuals and corporations and allows extraterritorial reach for criminal acts committed outside of the United States if the predicate offense applies extraterritorially.[105] Cases brought under the ATS have, indeed, also been brought under civil RICO, although unsuccessfully.[106] These include *Doe I v. Unocal Corp*.[107] and *Adhikari v. Daoud & Partners*.[108] *Licea v. Curaçao Drydock Co.*, which brought ATS and civil RICO charges against Curaçao Drydock Company for trafficking Cuban workers in a forced labor scheme in conspiracy with the Cuban Government, ended in a judgment in favor of the Cuban plaintiffs and a court award of $80 million, but this victory only arose from a default judgment after the defendants abandoned the proceedings.[109] The statute's burdensome pleading requirements[110] are "difficult, time consuming and expensive."[111] As a result, civil RICO is not as promising an avenue for relief as it initially appears, which may explain why recent foreign forced labor cases have not been filed under RICO.

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103. 335 U.S. 377, 379 (1948).

104. *See* Mallory Miller, *Hot Goods Part I: Rooting Out Forced Labor in Supply Chains Using the "Hot Goods" Provision of the FLSA*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2019), https://corpaccountabilitylab.org/calblog/2019/8/5/part-i-rooting-out-forced-labor-in-supply-chains-using-the-hot-goods-provisions-of-the-flsa [https://perma.cc/5YS3-VZYN] (explaining the extraterritorial application of the "Hot Goods" provision of the FLSA and how to use to increase accountability for "egregious labor violations"); *see also* Mallory Miller, *Hot Goods Part II: Rooting Out Forced Labor in Supply Chains Using the FLSA*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2019), https://corpaccountabilitylab.org/calblog/2019/8/5/hot-goods-part-ii-rooting-out-forced-labor-in-supply-chains-using-the-flsa [https://perma.cc/2F6T-SVYK] (explaining the rare applications of the FLSA overseas).

105. OFF. OF GEN. COUNS., U.S. SENT'G COMM'N, PRIMER: RICO GUIDELINES 1, 4 (2020), https://www.ussc.gov/sites/default/files/pdf/training/primhers/2020_Primer_RICO.pdf [https://perma.cc/9QBL-KZK7].

106. HUM. RTS. FIRST, *Corporate Liability and Human Trafficking* 5–6 (2015), https://www.humanrightsfirst.org/sites/default/files/HRFCorporateLiabilityTraffickingreport.pdf [https://perma.cc/TVX9-XMDY].

107. 395 F.3d 932, 961–62 (9th Cir. 2002).

108. 697 F. Supp. 2d 674, 674 (S.D. Tex. 2009).

109. 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008).

110. These include "proving an ongoing pattern of racketeering activity, that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity, and at least two predicate acts of racketeering committed within a ten-year period." Bang, *supra* note 8, at 276.

111. *Id.*

Besides bringing federal claims, plaintiffs may consider state tort law. They may litigate state claims in state courts or in federal courts pursuant to supplemental or diversity jurisdiction.[112] In fact, most ATS lawsuits have also included common law tort claims, such as assault, battery, or false imprisonment.[113] Although there are some advantages to bringing state law claims, such as the established acceptance of corporate liability for torts, there are several barriers.[114] First, most states have statutes of limitation of one to three years, compared to the ten-year statute of limitations of federal statutes like the ATS or the Torture Victims Protection Act.[115] This short statute of limitations period is especially challenging to meet in transnational forced labor cases involving plaintiffs who have suffered traumatic experiences and who often reside in rural areas.[116] A second potential issue is the conflict of laws for cases involving overseas conduct and foreign litigants, for which state courts will generally apply the law of the place of injury.[117] Lastly, state court judges, especially those who need to run for re-election, may be more susceptible to corporate lobbying and be less willing to challenge corporations than federal judges who enjoy tenure.[118] This, in turn, may create inconsistent court opinions among states, which may produce negative foreign policy implications.[119]

Foreign victims looking beyond U.S. law will also have difficulty finding recourse from international law. The International Court of Justice only hears cases between States, so individuals cannot directly petition the courts.[120] Meanwhile, the European Court of Human Rights,[121] the Inter-American Court of Human Rights,[122] and the African Court on Human

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112. Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UCI L. REV. 9, 15 (2013).

113. EARTHRIGHTS INT'L, *supra* note 13, at 31.

114. Hoffman & Stephens, *supra* note 112, at 17–20.

115. *Id.* at 19.

116. "Finding U.S. counsel and gathering evidence and testimony while plaintiffs are still traumatized and living in precarious conditions generally means that the process of preparing transnational human rights cases is more time-consuming than in a typical tort case." EARTHRIGHTS INT'L, *supra* note 13, at 31.

117. The state court may apply forum law if the facts show a strong connection to the forum state and the law of the forum does conflict with local law, or if there is a balance of interests to apply forum law. Hoffman & Stephens, *supra* note 112, at 11.

118. EARTHRIGHTS INT'L, *supra* note 13, at 9.

119. *See id.* at 31.

120. Statute of the International Court of Justice, art. 34(1) (1945).

121. *How to File a Case*, AFRICAN CT. ON HUM. & PEOPLES' RTS., https://www.african-court.org/wpafc/how-to-file-a-case/ [https://perma.cc/YEF4-K49A].

122. IACHR, *Consultation on Module I: System of Individual Petitions,* ORG. OF AM. STATES, https://www.oas.org/en/iachr/consultation/1_petitions.asp [https://perma.cc/ZX7A-LANB].

and Peoples' Rights[123] accept individual applications, but such petitions can only be brought against a defendant State and require the exhaustion of domestic remedies. The same can be said of individual complaints filed through the United Nations treaty body system, the Special Procedures of the Human Rights Council, and the Human Rights Council Complaint Procedure.[124] Meanwhile, international criminal law is also not a viable option, because the International Criminal Court does not have jurisdiction over corporate crimes.[125]

C. Clear Advantages of the TVPA

As foreign victims of forced labor seeking redress from MNCs search for alternative grounds of relief, the TVPA is a promising option.[126] The TVPA was originally passed as the Victims of Trafficking and Violence Protection Act of 2000 to "ensure just and effective punishment of traffickers, and to protect their victims" by promoting the "3P" model—protection, prosecution, and prevention.[127]

The statute became a possible tool for exacting corporate accountability in foreign forced labor cases with the passage of key amendments.[128] First, the 2003 reauthorization amended the TVPA, adding a civil remedy for victims of trafficking to sue their traffickers directly and

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123. *Right of Individual Application to the European Court of Human Rights*, COUNCIL OF EUR., [https://perma.cc/X84Q-2AYD].

124. *Human Rights Bodies – Complaint Procedures*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm [https://perma.cc/U5GG-QHTR].

125. *See* Ezell, *supra* note 11, at 516; *see also* Fien Schreurs, Nestlé *&* Cargill v. Doe *Series: Remedying the Corporate Accountability Gap at the ICC*, JUST SECURITY (Jan. 11, 2021) https://www.justsecurity.org/74035/nestle-cargill-v-doe-series-remedying-the-corporate-accountability-gap-at-the-icc/ [https://perma.cc/A8WQ-JAS9] (noting that the ICC does not have jurisdiction over corporations for human rights violations overseas).

126. Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RES. J. INT'L L. 17, 22 (2008).

127 *Summary of the Trafficking Victims Protection Act (TVPA) and Reauthorizations FY 2017*, ALL. TO END SLAVERY & TRAFFICKING (Jan. 11, 2017), https://endslaveryandtrafficking.org/summary-trafficking-victims-protection-act-tvpa-reauthorizations-fy-2017-2/ [https://perma.cc/Z49Q-5J3R] (citing Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (2000)). For links to various reauthorizations of the TVPA, see Off. to Monitor & Combat Trafficking in Persons, *International and Domestic Law*, U.S. DEP'T OF STATE, https://www.state.gov/international-and-domestic-law/ [https://perma.cc/TV8D-U2ER]

128. Beale, *supra* note 126, at 25.

obtain mandatory restitution with the creation of § 1595.[129] Then, in 2008, Congress added § 1589(b)[130] to allow criminal charges against those who financially benefit from forced labor and amended § 1595(a) to extend civil liability to those who benefit from any TVPA offense.[131] Reflecting Congress' understanding of the complex operations of global supply chains, this amendment created a new theory of liability that would make it easier to hold corporations liable by not requiring them to have directly participated in the trafficking, either by causing or contributing to the violation.[132] The 2008 reauthorization also created § 1596, which expressly grants extraterritorial jurisdiction.[133] These amendments have given the TVPA significant litigation advantages over the ATS. Specifically, the TVPA largely eliminates the issues presented in *Nestlé*: (1) the question of extraterritorial application of the statute and (2) the issue of corporate liability.

1. Extraterritorial Jurisdiction

The first advantage of the TVPA over the ATS is that it may avoid the extraterritoriality barriers that have predominated ATS litigation.[134] This does not mean, however, that defendants have not challenged the TVPA on extraterritorial grounds. In *Adhikari v. Kellogg Brown & Root, Inc.* ("*Adhikari II*"), corporate defendants successfully argued that there was no

129. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 1595, 117 Stat. 2878 ("An individual who is a victim of a violation of §§ 1589, 1590, or 1591 of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.").

130. 18 U.S.C. § 1589 ("Whoever knowingly benefits . . . from participation in a venture which has engaged in the providing or obtaining of labor or services . . . knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services . . . shall be punished . . . .").

131. 18 U.S.C. § 1595 ("An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator . . . in an appropriate district court of the United States and may recover damages and reasonable attorneys fees").

132. "It is clear . . . that the amendment was meant to expand liability beyond those who directly participated in the trafficking. The amendment also reflects an understanding of the operation of global supply chains . . . [and] gave trafficking victims a new tool to hold persons liable regardless as to whether they can be shown to have caused or contributed to that violation." Brief for Solidarity Center et al. as Amici Curiae Supporting Petitioners, Ratha v. Phatthana Seafood Co., 2017 U.S. Dist. LEXIS 174373 (No. 2:16-cv-04271), at *9–10.

133. 18 U.S.C. § 1596.

134. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 6 U.S.C., 8 U.S.C., 10 U.S.C., 18 U.S.C., 19 U.S.C., 21 U.S.C., 22 U.S.C., 28 U.S.C., and 42 U.S.C.)

extraterritorial reach because the trafficking acts were committed before 2008, the year that the TVPA was amended to provide for extraterritorial jurisdiction.[135] Consequently, only victims in foreign forced labor cases involving acts committed since 2008 may turn to the TVPA for relief.

More recently, corporate defendants also have challenged the notion that extraterritorial jurisdiction extends to civil cases brought under the TVPA. For example, in *Doe I v. Apple Inc.*,[136] corporate defendants argued that the TVPA "contains no clear, affirmative indication of congressional intent to create extraterritorial civil liability" because § 1596 only explicitly extends extraterritorial jurisdiction for criminal violations of § 1589 and § 1591 and does not list § 1595.[137] While the D.C. District Court dismissed this case on several grounds, they agreed with the defendants' argument that the court should not extend jurisdiction because "§ 1596 explicitly grants extraterritorial application to many criminal statutes [and] . . . does not mention their civil analogue [§ 1595]" and "the text and structure of § 1596 suggest that it was focused on criminal, not civil, applications."[138]

Other courts, however, have recognized that § 1596 implicitly extends extraterritorial jurisdiction to all federal courts in civil cases.[139] This is because civil liability under the TVPA is understood to be "coterminous" with the criminal provisions.[140] In other words, civil liability derives from the criminal provisions laid out in § 1581, § 1583, § 1584, § 1589, § 1590, and

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135. 845 F. 3d 184, 202 (5th Cir. 2017).

136. Brief for the Petitioner, Doe I v. Apple Inc., No. 1:19-cv-03737-CJN (D.D.C. June 26, 2020). See case discussed *infra* Part III.D.

137. Memorandum of Points and Authorities in Support of Defendants' Joint Motion to Dismiss at 30, Doe I v. Apple Inc., No. 1:19-cv-03737-CJN (D.D.C. Aug. 25, 2020). The defendant-appellees in *Ratha v. Phatthana Seafood, Co.* similarly argue that § 1596 only applies to criminal prosecutions. *See* Appellees' Answering Brief at 19–20, Keo Ratha v. Phatthana Seafood Co., No. 18-55041 (9th Cir. Sept. 7, 2018). Section 1596 also explicitly applies to § 1581 (Peonage; obstructing enforcement), § 1583 (Enticement into slavery), § 1584 (Sale into involuntary servitude), and § 1590 (Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor).

138. Doe I v. Apple Inc., No. 1:19-cv-03737-CJN, slip op. at 27–28 (D.D.C. 2021). *But see* Appellants' Reply Brief at 22, Keo Ratha v. Phatthana Seafood Co., No. 18-55041 (9th Cir. Nov. 28, 2018) (arguing "[n]o court has agreed with Defendants' argument that TVPA extraterritorial jurisdiction is limited to criminal prosecutions."); *see also* Appellants' Opening Brief at 44, Keo Ratha v. Phatthana Seafood Co., No. 18-55041 (9th Cir. May 25, 2018) (asserting that it is "undisputed that Phatthana attempted to sell shrimp in the United States . . . which is also sufficient for subject matter jurisdiction.").

139. *See, e.g.*, Adhikiri v. Daoud & Partners, 697 F. Supp. 2d 674, 683 (S.D. Tex. 2009) (holding that § 1596 can be applied to grant U.S. courts extraterritorial jurisdiction over human trafficking offenses retroactively).

140. Brief for Members of Congress Senator Blumenthal, Representative Smith, et al., as Amici Curiae Supporting Respondents, Nestlé USA Inc. v. Doe I, 141 S. Ct. 188 (2020) (Nos. 19-416 & 19-453), 2020 WL 6322316.

§ 1591. This is clear in the text of § 1595, which states: "An individual who is a victim *of a violation of this chapter* may bring a civil action against the perpetrator . . . ."[141] Therefore, forced labor practices committed outside of the United States probably fall within the scope of the TVPA, so long as they occurred during or after 2008.

2. Corporate Liability

The second advantage of the TVPA is that it eliminates the question of whether corporations can be sued. It is widely accepted that corporations can be held criminally and civilly liable under the TVPA,[142] and the plain language of the statute supports this reading. Section 1589(b), which creates criminal liability for knowingly benefiting from forced labor, begins with "[w]hoever knowingly benefits."[143] According to the Dictionary Act, which courts have used to interpret criminal statutes, the terms "person" or "whoever" include both natural and legal persons, unless the context indicates otherwise.[144] The same broad language is used in § 1595(a), which derives civil liability from the criminal offenses and thus applies accordingly to both natural and legal persons. [145] Another indication for corporate liability is that § 1591 defines "venture" as "any group of two or more individuals associated in fact, whether or not a legal entity"; and this definition informs the scope of "venture" in § 1595(a) as well.[146]

Not only does the TVPA provide for corporate liability, but liability is not limited to U.S. corporations. Instead, foreign corporations may also be sued as long as they are "present in" the United States.[147] In *Wang v. Gold Mantis Construction Decoration (CNMI), LLC*,[148] for example, seven Chinese construction workers trafficked to work a construction site on Saipan in the U.S. Commonwealth of the Northern Marina Islands ("CNMI") brought a TVPA suit against Imperial Pacific, the subsidiary of a Hong Kong-based

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141. 18 U.S.C. § 1595 (emphasis added).

142. Jonathan S. Tonge, *A Truck Stop Instead of Saint Peter's: The Trafficking Victims Protection Reauthorization Act Is Not Perfect, But It Solves Some of the Problems of* Sosa *and* Kiobel, 44 Ga. J. INT'L & COMP. L. 451 (2016).

143. Beale, *supra note* 126, at 37.

144. *Id.*

145. *See* Brief for Members of Congress Senator Blumenthal, *supra* note 140.

146. Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss at 10, Doe I et al. v. Apple Inc. et al., No. 1:19-cv-03737 (D.D.C. Oct. 26, 2020).

147. Section 1596 permits jurisdiction over alleged offenders who are either U.S. nationals, U.S. permanent residents, or "present in the United States, irrespective of the nationality of the alleged offender."

148. Wang v. Gold Mantis Construction Decoration (CNMI), LLC, No. 1:18-cv-00030, 2021 WL 2065398 (D. N. Mar. I. May 24, 2021).

company, and its contractors, two Chinese construction companies.[149] These foreign companies could be sued because they were physically present in the United States.[150]

Moreover, there is even a possibility that "presence" for purposes of jurisdiction under the TVPA does not necessarily have to be *physical* presence. In *Keo Ratha v. Phatthana Seafood Co., Ltd.*,[151] seven Cambodian villagers recruited to work at Thai seafood factories filed a TVPA suit under § 1595 against Thai and U.S. corporations that constituted a vertically integrated enterprise to produce, transport, and sell seafood products from Thailand in the U.S.[152] The case is currently on appeal before the Ninth Circuit,[153] and the plaintiffs argue that the court has subject matter jurisdiction over the Thai company, Phatthana, for its conduct in Thailand because "present in" jurisdiction does not require physical presence, but only "minimum contacts" for corporations.[154] In addition, they argue that only one offender—and not all offenders—need to be a U.S. national based on Congress' decision to use the phrases "any offense" and "an alleged offender" in § 1596, instead of "the alleged offender" or "the offenders."[155]

In sum, it appears that the TVPA explicitly authorizes extraterritorial jurisdiction over U.S. corporations, in addition to foreign corporations operating on U.S. territory. However, it may prove challenging to establish jurisdiction over foreign corporations operating abroad, and it is unclear whether suing foreign corporations alongside U.S. corporations will make it any easier to obtain jurisdiction over the foreign corporations. Either way, the fact that the TVPA unmistakably reaches U.S. corporations is a major advantage over the ATS.

D. *Keo Ratha v. Phatthana Seafood Co., Ltd.*: Potential Obstacles to TVPA Litigation

The TVPA has been described as eliminating the need for more complex theories of liability, such as aiding and abetting, by extending civil

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149. First Amended Complaint, Wang v. Gold Mantis Construction Decoration (CNMI), LLC, No. CV-18-00030 (D. N. Mar. I., March 15, 2019).

150. *See* 18 U.S.C. § 1596.

151. Keo Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8293174 (C.D. Cal. Dec. 21, 2017). See case discussed *infra* Part III.C.

152. These include California-based Rubicon Resources, LLC, and an affiliate, Wales & Co. Universe Ltd, as well as Thai corporations Phatthana Seafood and S.S. Frozen Food.

153. Keo Ratha v. Phatthana Seafood Co., No. 18-55041 (9th Cir. Jan 10, 2018).

154. Appellants' Opening Brief, *supra* note 138, at 45–47.

155. *Id.* at 47–49.

liability directly to those who financially benefit from human trafficking in § 1595(a):

> An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.[156]

Congress added the "knowingly benefits" provision to § 1595(a) intending to eliminate barriers to corporate liability that arise from the intricate relationship between forced labor and global supply chains, so it makes sense that § 1595(a) should be easier to fulfill than an aiding and abetting claim brought under the ATS.[157] To prove the *mens rea* for a § 1595 claim, for example, plaintiffs must show only that the corporate defendant either "knew or should have known" about the trafficking acts.[158] This *mens rea* standard—one of actual or constructive knowledge—is seemingly lower than the ATS's actual knowledge or purposeful intent standard.

However, due to limited case law, it is not yet clear if the TVPA's "knowingly benefits" standard actually provides a less complex theory of liability. The 2017 district court decision in *Ratha* suggests that the standards for § 1595 may not, in fact, be easier to satisfy.[159] The complaint alleges that the defendants participated in a venture in which they knowingly benefitted from the plaintiffs' forced labor. In December 2017, the U.S. District Court for the Central District of California granted summary judgment in favor of all four corporate defendants, holding that the plaintiffs had failed to prove that the corporate defendants participated in a venture from which they benefited (the *actus reus*) and that they knew or should have known about the alleged forced labor (the *mens rea*).[160] *Ratha* illustrates the potential challenges plaintiffs may face in satisfying the *actus reus* and *mens rea* elements of a § 1595 claim, in addition to proving an underlying TVPA violation of an actionable claim.

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156. 18 U.S.C. § 1595(a).
157. Brief for Solidarity Center, *supra* note 132, at *11–12.
158. *See* 18 U.S.C. § 1595(a).
159. *See* Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8293174 at *6 (C.D. Cal. Dec. 21, 2017)
160. *See id.* at *5–6.

1. The *Actus Reus* of a § 1595 Claim

According to the district court, the plaintiffs in *Ratha* failed to prove the "participation in a venture" element because they did not show that the corporate defendants "took some action to operate or manage the venture," such as "directing or participating in Phatthana's labor recruitment, Phatthana's employment practices, or the working conditions at Phatthana's Songkhla factory."[161] The plaintiffs also failed to satisfy the "benefit" element because the U.S. corporation, Rubicon, never sold any product processed at the Thai factory during the time of the plaintiffs' employment.[162] Instead, the plaintiffs merely demonstrated the defendants received indirect benefits from the sale of products processed at the factory.[163]

The plaintiffs have raised credible concerns regarding the district court's analysis.[164] Regarding the TVPA's "participation in a venture" element, they point out that the court incorrectly imported the "operate or manage" test from RICO caselaw,[165] even though the Supreme Court has confirmed that RICO's text is narrower than the TVPA's.[166] Notably, this limited reading of "participation in a venture" from *Ratha* has since been rejected by other courts.[167] Besides *Ratha*, "[e]very court . . . interpreting the 'participation in a venture' language . . . agrees that a defendant need not

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161. *Id.*

162. *Id.* at *4.

163. *Id.* at *19–20.

164. Plaintiffs contend that, "In granting summary judgment, the district court adopted an unduly narrow interpretation of the TVPA that repeatedly departed from well-established precedent . . . ." Appellants' Opening Brief, *supra* note 138, at 23.

165. *See* Reeves v. Ernst & Young, 507 U.S. 170, 177–79 (1993) (establishing the test that RICO liability is limited to those who have some part in directing the enterprise's affairs through "operation or management").

166. Appellants' Opening Brief, *supra* note 138, at 30. The appellants' brief lays out the various ways the defendants participated in a venture: (1) they attempted to sell shrimp made with forced labor to Walmart, even after Walmart rejected due to concerns about labor practices; (2) they handled press and public relations in a way to "defuse the story" of forced labor allegations; (3) they worked closely with Phatthana to market and sell its shrimp, including "on-site visits to its factories to obtain needed certifications, meet audit requirements, supervise quality control, and manage all aspects of marketing, sale and import into the United States," plus training arrangements for Phatthana staff; and (4) Rubicon's described its efforts as "vertically" integrated," considering that it could "control every aspect of production" and that it was highly involved in operations, including in labor issues. *Id.*

167. *See, e.g.*, Bistline v. Parker, 918 F.3d 849, 873 (10th Cir. 2019) (holding that participation in a venture, or association of two or more individuals, merely requires benefitting financially); Gilbert v. United States Olympic Comm., 423 F. Supp. 3d 1112, 1127 (D. Colo. 2019) (holding that participation in a venture can be achieved as a primary offender or simply by benefitting financially).

actively participate in the underlying forced labor or trafficking as long as they knew or should have known they are supporting a venture that is responsible for the unlawful activity."[168] The plaintiffs also underscore that the district court's reading of "benefit" was too narrow because it limited its analysis to financial profit from sales.[169]

2. The *Mens Rea* of a § 1595 Claim

Likewise, the court in *Ratha* held that the plaintiffs failed to show that the defendants knew or should have known about the forced labor, because they "reasonably relied on industry and government audits and certifications" ensuring that the Thai factory met worker safety and welfare standards.[170] In addition, the court considered general reports on forced labor in Thailand's seafood industry published by the media, NGOs, and governments, which they described as "conflicting and sometime [*sic*] unsubstantiated," to be insufficient to prove that the defendants knew or should have known about the forced labor in their supply chains.[171] The court contrasted these general reports with corporate representatives' firsthand visits to the cocoa farms in *Nestlé*, and the statements and complaints made by the workers to the corporate defendant in *Adhikari*.[172]

In response, the plaintiffs argue that the "knew or should have known" *mens rea* requirement in § 1595 is a negligence standard, for which they have provided substantial evidence.[173] Their opening brief points to the corporate defendants' "awareness of the country-specific, industry-specific and Defendant-specific reports," as well as site visits and executives communications, as at least inferring that Defendants should have

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168. Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss, *supra* note 123, at 15–16.

169. *Id.* at 40. *Ratha* improperly disregarded the benefit defendants gained by marketing the shrimp produced at Phatthana factory and their attempt to benefit by seeking to sell shrimp made with forced labor to Walmart even after Walmart's refusal.

170. *See* Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8293174 at *5 (C.D. Cal. Dec. 21, 2017).

171. Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss, *supra* note 123, at 40.

172. *See* Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 684 (S.D. Tex. 2009).

173. *Id.* at 34. The plaintiffs' argument is supported by numerous § 1595 cases recently brought against the hotel industry in the United States. *See, e.g.*, A.C. v. Red Roof Inns, Inc., No. 19-cv-4965, 2020 U.S. Dist. LEXIS 106012, (S.D. Ohio 2020). In these cases, the hotels were charged with knowingly benefitting from sex trafficking taking place in the hotels. The cases affirmed that "should have known" indicates that actual knowledge of the sex trafficking is not required under § 1595 and that, instead, the standard is a negligence standard of constructive knowledge. *See also* Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss, *supra* note 123, at 5.

known of the abuses.[174] Furthermore, the plaintiffs provide evidence of actual knowledge: news articles revealing the existence of forced labor in Phatthana Frozen Food Factory, which corporate officers responded to with a "coordinated campaign to manage the bad publicity" and "recommend[ations] against scheduling a Walmart audit at the Songhkla factory because it would get a 'negative report.'"[175]

The Ninth Circuit's upcoming decision on *Ratha* will help elucidate whether the TVPA's "knowingly benefited" standard actually imposes lower *actus reus* and *mens rea* standards than aiding and abetting liability under the ATS by addressing the issues of what constitutes "participation in a venture" and "benefit," and what "knew or should have known" entails.

3. Proving an Underlying TVPA Violation: The Issue of Coercion

The Ninth Circuit's decision in *Ratha* will also have to address one other potential obstacle plaintiffs may face in bringing a § 1595 claim: the issue of coercion. Just as plaintiffs must state a viable cause of action under the ATS to bring an aiding and abetting claim against a corporate defendant, plaintiffs will also have to prove there was an underlying TVPA violation from which they knowingly benefitted. To do so, plaintiffs must fulfill the following three elements that make up the federal definition of human trafficking in the labor context: providing, obtaining, or benefitting financially from (the *act* element) "the labor or services of a person" (the *purpose* element) "by means of force, threats of force, physical restraint," or other forms of coercion (the *means* element).[176]

The district court in *Ratha* dismissed the plaintiffs' case in part because it found no underlying TVPA violation.[177] According to the court, the plaintiffs failed to satisfy the *means* element of trafficking because the complaint did not show that defendants "engaged in force, threats of force, physical restraint, or threats of physical restraint to compel [the plaintiffs] to work at its Songkhla factory."[178] The court also pointed out that the only reason the plaintiffs could not return to their home country was because they had entered Thailand illegally, not because their work permits and "alien registration cards" had been withheld by defendants.[179]

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174. Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss, *supra* note 123, at 37.

175. *Id.* at 15.

176. 18 U.S.C. §§ 589(a), (b).

177. *See* Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8293174 at *4 (C.D. Cal. Dec. 21, 2017).

178. Order Granting Defendants Motion for Summary Judgment, *supra* note 134.

179. *Id.*

This narrow interpretation of the TVPA as requiring violent coercion is erroneous and will likely be overturned on appeal. The TVPA explicitly recognizes both physical and non-physical means of coercion.[180] This includes actual or threatened psychological harm, financial harm, reputational harm, and harms caused by abuse of the law or legal process, such as the threat of deportation or imprisonment.[181] Furthermore, the coercion does not have to be "overt," but can instead be "subtle."[182] Therefore, a broader range of forced labor cases brought under § 1595 ought to meet the coercion element than the district court's opinion in *Ratha* suggests. Still, the issue of a coercion is a nuanced matter that is often difficult to prove even in domestic cases against individual traffickers.[183] Accordingly, plaintiffs bringing claims under the TVPA ought to be prepared to address defendants' challenges that the facts do not amount to human trafficking.[184]

E. Assessing the Future Potential of the TVPA

Overall, the TVPA appears to be a promising tool for foreign victims seeking redress from MNCs for forced labor abuses committed abroad. The litigation advantage of the TVPA over the ATS is illustrated by the fact that some foreign forced labor cases brought under both statutes, such as *Adhikari II* and *Ratha*, failed to meet the ATS requirements, but survived the motion to dismiss for the TVPA claim.[185] Nonetheless, the statute remains underutilized.[186] It may be possible that human rights litigators will awaken to the potential of the TVPA as a tool to seek redress against MNCs for foreign victims of forced labor, similar to the way the ATS lay dormant as a possible

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180. *See* 22 U.S.C. § 7102.

181. 18 U.S.C. § 1589.

182. *What is Human Trafficking?*, U.S. DEP'T OF JUST. (Oct. 13, 2020), https://www.justice.gov/humantrafficking/what-is-human-trafficking [https://perma.cc/PYS7-YAPS]; *see e.g.*, Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd., No. SA CV10-01172 JAK (MLGx), 2012 WL 5378742 (C.D. Cal. Aug. 27, 2012) (considering financial harm to constitute "serious harm" under the TVPA and ordered a $4.5 million fine against the corporate defendant in favor of the 350 recruited Filipino guest-working teachers).

183. THE WARNATH GROUP, COERCION IN THE HUMAN TRAFFICKING CONTEXT 2 (2018), https://www.warnathgroup.com/wp-content/uploads/2018/12/Warnath-Group-Practice-Guide-Coercion-in-the-Human-Trafficking-Context.pdf [https://perma.cc/DA56-EDVZ].

184. Appellees' Answering Brief at 1–3, Keo Ratha, v. Phatthana Seafood Co., No. 18-55041 (9th Cir. Jan 10, 2018) (arguing that the case was one involving a foreign employment dispute, not human trafficking).

185. Ramona L. Lampley, *Mitigating Risk, Eradicating Slavery*, 68 AM. U. L. REV. 1707, 1735, 1740 (2019).

186. Ezell, *supra* note 11, at 523.

human rights litigation tool for nearly 100 years.[187] In fact, the number of civil cases brought under the TVPA increased six-fold from 2004 to 2017,[188] and there was a 126% increase in the number of civil cases from 2018 to 2019.[189] In particular, there has been a surge of § 1595 lawsuits filed against the hotel industry in the United States,[190] and one could imagine a similar uptick in cases involving forced labor committed abroad.

It is also possible to envision cases involving fact patterns similar to those of ATS cases brought before 2008, such as *Unocal* or *Nestlé*, being successfully brought under the TVPA today.[191] Hoffman recognized this during the *Nestlé* oral arguments, in which he stated, "It is certainly true that the TVPRA is broader than the ATS claims that we are making in this case and that it . . . seems very likely that any case from 2008 on would use . . . the Trafficking Victims Protection Act rather than the ATS in making these kinds of claims."[192] Indeed, in February 2021, International Rights Advocates ("IRAdvocates") filed a case very similar to *Nestlé* under the TVPA.[193] In *Coubaly v. Cargill, Inc.*, eight former child slaves from Mali who were trafficked to work on cocoa farms in Côte d'Ivoire brought TVPA claims against the companies Nestlé, Cargill, Mars, Mondelez, Hershey, Barry

187. *Id.* at 526.

188. *See* Alexandra F. Levy, *Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action*, THE HUM. TRAFFICKING LEGAL CTR. 10 (2018), https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf [https://perma.cc/Y8MP-NACQ]. The report does not provide information on the number of cases involving foreign forced labor claims.

189. FEEHS & CURRIER, *supra* note 84, at 13. The number of civil cases increased from 39 to 88 from 2018 to 2019. However, this spike is primarily due to an increase in sex trafficking cases and not in forced labor cases.

190. *See, e.g.*, H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 WL 6682152 (S.D. Ohio Dec. 6, 2019) (acknowledging the plaintiff's ability to establish a forced labor claim under the TVPA); A.C. v. Red Roof Inns, Inc., No. 2:19-CV-4965, 2020 WL 3256261 (S.D. Ohio June 16, 2020) (same); Doe S.W. v. Lorain-Elyria Motel, Inc., No. 2:19-CV-1194, 2020 WL 1244192 (S.D. Ohio Mar. 16, 2020) (same); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171 (E.D. Pa. 2020); A.B. v. Hilton Worldwide Holdings Inc., 484 F. Supp. 3d 921 (D. Or. Sept. 8, 2020) (same); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214 (N.D. Cal. July 30, 2020) (same); J. B. v. G6 Hosp., LLC, No. 19-CV-07848-HSG, 2020 WL 4901196 (N.D. Cal. Aug. 20, 2020) (same); M. L. v. Craigslist Inc., No. C19-6153 BHS-TLF, 2020 WL 5494903 (W.D. Wash. Sept. 11, 2020) (same); Doe v. Rickey Patel, LLC, No. 0:20-60683-WPD-CIV, 2020 WL 6121939 (S.D. Fla. Sept. 30, 2020) (same); S.Y. v. Naples Hotel Co., 476 F. Supp. 3d 1251 (M.D. Fla. Aug. 5, 2020) (same).

191. Ezell, *supra* note 11, at 531; *see also* Tonge, *supra* note 138, at 477–78.

192. Nestlé Transcript, *supra* note 26, at 55.

193. Terrence Collingsworth, *Press Release: Child Slaves Who Were Trafficked and Forced to Harvest Cocoa in Cote D'Ivoire Sue the Cocoa Companies that Enslaved Them: Nestlé, Cargill, Mars, Mondelēz, Hershey, Barry Callebaut, and Olam*, INT'L RTS. ADVOC. (Feb. 12, 2011), http://iradvocates.org/press-release/nestle/press-release-child-slaves-who-were-trafficked-and-forced-harvest-cocoa-cote-d [https://perma.cc/N3MN-GV6A].

Callebaut, and Olam.[194] Notably, all of the alleged harms occurred after December 23, 2008, meaning that extraterritorial jurisdiction should not present a barrier, unlike in *Nestlé* or TVPA cases involving earlier harms. A comparison of *Coubaly* with *Nestlé* may further illuminate the potential of using the TVPA to sue MNCs for knowingly benefiting from forced labor in their supply chains.[195]

CONCLUSION

Human rights advocates continue to face the challenge of seeking justice for victims of forced labor that occur in the context of multinational supply chains. While the ATS once appeared to be a promising tool to permit recovery for plaintiffs in foreign forced labor cases, the statute has now been interpreted so narrowly that only a limited set of claims will be able to proceed, especially after *Nestlé*. Until Congress passes legislation either amending the ATS or creating a new federal private right of action that allows victims of transnational human rights abuses to sue MNCs, the TVPA stands as the most promising litigation tool for foreign forced labor cases. Thus, foreign victims seeking redress for labor abuses in a multinational corporate supply chain context ought to consider bringing civil cases against MNCs under § 1595 of the TVPA.

Several characteristics of the TVPA make it promising for cases involving conduct during or after 2008. In bringing a § 1595 claim, plaintiffs will face significantly fewer barriers in proving both extraterritorial application of the statute and in finding jurisdiction over U.S. corporations and foreign corporations present in the United States. They may also have a lower *mens rea* standard to meet: one of actual or constructive knowledge, instead of the ATS standards of actual knowledge or purposeful intent. Of course, successfully bringing a TVPA suit will not be without obstacles. Depending on how courts rule in pending cases, plaintiffs may face

194. Complaint, Coubaly v. Cargill, Inc, No. 1:21-cv-00386 (D.D.C. Feb. 12, 2021).

195. Another notable TVPA case is *Doe I v. Apple Inc.*, filed by IRAdvocates in December 2019. This suit involves allegations against five U.S. technology companies—Apple Inc., Alphabet Inc., Dell Technologies Inc., Microsoft Inc., and Tesla Inc.—for knowingly benefiting from the forced labor of child cobalt miners in the Democratic Republic of Congo. See Complaint, 1:19-cv-03737 at 58. The Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss reveals that the litigants are grappling with the same issues as those in *Ratha*: whether extraterritorial jurisdiction is extended to civil cases under § 1596; what "participation in a venture" means; what constitutes a "benefit"; whether the *mens rea* standard is one of actual knowledge or constructive knowledge; and whether the alleged conduct amounted to a TVPA violation. *See* Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss, 1:19-cv-03737-CJN at 2, 5, 18, 25, and 33 (Oct. 26, 2020).

challenges proving coercion or that the corporate defendants knowingly benefitted from participation in a venture. Regardless of possible litigation hurdles, advocates should seriously consider bringing foreign forced labor cases under the TVPA, which could help pave the path for increased corporate accountability and justice for victims.