Courthouse Doors are Closed to Foreign Citizens for International Law Torts Committed by American Corporations

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Gisell Landrian, Courthouse Doors are Closed to Foreign Citizens for International Law Torts Committed by American Corporations, 55 U. MIA Inter-Am. L. Rev. 524 ()
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Courthouse Doors Are Closed to Foreign Citizens for International Law Torts Committed by American Corporations

Gisell Landrian*

This Note examines the intersection of corporate accountability, human rights violations, and legal recourse for victims of child slavery in the cocoa industry inspired by the Court’s decision Nestle USA, Inc. v. Doe. This decision further limited the scope of the Alien Tort Statute, hindering the plaintiffs’ quest for justice for international human rights violations. The Note analyzes the decision in Nestle USA, Inc. v. Doe through (1) an examination of the Court’s limitations on the Alien Tort Statute and (2) an analysis of the Canadian Supreme Court’s decision in Nevsun.

I. BACKGROUND ...................................................................527
II. NESTLE USA, INC. V. DOE ................................................532
III. NEVSUN RESOURCES LTD. V. ARAYA .........................535
IV. DEFICIENCIES IN THE CASE AGAINST NESTLE ........538
V. COMPARING NEVSUN AND NESTLE .............................541
   A. American Tort Law v. Canadian Tort Law ......................541
   B. Nestle and Nevsun Compared ........................................541
VI. CORPORATE ACCOUNTABILITY AFTER NEVSUN AND NESTLE ..........................................................544
VII. CONCLUSION .....................................................................547

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When individuals across the globe purchase chocolate bars made from cocoa beans, it is hard to imagine whether they understand the infamous root of cocoa bean production by enslaved children in the Ivory Coast. In *Nestle USA, Inc. v. Doe*, six plaintiffs sought justice for the human rights abuses they suffered on cocoa farms in the Ivory Coast after being trafficked and enslaved as children.¹ These farms in West Africa, exclusively funded by chocolate-producing corporations, exploited Malian children.² The children, now adults, claimed to have been recruited in Mali and then trafficked to the Ivory Coast under false pretenses.³ While in the Ivory Coast, the children were forced to work 12-14 hour days for no pay and with little idea as to when or how they could go home.⁴ The children were forced to work using dangerous equipment, such as machetes.⁵ They were also forced to apply hazardous pesticides without proper protective clothing, often leading to injuries and sickness with little to no subsequent care.⁶ Most children were promised payment after the annual harvest but never received any compensation for the forced labor.⁷ The corporation, Nestle, provided these farmers or enslavers with the technical and financial resources necessary to run the farms in exchange for the exclusive right to purchase the cocoa produced by the enslaved children.⁸

The global cocoa production and chocolate industry is no stranger to child slavery allegations. Over two decades ago in 2001, New York Senator Eliot Engel sought to pass legislation requiring a “no child slavery label” for chocolate products sold in the United

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² Id.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Nestle, 141 S. Ct. at 1935.
States. While the measure passed the House, the chocolate industry heavily lobbied against it, arguing the legislation was supposedly unnecessary. Industry leaders insisted that the corporations were already acting against child slavery abroad and, thus, legislation and government intervention were not necessary to combat child slavery in cocoa production. Subsequently, industry leaders, such as Hershey and Nestle and several senators agreed to eradicate child labor by July of 2005. But no legislation was passed. The agreement is now known as the Harkin-Engel Protocol and was meant to be a compromise between the government and industry leaders. However, the agreement only kept “federal regulators from policing the chocolate supply.”

Two decades later, even after this promise of eradication, the Ivory Coast is still rampant with child slavery with no real end in sight. On June 17, 2021, the United States Supreme Court told the Malian plaintiffs, who were enslaved as children, that Nestle’s corporate activity, allegedly aiding and abetting slavery, was not enough to seek justice under the Alien Tort Statute. While the adults who brought the action Nestle v. Doe have now escaped their enslavement, the Ivory Coast is still home to thousands of enslaved children forced to produce cocoa for corporations such as Nestle. The enslaved children on these farms are paid little to no money and do not attend school or visit their families. The Alien Tort Statute enacted by the First Congress to provide foreign plaintiffs a remedy

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11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 Nestle, 141 S. Ct. at 1938.
18 *Id.*
Foreign-born plaintiffs seeking redress in the United States have little to no means of attaining any semblance of justice. Congress has not enacted legislation to hold industry leaders accountable for the human rights violations they have committed abroad or for their failure to keep their end of the deal with United States senators. In its most recent decision concerning the Alien Tort Statute, the Court failed to extend the statute’s reach to allow the plaintiffs to hold these corporations accountable. The decision further limited a foreign plaintiff’s ability to seek redress against domestic corporations for torts violating international law.

This note will address the Alien Tort Statute from its enactment to the Supreme Court’s most recent decision concerning the statute. Part II will discuss Nestle v. Doe and the Supreme Court’s limitations on the scope of the Alien Tort Statute. Part III will discuss Nevsun and the Canadian doctrine of adoption of customary international law. Part IV will discuss the deficiencies in the Nestle plaintiffs’ case as outlined by the Supreme Court. Part V will compare Nevsun and Nestle and discuss why the plaintiffs were successful in the Canadian Supreme Court and how the plaintiffs in Nestle may have been successful abroad or domestically. Finally, Part VI will discuss the implications of the Nestle and Nevsun opinions and how plaintiffs may successfully bring corporate accountability actions for torts committed abroad.

I. BACKGROUND

The Alien Tort Statute gives the federal district courts original jurisdiction to hear “any civil action by an alien for a tort.” The one-sentence statute was enacted as part of the Judiciary Act of 1789 to provide foreign plaintiffs a remedy for international law violations “where the absence of a remedy might provoke foreign nations


20 Id.

to hold the United States accountable.” While the framers intended to create a forum for violations of international law that could impact U.S. foreign relations, the Alien Tort Statute has expanded beyond this original intent by creating a limited forum for foreign plaintiffs regardless of the foreign policy implications considered by the First Congress.

Although the statute was enacted in the 18th century, it was mostly dormant until 1980, when the Second Circuit issued its decision in *Filartiga v. Pena-Irala*. In *Filartiga*, two Paraguayan citizens brought suit against the former Inspector General of Paraguay for allegedly kidnapping, torturing, and killing the plaintiffs’ relative. The Second Circuit reversed the district court’s dismissal. The court held that it must interpret international law as it exists today and, thus, individuals may bring claims for human rights violations occurring outside the United States under the Alien Tort Statute. Human rights advocates celebrated *Filartiga* as an important tool for human rights litigation because it encouraged foreign plaintiffs to bring claims for human rights abuses committed abroad.

Following this decision, human rights advocates began using the statute to bring cases against perpetrators of human rights violations like the defendant in *Filartiga*. After several successful cases against individuals, human rights advocates began pursuing cases against government officials and, later, private corporations. Human rights advocates brought cases against corporations to hold them accountable for human rights violations committed abroad to increase profits. In its pursuit of justice, the Alien Tort Statute litigation has exposed multiple corporations that exercise their power

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22 MULLIGAN, *supra* note 19, at 3; Jesner, 584 U.S. at 243.
23 *Id.* at 4, 23.
24 *Id.* at 6.
25 *Id.*
26 *Id.*
27 *Id.*
29 *Id.* at 1217.
30 *Id.* at 1220 and 1230.
to exploit communities and individuals abroad for the corporation’s financial gain. Allegations against several different corporations include forced labor, murder, torture, aiding and abetting human rights violations, and conspiracy to torture and abuse individuals abroad. In the decades following *Filartifa*, federal appellate courts wrestled with what kind of cases the Alien Tort Statute created jurisdiction for and what kinds of causes of actions plaintiffs may seek. In 2004, the Supreme Court addressed the statute and its scope for the first time in *Sosa v. Alvarez-Machain*. In *Sosa*, the Court of Appeals held that the Alien Tort Statute creates a cause of action for an alleged violation of the law of nations. The alleged violation was the government’s removal of a Mexican citizen through a team of Mexican nationals paid to remove Alvarez-Machain, who allegedly tortured a federal DEA agent.

With respect to the Alien Tort Statute, the Supreme Court in *Sosa* held that the Alien Tort Statute did not create any new causes of action because it was a purely jurisdictional statute. In *Sosa*, and in a line of cases following *Sosa*, the Court clarified that “courts may exercise common-law authority under this statute to create private rights of action in very limited circumstances.” These circumstances include three historical torts: violation of safe conduct, infringement of the rights of ambassadors, and piracy. If the conduct alleged by a plaintiff does not fall within any one of these three historically recognized torts, in order for courts to create a new cause of action, plaintiffs must satisfy a two-step test:

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33 *Id.*
36 *Sosa*, 542 U.S. at 699.
37 *Id.* at 697-98.
38 *Id.* at 724, 743-44.
40 *Sosa*, 542 U.S. at 724.
First, the plaintiff must establish that the defendant violated “a norm that is specific, universal, and obligatory” under international law. That norm must be “defined with a specificity comparable to” the three international torts known in 1789. Second, the plaintiff must show that courts should exercise “judicial discretion” to create a cause of action rather than defer to Congress.41

Consequently, while the Alien Tort Statute allows foreign individuals to bring tort claims in federal courts, the causes of action must fall within the limited circumstances recognized by the Court or satisfy the limiting two-step Sosa test.42 Although the test articulated by the Court is limiting in nature, the Court acknowledged that the door to judicial power “is still ajar subject to vigilant doorkeeping.”43 An apparent victory for human rights advocates.

Before discussing Nestlé, it is essential to discuss the line of cases leading to the decision. To begin, Kiobel v. Royal Dutch Petroleum Co., a decision that was far from a victory for human rights advocates, seemingly shut the door left open by the Sosa court.44 In Kiobel v. Royal Dutch Petroleum Co., a group of Nigerian individuals residing in the United States filed suit under the Alien Tort Statute alleging that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria.45 The action arose out of the government’s actions in the early 1990s; during this time, the Nigerian government attacked “villages, beating, raping, killing, and arresting residents and destroying or looting property.”46 The plaintiffs alleged that the defendants aided and abetted these atrocities by providing the Nigerian forces with food, transportation, compensation, and much more.47 The Court

41 Nestlé, 141 S. Ct. at 1938.
43 Sosa, 542 U.S. at 729.
44 Knoblett, supra note 35, at 749 (“If Sosa left the door ‘still ajar,’ Kiobel slammed it shut.”).
46 Id. at 113.
47 Id.
held that because all of the alleged conduct took place outside the United States, and the plaintiffs could only allege corporate presence in the United States, this was not enough to extend the scope of the Alien Tort Statute to an extraterritorial application.\(^{48}\) In other words, the Court held that mere corporate presence is insufficient to bring a cause of action under the Alien Tort Statute, further limiting the scope of the Alien Tort Statute’s reach.\(^{49}\) Ultimately, once again, failing to find a valid cause of action or a form of redress under the Alien Tort Statute.

Later, in *Jesner v. Arab Bank, PLC*, the Court again declined to extend the reach of the Alien Tort Statute.\(^{50}\) In *Jesner*, the plaintiffs alleged they were injured or killed by terrorist acts committed abroad that were in part caused or facilitated by a foreign corporation.\(^{51}\) Particularly, plaintiffs allege that one of the defendants, Arab Bank, maintained bank accounts for terrorists and allowed the accounts to be used to pay the families of suicide bombers that led to the death of plaintiffs and plaintiffs’ family members.\(^{52}\) The Court held that a foreign corporation may not be held liable under the Alien Tort Statute, precluding most defendants previously litigated against in Alien Tort Statute actions.\(^{53}\) But, leaving open the question of whether domestic defendants may be held liable under the Alien Tort Statute. The Court further discussed that the political branch of government, Congress, is better equipped to make a determination regarding causes of action against a corporation for international tort law violations.\(^{54}\) The Court held that the political branch is best suited to determine foreign policy implications, such as whether a particular cause of action would or would not “create special risks of disrupting good relations with foreign governments.”\(^{55}\) Ultimately, the Court failed to find a valid cause of action or redress under the Alien Tort Statute.

\(^{48}\) *Id.* at 124-25.

\(^{49}\) *Id.*


\(^{51}\) *Id.* at 248.

\(^{52}\) *Id.* at 250.

\(^{53}\) *Id.* at 265; Knoblett, *supra* note 35, at 751.

\(^{54}\) *Jesner*, 584 U.S. at 272-74.

\(^{55}\) *Id.* at 273.
II. NESTLE USA, INC. V. DOE

Most recently, in *Nestle v. Doe*, the Supreme Court further limited the scope of the Alien Tort Statute while failing to reach the case’s merits, leaving many questions regarding the feasibility of cases brought under the Alien Tort Statute unanswered. In *Nestle*, six individuals brought an action against two United States based companies, Nestle USA, Inc. and Cargill. The plaintiffs alleged that they were trafficked into the Ivory Coast and enslaved as children to produce cocoa for these corporations who produce chocolate. While the defendant corporations did not own or operate the farms on the Ivory Coast, they provided the farms with the technical and financial resources necessary to run them in exchange for the exclusive right to purchase the cocoa produced on them.

The plaintiffs’ argument rested on the business relationship between the domestic corporations and the foreign farmers. In other words, the plaintiffs allege that through this business relationship, the defendant corporations aided and abetted child slavery because the corporations knew or should have known that the farms were enslaving children to produce cocoa. Further, the corporation did nothing to prevent or stop child slavery on the farms. While all of the injuries sustained by the plaintiffs occurred overseas, the plaintiffs alleged that the corporation made all significant operational decisions in the United States. Thus, the domestic corporations should be held accountable for their role in aiding and abetting slavery in the Ivory Coast through their domestic decision-making.

The district court dismissed the suit because the only domestic conduct alleged, general corporate activity, was insufficient to apply the Alien Tort Statute extraterritorially. The Ninth Circuit Court of Appeals reversed in part, ruling that dismissal was appropriate for foreign defendants but rejected the district court’s decision with

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57 Id. at 1935.
58 Id.
59 Id.
60 Id.
61 Id.
62 Id.
63 Id. at 1935.
64 Id. at 1936-37.
respect to the Alien Tort Statute’s domestic application. The Ninth Circuit held that the plaintiffs had sufficiently pled a domestic application of the Alien Tort Statute because of the domestic corporations’ financial decisions that allegedly led to the atrocities committed in the Ivory Coast. Subsequently, the Supreme Court granted certiorari. After hearing oral arguments from the parties, the Court reversed the judgment of the Court of Appeals, holding that “[w]hether and to what extent defendants should be liable under the Alien Tort Statute for torts beyond the three historical torts identified in Sosa lies within the province of the Legislative Branch.”

The Supreme Court held that because the Alien Tort Statute only applies domestically, and the plaintiffs failed to establish that the conduct relevant to the statute’s focus occurred in the United States, the plaintiffs sought an impermissible extension of the scope of the Alien Tort Statute. Consistent with the Court’s decision in Kiobel, the Court held that pleading mere corporate activity was insufficient to sustain a cause of action for international law torts committed abroad. Because all of the alleged aiding and abetting occurred in the Ivory Coast, the domestic general corporate activity was insufficient to establish a domestic application of the Alien Tort Statute.

Further, because the plaintiffs did not allege one of three historical torts previously recognized by the Court, plaintiffs had to satisfy the two-step Sosa test in order to compel the Court to recognize a new cause of action for violations of international law. The Court held that the plaintiffs did not satisfy the second prong of the Sosa test. In other words, the plaintiffs failed to show that the Court should exercise judicial discretion to create a cause of action for the international law violations rather than defer to Congress to pass legislation. Justice Thomas credits potential foreign policy concerns with the judiciary creating a cause of action under the Alien Tort Statute, such as discouraging companies or individuals from

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65 Id. at 1936.
66 Id.
67 Id. at 1940.
68 Nestlé, 141 S. Ct. at 1937.
69 Id.
70 Id.
71 Id. at 1938.
72 Id. at 1939.
73 Id.
engaging in intergovernmental efforts because they may be subjected to more private suits under the Alien Tort Statute.\textsuperscript{74} The Court limited the role of the judiciary to the following:

The judicial role is to resolve cases and controversies, which typically present only the parties’ perspectives. The Judiciary does not have the “institutional capacity” to consider all factors relevant to creating a cause of action that will “inherent[ly]” affect foreign policy.\textsuperscript{75}

Consequently, because foreign relations powers fall within the purview of the legislative branch, the Court deferred to Congress to create a cause of action for torts outside of the three historical torts previously recognized in \textit{Sosa}.\textsuperscript{76} Notably, the Court did not discuss whether Congress should create a cause of action to hold domestic corporations, like Nestle, accountable for international law tort violations. Instead, the Court deemed this decision to be outside the scope of its power as the judiciary branch.\textsuperscript{77}

In addition to the majority opinion in \textit{Nestle}, the Justices also wrote two concurrences and a dissent. For this note’s analysis, the most pertinent of the three are the two concurring opinions. The first concurrence recognizes the “real problem with this lawsuit[,]” that the Alien Tort Statute does not deputize the judiciary with the power to create new causes of actions.\textsuperscript{78} The first concurring opinion further notes that in the two decades of litigation following \textit{Sosa}, this Court has never recognized a new cause of action for international law violations under the two-step test outlined in \textit{Sosa}.\textsuperscript{79} Thus, the opinion calls for the Court to explicitly recognize it does not have the power to create new causes of action under any circumstance and that that power solely lies with the legislative branch, seemingly seeking to completely overrule \textit{Sosa} and forget the test instead of limiting its scope.\textsuperscript{80}

\textsuperscript{74} \textit{Nestlé}, 141 S. Ct. at 1939.  
\textsuperscript{75} \textit{Id.} at 1940.  
\textsuperscript{76} \textit{Id.}  
\textsuperscript{77} \textit{Id.}  
\textsuperscript{78} \textit{Id.} at 1942 (Gorsuch, J., concurring).  
\textsuperscript{79} \textit{Id.} at 1943.  
\textsuperscript{80} \textit{Nestlé}, 141 S. Ct. at 1943 (Gorsuch, J., concurring).
Similarly, Justice Sotomayor’s concurring opinion finds that the facts before the Court necessitate reversal because the respondents failed to allege a domestic application of the Alien Tort Statute.81 However, the Justice argues that the Court erred in limiting the Alien Tort Statute’s reach to the three historical international law torts: violation of safe conducts, infringement of the rights of ambassadors, and piracy.82 Justice Sotomayor argues that limiting the Alien Tort Statute in such a way directly contravenes the First Congress’ legislative determination that all foreign citizens may seek redress for international law torts under the Alien Tort Statute, essentially contravening a legislative directive from the First Congress to all federal courts.83 Particularly because the Alien Tort Statute gives federal district court’s original jurisdiction to hear “any civil action by an alien for a tort” and because the Alien Tort Statute was intended to provide noncitizens a federal forum to seek redress for international law torts, giving courts the power to recognize causes of action for violations of specific, universal, and obligatory norms of international law, the Court must follow that legislative directive.84 Additionally, Sotomayor describes Justice Thomas’ strict interpretation of the Sosa test to overrule Sosa in all but name because it is an unnecessary limiting test as applied in Nestle.85

III. NEVSUN RESOURCES LTD. V. ARAYA

In a recent decision by the Supreme Court of Canada, the court evaluated whether plaintiffs may bring a claim “under customary international law as incorporated into the law of Canada and domestic British Columbia law.”86 The plaintiffs in Nevsun Resources Ltd. v. Araya allege that they were enslaved by the Eritrean military and forced to provide labor for several companies owned by senior military officials.87 Notably, the plaintiffs alleged that the use of forced labor, slavery, and cruel, inhumane, or degrading treatment are

81 Id. at 1943-44 (Sotomayor, J., concurring).
82 Id. at 1944.
83 Id.
84 Id. at 1950 (Sotomayor, J., concurring).
85 Id. at 1945.
86 Nevsun Resources Ltd. v. Araya, 2020 SCC 5, (Can.).
87 Id.
breaches of customary international law and actionable at common law in Canada through the Canadian doctrine of adoption of customary international law.88

In its decision, the Supreme Court of Canada analyzed the doctrine of adoption, which stands for the proposition that customary international law may be adopted into Canadian common law.89 The court defined customary international law as follows:

Customary international law has been described as “the oldest and original source of international law.” It is the common law of the international legal system — constantly and incrementally evolving based on changing practice and acceptance. As a result, it sometimes presents a challenge for definitional precision.90

The court held that under its precedent, where no conflicting domestic legislation exists, customary international law should be automatically incorporated into domestic law.91 Where customary international law conflicts with domestic legislation, domestic legislation supersedes it, and customary international law does not apply.92 Further, absent a conflict, customary international law is automatically adopted into domestic law and does not require any form of legislation.93

The doctrine of adoption can be traced back to the 18th century and was most recently affirmed by the Supreme Court of Canada in R. v. Hape.94 In Hape, the Supreme Court of Canada held that “the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation.”95 The court held that customary international law is also the law of Canada unless Canada

88 Id.
89 Dzeba, supra note 42, at 394.
90 Nevsun Resources Ltd. v. Araya, 2020 SCC 5, para. 74 (Can.).
91 Id., ¶ 90.
93 Nevsun, 2020 SCC 5 at para. 86.
94 Id. at para. 87-90.
declares that its law is to the contrary expressly through domestic legislation. Additionally, suppose the Canadian government disagrees with the court’s adoption of customary international law. In that case, the legislature may enact domestic legislation that will automatically supersede the court’s adoption of any law.

In Nevsun, the Supreme Court of Canada found that prohibitions against forced labor and cruel, inhumane, and degrading treatment are customary international law. The court also rejected the defendant’s argument that they are excluded from liability because they are corporate entities, holding that corporations are not immune from liability under customary international law. Next, the court found that there was no Canadian law that conflicted with customary international law concerning forced labor and inhumane treatment. Accordingly, because the claims brought by the plaintiffs were all founded on well-established customary international law, and there is no conflicting domestic law, the corporations may be held liable under the Canadian doctrine of adoption.

The court dismissed the appeal and remanded the case to be decided on its merits: whether the corporations can be held liable for enslaving children abroad. Unfortunately, the case was ultimately settled before it could be decided, but the implications of the decision are vast. The Nevsun decision allows individuals to seek redress against private actors even if no domestic legislation creating the cause of action exists. So long as the alleged actions are violations of customary international law and there is no conflicting domestic law, defendants may be held liable through the doctrine of adoption.

96 Id.
97 Id.
98 Nevsun, 2020 SCC 5 para. 102-03.
99 Id. para. 113.
100 Id. para. 114.
101 See id. para. 87-90.
102 See id. para. 131-33.
103 Zullow, supra note 92, at 124.
104 See Nevsun, 2020 SCC 5 para. 90, 111.
105 See id.
IV. DEFICIENCIES IN THE CASE AGAINST NESTLE

In Nestle, the plaintiffs allege they were trafficked into the Ivory Coast as enslaved children to produce cocoa for chocolate-producing corporations.\(^{106}\) While the corporations did not own or operate the farms on the Ivory Coast, they did provide the farms with money in exchange for the exclusive right to purchase the cocoa produced on the farms.\(^{107}\) The only alleged domestic conduct was aiding and abetting child slavery via corporate decision-making in the United States because the corporation funded these farms and failed to do anything to prevent the enslavement of children abroad. Expanding on the Court’s decision in Kiobel, the Court held that not only is mere corporate presence insufficient, but so is general corporate activity to establish the domestic application of the Alien Tort Statute.\(^{108}\)

However, the Court should have discussed, explained, or illustrated how much domestic activity is enough to establish domestic application of the Alien Tort Statute. The Court’s only instruction to plaintiffs is that they “must allege more domestic conduct than general corporate activity.”\(^{109}\) The Nestle plaintiffs would have had to allege that Nestle committed human rights abuses in the United States beyond just fully funding, providing resources, and failing to prevent human rights abuses on farms that enslave children.\(^{110}\) This portion of the Court’s holding seems to discard the possibility of a corporate defendant being held liable if the international law violations are committed abroad, even if all decisions enabling the human rights violations happen domestically.\(^{111}\) This decision allows defendants, such as Nestle, to continue funding child slavery abroad without facing any accountability from the judicial branch, leaving the plaintiffs without any legislative or judicial redress for human rights abuses unless the corporations’ actions go beyond mere domestic decision-making.

Explicit human rights abuses committed in the United States would easily fall under the jurisdiction of the Alien Tort Statute, but

\(^{107}\) Id. at 1935.
\(^{108}\) Id. at 1937.
\(^{109}\) Id.
\(^{110}\) See id.
\(^{111}\) Id.
corporations do not commit these atrocities domestically. Even where, like in Nestle, the corporations fully fund the farms, there is no liability for the corporations. Based on the Court’s decisions, it seems that corporate defendants would have to take tangible actions such as directly enslaving children or providing physical resources from the United States to subject themselves to the Alien Tort Statute. It is hard to conceive the narrow scenario in which a corporation would commit atrocities that would affect a foreign plaintiff abroad but also participate in enough domestic activity to subject themselves to the Alien Tort Statute domestically. The Court should have held that fully financing a farm that enslaves children is enough, even if the farm is located abroad, as opposed to setting a high, almost impossible bar for plaintiffs to allege conduct that satisfies the Court’s requirements. The Alien Tort Statute was intended to create redress for these kinds of allegations from plaintiffs, but the Court’s holding severely limits the reach of the Alien Tort Statute.

The foreign policy concerns discussed by Justice Thomas are correctly rebutted by Justice Sotomayor in her concurrence: failing to provide an avenue for redress to plaintiffs also raises foreign policy concerns. Any decision regarding human rights violations committed abroad will raise foreign policy concerns. While the Court seems to entertain the narrow situation in which they could create a cause of action under the Alien Tort Statute, passing the two-prong Sosa test seems nearly impossible. The Court has already held that any new cause of action created under the Alien Tort Statute implicates foreign policy concerns. It is undisputed that foreign affairs are outside the scope of the judiciary’s power. Thus, the Court has limited its ability under the Alien Tort Statute to create new causes of action near impossibility because a plaintiff will never be able to allege a cause of action under the Alien Tort Statute that

112 See Nestlé, 141 S. Ct. at 1933.
114 Nestlé, 141 S. Ct. at 1948 (Sotomayor, J. concurring).
115 See id.
116 See id. at 1940.
117 Id.
does not implicate foreign affairs within the purview of the legislative branch. The Court’s holding effectively, as discussed by Justice Sotomayor, overrules Sosa and abandons the two-part test set out by the Court.\footnote{Id. at 1948 (Sotomayor, J. concurring).}

The Court also acknowledged that the plaintiffs do not have a cause of action under the Trafficking Victims Protection Reauthorization Act of 2003 (“TVPA”) because the Act does not apply retroactively.\footnote{Id. at 1939.} However, the Court uses TVPA as an example of Congress creating a cause of action for international law tort violations where it deems necessary. Justice Thomas acknowledges the plaintiffs’ injury while deflecting the responsibility to provide redress to Congress.\footnote{See Nestlé, 141 S. Ct. at 1939.} Nevertheless, the Court does not urge Congress to create a cause action allowing the plaintiffs to seek redress against Nestlé. The Court merely states that if Congress wanted to create a cause of action permitting the Nestlé plaintiffs to seek redress for torts committed abroad, allegedly aided and abetted by corporate activity, Congress would have and can still do so.

Justice Sotomayor also discusses the TVPA in her concurrence. While acknowledging Justice Thomas’s point, the opinion correctly notes that merely because Congress has chosen to legislate one tort does not mean that another form of conduct is any less tortious.\footnote{Id. at 1949 (Sotomayor, J. concurring).} Nor does it preclude the Court from using existing legislation as it was intended.\footnote{See id.} In other words, the fact that existing legislation addresses an international law tort does not preclude the Court from using the Alien Tort Statute as the First Congress intended to provide redress for foreign plaintiffs.\footnote{Id. at 1949 (Sotomayor, J. concurring).} Ultimately, the Court acknowledges that the Nestlé plaintiffs do not have any form of redress through the TVPA and declines to extend the Alien Tort Statute to provide the redress they seek for a valid injury.\footnote{Id. at 1939.} Once again, failing to find a valid cause of action or redress under the Alien Tort Statute.

\footnote{Id. at 1948 (Sotomayor, J. concurring).}
\footnote{Id. at 1939.}
\footnote{See Nestlé, 141 S. Ct. at 1939.}
\footnote{Id. at 1949 (Sotomayor, J. concurring).}
\footnote{See id.}
\footnote{Id.}
\footnote{Id. at 1939.}
V. COMPARING NEVSUN AND NESTLE

A. American Tort Law v. Canadian Tort Law

In the United States, tort law functions as a form of redress for individuals or groups of people who suffered harm caused by another individual or entity.125 This area of the law seeks to compensate the individual injured, deter those who may cause harm, and punish those who cause harm.126 The Alien Tort Statute sought to extend this privilege to individuals who suffered injuries caused by human rights abuses.127

While Canadian tort law seeks to offer the same form of redress, some critical differences are worth noting. Notably, tort law in Canada may vary from province to province, but most of the country’s tort law has been decided by the Canadian Supreme Court and is thus the same throughout the continent. Additionally, there are no civil juries, contingency fees, limited class actions, or punitive damages.128 Most importantly, as displayed in Nevsun, Canadian courts will adopt customary international law so long as it does not conflict with Canadian law, providing for a more significant number of causes of action for plaintiffs seeking justice.129 Hence, the court systems are fundamentally different in the scope they may provide redress for plaintiffs seeking corporate accountability because the United States Supreme Court has limited its ability to adopt any international law that Congress has not already legislated.

B. Nestle and Nevsun Compared

The United States Supreme Court decided in Nestle that the Alien Tort Statute does not extend to Nestle because the conduct relevant to the statute occurred abroad. In other words, operational

125 KEVIN M. LEWIS, CONG. R SCH. SERV., IF11291, INTRODUCTION TO TORT LAW 1 (2023).
126 Id.
129 Peter Bowal & Thomas D. Brierton, CANADA OPENS ITS COURTS TO OVERSEAS HUMAN RIGHTS ABUSES, 36 No. 6 Int’l Enforcement L. Rep. 236 (2020).
decision-making by the chocolate conglomerate, which allegedly aided and abetted the enslavement of children, was not enough to find them liable in the United States.\textsuperscript{130} The Court discussed that more is required beyond general corporate activity.\textsuperscript{131} Further, the Court decided that the plaintiffs failed to prove that the Court should exercise judicial discretion as opposed to deferring to Congress.\textsuperscript{132} This decision is in stark contrast with the Canadian Supreme Court’s decision in \textit{Nevsun}, where the court held that a corporation may be held liable in Canada for human rights abuses committed in Eritrea even where no domestic legislation creates this cause of action.\textsuperscript{133} Under the Canadian doctrine of adoption, corporations may be held liable for atrocities committed abroad so long as the customary international law does not conflict with the domestic law.\textsuperscript{134}

Would the \textit{Nevsun} plaintiffs have succeeded if they brought their cause of action in the United States? Likely no. Had the \textit{Nevsun} plaintiffs brought their claim in American courts, the result would have mirrored that of the Court’s in \textit{Nestle}; the plaintiffs would have been unsuccessful. Because the United States Supreme Court does not have an adoption doctrine that allows that Court to adopt customary international law, as does the Canadian Supreme Court, the \textit{Nevsun} plaintiffs would not have satisfied the required nexus to succeed in American courts. Similar to the atrocities alleged by the \textit{Nestle} plaintiffs, all of the alleged atrocities occurred abroad in Eritrea, none in Canada or the United States.\textsuperscript{135} Additionally, based on the facts presented in \textit{Nevsun}, it does not seem that the plaintiffs would have been able to prove to the Court, that it should exercise its judicial discretion in creating a cause of action because a new cause of action would raise foreign policy concerns just like the one in the \textit{Nestle} decision.\textsuperscript{136} Ultimately, because the \textit{Nevsun} defendant is a domestic corporation that committed all of its atrocities abroad, it would have received a similar reprieve from liability if the action

\begin{footnotesize}
\textsuperscript{131} \textit{See id.} at 1937.
\textsuperscript{132} \textit{Id.} at 1940.
\textsuperscript{133} \textit{See generally} Nevsun Resources Ltd. v. Araya, 2020 SCC 5, (Can.) (holding corporation liable for human rights abuses committed in another country).
\textsuperscript{134} \textit{Id.} para. 94, 114, 116.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{See id.}
\end{footnotesize}
had been brought in the United States, mainly because of the Court’s inability to adopt customary international law or create causes of action that Congress has not legislated.

Conversely, would the Nestle plaintiffs have succeeded if they brought their cause of action in Canada? Maybe. The Nestle plaintiffs may have had a successful claim in Canadian court under the same facts alleged before the United States Supreme Court. Assuming the Nestle plaintiffs can prove Nestle is domestic to Canada, the plaintiffs would have plead more than the Nevsun plaintiffs. Unlike the Nestle plaintiffs, the Nevsun plaintiffs did not plead or allege that the corporation’s domestic activity was sufficient for liability. 137 The Nevsun plaintiffs focused their claims purely on the atrocities committed abroad in Eritrea and the Canadian doctrine of adoption. 138 In Nestle, the plaintiffs described the atrocities committed abroad and the domestic decision-making that led to the human rights abuses committed abroad. 139 As the court did in Nevsun, the Canadian courts would have similarly held that the domestic actions and human rights violations committed abroad were founded on well-established customary international law. Because there is no conflicting domestic law, the corporations may be held liable under the Canadian doctrine of adoption.

Overall, the plaintiffs in both cases allege very similar facts because all of the defendants are accused of either enslaving individuals into forced labor or aiding and abetting forced labor. 140 The most apparent distinction between the two cases is the court’s power to provide a form of redress. More specifically, the Canadian court’s doctrine of adoption functionally allows the Court to create several causes of action for plaintiffs that may otherwise be unavailable. 141 In the United States, the Court cites its inability to create a cause of action and Congress’ failure to create such a cause of action as some of the reasons why it cannot provide the Nestle plaintiffs with redress for their injuries in the Ivory Coast.

137 See id. para. 60.
138 See Nevsun, 2020 SCC 5.
140 Compare Nevsun, 2020 SCC 5 para. 4 (ruling on a case where plaintiffs allege slave treatment), with Nestlé, 141 S. Ct. at 1935 (analyzing case where plaintiffs allege defendant aided and abetted slave work).
141 See Nevsun, 2020 SCC 5.
If the United States were to adopt customary international law, so long as the Court finds it does not conflict with any current United States laws, the Court could have held that the *Nestle* plaintiffs had a cause of action. Generally, if the United States Courts implemented the doctrine of adoption of customary international law, many would have causes of action to seek redress against foreign corporations with a domestic presence. Additionally, the Court would be within its power as the judiciary. The Court would still function as the judiciary, and Congress would remain the law-making branch by adopting customary international law. The law-making function would remain with Congress because the Court could not adopt laws that conflict with domestic legislation, the Court is limited to well-founded international common law, and Congress could pass legislation to override any of the judiciary’s adoptions.

Further, the Canadian doctrine of adoption is similar to the Supreme Court’s current role. As the judiciary, through its interpretation of the law, the Court often functionally creates laws under the doctrine of stare decisis. Additionally, the Court is always constrained by Congress’s directives because it cannot issue opinions or interpret precedent in a way that conflicts with legislation or the Constitution. Congress may also continue to enact legislation to limit the court’s interpretation of any law or precedent or adoption of customary international law. Thus, the Canadian doctrine of adoption is similar to the United States Supreme Court’s role of judicial review and the interpretation of the law under stare decisis.

VI. CORPORATE ACCOUNTABILITY AFTER NEVSUN AND NESTLE

In Canadian Courts, plaintiffs may bring causes of action for torts committed abroad through the court’s adoption doctrine. While the *Nevsun* plaintiffs settled before the case could be decided

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144 Id.
145 *Nevsun*, 2020 SCC 5, para. 90.
on its merits, the decision may open the door for individuals to seek redress against private actors even if no domestic legislation creating the cause of action for the alleged conduct exists.\textsuperscript{146} Foreign plaintiffs may seek justice in Canada if the alleged tortious actions violate customary international law and there is no conflicting domestic law.\textsuperscript{147} In Canadian courts, more corporate defendants may be held liable because the doctrine of adoption of customary international law allows the court to create causes of action based on international common law.\textsuperscript{148}

In the United States, the Court has closed the courthouse doors for plaintiffs seeking redress under the Alien Tort Statute for international law violations committed abroad unless the alleged conduct falls under a very limited set of circumstances.\textsuperscript{149} These circumstances include any of the three historically recognized torts, violation of safe conducts, infringement of the rights of ambassadors, and piracy.\textsuperscript{150} Additionally, plaintiffs may seek redress where the plaintiffs can pass the muster of the two-part \textit{Sosa} test, which requires the plaintiff to (1) prove that the defendant violated a norm that is specific, universal, and obligatory under international law and (2) show that courts should exercise judicial discretion to create a cause of action rather than defer to Congress.\textsuperscript{151} Further, after the Court’s decision in \textit{Nestle}, under the \textit{Sosa} test, it is insufficient to plead domestic corporate presence or general corporate activity for international law torts committed abroad.\textsuperscript{152}

Luckily, there are other avenues for plaintiffs to seek some accountability for human rights violations committed abroad. While the \textit{Nestle} plaintiffs do not have a cause of action under the TVPA, partly because the statute does not apply retroactively, other plaintiffs seeking accountability or justice may still pursue causes of action under the Act and maybe even the Alien Tort Statute.\textsuperscript{153} The TVPA allows citizens and noncitizens to bring claims for torture or

\textsuperscript{146} See generally id. at para. 111.
\textsuperscript{147} Id. at para. 90.
\textsuperscript{148} See Nevsun, 2020 SCC 5.
\textsuperscript{150} Id.
\textsuperscript{151} Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1938 (2021).
\textsuperscript{152} Id. at 1937.
\textsuperscript{153} Id. at 1940.
extrajudicial killings.154 Unlike the Alien Tort Statute, the act “pro-
vides a federal cause of action to aliens and U.S. Citizens for certain
claims of torture and extrajudicial killings, but contains no jurisdi-
cotional grant.”155 More specifically, the Act provides:

An individual who, under actual or apparent author-
ity, or color of law, of any foreign nation--(1) sub-
jects an individual to torture shall, in a civil action,
be liable for damages to that individual; or (2) sub-
jects an individual to extrajudicial killing shall, in a
civil action, be liable for damages to the individual’s
legal representative, or to any person who may be a
claimant in an action for wrongful death.156

Although some courts have found overlap between the Alien
Tort Statute and TVPA causes of action, they are often filed or plead
as two distinct causes of action.157 In essence, the TVPA is a more
complex statute that creates at least two substantive causes of action
for plaintiffs to seek redress.158 On the other hand, the Alien Tort
Statute is purely jurisdictional.159 The statute also imposes more
stringent requirements on plaintiffs, such as the requirement to ex-
haust administrative remedies, a ten-year statute of limitations, and
the action may only be brought against individual state actors.160
TVPA was intended to supplement the Alien Tort Statute and func-
tion as an additional form of redress for plaintiffs seeking justice for
international law violations so long as the alleged conduct falls
within the statute’s defined conduct. 161 Despite years of litigation
since its enactment, the TVPA remains a viable form of redress for
plaintiffs.162 Especially in comparison to the Court’s strict limita-
tions to Alien Tort Statute post-Kiobel, Jesner, and Nestle. Further,

155 Cora Lee Allen, Aiding and Abetting in Torture: Can the Orchestrators of Tor-
157 Allen, supra note 155, at 160.
158 Id.
160 28 U.S.C.A. § 1350; § 9:29. Torture Victim Protection Act, 2 Litigation of In-
ternational Disputes in U.S. Courts; Knoblett, supra note 35, at 752.
161 Torture Victim Protection Act § 9:29.
162 Knoblett, supra note 35, at 754.
the statute does not implicate the same issues presented with litigation under the Alien Tort Statute because it eliminates “(1) the question of extraterritorial application of the statute and (2) the issue of corporate liability.” While TVPA may suffer from deficiencies not discussed in this note, it is still a viable option for redress as long as the action meets the requirements outlined in the statute.

VII. CONCLUSION

The United States Supreme Court’s decision in Nestle and the Canadian Supreme Court’s decision in Nevsun has prompted essential conversations regarding corporate accountability for torts committed abroad violating international law. Although these conversations are not new, each country’s judiciary is refining its application of laws that allow plaintiffs to seek redress for torts committed abroad.

Ultimately, the Canadian courts have left open the possibility for plaintiffs to seek redress under customary international law. Conversely, the United States Supreme Court continues to narrow a plaintiff’s ability to seek redress for international law violations committed abroad, forcing plaintiffs to seek other forms of redress. However, Congress has failed to create any new causes of action despite the Court repeatedly citing Congress’ power and role as the political law-making branch. In sum, there are no other forms of redress available to plaintiffs.

Instead of deferring to Congress, the Supreme Court should examine how Canadian courts have opened their courthouse doors to plaintiffs seeking justice for human rights abuses abroad. The Court could have adopted customary international law or interpreted international law as allowed under the Alien Tort Statute. As Canadian courts do, the Court could adopt customary international law and, so long as there are no conflicts with domestic law, foreign plaintiffs will have a form of redress for torts committed abroad by foreign corporations with a domestic presence. The Court could have also looked beyond the three traditionally recognized torts to international law. As Justice Sotomayor discussed in her concurrence when the First Congress enacted the Alien Tort Statute, “Congress

163 Roberson, supra note 113, at 22.
expected federal courts to identity actionable torts under international law” by interpreting international law.\textsuperscript{164} The Court should have evaluated whether aiding and abetting child slavery abroad through domestic corporate action are breaches of customary international law. If so, the actions of the corporate defendants are actionable under the Alien Tort Statute. Ultimately, the Court should have evaluated the allegations as violations of international law and provided the plaintiffs with a forum to seek redress for the human rights abuses instead of deferring to Congress.

\textsuperscript{164} Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1946 (2021).