ALIEN TORT STATUTE — DOMESTIC CORPORATE LIABILITY — NINTH CIRCUIT DENIES REHEARING EN BANC OF CASE PERMITTING DOMESTIC CORPORATE LIABILITY CLAIM. — *Doe I v. Nestle, S.A.*, 929 F.3d 623 (9th Cir. 2019).

The Alien Tort Statute[1] (ATS) has a complicated history in federal courts. This centuries-old statute gives federal courts jurisdiction over torts "committed in violation of the law of nations."[2] In recent decades, litigators have used this language to bring claims for human rights violations.[3] However, the Supreme Court has repeatedly narrowed the applicability of the ATS, most recently holding in *Jesner v. Arab Bank, PLC*[4] that a foreign corporation cannot be sued under the statute.[5] But in the Ninth Circuit, a *domestic* corporation still can be sued, and last year the circuit declined to change that by denying en banc rehearing of the ATS case *Doe I v. Nestle, S.A.*[6] As the dissent from the denial of rehearing pointed out, the result leaves the circuit in tension with the spirit of the Supreme Court's decision in *Jesner*,[7] in which some Justices suggested that corporate liability generally is not the kind of universal norm required by the ATS.[8] While domestic corporate ATS liability survives in the Ninth Circuit, the court failed to meaningfully engage with the implications of *Jesner*, and by declining to correct this failure the court may have merely condemned ATS plaintiffs to labor on hopelessly until the Supreme Court speaks again.

This case arose from the still-common practice of child slavery on cocoa plantations in Côte d'Ivoire.[9] The plaintiffs were six former child slaves who alleged that, between the ages of twelve and fourteen, they were trafficked from Mali to cocoa plantations in Côte d'Ivoire, where they were forced to work without pay for twelve to fourteen hours a day, given inadequate food and shelter, and subjected to intimidation and torture.[10] The defendant corporations, Nestlé and Cargill, did not own or directly operate these plantations, but the plaintiffs alleged that

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[1] 28 U.S.C. § 1350 (2018).

[2] *Id.* ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

[3] STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER 6–7 (2018).

[4] 138 S. Ct. 1386 (2018).

[5] *Id.* at 1407.

[6] 929 F.3d 623, 626 (9th Cir. 2019); *see id.* at 628–29 (Bennett, J., dissenting from the denial of rehearing en banc).

[7] *See id.* at 628 (Bennett, J., dissenting from the denial of rehearing en banc).

[8] *See Jesner*, 138 S. Ct. at 1401 (plurality opinion).

[9] For an overview of the practice, see generally Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), https://wapo.st/cocoa-child-laborers [https://perma.cc/C9PC-6UBP].

[10] Appellants' Opening Brief at 3, 5–6, *Nestle, S.A.*, 929 F.3d 623 (9th Cir. 2019) (No. 17-55435).

they exercised a high degree of control over the global cocoa industry and that they actively and knowingly facilitated the use of child slaves in order to keep cocoa prices low.[11]

The present litigation dates back to a complaint filed in the Central District of California in 2005.[12] At that point, defendants included not only Nestlé USA, Inc. and Cargill, Inc., but also Nestlé, S.A. (Nestlé's Swiss parent company) and the Ivorian and West African subsidiaries of Nestlé and Cargill, respectively.[13] After a two-year stay,[14] the district court dismissed the claim in 2010 in part because it found that the ATS did not allow for corporate liability.[15] On appeal, however, the Ninth Circuit, in an opinion by Judge Dorothy Wright Nelson,[16] reversed and remanded, holding that the ATS *did* allow claims against corporations.[17] The Ninth Circuit based its reasoning on the principles laid out in circuit precedent[18]: that the scope of ATS liability proceeds norm by norm, that it does not depend on existing international precedent, and that it applies to all parties, including corporations, when the norm is "universal and absolute."[19] Rehearing en banc was denied[20] over a dissent by Judge Bea, who argued that the panel had erred by not adopting a "restrained conception" of ATS liability as called for by the Supreme Court.[21] On remand, the district court again dismissed the claim, this time on the grounds that the plaintiffs' claim constituted an "impermissible extraterritorial application of the ATS."[22]

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[11] *Id.* at 7–9.

[12] Appellants' Opening Brief at 4, Doe I v. Nestle USA, Inc. (*Nestle I*), 766 F.3d 1013 (9th Cir. 2014) (No. 10-56739).

[13] *Nestle, S.A.*, 929 F.3d at 628; Doe I v. Nestle, S.A., 748 F. Supp. 2d 1057, 1063 (C.D. Cal. 2010). The complaint also listed Archer Daniels Midland Company as a defendant. In addition to the ATS, the plaintiffs also initially brought claims under state law and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note (2012). *See* Doe I v. Nestle, S.A., 748 F. Supp. 2d at 1063. The district court dismissed these claims. *See id.* at 1120, 1122–24.

[14] Appellants' Opening Brief, *supra* note 12, at 4. The case was stayed pending a Ninth Circuit decision, *id.*, that proved not to be relevant.

[15] Doe I v. Nestle, S.A., 748 F. Supp. 2d at 1144–45.

[16] Judge Nelson was joined in full by Judge Wardlaw and in part by Judge Rawlinson.

[17] *Nestle I*, 766 F.3d at 1016, 1022.

[18] *Id.* at 1022 (citing Sarei v. Rio Tinto, PLC, 671 F.3d 736, 746 (9th Cir. 2011) (en banc), *vacated on other grounds*, 569 U.S. 945 (2013)).

[19] *Id.* (quoting *Sarei*, 671 F.3d at 760).

[20] Doe I v. Nestle USA, Inc., 788 F.3d 946, 946 (9th Cir. 2015). Judge Bea was joined by Judges O'Scannlain, Gould, Tallman, Bybee, Callahan, Milan Smith, and N. Randy Smith.

[21] *Id.* at 947 (Bea, J., dissenting from the denial of rehearing en banc) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004)).

[22] Nestlé v. Nestlé S.A., No. 05-5133, 2017 U.S. Dist. LEXIS 221739, at *4, 2017 WL 6059134, at *1 (C.D. Cal. Mar. 2, 2017). Both Lexis and Westlaw list the plaintiffs here as "John Nestlé, et al." rather than John Doe; this is presumably the result of a clerical error.

On appeal, Judge Nelson[23] again wrote for the Ninth Circuit and reversed the dismissal.[24] Judge Nelson considered both the decision of the lower court and the questions posed by the Supreme Court's intervening decision in *Jesner*.[25] In addressing the lower court's concern about extraterritorial applications of the ATS, the court looked to an earlier Supreme Court ATS case, *Kiobel v. Royal Dutch Petroleum Co*.[26] *Kiobel* held that, in order to be remediable under the ATS, conduct must "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application."[27] Unlike the district court, the Ninth Circuit held that this standard had been met because, while the slave labor had occurred overseas, plaintiffs alleged that it was "perpetuated from headquarters in the United States."[28]

In light of *Jesner*, which held that foreign corporations may never be liable under the ATS,[29] the Ninth Circuit ordered the plaintiffs to remove those defendant corporations that were not based in the United States.[30] However, despite at least one defendant's call to preclude domestic corporate liability,[31] the panel instead returned to its own precedent in *Nestle I* that corporations could be liable for aiding and abetting slavery under the ATS.[32] *Nestle I* held that the prohibition on slavery is a "universal and absolute" norm that applies to all parties, including corporate defendants,[33] and though *Jesner* means that norm can no longer be enforced against foreign corporations using the ATS, the court in *Nestle II* declined to modify its precedent beyond that necessary minimum.[34]

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[23] Judge Nelson was joined by Judge Christen. Judge Shea of the Eastern District of Washington, sitting by designation, concurred in the result but did not write a separate opinion. *See* Doe I v. Nestle, S.A. (*Nestle II*), 906 F.3d 1120, 1127 (9th Cir. 2018) (Shea, J., concurring).

[24] *Id*. (majority opinion).

[25] *See id.* at 1124–25.

[26] 569 U.S. 108 (2013); *see Nestle II*, 906 F.3d at 1124–25.

[27] *Kiobel*, 569 U.S. at 124–25 (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266–73 (2010)).

[28] *Nestle II*, 906 F.3d at 1126. This holding was consistent with some commentators' reading of *Kiobel*. *See, e.g.*, Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), https://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases [https://perma.cc/T533-E7YY].

[29] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).

[30] *Nestle II*, 906 F.3d at 1127; *see also id.* at 1124.

[31] *See* Defendant-Appellee Cargill, Incorporated's Supplemental Brief Regarding *Jesner v. Arab Bank, PLC* at 14–15, *Nestle II*, 906 F.3d 1120 (9th Cir. 2018) (No. 17-55435).

[32] *Nestle II*, 906 F.3d at 1124.

[33] *Nestle I*, 766 F.3d 1013, 1022 (9th Cir. 2014).

[34] *Nestle II*, 906 F.3d at 1124. The court did not address the reasoning of *Jesner*. *See id.* ("But *Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations." (citing Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc))).

Last year, the Ninth Circuit declined to rehear the case en banc, drawing a dissent written by Judge Bennett and joined in full or in part by seven other judges.[35] Judge Bennett argued that the panel's decision had been incorrect. He stated that the ATS was to be "narrowly construed and sparingly applied."[36] Specifically, Judge Bennett argued that the Ninth Circuit should have determined that corporations are not liable under the ATS in light of *Jesner*.[37] Though he admitted that *Jesner* had "expressly left open" the question of domestic corporate liability,[38] Judge Bennett nonetheless reasoned that the principles of judicial restraint reiterated in that case dictated that such liability should be denied.[39] Moreover, Judge Bennett's reading of *Jesner*'s plurality opinion and concurrences led him to conclude that "[f]ive Justices in *Jesner* strongly suggested that the ATS forecloses corporate liability."[40] In determining whether a cause of action is recognized under the ATS, Judge Bennett looked to another Supreme Court precedent, *Sosa v. Alvarez-Machain*,[41] which held that in order for an ATS claim to succeed, (1) the claim must address a violation of a norm that is "specific, universal, and obligatory,"[42] and (2) a court must determine that it is wise from a practical standpoint to make that violation a cause of action in America's federal courts.[43] He argued that "[c]orporate liability fail[ed] at both steps."[44]

Judge Bennett also suggested that the claim should have been rejected as impermissibly extraterritorial.[45] He pointed out that the plaintiffs' enslavement had happened entirely within Côte d'Ivoire, at the hands of local slavers and farmers.[46] He addressed the panel's contrary conclusion that the plaintiffs had alleged sufficient corporate business conduct within the United States by pointing out that the defendants' alleged payments to cocoa farmers and inspections of plantations would

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[35] *Nestle, S.A.*, 929 F.3d at 626 (Bennett, J., dissenting from the denial of rehearing en banc). Judges Bybee, Callahan, Bea, Ikuta, and Ryan Nelson joined in full, while Judges Milan Smith and Bade joined with respect to the extraterritoriality issue.

[36] *Id.*

[37] *Id.* at 627.

[38] *Id.*

[39] *See id.* at 627–28.

[40] *Id.* at 629.

[41] 542 U.S. 692 (2004); *see Nestle, S.A.*, 929 F.3d at 628–33 (Bennett, J., dissenting from the denial of rehearing en banc) (applying *Sosa*).

[42] *Sosa*, 542 U.S. at 732 (quoting *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)). In *Sosa* this standard was merely illustrative, but its use in *Nestle, S.A.* is the latest demonstration of the canonical status it has since attained. *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1398 (2018); *Nestle, S.A.*, 929 F.3d at 627.

[43] *Sosa*, 542 U.S. at 732–33.

[44] *Nestle, S.A.*, 929 F.3d at 628 (Bennett, J., dissenting from the denial of rehearing en banc); *see id.* at 631–33.

[45] *Id.* at 633.

[46] *Id.* at 634.

have in fact happened overseas.[47] As for corporate decisions within the United States, Judge Bennett argued that these could not overcome the presumption against extraterritorial application lest that presumption be devoid of meaning.[48]

This case marks only the latest development in the ATS's long and storied history,[49] but the Ninth Circuit's refusal to narrow ATS liability should not obscure the probability that that history is approaching its end. As the panel in *Nestle II* understood, the Court in *Jesner* did *not* require inferior courts to reject ATS liability for American corporations, and the Ninth Circuit was by no means required to rehear the case. However, as the dissent from denial pointed out, the Supreme Court *did* reason in a way that would make corporate liability difficult to justify, and it is likely only a matter of time before the Court makes the plaintiffs' case untenable. The Ninth Circuit has shown how ATS litigation against corporations may proceed for the time being in courts inclined to allow it, but this model does little to undermine the reasoning, ratified by the Supreme Court in *Jesner*, that makes the end of ATS corporate liability probable. By allowing litigation to continue in the meantime, only for it to quite possibly be rendered moot at some later date, the Ninth Circuit may be sending human rights plaintiffs down a road that leads nowhere.

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[47] *See id.* at 634–35.

[48] *See id.* at 635.

[49] The ATS was passed by the First Congress as part of the Judiciary Act of 1789, apparently in response to the United States' previous embarrassing inability to punish those who had injured foreign diplomats. *See* MULLIGAN, *supra* note 3, at 2–5. *But see* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (asserting that "no one seems to know whence [the ATS] came"). Uncertainty about the ATS's purpose continues to be stressed in decisions. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1417–18 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (questioning whether the concern about diplomats really motivated the passage of the ATS). In any case, the ATS faded into obscurity for nearly two centuries after its passage, until it found new life in the 1980 case *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *See* MULLIGAN, *supra* note 3, at 5–6 ("Between 1789 and 1980, litigants successfully invoked the ATS as a basis for jurisdiction in only two reported decisions." *Id.* at 5.). In that case, the Second Circuit allowed Paraguayan plaintiffs to sue under the ATS a former Paraguayan official who had tortured and killed their family member, *Filartiga*, 630 F.2d at 878–79, and the statute was soon put to use by litigants seeking redress in American courts for human rights abuses that occurred abroad, *see* MULLIGAN, *supra* note 3, at 6–7; *cf.* Michael Bazyler, *Litigating the International Law of Human Rights: A "How To" Approach*, 7 WHITTIER L. REV. 713, 721 (1985) (describing the ATS as "the best means" then available for holding a defendant liable for human rights violations committed abroad). Supporters and detractors of the statute agree that cases brought under the ATS have had international significance. For a supportive view by a plaintiff in the original case, see Dolly Filártiga, Opinion, *American Courts, Global Justice*, N.Y. TIMES (Mar. 30, 2004), https://www.nytimes.com/2004/03/30/opinion/american-courts-global-justice.html [https://perma.cc/ZN4S-YFV9]. For a critical view, see Curtis A. Bradley & Jack L. Goldsmith, Opinion, *Judicial Foreign Policy We Cannot Afford*, WASH. POST (Apr. 19, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702859.html [https://perma.cc/C52S-E4E3].

The Ninth Circuit did not meaningfully engage with *Jesner* in *Nestle II*. Instead it simply asserted that "*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations."[50] This reasoning ignores the Supreme Court's application of the two-step *Sosa* analysis described in Judge Bennett's dissent.[51] While the *Jesner* Court's analysis on step two, concerning the need for "judicial caution" due to the diplomatic implications of suing foreign corporations,[52] need not apply to domestic corporations, the Court's step-one analysis is less escapable. The *Jesner* plurality read international law as "counsel[ing] against" the existence of a universal norm of corporate liability — not merely foreign corporate liability.[53]

Jesner was the latest of three cases, along with *Sosa* and *Kiobel*, in which the Supreme Court narrowed ATS liability.[54] While the Court has taken only incremental steps — creating a two-step framework for liability, barring extraterritorial application, and barring foreign corporate liability — some Justices have given strong hints that they will only go further. In his opinion in *Jesner*, Justice Kennedy employed an argument, previously adopted by the Second Circuit, that corporate liability generally was not a universal norm in international law and thus failed the *Sosa* test for ATS liability.[55] For unclear reasons,[56] Justice

[50] *Nestle II*, 906 F.3d 1120, 1124 (9th Cir. 2018).

[51] *See Nestle, S.A.*, 929 F.3d at 627–28 (Bennett, J., dissenting from the denial of rehearing en banc).

[52] *Jesner*, 138 S. Ct. at 1407; *see also id.* at 1406–07.

[53] *Id.* at 1401 (plurality opinion). In applying the second step of *Sosa*, Justice Alito made much the same point in concurrence, *see id.* at 1410 (Alito, J., concurring in part and concurring in the judgment), while Justice Gorsuch skipped the *Sosa* test to argue against recognizing any new ATS causes of action, *see id.* at 1412 (Gorsuch, J., concurring in part and concurring in the judgment). Justice Gorsuch thereby reprised a strongly antiliability reading of the ATS staked out by Judge Bork when the D.C. Circuit considered its first ATS case. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798–801 (D.C. Cir. 1984) (Bork, J., concurring).

[54] Although in *Sosa* the Court ruled against the plaintiff and created the two-step framework that ATS claims must pass, *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33, 738 (2004), the case was not perceived as a defeat for the ATS litigation movement. *See* Eric A. Posner, *A Review*, 126 YALE L.J. 504, 515 n.52 (2016) (reviewing STEPHEN BREYER, THE COURT AND THE WORLD (2015)) (noting that the number of ATS cases rose after *Sosa*).

[55] *See Jesner*, 138 S. Ct. at 1401 (plurality opinion); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013). *But see* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011) (criticizing the Second Circuit's reasoning and factual claims and characterizing the court as an "outlier" among the federal circuits).

[56] Justice Kennedy had previously expressed reluctance to definitively settle ATS questions; in *Kiobel*, he even wrote a cryptic concurrence praising the Court for "leav[ing] open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute." *Kiobel*, 569 U.S. at 125 (Kennedy, J., concurring). An ungenerous commentator wrote that this quality of the *Kiobel* opinion meant that the decision "fails as precedent." Ralph G. Steinhardt, Kiobel *and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT'L L. 841, 843 (2013) (emphasis omitted).

Kennedy limited his holding to foreign corporations, and so lawsuits like *Nestle* remain possible. Repeated proclamations of the ATS's death have yet again proven premature.[57] But that does not mean that the Court's trend toward narrowing liability has stopped.

The Supreme Court's current composition suggests that it will only take *Jesner*'s reasoning further, meaning it is likely a matter of time before the Court reverses the Ninth Circuit's decision, or another one like it, on the grounds outlined in Judge Bennett's dissent. Judge Bennett's argument on corporate liability would be especially likely to prevail in the current Supreme Court: not only did much of *Jesner*'s reasoning apply to domestic as well as foreign corporations,[58] but Justice Kavanaugh has replaced Justice Kennedy on the Court. While on the D.C. Circuit, then-Judge Kavanaugh echoed the same Second Circuit argument partially adopted in *Jesner* to assert that "the ATS does not apply to claims against corporations."[59]

By refusing to pick up on the Supreme Court's signals, the Ninth Circuit is inviting dubious and prolonged litigation against American companies from future plaintiffs. Particularly where there are other tools that can be developed further with robust litigation, the court may be giving plaintiffs false hope and delaying the inevitable. The history of this case shows the potential consequences of holding open avenues of ATS liability. As the panel in *Nestle II* acknowledged, "delay does not serve the interests of any party."[60] The parties have had no opportunity to present the merits of their cases since litigation began fifteen years ago, primarily because of shifting and unclear rules about who is a proper ATS defendant.[61] With the Supreme Court poised to continue limiting ATS liability in general and to eliminate corporate liability in particular, it is likely only a matter of time before the case is dismissed again.

Ending domestic corporate ATS liability would not mean the end of all liability for human rights abuses committed abroad. There would remain political remedies, such as economic sanctions against states

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[57] For one such proclamation after *Kiobel*, see Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1751 (2014) (describing the "demise of ATS litigation"). For a proclamation after *Jesner*, see, for example, Jack Goldsmith (@jackgoldsmith), TWITTER (Apr. 24, 2018, 10:35 AM), https://twitter.com/jacklgoldsmith/status/988788536173387776 [https://perma.cc/QVA4-GQTY] ("ATS, RIP.").

[58] *See, e.g.*, *Jesner*, 138 S. Ct. at 1402–03 (comparing ATS liability to *Bivens* liability, an area where the Court has declined to recognize corporations as proper defendants).

[59] Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 72 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (citing *Kiobel*, 621 F.3d 111).

[60] *Nestle II*, 906 F.3d 1120, 1127 (9th Cir. 2018).

[61] *See id.* at 1126–27 (dismissing claims against foreign defendants in light of *Jesner*); Nestlé v. Nestlé S.A., 2017 U.S. Dist. LEXIS 221739, at *4, *8, *22 (C.D. Cal. Mar. 2, 2017) (dismissing the case as impermissibly extraterritorial in light of *Kiobel*); Doe I v. Nestle, S.A., 748 F. Supp. 2d 1057, 1144–45 (C.D. Cal. 2010) (dismissing the case because the district judge believed the ATS, as interpreted in *Sosa*, did not allow for corporate liability).

committing human rights abuses, with possible criminal consequences for corporations that aid them,[62] and new legal remedies could be created.[63] State law claims would remain viable as well.[64] Individuals will also remain liable under the Torture Victim Protection Act[65] (TVPA) insofar as they commit torts under color of law, and ATS individual liability will survive in the limited set of cases that satisfy both the two-part *Sosa* test and the *Kiobel* extraterritoriality requirement.[66]

Until relatively recently, the ATS provided human rights plaintiffs advantages not easily matched anywhere in the world,[67] making it possible for American federal courts to adjudicate everything from Colombian intimidation of trade unions[68] to Chinese restraints on expression.[69] If any of the tools mentioned above are to take its place, advocates will need to develop them. While the continued viability of the ATS claims against corporations does not prevent plaintiffs from using other tools if they deem them more effective, those plaintiffs should recognize that the end of domestic corporate liability seems likely. By declining to reconsider this case, the Ninth Circuit has postponed that end to some indefinite point in the future, after some indefinite expenditure of time and money by plaintiffs, defendants, and the court system, but it has not made it less likely. In not bringing its precedent into line with the probable future trends in the Supreme Court's jurisprudence, the Ninth Circuit, far from delivering a meaningful victory to ATS plaintiffs, may have only drawn out their struggle until the next grant of certiorari.

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[62] *See, e.g.*, Recent Case, Kashef v. BNP Paribas S.A., *925 F.3d 53 (2d Cir. 2019)*, 133 HARV. L. REV. 1103, 1109 (2020).

[63] *See* Pierre-Hugues Verdier & Paul Stephan, *After ATS Litigation: A FCPA for Human Rights?*, LAWFARE (May 7, 2018, 7:00 AM), https://www.lawfareblog.com/after-ats-litigation-fcpa-human-rights [https://perma.cc/4ZX3-YRDN].

[64] *See* Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 400–03 (2018). Indeed, many ATS complaints have included state law claims, *see* Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 15–17 (2013), though these claims have usually not been the basis for awards, *see id.* at 15. The same pattern played out in this case. *See* Doe I v. Nestle, S.A., 748 F. Supp. 2d at 1120–24 (dismissing state law claims).

[65] Pub. L. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2018)). The plaintiffs' TVPA claim was dismissed in this case for failing to meet the "color of law" requirement and because corporations are not proper TVPA defendants. *See* Doe I v. Nestle, S.A., 748 F. Supp. 2d at 1120.

[66] ATS plaintiffs have sought to expand this set of cases by arguing that the presumption against extraterritoriality can be overcome if the defendant has taken up residence in the United States, *see, e.g.*, Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss Second Amended Complaint at 16, Rojas Mamani v. Sanchez Berzain, 636 F. Supp. 2d 1326 (S.D. Fla. 2009) (Nos. 08-21063-CV, 07-22459-CV), but this argument is unlikely to be accepted by a court.

[67] *Cf.* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1097 (2001) (discussing the attractiveness of U.S. courts to potential victims of the Milosevic regime in Yugoslavia).

[68] *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1257 (11th Cir. 2009).

[69] *See* Wang Xiaoning v. Yahoo!, Inc., 2007 U.S. Dist. LEXIS 97566, at *2 (N.D. Cal. Oct. 31, 2007).