CA No. 17-55435

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE I, *et al.*,

Plaintiffs-Appellants,

v.

NESTLÉ S.A., *et al.*,

Defendants-Appellees,

On Appeal from the United States District Court
for the Central District of California
No. 2:05-cv-05133-SVW-MRW
(Honorable Stephen V. Wilson)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center headquartered in Washington, DC, with supporters in all 50 States, including many in California.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in this and other federal courts to oppose litigation designed to create new and expanded private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. *See, e.g., Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Sarei v. Rio Tinto plc*, 671 F.3d 736 (9th Cir. 2011), *vacated and remanded*, 569 U.S. 945 (2013). WLF also filed a brief in support of the certiorari petition filed in this case in 2015.

WLF is concerned that permitting unsubstantiated ATS claims of this sort to survive a motion to dismiss will impose unwarranted litigation costs on American

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[1] Pursuant to Fed.R.App.P. 29(a)(4)(E), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. Counsel for all parties have consented to the filing of this brief.

corporations conducting business overseas. It will expose them to ATS liability even in the absence of factual allegations demonstrating that they engaged in conduct specifically directed at bringing about the foreign human rights violations they routinely are alleged to have aided and abetted.

WLF is also concerned that allowing ATS suits of this sort to proceed through the discovery phase will likely harm the very groups of people that attorneys who file such suits claim to be helping. It will cause American companies to become less willing to do business in under-developed regions, thereby hindering efforts by residents of those regions to achieve economic gains.

STATEMENT OF THE CASE

Appellants are citizens of Mali who claim that they were treated inhumanely while (as children) they worked on cocoa plantations in Côte d'Ivoire (hereinafter, "Ivory Coast"). The plantations were owned by private farmers, and Appellants do not contend that Appellees ever managed them or held any ownership interest. Nonetheless, Appellants contend that their mistreatment amounted to international human rights violations and that Appellees Nestlé USA, Inc. ("Nestlé") and Cargill Inc.—processors and chocolate manufacturers that purchased significant quantities of cocoa grown in the Ivory Coast—aided and abetted those violations, even though the operative complaint contains no factual allegations that the companies

purchased cocoa from the plantations on which Appellants worked.

In 2010, the district court granted Cargill and Nestlé's motion to dismiss claims filed by Appellants under the ATS. *Doe I v. Nestlé, S.A.* ["*Nestlé I*"], 748 F. Supp. 2d 1057 (C.D. Cal. 2010). The court held, among other things, that Appellants had not adequately alleged facts sufficient to satisfy the *actus reus* requirements of an ATS claim for aiding and abetting a violation of the law of nations. *Id*. at 1110 (stating that Appellants had not "identified any of Defendants' conduct ... that had a material and direct effect on the Ivorian farmers' specific wrongful acts.").

While an appeal to this Court was pending, the Supreme Court issued its decision in *Kiobel*, which held that the federal courts' jurisdiction to hear ATS claims does not apply extraterritorially. *Kiobel*, 569 U.S. at 124. Because the issue of whether Appellants were seeking an extraterritorial application of federal law had been neither briefed nor decided in the district court, this Court "decline[d] to resolve the extraterritoriality issue and instead remand[ed] to allow [Appellants] to amend their complaint in light of *Kiobel*." *Doe I v. Nestlé, S.A.* ["*Nestlé II*"], 766 F.3d 1013, 1027 (9th Cir. 2014). The Court also declined: (1) to review the district court's determination that Appellants had inadequately pleaded *actus reus*; or (2) "to adopt an *actus reus* standard for aiding and abetting liability under the

ATS." *Id.* at 1026. Instead, the Court "remand[ed] to the district court with instructions to allow plaintiffs to amend their complaint in light of [two recent decisions from international war-crimes tribunals], both of which were decided after the complaint in this case was dismissed and this appeal had been filed." *Id.* at 1026-27.

On remand, Appellants filed a Second Amended Complaint (SAC) in July 2016. ER 132-169. The district court in March 2017 granted a motion to dismiss the complaint with prejudice, holding that Appellants were seeking an extraterritorial application—not a domestic application—of the ATS. ER 3-14. In light of that ruling, the court declined to reach the *actus reus* issue, ER 4, although that issue had been fully briefed by the parties.

SUMMARY OF ARGUMENT

WLF concurs with Cargill's and Nestlé's assertions that Appellants are seeking to apply the ATS extraterritorially and thus that *Kiobel* requires dismissal. WLF writes separately to focus primarily on an alternative basis for affirming the decision below: in their SAC, Appellants failed to allege facts sufficient to demonstrate the *actus reus* necessary to state an ATS claim. In particular, the SAC does not allege that either Nestlé or Cargill took steps "specifically directed" toward commission of a violation of the law of nations.

Consideration of Appellants' request—that the Court recognize their claims as actionable under the ATS—must take into account the Supreme Court's cautionary words in *Sosa*. The Supreme Court held that while the ATS creates federal court *jurisdiction* to hear tort claims filed by aliens alleging violations of the law of nations, the ATS does not itself create any causes of action. *Sosa*, 542 U.S. at 713-14. Rather, *Sosa* explained, Congress bears principal responsibility for determining what causes of action aliens may file. *Id.* at 727. While *Sosa* held open the possibility that there *may* exist federal common law rights of action over which courts may exercise ATS jurisdiction (in addition to three common law rights of action generally recognized at the time of the ATS's adoption in 1789), the Court held that federal courts should exercise "great caution" and "vigilant doorkeeping" in recognizing any such rights. *Id.* at 728, 729.

The Court made clear that courts should *not* recognize federal common law rights of action based simply on a claim that customary international law has been violated. Rather, in deference to Congress's primacy, courts are to exercise their doorkeeping function to recognize no more than a "narrow class" of claims, *id*. at 729, taking into account such factors as whether the claim is universally recognized under international law, the "practical consequences" of recognizing the claim, and whether the Executive Branch has expressed foreign policy concerns

about such recognition. *Id.* at 732-33 & n.21.

Appellants do not allege that Nestlé or Cargill or their agents played any role in Appellants' mistreatment while in the Ivory Coast. Rather, the SAC alleges that Nestlé and Cargill aided and abetted the violations of international law—forced labor; cruel, inhuman, or degrading treatment; and torture—by a series of actions that allegedly contributed to Appellants' injuries. Those actions allegedly included: (1) providing various forms of assistance (including monetary payments for purchased cocoa beans) to Ivory Coast farmers; (2) continuing to do business with farmers who were engaged in forced labor, despite possessing economic leverage that could have been used to end those practices; (3) issuing statements to American consumers that they were taking steps to prevent abusive labor practices in the Ivory Coast when they were not, in fact, doing so; and (4) lobbying against proposed federal legislation that would have caused a reduction in abusive labor practices.

None of those alleged activities meet the high bar established by *Sosa* for establishing a federal common-law right of action. A number of international tribunals have recognized that individuals can be held criminally responsible for "aiding and abetting" the violation of customary international laws. But Appellants have pointed to no tribunal decisions that have imposed liability for the

sorts of activities in which Nestlé and Cargill are alleged to have engaged. Moreover, while there is some disagreement among those tribunals regarding the precise *actus reus* for establishing aiding-and-abetting liability, there is substantial authority (as this Court recognized in *Nestlé II*) for limiting liability to those engaged "in conduct that is specifically directed toward the commission of a crime." *Nestlé II*, 766 F.3d at 1026. Under *Sosa*'s cautionary principle, federal courts are barred (in the absence of congressional direction) from recognizing ATS liability that is any broader than this "specifically directed" limitation because (by definition) a broader definition is not universally accepted within the international community. And none of the activities in which Nestlé and Cargill are alleged to have engaged can plausibly be described as "specifically directed" toward the commission of a crime. For example, there is no allegation that the "assistance" they provided to farmers consisted of training farmers regarding how to prevent child laborers from running away.

The rationale for rejecting recognition of Appellants' proposed aiding-and-abetting right of action is reinforced by longstanding limitations on aiding-and-abetting liability under American law. In general, there is no right of action in tort against those who aid or abet violation of a federal statute, unless Congress expressly or implicitly creates one. *Central Bank of Denver, N.A. v. First*

Interstate Bank of Denver, N.A., 511 U.S. 164, 182 (1994) (stating that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors"). Aiding and abetting is an ancient *criminal* law doctrine that Congress has codified and that is applicable to all federal criminal offenses. *See* 18 U.S.C. § 2. But even in the criminal context, the Supreme Court has made clear that aiding and abetting liability is limited to conduct undertaken for the purpose of "facilitating the crime." *Central Bank*, 511 U.S. at 181. "To aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'" *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

Those longstanding American-law limitations on aiding and abetting liability and the absence of any indication from Congress that it has authorized the courts to create an expansive federal-common-law aiding-and-abetting right of action under the ATS underscore *Sosa*'s "great caution" mandate. This Court should not recognize an aiding-and-abetting right of action against Nestlé and Cargill based on the SAC's factual allegations—none of which allege conduct

specifically directed toward enslaving or otherwise abusing Appellants.

Also pointing against recognition of Appellants' right of action are "the practical consequences," *Sosa*, 542 U.S. at 732, of doing so. One very likely consequence of authorizing aiding-and-abetting actions against American companies that provide financial assistance to those in impoverished, third-world nations is that the companies will cease providing such assistance. All can agree that improving living and working conditions in those nations is a laudable goal and one espoused by those who favor expanded ATS liability. That goal will not be furthered by judicial rulings whose practical consequence will be to reduce financial assistance provided to impoverished nations.

WLF also agree with Nestlé and Cargill that Appellants are seeking extraterritorial application of the ATS, an application prohibited by *Kiobel*. The Supreme Court concluded in *Kiobel* that Congress intended the ATS to have *no* extraterritorial application. The only question remaining for decision by this Court is whether the application sought by Appellants can be deemed domestic in nature. The Supreme Court has made clear that, in determining whether application of a statute is domestic in nature, courts should look to the statute's "focus." It also made clear, in a decision issued after *Nestlé II*, that the "focus" test fully applies to cases involving alleged extraterritorial application of the ATS. *RJR Nabisco, Inc.*

v. European Community, 136 S. Ct. 2090, 2101 (2016).

The ATS grants federal courts jurisdiction to hear a limited number of federal-common-law tort claims filed by those injured by such violations. The obvious "focus" of the ATS, therefore, is injuries caused by the violations. Appellants contend that, while living in Mali and the Ivory Coast, they were injured as a result of violations of the law of nations. Appellants' injuries have absolutely no connection with the United States; indeed, there is no evidence that any of them has ever set foot in the United States.

Under those circumstances, there is no plausible argument that Appellants are seeking a domestic application of the ATS. Nestlé's and Cargill's substantial U.S. presence is largely irrelevant to the domestic-application issue, in the absence of factual allegations that they took specified actions within the United States that were specifically directed toward commission of a crime actionable under the ATS. There is near-universal agreement among the federal appeals courts that domestic application is not established by allegations that a company made decisions from its U.S.-based headquarters to provide support (financial or otherwise) to an overseas entity that is alleged to have violated the law of nations.

ARGUMENT

I. APPELLANTS HAVE FAILED TO ALLEGE FACTS SUFFICIENT TO DEMONSTRATE THE *ACTUS REUS* NECESSARY TO STATE AN AIDING-AND-ABETTING CLAIM UNDER THE ALIEN TORT STATUTE

During the previous appeal of this case, the Court declined to address whether the First Amended Complaint adequately pleaded the *actus reus* for an ATS claim, and also declined to adopt a specific *actus reus* standard. *Nestlé II*, 766 F.3d at 1026. Rather, the Court deemed it prudent to defer a ruling on the *actus reus* issue until after Appellants had an opportunity to amend their complaint in light of several relevant decisions from international tribunals issued during the pendency of the first appeal. *Id.* at 1026-27. On remand and following the filing of the SAC, the parties fully briefed the *actus reus* issue in connection with a renewed motion to dismiss. The district court's dismissal order declined to address the issue (in light of its conclusion that the complaint was, in any event, subject to dismissal on extraterritoriality grounds). Nonetheless, given that the parties fully briefed the *actus reus* issue and that Cargill and Nestlé continue to press it, and given the issue's importance in many pending ATS cases, WLF urges this Court to address the issue in connection with its ruling in this appeal.

Appellants have alleged facts demonstrating that their mistreatment while employed in the Ivory Coast constituted violations of customary international law.

But the SAC does not contain allegations sufficient to demonstrate that Cargill and Nestlé can be held liable under the ATS for aiding and abetting those violations. At most, Appellants have alleged that Nestlé and Cargill took actions (such as paying farmers to purchase their cocoa beans) that enabled the farmers to continue to operate and thus to continue to violate customary international law. But allegations of that nature are insufficient to state an ATS claim, which requires a plaintiff to allege facts demonstrating that the alleged aider-and-abetter took steps "specifically directed" toward commission of a violation of the law of nations. The district court's dismissal should be affirmed because the SAC includes no allegations that either Cargill or Nestlé took actions that were directed toward ensuring that Appellants were mistreated.

A. Congress Has Not Authorized Any Rights of Actions for Law-of-Nations Violations, and *Sosa* Requires Courts to Exercise "Great Caution" Before Recognizing Such Rights of Action Under Federal Common Law

The ATS, adopted as part of the Judiciary Act of 1789, states in full, "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." 28 U.S.C. § 1350. The Supreme Court held in *Sosa* that while the ATS creates federal court *jurisdiction* to hear tort claims filed by aliens alleging

violations of the law of nations, the ATS does not itself create any causes of action. *Sosa*, 542 U.S. at 713-14. Although the first Congress created jurisdiction over this class of tort claims, it did not simultaneously authorize the filing of any such claims—a fact that may explain why virtually no lawsuits asserting ATS claims were filed until the late 20th century.

Sosa concluded that it was unlikely that "Congress would have enacted the ATS only to leave it lying fallow indefinitely," *id*. at 719; *i.e.*, that it would have created federal-court jurisdiction over tort claims by aliens yet failed to authorize the filing of *any* such claims. Accordingly, the Court held that when Congress adopted the ATS, it contemplated that the statute granted jurisdiction over three very limited common-law rights of action—based on law-of-nations tort actions recognized by 18th century legal scholars: violations of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 720.

While *Sosa* held open the possibility that there *may* exist other federal common law rights of action over which courts may exercise ATS jurisdiction, the Court held that federal courts should exercise "great caution" in recognizing any such rights. *Id.* at 728. It held that "judicial caution" was particularly warranted before recognizing a right of action based on activities that take place overseas, in light of "the possible consequences of making international rules privately

actionable." *Id.* at 727. Caution is also warranted, the Court stated, because "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases" and "Congress as a body has done nothing to promote" suits alleging violations of the law of nations. *Id.* at 727-28.[2]

Sosa thus makes clear that only a narrow subset of all potential law-of-nations violations should be recognized as actionable under federal common law. The Court listed several factors that courts should consider in deciding whether to recognize a right of action, including:

(1) no right of action should be recognized "for violations of any international law norms with less definite content and acceptance among civilized nations than the [three] historical paradigms familiar when § 1350 was enacted";

(2) a "judgment about the practical consequences of making the cause available to litigants in the federal courts";

(3) whether the right of action is one for which the plaintiff should be required to exhaust remedies in the courts of another nation before filing suit; and

(4) whether the Executive Branch has expressed foreign policy concerns about such recognition.

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[2] Congress has adopted a statute that focuses on one narrow aspect of human rights abuse. The Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 *note*, provides a right of action against any "individual" who, under color of foreign law, subjects another individual to "torture" or "extrajudicial killing." Appellants do not assert a claim against Cargill or Nestlé under the TVPA.

Id. at 732-33 & n.21.

B. The Second Amended Complaint Fails to State an Aiding-and-Abetting Claim Because It Fails to Allege Facts Demonstrating that Cargill or Nestlé Took Action Specifically Directed Toward the Commission of a Crime

The SAC does not allege that Nestlé or Cargill or their agents played any role in Appellants' mistreatment while in the Ivory Coast. Rather, it alleges that they aided and abetted the mistreatment by, among other things, providing:

> [O]ngoing financial support, including advance payments and personal spending money to maintain the farmers' and/or the cooperatives' loyalty as exclusive suppliers; farming supplies, including fertilizers, tools and equipment; training and capacity building in particular growing and fermentation techniques and general farm maintenance, including appropriate labor practices, to grow the quality and quantity of cocoa beans they desire.

ER 143, SAC ¶37. Absent from the SAC is any factual allegation that Nestlé or Cargill took any action specifically directed toward the mistreatment of Appellants or the commission of any crime. In the absence of such allegations, Appellants have not satisfied the *actus reus* requirements for ATS aiding-and-abetting liability.

As noted above, federal courts are not authorized to recognize federal common-law causes of action for alleged law-of-nations violations unless, at a minimum, the international-law standard allegedly violated has a "definite content"

and is universally accepted "among civilized nations." *Sosa*, 542 U.S. at 732. A number of international tribunals have recognized that individuals can be held criminally responsible for "aiding and abetting" the violation of customary international law. But even accepting that those decisions are sufficient to establish that aiding-and-abetting liability is a universally accepted international norm, there is disagreement among reported decisions regarding the *actus reus* required to establish such liability. Accordingly, *Sosa* requires that aiding-and-abetting rights of action under the ATS be limited to those plaintiffs whose allegations satisfy the most stringent *actus reus* standard adopted by international tribunals: allegations that the defendant took action *specifically directed* toward the commission of a crime.

One such tribunal decision was cited by this Court in *Nestlé II*:

> In [*Prosecutor v.*] *Tadic*, [Case No. IT-94-1-A (ICTY July 15, 1999)], the Appeals Chamber [of the International Criminal Tribunal for the former Yugoslavia] used the phrase "specifically directed" to distinguish joint criminal enterprise liability from aiding and abetting liability. *Tadic*, ¶¶227-29. While joint criminal enterprise liability only requires an individual to engage in conduct that "in some way" assisted the commission of a crime, the Appeals Chamber stated that aiding and abetting liability requires an individual to engage in conduct that is "specifically directed" towards the commission of a crime. *Id.* ¶229(ii).

Nestlé II, 766 F.3d at 1026.

Tadic's "specifically directed" standard is consistent with decisions issued

by the International Military Tribunal at Nuremberg (IMTN). For example, the IMTN acquitted a banker of charges that he aided and abetted the SS's use of slave labor, despite finding that the banker made huge loans to the SS with the knowledge that the loans would be used to finance slave-labor operations. *United States v. von Weizsaecker* ("*The Ministries Case*"), 14 T.W.C. at 308, 621-22 (1949). The tribunal concluded that the banker took no actions directed at furthering the criminal misconduct but rather simply engaged in his normal business activity of providing loans. It stated, "A bank sells money or credit in the same manner as the merchandiser of any other commodity. ... Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime." *Id.* at 622.

In contrast, the IMTN held that the owner of a firm that supplied poison gas to the Nazi regime for use in mass killings was guilty of aiding and abetting crimes against humanity because his conduct provided Nazis with the precise tools necessary to achieve their murderous goals. *Zyklon B Case*, 1 T.W.C. 93 (1947). The distinction between these two cases illustrates the IMTN's understanding of the *actus reus* requirement for aiding-and-abetting liability under international law: in the context of commercial services, provision of the precise means by which a

violation is carried out is sufficient to meet the *actus reus* requirement because one has taken actions specifically directed toward commission of a crime, while providing fungible resources such as money is not. *See In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 265-69 (S.D.N.Y. 2009) (dismissing ATS aiding-and-abetting claims against firms that conducted business with South Africa's apartheid regime, where the funds and goods supplied to the regime were not an "essential element" of the regime's law-of-nations violations).

None of Appellants' factual allegations amounts to a plausible claim that Nestlé or Cargill took action specifically directed at a violation of customary international law. The SAC alleges that they provided funds and other forms of assistance and training to Ivorian farmers, but includes no allegations that this aid was outside of a normal commercial relationship or was specifically directed to assist farmers with oppressing their workers. Indeed, Appellants specifically allege that the training was directed at improving the "quality and quantity of cocoa beans" produced, ER 143, a commercial activity that one would normally expect buyers to undertake and that bears no relationship to the farmers' alleged crimes. While Appellants assert that Cargill and Nestlé possessed sufficient economic power to force farmers to cease mistreating laborers, they cite no case law supporting the proposition that the firms were under any obligation to act.

Still further afield are claims that Cargill and Nestlé lobbied against anti-slavery legislation and lied to American consumers by claiming to be working to improve labor conditions. Such constitutionally protected activity cannot plausibly be deemed to have been specifically directed toward the commission of a crime; indeed, the SAC does not allege that views expressed within the United States had any direct impact on the actions of Ivorian farmers.[3]

C. Longstanding Limitations on Aiding-and-Abetting Liability Under American Law Reinforce the Rationale for Rejecting Recognition of Appellants' ATS Claims

Because Appellants are asking the federal courts to recognize a right of

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[3] Appellants' aiding-and-abetting claims are particularly problematic because they are aimed at private parties who are not plausibly alleged to have acted under color of law. Customary international law focuses primarily on the conduct of nations, including the conduct of individuals acting with government authority. As the Second Circuit has explained, "[C]ustomary international law addresses *only* those 'wrongs' that are 'of *mutual*, and not merely *several* concern' to States." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (quoting *Filartega v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)) (emphasis in original). While such crimes as official torture and genocide are of mutual concern to the world community, "murder of one private party by another" is not, and thus "is not actionable under the [ATS] as a violation of customary international law." *Ibid.* *Sosa* directs that courts should be particularly hesitant to recognize a federal common-law aiding-and-abetting right of action against private parties not demonstrated to have been acting under color of law. 542 U.S. at 732 n.20 (emphasizing the need for restraint in recognizing an ATS cause of action when "the defendant is a private actor"). The SAC includes boilerplate claims that "Defendants' actions occurred under color of law and/or in conspiracy or on behalf of those acting under color of official authority" (*see* ¶¶81, 87, 91), but it includes no factual allegations to support those claims.

action said to arise under *federal common law*, Anglo-American common-law limitations on civil aiding-and-abetting rights of action are highly relevant to determining whether Appellants have stated an ATS claim. Those limitations reinforce the conclusion that Appellants have not stated an actionable claim.

Aiding and abetting is an ancient *criminal* law doctrine. But while prosecutors can establish that a defendant violated a federal criminal statute by proving that the defendant aided and abetted the crime, *United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005) ("Aiding and abetting is simply one means of committing a single crime; ... [it] is embedded in every federal indictment for a substantive crime"), aiding and abetting liability has been treated far differently in the context of civil actions for damages. Although Congress adopted in 1909 a general aiding-and-abetting statute applicable to all federal criminal offenses, 18 U..C. § 2, it has never adopted a general *civil* aiding-and-abetting statute.

In general, there is no right of action in tort against those who aid or abet violation of a federal statute, unless Congress expressly or implicitly creates one. *Central Bank of Denver*, 511 U.S. at 182 (stating that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors"). In *Central Bank*

of Denver, the Court concluded that federal securities law did not permit private plaintiffs to maintain an aiding and abetting suit against a bank that served as indentured trustee for an allegedly fraudulent bond deal. It explained, "If ... Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text [of the Securities Exchange Act of 1934]. But it did not." *Id.* at 177. Given Congress's documented aversion to creating civil aiding-and-abetting liability, *Sosa*'s words of caution—that the decision to create a private right of action for law-of-nations violations is "one better left to legislative judgment"—take on special force in the aiding-and-abetting context.

Moreover, even in the criminal context, federal aiding-and-abetting liability does not encompass any of the alleged conduct at issue in this case. The Supreme Court has made clear that criminal aiding-and-abetting liability is limited to conduct undertaken for the purpose of "facilitating the crime." *Central Bank of Denver*, 511 U.S. at 181. "To aid and abet a crime, a defendant must not just in some sort associate himself with the venture, but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed." *Rosemond*, 134 S. Ct. at 1248. That "participate in it as in something that he wishes to bring about" standard is equivalent to the "specifically directed toward

the commission of a crime" standard described in *Tadic* for establishing the *actus reus* for aiding-and-abetting law-of-nations violations. And as explained above, the SAC's factual allegations do not come close to adequately alleging *actus reus* under those standards.

D. "Practical Consequences" Counsel Against Recognition of Appellants' Right of Action

Sosa directed lower courts—when considering whether to exercise their federal common-law authority to recognize a cause of action under the ATS—to take into account "the practical consequences" of doing so. 542 U.S. at 732-33. WLF submits that the adverse practical consequences of recognizing ATS aiding-and-abetting rights of action against defendants who have taken no actions specifically directed toward commission of a crime would be significant.

As a practical matter, multi-national corporations cannot undertake major industrial or commercial activities in an impoverished nation without the active cooperation of that nation's government and business community. It is a regrettable but undeniable fact that the governments and large domestic employers in many such nations do not respect the human rights of their citizens. *See, e.g.,* Human Rights Watch, *World Report 2018* (January 2018) (documenting human rights abuses in more than 90 countries).

If multi-national corporations find themselves targeted by ATS suits whenever they enter into a contract with a foreign government or foreign business that violates human rights, they will be less likely to enter into such business transactions in the future—thereby harming the very people that ATS litigation is designed to help. Indeed, Talisman Energy's decision to abandon its oil exploration activities in South Sudan was triggered in significant part by the adverse publicity it suffered while being targeted with an ATS lawsuit by activists in New York. *See Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 262 (2d Cir. 2009).

There are more than 900,000 cocoa farmers in the Ivory Coast, most of whom operate small family farms. Three-and-one half million people (out of a total national population of 22 million) rely on cocoa production for their livelihood. *See generally*, Sarah Grossman-Greene and Chris Byer, *A Brief History of Cocoa in Ghana and Côte d'Ivoire* (Tulane University 2009). Abuse of child labor has been a persistent problem on Ivory Coast farms for decades. Counsel for Appellants apparently believe that they have the answer to ending such abuse: multinational corporations should cease doing business with farms that persist in engaging in abusive labor practices.

But it is difficult to see how boycotts of Ivory Coast cocoa markets—steps

likely to decrease cocoa production and agricultural employment—could lead to improved conditions among the nation's agricultural workers. Nor are improved conditions likely to be achieved by authorizing expanded ATS lawsuits against multinational corporations.

II. THE DISTRICT COURT'S DISMISSAL ON EXTRATERRITORIALITY GROUNDS SHOULD BE AFFIRMED

The decision below should also be affirmed on the ground that Appellants are seeking extraterritorial application of the ATS. Cargill and Nestlé have cogently explained why Appellants' claims should be deemed extraterritorial in nature. WLF will not repeat that entire explanation here; rather, we wish to emphasize several particularly salient points.

A. *Kiobel* Determined that the ATS Has Only Domestic Application Because Congress Did Not Express a Clear Intent to the Contrary

The well-accepted presumption against extraterritoriality has been explained by the Supreme Court as follows: "Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco*, 136 S. Ct. at 2100. The presumption is an outgrowth of "a basic premise of our legal system that, in general, 'United States law governs domestically but does not govern the world.'" *Ibid* (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

The Court had little difficulty concluding in *Kiobel* that Congress, when it adopted the ATS, did not intend to grant federal courts jurisdiction to hear extraterritorial claims. It stated, "[N]othing in the text of the statute suggest that Congress intended causes of action recognized under it to have extraterritorial reach." *Kiobel*, 569 U.S. at 118. It concluded:

> [T]he presumption against extraterritoriality applies to claims under the ATS, and ... nothing in the statute rebuts that presumption. "[T]here is no clear indication of extraterritoriality here," *Morrison* [*v. National Australia Bank Ltd.*], 561 U.S. [247, 265 (2010)], and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.

Id. at 124.

Despite that clear holding, Appellants refer to efforts to "rebut" the "presumption against extraterritoriality." *See, e.g.*, Appellants Br. 13. They also argue actions that are "extraterritorial" may nonetheless "touch and concern the United States" and thereby be rendered actionable under the ATS. *Id* at 14. Those statements suggest a basic misunderstanding of the Supreme Court's holdings in *Morrison*, *Kiobel*, and *RJR Nabisco*. Once the courts have determined that Congress did not intend the law at issue to apply extraterritorially, the law can *never* be applied to overseas conduct, and there is no mere "presumption" that can be "rebutted"—by, for example, demonstrating that the defendant accused of

overseas misdeeds maintains a substantial presence in the United States. "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 561 U.S. at 255. In light of *Kiobel*, the defendant's contacts with the United States can never be sufficient to justify a court's decision to recognize a federal common-law right of action based on law-of-nations violations that occurred overseas. "The principles underlying the presumption against extraterritoriality ... constrain courts exercising their power under the ATS," *Kiobel*, 569 U.S. at 117—both the power to exercise ATS jurisdiction and the power (implicitly granted by Congress when it adopted the ATS) to recognize a small number of rights of action under federal common law.

Once a court has determined that Congress did *not* intend the federal statute under which a plaintiff has filed suit to apply extraterritorially, *Morrison* instructs that the court should turn to step two of the two-step framework for addressing extraterritoriality issues: determining whether the plaintiff is seeking a domestic application of the statute (permissible) or an extraterritorial application (impermissible). *Morrison*, 561 U.S. at 266. The parties disagree regarding the proper test for determining whether Appellants are seeking a domestic application of the ATS.

WLF submits that, whatever test the Court ultimately applies, Appellants'

ATS claims should be deemed extraterritorial and thus barred by *Kiobel*. Moreover, as demonstrated above, Appellants have failed to adequately allege facts demonstrating the *actus reus* necessary to state an aiding-and-abetting claim. While some of the SAC's allegations (*e.g.*, lobbying Congress) undoubtedly involve actions that occurred in the United States, they are so far afield from the sorts of actions that can give rise to ATS aiding-and-abetting liability—that is, actions specifically directly toward the commission of a crime—that their American situs cannot be deemed relevant in determining whether any plausible claims involve a domestic application of the ATS. To the extent that any allegations in the SAC could be interpreted as charging that agents of Cargill or Nestlé provided direct hands-on assistance to farmers' abuse of child laborers, such hands-on assistance could only have occurred in the Ivory Coast and thus would not constitute a domestic application of the ATS.

B. *RJR Nabisco* Confirms that *Morrison*'s "Focus Test" Applies to Cases Involving Alleged Extraterritorial Application of the ATS

Morrison announced a "focus test" for determining whether a plaintiff is seeking domestic application of a federal statute that has been determined not to apply extraterritorially. Under that test, courts first must determine the principal concern on which Congress was focused when it adopted the statute. If the actions

cited in a complaint that are most closely related to the statute's principal concern occurred overseas, then *Morrison*'s focus test requires a finding that the plaintiff is seeking an impermissible extraterritorial application of the statute—even if the complaint alleges that other relevant conduct occurred within the United States. *Morrison*, 561 U.S. at 266-67.[4] As the Court explained, the American situs of *some* relevant conduct cannot by itself be sufficient to conclude that the plaintiff is seeking domestic application of a federal statute:

> For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.

Id. at 266.

Kiobel, which involved an ATS claim arising out of alleged law-of-nations violations committed in Nigeria by an Anglo-Dutch corporation, reached the Supreme Court three years after *Morrison*. After holding that Congress did not intend that the ATS should apply extraterritorially, *Kiobel* had no need to apply

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[4] *Morrison* determined that the "focus" of the statute at issue, the Securities Exchange Act, was the purchase and sale of securities. Because the plaintiffs (who alleged that they were defrauded in connection with their purchase of securities) had purchased securities in Australia, the Court determined that they were seeking an impermissible extraterritorial application of the Act—even though numerous aspects of the defendants' alleged fraud had occurred within the United States. *Ibid*.

any sort of test to determine whether the plaintiffs sought a domestic application of the ATS because (the Court determined) the plaintiffs' claims lacked *any* connection with the United States. 569 U.S. at 124. Citing *Morrison*, the Court added that had there been some connection with the United States, that fact would not necessarily have been sufficient to demonstrate that the claim was being applied domestically: "And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* at 124-25.

In discussing whether Appellants were seeking domestic application of the ATS, *Nestlé II* noted *Kiobel*'s use of the phrase "touch and concern" and the Supreme Court's failure to mention the phrase "focus test." *Nestlé II*, 766 F.3d at 1027-28. *Nestlé II* suggested that the "touch and concern" language might be a signal that the Supreme Court intended to establish a new test, applicable to ATS claims only, for determining whether the plaintiff was seeking domestic application of the ATS. *Ibid*. This Court declined to assign any precise meaning to "the amorphous touch and concern test"; rather, it remanded the case to provide Appellants with an opportunity to amend their complaint in light of *Kiobel*, and to attempt to demonstrate that they sought merely to apply the ATS domestically. *Id.* at 1028.

Following remand, the Supreme Court's *RJR Nabisco* decision cleared up any confusion regarding whether *Kiobel*'s "touch and concern" language sought to establish an extraterritorial-versus-domestic-application test that differed at all from *Morrison*'s focus test. *RJR Nabisco* made clear that it had not created a distinct test for ATS cases; rather, it held that the focus test applies to *all* extraterritoriality cases. *RJR Nabisco*, 136 S. Ct. at 2101. The Court stated, "*Morrison* and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues. ... If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking at the statute's 'focus.'" *Ibid.*

WLF agrees with Nestlé and Cargill that the ATS "focuses" on providing compensation for aliens injured by those law-of-nations violations that are clearly and universally condemned throughout the civilized world. Because the locus of the violations and injuries alleged by Appellees is the Ivory Coast, *Morrison* and *Kiobel* dictate a finding that Petitioners are not seeking domestic application of the ATS. Although Appellees allege that decisions to provide financial and material support to farmers who abused children originated with Cargill and Nestle officials located in the United States, activity of that nature is not the "focus" of the ATS and thus does not constitute domestic application of the statute. *Doe v. Drummond*

Co., 782 F.3d 576, 598 (11th Cir. 2015); *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 198 (5th Cir. 2017). Indeed, as explained above, regular commercial activity of that nature would not be actionable under an aiding-and-abetting theory, even if the forced labor were occurring within the United States.

This would be a different case if Appellants plausibly alleged that Cargill or Nestlé masterminded international slavery from their American offices, including facilitating trafficking from Mali and training farmers on how best to subjugate children. But in the absence of factual allegations of that nature in the SAC, Appellants cannot plausibly argue that any violations of the ATS occurred domestically.

CONCLUSION

The Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify:

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,985 words, excluding the portions exempted by Fed.R.App.P. 32(f).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because: this brief has been prepared in a proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
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Attorney for Washington Legal Foundation

Dated: February 12, 2018

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule28-2.6, undersigned counsel certifies that, to counsel's knowledge, there are no related cases pending in this Court.

/s/ Richard A. Samp
Richard A. Samp

Dated: February 12, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2018, I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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