Chapter 5, Problem IV

The *Kiobel* case is not the only litigation arising out of Royal Dutch Shell's operations in Nigeria. Four Nigerian farmers and an environmental NGO sued Shell in the Netherlands for damage suffered as the result of oil spills from underground pipelines and an oil well. In January 2021, the Court of Appeal of The Hague ruled that, under Nigerian tort law, Shell's Nigerian subsidiary was liable for the damage resulting from the spills. In response to this ruling, in August 2021 Royal Dutch Shell agreed to pay $ 111.6 million to communities in southern Nigeria injured by the spills.

Meanwhile, ATS suits continue to be litigated in U.S. courts. *Nestlé USA v Doe*, 141 U.S. 1931 (2021), is the Supreme Court's most recent ATS decision. The Court accepted this case to decide whether U.S. corporations could be sued in ATS actions, a question raised – but not resolved – in *Kiobel* and *Jesner*. An edited version of the Court's opinion follows.

NESTLÉ USA, INC., Petitioner
v.
John DOE, et al.;

CARGILL, INC., Petitioner
v.
John DOE I, et al.

Justice THOMAS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Part III, in which Justice GORSUCH and Justice KAVANAUGH join.

I

According to the operative complaint, Ivory Coast—a West-African country also known as Côte d'Ivoire—is responsible for the majority of the global cocoa supply. Respondents are six individuals from Mali who allege that they were trafficked into Ivory Coast as child slaves to produce cocoa.

Petitioners Nestlé USA and Cargill are U.S.-based companies that purchase, process, and sell cocoa. They did not own or operate farms in Ivory Coast. But they . . . provided those farms with technical and financial resources—such as training, fertilizer, tools, and cash—in exchange for the exclusive right to purchase cocoa. Respondents allege that they were enslaved on some of those farms.

Respondents . . . contend[ ] that this arrangement aided and abetted child slavery. Respondents argue that petitioners "knew or should have known" that the farms were exploiting enslaved children yet continued to provide those farms with resources. . . . [A]lthough . . . respondents' injuries occurred outside the United States,

respondents contend that they can sue in federal court because petitioners allegedly made all major operational decisions from within the United States.

II

Our precedents "reflect a two-step framework for analyzing extraterritoriality issues." *RJR Nabisco, Inc.* v. *European Community*, 579 U.S. 325, 337 (2016). First, we presume that a statute applies only domestically, and we ask "whether the statute gives a clear, affirmative indication" that rebuts this presumption. For the ATS, *Kiobel* answered that question in the negative. Courts thus cannot give "extraterritorial reach" to any cause of action judicially created under the ATS. Second, where the statute, as here, does not apply extraterritorially, plaintiffs must establish that "the conduct relevant to the statute's focus occurred in the United States." *RJR Nabisco*, 579 U.S., at 337. "[T]hen the case involves a permissible domestic application even if other conduct occurred abroad." *Ibid.*

The parties dispute what conduct is relevant to the "focus" of the ATS. . . . [P] etitioners and the United States contend that "the conduct relevant to the [ATS's] focus" is the conduct that directly caused the injury. All of *that* alleged conduct occurred overseas in this suit. [R]espondents argue that . . . the "focus" of the ATS is conduct that violates international law, that aiding and abetting forced labor is a violation of international law, and that domestic conduct can aid and abet an injury that occurs overseas.

Even if we resolved all these disputes in respondents' favor, their complaint would impermissibly seek extraterritorial application of the ATS. Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast. The Ninth Circuit nonetheless let this suit proceed because respondents pleaded as a general matter that "every major operational decision by both companies is made in or approved in the U.S." But allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.

As we made clear in *Kiobel*, a plaintiff does not plead facts sufficient to support domestic application of the ATS simply by alleging "mere corporate presence" of a defendant. Pleading general corporate activity is no better. Because making "operational decisions" is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct. To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity.

III

Respondents' suit fails for another reason, which does not require parsing

allegations about where conduct occurred: We cannot create a cause of action that would let them sue petitioners. That job belongs to Congress, not the Federal Judiciary. *Sosa* indicated that courts may exercise common-law authority under the ATS to create private rights of action in very limited circumstances. 542 U.S., at 724. *Sosa* suggested, for example, that courts could recognize causes of action for three historical violations of international law: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." But our precedents since *Sosa* have clarified that courts must refrain from creating a cause of action whenever there is even a single sound reason to defer to Congress. See, *e.g.*, *Hernández*, 589 U.S., at ––––. Tellingly, we have never created a cause of action under the ATS. Even without reexamining *Sosa*, our existing precedents prohibit us from creating a cause of action here.

A

We have been clear that "the ATS is a jurisdictional statute creating no new causes of action." Aliens harmed by a violation of international law must rely on legislative and executive remedies, not judicial remedies, unless provided with an independent cause of action. In more than 200 years, Congress has established just one: the Torture Victim Protection Act of 1991. . . . Because that cause of action does not apply here, respondents ask us to create a new one.

In *Sosa* . . . we described a two-step test that plaintiffs must satisfy before a court can create a cause of action under the ATS. 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. *Id.* at 726, 736, and n. 27.

[O]ur precedents have made clear that the second step of *Sosa . . .* is extraordinarily strict. A court " 'must' " not create a private right of action if it can identify even one " 'sound reaso[n] to think Congress might doubt the efficacy or necessity of [the new] remedy.' " *Jesner*, 584 U.S., at –––.

B

Regardless of whether respondents have satisfied the first step of the *Sosa* test, it is clear that they have not satisfied the second. Our decisions since *Sosa . . .* compel the conclusion that federal courts should not recognize private rights of action for violations of international law beyond the three historical torts identified in *Sosa*.

We recently identified a sound reason to think Congress might doubt a judicial decision to create a cause of action that would enforce torts beyond those three: Creating a cause of action under the ATS "inherent[ly]" raises "foreign-policy

concerns." *Jesner*, 584 U.S., at ––––. This suit illustrates the point, for the allegations here implicate a partnership . . . between the Department of Labor, petitioners, and the Government of Ivory Coast. Under that partnership, petitioners provide material resources and training to cocoa farmers in Ivory Coast—the same kinds of activity that respondents contend make petitioners liable for violations of international law. Companies or individuals may be less likely to engage in intergovernmental efforts if they fear those activities will subject them to private suits.

When we decided *Sosa*, we remarked that there is "no basis to suspect Congress had any examples in mind beyond th[ree] torts" when it enacted the ATS. . . . Nobody here has expressly asked us to revisit *Sosa*. But precedents since *Sosa* have substantially narrowed the circumstances in which "judicial discretion" under the *Sosa* test is permitted. Under existing precedent, then, courts in some circumstances might still apply *Sosa* to recognize causes of action for the three historical torts likely on the mind of the First Congress. But as to other torts, our precedents already make clear that there always is a sound reason to defer to Congress, so courts may not create a cause of action for those torts. Whether and to what extent defendants should be liable under the ATS for torts beyond the three historical torts identified in *Sosa* lies within the province of the Legislative Branch.

Justice GORSUCH, with whom Justice ALITO joins as to Part I, and with whom Justice KAVANAUGH joins as to Part II, concurring.

I write separately to add two points. First, this Court granted certiorari to consider the petitioners' argument that the Alien Tort Statute (ATS) exempts corporations from suit. Rather than resolve that question, however, the Court rests its decision on other grounds. That is a good thing: The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding. Second, the time has come to jettison the misguided notion that courts have discretion to create new causes of action under the ATS—for the reasons Justice THOMAS offers and others as well.

I

Nothing in the ATS supplies corporations with special protections against suit. The statute specifies which plaintiffs may sue ("alien[s]"). It speaks of the sort of claims those plaintiffs can bring ("tort[s]" in "violation of the law of nations or a treaty of the United States"). But nowhere does it suggest that anything depends on whether the defendant happens to be a person or a corporation.

Understandably too. Causes of action in tort normally focus on wrongs and injuries, not who is responsible for them. When the First Congress passed the ATS, a "tort" meant simply an "injury or wrong" whoever committed it. G. Jacob, O. Ruffhead, & J. Morgan, A Law Dictionary (10th ed. 1773). Nothing has changed in the intervening centuries. Generally, too, the law places corporations and individuals on

equal footing when it comes to assigning rights and duties. Even before the ATS's adoption, Blackstone explained that, "[a]fter a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities," including "[t]o sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may." 1 W. Blackstone, Commentaries on the Laws of England 463 (1765).

II

The real problem with this lawsuit and others like it thus isn't whether the defendant happens to be a corporation. To my mind, it's this: . . . the ATS nowhere . . . deputizes the Judiciary to create new causes of action. Rather, the statute confers "jurisdiction" on federal courts to adjudicate "tort" claims by aliens for violations "of the law of nations." Perhaps this language was originally understood to furnish federal courts with authority to entertain a limited number of specific and existing intentional tort claims that, if left unremedied, could give rise to reprisals or war. Perhaps, too, the law affords federal courts jurisdiction to hear any other tort claims Congress chooses to create. But nothing in the statute's terse terms obviously authorizes federal courts to invent new causes of action on their own. . . .

Making this clear would . . . get this Court out of the business of having to parse out ever more convoluted reasons why it declines to exercise its assumed discretion to create new ATS causes of action. It would absolve future parties from years of expensive and protracted litigation destined to yield nothing. It would afford everyone interested in these matters clear guidance about whom they should lobby for new laws. It would avoid the false modesty of adhering to a precedent that seized power we do not possess in favor of the truer modesty of ceding an ill-gotten gain. And it would clarify where accountability lies when a new cause of action is either created or refused: With the people's elected representatives.

Justice SOTOMAYOR, with whom Justice BREYER and Justice KAGAN join, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion. . . . I do not, however, join Justice THOMAS' alternative path to [dismissing the complaint], which would overrule *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), in all but name.

I

A

Unsurprisingly, the domestic and international legal landscape has changed in the two centuries since Congress enacted the ATS. On the one hand, this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), "denied the existence of any federal 'general' common law." *Sosa*, 542 U.S. at 726. *Erie* thus foiled the First Congress' expectation "that the common law would," of its own accord, "provide a cause of action for the

modest number of international law violations," 542 U.S. at 724, that qualify as "tort[s] ... in violation of the law of nations." On the other hand, the class of law-of-nations torts has grown "with the evolving recognition ... that certain acts constituting crimes against humanity are in violation of basic precepts of international law." *Jesner* v. *Arab Bank, PLC*, 584 U.S. ––––, ––– (2018). Like the pirates of the 18th century, today's torturers, slave traders, and perpetrators of genocide are " '*hostis humani generis*, an enemy of all mankind.' " *Sosa*, 542 U.S. at 732.

The Court reconciled these two legal developments in *Sosa* v. *Alvarez-Machain*. There, the Court explained that it would "be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet" in a post-*Erie* world. 542 U.S. at 730. Indeed, . . . the "post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way." 542 U.S. at 729. For over 200 years (both before and after *Erie*), courts have adhered to the principle that "the domestic law of the United States recognizes the law of nations." 542 U.S. at 729.

In the years since, this Court has read *Sosa* to announce a two-step test for recognizing the availability of a cause of action under the ATS. Courts first ask "whether a plaintiff can demonstrate that the alleged violation is 'of a norm that is specific, universal, and obligatory.' " If so, then "it must be determined further whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion." *Jesner*, 584 U.S., at ––––.

B

Justice THOMAS reads *Sosa* and this Court's subsequent precedents to impose an "extraordinarily strict" standard at *Sosa*'s second step. If a court "can identify even one 'sound reaso[n]' " to think Congress might doubt the need for a cause of action under the ATS, we are told, the court should refuse to recognize it.

The trouble with Justice THOMAS' test is that it is unmoored from both history and precedent. The ATS was a statute born of necessity. In the early days of the Republic, the "Continental Congress was hamstrung by its inability" under the Articles of Confederation "to 'cause infractions of treaties, or of the law of nations to be punished.' " *Sosa*, 542 U.S., at 716. The United States' failure to redress such offenses "caused substantial foreign-relations problems," *Jesner*, 584 U.S., at ––, and "threaten[ed] serious consequences in international affairs," *Sosa*, 542 U.S., at 715. On more than one occasion (and in no uncertain terms), foreign powers expressed their displeasure with the United States' failure to provide redress for law-of-nations violations against their citizens. Congress' "principal objective" in establishing federal jurisdiction over such torts, therefore, "was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might

cause another nation to hold the United States responsible for an injury to a foreign citizen." *Jesner*, 584 U.S., at ––––.

It was Congress' assessment that diplomatic strife is best avoided by providing a federal forum to redress those law-of-nations torts that, if not remedied, could bring international opprobrium upon the United States. Because the First Congress did not pass "the ATS only to leave it lying fallow indefinitely," the statute "is best read as having been enacted on the understanding that the common law would provide a cause of action" for widely recognized torts in violation of the law of nations. *Id.* at 719, 724. In other words . . . Congress expected federal courts to identify actionable torts under international law and to provide injured plaintiffs with a forum to seek redress. . . . Respect for the separation of powers is hardly served by refusing a legislatively assigned task.

II

Applying the wrong standard at *Sosa*'s second step, Justice THOMAS reaches the wrong answer. He announces that, except for "the three historical torts likely on the mind of the First Congress," "there always is a sound reason" for courts to refuse to recognize actionable torts under the ATS.[4]

First, Justice THOMAS argues that "creating a cause of action to enforce international law beyond three historical torts invariably gives rise to foreign-policy concerns." He offers no meaningful support for that sweeping assertion, nor does he explain why an ATS suit for the tort of piracy, for example, would categorically present fewer foreign-policy concerns than a suit for aiding and abetting child slavery. . . . Moreover . . . Justice THOMAS ignores the other side of the equation: that foreign nations may take (and, indeed, historically have taken) umbrage at the United States' refusal to provide redress to their citizens for international law torts committed by U.S. nationals within the United States. Closing the courthouse doors thus "gives rise to foreign-policy concerns" just as "invariably," as leaving them open.

* * *

The First Congress chose to provide noncitizens a federal forum to seek redress for law-of-nations violations, and it counted on federal courts to facilitate such suits by recognizing causes of action for violations of specific, universal, and obligatory norms of international law. I would not abdicate the Court's obligation to follow that legislative directive. Because I find no support for Justice THOMAS' position in the ATS or in this Court's precedents, I do not join that portion of Justice THOMAS' opinion.