Global Private International Law

Adjudication without Frontiers

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11. Global supply chains: *Doe v. Nestle*

11.1 CASE BACKGROUND

This is a (purported) child slavery case involving cocoa farms in the Ivory Coast. Such farms supply the cocoa which is transformed and ultimately marketed worldwide by the defendant(s) (Nestle USA, Archer Daniels Midland and Cargill), powerful multinational actors in the agro-food industry. It was alleged that the defendant corporations aided and abetted child slavery by providing assistance to Ivorian farmers. First filed in 2005 as a class action in federal court, in the name of the (purported) child slaves, the case raised two sets of jurisdictional issues under the Alien Tort Statute. One was the geographical scope of that statute. On this point the question, shrouded in controversy since the Kiobel case, is whether the situation in dispute 'touches and concerns' the territory of the United States. But for the purposes of this chapter, it is the second issue concerning the *material* scope of the statute which elicited from the Ninth Circuit the most remarkable response. According to the Alien Tort Statute, federal courts have jurisdiction over torts committed by aliens in violation of the law of nations. Jurisdiction depended therefore on whether or not there had been a violation of the law of nations on the part of the defendants. While the law of nations forbids aiding and abetting a crime (that is, providing assistance or other forms of support towards its commission), the question arose as to whether the defendants had acted, as required by the rule of international law, with 'knowledge' or (more stringently) 'purpose' of facilitating the criminal act. The Ninth Circuit answers that a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery. They might have used their economic leverage in the cocoa market either to ensure that the farms did not have recourse to such methods, or that farms using slavery were excluded from the supply chain.

This case draws attention to the ways in which the structure and operation of global value chains are largely dependent upon the often invisible work done by private international law rules. The way in which the jurisdictional requirements play out here can impact upon the whole political economy of such arrangements. Moreover, it illustrates the conflicting claims, values, interests, ideals, and norms which appear beyond the remit of state law, in varied spheres and with diverse stakes, and which require new modes of legal expression. Remarkably, neither territory, nor sovereignty, nor the requirements of foreign policy are part of the legal reasoning used by the Ninth Circuit, although they have been the focus of (private international) law's more familiar approach to the governance of corporate conduct abroad. On the other hand, what the Court is clearly attempting to do, within the formal confines of a determination of jurisdiction, is to bring the pressure of the legal system on a point (in various vocabularies, a 'hub', weakest link or 'pressure point', or a point of 'jurisdictional touchdown') in a global value chain.

Cases: Court of Appeals for the Ninth Circuit: Case No. 10-56739 (9 April 2014; 4 September 2015); Central District of California, Judge Wilson, 2 March 2017

11.2 ABOUT CAPITALISM AND PRIVATE INTERNATIONAL LAW

Tomaso Ferrando

1. PRIVATE INTERNATIONAL LAW AND THE PRODUCTION OF 'DARK VALUE'

The internationalisation of production and the shift from vertical integration to contractual links are presenting courts with new challenges when judges are asked to redress violations that occur at different points of the supply chain. In the struggle for global governance and corporate accountability, the fact that slavery, forced labour, violations of *jus cogens* and environmental disasters take place beyond borders already poses legal concerns and raises significant obstacles. When the same events are realised by third party contractors that only have a contractual obligation and that may operate several tiers away from the lead firm, the possibility that victims obtain some form of satisfaction appears even more unlikely.[1]

This is recognised by Susan Marks when she states that

> [n]ational governments, even the most powerful among them, face growing difficulty in controlling the activities of business, and especially finance, is today very widely acknowledged. The question of the significance of this development for nation-state-based systems of power is considered by many to be one of the most important political questions of our age.[2]

The case under analysis, along with others that were brought in the past and others that will follow, reflects the evolving interactions between law, territory and corporate accountability. In particular, it is characterised by the Ninth Circuit Court's attempt to elaborate a legal framework that can cope with the dual nature of supply chain capitalism as contemporary constructed around the ideas of order and coherence, on the one hand, and of chaos and fragmentation, on the other hand. As discussed below, firms that occupy a leading position in transnational supply capitalism are increasingly paying attention to the transparency, traceability and standardisation of their supply chains: control, organisation, efficiency and public concern require it. On the other

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[1] See, e.g. Mark Anner, Jennifer Bair and Jeremy Blasi, 'Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' (2013) 35(1) *Comparative Labor Law and Policy Journal* 1–43; Kevin B. Sobel-Read, 'Global Value Chains: A Framework for Analysis' (2014) 5 *Transnational Legal Theory* 364–407; Naomi Jiyoung Bang, 'Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases' (2013) 35 *Houston Journal of International Law*; Galit A. Sarfaty, *Shining Light on Global Supply Chains* (2014), available from http://papers.ssrn.com/abstract=2512417 (last visited 29 Dec 2014); Stephanie Barrientos, '"Labor Chains": analysing the role of labour contractors in global production networks' (2011), https://ideas.repec.org/p/bwp/bwppap/15311.html (last visited 29 Dec 2014).

[2] Susan Marks, 'Empire's Law (The Earl A. Snyder Lecture in International Law)' (2003) 10 *Indiana Journal of Global Legal Studies* 1. See also Michael Hardt and Antonio Negri, EMPIRE (Cambridge MA, Harvard University Press 2001).

hand, it can be claimed that the goal of profit maximisation is best achieved by deciding not to control some areas and some aspects, i.e. by refraining from assessing the dark spots of production, favouring their preservation, and profiting from the cheapness of labour, nature, food and resources.[3] It is the engagement with the boundary between chaos and order that makes *Doe v. Nestle et al.* important and that would require to be addressed further.

2. TAKING CONTRACTS-BASED CAPITALISM SERIOUSLY

It may seem anachronistic to discuss an Alien Tort Statute case after the *Kiobel* judgment. It is known, in fact, that most of the decisions that were issued in the aftermath of that milestone decision had to bow to the stringent concept of 'touch and concern' formulated by Justices Scalia and Alito. Almost all the cases were thus dismissed at the jurisdictional stage, without even the possibility of questioning the matter of convenience of the forum – let alone the substance of the claim. As a consequence, the non-jurisdictional points that are raised in these cases – both by parties and judges – often end up forgotten. This may be the future of the case under scrutiny, which would be a shame given the Court of Appeal's innovative proposal to move beyond the idea of legal and territorial chaos and to identify ways to make the productive and economic coherence of supply chains legally relevant.

In fact, the *Nestle* case offered the plaintiffs and the court a unique opportunity to deal with an issue that several authors consider among the most problematic aspects of supply chain capitalism, i.e. subcontracting and the allocation of liability that it generates among its actors. For example, Stephanie Barrientos stated that '[t]hird party labour contractors are increasingly prevalent in Global Production Networks, and are a potential channel for 'new forms of slavery.'[4] Similarly, Anner, Bair and Blasi conclude that '[t]here is widespread consensus that twenty years of efforts to address poor working conditions and violations of workers' rights in global supply chains for apparel products have been mostly unsuccessful.'[5]

More recently, Naomi Jiyoung Bang intervened in the debate defining supply chain contracts as a charade that covers the fact that '[c]orporations using global production chains, containing multiple levels of subcontracting and outsourcing, breed human trafficking and forced labor' and allow them to 'easily avoid accountability given the extraterritorial location of the suppliers, and the appearance of 'arm's length' contracts with their suppliers.'[6] For Hayashi 'Contracting out the production part of their

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[3] Anna L. Tsing, *The Mushroom at the End of the World: on the Possibility of Life in Capitalist Ruins* 1st edn (Princeton NJ, Princeton University Press 2015); Jason W. Moore, *Capitalism in the Web of Life* 1st edn (London and New York, Verso Books 2015).

[4] Barrientos (n 1).

[5] Mark Anner, Jennifer Bair and Jeremy Blas, 'Buyer Power, Pricing Practices, and Labor Outcomes in Global Supply Chains', IBS working paper (2012) available from http://www.colorado.edu/ibs/pubs/pec/inst2012-0011.pdf (last accessed 29 January 2015).

[6] Bang (n 1) (footnotes omitted). See also Special Rapporteur on the Human Rights of Migrants, Specific Groups and Individuals Migrant Workers, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/73 (2005), at 2; ESCOR, 62d Sess. (Dec. 30, 2005).

business has enabled manufacturers to minimize their investment and insulate themselves from instability and risk. By characterizing their relationship with contractors as independent, they have avoided legal responsibility for workers' compensation, unemployment insurance and fringe benefits.'[7]

Facing a system of production that is increasingly global and shifting from property (direct control through foreign direct investments and shareholding) to contract (purchase agreements and mediated connections), the Circuit Court tried to develop a legal reconstruction of the supply chain that may be capable of addressing this double transition and providing responses to violations and forms of exploitation that may take place behind the contract veil. Although temporarily frustrated by the trump card of jurisdiction, *Nestle* represents an attempt to engage with the complexity of production and to move beyond the double use of contractual agreements both as sources of unity for the chain and as tools to create legal distance, fragmentation and impunity.

As discussed below, the Ninth Circuit's opinion in *Nestle* offers a combination between territory, contracts and lead firms' actions to overcome the geographical and legal fragmentation that are crucial to the economic success of transnational chains. The claim highlights the extent to which contemporary legal understanding of transnationality are lagging behind the reality on the ground. It brings to light the need to combine the economic and legal elements of the cocoa supply chain to define a distribution of legal responsibilities that is ultimately more reflective of the value distribution and economic power of that specific chain. Whether this position will be successful in the future also depends on the possibility for its elements to be known and discussed.

3. REDEFINING 'AIDING AND ABETTING' AT THE TIME OF SUPPLY CHAIN CAPITALISM

When it comes to providing solutions to the fact that contracts normally shield lead companies (in the Global North) from accountability, different approaches have been suggested. For example, Anner et al. propose a proactive intervention and to extend the idea of the 'jobbers agreements' at the transnational level, i.e. to expand the use of the trilateral contracts concluded between contractors, intermediaries (jobbers) and workers' unions that were useful to improve the labour conditions in sweatshops in the 20th century in the USA.[8] Another possibility would be to transnationalise the doctrine of

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[7] Dennis Hayashi, 'Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act' (1992) 17 *Yale J. Intl'l L.* 195, 199.

[8] See Anner, Bair and Blasi (n 1) p 13 ('The jobbers agreement served as the lynchpin of a system that was sometimes called triangular collective bargaining – so named because the goal was to regulate, via a set of paired contactors and jobbers agreements, relations between the three 'sides' of the production triangle: the workers as represented by the union, and the jobbers and contactors, each represented by their own employers association. Yet among these three parties to the agreement, the jobber was clearly recognized to be the most powerful industry actor and the only one capable of safeguarding the wages and working conditions of garment workers in contracting shops'). Such contracts would deprive corporations of the possibility to deflect responsibilities by the interposition of intermediaries and would multiply standing and

the 'joint-employer doctrine', i.e. the recognition that independent contractors often are simply interposed between workers and final beneficiaries and the identification of common responsibilities towards workers.[9] This was, for example, the attempt advanced in *Doe v. Wal-Mart Inc*, a case that was brought – and dismissed – against the US parent and several subsidiaries to recognise the former's liability for misconducts of the latter.[10]

Recently, Bang proposed to extend the economic reality test from the national to the transnational level, an operation to be realised by adopting an elaborated *ex post* jurisdictional strategy that consists of two prongs: first, the courts of the corporations' home state should apply the 'economic realities test as a vehicle to determine the existence of joint employment between a corporation and their contractor.'[11] Secondly, courts should extend the scope of domestic legislation to cover extraterritorial conduct, if it can be indirectly attributed to national corporations.[12]

Another pattern followed by plaintiffs and courts in the USA is represented by the notion of 'aiding and abetting', i.e. the possibility to recognise secondary liability to a violation of law without direct participation. In the US national context, the parameter is generally satisfied when

> (1) the party whom the defendant aids must perform a wrongful act that causes an injury;
> (2) the defendant must be generally aware of his role as part of an overall illegal or tortious

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the venues to obtain their enforcement. However, they would require an active involvement of all the parties – unlikely to happen without sufficient pressure both on buyer corporations and subcontractors – and attention in the definition of the governing rules and adjudicatory venues.

[9] *Castillo v. Case Farms of Ohio* [1999] W.D. Tex 96 F. Supp. 2d 578, 596.

[10] *Doe v. Wal-Mart Inc* [2009] 9th Cir. 572 F.3d 677. In that case, the court affirmed that the common law test for joint-employment required 'the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.' The court equated the concept of 'control' to physical proximity as well as frequency of contact, holding that '[a] finding of the right to control employment requires … a comprehensive and immediate level of "day-to-day" authority over employment decisions.' The content of the supply-contract and the allocations of rights and obligations that it produced were thus considered irrelevant.

[11] Bang (n 1) at 258.

[12] Bang's application of the economic reality test to the global system of production would thus require courts to take patterns of capital seriously. Judges should move beyond the territorial fragmentation of multiple jurisdictions and at the same time recognise the role of law (in this case of contracts) in distancing the observer from the underlying distribution of power and control. Courts would recognise that global value chains represent the new transnational space of jurisdictional operation and that legal formalism is inconsistent with the way in which capital operates. Foreign subcontractors would thus be 're-territorialised' and considered operating under the control of the domestic corporation, so that buyer and subcontractor would be both equally liable for injuries suffered by overseas factory workers. Borders and contractual formalism would be replaced by transnationality and economic reality, and judges would be the craftsmen. 'Essentially', Bang concludes, 'the logic is that if the contractor is found to be an employee of a corporation, then its workers are also the corporation's employees' and therefore they could be considered a unity when responsibilities have to be allocated. See Bang (n 1) at 279.

> activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.[13]

However, its standards have been at the centre of jurisdictional challenges in the context of the ATS and of transnational litigation, in particular because of the transplantation of the notion of 'purpose' from international criminal law (Rome Statute) to private international law and corporate accountability cases.[14]

Nestle operates within this framework. However, its innovation is represented by the Court's attempt to fulfil the requirements of 'aiding and abetting' by embedding the violations in their economic and legal context, i.e. the cocoa supply chain controlled by the plaintiffs and based on the extraction of value from slave labour. What the Court tried to do, was to give relevance to the plaintiffs' active involvement in enforcing coherence and control along the chain (by enforcing standards, checking production, having access to the land where the cocoa was produced, etc.) and, at the same time, to the actions or omission aimed at maintaining a space of darkness, chaos and lack of accountability.

> In the court's interpretation of the link between supply chains and law, the contractual construction of supply chains as a commercially reliable space and the existence of dark spots of unaccountability represent the two sides of the same coin which cannot be read separately. Therefore, the exclusivity of the contractual relationship, the quality control exercised by the defendants in order to satisfy their own self-regulation and the interests of the consumers, and the transfer of technology and resources to guarantee the needed supply (all expressions of order and coherence), must be read together with the omitted use of the economic leverage deriving from the exclusive buyer/seller contractual agreements, the cost-cutting delocalisation which is proper of supply chain capitalism, and the exercise of political lobby in the United States to avoid the introduction of mandatory labelling and reduce the level of transparency.

4. CHEAPNESS AT THE BEGINNING AND END OF SUPPLY CHAIN CAPITALISM

Another element that deserves attention is the Ninth Circuit's attempt to prove the existence of *mens rea* by the identification of the profit motive as an indication of purpose. In the Court's reconstruction, child slaves represented a central element in the establishment and maintenance of the cocoa chain because of the cost-cutting benefits that they represent. Although the defendants were not directly interested in harming children, they were interested in lowering their cost of production – whatever it takes.

According to the Court:

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[13] *Doe*, 654 F.3d at 34 (citing *Halberstam v. Welch* [1983] D.C. Cir. 705 F.2d 472, 477). *Hauser v. Farrell* [1994] 9th Cir. 14 F.3d 1338, 1343, rev'd on other grounds, *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.* [1994] 511 U.S. 164; accord *Halberstam v. Welch* [1983] D.C. Cir. 705 F.2d 472, 477.

[14] *Aziz v. Alcolac, Inc.* [2011] 4th Cir. 658 F.3d 388, 399–400; *Presbyterian Church of Sudan v. Talisman Energy* [2009] 2nd Cir., Inc., 582 F.3d 244, 259.

> [T]he defendants placed increased revenues before basic human welfare, and intended to pursue all options available to reduce their cost for purchasing cocoa. Driven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child slavery, the cheapest form of labor available. These allegations explain how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that defendants acted with the purpose to facilitate child slavery.[15]

In the reasoning of the Court, profit, exploitation and responsibility are circularly constructed. The use of cheap labour is seen as a prerequisite to the increase in return and the obtainment by the defendants of a dominant position in the supply chain (at least in Ivory Coast). It is through the exploitation of slave labour and children, the Court concludes, that foreign corporations can produce 'dark value' (generate non-internalised externalities) in the Ivory Coast and appropriate a higher rent.[16] However, the same market power achieved through exploitation would have required the defendants to intervene and act against their own economic interest. For the Court it is not important how the leading position in a supply chain is obtained: what matters is that this implies obligations and lowers the standard for accountability.

On the contrary, the defendants decided to use their resources and their political power to allegedly lobby against a 2001 United States Congressional proposal to require chocolate manufacturers and importers to certify and label their products as 'slave free.' As a result, the mandatory law was replaced by a 'voluntary arrangement known as the Harkin-Engel protocol, in which the chocolate industry agreed upon certain standards by which it would self-regulate its labor practices.'[17] In a circular way, if slavery and cheap labour lie behind profit and revenues, they also provide the resources that are needed to avoid political and legal interventions that may impact the way in which value is produced and accumulated.[18]

5. LAW AND TRANSNATIONAL GLOBAL PRODUCTION

To conclude this short note, I would like to stress the importance of the Ninth Court's focus on the just mentioned lobbying operations realised by the defendants in a jurisdiction that is not the same where the violations occurred. Implicitly, the judges recognise that legal interventions at the domestic level can introduce disturbances in the

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[15] *Doe*, 654 F.3d, at 22.

[16] It is my opinion that the massive violations of human rights committed by the government in Sudan should not be kept separated from the case of child labour in Ivory Coast. If the threshold to determine that the defendant purposefully aided and abetted a violation of international law is represented by the economic benefit that it obtains, it could be claimed that Talisman Energy obtain an economic benefit because of the reduced social opposition, the lower costs of labour and the cheaper access to resources.

[17] *Doe*, 654 F.3d, at 1066.

[18] Raj Patel and Jason W. Moore, *A History of the World in Seven Cheap Things: a Guide to Capitalism, Nature and the Future of the Planet* 1st edn (Oakland CA, University of California Press 2017).

supply chain and impact the way in which value and power are allocated throughout all actors and nodes.[19]

Although lobbying is not considered a violation per se, the position of the Court reveals two aspects of the complex interaction between value chains and legal structures: a) that corporations are aware that the mechanism of extraction and appropriation of capital throughout the chain could be modified by legal interventions that do not take place there were exploitative conducts take place – for example by reforming the legal framework in the country where the final products are sold rather than where natural resources are extracted; b) that the current system of law is, in most cases, incapable of coping with transnational forms of production and that the status quo is reproductive of inequalities and legalised violence.

From the perspective of law in Global Production, courts' lax attitude toward misconducts realised beyond national boundaries produces a judicially-created incentive for incorporating, offshoring and outsourcing. The geography and forms of production are, therefore, deeply intertwined with the spatial extension of jurisdiction and the identification of the content and applicability of a set of legal tools, in particular those of private international law and tort law. More than one decade ago, Saskia Sassen noted that the relation between the global capital economy and national states is not adequately or usefully captured by the use of a clear-cutting distinction between global and national. According to Sassen,

> [t]his duality is conceived of as a mutually exclusive set of terrains where what the global economy gains the national economy or the national state loses. It is this type of dualism that has fed the proposition of declining significance of the national state in a globalized economy. Such a dualist perspective also resists the recognition that we may be dealing with a new bundle of practices that are stabilizing new meanings of sovereign power and constituting new institutional locations for components of this power.[20]

Instead of passively suffering for the globalisation processes that operate beyond the scope of government, courts all over the world have been increasingly required to interrogate this duality. To paraphrase Anna Tsing, these interventions may create spaces of transformative encounters along the supply chains, making new legal assemblages and new distribution of power possible.[21] Where they take, it is often hard to foresee. In this context, some courts – including the Supreme Court in *Kiobel* – have adopted territorial reconstructions of their jurisdictions that 'do not fit globalization and

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[19] Tsing (n 3) 160; Tomaso Ferrando, 'Land Rights in Global Production: Leveraging Multi-Spatiality and "Legal Chokeholds"' (2017) 2 *Business and Human Rights Journal* 2.

[20] Saskia Sassen, 'Territory and Territoriality in Global Economy' (2000) 15 *International Sociology* 2, at 376.

[21] I do not share the plaintiffs' position that the introduction of a certification scheme would have been such that 'Defendants' cocoa plantations would not have been able to use child labor.' A critical approach to law requires considering the indeterminacy of regulation, the multiplicity of its interpretation, and the role that context, power and asymmetries play in determining its consequences. However, the existence of a mandatory system of labelling and certification, supported by an appropriate mechanism of control and complaints, may have improved the conditions of cocoa workers throughout the chain (and not only in Ivory Coast).

the transcendence of territorial border'[22] or dismissed the role of control and chaos as two complementary elements of supply chains. Thus, they take legal decisions that create spaces of legal impunity that contribute to the consolidation of an exploitative form of supply chain capitalism based on the combination between 'dark and bright value'.[23] Others have tried to think differently.

Among these, the Ninth Circuit in *Doe v. Nestle et al.* teaches us that the 'allegedly "external" processes of globalization should be seen as distinctly co-evolving with and as being produced, constructed and conceived *within* the nation state.'[24] It also proves that Moore and Princen may be right when they affirm that contemporary transnational capitalism is constructed on the extraction of dark value via the production and accumulation of cheap labour, cheap nature, cheap food and cheap natural resources.[25] At the same time, it highlights the potential implications of higher levels of control that are imposed in the name of sustainability of their supplies and safety of the consumers. In this tension between order and chaos, *Nestle* suggests to engage with the role of law in the production and extraction of value along the supply chains (both through control and darkness) and sounds like a clear invitation to private international lawyers to be at the forefront of this new intellectual and practical endeavour.

11.3 GRAPPLING WITH (GLOBAL SUPPLY) CHAINS: TRANSNATIONAL HUMAN RIGHTS LITIGATION IN THE AGRIBUSINESS SECTOR

Samuel Fulli-Lemaire

For the most part, human rights litigation against transnational corporations (hereafter TNCs) belies the well-known saying that a chain is no stronger than its weakest link. The conundrum which lies at the heart of these cases is easily expressed: while meaningful reparation can only be obtained if the ultimate parent is held liable,

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[22] Ralf Michaels, 'Empagran's Empire: International Law and Statutory Interpretation in the US Supreme Court of the Twenty-First Century', in David L. Sloss, Michael D. Ramsey and William S. Dodge (eds.), *International Law in the US Supreme Court* 1st edn (Cambridge, Cambridge University Press 2009) at 539.

[23] See Donald A. Clelland, 'The Core of the Apple: Dark Value and Degrees of Monopoly in Global Commodity Chains' (2014) 20 *Journal of World-Systems Research* 1.

[24] Peer Zumbansen, 'Defining the Space of Transnational Law', in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Queen Mary Studies in International Law, Leiden, Brill 2012). See also some of the seminal works by Saskia Sassen, e.g. Saskia Sassen, 'Globalization or denationalization?' (2003) 10 *Review of International Political Economy*; Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton, Princeton University Press 2001); Saskia Sassen, *The Mobility of Labor and Capital: A Study in International Investment and Labor Flow* (Cambridge, Cambridge University Press 1988).

[25] Thomas Princen, 'The Shading and Distancing of Commerce: When Internalization Is Not Enough' (1997) 20 *Ecological Economics* 3; Moore (n 3); Patel and Moore (n 18).

proceedings can often be brought successfully only against the direct perpetrators.[26] The relative impunity thus enjoyed by TNCs from the Global North[27] when they have profited from human rights violations in the Global South, and the correlative difficulty in coming up with remedies within the traditional frameworks of both public and private international law, are thrown into sharp relief by *Doe v. Nestlé*. This case also offers the much-needed reminder that, even though the manufacturing and extractive industries provide perhaps the most famous or striking cases at the intersection of the transnational human rights violations and global supply chain issues, the agribusiness sector cannot be ignored.[28]

The three plaintiffs in *Doe v. Nestlé* claim to be former child slaves who were forced to work on Ivorian cocoa plantations and subjected to other abuse. They allege that the defendants – Nestlé USA Inc., Archer Daniels Midland Company and Cargill Inc. Company – are liable under the Alien Tort Statute (hereafter ATS) for aiding and abetting child slavery. Since the plaintiffs filed in 2005 a proposed federal class action, several orders have been rendered by both the District Court of the Central District of California and the Court of Appeals for the Ninth Circuit,[29] the latter turning out to be

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[26] Naturally, cases where the abuse can be attributed *directly* to the TNCs themselves also raise fascinating issues and obtaining compensation for the victims is a taxing endeavour in this context as well. Nonetheless, the challenges posed by human rights violations committed by actors of a supply chain which are not the ultimate parent are turning out to be particularly vexing, for reasons that will be made clear over the course of this paper.

[27] On the notion of regulatory gaps, see Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 *Colum. J. Transnat'l L.* 209, 251–54, and the references cited.

[28] For an overview of the pivotal role played by TNCs in the agribusiness sector and the complex interplay with their suppliers, see Kaitlin Y. Cordes, 'The Impact of Agribusiness Transnational Corporations on the Right to Food', in Olivier De Schutter, Kaitlin Y. Cordes (eds), *Accounting for Hunger – The Right to Food in the Era of Globalization* (Oxford, Hart 2011). The part of the article devoted to the cocoa industry (37–44) makes for very sobering reading and contains an indictment of the manufacturers' (economic) responsibility in the persistence of child and forced labour every bit as damning as the Ninth Circuit's: 'The Ivorian cocoa industry's dependence on child labour or forced labour demonstrates the desperation of cocoa farmers that arises from the low prices they are paid. This subsequently implicates the right to food: because cocoa farmers in the Côte d'Ivoire receive insufficient income from their cocoa products, they are unable to purchase sufficient food without resorting to illegal labour and human rights abuses' (38–39). Nestlé's role in relation to the murders of ten Colombian union members by presumed paramilitaries between 1986 and 2005 has also been questioned. Again, the firm's refusal to increase the price it paid for milk deliveries was singled out as a decisive reason why conflicts between milk producers and union members escalated during that period, see Éric David, Gabrielle Lefèvre, *Juger les multinationales – Droits humains bafoués, ressources naturelles pillées, impunité organisée* (Brussels, Mardaga/Grip 2015), esp. 45–48. Kraft has also been accused by Oxfam of buying cocoa harvested by enslaved children, see Fabrizio Marrella, 'Protection internationale des droits de l'homme et activités des sociétés transnationales' (2017) 385(33) *RCADI* 199.

[29] At the time of writing, the case in a broader sense is made up of four judgments, the two most recent of which will be discussed here: *Doe I v. Nestlé USA Inc* 766 F 3r 1013 (9th Cir 2014) which was rendered in September 2015; *Doe I v. Nestlé USA Inc.* 05-cv-05133 US District Court, Central District of California (Los Angeles) 2 March 2017.

markedly more sympathetic to the purported victims' case than the former, or the Supreme Court for that matter.

Doe v. Nestlé, which is again pending in the Ninth Circuit,[30] exemplifies the considerable uncertainty which surrounds the scope and thus the potential of ATS litigation before US federal courts (1). That is not to say, unfortunately, that other approaches would necessarily fare better if they were applied in similar circumstances; in that sense *Doe v. Nestlé* can be used as a test case and a basis for comparison (2).

1. THE UNCERTAINTIES SURROUNDING ATS LITIGATION IN THE UNITED STATES AFTER *KIOBEL*

Doe v. Nestlé perfectly illustrates both the considerable uncertainty that still surrounds ATS litigation before US federal courts and the reasons why this uncertainty now appears unlikely to be resolved in a way that would benefit victims of human rights abuses. The ATS is a 1789 law which reads, 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'.[31] As recounted in the Ninth Circuit judgment of 2015,[32] this law was 'almost never invoked' for the first 200 years of its existence. This changed dramatically during the 1980s however,[33] and since then the ATS has been a focus of litigation on the initiative of foreign victims of violations of international law, and consequently of academic study. A number of difficulties remain, three of which can be usefully discussed using the Ninth Circuit judgment:[34] the delineation of corporate liability for aiding and abetting under the ATS (A), the role of international law in the context of ATS litigation (B), and how the presumption against the extraterritorial application of the ATS can be overcome (C).

A. The Delineation of Corporate Liability for Aiding and Abetting Under the ATS

For the sake of clarity, this first question must actually be broken down into two sub-questions, which are both discussed comprehensively in the Ninth Circuit judgment.

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[30] John Bellinger, Andy Wang, '*Jesner v. Arab Bank*: The Supreme Court Should Not Miss the Opportunity to Clarify the "Touch and Concern" Test' (Lawfare Blog, 10 October 2017) <https://www.lawfareblog.com/jesner-v-arab-bank-supreme-court-should-not-miss-opportunity-clarify-touch-and-concern-test> accessed 15 February 2018.

[31] USC § 1350.

[32] 766 F 3r 1013 (9th Cir 2014) 10ff.

[33] See *Filártiga v. Peña-Irala* 630 F 2d 876 (2nd Cir 1980) and *Sosa v. Alvarez-Machain* 542 US 692 (2004).

[34] The District Court's 2017 ruling, by contrast, only deals with the third issue, that is to say the possibility of overcoming, in the circumstances of the case, the presumption that the ATS should not apply extraterritorially. Because the Court 'finds that the complaint seeks an impermissible extraterritorial application of the ATS, [it] does not reach the merits of Defendants' remaining arguments' (2).

The first is the possibility of corporate liability under the ATS, that is to say 'whether and under what circumstances corporations can face liability for ATS claims'.[35] This issue was initially at the heart of the *Kiobel* case, but the Supreme Court did not settle it because it redirected the discussions towards the determination of the extraterritorial scope of the ATS.[36] Deciding that corporations can indeed be held liable for violations 'of the law of nations' implies accepting, first, that the law of nations applies to private actors, and second that it can apply to legal persons as well as to natural persons. The latter contention is addressed at length by the Ninth Circuit, which finally concludes that 'the prohibition against slavery is universal and may be asserted against the corporate defendants in this case'.[37]

The second sub-question is specific to aiding and abetting ATS claims, and regards the two constitutive elements of the crime.[38] As far as the objective element is concerned, the Court merely observes that 'the *actus reus* of aiding and abetting is providing assistance or other forms of support to the commission of a crime', an assistance which furthermore must be 'substantial', but the Court declines to go beyond and does not address the point of 'whether international law imposes the additional requirement that the assistance must be specifically directed towards the commission of the crime'.[39]

Regarding the subjective element, the tone is decidedly sharper.[40] The Ninth District alludes to the controversy surrounding the *mens rea* standard for aiding and abetting liability: is it enough to prove that the defendants knew that their acts would facilitate the commission of the underlying offence, or should the claimant show that they had acted with the purpose of facilitating the criminal act? The Court deems it unnecessary to choose between the competing *knowledge* and *purpose* standards, because it declares itself satisfied that the allegations satisfy the latter, more stringent standard: 'the allegations suggest that a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery'. To reach this inference of purpose, the Court emphasises that the defendants are alleged to have directly benefitted 'from the use of child labour', to have refrained from using their 'control over the Ivory Coast cocoa market … to stop the use of child slavery', and to have 'participated in lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as "slave free"'. It should be kept in mind that deciding on a motion to dismiss requires the Court to '[read] the allegations

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35 766 F 3r 1013 (9th Cir 2014) 15.

36 On this point, see Dominique Bureau and Horatia Muir Watt, *Droit international privé* vol 2, 4th edn (Paris, PUF 2017) para. 1024-2; Philip Liste, 'Transnational Human Rights Litigation and Territorialised Knowledge' (2014) 5(1) *TLT* 1, 14–18, who analyses the switch as 'spatial politics of the law at work'.

37 766 F 3r 1013 (9th Cir 2014) 18.

38 On this point, see Inés Tófalo, 'Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations' in Olivier De Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Hart 2006).

39 766 F 3r 1013 (9th Cir 2014) 26–27.

40 Ibid., 20–26.

in the light most favourable to the plaintiffs'; nonetheless, the Court's language is extremely striking and reveals a determination to make the defendants accountable.

B. The Role of International Law in the Context of ATS Litigation

The reasoning developed regarding both these points underlines the pivotal role that (public) international law plays in defining the contours of liability under the ATS. That role, however, is not entirely unproblematic. US federal courts have to engage with the complex array of sources that make up international law[41] and, ultimately, decide which norm should prevail in case of conflict. This seemingly technical exercise naturally provides ample scope for policy considerations to interfere, as Scheffer points out:

> this paradox, of American courts fully embracing tribunal jurisprudence to determine the fate of claims under federal law while some political, academic, and judicial dialogue paints foreign and international rulings as somehow poisonous to the American system, becomes particularly stark when some senior conservative judges on the federal bench warmly invoke the Rome Statute of the International Criminal Court and then misinterpret it to establish both a narrow purpose standard for aiding and abetting and the denial of corporate liability under the Alien Tort Statute altogether.[42]

C. Overcoming the Presumption Against the Extraterritorial Application of the ATS

Whether or not claims based on an extraterritorial application of the ATS can succeed is, of course, arguably the most decisive and critical issue raised by ATS litigation in its current state. It should then come as no surprise to find it at the heart of the *Doe v. Nestlé* case. Because the two key Supreme Court cases of this discussion, however, are covered by other entries in this case-book,[43] this dimension of *Doe v. Nestlé* will only be touched upon here.

It is by now well-known that, in its eagerly awaited *Kiobel* ruling of 2013,[44] the Supreme Court 'severely diminished'[45] the scope for ATS litigation by holding that the statute did not rebut the general 'presumption against extraterritoriality'. As a result, ATS suits could only be filed if they 'touch[ed] and concern[ed] the territory of the United States ... with sufficient force to displace the presumption'.[46] Beyond making

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[41] The statutes and case-law of international and hybrid war tribunals assume particular relevance, notably the Rome Statute of the International Criminal Court, see the Ninth Circuit's judgment at 13–27. On this point, see David Scheffer, 'The Impact of the War Crimes Tribunals on Corporate Liability for Atrocity Crimes under US Law' in Charlotte Walker-Said, John D. Kelly (eds), *Corporate Social Responsibility? Human Rights in the New Global Economy* (Chicago IL, The University of Chicago Press 2015).

[42] Scheffer (n 41) 156.

[43] See below the '*RJR Nabisco Inc v. European Community*' and '*Kiobel v. Royal Dutch Petroleum Co*' entries.

[44] 133 US 1659 (2013).

[45] Geert van Calster, *European Private International Law* 2nd edn (Oxford, Hart 2016) 366. See also the various articles in 'Agora: Reflections on *Kiobel*' (2013) 107(4) *AJIL* 829, 829–63.

[46] 133 US 1659 (2013), 1669.

clear that 'the ATS did not give US courts jurisdiction over so-called foreign-cubed cases, that is, cases brought by foreign victims, against foreign defendants, for violations occurring in countries other than the United States',[47] *Kiobel* was characterised as raising more questions than it answered.[48] Two points stood out as particularly vexing.

The first, which is tackled by both the Ninth Circuit in its 2015 judgment and the District Court in its 2017 judgment, relates to the content of the 'touch and concern' test put forward in *Kiobel*. To summarise briefly, proponents of the restrictive view – including the defendants, unsurprisingly – argued that this test was equivalent to the focus test set out in the earlier *Morrison* case of 2010,[49] according to which 'courts first determine the "focus of congressional concern" for a statute, and allow the statute to be applied to a course of conduct if the events coming within the statute's focus occurred domestically'.[50] Following another, more expansive interpretation however, which seems to have satisfied the Ninth Circuit in 2015, *Kiobel* 'did not incorporate *Morrison*'s focus test', which leaves open the possibility that the 'touch and concern' test might be less stringent. In 2016, the Supreme Court in *RJR Nabisco* explicitly brought together *Morrison* and *Kiobel* as reflecting a unitary 'two-step framework for analyzing extraterritoriality issues',[51] with the focus test at its heart. On this base, the District Court in 2017 ruled – convincingly, it must be said – that the view had prevailed and that the focus test should be applied to ATS claims.[52]

But even on the assumption that the first, methodological issue, has now been so resolved, the second, more concrete issue, remains: which contracts with the United States will be sufficient to overcome a presumption against extraterritoriality?[53] The District Court, in its 2017 ruling, disqualifies all the factors put forward by the plaintiffs: US-based decision-making, the provision of funds originating in the US, the provision of supplies and training, public statements against child slavery, and

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[47] Nadia Bernaz, *Business and Human Rights – History, Law and Policy – Bridging the Accountability Gap* (Abingdon, Routledge 2017) 269.

[48] Ralph G. Steinhardt, 'Kiobel and the Multiple Fractures of Corporate Liability for Human Rights Violations' (2013) 28 *Md. J. Int'l L.* 1, 10.

[49] *Morrison v. National Australia Bank* 561 US 247, 130 US 2869 (2010).

[50] Ninth Circuit's ruling, 30.

[51] *RJR Nabisco Inc v. European Community* 136 US 2090 (2016), 2101: 'At the first step, we ask whether the presumption against extraterritoriality has been rebutted – that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. … 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 to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory'.

[52] At 2–3.

[53] On this point, see also Bellinger and Wang (n 30). The dissenting opinion in *Adhikari v. Kellogg Brown & Root Inc* 845 F 3d 184 (5th Cir 2017), which accepts that it follows from *RJR Nabisco* that a two-step framework must be applied in ATS cases, and that a 'focus' reasoning is relevant, but disagrees with the majority as to the implementation of the test, shows that some room for manoeuvre remains even after *RJR Nabisco*.

lobbying against (timid) federal legislation aimed at combating child slavery – for the Court, the first three are 'ordinary business operations'.[54]

Despite the uncertainty which led to a split in the federal courts of appeals and the resultant doctrinal criticism, the Supreme Court has proved unwilling to revisit the topic of ATS litigation in the years that followed *Kiobel*, denying at least six petitions for writs of certiorari.[55] However, it has recently granted one in the *Jesner et al v. Arab Bank PLC* case,[56] which could then provide an opportunity for much-needed clarification.

Moving a little away from the specifics of ATS litigation, it is apparent that the mechanical application of rules which were not designed specifically for the purpose of addressing human rights violations in global supply chains – here, the ATS statute –, as evidenced by the formalistic reasoning of the District Court and the restrictive interpretations of the Supreme Court, cannot be expected to lead to accountability in a reliable manner. Conversely, the more flexible arguments relayed by the Ninth Circuit hint at what a holistic approach could achieve if it were allowed to thrive. This insight can now be studied in other contexts.

2. *DOE V. NESTLÉ* AS A TEST CASE FOR OTHER APPROACHES TO CORPORATE LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Two very different directions can be explored. The first involves turning to the other side of the Atlantic and switching from a public to a private international law-grounded reasoning. In other words, it amounts to testing the existing, traditional, European private international rules, by applying them to a *Doe v. Nestlé*-type situation (A).[57] The shortcomings that will thus be revealed encourage the investigation of other, decidedly more prospective avenues, which appear particularly suited to global supply chain scenarios (B).

A. The Application of European Private International Law Rules

From a European perspective, *Doe v. Nestlé*-type cases appear quite different, mainly because this time the crux of the matter does not reside in jurisdiction. This, in turn, comes about as a result of the general ground for jurisdiction of article 4 of Brussels I

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[54] For the record, the Supreme Court in *Kiobel* had specified that 'mere corporate presence' would be insufficient to disprove the presumption, see 133 US 1659 (2013), 1669.

[55] Note 'Clarifying *Kiobel*'s "Touch and Concern" test' (2017) 130 *Harv. L. Rev.* 1902, 1923.

[56] <http://www.scotusblog.com/case-files/cases/jesner-v-arab-bank-plc/> accessed on 15 February 2018.

[57] Despite what is sometimes described as a European preference for redressing human rights violations through criminal law rather than civil law (see e.g. Caroline Kaeb and David Scheffer, 'The Paradox of Kiobel in Europe' (2013) 107 *AJIL* 852, 855; George P. Fletcher, *Tort Liability for Human Rights Abuse* (Oxford, Hart 2008) 9–10), 'prosecutions of business and human rights violations have been rare', see Bernaz (n 47) 285, who does refer to a single French case.

Recast Regulation: if victims of a human rights violation bring proceedings, the court of the defendant's domicile will be able to assert jurisdiction regardless of the type of claim.[58] 'Consequently truly multinational corporations may in theory at least be quite easily pursued in the courts of an EU Member State, even for actions committed outside the EU'.[59]

The difficulty, however, is merely postponed; more specifically it resurfaces at the stage of the determination of the applicable law. Because the Rome II Regulation on the law applicable to non-contractual obligations does not contain a specific rule for human rights violations, the applicable law is, under the general rule of article 4 (1), 'the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred'. As van Calster puts it, 'given that plaintiffs generally do not pursue the case with a view to having the law of a non-EU Member State apply … , this general rule of the Rome II Regulation in all likelihood is not the goal of the plaintiffs',[60] in whose interest it is to aim for the (presumably) greater compensation that could be awarded under the law of a Member State. Moreover, it appears unlikely that this outcome can be avoided in a *Doe v. Nestlé* scenario through the use of the Regulation's exceptions, in particular the exception clause of article 4 (3).[61] Ultimately, the only way to avoid the application of the *lex loci damni* could be the public policy exception,[62] which furthermore provides a classic channel for human rights to intervene within private international law reasoning. Even then, however, a requirement that the dispute be sufficiently connected to the forum might in some cases thwart the whole strategy.[63]

Once again, some of the shortcomings of the European approach can be traced back to the absence of a rule specifically designed to bring accountability to TNCs implicated in human rights violations in the Global South.[64] With this in mind, the notion of global supply chain can perhaps be put to good use.

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[58] According to article 4 (1) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'. Regarding the determination of the domicile of a corporate defendant, see art. 63 (1) of the Regulation.

[59] van Calster (n 45) 367. Interestingly, the European Commission submitted to the US Supreme Court an *amicus curiae* brief in the *Kiobel* case 'arguing in favour of universal civil jurisdiction for victims of violations of human rights, which would also attract universal criminal jurisdiction', see Bernaz (n 47) 276.

[60] van Calster (n 45) 369.

[61] Ibid.

[62] See article 26 of the Rome II Regulation.

[63] Horatia Muir Watt, 'Les enjeux de l'affaire Kiobel: le chaînon manquant dans la mise en œuvre de la responsabilité des entreprises multinationales en droit international public et privé' [2010–2012] *Travaux du comité français de droit international privé* 233, 241. It should be pointed out that, during the debates which followed Muir Watt's presentation, a *Cour de cassation* judge weighed in favour of triggering the public policy exception (247).

[64] Other factors are naturally at play, for instance 'the absence of collective redress mechanisms' in most European countries, see Bernaz (n 47) 275.

B. Global Supply Chains as Catalysts of New Adjudication Strategies

In what is far from its least important merit, *Doe v. Nestlé* draws attention to those cases where the idea of parent company liability is virtually useless because the conduct giving rise to liability cannot be traced back to a subsidiary of the TNC. This is significant, because the interest generated by this thriving approach, as well as the advances it has brought about,[65] is such that it could overshadow other, equally valuable, developments. *Doe v. Nestlé* thus demonstrates that a strategy aiming at imposing accountability on multinational firms for their activities outside their home country must go beyond the issue of lifting the corporate veil. One such avenue, which relies on the concept of global supply chains, will be briefly described.

The basic idea is to involve the TNCs themselves more closely in policing the behaviour of their sub-suppliers established abroad, in a way that goes beyond trusting blindly in their ability and willingness to self-regulate. This implies, first, that TNCs adopt meaningful corporate social responsibility (hereafter CRS) codes and, second, that they manage to enforce them down their respective supply chains. The main obstacle, naturally, comes from privity of contract: while the buyer's CSR policy can become part of a contract with a first-tier supplier by incorporation through the buyer's general terms and conditions, through an expressly negotiated contract or through an invitation to tender,[66] the sub-suppliers will not directly be bound because they are not party to the first contract. This obstacle, at least in theory, is not entirely insuperable: 'if the buyer's general terms and conditions impose a duty on the first-tier supplier to implement the buyer's CSR policy further down its own supply chain (perpetual clause) then this term constitutes a contractual duty on the supplier to do so'.[67] By iteration then – and, again, in theory – the CSR duties could be passed down the chain and enforced.

The TNCs' ability to police the behaviour of their sub-suppliers nonetheless remains limited at best, especially if the difficulty of becoming aware of breaches is factored

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65 For the possibility that, under English law, a parent company may owe a duty of care to employees of its subsidiary (in a domestic case), see *Chandler v. Cape Plc* [2012] EWCA Civ 525. For a tentative step towards an extension of that duty of care to other third parties beyond employees (in a cross-border case), see *Lungowe v. Vedanta and Konkola* [2017] EWCA Civ 1528. On the *Shell* case in the Netherlands, see Bernaz, above n 47, 279–80; Claire Bright, 'Affaire *Shell* aux Pays-Bas (Tribunal de district de La Haye): Quelques réflexions' in Laurence Dubin and others (eds), *L'entreprise multinationale et le droit international* (Paris, Pedone 2017). For a critique of the distinction between supply chains structured through contracts and supply chains structured through equity ownership from the point of view of liability of TNCs, see Peter Rott and Vibe Ulfbeck, 'Supply Chain Liability of Multinational Corporations?' (2015) 23(2) *ERPL* 415, who argue that supply chain liability could be based on control in both contexts. For an in-depth look at various innovative approaches to production liability, see Jaakko Salminen, 'From National Product Liability to Transnational Production Liability: Conceptualizing the Relationship of Law and Global Supply Chains' (Doctoral Dissertation, University of Turku 2017), available from the author upon request.

66 On these three techniques, see Andreas Rümkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Cheltenham, Edward Elgar 2015) esp. 85–95.

67 Ibid., 99.

in.[68] In all likelihood, this makes Western TNCs unlikely to invest the significant resources that would be necessary to contractually enforce CSR.[69] Moreover, as shown by *Doe v. Nestlé*, the TNCs can actually *profit* from violations of their own CSR codes, in this instance by reaping the benefits of the low prices for raw materials which suppliers can only accept by resorting to forced or child labour. How, then, to remove the incentive to turn a blind eye to transgressions down a supply chain? This objective should be pursued, because the various ways to fight human rights abuses are not mutually exclusive but, on the contrary, can be mutually reinforcing. A multipronged approach, which includes consumer activism and more effective sanctions, should then be favoured.

From the latter point of view, initiatives like the French legislator's recent corporate duty of vigilance Act, which imposes a nucleus of legal responsibility on parent companies and commissioning companies for the acts of their subsidiaries, suppliers and sub-contractors, appear extremely significant.[70] All in all, the notion that duties should be imposed on actors in relation to acts that unfold within their 'spheres of influence'[71] seems to be gaining ground – this notion, incidentally, could in the future find application in public as well as in private international law. This could for instance, perhaps through the conclusion of an international treaty,[72] lead to a duty being

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[68] Ibid., 102–22.

[69] Ibid., 123. Rümkorf concludes: 'It is [the decision of Western buyers] how they include, monitor and enforce CSR in their supply chain. The fact that the research for this chapter has not shown a single decided case about the breach of CSR terms reveals the economic reality of CSR'. For an exploration of other techniques, see Jaakko Salminen, 'Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities' (2016) 23(2) *Indiana Journal of Global Legal Studies* 709.

[70] On the 2017-399 Law of 23 March 2017 on the duty of oversight of parent companies and commissioning companies, see Béatrice Parance and Élise Groulx, 'Regards croisés sur le devoir de vigilance et le *duty of care*' [2018] *Journal du droit international (Clunet)* doctr 2; Horatia Muir Watt, 'Devoir de vigilance et droit international privé. Le symbole et le procédé de la loi du 27 mars 2017' (2017) 50 *Revue internationale de la compliance et de l'éthique des affaires* 48–53.

[71] Alain Supiot reasons in terms of 'allegiance networks', see 'Introduction' in Alain Supiot (ed.), *Face à l'irresponsabilité: la dynamique de la solidarité* (Paris, Collège de France 2018) 7–11, and the references cited.

[72] See Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* 41. See also point (I-A-2) of the non-binding 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31)', the so-called 'Ruggie principles', according to which 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'. For an overview of the discussions to which the Ruggie principles have given rise, see Francisco Javier Camora Cabot, Lukas Heckendorn Urscheler and Stéphanie De Drycker (eds), *Implementing the U.N. Guiding Principles on Business and Human Rights – Private International Law Perspectives* (Zurich, Schulthess 2017). On the role played by the notion of a TNC's 'sphere of influence' in the earlier 'Global Compact' proposed at the 1999 Davos summit by the then-UN Secretary General Kofi Annan and the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' approved by the UN Sub-Commission for the Promotion and Protection of Human Rights in Resolution 2003/16 of 14 August 2003

imposed on home states to ensure that their (corporate) citizens respect fundamental rights 'when exercising an economic activity' abroad.[73]

Postscript: after this chapter was delivered to the editors, the US Supreme Court handed down its eagerly-awaited decision in the *Jesner v. Arab Bank* case,[74] which delivers a near-fatal blow to ATS litigation before US federal courts. In an opinion authored by Justice Kennedy, the Court ruled by a 5-4 majority that, absent congressional instructions, foreign corporations may not be defendants in suits brought under the ATS.[75] Naturally, this controversial ruling dramatically alters the discussion described in the first part of the chapter. This makes the alternatives discussed in the second part all the more relevant.

(UN doc E / CN.4 / Sub.2 / 2003 / 12 / Rev.2 (2003)), see Olivier De Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford, Hart 2006) esp. 9–17.

[73] Horatia Muir Watt, 'Future directions?' in Horatia Muir Watt and Diego P. Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford, Oxford University Press 2014) 353. See also, by the same author (n 63) 242; 'Private International Law Beyond the Schism' (2011) 2(3) *TLT* 347, passim.

[74] See above n 56.

[75] *Jesner et al v. Arab Bank PLC* 584 US ___ (2018).