INSIGHT

The Role of Soft-Law in Adjudicating Corporate Human Rights Abuses: Interpreting the Alien Tort Statute in the Light of the UN Guiding Principles on Business and Human Rights

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Abstract: In the last years, the Alien Tort Statute (ATS) has been used as main reference for human rights litigation against corporations in the US. However, subsequent interpretation of the ATS by the US Supreme Court has progressively narrowed its scope of application, so that now it hardly can be considered as a viable legal basis for claims against human rights abuses occurred overseas in supply chains. In the recent *Nestlé* case, the US Supreme Court affirmed that general corporate activity in the US territory cannot be a sufficient basis to overcome the presumption against extraterritoriality set in the *Kiobel* case. The risk of leaving a wide range of human rights violations without an effective remedy in the US is tangible. A solution may be to look at the UN Guiding Principles on Business and Human Rights (UNGPs) as the international guidance to corporate responsibility to respect human rights as a tool to interpret domestic law accordingly and recognize the duty of lead companies to use leverage over their business partners to prevent violations. The lessons learned from recent European domestic case-law is paradigmatic in this sense and may be a source of inspirations for future UNGPs-oriented reading of the ATS.

Keywords: UNGPs – leverage – human rights – ATS – corporations – supply chain.

I. Introduction

At the 10th anniversary of the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs),[1] domestic litigation against multinational enterprises for human rights abuses occurring in their supply chain is constantly growing. This is a result of the

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[1] Human Rights Council, Resolution 17/31 of 21 March 2011, UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc A/HRC/17/31.

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greater attention paid by some domestic courts to soft-law as instruments of adjudication that can shape the content of hard laws. Indeed, at the international level, the UNGPs still constitutes the main reference and guidance on corporate responsibility to respect human rights, despite their soft-law character. Lately, several European States incorporated those principles in domestic laws that provide for corporate liability for human rights abuses, thus hardening the soft standards. In Europe, where many multinational enterprises have their main headquarters, mandatory human rights due diligence laws have been adopted in France, Germany and Norway;[2] also, the European Parliament has called the European Commission to adopt a legislative proposal for a directive on mandatory human rights due diligence.[3]

In this framework, despite being the home State of many multi-national enterprises, the US are still missing from this roll call and the recent rulings of the US Supreme Court are not leaving hope for better scenarios in the near future.

Indeed, on 17 June 2021 the US Supreme Court issued a decision on the case *Nestlé USA, Inc. v Doe et al.*,[4] after more than fifteen years of proceedings.[5] The claim was originally brought by six former child slaves from Mali alleging to be victims of human rights abuses in Ivorian cocoa farms from which the defendants sourced their raw materials. The request to find the liability of the defendants for such abuses was finally rejected because injuries occurred outside the US territory, which constitutes an "impermissible extraterritorial application of the ATS".

Ruling out the possibility to hold accountable chocolate giants Nestlé and Cargill for alleged child labor in their cocoa supply chain, the decision is consistent with the most recent trend in US Supreme Court to constantly narrowing the scope of the Alien Tort Statute (ATS) in cases involving corporate human rights violations.[6] Indeed, since the fa-

[2] See the latest updates on corporate accountability legislative progress in Europe provided by the European Coalition for Corporate Justice www.corporatejustice.org.

[3] See Resolution of the European Parliament of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). As announced by the European Commissioner for Justice Didier Reynders on 29 April 2020, the proposal would be part of the sustainable corporate governance initiative and it was expected by the end of 2021 ec.europa.eu; however, after several delays, the proposal is now expected in 2022.

[4] Supreme Court of the United States of 17 June 2021 n. 19-416 *Nestlé USA, INC. v Doe et al*.

[5] The history of the case is described in MM Coppa, 'Doe v. Nestle, S.A.: Chocolate and the Prohibition on Child Slavery' (2021) Pace International Law Review; LE Wilkinson, 'Piercing the Chocolate Veil: Ninth Circuit Allows Child Cocoa Slaves to Sue under the Alien Tort Statute in Doe I v. Nestle USA' (2018) Villanova Law Review Online www.villanovalawreview.com 20.

[6] For an overview of the use of the ATS in litigation against corporations see B Stephens, 'The Rise and fall of the Alien Tort Statute' in S Deva and D Birchall (eds), *Research Handbook on Human Rights and Business* (Elgar 2020) 46-62.

mous decision delivered in the famous *Kiobel* case,[7] the US Supreme Court established a presumption against the extraterritorial application of the ATS, so that the possibility to consider it as an effective tool for remedies for human rights abuses in context of business activities has been constantly at risk.[8] The decision at stake reiterates the presumption against extraterritoriality barrier, in line with precedents. However, it seems that the US Supreme Court in this case both failed to clarify the necessary evidence to overcome such presumption and, most importantly, it missed the opportunity to engage in evolutive interpretation of its domestic law, in accordance with emerging trends concerning corporate responsibility to respect human rights in their supply chain.

In this light, the paper argues that current interpretation of the ATS by the US Supreme Court ignores and contradicts international standards of corporate responsibility, as set forth in the UNGPs, that plainly recognizes a supply chain accountability based on the duty of the lead companies to exercise leverage over business partners to prevent and stop human rights abuses, wherever they occur. Such interpretation further overlook how the UNGPs are consistently implemented and translated in a growing corpus of both European domestic legislations and case-law and reflected in the ongoing negotiations of an Internationally Binding Treaty on business and human rights.[9] On this basis, the US Supreme Court should have instead recognized the existence of a leverage-based responsibility of Nestlé for human rights abuses occurring abroad, that would supersede and overcome the extraterritoriality barrier.

In the light of the above, section II will first provide a brief overview of the cocoa market, to argue that the asymmetry of power between the actors in cocoa supply chain is plainly providing Nestlé and other chocolate giants with the leverage necessary to influence the behavior of business partner. Section III will draw an assessment of the proceeding in the light of the subsequent rulings of the US Supreme Court on corporate accountability, showing that the decision at stake is consistent with evolving restrictive interpretation of the ATS. Section IV highlights the relevant content of the UNGPs on leverage-based accountability and the role of soft-law instruments in domestic proceedings. Section V and VI describe relevant European case-law applying such principles and propose a reassessment of *Nestlé* in the light of such precedents.

[7] US Supreme Court judgment of 17 April 2013 n. 10-1491 *Kiobel et al. v Royal Dutch Petroleum Co et al*. For a comment on the case and its implications also in relation to European fora see A Bonfanti, 'No Extraterritorial Jurisdiction Under the Alien Tort Statute: Which "Forum" for Disputes on Overseas Corporate Human Rights Violations After "Kiobel"?' (2013) Diritti Umani e Diritto Internazionale 379-400; M Fasciglione, 'Corporate Liability, Extraterritorial Jurisdiction and the Future of the Alien Tort Claims Act: Some Remarks After "Kiobel"?' (2013) Diritti Umani e Diritto Internazionale 401-435.

[8] Despite being a reference for human rights accountability in the US since the decision in US Court of Appeal for the Second Circuit judgment of 30 June 1980 *Filàrtiga v Pena-Irala*. See *infra* section III.

[9] Open-ended Intergovernmental Working Group on Transnational Corporations and other business enterprises with respect to human rights, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (17 August 2021) third revised draft www.ohchr.org.

II. Some remarks on the features of cocoa supply chain

This premise on cocoa market has a twofold objective. First, it is relevant because the phenomenon of child labor in cocoa supply chain in so widespread and documented that Nestlé knew about it and intentionally maintained and supported the status quo in order to source cocoa beans at lower prices. Second, a description of the actors in the cocoa market makes it clear that lead companies have economic leverage over cocoa farmers in their supply chain and, consequently, that they are required to use such leverage to halt the abuses.

The cocoa industry generates huge profits that hardly reach the last tier of the supply chain. Indeed, the few countries where cocoa farms are mostly located are those countries where the worst forms of poverty are experienced. The world depends on cocoa producers in West Africa, as more than 80 per cent of bulk cocoa comes from Ivory Coast and Ghana. Structural inequalities and poverty are widespread and systemic and they are both cause and consequence of child exploitation: it is estimated that 1.5 million children are working in Ghana and Ivory Coast in cocoa production.[10] The use of child labor is therefore a renown and widespread problem of the cocoa industry.

Furthermore, contrary to other agricultural productions, such as palm oil or sugar cane, cocoa production is characterized by a network of producers mainly made up of small family business farming.[11] This condition makes cocoa farmers far more depending on food giants than other sectors and, conversely, it makes food giants capable of influencing the market, since small farmers have no bargaining power and barely no alternatives for living. This scenario creates is the precondition for human rights abuses to perpetuate.

The vicious circle of structural inequalities fostered by cocoa market is hard to eradicate, but the first step to tackle human rights abuses in the industry is to acknowledge the role and responsibility of multi-national enterprises at the top of the supply chains in contributing to the maintenance of such structural inequalities, as they are the actors that make the rule of the market. Human rights challenges of the cocoa supply chain cannot be tackled alone, but a holistic approach is necessary to address all the connected problems of cocoa production, as causes and consequences of the worst form of child labor are deeply intertwined.[12]

III. The interpretation of the ATS and the *Nestlé* case: a tug-of-war between courts

The case has a long story behind, which reflects the changes in interpretation of the ATS by the US Supreme Court. The first claim was brought by former child slaves before the

[10] Voice Network, *Cocoa Barometer* (2020) www.voicenetwork.eu 56.

[11] UNCTAD, *Cocoa industry: integrating small farmers into the global value chain* (2016) UNCTAD/SUC/2015/4 unctad.org 6.

[12] Voice Network, *Cocoa Barometer* cit. 12.

US District Court in California against Nestlé, Cargill and ADM, three chocolate giants operating in Ivory Coast and controlling most of the cocoa production in the area. The accusations were of the most severe violations of human rights. The claimants affirmed to have been trafficked as children and enslaved in cocoa farms in Ivory Coast; while working, they were beaten and tortured when trying to escape. The defendants were not running or operating those farms directly, but knowingly sourced cocoa bulks from them, while supporting the farmers through financial and technical assistance, such as training in agricultural techniques or labor practices. In addition, defendants were carrying out periodic controls in the farms, so that they had a continuous and first-hand overview of the situation. In sum, the claimants alleged that defendants were systematically taking advantage of human rights violations in their supply chain, by sourcing cocoa at lower prices, instead of using their economic leverage to prevent and halt child slavery.

In the impossibility to access an effective remedy in Ivory Coast, due to widespread corruption and lack of effective protection in Malian law, the claimants sought redress in the US where the defendants had they headquarters, bringing the claim under the ATS to hold the companies accountable for aiding and abetting child labor in their supply chain. The allegations of the claimants were that there was no law in Mali to allow civil damages cause by foreign companies and further no claims can be brought in Ivory Coast due to widespread corruption and likely non-effective as remedy asked by foreign children against big companies.[13]

The case was first dismissed by the District Court in 2010; the Court of Appeal reversed the decision of the District Court in 2014,[14] remanding to the District Court the question of whether the *Kiobel* test on extraterritoriality was met and granting the applicants the opportunity to amend their complaints taking into account the new interpretation of the ATS.[15]

Indeed, pending the first decision of the Court of Appeal, the judgment in *Kiobel*[16] case was adopted by the US Supreme Court, significantly narrowing the possibility to use the ATS in cases as the one at stake. In particular, the US Supreme Court held that if a claim does not "touch and concern" the territory of the US with sufficient force, the presumption against extraterritorial application arise. In other words: to allow claims to be brought in front of US judges for human rights abuses committed abroad, claimants should prove the existence of conducts related to the territory of the US with sufficient force since, "corporations are often present in many countries and it would reach too far to say that mere corporate presence suffices".[17] Notwithstanding (and because of) the generic nature of such affirmation, its implications in terms of litigation against corporations in human rights

[13] US District Court – Central District of California order of dismissal of 8 September 2010, 4.

[14] US Court of Appeals for the Ninth Circuit judgment of 4 September 2014 n. 10-56739766 *Doe v Nestlé USA Inc. et al*.

[15] *Ibid*.

[16] *Kiobel et al. v Royal Dutch Petroleum Co et al*. cit.

[17] *Ibid*.

abuses are huge.[18] As the decision in the Nestlé case confirms, asking for proofs of conducts related to the US territory, without explaining what degree and nature of conducts to be proven, translates into a virtually impossible use of the ATS for all major human rights abuses in supply chains, which are usually committed in third countries, while the position of the lead company is that of a mere supporter or facilitator of such violations.

In 2016, the claimants raised an amended complaint, which was rejected by the District Court and reversed by the Ninth Circuit in Appeal once again, based on the US Supreme Court's decisions in *Jesner*[19] and *Nabisco*,[20] that were adopted in the meanwhile. The Court of Appeal confirmed its view, holding that *Jesner* only ruled out the possibility to apply ATS to foreign corporations, while still allowing to sue domestic corporations under the ATS.[21] As for the claim on extraterritorial application of the ATS, the Court of Appeal was still bound by the touch and concern test set in *Kiobel*, but it further referred to the "focus test" applied in *Nabisco*, to better interpret the standard. The Court of Appeal maintained that the ATS focus is not limited to principal offenses, but it may well be integrated by the conduct of aiding and abetting a violation of the law of nations. On these bases, the Court of Appeal was satisfied with the allegations of the claimants as alleged corporate activities of Nestlé and Cargill[22] were sufficient domestic conduct.

In 2019, a petition for *certiorari* was submitted to the Supreme Court of the US, where Nestlé and Cargill claimed that no sufficient domestic conduct was established to admit the claim under the ATS, failing to meet the *Kiobel* test. Indeed, by confirming that the mere corporate presence is not sufficient to meet the standard, the US Supreme Court here added a further brick to the ATS fortress by further asserting that the allegation of general corporate activity does not meet this requirement either. Furthermore, the US Supreme Court added that even considering the focus test set in *Nabisco*, the claimants only alleged general corporate activity, which is not sufficient to meet this standard. The final decision in *Nestlè* partly clarifies the different positions taken by Court of Appeals with regard to the "touch and concern" test so far.[23]

[18] WS Dodge, 'Business and Human Rights Litigation in U.S. Courts Before and After Kiobel' in D Baumann-Pauly and J Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 244-252.

[19] US Supreme Court judgment of 24 April 2018 n. 16-499 *Jesner et al. v Arab Bank Plc*.

[20] US Supreme Court judgment of 20 June 2016 n. 15-138 *RJR Nabisco, Inc. et al. v European Community et al*.

[21] For a comment on the implications of the case see WS Dodge, 'Corporate Liability under the US Alien Tort Statute: A Comment on Jesner v Arab Bank' (2019) Business and Human Rights Journal 131.

[22] Consisting in providing personal spending money to maintain the farmers' loyalty as exclusive supplier, sending employees from headquarters to inspect and report back, through financial arrangements originated in the US, see US Court of Appeal for the Ninth Circuit judgment of 23 October 2018 n. 17-55435 *Doe v Nestle et al*.

[23] Since some of the Appeal Courts left open the possibility to consider decision-making in the US to be a relevant conduct to satisfy the requirement. For an overview of the positions of Circuits with reference to the "touch and concern" test, see WS Dodge, 'Business and Human Rights Litigation in U.S. Courts Before and After Kiobel' cit. 249-250.

The result is that, today, the ATS seems to be restrictively interpreted in order not to allow claims against corporations for violations committed abroad, according to the established presumption against extraterritoriality, which cannot be defeated by allegations of general corporate activity.

In the light of the above, the case provides an invaluable opportunity to critically assess the interpretation of the ATS provided by the US Supreme Court and to wonder how the legal standards elaborated so far could have been interpreted in accordance with existing and emerging standards of corporate responsibility to respect human rights.[24]

As it will be argued in the next sections, the current interpretation of the ATS opposes to the developments already reached before European domestic courts (and laws) where a growing case-law and legislation are admitting claims against lead companies for violations committed in their supply chains abroad, which reflects both the provisions of the UNGPs and the latest draft of the internationally binding treaty on business and human rights under negotiations.

IV. The relevant role and content of UNGPs

Before getting into the relevant European case-law that may inspire new ATS applications, it is worth to briefly address the relevance of the UNGPs in interpreting domestic law. The corporate responsibility to respect human rights is nowadays enshrined in international soft-law instruments adopted with broad consensus, the main reference being the UNGPs. While they have no binding effects, they may be hardened by orienting domestic law interpretation.[25] Taking into account a broad definition of soft law as any international instrument which is outside traditional sources of international law and contains principles, norms or standards, or expected behavior[26] the UNGPs are fully entitled to be included, since they were adopted with a Resolution of the Human Rights Council.[27] All the more when they are adopted with no express opposition by States, they might be considered as evidence of an emerging consensus among States and of new international customs.[28] One of the roles recognized to soft-law instruments is indeed to

[24] While decision making in general terms have been considered not enough, other courts claimed that the requirement could be satisfied if the US conduct would be a violation of international law *per se*. *Ibid*. 250.

[25] Besides the incorporation of the principles in proper domestic laws; in this sense, C Macchi and C Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in M Buscemi, N Lazzerini, L Magi and D Russo (eds), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law* (Brill 2020) 218-246.

[26] D Shelton, 'Normative Hierarchy in International Law' (2006) AJIL 319.

[27] Human Rights Council, Resolution 17/31 of 21 March 2011 cit.

[28] J Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in S Deva and D Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 158; International Law Commission, Report of the International Law Commission on the Work of its Seventieth Session of 30 April to 1 June and 2 July to 10 August 2018, UN Doc A/73/10 (2018), conclusion n. 6 and n. 12.

anticipate future hard law, which is often a codification of well-established and shared principles already existing and recognized among States; this is happening for the UNGPs in anticipating, inspiring and shaping the content of the binding treaty on corporations and human rights, currently under negotiations.

Besides this function, soft-law can also have normative effects *per se*, as part of the application of international law and interpretation of existing norms, even in domestic law and especially by higher courts in paving the way for further developments at the international level.[29] The influence that UNGPs are exercising on international and domestic adjudication worldwide is well described in a recent report commissioned by the UN Working Group on human rights and transnational corporations that examines the impact of UNGPs and other soft-law instruments on business and human rights before courts.[30] Although it reports a general lack of express reference to UNGPs and instruments alike in domestic case-law, it nonetheless shows that the same principles can be found and applied in a growing corpus of cases, through the application of UNGPs-inspired domestic laws and as interpretation tool "to understand the context and meaning of the domestic provisions".[31] This influence and subsequent incorporation of soft law provisions into domestic law through interpretation is witnessed especially in recent European case-law on parent-subsidiary relationship.[32]

Provided that they can have normative function *per se*, it is relevant to briefly look at the content of the UNGPs. The UNGPs require business enterprises to avoid infringing human rights of others and address when adverse impacts occur (Principle 11). In particular, the corporate responsibility to respect human rights lies on three possible conducts. First, enterprises should avoid causing human rights adverse impacts. Second, enterprises should avoid contributing to adverse human rights impact. Third, and most importantly, enterprises should prevent or mitigate human rights impacts directly linked to operations, products or services carried out by business partners (Principle 13). All these conducts include both acts and omissions and business partners include all entities in the enterprise's value chain (Principle 13, commentary).

In both the second and third case, prevention and mitigation of adverse human rights impacts require the enterprise to exercise its leverage over business partners to stop the abuses. Leverage exists when the enterprise can "effect change in the wrongful practices

[29] See M Kanetake and A Nollkaemper, 'The Application of Informal International Instruments Before Domestic Courts' (2014) GWashIntlLRev 765, 774 ff.; and, more generally, C Chinkin, 'Normative Development in the International Legal System' in D Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2003) 30.

[30] See the report drafted by DW Rivkin, SJ Rowe, D Enix-Ross, E Austin, S Burton, AD Dumoulin, N Goh, R Hoover, M Lawry-White, KR Seifert and A Singh, *UN Guiding Principles on Business and Human Rights at 10: The Impact of the UNGPs on Courts and Judicial Mechanisms* (2021) Debevoise & Plimpton www.debevoise.com.

[31] *Ibid*. 14-15. On the normative value of soft-law, especially on business and human rights, see A Spagnolo, 'To What Extent Does International Law Matter in the Field of Business and Human Rights?' in M Buscemi, N Lazzerini, L Magi and D Russo (eds), *Legal Sources in Business and Human Rights* cit. 88-89.

[32] See *infra* section V.

of an entity that causes a harm"; leverage increases, for example, by offering capacity building to the related entity (Principle 19, commentary).

Last, but not least importantly, the UNGPs also calls for States to secure effective remedies for victims of human rights abuses due to corporate activities (Principle 25). Implementing this principle means first and foremost to "reduce legal, practical and other relevant barriers" to the achievement of a redress (Principle 26). Legal barriers include those resulting from imbalances between the parties, such as different access to information (Principle 26, commentary).

These principles have been translated in the provisions of the current draft of the legally binding instrument on business and human rights, that include an obligation upon States to ensure that domestic law allows liability of companies for failure to prevent human rights abuses committed by another entity (art. 8(6)). In particular, this liability should be foreseen when the company "control, manages or supervises such person or the relevant activity" that caused or contributed to the human rights abuse or should have foreseen such abuse.[33]

It appears that both the UNGPs and the current draft of the future treaty on business and human rights envisage corporate liability as possible result of an omission, consisting in the failure to prevent or halt the harmful conduct of another entity when an enterprise is in the condition to do so, having the necessary influence on the actions of the other company.

Such principles have been applied in recent domestic jurisprudence before European courts, so far only in the context of parent-subsidiary relationships. However, the same principles can be applied in the context of global supply chains, provided that the same *ratio* underlies the relationship between lead companies and business partners, as it will be highlighted in the next paragraph.

V. Lessons from European case-law

European domestic courts expressly used the UNGPs as interpretative tool to apply domestic law on corporate liability in a recent case on climate change, namely *Milieudefensie and other associations against Royal Dutch Shell Plc* (RDS),[34] where the claimants asked The Hague District Court to order RDS to reduce its emissions in line with the objectives of the Paris Agreement.

On 26 May 2021, The Hague District Court held that Shell Group policies were contributing to climate change and ordered the oil giant to reduce its greenhouse gas (GHG)

[33] Open-ended Intergovernmental Working Group on Transnational Corporations and other business enterprises with respect to human rights, *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* cit.

[34] The Hague District Court judgment of 26 May 2021 C/09/571932 *Vereninging Milieudefensie v Royal Dutch Shell Plc*.

emissions. The claimants based their action on the assumption that RDS has an obligation stemming from the standard of care provided by the Dutch civil code, for the interpretation of which soft-law endorsed by the company should be used, such as the UNGPs, the UN Global Compact and the OECD Guidelines for Multinational Enterprises.[35]

Two aspects of this judgment are worth to be highlighted in order to reassess and shed new lights on the decision in the *Nestlé* case. The first concerns the conduct that gives rise to liability of the company and the second concerns the interpretation of national laws in the light of international instruments.

As for the first aspect, in the *Shell* case, the Court examined the question of the meaning of the "event giving rise to the damage" in order to establish the law applicable to the case, pursuant to art. 7 of Rome II Regulation. The Court concludes that the adoption of corporate policies may well constitute an independent cause of the environmental damage linked to climate change towards Dutch residents.[36] The Court therefore recognizes that corporate policies (in this case group policies) may be an act causing the damage, rejecting RDS's opinion that the mere adoption of a policy cannot be considered *per se* a dangerous act. The *ratio* of this assumption leads to reconsider the relevance of corporate policies in relation to adverse effects as consequences of decision-making processes at the headquarters. In the context of the ATS, recognizing the relevance of corporate policies as acts that may cause damage *per se* means to acknowledge that the adoption of corporate policies (*rectius* in the case at stake the *failure* to adopt corporate policies able to stop the harmful conduct of third parties through the leverage that lead companies exercise on their business partners) is the relevant focus to identify domestic conducts that satisfy the "touch and concern" test and overcome the presumption against extraterritoriality of the ATS.

The second aspect concerns the interpretation of domestic law in order to assess the liability of corporations. In interpreting the standard of care imposed by Dutch law, the Court included the UNGPs. Indeed, the argument of the claimants was that RDS had an obligation to act in accordance with climate change prevention objectives, resulting from an unwritten standard of care pursuant to domestic civil liability laws. To interpret this standard of care and fill in with specific content, the Court would have had to use not only internationally recognized human rights (such as the right to life and the right to respect for private and family life) but also international soft law such as the UNGPs, the OECD Guidelines for Multinational Enterprises and the UN Global Compact. All of such soft law instruments were indeed endorsed by RDS.[37] Following the requests of the claimants, the Court affirmed that the unwritten standard of care that the corporation owed to the claimants was to be interpreted in the light of the UNGPs, given their universally endorsed content. The latter further

[35] *Ibid*. para. 3(2). On the use of the UNGPs as interpretative tool see also C Macchi and J van Zeben, 'Business and Human Rights Implications of Climate Change Litigation: *Milieudefensie et al. v Royal Dutch Shell*' (2021) RECIEL 1-7.

[36] *Vereninging Milieudefensie v Royal Dutch Shell Plc* cit. para. 4(3)(6).

[37] *Ibid*. para. 3(2).

makes it irrelevant whether or not the company itself expressly committed to the UNGPs.[38] The Court went further in recalling value chain's accountability, by pointing out that companies may contribute to adverse human rights impact through activities that may well include omissions and that includes the duty to prevent or mitigate adverse impacts directly linked to relationships with business partners. In this sense, the court observed that RDS had a policy setting influence over affiliated companies of the group and the business relationship for the supply of raw materials is part of its value chains as well.[39]

The *Shell* case is emblematic of how European courts are in the forefront of litigation against multinational enterprises on human rights abuses.[40] Indeed, while not expressly referring to the UNGPs, previous domestic jurisprudence applied the same principles and formally endorsed parent-subsidiary responsibility. In this sense goes both the decision of UK Supreme Court in the case *Lungowe v Vedanta Plc*,[41] and the one in the case *Okpabi and others v Royal Dutch Shell*.[42] Both cases refer to parent-subsidiary relationship and recognized the responsibility of the former for human rights abuses of the latter. The decisions were based on the existence of a duty of care due to the supervision and control exercised in fact by the parent company over the subsidiary.

VI. A re-assessment of *Nestlé v. Doe* in the light of the UNGPs

Provided the role that UNGPs may have in shaping domestic law and the effects that they had on recent rulings of European courts, the question turns now on how such principles could and should have been applied to the *Nestlé* case, shaping the content and meaning of the ATS accordingly.

[38] *Ibid*. para. 4(4)(11) ff.

[39] The point is clearly made in C Bright, A Marx, N Pineau and J Wouters, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) Business and Politics 667.

[40] Outside Europe, some domestic courts recognized corporate responsibility in recent years. Especially worth noting is the landmark case from Canadian Supreme Court in *Nevsun* as a further milestone in recognizing the existence of a corporate duty to respect human rights based on violations of customary international law. The decision directly recognized the applicability of customary international law, especially in relation to severe human rights violations committed by non-State actors. The case clearly made the point that the development of international law also passes through domestic law judgments that shapes the substance of international law, see Supreme Court of Canada, judgment of 28 February 2020 *Nevsun Resources Ltd. v Araya* 2020 SCC 5, 72.

[41] UK Supreme Court judgment of 10 April 2019 *Vedanta Resources Plc and another v Lungowe and others* [UKSC] 20.

[42] UK Supreme Court judgment of 12 February 2021 *Okpabi and others v Royal Dutch Shell Plc and another* [UKSC] 3. On human rights litigation against corporations in the UK, see generally R Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective' (2021) Business and Human Rights Journal 255-269.

The abovementioned case-law refers to parent company liability for the activity of their subsidiaries. By analogy, the same principles may apply to liability of lead companies in supply chains, since the *ratio* that leads to the responsibility of parent companies may be translated on the lead companies in global supply chain.[43]

Indeed, absent a formal parent-subsidiary relationship, cases like *Vedanta* and *Shell* demonstrated that the core principle is to establish that one company had the opportunity to "take over, intervene in, control, supervise or advise the management of the relevant operation" of the other company.[44] The level of responsibility will depend on the leverage that the company might have on its business partners, which is higher in situations that have been defined as captive value chains,[45] meaning those in which there are small suppliers depending on larger buyers that usually control and monitor their business partners and are characterized by asymmetry of power.

Cocoa farmers are usually small family business, that relies on large buyers and producers, especially where there is no local consumption that would otherwise ensure their subsistence. The full dependency of such farms on large buyers implies that the latter univocally make the price of cocoa bulks and the former usually operates upon exclusive commercial relationships. Furthermore, farmers may be required to obtain sustainability certificates or to adhere to internal compliance mechanism on sustainability to gain financial support. In sum, it can be affirmed that dominant companies are in full control or at least exercise a deep supervision over small farmers.

In the case at stake, the dependency of the farmers on the contractual relationship with Nestlé and the degree of supervision exercised by the latter, are both the premises to the existence of leverage, as the possibility to influence a business partner's behavior. And the existence of leverage is the premise for the duty to exercise leverage and the failure to exercise such leverage may be the conduct giving rise to responsibility of the lead company.

This leads us to review the latest interpretation of the ATS in the *Nestlé* case, in the light of the principles recalled so far. The presumption against extraterritorial application of the ATS should be considered overcome by the allegation of the failure to act, *i.e*. the omissive conduct of Nestlé, consisting in not using its economic leverage to stop the abuses. The omission is precisely the relevant conduct considering that the UNGPs are asking for lead companies *to do* something in case of violations of human rights in their value chains, namely to use their leverage upon business partners to prevent violations. In other words, if the conduct relevant to proceed under the ATS should be a domestic one, and the relevant conduct for the UNGPS is the failure to act, the reasoning of the

[43] C Bright, A Marx, N Pineau and J Wouters, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' cit. 679.

[44] *Vedanta Resources Plc and another v Lungowe and others* cit. para. 49.

[45] G Gereffi, J Humphrey and T Sturgeon, 'The Governance of Global Value Chains' (2005) Review of International Political Economy 78-104.

Supreme Court on the insufficient allegation of domestic conduct based on mere corporate general activity cannot resist, since the relevant conduct is the omissive conduct of not having exercised the sufficient leverage, which is by its very nature a domestic conduct or, at least, a conduct that cannot be framed in the definitions of domestic or non-domestic. Omission is relevant *per se* in any case where an actor is required to act and knowingly or negligently fails to do so; in other words, when there is an obligation to act that has not been fulfilled.[46] If an obligation to act exists, then the mere omission is a relevant conduct occurred in the US territory, since it is the place where relevant decisions were *not* taken.

Considering the failure to exercise leverage as the focus of the conduct, not only implies that the extraterritoriality issue falls, but also dismisses the request to prove domestic conduct with sufficient force. In this sense, it would naturally follow that, alleging the omission, it is upon the company to prove that it had no leverage or that it had exercised the leverage over the business partner. This would also overcome the obstacle of providing the necessary evidence of corporate decisions, that usually are inaccessible to the claimants, at the same time eliminating the barrier to an effective remedy resulting from the current interpretation of the ATS.

VII. Concluding remarks

Some commentators optimistically saw the judgement in *Nestlé* as a positive confirmation of the fact that US corporation can, in principle, be sued before US Courts under the ATS;[47] a step that was not to be taken for granted after *Jesner*. Nonetheless, even admitting that this may be read as a positive step towards a full recognition of claims in corporate litigation for human rights abuses, it is cold comfort if compared to the developments recently witnessed in Europe, where domestic courts are growingly admitting claims brought by victims of human rights abuses committed abroad by subsidiaries against parent companies in their home State.[48]

In theory, the US are one of the few American countries that already drafted a National Action Plan on Business and Human Rights in 2016 and that formally adopted several measures to implement at the national level the UN Guiding Principles on Business and Human Rights. Meanwhile, international developments cannot be ignored. Negotiations to elaborate an international legally binding instrument to regulate the activities of

[46] F Latty, 'Actions and Omissions' in J Crawford, A Pellet, S Olleson and K Parlett (eds), *The Law of International Responsibility* (Oxford university Press 2010) 355 ff.

[47] WS Dodge, 'The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality' (18 June 2021) Just Security www.justsecurity.org; D LeClercq, 'Nestlé United States, Inc. v. Doe. 141 S. Ct. 1931' (2021) AJIL 694-700.

[48] See *supra* section V.

transnational corporations are underway and the corporate responsibility to respect human rights has been recognized as increasingly transforming into legal duties,[49] considering mandatory human rights due diligence laws adopted in domestic legal systems worldwide, implementing that "smart mix of measures" called for in the UN Guiding Principles on Business and Human Rights.[50]

Still, in practice, the US so far has provided no effective remedies against human rights violations committed abroad by US corporations, despite the ATS was used as legal basis for the largest body of domestic case-law on corporate responsibility for human rights abuses.[51] The decision in *Nestlé* merely adds a further brick on the wall against litigation versus multinational corporations when abuses are committed overseas. The latest reading of the ATS not only defeats the purpose of the UNGPs,[52] running against the recognition of full corporate responsibility for human rights abuses in supply chains, but also undermines the US political commitment to regulate business conduct, although formally endorsing and implementing the UNGPs.[53]

But most importantly, this further moves away an awaited first step towards an overturn of the business model governing the chocolate industry. The market is based on perpetuation of poverty of farmers, which has no choice but accepting the lowest prices made at the top of the supply chain, at the workers' expenses.[54] In this view, prosecuting farmers for bad working conditions in cocoa farms, excluding them from global markets when they do not meet social certification standards, or blaming governments of producing countries can be a short-term solution only, with highly unfair outcome. In any event, it is a solution incapable to reverse a broken business model on the long-term. Lead companies like Nestlé have the necessary leverage that could change the behavior of their business partners, by supporting them to comply and reviewing market conditions to allow them to comply to human rights: enforcing the duty to exercise their power in a way that halt the abuses in supply chain is the first step towards a real change in global food production.

[49] As noted by the High Commissioner for Human Rights at the opening of the Seventh Session of the Working Group on Transnational Corporations and Other Business Enterprises with respect to human rights (25-29 October 2021) Draft report para. 2.

[50] UNGPs, principle 3, commentary.

[51] I Pietropaoli, *Business, Human Rights and Transitional Justice* (Routledge 2020).

[52] Depriving once again the ATS of its *effet utile*, as already noted after *Kiobel* in A Bonfanti, 'No Extraerritorial Jurisdiction Under the Alien Tort Statute' cit. 397.

[53] For example, through the adoption of a National Action Plan in December 2016 and several other initiatives advertised by the US Department of State, see www.state.gov. On the other hand, association recently denounced the hostile attitude of the US towards the ongoing negotiations of the UN legally binding treaty on transnational corporations and human rights, see CISDE statement, 'No Steps Back: Catholic Organizations Denounce US Attempt to Derail the Negotiations for a UN Treaty on Transnational Corporations' (25 October 2021) www.cidse.org. All oral statements made by States and participants at the 7th Session are available at www.ohchr.org.

[54] Voice Network, *Cocoa Barometer* cit. 14.