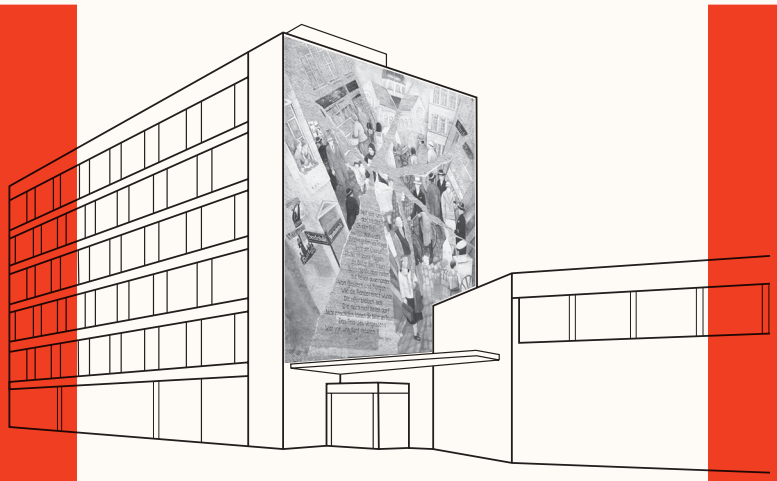

Emily Sipiorski

Cocoa and International Law: Some Remarks on the Contradictions and Symmetry in the Role of Private Actors in Elevating and Unifying Standards

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

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A. Introduction

Cocoa, its attributes for the tongue are rarely contested[1] and its health benefits emerging,[2] occupies a less positive space in both history and the present regarding human rights and environmental practices.[3] Colonialism was often motivated by such luxuries as diamonds,[4] sugar,[5] petroleum,[6] as well as cocoa beans. In the past decades, the exposure of the use of child labour in the cocoa industry in West Africa[7] and deforestation[8] linked to the expansion of plantations has resulted in efforts by governments to control the importation of cocoa products failing to respect environmental and human rights standards.[9] Yet, abusive practices continue and soft law deadlines for eradication have been missed.[10] While operating in the private sphere of international law, the conduct has affected the goals of the public sphere. It is in its ability to touch and impact the public sphere that the relevance of these private actors in the operation of the law becomes a more pressing issue.

Several decades ago, the labour practices of cocoa plantations in Côte d'Ivoire were exposed by an Ivorian newspaper.[11] A British documentary on the labour practices in Burkina Faso, Mali, and Togo followed.[12] It was alleged that children were being sold into slavery and trafficked from neighbouring countries to work on the plantations.[13] Government officials in Côte d'Ivoire indicated that the cocoa industry was in part responsible as the prices were kept too low and prevented Ivorians from earning an adequate wage.[14] The responses to the labour crisis take only in part the complex economic reality of Western Africa into account, where

1 *Albers*, Psychology Today, 11 February 2014, available under: < https://www.psychologytoday.com/us/blog/comfort-cravings/201402/why-do-we-crave-chocolate-so-much > (last accessed 10 September 2020); *Whittemore*, The Manual, 14 May 2019, available under: < https://www.themanual.com/food-and-drink/science-of-chocolate-why-it-tastes-good/ > (last accessed 10 September 2020).

2 *van Wensem*, Integrated Environmental Assessment and Management 11 (2015), 176 (177); *Latif*, Netherlands Journal of Medicine 71 (2013), 63; *Nurk*, *et al.,* Journal of Nutrition 139 (2009), 120 (121).

3 *Hinch*, in: Gray/Hinch (eds.), A Handbook of Food Crime, 77 (78) (historically tracing cocoa production in the Americas and slave labour: "Its ascendency as one of the world's favourite food treats coincided with an increase in the use of slave labour, as well as a major change in the source of slave labour.").

4 *D'Angelo*, Historical Research 89 (2016), 136 (139 et seq.); *le Billon*, African Affairs 100 (2001), 55 (56).

5 *Stack/Ackrill/Bliss*, European Review of Agricultural Economics 46 (2019), 79 (79); *Mahler*, International Organization 35 (1981), 467; *Mintz*, Sweetness and Power: The Place of Sugar in Modern History; *Mitchell*, World Bank Policy Research Working Paper No. 322 (2004).

6 *D'Angelo*, Historical Research 89 (2016), 136 (139 et seq.); *le Billon*, African Affairs 100 (2001), 55 (56).

7 Fair Trade Foundation, Commodity Briefing (August 2011), Fairtrade and Cocoa, available under: < https://curtisresearch.org/wp-content/uploads/Cocoa-Briefing-FINAL-8Sept11.pdf > (last accessed 10 September 2020).

8 Vivid Economics, State and Trends of Deforestation in Côte d'Ivoire (2019-2020), July 2020, available under: < https://www.vivideconomics.com/wp-content/uploads/2020/07/State-and-Trends-of-Deforestation-in-CdI-1.pdf > (last accessed 10 September 2020).

9 Vivid Economics, State and Trends of Deforestation in Côte d'Ivoire (2019-2020), July 2020, available under: < https://www.vivideconomics.com/wp-content/uploads/2020/07/State-and-Trends-of-Deforestation-in-CdI-1.pdf > (last accessed 10 September 2020).

10 *Hinch*, in: A Handbook of Food Crime, 77 (77) (critically indicating that "governments often collaborate with the cocoa industry to create and perpetuate these [child labour and forced labour] abuses. This collaboration creates illusory restrictions on forced labour that allow slavery to persist."); *Whoriskey/Siegel*, The Washington Post, 5 June 2019, available under: < https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/ > (last accessed 10 September 2020) ("The world's chocolate companies have missed deadlines to uproot child labor from their cocoa supply chains in 2005, 2008 and 2010. Next year [2020], they face another target date and, industry officials indicate, they probably will miss that, too.").

11 *Schrage/Ewing*, The Journal of Corporate Citizenship, 99 (100).

12 *Schrage/Ewing*, The Journal of Corporate Citizenship, 99 (100) (further indicating that "[a]ccording to subsequent media account, children as young as six years old were forced to work 80-100 hour weeks without pay, suffered from malnutrition, and were subject to beatings and other abuse.").

13 *Schrage/Ewing*, The Journal of Corporate Citizenship, 99 (100).

14 *Schrage/Ewing*, The Journal of Corporate Citizenship, 99 (100).

children often have a role in contributing to family income;[15] and thereby the practices expose the additional layer to the systemic problem of child labour which may require both education and development to eradicate. The use of child labour—and subsequently the need to regulate it—is a widespread practice in industrializing states.[16] The implementation of laws banning the practice, alongside laws making education compulsory, have often resulted in the elimination of the practice.[17]

In the past year, the cocoa industry has called upon the European Union (EU) to draft legislation making the companies responsible for abuses of human rights and the environment in the supply chain.[18] This initiative runs in parallel with the intention by the European Commission to enact due diligence standards in the supply chain for products sold in the EU.[19] This initiative falls in line with an on-going industry-wide reassessment of its labour and environmental practices.[20] The cocoa industry, largely limited to five main companies, allows for a unified and forward movement in objectives that may not be otherwise possible.[21] Thus, the dark history may prove to be a motivation to construct a new present for international law more generally—namely, using it as a model for cooperation among various actors as a means of achieving integrated public interests arising out of international legal instruments, and more specifically, extra-territorial public interest.

These regional, EU-based efforts, however, sit in incongruence with legal developments in the United States. A lawsuit brought on behalf of former child slaves has journeyed through the

15 *Basu*, Journal of Economic Literature 37 (1999), 1083 (1115) (in a general sense, cautioning against complete restriction of child labor as "there are worse things that can happen to children than having to work.").

16 *Basu*, Journal of Economic Literature 37 (1999), 1083 (1088 *et seq.*).

17 *Brown/Christiansen/Philips*, Business History Review 66 (1992), 723; *Bolin-Hort*, Work, Family, and the State: Child Labor and the Organization of Production in the British Cotton Industry, 1780-1920; *Weiner*, The Child and the State in India: Child Labor and Education Policy in Comparative Perspective; *Basu*, Journal of Economic Literature 37 (1999), 1083 (1116) ("In general, it is better to take economy-wide measures against child labor and, if there is to be a sector-specific ban, this should be based on the working conditions of that sector, rather than the destinations of the goods. This reservation carries over to certain kinds of international action, such as the imposition of minimal labor standards as a prerequisite for trade, since this results in the maintenance of standards only in the exports sector."). Convention No. 182 on the Worse Forms of Child Labour (1999), adopted 21 years ago, recently received universal ratification, and directs attention at this specific interest in education. The Preamble of Convention 182 provides that "Considering that the effective elimination of the worst forms of child labour requires immediate and comprehensive action, taking into account the importance of free basic education and the need to remove the children concerned from all such work and to provide for their rehabilitation and social integration while addressing the needs of their families."

18 VOICE Network, Cocoa companies call for human rights and environmental due diligence requirements, 2 December 2019, available under: < https://www.voicenetwork.eu/2019/12/cocoa-companies-call-for-human-rights-and-environmental-due-diligence-requirements/ > (last accessed 10 September 2020); *Whoriskey*, The Washington Post, 31 December 2019, available under: < https://www.washingtonpost.com/business/2019/12/31/chocolate-companies-ask-taste-government-regulation/ > (last accessed 10 September 2020).

19 *Smit, et al.*, Study on Due Diligence Requirements through the Supply Chain, January 2020, available under: < https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en > (last accessed 10 September 2020); *Martin-Ortega/Methven O'Brien*, EJIL:Talk!, 1 September 2020, available under < https://www.ejiltalk.org/mandatory-human-rights-due-diligence-options-of-monitoring-enforcing-and-remedy-under-the-future-eu-legislation/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2 > (last accessed 10 September 2020); European Commission for Corporate Justice, Commissioner Reynders Announces EU Corporate Due Diligence Legislation, 30 April 2020, available under: < https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation > (last accessed 10 September 2020) (indicating that "the EU Commissioner for Justice, Didier Reynders, committed to a legislative initiative on mandatory human rights and environmental due diligence obligations for EU companies in early 2021, which will include liability and enforcement mechanisms and access to remedy provisions for victims of corporate abuse."); *Krajewski, et al.*, Briefings: Human Rights Due Diligence Legislation – Options for the EU, June 2020, available under: < https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf > (last accessed 10 September 2020).

20 *Schrage/Ewing*, The Journal of Corporate Citizenship 18 (2005), 99 (100).

21 Oxfam, Towards a sustainable cocoa chain: Power and possibilities within the cocoa and chocolate sector, 2009, 15 and 18, available under: < https://policy-practice.oxfam.org.uk/publications/towards-a-sustainable-cocoa-chain-power-and-possibilities-within-the-cocoa-and-112341 > (last accessed 10 September 2020).

courts and was recently granted *certiorari* by the U.S. Supreme Court. This claim was brought before the U.S. Courts against several cocoa companies.[22] Grounded on the Alien Tort Statute (ATS), the dispute approaches the broader question of corporate responsibility under international law, and more specifically their liability before U.S. Courts for human rights violations.

The following paper uses the cocoa industry as a lens by which to observe the growing influence of the private sector in encouraging (or discouraging) emerging standards of conduct and public interests in an integrated manner in international normative frameworks. The first section (B) explores the complex web of international standards as well as regional and domestic laws that have been implemented in response to the exposure of inadequate labour standards (and to some extent, environmental standards) in the production of cocoa products. The next section (C) discusses the impacts of these private actors on the international legal sphere, and in that respect, approaches the systemic integrative potential created by economic actors in the international public space. The final section (D) approaches the moral and practical implications of private engagement in the implementation of standards within international law.

22 *Nestlé USA, Inc. v. Doe I*, 766 F.3d 1013; *Nestlé USA, Inc. v. Doe I*, No. 19-416; *Cargill, Inc. v. Doe I*, No. 19-453.

B. The Laws Regulating Cocoa Production

I. International Law

The response to the exposure of child labour in the cocoa industry has been, to a large extent, a cooperative effort between states, organizations, and the industry. In the initial response to the exposure of child labour in the cocoa industry, and in recognition of the territorial limits of domestic legislation, the Western African states involved in cocoa production were motivated to draft a legal framework to combat slavery and forced labour. A Declaration and Plan of Action against Trafficking in Persons was adopted in December 2001 by the Economic Community of West African States (ECOWAS).[23] This declaration built on several international conventions and declarations on the prevention of slavery, child labour, and trafficking: including, the Universal Declaration on Human Rights,[24] the United Nations Convention on the Rights of the Child, and the International Labour Organization Convention (ILO) 182 on the Worst Forms of Child Labour.[25] The African Charter on the Rights and Welfare of the Child provided further guidance in the scope of the declaration, particularly its provisions on child labour, protection against child abuse and torture, and on trafficking.[26] This ECOWAS declaration criminalised trafficking and called on member states to implement measures "provid[ing] for the protection and physical, psychological and social recovery of victims of trafficking through affording them the full protection of their physical safety, privacy, and human rights"[27], cooperate with respect to border controls,[28] and implement national task forces.[29] The declaration also called upon all member states to ratify the international legal instruments combatting trafficking. The Preamble provides in part, "that effective action to prevent and combat trafficking in persons requires a comprehensive international approach in the countries of origin, transit, and destination that includes measure to prevent trafficking, as well as protecting their internationally recognized human rights".[30] In this sense, the declaration emphasized the requirements for cooperation in achieving the goals towards eliminating the use of child and forced labour in the cocoa industry.[31]

Along similar lines, but created in the states of consumption rather than harvesting production, the Harkin-Engel Protocol, an international public-private agreement negotiated by two U.S. politicians, was enacted in 2001 with the promise that by 2005, "the worst forms of child labour" would be eradicated from supply chains, pursuant to the International Labour

23 ECOWAS, Declaration on the Fight Against Trafficking in Persons (12 December 2001).

24 ECOWAS, Declaration on the Fight Against Trafficking in Persons (12 December 2001); Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), Article 4 ("No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms").

25 Convention 182 concentrates on the most harmful of activities, including slavery, prostitution, and trafficking of drugs. Article 3 of Convention 182 defines "the worst forms of child labour": including *inter alia* "(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; […] (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."

26 African Charter on the Rights and Welfare of the Child (1999).

27 ECOWAS, Declaration on the Fight Against Trafficking in Persons (12 December 2001), para. 7.

28 ECOWAS, Declaration on the Fight Against Trafficking in Persons (12 December 2001), para. 12.

29 ECOWAS, Declaration on the Fight Against Trafficking in Persons (12 December 2001), para. 18.

30 ECOWAS, Declaration on the Fight Against Trafficking in Persons (12 December 2001), Preamble.

31 ECOWAS, Declaration on the Fight Against Trafficking in Persons (12 December 2001), para. 6 (providing for the "care and repatriation" of citizens who had become trafficking victims).

Organization (ILO) Conventions 182 and 29.[32] While non-binding, the protocol gave an opportunity to the industry to regulate, and provided for the creation of advisory groups and public statements on the specific issue of forced and child labour. The protocol particularly reflected the use of coerced or compelled labour in the private economy, and attempted to draw a line between these international state-based obligations and the actions of private actors in the market—thus, attempting to create an indirect respect for international human rights frameworks in order to have access to the market. As a voluntary agreement that included governments, industry, producers, laborers, and non-governmental organizations, the approach to ending the abuses was a series of dates by which the practices were to be eradicated.[33] There were no legal obligations contained in the agreement; the deadlines were not met.

Building on the Harkin-Engel Protocol as a public-private partnership, the Child Labour Cocoa Coordinating Group, including the governments of Côte d'Ivoire and Ghana in addition to representatives from the industry aimed to address the issue of child labour.[34] The U.S. International Labor Affairs Bureau has responded with a series of projects, including the mobilization of community action and coordination with the ECOWAS effort at reducing the use of child labour and trafficked individuals in the production of cocoa.[35]

Moreover, as a voluntary mechanism, industry-specific coordination is organized by the International Cocoa Organization (ICCO). The United Nations Cocoa Conference, made up of Member States from either importing or exporting states, last convened in 2010 for the purpose of drafting the International Cocoa Agreement.[36] The Agreement provides in the preamble: "Recognizing the contribution of the cocoa sector to poverty alleviation and the achievement of the internationally agreed development goals, including the Millennium Development Goals (MDGs); Recognizing the importance of cocoa and the cocoa trade for the economies of developing countries […] Recognizing the need to ensure the transparency of the international cocoa market, for the benefit of both producers and consumers […]".[37] The agreement defines "a sustainable cocoa economy" as "an integrated value chain in which all stakeholders develop and promote appropriate policies to achieve levels of production, processing and consumption that are economically viable, environmentally sound, and socially responsible for the benefit of present and future generations, with the aim of improving productivity and profitability in the cocoa value chain for all stakeholders concerned, in particular for the small holder producers."

The specific reference to Convention 29 in the Harkin-Engel Protocol exposes limitations in the ILO initiatives. The continued use of forced labour practices within the cocoa industry epitomizes a global failure to accelerate the elimination of such practices. Despite its

32 Convention No. 182 on the Worse Forms of Child Labour (1999); Convention No. 29, Article 1 indicates the intention of the Convention, namely that Members "undertake[] to suppress the use of forced or compulsory labour in all its forms within the shortest possible period." See also, *Anton*, International Legal Materials 53 (2014), 1227 (1227) (noting the historical foundations of Convention 29 in colonial administrations and indicating that the "broad definition of forced labor has meant that the intertwined actions taken against slave or slavery-like practices like debt bondage, the human trafficking of 'sex slaves' and 'domestic servants,' and those imposed on migrants, have been viewed as either extensions or a normative merging.")

33 *Whoriskey*, The Washington Post, 31 December 2019, available under: < https://www.washingtonpost.com/business/2019/12/31/chocolate-companies-ask-taste-government-regulation/ > (last accessed 6 August 2020).

34 United States Bureau of International Labor Affairs, Child Labor in the Production of Cocoa, available under: < https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa > (last accessed 10 September 2020).

35 United States Bureau of International Labor Affairs, Child Labor in the Production of Cocoa, available under: < https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa > (last accessed 10 September 2020).

36 *Khamsi*, International Legal Materials 50 (2011), 669; United Nations Conference on Trade and Development, International Cocoa Agreement, 2010, TD/Cocoa.10/3.

37 United Nations Conference on Trade and Development, International Cocoa Agreement, 2010, TD/Cocoa.10/3.

near-century existence as an international instrument, a comprehensive report by the International Labour Office in 2013 approached and examined the gaps in implementation of Convention 29.[38] This report resulted in the negotiation of a new protocol that recognizes the changes in forced labour since the initial adoption of the Convention (as well as Convention 105) and provides for the urgency of eliminating forced labour in the global workplace.

This issue of the cocoa industry also sits inside a larger human rights discussion on the control and regulation of child labour and trafficking.[39] The UN Convention on the Rights of the Child provides a framework for signatory states to protect and improve the rights of children.[40] As the majority of child labour takes place in the agricultural sector,[41] cocoa exemplifies this reality. The prohibition of child labour, in general, is further included in several treaties and conventions[42] and would bear general relevance over the issue of labour in the cocoa industry. In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, providing for the abolition of child labour.[43] The Convention on the Worst Forms of Child Labour was adopted in 1999, and further work was accomplished in the International Programme on the Elimination of Child Labour. In particular, the Convention the Rights of the Child, adopted in 1989, provided for the adopted of soft law instruments intended to regulate the practice, in addition to The Programme of Action for the Elimination of the Exploitation of Child Labour.[44]

In addition to the labour standards and more specific protocols aimed at eliminating violations in the production process, there are additional mechanisms under international law that impact the industry. From the perspective of international trade law, for example, the use of Sanitary and Phytosanitary measures can impact the trade of products.[45] Moreover, and not directly dealt with in the above commitments, the issue of deforestation and its relevance to cocoa production requires additional domestic commitments despite the international mechanisms available.[46]

38 *Anton*, International Legal Materials 53 (2014), 1227 (1228).

39 See, amongst many other, *Ehrenberg*, Yale Journal of International Law 20 (1995), 361 (403) (categorizing child labour as an illegal trade subsidy and recommending regulation under the WTO as an unfair comparative trade advantage); *Chuang*, Indiana Journal of Global Legal Studies 13 (2006), 137 (163) (indicating that the socio-economic causes of trafficking of children for labour need to be addressed to develop a more effective response); *Giampetro-Meyer/Brown/Kubasek*, Loyola of Los Angeles International and Comparative Law Review 16 (1994), 657 (674) ("Despite the ILO's emphasis on abolishing harmful child labor, this problem remains pervasive in both industrialized and developing nations. Often, as an undeveloped nation becomes more industrialized and affluent, the number of children working out of necessity may diminish, only to be replaced by another equally harmful form of child labor—children who choose to work to obtain extra income").

40 Convention on the Rights of the Child, G.A. Resolution 44/24, especially Article 4 ("States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.").

41 United Nations Food and Agriculture Organization, Framework on Ending Child Labour in Agriculture, 2020, xiii, available under: < http://www.fao.org/3/ca9502en/CA9502EN.pdf > (last accessed 10 September 2020); *Baradaran/Barclay*, Columbia Human Rights Law Review 43 (2011), 1 (9 *et seq.*).

42 See generally, *Humbert*, The Challenge of Child Labour in International Law, 1 *et seq.*

43 International Labour Conference, eighty-sixth session, Geneva 1998.

44 UN Commission on Human Rights, forty-ninth session, 10 March 1993, E/CN.4/1993/79. See also, UN General Assembly, A World Fit for Children, Preparatory Committee for the Special Session of the General Assembly on Children, third substantive session, 7 June 2001, A/AC.256/CRP/Rev.3 (Part I).

45 Analogies can be drawn to dolphin-safe tuna litigation in trade law. See for example, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, DS381, Appellate Body Report (16 May 2012) (trade dispute brought by Mexico regarding United States Code 16 § 1385 and the Code of Federal Regulations 50 §§ 216.91 and 216.92); *United States—Restrictions on Imports of Tuna* (not adopted, circulated on 3 September 1991) (trade dispute regarding United States Marine Mammal Protection Act that prohibited importation of fish from countries and intermediary countries not meeting dolphin protection standards).

46 See for example, Paris Agreement to the United Nations Framework Convention on Climate Change (12 December 2015), United Nations Publication No. 54113, Article 5 (providing that "parties should take action to conserve

II. Domestic Laws

Domestic laws—including in particular the domestic implementation of international labour and environmental standards—remain the most relevant in the production, trade, and sale of chocolate. In the United States, a legislative amendment to an agriculture bill intended to allocate certain money for the use of a label on cocoa products, designating that the product had not been produced with child labour.[47] This 2001 effort, while accepted by the lower house, was never introduced in the U.S. Senate, in part because of the coordinated effort to enact the international Harkin-Engel protocol.[48] More recently, the Trade Facilitation and Trade Enforcement Act of 2015[49] prohibits the importation of products made using child labour, as well as forced labour more generally.[50]

The enactment of these standards has proven thorny, with compliance gaps prevalent. Other means have been located by non-governmental organizations working on labour issues—particularly forced labour—to elevate the activities of the cocoa companies. In this respect, a lawsuit was brought by International Rights Advocates, a U.S.-based non-profit to the U.S. Courts under the ATS, on behalf of six children who worked as slaves on cocoa plantations in Côte d'Ivoire.[51] The circuit court dismissed the claim,[52] after which the Ninth Circuit vacated the dismal[53] and provided a revised opinion,[54] and further denied en banc review.[55] The current interpretation of the ATS by the U.S. Supreme Court prohibits corporate liability, instead providing that its purpose is directed at individuals.[56] Now granted certiorari by the Supreme

and enhance […] forests."); United Nations Framework Convention on Climate Change (9 May 1992), 1771 United Nations Treaty Series 107. See also, *Bendel*, EJIL:Talk!, 6 December 2019, available under: < https://www.ejiltalk.org/bringing-deforestation-before-an-international-court/ > (last accessed 10 September 2020) (indicating the many jurisdictional and substantive hurdles to regulating deforestation at an international law).

47 House Amendment 142 to Public Law 107-76, FY2002 Agriculture, Rural Development and Food and Drug Administration (FDA) Appropriations.

48 Congressional Research Service, Child Labor in West African Cocoa Production: Issues and U.S. Policy, 13 July 2005, available under: < http://www.nationalaglawcenter.org/assets/crs/RL32990.pdf > (last accessed 10 September 2020).

49 Public Law 114-125, 24 February 2016.

50 See also 19 U.S.C. § 1307 ("All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited[…]"). In the United States, cocoa imports are regulated by Customs and Border Protection, the Food and Drug Administration, and the Customs and Border Protection Department of Agriculture. U.S. Senators have separately called upon the Department of Homeland Security to enforce the relevant restrictions on importation. See Letter to the Acting Secretary of the U.S. Department of Homeland Security Kevin McAleenan from U.S. Senators Sherrod Brown and Ron Wyden, dated 12 July 2019, available under: < https://www.brown.senate.gov/imo/media/doc/BrownWydenMcAleenanLetter-CocoaImportsJuly122019.pdf > (last accessed 10 September 2020).

51 A writ of certiorari was granted by the United States Supreme Court to hear the consolidated disputes *Nestlé USA, Inc. v. Doe I*, 766 F.3d 1013 and *Cargill, Inc. v. Doe I*, 2 July 2020 (petition for writ of certiorari available under: < https://www.supremecourt.gov/DocketPDF/19/19-416/116977/20190925125724473_Nestle%20Cert%20Petition%209.25%20Final.pdf >). See also *Balch*, The Guardian, 5 August 2020, available under: < https://www.theguardian.com/global-development/2020/aug/05/us-could-become-safe-haven-for-corporate-abusers-activists-warn > (last accessed 10 September 2020).

52 *Nestlé USA, Inc. v. Doe I*, 748 F. Supp. 2d 1057.

53 *Nestlé USA, Inc. v. Doe I*, 738 F.3d 1048.

54 *Nestlé USA, Inc. v. Doe I*, 766 F.3d 1013.

55 *Nestlé USA, Inc. v. Doe I*, 788 F.3d 946.

56 *Jesner et al. v. Arab Bank, PLC*, 584 US ____ (2018), 29 (limiting application of the ATS and holding in the majority that "judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government."); *Kiobel v. Royal Dutch Petroleum Co.*, 569 US 108 (2013), 124; *Kiobel v. Royal Dutch Petroleum Co*, 621 F. 3d 120 (holding that the ATS does not apply to corporations, basing the decision in part on the jurisdictional limitations imposed by international criminal tribunals to natural persons). See also, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (providing the first modern case of ATS application towards a private individual and thereby establishing the basis for future use, including

Court, the interest in the dispute centres on the Court's decision regarding corporate liability under the ATS.[57] The U.S. Supreme Court will take the decision on the territorial scope of the law, considering specifically two questions: "1. Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity. 2. Whether the Judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations."[58]

The issues in dispute lay bare corporate liability in the international sphere. In recognition of the importance of this dispute to corporate interests, the Coca-Cola Company, amongst others, submitted an *amicus* intervention in the dispute.[59] Arguing against the liability of corporations under the ATS, the *amicus* provides in part, "[o]f all the relevant international law sources—including the Nuremberg trials, the ad hoc tribunals for the former Yugoslavia and Rwanda, and the Rome Statute—not a single one extends the international law obligations expressed therein to corporations, nor is there any other evidence of a consensus among nations that such an extension would be appropriate."[60]

Recent cases out of the U.S. Supreme Court have limited the liability with regard to torts "committed in violation of the law of nations or a treaty of the United States."[61] In particular, the 2018 decision in *Jesner v. Arab Bank* determined that it was beyond the intent of the legislature to include corporations within the jurisdiction of the Alien Tort Statute.[62] This decision followed the earlier *Kiobel v. Royal Dutch Petroleum* precedent in which the court held that the ATS does not extend to foreign corporations when all the relevant acts took place outside the United States.[63] In the *Jesner* dissent, written by Justice Sotomayor and joined by three other justices, she considered that there was no basis for excluding foreign corporations from the scope of the Statute: "[n]othing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged."[64] The *Nestlé v. Doe I* dispute will therefore approach these issues from another angle, and hold the potential to further limit the jurisdictional scope under the ATS.

its potential application toward corporate defendants).

57 *Ku*, Virginia Journal of International Law 51 (2011), 353.

58 Consolidated disputes *Nestlé USA, Inc. v. Doe I*, 766 F.3d 1013 and *Cargill, Inc. v. Doe I*, 2 July 2020 (writ of certiorari granted by U.S. Supreme Court on 2 July 2020).

59 See in particular, amicus curiae submission filed by the Coca-Cola Company on 28 October 2019, available under: < https://www.supremecourt.gov/DocketPDF/19/19-416/120404/20191028103856596_19-416%2019-453acCoca%20-Cola%20Company.pdf > (last accessed 6 August 2020).

60 Coca-Cola Company, Amicus Curiae in Consolidated disputes *Nestlé USA, Inc. v. Doe I*, 766 F.3d 1013 and *Cargill, Inc. v. Doe I*, filed on 28 October 2019, available under: < https://www.supremecourt.gov/DocketPDF/19/19-416/120404/20191028103856596_19-416%2019-453acCoca%20-Cola%20Company.pdf > (last accessed 6 August 2020).

61 Alien Tort Statute, 28 USC § 1350.

62 *Jesner et al v Arab Bank, PLC*, 584 US ____ (2018).

63 *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013), 124.

64 *Jesner et al. v. Arab Bank, PLC*, 584 US ____ (2018), Dissent at 1.

III. Regional Initiatives

Current initiatives in the EU contrast the potential limitations on extra-territorial corporate liability in the U.S. case. The European Commission is currently pushing forward a legislative proposal that would enable the enforcement of human rights standards extraterritorially over European companies, and there is a simultaneous movement by private actors to enact similar standards of behaviour by economic actors in the supply chain.[65] The narrative from the industry may not be entirely pure—likely highly impacted by concerns for profitability as well as a desire to harness greater authority over attempts to control practices. Yet, the attempts to motivate and enact standards where the industry itself is limited demonstrates a cooperative role of economic actors in the recognition of international legal norms.

In a position paper on the EU's policy and regulatory approach to cocoa, key players in the industry recommended the implementation of due diligence standards in the supply chain for the cocoa industry. The document, supported by, amongst others, Fairtrade International, Mars Wrigley, and Mondelez International, provided that "As by far the largest importer and consumer of cocoa in the world – the majority of it from West Africa – the EU has a greater ability than any other consumer market to drive change in the cocoa sector, and a clear duty and opportunity to take responsibility and demonstrate leadership, including through legislative action to address these issues. Our ultimate aim is a fully sustainable cocoa supply chain that delivers living incomes to cocoa farmers and reduces and eventually eliminates human rights abuses, including child labour, and environmental degradation."[66]

IV. Industry Initiatives

In addition to the more recent initiative to encourage the EU to enact due diligence requirements, with failed commitments under the Harkin-Engel Protocol, the companies responded by turning to non-profit groups to inspect plantations for human rights abuses through the use of child labour and deforestation practices. The non-profits—including Fairtrade, the Rainforest Alliance, and Utz—would provide the chocolate companies with certifications. These certifications were also exposed as falling short: farms continued to use child labour despite certifications.[67]

65 VOICE Network, Cocoa companies call for human rights and environmental due diligence requirements, 2 December 2019, available under: < https://www.voicenetwork.eu/2019/12/cocoa-companies-call-for-human-rights-and-environmental-due-diligence-requirements/ > (last accessed 10 September 2020); European Commission for Corporate Justice, Commissioner Reynders Announces EU Corporate Due Diligence Legislation, 30 April 2020, available under: < https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation > (last accessed 10 September 2020), at 1:01:00 *et seq.* (During a webinar organized by the European Parliament Working Group on Responsible Business Conduct—discussing in part the potential for a mandatory due diligence requirements on the supply-chain of European businesses by 2021—Bart Vandewaetere, Vice President for Corporate Communications and Government Relations at Nestlé highlighted the voluntary partnerships that currently exist within the cocoa industry on issues relating to sustainability and human rights. He indicated a need for mandatory due diligence to ensure stability across the sector, and considered the cocoa industry to be an ideal starting place because of the small number of countries involved.).

66 VOICE Network, Cocoa companies call for human rights and environmental due diligence requirements, 2 December 2019, available under: < https://www.voicenetwork.eu/2019/12/cocoa-companies-call-for-human-rights-and-environmental-due-diligence-requirements/ > (last accessed 10 September 2020).

67 *Whoriskey*, Chocolate Companies Say Their Cocoa is Certified, The Washington Post, 23 October 2019, available

C. Non-State Actors in International Legal Norms

The role of the cocoa industry in elevating the law is debatable, yet the impact of lobbying efforts and compliance initiatives can prove beneficial to the creation and adherence of mechanisms that take the multi-faceted nature of economic activities and their impacts in the international legal sphere more fully into account, particularly their impact on human rights initiatives. The transboundary nature of cocoa production and its interest to economically developed states potentially makes an integrated regulation of child labour practices possible, benefiting from cooperation among government, international organizations, and the industry. In that sense, it demonstrates the potential for elevating and integrating international legal norms—highlighting the necessity of a cooperative approach in order to be successfully enacted. As demonstrated above, previous attempts to eradicate the practices were met with failure when all interested actors were not committed to the initiatives.

In that respect, it has been undeniable for several decades that the scope of relevant actors in international law is expanding and transforming,[68] sometimes attributed to a matter of perspective.[69] The role of non-state actors in the development of international legal norms is a discussion already explored from several angles in the literature.[70] This role extends from intervention through *amicus curiae* submissions[71] to more active roles in the creation and direction of framing the legal norms.[72] The transforming relevance of private actors has frequently been linked to globalization in a general sense,[73] and more specifically, the transboundary movements of goods, people, pollution, capital, and disease.[74] In parallel, the debate has questioned the role of sovereignty in this changing landscape as a necessary discussion as other actors

under: < https://www.washingtonpost.com/business/2019/10/23/chocolate-companies-say-their-cocoa-is-certified-some-farms-use-child-labor-thousands-are-protected-forests/?itid=lk_interstitial_manual_20 > (last accessed 9 September 2020).

68 See *inter alia*, *Vicuña*, Max Planck Yearbook of United Nations Law 5 (2001), 53 (53) ("international society is becoming increasingly institutionalized within a process of globalization. Yet it is by its very nature a decentralized society where individuals, corporations and international organizations, both public and non-governmental, have an expanding role to perform and a specific interest to pursue."); *Roberts/Sivakumaran*, Yale Journal of International Law 37 (2012), 107 (108) ("States jealously guard their lawmaking powers as a key attribute of statehood, making them generally resistant to the idea of sharing such power [in the creation of international law] with any nonstate actors."); *Charnovitz*, Michigan Journal of International Law 18 (1997), 183. With respect to environmental law, see for example, *Drumbl*, in: Fitzmaurice/Ong/Merkouris (eds.), Research Handbook on International Environmental Law, 3; *Boer*, in: Morgera/Kulovesi (eds.), Research Handbook on Natural Resources and International Law, 449 (449) (citing "environmental disasters, armed conflict, and post-colonial democratization processes" as contributing to the increasingly diverse actors in international law); *Marauhn*, in: Bodansky/Brunne/Hey (eds.), The Oxford Handbook of International Environmental Law, 738. With respect to the impact of non-governmental actors in human rights law, see for example, *Alston*, in: Alston (ed.), Non-State Actors and Human Rights, 3.

69 *D'Aspremont*, in: Noorthmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 9 (9) ("the role and status of non-state actors is a matter of paradigmatic choice. This choice is being informed by normative preconceptions and agendas as well as the possible awareness of the expectations of the community one seeks to convince.").

70 *Mbengue*, in: d'Aspremont (ed), Participants in the Legal System, Multiple Perspectives on Non-State Actors in International Law, 372 (380) ("non-state actors contribute primarily to the definition of the issues that should be dealt with at the international level, even if the last word in terms of policy orientations might often belong to States or to international organisations."); *Trevisanut*, The International Journal of Marine and Coastal Law 29 (2014), 645 (647 *et seq.*) (discussing the role of private actors in the offshore energy sector and analysing "instances where there is a delegation of regulatory powers or implementation duties from the international or State level to the private actors.").

71 *Hollis*, Boston College International and Comparative Law Review 25 (2002), 235 (237); *Shelton*, American Journal of International Law 88 (1994), 611 (616).

72 *Daugirdas*, European Journal of International Law 31 (2020), 201 (201 *et seq.*).

73 *Slaughter*, A New World Order, 9; *Stephan*, Virginia Law Review 97 (2011), 1573 (1573).

74 *Krasner*, Sovereignty: Organized Hypocrisy, 3; *Hollis*, Boston College International and Comparative Law Review 25 (2002), 235 (236).

gain additional power and influence within the legal sphere.[75] States have remained the only subjects of international law, linked to their power to carry out legal obligations,[76] and thus extending responsibility under international law has been complicated.[77] The historical and foundational conceptualization of sovereign states' monopoly on creating the law and ensuring enforcement is limited in the era of growing sustainability initiatives and in the transboundary implementation of human rights initiatives.[78] This structure, and emerging structure of norms, can at times require cooperation and compliance from additional actors in the legal sphere, a recognition of the limitations of sovereignty that have already been noted.[79] The transboundary nature of many developing areas of international law means that to some extent, the state may lack the form and authority to effectively achieve the relevant goals. In that sense, the actors in the international sphere and those possessing the power to violate the standards established within the international legal order have expanded alongside the expansion of transnational wealth and power.[80]

Additionally, while states have the power to provide for the enforcement of the law,[81] their power has proven to be limited in its ability to realize and effectuate these increasingly relevant legal frameworks. In particular, the ability to realize international human rights and environmental laws have been limited by domestic implementation and compliance as well as by the increasingly complicated role of private actors in the international sphere.[82] This demonstrates a significant structural deficiency where the law intends to elevate human rights standards, and thus requires reconsideration of the actors and sources in the creation, enactment, and enforcement of international law.

75 *Jayasuriya*, Indiana Journal of Global Legal Studies 6 (1999), 425 (425) (considering sovereignty to be "no longer theoretically or empirically serviceable in the face of the internationalization of economic and social activity"); *Goldsmith*, Stanford Law Review 52 (2000), 959 (959) (identifying "economic globalization, transportation and communications advances, the rise of nongovernmental organizations (NGOs), and the spread of international human rights law" as key factors in the decline of power by nation-states).

76 *St. Korowicz*, American Journal of International Law 50 (1956), 533; *Vázquez*, Columbia Journal of Transnational Law 43 (2005), 927 (932 *et seq.*).

77 See for example, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126-127 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 82-85 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), vacated on other grounds, 527 F. App'x 7 (D.C. Cir. 2013). See also, *Liste*, Transnational Legal Theory 5 (2017), 1; *Liste*, European Journal of International Relations 22 (2016), 217.

78 *Tinker/Szasz*, Proceedings of the Annual Meeting (American Society of International Law) 89 (1995), 177 (180) ("The role of non-governmental organizations or civil society in human rights and sustainable development policy and law is expanding, gaining legitimacy from, and in turn giving legitimacy to, international organizations. Projects on the level of local communities may be motivated by ideals and goals comparable to those of international organizations on the global level, offering a structure for change and global governance."); *Hey*, American Journal of International Law Unbound 112 (2016), 350 (352) (providing that in the era of the Anthropocene, "the [Universal Declaration of Human Rights] UDHR requires all duty-holders to consider the implications of 'community' in Article 29(1). Given our interconnected socioeconomic relations across the globe, the term 'community' should be understood as having global implications."). On the role of international organizations in the development and direction of treaties and arguably customary international law, see for example, *Daugirdas*, European Journal of International Law 31 (2020), 201 (201 *et seq.*) (arguing that international organizations have a role in the creation of customary international law); *Stiles*, in: Oxford Research Encyclopedias: International Studies.

79 In the environmental sense, see for example, *Lac Lanoux Arbitration* (France v. Spain), 16 November 1957, R.I.A.A. 281; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010, [2010] ICJ Rep. 977.

80 *Hey*, American Journal of International Law Unbound 112 (2016), 350 (354) ("Capturing the normative implications of this awareness is most challenging in view of the nature of the international (economic) order, in which socioeconomic rights have not been foregrounded equally with civil and political rights.").

81 *Vázquez*, Columbia Journal of Transnational Law 43 (2005), 927 (930).

82 *Chandler*, Corporate Liability: Human Rights and Modern Business, 1 (indicating that "Whether directly or indirectly, companies encounter problems which we would now classify under the generic heading of human rights. In their supply chains they can meet exploitative child labour, discrimination, risks to health and life, forced labour. The extractive industries can be involved in the spoliation of the environment and the destruction of communities. […] Simply through their presence companies provide economic support and moral sanction to oppressive governments. If they lack appropriate policies and principles, companies risk the legitimate charge of complicity with oppression in pursuit of profit.").

These limitations are apparent in the failed legal initiatives to regulate the cocoa industry. In one sense, private actors are utilizing their economic and transborder power to motivate compliance and implementation of human, environmental, and social rights, and thereby impacting the creation and enactment of international law. On the other hand, there is resistance to a full liability of the corporate actions, and domestic legal systems are limited in their ability to extra-territorially implement the standards emerging from international law.

I. The Positive and Negative Roles of Other Actors

While the most recent examples from the EU standpoint show positive implications for private interests in the enactment of legislative change, the more limited perspective from the U.S. demonstrates the complicated responses to international legal framework—even within a single industry. Economic interests can at times impede the heightening of standards. In that respect, the role of private economic actors can be seen as a negative impact on the development of law; nonetheless, these actors remain influential in the decisions that sovereign states make when concluding agreements or other international commitments. It is, however, the positive sense, the heightening of social and environmental standards within international law that proves interesting in the upward development of the system—namely, this creation of the law and emerging standards of conduct by the heightening of requirements for responsibility[83] and progressive conduct that benefits the international community.[84] Thus, the potential impacts by the cocoa industry in encouraging enactment of due diligence standards in the supply chain at the regional European level demonstrates a transition in the structural foundations of international law. Yet, the dynamics of this influence may remain misunderstood and rooted in traditional conceptualizations of the functioning of the international legal order.

II. Forms of Influence

The transboundary nature of economic activities and its impact on human rights,[85] has previously led to the creation of soft law mechanisms to approach these potential abuses by non-state actors. This enactment of soft law, and non-binding mechanisms such as the Harkin-Engel Protocol, may prove ineffective in achieving the desired goals but demonstrate the evolution of the law and the capability of input by non-state actors. Therefore, within this transforming

83 *Daugirdas*, European Journal of International Law 31 (2020), 201 (212) (noting with respect to the responsibility of international organizations in international law: "it is awkward to describe the capacity to incur international responsibility as an implied power of international organizations – in fact, it is awkward to describe it as a 'power' at all. Rather, the capacity to incur responsibility for violations is better described as a consequence of international organizations' separate legal personalities – the flipside of their capacity to have and enforce rights under international law, as affirmed in the *Reparation for Injuries* opinion.").

84 *Roberts/Sivakumaran*, Yale Journal of International Law 37 (2012), 107 (120) (indicating that non-state actors should be allowed to create international law as long as it advances the needs and interests of the international community as a whole).

85 *De Brabandere*, in: D'Aspremont (ed.), Participants in the Legal System, Multiple Perspectives on Non-State Actors in International Law, 268 (269) ("Debates on the role of non-state actors in the human rights sphere are at the very centre of the question whether the existing classical state-centric approach in international law and human rights law still is able to address the contemporary challenges of international society.").

influence on international law from non-state actors,[86] discussion has been directed to the question of soft law in the international sphere. While contentious whether soft law achieves a status comparable to law,[87] it retains the power to modify existing sources.[88] Soft law mechanisms under the grander theme of International Corporate Social Responsibility have attempted to address these changing landscapes of the law and the changing roles of private actors.[89] The United Nations Guiding Principles on Business and Human Rights made an initial step towards the possibility of human rights standards integrated into private actors' behaviours. The influence of these initiatives is made apparent as due diligence standards have transformed into legislative initiatives. These voluntary provisions addressed the inability of international law to hold private actors liable for their failure to comply with human rights standards while conducting business outside the borders of their home jurisdiction. The OECD has similarly enacted Guidelines that act as a comprehensive code of conduct for multinational enterprises.[90] The enactment of these soft law standards opens a broader perspective on the complexity of actors within the system, and in particular the capability of private actors' ability to effectuate positive impacts within these normative frameworks of law.[91]

86 *Charnovitz*, Michigan Journal of International Law 18 (1997), 183 (285). In discussing the participation of civil society and non-governmental organizations in international law, *Steve Charnovitz* points to the failures in the United Nations system because of its age, framed by its role to recover the peaceful relationship between states after war. By placing NGOs as vital actors within this system, he considers it a step towards re-invigorating the role of international organizations to more actively approach the realities of globalization. This discussion extends well beyond the participation of civil society in the existing frameworks of international law, building on the system as it currently exists and extending it into working frameworks for the relevant issues currently confronting the global community. See also, *Ridgeway*, Merchant of Peace: Twenty Years of Business Diplomacy Through the International Chamber of Commerce, 391 (considering a need for reformulations "between the state and those institutions which carry the seeds of a new world society.").

87 *Besson*, in: Besson/Tasioulas (eds.), The Philosophy of International Law, 171 (indicating that soft law "is kind of an intermediary international legal outcome whose legality might be questioned and normativity *qua* law is almost inexistent.").

88 *Castañda*, Annuario Mexicano de Derecho International XIII (2013), 355 (392 et seq.).

89 Regarding the place of soft law generally in the creation of international legal norms, see for example, *Shelton*, American Journal of International Law 100 (2006), 291; *Boyle*, in: Evans (ed.), International Law, 122; *Klabbers*, Nordic Journal of International Law 65 (1996), 167. See generally, *Zerk*, Multinationals and Corporate Social Responsibility.

90 OECD Guidelines for Multinational Enterprises, 2011; OECD Due Diligence Guidance for Responsible Business Conduct, 2018.

91 *Butler*, American Journal of International Law 114 (2020), 189 (190-191) (indicating that there is an increasing tendency "for businesses to enforce international sanctions—or to implement or enforce international rules more generally—without first being required to do so by their home state" despite not having taken this role historically); *Shaffer*, Connecticut Law Review 42 (2009), 147.

D. Global Public Interest as a Conceptual Foundation

The changes in the actors' roles in international law can be understood through the lens of global public interests. As the focus of global law has transformed, the changes in focus on relevant actors has also been dislodged. The European Commission's legislative initiative to enforce human rights standards extraterritorially over European companies and the simultaneous movement by private actors to enact similar standards of behaviour by actors in the supply chain,[92] demonstrates how a synergy between these interests can produce binding implementation of standards.

Global public interests, as approached in international law, tend to produce controversy in the process of definition and even more so in application.[93] Its aspirational,[94] yet links issues such as social justice and equal access.[95] There are a handful of other terms that are often supplied to achieve similar ends—common interest,[96] common good, global public goods,[97] general welfare. From a domestic perspective, international trade law allows exceptions based on (domestic) public interest.[98] Its relevance in international investment law has been noted.[99] Its existence in international law can often be displaced to private international law and reverted to domestic law, yet it retains relevance in diverse areas of international law. There is a purpose for reverting to such a concept. In particular, international environmental law and international human rights laws are built on a sense of global public interest—the idea of a common interests for humanity, irrespective of borders[100]—that extend beyond the common goods which they aim to protect. But its scope encompasses all private actors, meaning that global private interests fits into the complex structure of the global economy that also includes transnational actors. A global public interest allows for the incorporation of a more wide-ranging system of rights and values, as well as sense of morality in the recognition of those rights.

92 VOICE Network, Cocoa companies call for human rights and environmental due diligence requirements, 2 December 2019, available under: < https://www.voicenetwork.eu/2019/12/cocoa-companies-call-for-human-rights-and-environmental-due-diligence-requirements/ > (last accessed 10 September 2020).

93 Black's Law Dictionary defines public interest as "1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake: esp., an interest that justifies governmental regulation." Black's Law Dictionary (3rd Pocket Edn., 2006).

94 Regarding its linkages with constitutionalism in international law, see for example, *Habermas*, The Divided West, 115 and 136.

95 This can be understood as derived from its origins in the U.S. legal system, in which Justice Brandeis noted in 1905, "Instead of holding a position of independence between the wealthy and the people, prepared to curb the excesses of either, able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people." *Brandeis*, American Law Review 39 (1905), 55.

96 *Feichtner*, in: Max Planck Encyclopedia of Public International Law.

97 *Walker*, Indiana Journal of Global Legal Studies 23 (2016), 249; *Kaul/Mendoza*, in: Kaul *et al.* (eds.), Providing Global Public Goods: Managing Globalization, 78 (95); *Augenstein*, Indiana Journal of Global Legal Studies 23 (2016), 225 (248) ("To the extent that global interdependencies in the production and consumption of public goods have blurred the state-based distinction between domestic and foreign politics, the global public goods approach provides presumptive justifications for state intervention to prevent 'market failures' in matters of common global concern. To be legitimate, such global assertations of state power must be accompanied by the recognition of the rights-based claims of those concerned to be affected by, and to therefore have a legitimate say in, the definition of the state's public good.").

98 General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), Article XX(b) (allowing exceptions "necessary to protect human, animal or plant life or health"); *Harris/Moon*, Melbourne Journal of International Law 16 (2015), 1 (6) (considering the extension of a state's treaty-based human rights obligations beyond their territory in the context of WTO law).

99 *Giest*, Chicago Journal of International Law 18 (2017), 321 (333 *et seq.*); see generally, *Kulick*, Global Public Interest in International Investment Law.

100 See also, for example, *inter alia* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 10 October 1967, 610 United Nations Treaty Series 205.

Global public interest embodies a proactive approach to issues of universal human interest, including the environment, human rights, and development. It sits alongside global rule of law, illustrating the underlying objectives to be achieved by its implementation.[101] By casting the foundation as global public interests, it recognizes the role of public as well as private actors in identifying and advancing forward the objectives. The Global Compact, for example, responds to and recognizes one side of this conceptualization by incorporating principles derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.[102]

The growth of an idea of global public interest is limited by the shape of public international law, maintaining the right of the sovereign state to define and implement, and the foundation of international law in both consent[103] and reciprocity,[104] resulting in an exclusion of actors that both facilitate and denigrate the realization of these interests. It is the actions of private actors—namely their neglect of these higher ideals that have been formulated in human rights law and environmental law—that demonstrate the need for an interconnected public interest and mechanisms for the implementation of it.[105] The foundation rests on the intersections of law and morality and their implementation into the international legal sphere, in particular, their implementation in a manner which elevates the broader role of public interests.

From a parallel perspective, the movement towards systemic integration between international legal spheres may benefit by a closer look towards these non-state actors within this conception of global public interests.[106] Steps forward towards greater integration are being made in human rights law[107] and to some extent in international economic law,[108] however, the systems still function with independence. Soft law has stepped in to resolve part of the limitations, and a more interesting angle on reaching closer systemic integration comes from the role of non-state actors, in particular private actors, in international law. While economic interests often over-shadow attempts in the private sector to uphold state-centric social, human rights, and environmental interests, the recent initiative by the cocoa industry to support and encourage the enactment of due diligence in the supply chain at the European level

101 *Rijpkema*, Transnational Legal Theory 4 (2013), 167 (192).

102 *Khan*, in: Max Planck Encyclopedia of International Law, Global Compact, para. 14 (noting the resistance to a regulatory regime and the resulting violations of the embodied principle, settling its successes on "the channels through which it provides facilitation and encourages policy dialogue, learning, local networks, and projects."); *Deva*, Syracuse Journal of International Law and Commerce 34 (2006), 107 (107).

103 See inter alia, *Roberts/Sivakumaran*, Yale Journal of International Law 37 (2012), 107 (109).

104 *Simma*, in: Max Planck Encyclopedia of Public International Law, Reciprocity, para. 2 ("From an objective point of view, in international law, reciprocity may in this context be understood as the status of a relationship between two or more States under which a certain conduct by one party is in one way or another juridically dependent upon that of the other party. Such conduct will in most instances, but not necessarily, amount to identical or equivalent treatment."). See also, *Srivastava*, Sri Lanka Journal of International Law 6 (1994), 243 (247).

105 This research intends to bring the fragmentation criticism already sufficiently approached in the literature, and move towards recognizing not only the fragmentation created by distinct systems of international law but fragmentation created by disregard for the roles of relevant actors.

106 Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (13 April 2006); *Peters*, International Journal of Constitutional Law 15 (2017), 671 (671).

107 *Al-Dulimi and Montana Management Inc. v. Switzerland*, 2016 European Court of Human Rights, para. 140 (App. No. 5809/08).

108 See for example the use of counter-claims by responding states for violations of environmental standards: *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Award, 27 September 2019, para. 1023; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, 7 December 2017, para. 60; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1151.

demonstrates a unique (and potentially growing) perspective on integrating various international commitments by states into a unified whole. It is through the utilization of these actors—with transboundary economic influence—that the various pieces of international law are able to be more holistically connected.

I. Private Actors in the Global Public Interest

Private actors have long been integrated into the protections provided by international law.[109] Diplomatic protection has ensured that private interests were protected under international law.[110] Now, there is an increasingly significant role of private actors in the creation of international law.[111] *Anne-Marie Slaughter* has discussed the increasing relevance of private actors in the process of creating international law.[112] *Carlos Manuel Vázquez* refers to the current obligations of corporations in international law as indirect: reliant on the state to enforce standards.[113] *Paul B. Stephan* has approached the privatization of international law.[114] This advances in parallel with the changing role of states;[115] the conceptualization of the law necessarily moves beyond an international law about the rights and obligations of states.[116]

The cocoa industry, as it impacts broader public interests on a global level, exposes compliance gaps inherent in the structure of international law. International frameworks intended to elevate standards of human rights and environmental standards are unable to accomplish their tasks when the private actors operate with such a global scope that domestic-level compliance of all aspects of the operation is impossible to achieve. The private actors appear initially as the cog in the wheels of transnational compliance, a system reliant on sovereign states. This, however, is an over-simplification of the reality of the structural limitations of

109 See for example, private actors seeking diplomatic protection under international law: *inter alia*, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of Congo), Judgment, [2010] ICJ Reports 639; *Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), Judgment, Merits, Second Phase, [1970] ICJ Reports 3.

110 International Law Commission, Draft Articles on Diplomatic Protection (2006); *Vermeer-Künzli*, European Journal of International Law 18 (2007), 37 (38).

111 With reference to soft law mechanisms, see for example, *Deng*, in: Biersteker/Spir/Sriram/Raffo (eds.), International Law and International Relations: Bridging Theory and Practice, 141 (141); *Abbott*, in: Biersteker/Spir/Sriram/Raffo (eds.), International Law and International Relations: Bridging Theory and Practice, 166 (167) (identifying the systematic distinctions of "privately generated soft law" in the Guiding Principles on Internal Displacement).

112 *Slaughter*, A New World Order, 9 ("A major element of global governance, in turn, has been the rise of global policy networks, celebrated for their ability to bring together all public and private actors on issues critical to the global public interest […] These projects focus on the many ways in which private actors now can and do perform government functions, from providing expertise to monitoring compliance with regulations to negotiating the substance of those regulations, both domestically and internationally."). See also, *Bolton*, Chicago Journal of International Law 1 (2000), 215 (217-218) ("the detachment from governments that makes international civil society so troubling, at least for democracies. […] [T]he civil society idea actually suggests a 'corporativist' approach to international decision-making that is dramatically troubling for democratic theory because it posits 'interests' (whether NGOs or businesses) as legitimate actors along with popularly elected governments.").

113 *Vázquez*, Columbia Journal of Transnational Law 43 (2005), 927 (930) ("International law, as it exists today, includes norms that address the conduct of corporations and other non-state actors but, with very few exceptions, the norms do so by imposing an obligation on states to regulate non-state actors. Thus, for the most part, international law regulates such non-state actors indirectly.").

114 *Stephan*, Virginia Law Review 97 (2011), 1573 (1573) (noting boldly that "[t]he old understanding of international law as something created solely by and for sovereigns is defunct.").

115 *D'Amato*, Georgia Journal of International and Comparative Law 25 (1995-1996), 47; *Trimble*, Michigan Law Review 95 (1997), 1944; *Bolton*, Chicago Journal of International Law 1 (2000), 205 (217) (referring [critically] to the Landmines Convention as a turning point in the involvement of non-governmental actors—in this case, non-governmental organizations—in international diplomacy).

116 *C.f. Janis*, American Journal of International Law 78 (1984), 405 (409).

international law. The cocoa industry may demonstrate an alternative, operating alongside the existing frameworks in international law, for private-incentivized elevation of human rights standards and global public interests more generally. This industry is one of several examples of emerging private actors impacting the public sphere. On a theoretical level, this proposed transformation of perspectives interacts with conceptions of reciprocity and the morality of international law, once seen as upheld by the sovereign states, but now viewed distinctly as private economic power expands. The current developments in the industry, however, can be applied to re-image the shape of international law, using the pieces that exist and building on them to discover a more versatile and effective shape for the current reality—thereby, creating a system that integrates economic power and human rights obligations.

II. The Moral Implications of Private Influence

The limitations on regulation of economic actors are often rooted in perceptions of morality and justice in international legal systems which necessitate the sovereign state's role. States' inability to enact public interest standards, as epitomized by the limitations in international economic law to heighten human rights and environmental standards in an extra-territorial context, demonstrates a distinct moral deficit. The practical realities of the global economic system that incentivizes profits may under some circumstances simultaneously de-incentive public interests. Nonetheless, multinational corporations possess economic and social power that could allow for interests to be realized—the potential shape of which may be better understood by the cocoa industry's efforts. This approach respects the conflicting narratives of public interests, their interactions with state-led initiatives, and company self-interest.

This moral concern that arises out of the possible inputs of private actors into the system of international law can be divided into several perspectives. From one perspective, the increased activity of private actors within the systems of law that enact global public interests, could result in a lowering of authority of sovereign states while private actors are elevated. While the United Nations Guiding Principles of Business and Human Rights have attempted to neutralize these concerns by leaving enactment and enforcement in the hands of sovereign states,[117] the earlier Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, largely a restatement of the existing soft law obligations,[118] led certain states to question the changes in authority.[119] These Norms were

117 United Nations Guiding Principles of Business and Human Rights (2011), Article 1, Commentary ("The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.").

118 *Weissbrodt/Kruger*, American Journal of International Law 97 (2003), 901 (913).

119 United States Council for International Business, UN to Review Proposed Code on Human Rights for Business, 5 March 2004, athttp://www.uscib.org/index.asp?documentlD=2846 (reflecting a concern that the norms would result in the privatization of human rights enforcement); Thomas Niles, Letters to the Editor, UN Code No Help to Companies, Financial Times, 17 December 2003, 18 ("However well intentioned, the draft norms would, if adopted, create a new international legal framework, cutting across virtually every area of business operation, with companies, rather than the governments that negotiated them, responsible for implementing international treaties and conventions. Not only would this create conflicting legal requirements for companies operating around the world, it would also divert attention from much-needed efforts to improve the capacity of national governments to implement and enforce existing human rights

controversial, and were rejected as over-stepping the traditional barriers that had led to the creation of the international system. From a second perspective, however, the increasingly relevant role of private actors in violating and upholding global public interests results in a certain necessity to integrate those actors into the system. Excluding the culpability of those actors results in a lowering of global public interests and also eliminates the potential for those standards to be heightened by the comprehensive role of private actors in crossing borders and operating globally.

E. Conclusion

The transforming power of private actors alongside the more robust enactment of human rights and physical realities of the planet demand a closer reflection towards the architectural exclusion of economic actors in an increasingly meaningful manner, a manner that elevates the global public interests that have become central to international law. This paper has attempted to consider how the cocoa industry sits at a cusp of enactment of global public interests, and the implications of their involvement in the advancement and enactment of relevant and binding international law. The capacity of economically powerful, transboundary economic actors to impact the enactment of law indicates an untapped potential for international law. Even if the motivation is derived from economic factors, private participation in the development of standards could be effectively harnessed towards a symmetrical creation of global public interest standards. This motivation by the cocoa industry, their ability to unite internally and externally, drives forward elements of enforcement of human rights and environmental law that have been difficult and thorny to achieve without a cooperative perspective. The nature of these economic actors crossing (at times, several) borders creates a unique opportunity to infiltrate the global system with recognized public interests—an infiltration that territorial sovereignty excludes. This research intends to further challenge the role of private actors in the international system. The input of private actors can be seen as both able to harm and able to elevate. The industry-specific impacts on the development of the law are one window to a better view of how positive impacts could manifest.

laws. Finally, although the proposed norms are said to be 'non-voluntary' [which presumably means obligatory], it is totally unclear who would have the responsibility for enforcing their implementation.").

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