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Nestlé's Bitter Apology:

Child Labour, International Law and The Cocoa Industry

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Abstract

This thesis investigates Nestlé's impunity for aiding and abetting forms of child labour in Côte d'Ivoire through analysing the landmark case *Doe v. Nestlé*. By employing a qualitative content analysis, this study disseminates the nearly two-decade court battle of oral arguments before the Supreme Court, amicus briefs from interested third parties, court rulings, as well as an interview with the leading lawyer in the case—Terry Collingsworth—which supports the findings and offers a narrative. Through the lens of Martti Koskenniemi's theory of the international legal argument this research uncovers structural problems governing the relationship between multinational corporations, international law, and human rights transgressions in a real-life legal context. The findings show how international law itself contributes to the impunity of Nestlé. The recent trend of passing extraterritorial laws drives this study, awarding salience to an otherwise clandestine industry.

Keywords: Corporate Accountability, Business and Human Rights, International Law, *Doe vs Nestlé*

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List of Abbreviations

ATS Alien Tort Statute

CSR Corporate Social Responsibility

BHR Business and Human Rights

MNC Multinational Corporations

UNGP United Nations Guiding Principles

1 Introduction

“If you could bring a suit against 10 slaveholders, when those 10 slaveholders form a corporation, why can’t you bring a suit against the corporation? [...] What sense does this make? [...] 10 slaveholders decide to form a corporation specifically to remove liability from themselves, and now you’re saying you can’t sue the corporation?”¹

This is the original excerpt of the U.S. Supreme Court hearing of the oral arguments in *John Doe I-VI et al v. Nestlé USA, Inc. (Doe vs Nestlé)* held in 2020, which is part of the qualitative data collected for the research in this thesis. These questions were posed by Supreme Court Justice Elena Kagan to the lawyer of the petitioners (Nestlé) during oral arguments. This extract represents part of the wider discussion about the liability of multinational corporations (MNCs) in the highest court of the United States concerning one of the gravest human rights violations existing today²: “child slavery”³.

The statement of facts in the Supreme Court Decision of the case indicate that Nestlé “maintains an unusual degree of control over the cocoa market in the Ivory Coast because of its enormous buying power, and maintains that power by providing resources to plantations engaged in child slavery”.⁴ Nestlé’s influence on this slavery-based system is partially maintained by giving local

¹ Transcript of Oral Argument, *Nestlé USA, Inc. v. Doe* (19-416), Supreme Court of the United States (2020), pp. 20-21, https://www.supremecourt.gov/oral_arguments/audio/2020/19-416, (accessed 12 August 2024).

² K. Annan, 'Secretary-General Calls Human Trafficking ‘One of The Greatest Human Rights Violations’ of Today', *The Office of the High Commissioner for Human Rights*, 2002, <https://www.ohchr.org/en/statements/2009/10/secretary-general-calls-human-trafficking-one-greatest-human-rights-violations>, accessed 6 June 2024.

³ The terminology child slavery was used in the factual background statement in the U.S. Supreme Court ruling, see: *NESTLE USA, INC. v. DOE ET AL.* 593 U. S. (2021), p. 1

⁴ *NESTLÉ U.S.A., INC., Petitioner, v. JOHN DOE I et al., INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS*: Pp. 4 (https://www.supremecourt.gov/DocketPDF/19/19-416/125373/20191212153213243_Nestle%20BIO.pdf)

farmers and/or farmer cooperatives ongoing financial support, such as advance payments and personal spending money, ensuring their loyalty as exclusive suppliers.⁵

That MNCs have so much power is not an anomaly in today's world. MNCs have become one of the most powerful actors globally, sometimes even wielding more power than states⁶. However, effective mechanisms for holding these global giants accountable are still in their infancy, despite 50 years of scholarly discussions in a relatively new field called business and human rights. The field consists of lawyers, economists, anthropologists, and social scientists who all address the accountability gap of MNCs⁷. One of the questions is whether MNCs can be held accountable through national legislation that has extraterritorial reach, as the state where the MNC is from usually does not match the state where the human rights violation occurred⁸. One such law that has been analysed by scholars and used by lawyers to sue MNCs is the Alien Tort Statute (ATS)⁹, a law in the U.S. that grants “[t]he district courts [...] original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”¹⁰. The ATS was also used in the case *Doe vs. Nestlé* to sue Nestlé for allegedly aiding and abetting child slavery in the Ivory Coast¹¹. A Court of Appeals ruled that the ATS can successfully be extended to MNCs, meaning Nestlé could be held accountable under international law. However, the U.S. Supreme Court held that such an application “must allege more domestic conduct than general corporate activity”.¹² Nestlé serves as a stark illustration of how global corporate

⁵ NESTLÉ U.S.A., INC., Petitioner, v. JOHN DOE I et al., INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS: pp. 4 (https://www.supremecourt.gov/DocketPDF/19/19-416/125373/20191212153213243_Nestle%20BIO.pdf)

⁶ U. Baxi, ‘Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?’, *Business and Human Rights Journal*, vol. 1, no. 1, 2016.

⁷ J.V. Gabriel and F. Wettstein, “‘Business and Human Rights’ and the United Nations Sustainable Development Goals: Complementary or Conflicting Agendas”, in: R. Brinkmann (ed), *The Palgrave Handbook of Global Sustainability*. Palgrave Macmillan, Cham, 2023, pp. 939-954.

⁸ S. Chesterman, ‘Oil and Water: Regulating the Behavior of Multinational Corporations Through Law’, *New York University Journal of International Law and Politics*, vol. 36, 2004, p. 315.

⁹ B. Stephens, ‘The Curious History of the Alien Tort Statute’, *Notre Dame Law Review*, vol. 89, 2014, p. 1467.

¹⁰ Alien Tort Statute: ATS 28 U.S.C. § 1350.

¹¹ D. LeClercq, ‘Nestlé United States, Inc. v. Doe. 141 S. Ct. 1931’. *American Journal of International Law*, vol. 4, 2021, pp. 694.

¹² Nestlé USA, Inc. vs. Doe et al. 593 U. S. 2 (2021).

entities stay immune while committing human rights abuses overseas. This study is about finding out whether international law itself is causal to this lack of accountability.

This chapter outlines the research aim, purpose, and research questions, as well as a background of the case Doe vs Nestlé and its relevance to the field. Chapter 2 outlines the theoretical framework for the study, which consists of previous research in the field of business and human rights, as well as an outline of the main concepts of Martti Koskenniemi's theory on international law. In Chapter 3 the methodology, and data are discussed following the analysis in Chapter 4. The thesis ends with an insightful discussion in chapter 5 and concludes in chapter 6, as well as provides a brief outline of possible future research.

1.1 Research Problem, Purpose, and Research Questions

This research investigates Nestlé's impunity for aiding and abetting the harshest forms of child labour in Côte d'Ivoire. The broader research problem addressed in this thesis is the persistent lack of accountability for MNCs like Nestlé who commit extraterritorial corporate-related human rights abuses. This problem is addressed in the field of business and human rights, which is dedicated to finding causes and solutions to the persistent accountability gap when it comes to corporate-related human rights abuses in the Global South¹³. Therefore, this thesis aims to find out whether a reason for the accountability gap of MNCs could be a problem of the structural issues underlying international law itself and how these structural issues contribute to the accountability gap. The following research questions are employed to correspond to these aims:

- a. Why are multinational corporations *still* not held accountable for their human rights violations abroad?
- b. How does international law play a role in the accountability gap of MNCs?

¹³ F. Wettstein, 'Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights'. *Business and Human Rights Journal*, 2021, pp. 312-325

To address these questions, the research employs a qualitative content analysis on a range of primary legal data from the case *Doe vs Nestlé* starting in 2005 and ending in 2021, three oral arguments before the Supreme Court, eight briefs from interested parties, as well as an exclusive interview with Terry Collingsworth—the leading lawyer of the case—as an expert narrative to support the analysis. By applying Martti Koskenniemi’s critical theory of international law from the book “From Apology to Utopia”¹⁴, this research examines how the underlying systemic issues of international law contribute to the impunity of Nestlé.

1.2 Background Nestlé and Ivory Coast

Before introducing the theoretical framework in Chapter 2, this chapter offers a brief Background on Nestlé’s involvement in the Ivory Coast including its relevance for societal debate.

Côte d'Ivoire holds a prominent position in the global cocoa industry as the world's leading exporter of cocoa beans, accounting for 41.27% of the global cocoa supply in 2021.¹⁵ However, the country's cocoa production has been marred by persistent and disturbing issues of child trafficking, child labour, and the prevalence of the worst forms of child labour, often referred to as child slavery.¹⁶ Child trafficking is a significant concern in Côte d'Ivoire, with children trafficked from neighbouring countries like Burkina Faso and Mali to work on cocoa farms¹⁷. This section will give a brief account of the history of Nestlé’s involvement in the cocoa industry.

Cocoa's extensive history goes back to early American civilizations. The Mayans, for instance, used it as a beverage, an offering, and even as a currency around 1000 BC¹⁸. When Columbus

¹⁴ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge, Cambridge University Press, 2006.

¹⁵ Tridge, *Cocoa Bean* [website], <https://www.tridge.com/intelligences/cocoa-bean/import>, (accessed 05 June 2024).

¹⁶ International Labor Organization, *Worst Forms of Child Labour Convention*, no. 182, 1999, https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182, (accessed 06 June 2024).

¹⁷ International Cocoa Initiative, *Child labour in cocoa* [website], <https://www.cocoainitiative.org/issues/child-labour-cocoa>, (accessed 06 June 2024).

¹⁸ S.D. Coe and M.D. Coe, *The True History of Chocolate*, 1st ed, London, Thames and Hudson, 1996.

arrived in Mesoamerica, he encountered cocoa¹⁹, but it was Hernán Cortés who introduced it to Europe in 1528.²⁰ Cocoa spread across Europe²¹, leading to increased demand, which the Spanish met by exploiting Mayan labour and importing slaves from Africa.²² It was only in the 19th century that cocoa production reached Ghana and the Ivory Coast which became the largest cocoa producer in the world. Among the innovators who shaped the evolution of cocoa into the chocolate we know today was Henri Nestlé, the founder of Nestlé. His contributions were instrumental in the development of milk chocolate, paving the way for large-scale chocolate production to meet the growing demand.²³ The exploitation of slaves through the practices of buying, selling, and trading played a pivotal role in enabling the extensive acquisition and colonisation of lands, culminating in the global production of commodities²⁴. Today, “a small handful of global corporations perpetuate the conditions that flourished in the late 1700s”²⁵, Nestlé being one of them.²⁶ This continuity can be attributed, in part, to the acceleration of neoliberalism and free-market trade under the guise of capitalism.²⁷

During the 1990s, reports emerged about the trafficking and exploitation of children on West African cocoa farms.²⁸ These children, usually between the ages of 12 and 16, are subjected to arduous work, long hours, and hazardous conditions. They are often deprived of salary, education,

¹⁹ S.D. Coe and M.D. Coe, *The True History of Chocolate*.

²⁰ T. L. Dillinger et al., ‘Food of the Gods: Cure for Humanity? A Cultural History of the Medicinal and Ritual Use of Chocolate’, *The Journal of Nutrition*, vol. 130, no. 8, 2000, page number; D. Lippi, ‘Chocolate in History: Food, Medicine, Medi-Food’, *Nutrients*, vol. 5, no. 5, 2013.

²¹ E. Poelmans and J. Swinnen, ‘A Brief Economic History of Chocolate’, in M.P. Squicciarini and J. Swinnen (eds.), *The Economics of Chocolate*, New York, Oxford University Press, 2016, p. 15.

²² *ibid.*, p. 17.

²³ *ibid.*, p. 20.

²⁴ B. Athreya, ‘White Man’s “Burden” and the New Colonialism in West African Cocoa Production’, *Race/Ethnicity: Multidisciplinary Global Contexts*, vol. 5, no. 1, 2011, pp. 51-52.

²⁵ *ibid.*, p. 52.

²⁶ *ibid.*

²⁷ S.I.R. Barrera, *Unearthing the Foundations of Exploitation: The Varieties of Capitalism and Forced Labour*, Honours Thesis, The University of Sydney, 2021, <https://hdl.handle.net/2123/27365>, (accessed 09 June 2024).

²⁸ P. Robson, ‘Ending Child Trafficking in West Africa: Lessons from the Ivorian cocoa sector’, *Anti-Slavery International*, London, 2010, p. 12. https://www.antislavery.org/wp-content/uploads/2017/01/cocoa_report_for_website.pdf, (accessed 12 June 2024).

and basic rights, trapped in a cycle of exploitation²⁹. Despite the abundance of discussions and initiatives from major chocolate suppliers promising to put an end to the worst forms of child labour,³⁰ tangible progress in this matter has been minimal. Investigating and shedding light on the cocoa industry can be a perilous undertaking, as evidenced by the mysterious disappearance of investigative journalist Guy-André Kieffer in 2004 while looking into corruption and illegal practices within the cocoa sector.³¹ The dangers and controversies surrounding the industry are further highlighted by difficulties faced by journalists and researchers, including visa denials and threats from industry representatives.³²

In 2001, a former US Representative put forward a bill to create a child-slavery-free label. This label would have certified that no child slave labour was used during cocoa production.³³ However, the international cocoa industry, including Nestlé, strongly opposed this initiative. Even though the bill passed in the House of Representatives, pressure from the chocolate industry convinced lawmakers to consider an alternative solution³⁴. As a result—under industry influence from multinationals like Nestlé along with other stakeholders in the field—lawmakers decided to address the issue without resorting to legislation. Instead, they negotiated the Harkin-Engel Protocol which is a voluntary initiative aimed at ending the worst forms of child labour by 2005.³⁵

²⁹ International Cocoa Initiative, 'Comparative analysis of child labour decrees in Ghana, Côte d'Ivoire and Cameroon', *International Cocoa Initiative*, 2018, <https://www.cocoainitiative.org/knowledge-hub/resources/comparative-analysis-child-labour-decrees-ghana-cote-divoire-and-cameroon>, (accessed 12 June 2024); S. Sadhu et al., 'NORC Final Report:

Assessing Progress in Reducing Child Labor in Cocoa Production in Cocoa Growing Areas of Côte d'Ivoire and Ghana', Chicago, *NORC at the University of Chicago*, 2020, p. 10, https://www.norc.org/content/dam/norc-org/pdfs/NORC%202020%20Cocoa%20Report_English.pdf, (accessed 13 June 2024).

³⁰ NORC at the University of Chicago, *Assessing Child Labor in West Africa Cocoa Farming* [website], <https://norc.org/research/projects/assessing-child-labor-in-west-africa-cocoa-farming.html>, (accessed 11 June 2024).

³¹ Julia Crawford, 'Disappeared: Guy-André Kieffer missing in Ivory Coast', *Committee to Protect Journalists* [website], <https://cpj.org/?p=9079>, (accessed 14 June 20213).

³² http://nbcgib.uesc.br/cicacau/arquivos/producao_tecnico_cientifica/522.pdf Page 27.

³³ Slave Free Chocolate, *Children trafficked and used as slave labor on cocoa farms. How did this all come about?* [website], <https://www.slavefreechocolate.org/children-slavery-cocoa>, (accessed 14 June 2023).

³⁴ P. Whoriskey and R. Siegel, 'Cocoa's child laborers', *The Washington Post*, 5 June 2019, <https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/>, (accessed 15 June 2024).

³⁵ Slave Free Chocolate, *Children trafficked and used as slave labor on cocoa farms. How did this all come about?* [website], <https://www.slavefreechocolate.org/children-slavery-cocoa>, (accessed 17 July 2024).

However, this voluntary initiative has notably failed³⁶, as highlighted by a report of the United States Department of Labor highlights in 2020³⁷. The findings reveal that approximately 1.56 million children are still subjected to the harshest conditions of child labour within the Ivory Coast's cocoa industry.³⁸ Terry Collingsworth, an international human rights lawyer and head of IRAdvocates, decided to take legal action, because:

*“2005 rolled around, and they hadn't done a thing, not one thing [to ensure that child slavery would end]. [...] I sued Nestlé and Cargill because I had evidence of their supply chain.”*³⁹

Having previously tried to sue multinationals with the respective MNCs' codes of conduct without success, Collingsworth investigated other avenues to sue multinationals and “found [an] old statute called the Alien Tort Statute”⁴⁰. After an almost two-decade court battle, Nestlé got away and was not held accountable the Supreme Court ruled in favour of Nestlé, and they were not held accountable for the allegations.

Nestlé continues to grow, with an increasing net profit from 7.2 billion in 2017 to ca. 11.3 billion Swiss francs in 2023⁴¹ and “the Court has yet to rule in favour of a plaintiff in any case that navigates corporate accountability and human rights”⁴². Nestlé serves as a stark illustration of how global corporate entities stay immune while committing human rights abuses overseas. By looking

³⁶ K. Mustapha, 'Taste of Child Labor Not So Sweet: A Critique of Regulatory Approaches to Combating Child Labor Abuses by the U.S. Chocolate Industry', *Washington University Law Review*, vol. 87, no. 5, 2010, p. 1167.

³⁷ U.S. Department of Labor. *Child Labor in the Production of Cocoa*. Available at: <https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa>, (accessed 1 August 2024).

³⁸ S. Sadhu et al., 'NORC Final Report: Assessing Progress in Reducing Child Labor in Cocoa Production in Cocoa Growing Areas of Côte d'Ivoire and Ghana', Chicago, *NORC at the University of Chicago*, 2020, p. 10, https://www.norc.org/content/dam/norc-org/pdfs/NORC%202020%20Cocoa%20Report_English.pdf, (accessed 15 June 2024).

³⁹ T. Collingsworth, 'Personal Interview with the author', 24 March 2023, p. 12.

⁴⁰ *ibid.*, p. 3.

⁴¹ N-G Wunsch, 'Net profit of the Nestlé Group worldwide from 2005 to 2023', Statista [website], 2024, <https://www.statista.com/statistics/268889/net-profit-of-the-nestle-group-worldwide/>, (accessed 03 July 2024).

⁴² A. Qi, 'Nestle USA v. Doe I and the Future of Corporate Accountability', *Columbia Undergraduate Law Review*, 2021, <https://www.culawreview.org/journal/nestle-usa-v-doe-i-and-the-future-of-corporate-accountability>, (accessed 03 July 2024).

into this case Doe vs Nestlé, this thesis investigates why such global entities are not being held liable. Additionally, by examining primary data of the case Doe vs Nestlé about the applicability of the ATS this study finds how international law itself is contributing to this accountability gap.

1.3 Relevance for Societal Debate

John Ruggie highlighted that globalisation has created a governance gap, explaining that "between the scope and impact of economic forces and actors and the capacity of societies to manage their adverse consequences" lies a significant disparity.⁴³ This raises the question: Should we aim to manage or eliminate these consequences?

Studying the impact of multinational corporations on human rights is crucial, given that these entities can sometimes wield more power than states.⁴⁴ Their significant influence and bargaining power can lead to severe consequences, as illustrated by the alarming figure of 1.56 million child labourers enduring the harshest conditions in this case⁴⁵. This research is vital in understanding and addressing these critical issues.

The case of Nestlé's supply chain in the Ivory Coast is highly relevant to human rights and societal debate for several reasons. It highlights serious human rights violations, such as child labour and poor working conditions, providing a concrete example of corporate involvement in such abuses. By examining the factors contributing to the impunity of multinational corporations, the case underscores the gaps in legal and regulatory frameworks that allow these abuses to occur without adequate punishment or remediation. The findings can inform policymakers and regulators about

⁴³ J. Ruggie, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/8/5)', Human Rights Council, 2008, p. 3.

⁴⁴ S. Strange, 'Big Business and the State', *Millennium: Journal of International Studies*, vol. 20, no. 2, 1991, pp. 245-246.

⁴⁵ S. Sadhu et al., 2020, p. 10.

the systemic issues needing to be addressed to ensure better protection of human rights, leading to stronger laws and regulations that hold corporations accountable for their actions abroad.

The societal debate around this case can pressure corporations to adopt more ethical practices and improve supply chain transparency. Public scrutiny and consumer advocacy can drive change within corporations, promoting more responsible business practices. The case also enhances public awareness and engagement by involving the public in discussions about the impact of their consumption choices and the role of businesses in upholding human rights. Additionally, it emphasises the need for international cooperation in addressing human rights violations by multinational corporations, fostering dialogue and collaboration between governments, international organisations, NGOs, and the private sector to create a more equitable global business environment in addition to legal accountability mechanisms.

1.4 Research Positionality and Ethical Considerations

At this juncture, I wish to delineate my pre-theoretical commitments or the human rights ontology that serves as the bedrock for my research. Much like Halme-Tuomisaari & Slotte, I harbour scepticism toward the conventional textbook narrative, a narrative that has echoed through history—crafted predominantly by white Western male philosophers, and often magnified by politicians and activists⁴⁶. This storyline typically roots itself in historical events or tales aimed at future advancement yet remains ensnared within the concept of "the inevitable triumph of the Western, liberal world."⁴⁷

While I do fundamentally concur that most human rights encompass a universal aspect, this stance does not negate multiculturalism. Quite the opposite, actually—I advocate for embracing a vision of shared global autonomy and empathy⁴⁸. My viewpoint aligns closely with Hunt's ontology,

⁴⁶ M. Halme-Tuomisaari and P. Slotte, 'Revisiting the origins of human rights: introduction', in M. Halme-Tuomisaari and P. Slotte (eds.), *Revisiting the Origins of Human Rights*, Cambridge University Press, 2015, p. 1.

⁴⁷ Halme-Tuomisaari and Slotte, 'Revisiting the origins of human rights', p. 7.

⁴⁸ L. Hunt, *Inventing Human Rights*, New York, WW Norton Co, 2008, pp. 29-32.

which asserts that human rights are anchored in a history of continuity—encompassing shared practices and emotions continually reflected and redefined. This nurtures what Hunt terms "imagined empathy" which forms the cornerstone of human rights⁴⁹. Hence, I refute the idea that only localised frameworks can fully capture all cultural practices, as Moore suggests⁵⁰. Conversely, I assert that this enduring history of continuity allows for more significant cultural relativism within human rights discourse than is often acknowledged by critiques of the traditional textbook narrative.

Ethical considerations were central to the study's design and execution using Michael Patton's key considerations in qualitative research for the interview with Terry Collingsworth⁵¹. The relevant considerations are 1) Informed Consent, 2) Respect for Participants, 6) and Transparency. Explicit permission was obtained to share his identity and contribution details. Collingsworth did not want to stay anonymous and gave full consent to reveal all details of the interview, as well as his identity and insights into the case. Additionally, data security was a top priority. All interview data was securely stored, with access restricted to the research team (me). This approach safeguarded the integrity and confidentiality of the provided information.

1.5 Limitations

The interpretive nature of qualitative research means findings can be influenced by researcher bias. Insights might reflect the researcher's perspectives as much as those of participants. This subjectivity provides rich, context-specific insights but limits the ability to generalise findings to broader populations or different legal frameworks.⁵² This study focuses on a specific legal framework that has since been weakened by subsequent Supreme Court rulings—see next chapter.

⁴⁹ *ibid.*, p. 32.

⁵⁰ G.E. Moore, 'The Objectivity of Moral Judgements (concluded)', in H. Shaw William (ed.), *Ethics: and "The Nature of Moral Philosophy"*, British Moral Philosophers, Oxford, 2005, p. 76.

⁵¹ M.Q. Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice*, 4th edn., Thousand Oaks, California, SAGE Publications, 2015, p. 259.

⁵² J. Maxwell, *Qualitative Research Design: An Interactive Approach*, 3rd edn., Thousand oaks, California, SAGE Publications, 2013.

This might complicate studying the ATS in relation to corporations in the future, as lawyers might not use it as much⁵³. The evolving law under investigation further complicates the ability to generalize findings to other contexts or predict future legal outcomes.

Due to the vast amount of data available, this study could only capture a small sample, which influenced the research findings because it is of qualitative nature and depends largely on which data is selected. However, by carefully selecting the sample and randomising the data set where possible, this research tried to counteract the limitation.

In conclusion, while this study offers valuable insights through an in-depth exploration of a specific legal case, these findings should be understood within the context of the study's methodological limitations.

2 Theoretical Framework

The literature on international law and corporate accountability has evolved significantly over the past few decades, reflecting the growing influence of multinational corporations and the challenges in regulating their activities on a global scale. This chapter explores key themes in the literature, focusing on the evolution of corporate accountability under international law, the debate between corporate social responsibility (CSR) and legal accountability, the jurisdictional challenges in holding corporations accountable, the role of international human rights law, and the relevance of Martti Koskenniemi's theory of indeterminacy.

2.1 Previous Literature

Previous scholarship in the business and human rights field is divided into three sub-themes: International Law and Corporate Accountability (2.1.1), CSR and Corporate Accountability

⁵³ C. Petch, 'What Remains of the Alien Tort Statute after *Nestlé USA, Inc. v. Doe?*', *Northwestern Journal of International Law & Business*, vol. 42, no. 3, 2022.

(2.1.2), and Jurisdictional Issues of Corporate Accountability (2.1.3). This theoretical framework is pertinent to the qualitative content analysis of the case Doe vs Nestlé, as it helps understand why multinational corporations are still not held accountable and provides the theoretical underpinning to how international law plays a role in perpetuating this accountability gap.

2.1.1 International Law and Corporate Accountability

Andrew Clapham articulates that as corporations gained power and influence across borders, it became essential for international law to adapt. Extending its reach to encompass these powerful non-state actors was necessary.⁵⁴ This shift is reflected in the development of the BHR framework. Especially noteworthy was the endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011. These principles, developed under John Ruggie's leadership, mark a significant milestone in corporate accountability's evolution. They establish a global standard aimed at preventing and addressing human rights impacts linked to business operations.⁵⁵ Nadia Bernaz further delves into this progression, stressing that the UNGPs have indeed bridged a significant accountability gap. They define corporations' responsibilities for respecting human rights and states' roles in enforcing these standards.⁵⁶ Despite these significant advancements, however, literature acknowledges persistent challenges in enforcing corporate accountability under international law, particularly where national legal frameworks are fragile or unwilling to act. Surya Deva, for example, critiques the UNGPs for catering to too many corporate interests⁵⁷.

⁵⁴ A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, p. 85.

⁵⁵ J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, New York, W.W. Norton & Company, 2013, p. 45.

⁵⁶ N. Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, 1st edn., Routledge, 2017, p. 102.

⁵⁷ S. Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, 2013, p. 78.

2.1.2 CSR and Corporate Accountability

BHR scholars usually refer to the accountability gap—also referred to as governance gap or liability gaps—as the lack of mechanisms in place to hold MNCs accountable for human rights violations committed abroad⁵⁸.

Florian Wettstein sees the evolution of BHR as a fundamental critique of CSR because the hard-law initiatives of the former are trying to close the gap of accountability that the latter created.⁵⁹ They perceive CSR as advancing neoliberal agendas. Banerjee critiques CSR as a neoliberal strategy often failing to address power structures and economic practices causing social/environmental harm⁶⁰. Scherer & Palazzo argue that CSR lacks efficacy due to an absence of necessary political and legal frameworks to hold corporations accountable.⁶¹ In response, there has been a growing push towards establishing binding international legal frameworks that impose direct obligations on corporations. Deva & Bilchitz argue that voluntary CSR initiatives are insufficient for addressing the complex human rights challenges posed by multinational corporations. They advocate for the development of international treaties or laws that can compel corporations to adhere to human rights standards. This would move beyond the limitations of voluntary CSR towards a more enforceable system of corporate accountability.⁶² Increasingly, scholars such as De Schutter are advocating for national law which has become the predominant method for regulating MNCs⁶³, primarily due to the assertion of domestic jurisdictions over

⁵⁸ F. Wettstein, 'Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights'. *Business and Human Rights Journal*, 2021, pp. 312-325; See also in W. Cragg, 'Business and Human Rights: A Principle and Value-Based Analysis' in W. Cragg (ed), *Business and Human Rights*, Cheltenham, Edward Elgar Publishing Limited, 2012; K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, New York, W.W Norton & Co, 2011.

⁵⁹ F. Wettstein, 'The history of business and human rights and its relationship with corporate social responsibility', in S. Deva and D. Birchall, *Research Handbook on Human Rights and Business*, Cheltenham, Edward Elgar Publishing Limited, 2020, p. 35.

⁶⁰ S.B. Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly', *Critical Sociology*, vol. 34, no. 1, 2008, p. 53.

⁶¹ A.G. Scherer and G. Palazzo, 'Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective', *The Academy of Management Review*, vol. 32, no. 4, 2007, p. 1103.

⁶² S. Hopgood, *The Endtimes of Human Rights*, Ithaca, NY, Cornell University Press, 2013, p. 125.

⁶³ O. De Schutter, Extraterritorial Jurisdiction as a Tool for improving Human Rights Accountability of Transnational Corporations, Report prepared as support of the mandate of

corporate conduct⁶⁴. However, several challenges impede the effectiveness of national regulatory frameworks in ensuring corporate accountability for human rights violations.

2.1.3 Jurisdictional Issues of Corporate Accountability

Several challenges impede the effectiveness of national regulatory frameworks in ensuring corporate accountability for human rights violations. The regulation of MNCs often involves complex jurisdictional issues, including conflicts between home state and host state regulations⁶⁵. Home state jurisdiction refers to the laws and regulations of a corporation's country of incorporation, while host state jurisdiction pertains to the laws of the country where the corporation operates⁶⁶. Bright identifies cases where for example home states might not be able or willing to change their domestic laws for several reasons. One reason is called "law shopping", where MNCs can choose to operate and bring the money that comes with it to countries with the least restrictive laws.⁶⁷ Chesterman identifies another jurisdictional barrier, the so-called "forum non conveniens" which enables courts to dismiss a case and refer the case to a better-suited court. This is usually when courts do not want to infringe on sovereignty with extraterritorial laws.⁶⁸

Extraterritorial jurisdiction—where a state extends its legal authority beyond its borders—has been proposed as a potential solution to the challenge of holding corporations accountable on an international scale⁶⁹. The ATS in the U.S. stands out as a prime example. It allows foreign plaintiffs to sue corporations for human rights abuses committed overseas. However, Petch observes that recent decisions by the U.S. Supreme Court, such as *Kiobel v. Royal Dutch Petroleum & Jesner*

the SRSJ John Gerard Ruggie, 2009, p. 184.

⁶⁴ C. Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights', *Human Rights Quarterly*, vol 21, 1999, p. 65-66.

⁶⁵ De Schutter, *Extraterritorial Jurisdiction as a Tool for improving Human Rights Accountability of Transnational Corporations*, p. 29.

⁶⁶ Chesterman, 'Oil and Water', p. 315.

⁶⁷ C. Bright, 'Creating a Legislative Level-Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward? WP, p 4.

⁶⁸ Chesterman, 'Oil and Water', p. 315

⁶⁹ *ibid.*

v. Arab Bank, and Doe vs Nestlé have significantly limited the ATS's scope, thereby reducing its effectiveness in ensuring corporate accountability.⁷⁰

2.2 Theory

Traditionally, international law has been seen as a system that determines how states behave (see 2.1.1). Nevertheless, many scholars in the field BHR argue that states, being subjects of international law, are crucial in enforcing these norms. The Alien Tort Statute is an example of a law that, despite being a national law, can be applied when there has been a violation of international law, and allows for aliens to sue U.S. persons (whether judicial persons are included is left open) in a federal court.

Martti Koskeniemi's theory of the international legal argument is used to analyse the data from the case Doe vs Nestlé in order to see how international law is contributing to corporate liability.

2.2.1 From Apology to Utopia

This section will summarise the concepts from the book "From Apology to Utopia" by Martti Koskeniemi, an eminent figure in international law. He focuses on balancing normativity (the notion that law should be autonomous, not swayed by states) and concreteness (the flexibility of law to align with state actions)⁷¹. Additionally, he explores the two distinct frameworks through which international law is justified: descending and ascending justifications. Descending justifications prioritise legal norms over state consent, essentially imposing law from the top down. On the other hand, ascending justifications emphasise state consent, crafting law from the ground up⁷². Koskeniemi's main argument is that international law struggles with a core indeterminacy; it is either overly political due to state influence or too idealistic, thus rendering it ineffective⁷³.

⁷⁰ C. Petch, 'What Remains of the Alien Tort Statute after Nestlé USA, Inc. v. Doe?' *Northwestern Journal of International Law and Business*, 2022, p. 399.

⁷¹ *Ibid.*, p. 17.

⁷² *Ibid.*, p. 59.

⁷³ *Ibid.*, p. 24.

2.2.2 Normativity vs Concreteness

Koskenniemi asserts that international law should remain independent from global politics yet it constantly grapples with a tension between normativity and concreteness.⁷⁴

Normativity implies the law ought to function autonomously without being influenced by states. However, if it mirrors state behaviour excessively, it loses its normative strength. On the flip side, if it is too detached from state actions, it risks becoming impractical and utopian.⁷⁵ Concreteness refers to the law's ability to adapt to changing state behaviours. Still, it must retain some degree of autonomy to be effective, even when it clashes with state policies.⁷⁶ Koskenniemi underscores that legal standards emerge from subjects⁷⁷ and must be binding once established, although the distinction between rule creation and enforcement often gets blurred⁷⁸.

He posits that the fundamental issue in international law is not the laws themselves but how they are justified by legal professionals.⁷⁹ To address this, he differentiates between descending justifications that prioritise normativity, and ascending justifications that emphasise concreteness.⁸⁰

2.2.3 Descending vs Ascending Patterns of Justification

Descending patterns of justification position the legal code as superior to the state. This operates in a non-consensual manner. The idea here is that normativity is highly valued, suggesting that legal norms should be upheld regardless of whether the state consents or behaves accordingly. In essence, it is a top-down imposition of law⁸¹. Ascending approaches, however, invert this relationship. They prioritise the state over the legal code and emphasise a consensual dynamic.

⁷⁴ Ibid., p. 17.

⁷⁵ Ibid., p. 17.

⁷⁶ Ibid., p. 19.

⁷⁷ Ibid., p. 21.

⁷⁸ Ibid., p. 23.

⁷⁹ Ibid., p. 589.

⁸⁰ Ibid., p. 589.

⁸¹ Ibid., p. 59.

This method values concreteness and advocates for the creation and application of law through mutual agreements and practices among states. Essentially, it reflects a bottom-up construction of legal norms.⁸²

Both descending and ascending patterns of justification are mutually exclusive. Either the state shapes the law (ascending-concrete-apologetic) or the law shapes the state (descending-normative-utopian), there is no middle ground⁸³. Therefore, international law is simultaneously “overlegitimising”, as it justifies any behaviours while simultaneously being “underlegitimising”, because it is “incapable of providing a convincing argument of the legitimacy of any practices”.⁸⁴

The characteristics above lead to Koskenniemi’s indeterminacy thesis, namely that the system of international law is structurally not capable of providing a legal solution, because of the identity of international law itself—never being able to separate from politics.⁸⁵

2.2.4 Indeterminacy Thesis

Koskenniemi’s indeterminacy thesis asserts that international law, by its very essence, cannot offer clear and definitive legal solutions due to its deep entwinement with politics. Essentially, this implies that international law can never entirely dissociate itself from political influence, thus rendering it inherently unstable⁸⁶.

Yet, the indeterminacy of international law is to Koskenniemi exactly what makes it work⁸⁷. This indeterminacy is further underlying decisionism and structural biases within legal institutions⁸⁸, making a universally accepted legal framework hard to achieve⁸⁹. Koskenniemi stresses the importance of ongoing critical engagement with international law’s principles and practices to

⁸² Ibid., p. 59.

⁸³ Ibid., p. 59.

⁸⁴ Ibid., p. 67.

⁸⁵ Ibid., p. 387.

⁸⁶ Ibid., p. 387.

⁸⁷ Ibid., p. 591.

⁸⁸ Ibid., p. 600.

⁸⁹ Ibid., p. 615.

successfully navigate these inherent challenges. For Koskenniemi, the aim of his thesis is not to argue that a middle ground never exists, “the process of seeking and maintaining the middle-ground is a terrain of irreducible adversity”⁹⁰. Koskenniemi stresses the necessity for ongoing critical scrutiny of international law to effectively navigate these complex challenges. He does not contend that a perfect equilibrium is attainable; rather, he acknowledges that striving for balance in international law is innately difficult. As he puts it “Consensus is, after all, the endpoint of a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or “neutral” position”⁹¹.

As Koskenniemi outlined above, international law struggles to find a balance between two extremes. On the one hand, it risks merely reflecting what countries already do. It could lose its power to set and enforce meaningful standards. This is termed as being "apologetic." On the other hand, international law might establish rules that are too idealistic. Such rules could be unrealistic and lack the power to compel countries to follow them. This is known as being "utopian."

This theory holds importance when examining the relationship of international law with the lack of accountability for MNCs. It can highlight if international law—or specifically, the Alien Tort Statute—leans too much towards being apologetic or utopian. Koskenniemi argues there is no true middle ground between these extremes. Applying this lens to the analysis is crucial. It sheds light on how international law could either contribute to or fail in preventing such impunity.

2.3 Gap in The Literature

The field of BHR has deeply explored the various challenges linked to corporate accountability—see 2.1. Scholars have criticised MNCs for being excessively neoliberal⁹². They argue it often

⁹⁰ Ibid., p. 597.

⁹¹ Ibid. p. 597.

⁹² S.B. Banerjee, ‘Corporate Social Responsibility: The Good, the Bad and the Ugly’, *Critical Sociology*, vol. 34, no. 1, 2008, p. 53.

perpetuates the very issues it's supposed to address⁹³. This critique implies that CSR frameworks might not be effective in enforcing genuine corporate responsibility, as they prioritise voluntary commitments over binding obligations. As elaborated in the previous research, legal solutions in the BHR domain face significant hurdles, such as jurisdictional issues. Problems like "law shopping" and "forum non conveniens" complicate the enforcement of BHR standards.

There is a growing trend towards creating national or regional jurisdictions with extraterritorial reach—allowing laws to be applied to corporations beyond their home country. This development emphasises the critical need to examine how international law is applied in the context of national jurisdiction with extraterritorial reach. Specifically, its application to corporations in real-world scenarios is an underexplored area. This study seeks to fill this gap by investigating how international law acts in a court case in the context of MNCs and human rights violations. It aims to provide insights essential for developing more effective BHR frameworks that ultimately lead to enhanced accountability mechanisms. The next chapter outlines the methodology used to investigate the case Doe vs Nestlé.

3 Methodology

This chapter will introduce the qualitative content analysis and the primary data sources consisting of legal documents, court hearing transcripts, briefs of interested parties, and an expert interview with the leading lawyer of the case. This combination together with the critical lens of international law will provide the tools necessary for the analysis to explore why multinationals are still not held accountable for their human rights violations and whether international law itself is a problem contributing to the accountability gaps of multinationals.

⁹³ F. Wettstein, 'The history of business and human rights and its relationship with corporate social responsibility', in S. Deva and D. Birchall, *Research Handbook on Human Rights and Business*, Cheltenham, Edward Elgar Publishing Limited, 2020, p. 35.

3.1 Data Collection and Material

To better understand the collected data, the court proceedings of Doe vs Nestlé are first summarised, as well as a brief history of Amicus Curiae to understand the context of this data set.

3.1.1 Context Case Material Doe vs Nestlé Court Proceedings

The case of Doe v. Nestlé started in 2005 when child slaves from Mali filed a lawsuit in the United States District Court for the Central District of California. They alleged that Nestlé USA and other companies aided and abetted human rights abuses on cocoa in Ivory Coast. The district court dismissed the case. They ruled that the plaintiffs had not established aiding and abetting liability under the ATS.⁹⁴ In 2014, however, the Ninth Circuit Court of Appeals reversed this dismissal. They held that corporations could be liable under the ATS and that the plaintiffs had sufficiently alleged Nestlé's involvement. Nestlé then petitioned the U.S. Supreme Court to review the decision, but the Court declined and remanded the case for further proceedings.⁹⁵

On remand in 2017, the district court dismissed the case again. This time they cited the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, which limited the extraterritorial application of the ATS. The Ninth Circuit reversed this dismissal in 2018.⁹⁶

Yet, in 2021, the Supreme Court ultimately ruled in favour of Nestlé. They decided that the plaintiffs' claims did not sufficiently connect to conduct within the United States to overcome the presumption against extraterritorial application of the ATS.⁹⁷

⁹⁴ United States District Court for the Central District of California, *John Nestlé, et al. v. Nestlé, S.A., et al.*, No. CV 05-5133-SVW-MRW (10 March 2017), https://media.business-humanrights.org/media/documents/files/documents/03.10.17_Order_Granteeing_MTD_002.pdf, (accessed 29 July 2024).

⁹⁵ United States Court of Appeals for the Ninth Circuit, *John Doe I, et al. v. Nestlé USA, Inc., et al.*, No. 10-56739 (4 September 2014), <https://cdn.ca9.uscourts.gov/datastore/opinions/2014/09/04/10-56739.pdf>, (accessed 29 July 2024).

⁹⁶ *John Nestlé v. Nestlé, S.A.* (2017).

⁹⁷ United States Supreme Court, *Nestlé USA, Inc. v. Doe I, et al.*, No. 19-416 (17 June 2021) https://www.supremecourt.gov/opinions/20pdf/Mohan,19-416_i4dj.pdf, (accessed 29 July 2024).

3.1.2 Context Amicus Curiae Briefs Material

Amicus (or plural: Amici) Curiae literally means “friend(s) of the court”. The general understanding of its function is for a person or a group to advise the court with legislation that may not have been considered yet or may have erred in. It is expected that the person or group filing the amicus curiae brief presents new arguments and is not party to the original case, but who may be significantly impacted or has a significant interest in its outcome. Amicus briefs may only be submitted by lawyers who are admitted to practice at the Supreme Court.⁹⁸ There is widespread existing critique that the modern amicus curiae have transformed the courts into a political battleground for promoting the individual agendas of social, political, and business entities. The amicus has evolved into an advocate aligned with specific parties or those with the financial means to submit such briefs.⁹⁹ As amicus curiae participation offers a mechanism for groups to influence public policy, it has risen to prominence as the predominant lobbying technique employed by interest groups. This method offers a budget-friendly route to gain entry to the highest national court. Moreover, this trend has given rise to the improper utilisation of amicus briefs by lawyers who submit them to showcase their specialised skills, frequently with the aim of attracting prospective clients.¹⁰⁰ Lastly, it is worth mentioning that the Court can also invite an amicus curiae and ask for its opinion. The United States is often invited when decisions affect them, and they have some special rules that apply since they are seen to defend the interest of the public. In this case, The Supreme Court invited the United States (Trump Administration at the time) both for oral arguments and for submitting a brief.

Studies show that amicus curiae briefs have a significant influence on judgments¹⁰¹. Paul Collins,

⁹⁸ Legal Information Institute, 'Rule 5. Briefs on the Merits: Number of Copies, Time to File, and Consequences for Failure to File' (Cornell Law School) https://www.law.cornell.edu/rules/supct/rule_5, (accessed 30 July 2024).

⁹⁹ S. Chandra Mohan, “THE AMICUS CURIAE: FRIENDS NO MORE?” *Singapore Journal of Legal Studies*, 2010, p 372. JSTOR, <http://www.jstor.org/stable/24870502>, (accessed 14 August 2024).

¹⁰⁰ Friends no More: 372

¹⁰¹ See for example: Collins, Paul M. Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs. *Political Research Quarterly*, Mar., 2007, Vol. 60, No. 1 (Mar., 2007), pp. 55-70. Sage Publications, Inc. on behalf of the University of Utah; Kelly J. Lynch, "Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs" (2004) 20:1 J.L. & Pol. 33; Suzanne U. Samuels, First Among Friends: Interest Groups, the US Supreme Court, and the Right to Privacy; Samuel Krislov, The Amicus Brief: From Friendship to

for example, examines the impact of amicus curiae on the court's ideological policy outcomes¹⁰² and concludes that lobbyists or organised interests play an important role in shaping both the Court's agenda-setting decisions and the ideological direction of cases disposed of based on merit.¹⁰³

This section provides a reasoning for why this study chose to choose Amicus Curiae briefs as part of the data sources, as they are at times used as instruments for lobbying, and have been proven to influence judgements. This will also enhance the validity of the study because there is evidence that they have a direct impact on court decisions.

3.1.3 Data Collection

As this thesis investigates how international law contributes to the accountability of multinational corporations by using the case Doe vs Nestlé, the primary data chosen revolves around the legal argumentation and expertise on whether international law can be applied in the case of Nestlé's human rights violations (child slavery) in Côte d'Ivoire.

Therefore, the first primary data set consists of legal documents, court hearing transcripts, briefs of interested parties, and an expert interview with the leading lawyer of the case.

1. Court Rulings (2 samples)
2. Oral Arguments (3 samples)
3. Amicus Briefs (8 samples)
4. Briefs to the Court (2 Samples)
5. Terry Collingsworth Interview (1 Sample)

Advocacy, 72 YALE L.J. 694, 694 (1963)

¹⁰² Collins, Paul M. Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs. *Political Research Quarterly*, Mar., 2007, Vol. 60, No. 1 (Mar., 2007), pp. 55-70. Sage Publications, Inc. on behalf of the University of Utah: pp. 59

¹⁰³ *ibid.*, p. 65.

The Court Rulings were found in the search engine of the Business and Human Rights Resource Centre, which, is the “world's leading independent resource”¹⁰⁴ on human rights-related abuses by MNCs¹⁰⁵, under the Nestlé company profile.¹⁰⁶ The two judgments that were selected were the Appeals Court Ruling¹⁰⁷ (Coded as A1) and b) the Supreme Court Ruling (Coded as S1)¹⁰⁸. Because there are some dissenting opinions from the Ruling, S1 is divided into Justice Thomas (S1.1), Justice Gorsuch (S1.2), Justice Sotomayor (S1.3), and Justice Alito (S1.4). These are important data sets to analyse the indeterminacy of international law¹⁰⁹, as they include decisions and opinions of Supreme Court judges about whether the ATS and therefore international law is applicable.

The next set of data are the oral arguments brought in front of the Supreme Court. This is publicly available as an MP3 file as well as transcribed on the official website of the U.S. Supreme Court¹¹⁰. These provide arguments about the applicability of the ATS and their reasoning to corporations. It is important to mention here that the United States was invited by the Supreme Court to express their opinion on the case as *Amicus Curiae*, a common practice that is criticised for impeding the objectivity of the case (see 3.2.2).

¹⁰⁴ Business And Human Rights Resource Centre, *Charity Commission for England and Wales* [website], <https://register-of-charities.charitycommission.gov.uk/charity-details/?regid=1096664&subid=0>, (accessed 25 June 2024).

¹⁰⁵ Business & Human Rights Resource Centre, *Influence Watch* [website], <https://www.influencewatch.org/non-profit/business-human-rights-resource-centre/>, (accessed 25 June 2024).

¹⁰⁶ Business & Human Rights Resource Centre, *Nestlé, Cargill & Archer Daniels Midland lawsuit (re Côte d'Ivoire)* [website] <https://www.business-humanrights.org/en/latest-news/nestl%C3%A9-cargill-archer-daniels-midland-lawsuit-re-c%C3%B4te-divoire-2/>, (accessed 24 June 2024).

¹⁰⁷ United States Court of Appeals for the Ninth Circuit, *John Doe I, et al. v. Nestlé USA, Inc., et al.*, No. 10-56739 (4 September 2014) <https://cdn.ca9.uscourts.gov/datastore/opinions/2014/09/04/10-56739.pdf>, (accessed 24 June 2024).

¹⁰⁸ United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al.*, No. 19-416 (17 June 2021) https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf, (accessed 23 June 2024).

¹⁰⁹ Koskenniemi, 2011: 591.

¹¹⁰ Supreme Court of the United States, *Oral Arguments Audio for Case 19-416*, 2020. https://www.supremecourt.gov/oral_arguments/audio/2020/19-416, (accessed 02 August 2024).

In support of the oral arguments, the briefs of both parties Doe (BR1)¹¹¹ and Nestlé (BP1)¹¹² were analysed, which were submitted to the Supreme Court for review before the hearing.

The Amicus Curiae Briefs were extracted from the compilation of all Supreme Court documents collected by the independent news and analysis forum SCOTUSblog, a website that “reports on every major merits case before the court at least three times: before argument, after argument and after the decision”¹¹³. It aims to report free from bias and “according to the highest journalistic and legal ethical standards.”¹¹⁴ The material can be found under the subheading “Nestlé USA, Inc. v. Doe I”¹¹⁵. As mentioned, (in 3.2.2), Amicus Curiae briefs are submittals of parties that have a profound interest (be it of a social, political, legal, or economic nature) in the outcome of a case and can therefore be seen as valuable resources to analyse the social, political and economic dimensions underlying the case. In total, there were 31 briefs submitted to the court. As this data set would exceed the boundaries of this thesis, eight briefs in total were selected, four briefs in support of the petitioners (Nestlé) and four briefs in support of the respondents (Doe). The U.S. Chamber of Commerce (P4.1.)¹¹⁶ and The United States Government (P4.3)¹¹⁷ are pertinent to analyse using Koskenniemi’s theory on international law, as they reflect state interests, which—as section 3.2.2 shows—has an influence on the Supreme Court ruling. The other briefs, however, are crucial to analyse because they bring in supporting or opposing arguments, which can also

¹¹¹ Nestlé, *Revised Final Brief for the Supreme Court Case 19-416* (2020)

[https://www.supremecourt.gov/DocketPDF/19/19-](https://www.supremecourt.gov/DocketPDF/19/19-416/157704/20201014155852761_Nestle%20Revised%20Final%20Type%20A.pdf)

[416/157704/20201014155852761_Nestle%20Revised%20Final%20Type%20A.pdf](https://www.supremecourt.gov/DocketPDF/19/19-416/157704/20201014155852761_Nestle%20Revised%20Final%20Type%20A.pdf), (accessed 01 August 2024).

¹¹² Nestlé, *Opening Brief for the Supreme Court Cases 19-416 and 19-453*, 2020.

[https://www.supremecourt.gov/DocketPDF/19/19-416/151727/20200831135559746_19-416%2019-](https://www.supremecourt.gov/DocketPDF/19/19-416/151727/20200831135559746_19-416%2019-453%20Nestle%20Opening%20Brief%208-31%20final.pdf)

[453%20Nestle%20Opening%20Brief%208-31%20final.pdf](https://www.supremecourt.gov/DocketPDF/19/19-416/151727/20200831135559746_19-416%2019-453%20Nestle%20Opening%20Brief%208-31%20final.pdf), (accessed 02 August 2024).

¹¹³ SCOTUSblog, *About SCOTUSblog*, n.d. Available at: <https://www.scotusblog.com/about/>, (accessed 03 August 2024).

¹¹⁴ *ibid.*

¹¹⁵ SCOTUSblog (n.d.) *Nestlé USA, Inc. v. John Doe I*. Available at: <https://www.scotusblog.com/case-files/cases/nestle-usa-inc-v-john-doe-i/>, (accessed 03 August 2024).

¹¹⁶ *Chamber of Commerce of the United States of America, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, U.S. Supreme Court, filed 8 September 2020. Available at: http://www.supremecourt.gov/DocketPDF/19/19-416/153386/20200908155552216_19-416.19-453%20tsac%20Chamber%20of%20Commerce.pdf, (accessed 03 August 2024).

¹¹⁷ United States, *Amicus Brief for the Supreme Court Case 19-416*, 2020.

http://www.supremecourt.gov/DocketPDF/19/19-416/153365/20200908144507659_19-416tsacUnitedStates.pdf, (accessed 04 August 2024).

contribute to the Court Ruling, but also show the underlying interest of stakeholders in the case, which can support the arguments of the petitioners (Nestlé) or respondents (Doe). The briefs that were chosen in support of the respondents are the Center for Justice & Accountability and Human Rights First (R3.1)¹¹⁸, International Law Scholars, Former Diplomats, and Practitioners (R3.2)¹¹⁹, Professors of Legal History (R3.3)¹²⁰, and Tony's Chocology (R3.4)¹²¹. The briefs chosen in support of the petitioners besides the U.S. The Chamber of Commerce (P4.1.) and The United States Government (P4.3) are The Coca-Cola Company (P4.2), and the World Cocoa Foundation (P4.4).

With the context of already having engaged with the previous data, as well as having established the outlines of the literature review to have contextual knowledge, the last unit of primary data was extracted from conducting a semi-structured interview¹²² with the leading case lawyer, Terry Collingsworth¹²³. This structure of interviewing allows me to maintain a balance between obtaining insights related to the questions asked and simultaneously allowing the respondents to voice issues that are relevant to them. The interview was conducted via Zoom on the 24th of March 2023 and took 63 minutes. It can be found in the annex. The interview was transcribed using the free transcribing tool Notta¹²⁴ and double-checked and corrected by the researcher. This primary

¹¹⁸ Center for Justice, *Amicus Brief for the Supreme Court Cases 19-416 and 19-453*, 2020. Available at: http://www.supremecourt.gov/DocketPDF/19/19-416/158375/20201021125637549_19-416%20and%2019-453%20Center%20for%20Justice%20Amicus.pdf, (accessed 04 August 2024).

¹¹⁹ International Law Scholars, *Amicus Brief for the Supreme Court Cases 19-416 and 19-453*, 2020. Available at: http://www.supremecourt.gov/DocketPDF/19/19-416/158399/20201021145537418_19-416%20-%20453%20BSAC%20International%20Law%20Scholars.pdf, (accessed 04 August 2024).

¹²⁰ Professors of Legal History, *Amicus Brief for the Supreme Court Case 19-416*, 2020. Available at: http://www.supremecourt.gov/DocketPDF/19/19-416/158443/20201021180502177_40214%20pdf%20Ray%20br.pdf, (accessed 04 August 2024).

¹²¹ Tony's. *Amicus Brief for the Supreme Court Case 19-416*, 2020. Available at: http://www.supremecourt.gov/DocketPDF/19/19-416/158392/20201021144526209_Tonys%20Amicus%20Main%20Document%20E%20FILE%20Oct%2021%202020.pdf, (accessed 05 August 2024).

¹²² W. C. Adams, *Conducting Semi-Structured Interviews 2015* https://www.researchgate.net/publication/301738442_Conducting_Semi-Structured_Interviews, (accessed 04 August 2024).

¹²³ Collingsworth, 'Personal Interview with author', 2023,

¹²⁴ Notta.ai, *Notta: AI-powered transcription service.*, n.d. Available at: <https://www.notta.ai/en>, (accessed 20 July 2024).

qualitative data helps understand the narrative of the case, as well as brings in a historical and socio-political context, which Koskenniemi highlighted as important to understand the dynamics of international law and politics.

Group	Sub-Category	Data Set	Code
1. Court Decisions		Appeals Court Decision	A1
		Supreme Court Decision	S1
		Justice Thomas	S1.1
		Justice Gorsuch	S1.2
		Justice Sotomayor	S1.3
		Justice Alito	S1.4
2. Oral Arguments in front of the Supreme Court		Hoffman's Oral Argument defending Doe I-VI	H2
		Katyal's Oral Argument defending Nestlé	K2
		Gannon's Oral Argument defending U.S. Interests	G2
3. Amicus Briefs	a) In favour of the Respondents	Global Justice Center	R3.1
		International Law Scholars	R3.2
		Professors of Legal History	R3.3
		Tony's Chocolonely	R3.4
	b) In favour of the Petitioners	US Chamber of Commerce	P4.1
		Coca Cola Company	P4.2

		U.S. Government (Trump Administration)	P4.3
		World Cocoa Foundation	P4.5
4. Briefs to the Court		Briefs of the Respondents	BR1
		Briefs of the Petitioners	BP1
5. Interview with Terry Collingsworth		Interview with Terry Collingsworth	T5

3.2 Data Analysis

This section elaborates on the types of analyses conducted on the previously described data set to address the research questions. Initially, a thematic analysis was performed using the data set of court decisions and amici curiae briefs. Following this, a narrative analysis was carried out on the stand-alone interview. Finally, the triangulation method was employed to integrate information across all data sources.

3.2.1 Qualitative Content Analysis

While content analysis is traditionally associated with quantitative aspects, it is important to note that the dichotomy between qualitative and quantitative methods in social science research is not absolute. Prior argues that such a division is impractical since all social observations necessitate the use of qualitative categories, including but not limited to gender, class, race, and age. In essence, the social sciences do not rely on descriptive categories that correspond to discrete "natural kinds" in the world.¹²⁵ Content Analysis is a versatile method utilised for analysing speech, text, and images. The data was initially highlighted and then themes were searched in line

¹²⁵ L. Prior, 'Content Analysis', in P. Leavy, *The Oxford Handbook of Qualitative Research*, 2nd edn., Oxford University Press, 2020, pp. 313.

with the theoretical framework and the theory. Three themes were chosen: ‘Political Interests’, ‘Economic Interests’, and ‘Corporate Accountability and International Law’.

3.2.2 Narrative analysis

To further support my findings, I will conduct a narrative analysis using a semi-structured interview with the lead attorney from the Doe v. Nestlé case, which was conducted following the Supreme Court hearing. This narrative analysis will involve several key steps: first, familiarising myself thoroughly with the interview data; next, identifying any relevant narrative themes that emerge; then performing a structural analysis of the narrative to understand how the story is constructed; and finally, interpreting the meaning of the narrative within the broader context of the case. This method uncovers deeper insights into the background and arguments presented, as well as the broader implications of the case. This approach is supported by Riessman’s framework for narrative analysis, which emphasises the importance of these steps in understanding the narratives within qualitative research.¹²⁶

3.2.3 Triangulation

According to Yin, to pull together the same findings from different data sources, it is important to develop convergence evidence, meaning different data sets measure the same phenomenon, which is called triangulation.¹²⁷ Triangulation is crucial because it enhances the credibility and validity of the research findings by cross-verifying data from multiple sources. This method helps to mitigate biases and uncover more comprehensive insights into the research problem.¹²⁸ Triangulation is relevant to this study, as five sets of data amounting to 16 data samples based on different actors from various social standings, roles in society, and interests were collected in a real-world context (Doe vs Nestlé) discussing international law (the Alien Tort Statute) in the

¹²⁶ C. K. Riessman, ‘Narrative Methods for the Human Sciences’. SAGE Publications, 2008, pp. 53-70.

¹²⁷ R.K. Yin, *Case Study Research and Applications: Design and Methods*, 6th ed., SAGE Publications, 2018, p. 128.

¹²⁸ N.K. Denzin, ‘Triangulation: A Case for Methodological Evaluation and Combination’. *Sociological Methods*, 1978, pp. 339-357.

context of a multinational corporation (Nestlé) and its corporate-related human rights violations (aiding and abetting child slavery) against individuals (Doe I-VI).

3.3 Trustworthiness

The trustworthiness of this study is established through several key strategies aimed at enhancing transparency, validity, and reliability. First, a clear, step-by-step process was implemented throughout the research. This significantly enhances transparency and rigour. This systematic approach ensures that findings are derived in a structured and reliable manner, allowing for clear traceability of the research process.¹²⁹ By meticulously documenting each phase of the study, the potential for bias is minimised and credibility is strengthened.

Additionally, the use of NVivo software plays a crucial role in ensuring the transparency, validity, and reliability of the research findings. NVivo facilitates organisation and analysis of qualitative data (providing a systematic way to manage and interpret complex datasets)¹³⁰. This tool supports the rigorous coding process; ensuring data analysis is consistent and replicable which contributes to the overall trustworthiness of the study.

Moreover, the application of triangulation further reinforces the study's validity. By integrating multiple sources and methods, triangulation helps develop convergence (strengthening construct validity of the case)¹³¹. This approach allows the study to cross-verify findings from different angles. Thus, ensuring conclusions drawn are well-supported and reliable.

Together these strategies ensure that the study is conducted with a high level of trustworthiness, making findings credible and dependable for future research and practical application.

¹²⁹ V. Braun and V. Clarke, 'Thematic analysis', in H. Cooper, P. M. Camic, D. L. Long, A. T. Panter, D. Rindskopf, & K. J. Sher (Eds.), *APA handbook of research methods in psychology*, Vol. 2, Research designs: Quantitative, qualitative, neuropsychological, and biological, American Psychological Association, 2012, pp. 79–81.

¹³⁰ A. Castleberry and A. Nolen, 'Thematic analysis of qualitative research data: Is it as easy as it sounds?', *Currents in Pharmacy Teaching and Learning*, vol. 10, no. 6, 2018, pp. 807-815.

¹³¹ Yin, *Case Study Research and Applications*, p. 128.

3.4 Limitations

Qualitative methods are inherently subjective as the researcher shapes the analytical process. This raises concerns about researcher bias. The interpretations and insights derived from qualitative data are influenced by the researcher's perspective, which can affect the objectivity of the findings. This subjectivity can also limit the generalizability of the results. The conclusions drawn from the data may not be applicable in different contexts or with different participants. In counteracting to these limitations data triangulation (as described in section 3.3.3.) is applied in this research. Additionally, the limitations are met by careful consideration of patterns across the entire dataset to increase the validity of my findings.

Finally, the study examines a specific law that has since been weakened by the Supreme Court. This further limits the applicability of the findings. The changes to the law may alter its impact and relevance—making it challenging to draw broader conclusions from this case study. These factors collectively highlight the importance of considering the study's context and the evolving legal landscape when interpreting the findings.

4 Analysis

Three themes were chosen based on the qualitative content analysis that was conducted on the court rulings, oral arguments, party briefs, and amicus briefs with the help of the theoretical framework on corporate accountability and international law (see Chapter 3), namely 'Political Interests', 'Economic Interests', and 'Corporate Accountability and International Law'. Each of these themes begins by introducing what theory is relevant, then goes on to the analysis of the Court Decisions, Oral Arguments, and Briefs, and then analysing the Amicus Briefs. Each section is finished with a conclusion and a supporting narrative from an expert in the field.

4.1 Political Interests Introduction

Understanding political interests in the data is crucial because, as Martti Koskenniemi argues, international law is not a neutral and objective system; rather, it is deeply influenced by the underlying political and economic contexts in which it operates. Koskenniemi suggests that legal arguments and decisions often reflect broader political and economic interests, making it essential to analyse these factors to fully comprehend the effectiveness and motivations behind the law.¹³²

Koskenniemi's framework emphasises that international law often serves as a tool for advancing state or corporate interests under the guise of neutrality¹³³. Therefore, analysing political interests in the data of the *Doe v. Nestlé* case is not just about understanding the legal arguments but also about uncovering the real-world implications of those arguments. It allows us to see how international law can be used to either enforce or evade accountability, depending on the interests of those in power.

Thus, understanding the political and economic interests in this case is essential for a comprehensive analysis of how international law is being applied and the extent to which it is serving justice or perpetuating existing power structures. Koskenniemi's perspective underscores that law is not merely a technical exercise but a reflection of broader social, political, and economic forces, making it imperative to scrutinise these interests.¹³⁴

4.1.1 Analysis of Political Interests in Court Decisions, Oral Arguments, and Briefs

In terms of commenting on the implication of foreign politics for the reason that Nestlé should not be held accountable under the ATS, A1 had no comment about whether there would be foreign relations implications, and H2, R3.5, and S1.3 clarified that it would not have an effect on foreign

¹³² Koskenniemi, 2006: pp. 66-71; *ibid*, pp. 498-503.

¹³³ Koskenniemi, 2006: pp. 601-606; *ibid*. Pp. 615-618.

¹³⁴ Koskenniemi, 2006: pp. 607-613.

relations. S1.1, S1.2, G2 and K2 all said that the case would have a profound influence on foreign politics.

A1 and S1 reached different conclusions on holding MNCs accountable to international law. A1 affirmed that extending international law to foreign corporations has implicated foreign policy concerns previously: *“Indeed, the foreign policy implications of recognizing a claim under the ATS “are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.”*¹³⁵ Since the case involved a domestic corporation operating within U.S. territory, A1 did not mention any foreign policy implications.

In contrast, S1.1 argues that applying the ATS would *“inherently affect foreign policy.”*¹³⁶ and that it would be *“the political branches, not the Judiciary [that] have the responsibility and institutional capacity to weigh foreign policy concerns.”*¹³⁷ S1.2 concurs, warning that *“were we to create new causes of action, we would risk doing exactly what Congress adopted the ATS to avoid: complicating or even rupturing this Nation’s foreign relationships.”*¹³⁸ G2 echoes these concerns, highlighting *“foreign relations problems because they implicate the actions of foreign officials.”*¹³⁹ Since G2 represents the United States Government as an Amicus invited by the Supreme Court, it can be said that the United States explicitly expresses that holding Nestlé accountable would have implications for Foreign relations.

K2 expresses concern that cases like this could proliferate and *“go on for decades, with harm to our foreign policy, separation of powers, and other policy objectives.”*¹⁴⁰ However, K2 makes no comment on why that is relevant to not holding MNCs accountable. Additionally, K2 makes reference to *“other policy objectives”* which is vague, making this an unsubstantiated argument with no solid foundation. P4.5 additionally gives the reason that *“Allowing foreign corporations’ domestic affiliates, like Nestlé USA, to be hauled into American courts “would imply that other*

¹³⁵ United States Court of Appeals for the Ninth Circuit, *John Doe I, et al. v. Nestlé USA, Inc., et al.*, 2014, p. 44.

¹³⁶ Thomas In United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al.*, No. 19-416, 2021. p. 10.

¹³⁷ *ibid.*, p. 9.

¹³⁸ Gorsuch In United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al.*, No. 19-416, 2021, p. 6.

¹³⁹ Gannon In Supreme Court of the United States, *Oral Arguments Audio for Case 19-416*, 2020. p. 47.

¹⁴⁰ Katyal In Supreme Court of the United States, *Oral Arguments Audio for Case 19-416*, 2020, p. 30.

nations, also applying the law of nations, could have”¹⁴¹ U.S. corporations’ foreign affiliates “into their courts for alleged violations of the law of nations.”¹⁴² This is not a founded argument because it should not matter whether other entities abroad are also held accountable for human rights violations. What is pertinent to the case is Nestlé’s accountability. BP1 also argues that it is not the Court, but the Congress that needs to address foreign policy concerns¹⁴³. This argument assumes that there are grave foreign policy concerns, which H2, H1, and BR1 did not see as such. However, H2 offers a counterpoint, noting that “the Ivory Coast has not objected to the case, nor has the United States expressed any particular objection on foreign policy grounds.”¹⁴⁴ This contrast illustrates that while G2 raises foreign policy concerns about extending legal mechanisms to hold MNCs accountable, the U.S. has not consistently presented such objections. Hofman even explicitly states that the United States “had explicitly expressed there was no such foreign policy concern up to this point.”¹⁴⁵ BR1 states also that since U.S. corporations are concerned, no there is no evidence of interference with foreign relations: “But there is no similar evidence of interference with or disruption of foreign relations relating to ATS claims against U.S. corporations.”¹⁴⁶ BR1 goes further to state: “Likewise the U.S. Department of Labor annually cites Cote D’Ivoire for allowing the “Worst Forms of Child Labor” in cocoa harvesting.¹⁷ Respondents’ ATS claims against U.S. corporations create no additional foreign relations problems.”¹⁴⁷. In contrast, extending the ATS to Nestlé would be “fully consistent with U.S policy.”¹⁴⁸ This shows that rather than going against foreign policy concerns, the Respondents argue that in fact adhering to conventions already signed is fully in line with U.S. politics. This is additionally echoed by S1.3 (Justice Sotomayor), also emphasises that the U.S. foreign policy may suffer if they make their corporations immune to human rights violations: “that foreign nations may take (and, indeed, historically have taken) umbrage at the United States’ refusal to provide redress to their citizens

¹⁴¹ Nestlé, *Opening Brief for the Supreme Court Cases 19-416 and 19-453*, 2020, p. 46.

¹⁴² *ibid.*, p. 46.

¹⁴³ *ibid.*, p. 33.

¹⁴⁴ Hoffman In Supreme Court of the United States, *Oral Arguments Audio for Case 19-416*, 2020 p. 53

¹⁴⁵ *ibid.*, p. 54.

¹⁴⁶ Doe, *Revised Final Brief for the Supreme Court Case 19-416*, 2020, p. 10.

¹⁴⁷ *ibid.*, p. 30.

¹⁴⁸ *ibid.*, p. 32.

for international law torts committed by U. S. nationals within the United States.”¹⁴⁹ During the questioning of Mr. Gannon in G2, Justice Kagan also raised concerns about how the U.S. legal system would be perceived negatively internationally if it failed to hold corporations accountable for human rights violations like child slavery, emphasising that most countries with strong rule-of-law frameworks hold corporations liable: “Mr. Gannon, one of the amicus briefs in this case says that many of the countries around the world with the strongest rule of law systems do hold their corporations civilly liable for the kinds of actions at issue here. And the amicus brief says that's true of the United Kingdom, France, Germany, Japan, Canada”¹⁵⁰ Further, Chief Justice Roberts’ observation during oral arguments of G2 further expresses that there has been an “absence of objections from foreign governments regarding the extension of ATS liability”¹⁵¹ confirms this argument. And he suggests that the courts might be “a little less cautious”¹⁵² in this regard, meaning that extending the ATS to corporations is not as much of a concern as it is put out to be. There are three observations made from analysing the court-related documents.

1. Both A1 and A2 come to a different ruling on whether the ATS applies. A1 does not have any foreign policy concerns in it and is in favour of holding corporations accountable. S1 has raised foreign policy concerns and has ruled against MNCs being held accountable.
2. Second, proponents of applying the ATS to Nestlé think it is a foreign policy concern not to hold MNCs accountable, the argument is turned around for the proponents of the law.
3. There has not been an account of a foreign government opposing ATS litigations against US corporations.

4.1.2 Analysis of Political Interests in Amici Curiae Briefs

The Amici Curiae briefs reveal a stark divide over the application of the ATS to hold multinational corporations accountable. On one side, the U.S. Chamber of Commerce and other opponents argue

¹⁴⁹ Justice Sotomayor In United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al.*, No. 19-416, 2021, p. 9.

¹⁵⁰ Gannon In Supreme Court of the United States, *Oral Arguments Audio for Case 19-416*, 2020, p. 44.

¹⁵¹ *ibid.*, p. 32.

¹⁵² *ibid.*, p. 32.

that extending the ATS to cases involving foreign relations could lead to international friction and infringe on the constitutional separation of powers. P4.1. asserts that allowing such cases could "usurp legislative responsibilities"¹⁵³ and "shape international law and foreign relations"¹⁵⁴ in ways that are inappropriate for the judiciary. They further argue that the judiciary's involvement in these cases "raises risks of adverse foreign policy consequences"¹⁵⁵ and that limiting extraterritorial applications of the ATS helps avoid international disputes¹⁵⁶.

The United States, P4.3., as the only invited Amicus, echoed these concerns of implications for foreign relations four times in their Amicus Brief:

"These cases are likely to provoke—and, indeed, have provoked — “the very foreign-relations tensions” and plaintiffs have repeatedly sought to hold defendants liable for aiding and abetting foreign misconduct (including misconduct by foreign states), which has implications for U.S. foreign policy”¹⁵⁷

“hold defendants liable for aiding and abetting foreign misconduct (including misconduct by foreign states), which has implications for U.S. foreign policy.”¹⁵⁸

“Given the sensitive foreign-relations concerns”¹⁵⁹

“hinged on the “foreign policy implications”¹⁶⁰

Adding to this perspective, the professors of legal history (R3.3) argue that the Framers of the Constitution intended for general matters involving aliens and international law to be handled by

¹⁵³ *Chamber of Commerce of the United States of America, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, 2020, p. 2.

¹⁵⁴ *ibid.*, p. 21.

¹⁵⁵ *World Cocoa Foundation et al., Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, 2020, p. 5.

¹⁵⁶ *ibid.*, p. 21.

¹⁵⁷ *United States, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416: p. 17.

¹⁵⁸ *ibid.*, p. 17.

¹⁵⁹ *ibid.*, pp. 20-21.

¹⁶⁰ *ibid.*, p. 11.

federal government branches to ensure proper oversight over potentially volatile relations.¹⁶¹ This historical context is used to support the argument that the judiciary should not extend its reach into foreign-related cases, which could disrupt the careful balance of powers envisioned by the Framers.

On the other side, proponents of applying the ATS argue that holding corporations accountable for human rights abuses is a legitimate function of the judiciary, regardless of foreign policy concerns. The Center for Justice and Accountability (R3.1) asserts that it is "decidedly within the powers of the federal judiciary to hold American actors liable for trampling on human rights in developing nations."¹⁶² They argue that applying the ATS to corporations aligns with the United States' broader diplomatic goals concerning human rights policies. R3.1, for example, believes that holding corporations accountable is vital to ensure good foreign relations: "Despite foreign-policy considerations weighing strongly *in favour of* imposing ATS liability on domestic corporations aiding and abetting child slavery and trafficking, petitioners urge this Court to deny jurisdiction¹⁶³". Additionally, R3.1. states that "Prudential concerns with respect to foreign policy have counselled in favour of judicial caution in past cases"¹⁶⁴

Three observations can therefore be made about the data in terms of political interests:

1. All Amici except for R3.3 in favour of extending the ATS to Nestlé and in more general terms international law to domestic MNCs do not see its application impeding on foreign relations, on the contrary they see it as concerning for foreign relations if domestic MNCs do not get held accountable.
2. All Amici that are not in favour of extending the ATS to Nestlé or more broadly international law to domestic MNCs recognise foreign policy issues.

¹⁶¹ Professors of Legal History, *Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No., 2020, p 13.

¹⁶² *Center for Justice and Accountability, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, 2020, p. 8.

¹⁶³ *ibid.*, p. 16.

¹⁶⁴ *ibid.*, p. 21.

3. Amici of R3.3 do not address foreign policy concerns which implies that they do not think it is a pertinent factor to deciding about corporate accountability. This contrasts sharply with the heavy emphasis on such concerns by Amici opposing the application of the ATS to MNCs.

4.1.3 Conclusion Political Interests

The data from the court rulings, oral arguments and briefs, as well as the Amici Curiae briefs reveal a significant dichotomy in how economic and foreign policy concerns are implicated in the debate over applying the ATS to corporations like Nestlé. 3.1, 3.2, 3.4, H1, BR1, A1, S.1, and S.2 all argue that not holding American corporations accountable for human rights violations abroad could harm U.S. foreign relations more than the potential friction caused by extending ATS liability. In contrast, K1, P4.4, P4.1, P4.2, P4.3, BP1, G1, S1.1. and S1.2. all raise substantial concerns about the implications for foreign relations, arguing that such actions could undermine the authority of the executive and legislative branches, which are constitutionally responsible for managing foreign affairs. Additionally, the opponents raise concerns about the economic standing of U.S. corporations if international law was applied to MNCs. The most important observation is that through oral arguments G2 and an P4.3, The U.S. government and the Chamber of Commerce explicitly said that there will be economic and foreign policy implications, which was also found to be in S1.

This dichotomy can be effectively understood through the indeterminacy lens of Koskenniemi, which suggests that international legal arguments often reflect underlying political interests. Koskenniemi's framework highlights how legal positions are not neutral but are instead shaped by the broader political and economic interests they serve¹⁶⁵. In this context, the debate over the ATS reflects two competing visions: one side seeks to enforce state will or interest by holding corporations accountable under international law, while the other side aims to avoid this by

¹⁶⁵ Koskenniemi, 2006, p. 24.

emphasising judicial overreach and the potential for international friction¹⁶⁶. These underlying factors uncover how international law can be used to either enforce or evade accountability, depending on political interests. The extensive emphasis on foreign policy concerns by those opposing the ATS's application can be seen as a strategic use of these concerns to maintain a system of impunity for multinational corporations. By framing the debate in terms of potential international friction and the constitutional separation of powers, these parties may be attempting to shield corporations from accountability for human rights abuses, thereby preserving their interests at the expense of broader human rights considerations. This aligns with Koskenniemi's view that legal arguments often serve to mask deeper political objectives¹⁶⁷, in this case, the protection of corporate interests.

Koskenniemi would likely critique this as a clear instance where international law, as embodied by the ATS, is compromised by its apologetic nature, meaning not as objective as it is described to be, as the "law's objectivity lies in its normativity"¹⁶⁸. This sort of argument is an ascending pattern of justification because state interests are prioritised over the legal code.¹⁶⁹ The statute's application is bent to align with the interests of powerful states and corporations, thereby undermining its ability to serve as a robust mechanism for justice.

Political Interests found in the data of the Doe vs Nestlé case indicate that the United States, the Chamber of Commerce, the Supreme Court, and the other Amici have expressed profound political interest in not applying the ATS to MNCs, which is a representation of the ATS being apologetic for state interests and maintaining a system of impunity for MNCs.

4.1.4 Narrative Terry Collingsworth

Terry Collingsworth's interview supports this interpretation, particularly regarding the influence of corporate lobbying. Terry highlights the role of the U.S. Chamber of Commerce, which he

¹⁶⁶ Koskenniemi, 2006, pp. 17-23

¹⁶⁷ Koskenniemi, 2006, pp. 597-617

¹⁶⁸ Koskenniemi, 2006, 63

¹⁶⁹ Koskenniemi, 2006, 59

describes as "the leading organiser of these lies"¹⁷⁰ and notes its significant influence over political decisions. This influence has contributed to Supreme Court rulings that protect U.S. corporate interests, such as limiting ATS lawsuits to U.S. corporations and excluding foreign corporations to avoid potential foreign relations conflicts—a rationale that, as Terry notes, "is not in the constitution"¹⁷¹ and was judicially created.

Additionally, Collingsworth points out the legislative inaction that has hindered efforts to amend the ATS to restore its extraterritorial application. Despite drafting an amendment, it was "never even introduced in the Senate,"¹⁷² reflecting the broader political environment where corporate interests often prevent meaningful reforms. This inaction further demonstrates how political interests can stymie efforts to hold corporations accountable under international law, reinforcing the system of impunity that Koskeniemi's framework helps to explain.

4.2 Economic Interests Introduction

While foreign policy concerns in the previous section are more related to states, economic concerns can be related to both states and MNCs. Clapham posits that the traditional state-centric perspective of international law is outdated. It fails to recognize the influence of other powerful actors, like MNCs, on the global stage¹⁷³. Wettstein views MNCs as legitimate subjects of international law¹⁷⁴. This makes it crucial to probe if these corporations harbour underlying interests that shape how international law is applied.

Although Koskeniemi primarily discusses international law concerning state interests,¹⁷⁵ it is essential to consider corporate interests as well. Corporations are increasingly acting as primary

¹⁷⁰ Collingsworth., 2023, p 2.

¹⁷¹ Collingsworth, 2023, p 6.

¹⁷² Collingsworth, 2023: p. 5

¹⁷³ Clapham, *Human Rights Obligations of Non-State Actors*, p. 85.

¹⁷⁴ Wettstein, *Multinational Corporations and Global Justice*, 2009, p. 153-164.

¹⁷⁵ See in Koskeniemi, 2006.

agents in the international arena.¹⁷⁶ Therefore their ability to influence and potentially bend the law warrants careful analysis—and serious consideration.

4.2.1 Analysis of Economic Interest in Oral Arguments and Briefs

The issue of corporate liability, especially regarding domestic corporations facing suits under the ATS, is closely interlinked to economic interests and broader policy considerations. Advocates for limiting corporate liability under the ATS argue that allowing such suits against U.S. corporations could negatively impact the U.S. economy. According to BP1, "permitting domestic corporate ATS liability will harm our economy."¹⁷⁷ The concern is that subjecting U.S. corporations to liability under the ATS could place them at a competitive disadvantage compared to foreign corporations, which might not adhere to the same legal standards. This disparity could, as highlighted, "make[...] it easier for domestic corporations to be displaced by foreign competitors that have no incentive to respect human rights norms."¹⁷⁸

BP1 therefore directly connects competitive disadvantage with human rights norms, and therefore competitive advantage with the lack of human rights norms.

BP1 states further that such an imbalance might also deter global investment, mainly in developing economies where this investment is crucially needed. The threat of litigation under the ATS might prompt corporations to avoid certain markets completely. This perspective underscores the point by stating "thereby hindering global investment in developing economies, where it is most needed."¹⁷⁹

BP1 further gives an account of The Judiciary's role in these issues could lead to unforeseen consequences. Concerns have been raised that allowing ATS suits against domestic corporations could "*place the Judiciary in the middle of foreign-policy debates, harm our economy, enable*

¹⁷⁶ Wettstein, *Multinational Corporations and Global Justice*, 2009, p. 153-164.

¹⁷⁷ Nestlé, *Opening Brief for the Supreme Court Cases 19-416 and 19-453*, 2020, p. 48.

¹⁷⁸ *ibid.*, p. 47.

¹⁷⁹ *ibid.*, p. 46.

litigants to sidestep Jesner, and reduce the ATS's deterrent effect."¹⁸⁰ Additionally, some argue these decisions encompass complex questions of economic regulation and foreign policy that Congress should decide instead of courts. "*It should be for Congress—not the Judiciary—to decide whether to extend the ATS beyond those limits.*"¹⁸¹

Conversely, there is a compelling moral and ethical argument for holding corporations accountable when they cross from just conducting business to enabling human rights abuses. In some instances, corporate defendants are accused of establishing supply chains involving exploitative practices like child slave labour—to obtain cheaper raw materials. H2 makes this oral argument in Court: "*These corporate defendants have crossed the line between merely doing business and facilitating that system.*"¹⁸² Moreover, H2 states that "*These corporations have set up a supply chain where they know cocoa beans are being made by means of child slave labor and forced labor. They know that's where the cheap beans come from.*"¹⁸³ which gives an account of Nestlé's knowledge of child slave labour and forced labour in the supply chain. BR1 has also identified "no evidence [from the Petitioners] supporting" the claim that there was a "record of identifiable impact on foreign investment" and therefore calls such claims "Unsupported policy arguments [that] do not justify the requested immunity from Respondents' claims."¹⁸⁴

H2 even goes further and turns the argument around, namely that "*Allowing Petitioners to take advantage of child slavery actually places U.S. corporations which operate ethically and legally at a competitive disadvantage.*"¹⁸⁵ This shows the disparity between norms and economic interests.

Therefore, the debate over corporate liability under the ATS transcends legal or economic concerns and touches on fundamental ethical issues. Economic harm and competitive disadvantage are

¹⁸⁰ Nestlé, *Opening Brief for the Supreme Court Cases 19-416 and 19-453*, 2020, p. 13.

¹⁸¹ *ibid.*, p. 4.

¹⁸² Hoffman In Supreme Court of the United States, *Oral Arguments Audio for Case 19-416*, 2020, p. 61.

¹⁸³ *ibid.*, p. 60.

¹⁸⁴ Doe, *Revised Final Brief for the Supreme Court Case 19-416*, 2020, p. 32.

¹⁸⁵ *ibid.*, p. 32-33.

specifically of importance to those who do not want the ATS to be extended to MNCs, while those in favour express the need for a moral imperative to prevent and address human rights abuses.

The Supreme Court did not explicitly list an economic reason in the decision, however, it can be said implicitly, because MNCs are only interested in intergovernmental cooperation if profits are involved, and therefore an economic interest can be derived. S.1.1 states that *“Companies or individuals may be less likely to engage in intergovernmental efforts if they fear those activities will subject them to private suits”*¹⁸⁶

The following Observations can be made about the Data:

1. The main drivers of economic interests were BP1 with five explicit mentions of economic impact if the ATS were to be applied to them.
2. Only H1 referred to economic interests in the Oral arguments, stating that it would be a disadvantage for those who comply with international norms
3. Neither G1 nor K1 made any suggestions of economic impacts in their arguments.
4. A1 did not comment on any economic impact in their court decision, however, the Supreme Court mentioned the negative effect on intergovernmental efforts, which could be understood as a far-reaching economic interest, because corporations would not interact in such situations without having an economic interest.

4.2.2. Analysis of Economic Interests in Amicus Curiae Briefs

The Chamber of Commerce (4.1) implies that extending the ATS to MNCs will discourage commercial interaction in developing nations, or in the second quote investing abroad in general:

¹⁸⁶ Thomas In In United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al.*, No. 19-416, 2021, p. 9.

“[T]he State Department has encouraged commercial interaction with still-developing nations, in the hope of promoting economic development, the rule of law, and change from within the system.”¹⁸⁷

“Allowing ATS claims to proceed in cases like this one “could establish a precedent that discourages American corporations from investing abroad”¹⁸⁸

The U.S. Government (4.3.) also highlights that U.S. companies will suffer from an economic disadvantage if international law applies to MNCs:

“The Trump Administration argues that doing so could disadvantage American companies in global markets, particularly in developing economies where human rights violations are more prevalent: “Such a rule would place U.S. corporations at a distinct disadvantage, particularly ‘in developing economies’ where there may be ‘a history of alleged human-violations and a correspondingly heightened potential for liability exposure.”¹⁸⁹

Therefore, it can be said that the U.S. government explicitly expresses the will to not hold Nestlé accountable under international law because it would have political and economic consequences for the United States.

Amici P4.2 agrees with this and states that extending ATS liability could "subjects American corporations to an immediate, constant risk of claims seeking to impose massive liability"¹⁹⁰, potentially deterring investment in regions where it is most needed.

¹⁸⁷ *Chamber of Commerce of the United States of America, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, 2020, p. 26.

¹⁸⁸ *ibid.*, p. 26.

¹⁸⁹ *United States, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, 2020, p. 11.

¹⁹⁰ *The Coca-Cola Company, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, p. 10.

R3.1. comment on a similar statement the Acting Solicitor General made in a prior case and termed it “far-fetched”¹⁹¹ because “The continuing need for private investment in developing nations should not provide a license to encourage and facilitate child slavery in the supply chain.”¹⁹²

Proponents of applying the law, such as R3.4 also find that rather than the large corporations being at a disadvantage, the Small- and Medium-sized chocolate companies struggle with “[the] corporate race to the bottom”¹⁹³ because it puts those companies at a disadvantage who do comply with international law.

Some Observations can be made about the Data:

1. The U.S. Government, the U.S. Chamber of Commerce, and the Coca-Cola Company all make explicit remarks about how such an international law will not only disincentivize, but also disadvantage US MNCs
2. R3.1. rather sees the disadvantage as being with ethical corporations who comply with norms.
3. There is a juxted opposition between economic investment and norms.

4.2.3 Conclusion Economic Interests

The economic context surrounding the ATS shows a tendency to be overly deferential to the interests of states and MNCs. Opponents of extending corporate liability under the ATS, especially those supported by the U.S. Government (P4.3) and large corporations like Coca-Cola (P4.2), stress the potential economic disadvantages for U.S. companies operating in global markets. This is particularly true in regions with a history of human rights violations. These arguments reflect a

¹⁹¹ *Center for Justice and Accountability, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, 2020, p. 15.

¹⁹² *Ibid.*

¹⁹³ *Tony's Chocolonely, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, p. 10.

fundamentally apologetic stance¹⁹⁴, prioritising economic considerations over the enforcement of international human rights norms.

This apologetic approach risks making the ATS overly influenced by the interests of states and powerful corporations rather than serving its original purpose: upholding international law's normative principles¹⁹⁵. By limiting the scope of the ATS to avoid potential diplomatic or economic repercussions, there is a risk that the statute becomes mainly a tool for state and corporate interests¹⁹⁶. This shift reduces the ATS from its normative foundations to a more concrete, state-centred application (thus easily accommodating the priorities of powerful actors at the expense of broader ethical imperatives it was designed to protect).

In this context, arguments against extending ATS liability are not just reflective of the interests of a single powerful actor. They also reflect those of MNCs that have gained significant influence in the global order due to their economic power. The increasing influence of MNCs on international law raises concerns that the ATS—and international law more broadly—could become even more susceptible to apologism, where law mirrors existing power dynamics rather than upholding universal human rights.¹⁹⁷

4.2.4 Narrative Terry Collingsworth

In support of the conclusion, Terry sheds light on the financial power of corporations to evade accountability: *“We conservatively estimate that by now, they have spent \$100 million plus on lawyers—16 years of litigation with those three giant law firms. We can only guess, but they've also had top-tier public relations firms working for them. They've had lobbyists that have been working for them. I would say conservatively, they've spent at least \$150 million trying to squash our original case against them.”*¹⁹⁸ Terry adds that MNCs take considered legal steps to evade

¹⁹⁴ Koskenniemi, 2006, p. 24.

¹⁹⁵ Koskenniemi, 2006, p. 17.

¹⁹⁶ Koskenniemi, 2006, p. 24.

¹⁹⁷ Koskenniemi, 2006, p. 59.

¹⁹⁸ Collingsworth, T., ‘Personal Interview with the author’, 24 March 2023, p. 7.

accountability. One example of that being “the mass migration from owning your factories to using contractors, that was a considered legal step”¹⁹⁹ Finally, Terry supports the conclusion that the U.S. Chamber of Commerce and the U.S. Governments have significant influence in the way these laws are shaped: “*The U.S. Chamber of Commerce is the leading organizer of these lies and has the ear of the administrations, the president, and all of that.*”²⁰⁰

4.3 Corporate Accountability and International Law

By looking at corporate accountability in the data, it will be apparent how the different actors view the global order and therefore whether the MNCs are directly liable or not. For this section, both the ideas of Wettstein and Koskenniemi will be used. According to Wettstein, only seeing states as subjects of international law is outdated²⁰¹. He argues that MNCs should be primary agents of global justice, meaning direct subjects of international law.²⁰² Koskenniemi challenges the objectivity of international law and highlights the inability of international law to provide clear solution, which he calls his indeterminacy thesis²⁰³. It is crucial to analyse where the different parties stand on corporate accountability to be able to tell what implications international law itself has on the case. According to Wettstein, when political and economic processes exceed boundaries, the obligations of states become blurry, therefore MNCs should become primary agents of global justice.²⁰⁴

4.3.1 Analysis of Corporate Accountability and International Law in Court Rulings, Oral Arguments, and Briefs

A1 was clearly able to identify and define specific norms underlying the “*ATS claim are the norms against aiding and abetting slave labor, which the defendants allegedly violated by providing*

¹⁹⁹ Collingsworth, T., ‘Personal Interview with the author’, 24 March 2023, p. 4.

²⁰⁰ Collingsworth, T., ‘Personal Interview with the author’, 24 March 2023, p. 3.

²⁰¹ F. Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution*, 1st ed., Stanford University Press, 2009, p. 156.

²⁰² Wettstein, *Multinational Corporations and Global Justice*, 2009, p. 153-164.

²⁰³ Koskenniemi, 2009, 17, 59.

²⁰⁴ Wettstein, *Multinational Corporations and Global Justice*, 2009, p. 153-164.

financial and non-financial assistance to cocoa farmers in the Ivory Coast."²⁰⁵ On the other hand, K2 argues that In discussions around the ATS, it has contended that *"there is no specific, universal, and obligatory international law norm of corporate liability that fully applies to domestic corporations"*²⁰⁶. BP1 concurs that since *"there is no specific, universal, obligatory international-law norm of corporate liability,"*²⁰⁷ courts should avoid creating new causes of action under the ATS²⁰⁸ BP1. Yet, Justice Sotomayor disagrees with this viewpoint, expressing that *"there is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons"*²⁰⁹. Also, Justice Kagan asks during the oral examination of K2: *"If you could bring a suit against 10 slaveholders, when those 10 slaveholders form a corporation, why can't you bring a suit against the corporation? [...] What sense does this make? [...] 10 slaveholders decide to form a corporation specifically to remove liability from themselves, and now you're saying you can't sue the corporation?"*²¹⁰ S1.3 and Justice Kagan during oral examination in K2 therefore both include legal persons, as well as natural persons under the scope of the ATS.

One significant barrier that was apparent from the data to holding MNCs accountable is the lack of precedent law, as well as global consensus on regulating corporate behaviour under international law. Even if we assume that corporations could be held liable under this law, there is no settled agreement on how exactly to do it. This legal ambiguity allows corporations to find and navigate through loopholes, letting them escape liability for actions that—if individuals committed—would likely lead to legal consequences. Nestlé's legal team brings attention to this issue: *"The question is not whether you are exempting corporations but if they're included as a subject of the law of nations, which is what the ATS text mentions"*²¹¹. On the other hand, Justice Gorsuch believes in

²⁰⁵ United States Court of Appeals for the Ninth Circuit, *John Doe I, et al. v. Nestlé USA, Inc., et al.*, 2014, p. 14.

²⁰⁶ Nestlé, *Revised Final Brief for the Supreme Court Case 19-416*, 2020, p. 5.

²⁰⁷ Nestlé, *Opening Brief for the Supreme Court Cases 19-416 and 19-453*, 2020, p. 14.

²⁰⁸ Nestlé, *Revised Final Brief for the Supreme Court Case 19-416*, 2020, p. 5

²⁰⁹ Justice Sotomayor In United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al., No. 19-416*, 2021, p. 8.

²¹⁰ Kagan In Transcript of Oral Argument, *Nestlé USA, Inc. v. Doe (19-416)*, Supreme Court of the United States, 2020, pp. 20-21, https://www.supremecourt.gov/oral_arguments/audio/2020/19-416, (accessed 12 August 2024).

²¹¹ Katyal In Transcript of Oral Argument, *Nestlé USA, Inc. v. Doe (19-416)*, Supreme Court of the United States, 2020, pp. 23, https://www.supremecourt.gov/oral_arguments/audio/2020/19-416, (accessed 12 August 2024).

holding corporations accountable. He asserts that *"the notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding"*²¹². This shows that the legal text of the ATS is interpreted in two very different extremes. Also, the question arises: who are subjects of international law?

A different dimension of this debate focuses on the potential deterrence effects of holding corporations liable. Critics argue that imposing liability on corporations might deter individual accountability. They say the focus would shift from prosecuting wrongdoers to targeting the corporate entity itself. As Katyal noted, *"If you go after corporations and imbue them with liability, then people don't go after individual wrongdoers and, as a matter of deterrence, you might want to go after them"*²¹³. This argument suggests that holding corporations liable could inadvertently weaken efforts to hold individuals accountable for their actions. However, holding corporations liable does not automatically mean not holding individuals liable.

It also complicates the legal landscape. However, this view is contested. Some believe corporate status should not grant immunity from accountability. Justice Alito underscores this by stating, *"corporate status does not justify special immunity"*²¹⁴. The reluctance of courts to establish new causes of action under international law is a significant factor in the accountability gap. Justice Gorsuch, reflecting this judicial caution, stated, *"This Court has never—not once in 230 years—invoked the ATS to create a new cause of action"*²¹⁵. This hesitation highlights the judiciary's reluctance to broaden the scope of international law to include corporate liability, especially in the absence of specific legislative directives or established norms.

However, in situations like Nestlé USA's alleged involvement in child slavery in the Ivory Coast, actions taken on U.S. soil may sufficiently "touch and concern" the United States enough to justify corporate liability under the ATS: *"Respondents' claims that U.S. corporations aided and abetted*

²¹² Katyal In Transcript of Oral Argument, *Nestlé USA, Inc. v. Doe* (19-416), Supreme Court of the United States, 2020, pp. 12. , https://www.supremecourt.gov/oral_arguments/audio/2020/19-416, (accessed 12 August 2024).

²¹³ *ibid.*, pp. 13.

²¹⁴ Alito In United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al.*, No. 19-416, 2021, p. 1.

²¹⁵ Gorsuch In the United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al.*, No. 19-416, 2021, p. 4.

*child slavery and forced labour from U.S. territory 'touch and concern' the United States sufficiently"*²¹⁶.

4.3.2 Analysis of Corporate Accountability and International Law Amici Curiae Briefs

A central issue of corporate accountability under international law is the absence of a specific and controlling international law norm that fully applies to corporations. This gap creates significant challenges in holding MNCs accountable under statutes like the ATS. Even if such norms existed, the lack of global consensus on regulating corporate behaviour further complicates enforcement. As highlighted in P4.2: *"without global consensus on corporate liability for violations of international law, ATS suits against corporations should be dead on arrival."*²¹⁷

The absence of consensus is rooted in the traditional framework of international law, which primarily delegates the enforcement of human rights norms to individual states rather than establishing a universal mechanism for corporate accountability. Although international law allows the U.S. to recognize a cause of action against domestic corporations under the ATS, there is no consistent international agreement on how this should be applied across different jurisdictions. This challenge is underscored by the argument that *"extending international law status to corporations—such that a corporation could be held liable under the ATS—lacks a global consensus"*²¹⁸. Without a coherent legal framework, U.S. businesses might face disproportionate risks compared to foreign entities engaged in similar conduct, as noted in the concern that *"there is no indication that Congress in enacting the ATS intended to treat U.S. businesses worse than foreign businesses engaged in the same conduct"*²¹⁹.

²¹⁶ Doe, *Revised Final Brief for the Supreme Court Case 19-416*, 2020, p. 11.

²¹⁷ *The Coca-Cola Company, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416, p. 24.

²¹⁸ *ibid.*, p. 16.

²¹⁹ *United States, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I*, No. 19-416:, 2020, p. 11.

Moreover, the debate over corporate liability under the ATS reveals deeper tensions between upholding international norms and protecting national interests. Proponents of corporate accountability argue that international law should extend the scope of liability for violations of fundamental human rights norms, such as the prohibition of slavery, to corporate entities. As argued by R3.2, *"customary international law prohibits slavery and that this norm applies to juridical persons."*²²⁰ However, enforcement remains inconsistent due to states' reliance on implementing these norms. This inconsistency reflects a broader reluctance within the international community to establish a binding framework for corporate liability.

This tension is further complicated by concerns over the judiciary's role in expanding the scope of international law to include corporate liability. Critics argue that judicial activism in this area risks overstepping judiciary boundaries and encroaching on legislative and executive responsibilities. The argument that *"the political branches already have given considerable thought to the best means for advancing our nation's interest in combatting the use of the worst forms of child labor on overseas cocoa farms, and it is not through litigation"*²²¹, illustrates this perspective perfectly well. Critics contend that the judiciary lacks *"the resources nor institutional competence to second guess political branches,"*²²² emphasising judicial restraint to maintain economic stability and separation of powers.

On one hand, proponents assert that the ATS is essential for fulfilling U.S. international obligations and upholding fundamental human rights. They argue that *"American commercial exploitation of defenceless children languishing in at-risk, broken societies cries out for a remedy. Consistent with fundamental values underpinning our constitutional republic, the very First Congress provided one through ATS"*²²³. This moral and legal foundation necessitates judicial action to

²²⁰ International Law Scholars, *Amicus Brief for the Supreme Court Cases 19-416 and 19-453*, 2020, p. 28.

²²¹ *World Cocoa Foundation et al., Amicus Curiae Brief, Nestle USA, Inc. v. Doe I, No. 19-416*, 2020, p. 4.

²²² *ibid.*, p. 6.

²²³ *Center for Justice and Accountability, Amicus Curiae Brief, Nestle USA, Inc. v. Doe I, No. 19-416*, 2020, p. 4.

address such violations, ensuring American companies do not escape accountability for enabling and exploiting human rights abuses.

Ultimately, the debate over ATS and corporate liability highlights a broader struggle within international law: balancing global norm enforcement with national interest protection. While some see the judiciary as crucial in holding corporations accountable, others view it as an overreach disrupting power balance and economic stability.

4.3.3 Conclusion Corporate Accountability and International Law

What can be taken from the data is that there is an absence of a clear, universally accepted norm of corporate liability.

The accountability gap for MNCs under international law can be profoundly understood through the lens of Koskenniemi. This gap is largely due to the absence of a specific, universal norm in international law that applies unequivocally to corporate entities. Courts' reluctance to extend liability to corporations, especially under the ATS, stems from this lack of clear legal frameworks and consensus. Additionally, concerns over creating new causes of action without legislative backing exacerbate the courts' hesitance, which aligns with Koskenniemi's idea of international law struggling with its inherent indeterminacy²²⁴.

Koskenniemi's framework reveals that international law is caught in a persistent tension between normativity and concreteness²²⁵. On one hand, the law should be autonomous—not swayed by state interests (normativity)²²⁶. On the other hand, it needs to be adaptable to state behaviours (concreteness)²²⁷. This duality is evident in ongoing debates about whether the ATS should apply to corporations. The judiciary's reluctance to expand the law's scope without explicit norms

²²⁴ Koskenniemi, 2006, p. 24.

²²⁵ Koskenniemi, 2006, p. 17.

²²⁶ Koskenniemi, 2006: p. 17.

²²⁷ Koskenniemi, 2006: p. 19.

reflects a concern with maintaining this balance that Koskenniemi describes as the law's struggle to find a middle ground between being overly political and overly idealistic.

Arguments against corporate liability under the ATS, such as claims that "*there is no specific, universal, obligatory international-law norm of corporate liability*,"²²⁸ highlight the apologetic nature of international law in this context. The courts' deference to the absence of clear norms and their reluctance to create new legal standards suggest that international law is overly accommodating to existing state practices and corporate interests. This aligns with Koskenniemi's assertion that international law can become "apologetic," losing its normative strength by reflecting what states and powerful entities like MNCs already do rather than setting and enforcing meaningful standards.²²⁹

Moreover, the debate over whether corporate actions that "touch and concern" the United States are sufficient for ATS liability, as illustrated in cases like Nestlé USA's alleged involvement in child slavery, underscores this tension. Justice Sotomayor's statement that "*there is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons*,"²³⁰ reflects a normative approach seeking to uphold universal human rights standards. However, courts' hesitance to fully embrace this perspective indicates a struggle to maintain concreteness by not overstepping established boundaries, therefore staying in a state of utopia.

Koskenniemi's indeterminacy thesis argues that international law cannot offer clear and definitive solutions due to its entwinement with politics. In extending ATS liability to corporations, courts exhibit caution reflecting this indeterminacy as they grapple with the complex interplay of legal norms, state interests, and global corporate practices. The unwillingness for a global consensus on corporate liability and differing opinions within the judiciary illustrate the inherent instability and unpredictability of international law in addressing corporate accountability. This is further

²²⁸ Nestlé, *Revised Final Brief for the Supreme Court Case 19-416*, 2020, p. 5.

²²⁹ Koskenniemi, 2006: 69.

²³⁰ Justice Sotomayor In United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al., No. 19-416*, 2021, p. 8.

complicated by Wettstein's view that MNCs should be primary agents of global justice²³¹, which challenges the traditional state-centric view of international law and calls for a rethinking of the roles and responsibilities of these powerful entities in the global legal order.

4.3.4 Narrative Terry Collingsworth

Terry purports that there is no lack of global consensus, because these companies signed the Harkin-Engel-Protocol proving that they agree to those norms, but do not want to comply with them at the same time:

“We are not going to these companies and saying, 'I have some great ideas of norms that you should be responsible for.' We are instead saying to them, 'You agreed to these norms. You promised the public that you were going to comply with these specific norms. I didn't make them up. I didn't impose them on you. So we're going to force you to do what you promised.’”²³²

This example reflects the CSR vs BHR discourse in the theoretical framework, which critiques voluntary initiatives for this exact reason. Wettstein explains that the very failure of these voluntary mechanisms are a hindrance to hard law²³³.

5 Discussion

This study has set out to research why multinational corporations are still not held accountable for their human rights violations committed abroad and how international law contributes to this gap by exploring the case Doe vs Nestlé.

²³¹ Wettstein, *Multinational Corporations and Global Justice*, 2009, p. 215.

²³² Collingsworth, T., 'Personal Interview with the author', 24 March 2023, p. 3.

²³³ Wettstein, 'The history of business and human rights and its relationship with corporate social responsibility', 2020, p. 35.

The analysis found that political interests are a key factor in this gap. There is a clear division between those who claim that holding Nestlé accountable could harm U.S. foreign relations²³⁴ and those who believe failing to do so weakens the judiciary's authority on human rights²³⁵. Koskenniemi's indeterminacy thesis helps explain this conflict, suggesting international legal arguments often reflect political interests instead of neutral principles²³⁶. The ATS debate in the case *Doe vs Nestlé* highlights this issue. Some parties use concerns over international friction and separation of powers to protect corporations from liability, prioritising state interests over the statute's goals, although international law defines itself in its objectivity²³⁷.

Economic interests make enforcing international law through the ATS even more challenging. Opponents of applying the statute to MNCs argue corporate liability could disadvantage U.S. companies²³⁸, especially in regions with past human rights abuses, while others see this disadvantage with those corporations that are in line with the norms. This position emphasises economic concerns over human rights norms, which according to Koskenniemi is an apologetic approach.²³⁹ The data indicates this stance aligns with state interests, indicating the ATS is being used to meet powerful actors' needs rather than its intended principles.

Therefore, corporate accountability suffers most from this interplay. Despite the aim of international law to hold MNCs accountable, state and corporate interests overshadow such norms, making them more concrete at each application. This avoidance is worsened by fears of judicial overreach, making courts hesitant to extend liability under the ATS²⁴⁰. As Koskenniemi notes, this reluctance reflects a broader struggle within international law to balance its goals with power dynamics' realities, leading to an apologetic stance that favours the status quo²⁴¹.

²³⁴ Data: K1, P4.4, P4.1, P4.2, P4.3, BP1, G1, S1.1. and S1.2.

²³⁵ Data: 3.1, 3.2, 3.4, H1, BR1, A1, S.1 and S.2

²³⁶ Koskenniemi, 2006, p. 24.

²³⁷ Koskenniemi, 2006, p. 63

²³⁸ Data: P4.1, P4.2, P4.3, P4.4, S1.1, BP1

²³⁹ Data: H1, R3.1, R3.4

²⁴⁰ Thomas In United States Supreme Court, *Nestle USA, Inc. v. Doe I, et al.*, No. 19-416, p. 3.

²⁴¹ Koskenniemi, 2006, p. 606.

The findings show that on all three levels—Political Interests, Economic Interests, and Corporate Accountability—there is a constant tension between two poles of the ATS, as it struggles to find a balance between two extremes. On the one hand, it risks merely reflecting what countries already do. It could lose its power to set and enforce meaningful standards. This is termed as being "apologetic." On the other hand, international law might establish rules that are too idealistic. Such rules could be unrealistic and lack the power to compel countries to follow them. This is known as being "utopian." In the case of *Doe vs. Nestlé*, due to the influence of not only state will and interest, but also economic corporate will and interest, the law struggles to escape an apologetic state.

6 Conclusion

As derived from the theoretical framework, the field Business and Human Rights struggles in the quest for corporate accountability, despite its five-decade existence. The first question that was explored was therefore why MNCs are *still* not held accountable for their human rights violations abroad. Secondly, since the upcoming trend is to hold MNCs accountable through national jurisdiction but with international reach, it is important to analyse how international law plays a role in the accountability gap. These questions were explored by conducting a qualitative content analysis of three oral arguments in front of the Supreme Court, two briefs submitted by the petitioner and respondents, two court rulings, and eight amicus curiae briefs combined with an expert interview—as a supporting narrative for the findings—from the case *Doe vs. Nestlé*. This case, which is a 15-year battle of six former child slaves attempting to take on one of the largest multinationals of our time—Nestlé—ended in the U.S. Supreme Court Ruling against extending international law to Nestlé leaving people wondering what the ATS, a law that protects aliens from violations of international law, is for.

The study finds that the ATS, although intended to serve as a tool for justice, is compromised by the overwhelming clout of political and economic interests by the U.S Government and the U.S Chamber of Commerce, as well as third parties including MNCs interested. This vulnerability

shines a light on a significant power imbalance. MNCs and states can bend the law to their favour, making it—as Koskenniemi puts it—apologetic. Hence, international law, as it stands now, struggles to hold corporations accountable for human rights abuses, creating an accountability gap that weakens the very principles it was meant to uphold.

7 Future Research

The potential shift in power in the international legal order raises critical questions about international law's future: as MNCs grow in power and influence, will the law increasingly serve their interests? Will it further entrench an apologetic stance? Or can it retain its normative aspirations? The challenge lies in ensuring that international law, including the ATS, does not become overly concrete in serving state and corporate interests but continues to strive for protecting universal principles it was originally intended for.

Moving forward, the challenge will be identifying ways to bolster international law. It must effectively tackle these imbalances to ensure the ATS, along with other similar statutes, accomplishes its intended purpose within the global legal framework. Further, the growing power of MNCs must be acknowledged in modern legal frameworks. This requires a shift from a solely state-focused view to one that includes these powerful corporate entities. The implications of their actions on the global legal landscape are significant. Understanding and examining their roles and power dynamics within the legal system is not just beneficial—it is necessary for a holistic approach to international law.

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