

## **THE WORST FORMS OF CHILD LABOUR IN COCOA PLANTATIONS IN CÔTE D'IVOIRE & DIRECT OBLIGATIONS OF TRANSNATIONAL CORPORATIONS**

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### **1. Introduction**

The main ingredient of chocolate has a bitter taste: the exploitation of children during the harvesting season in some cocoa plantations in Côte d'Ivoire. Media attention on the issue and the indirect link with major transnational corporations (TNCs) producing and selling chocolate all over the world, led in 2001 to the adoption of the Hankin-Engel Protocol,<sup>2</sup> a voluntary plan of action signed by two of the largest groups in the chocolate and cocoa industry (namely the World Cocoa Foundation and the Chocolate Manufacture Association) and supported by US Senator Tom Harkin and Congressman Eliot Engel. The Protocol was aimed, on one hand, at establishing the International Cocoa Initiative and, on the other, at implementing a voluntary certification process for companies that would have assured that cocoa production and harvesting were conducted without the use of any of the worst forms of child labour (WFCL).<sup>3</sup>

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<sup>2</sup> Chocolate Manufacturers Association, 'Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour' (September 19, 2001). Available at: [http://www.childlabor-payson.org/meetings/Ghana Consultative Meeting 2010/Documents3.html](http://www.childlabor-payson.org/meetings/Ghana%20Consultative%20Meeting%202010/Documents3.html) (last accessed 3 May 2013).

<sup>3</sup> This Chapter makes reference to the WFCL as defined by Article 3 a) and d) of the ILO Convention No.182 as being: '(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; ... (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children'. See: 38 ILM 1207.

Unfortunately, eleven years after its adoption, the effectiveness of the Hankin-Engel Protocol is very much questioned and efforts aimed at driving on different routes failed too. What, then, can be done? This Chapter aims to answer this question. First of all, it examines the WFCL in cocoa plantations in Côte D'Ivoire and the recent failed attempts at fighting against them. It then considers that a combined reliance, on one hand, on Côte D'Ivoire's obligations under international slavery, human rights, labour and trafficking law and, on the other, on direct obligations for TNCs, should contribute to the elimination of the problem. In this respect, it is founded on the Research Network Programme (RNP), Globalisation and Transnational Human Rights Obligations' (GLOTHRO) basic tenet that human rights risk being marginalised in a globalised world in which states are, at times, unable to guarantee their fulfillment while, instead, other actors including, in particular, TNCs – as is the case in cocoa production – have the power, resources and capability to do so.<sup>4</sup>

Therefore, the situation of TNCs is compared to those of *sui generis* entities enjoying a limited subjectivity under international law. Consequently, a proposal is made to consider TNCs special actors, whose limited international subjectivity would be instrumental in guaranteeing that they might accept direct obligations as third parties to a cocoa treaty, so as to guarantee the certification of their production chain as being free from the WFCL and fund community development initiatives and the rehabilitation of exploited children.

## **2. The Dark Side of Chocolate: Child Trafficking and the Worst Forms of Child Labour in Cocoa Plantations in Côte D'Ivoire**

The relevance of the phenomenon of child labour exploitation in plantations and its spread across the world is emphasised by the International Labour Organization (ILO), which believes that 132 million children under the age of 15 are working in

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<sup>4</sup> For more information on the GLOTHRO project, see: <http://www.glothro.org/> (last accessed 10 December 2013).

agriculture worldwide, thus constituting approximately 60% of the global estimate of all instances of child labour.<sup>5</sup> Moreover, in terms of health and safety, the ILO considers agriculture, together with mining and construction, to be the most dangerous sector for children.<sup>6</sup> This is mainly determined by the fact that minors are, for instance, using farm machines or cutting tools, which might be extremely dangerous for them, and are frequently exposed to fertilisers and/or pesticides, etc.<sup>7</sup>

This global picture represents well the specific situation of children exploited in cocoa plantations in Côte D'Ivoire. The country is the world's largest producer and exporter of cocoa and, according to different sources, it accounts for between 35% and 40% of the world's supply.<sup>8</sup> Moreover, it is believed that there are between 600,000 and 800,000 small, family-held farms that produce more than 1.4m tons of cocoa per year; nearly two times the production of neighboring Ghana, which is the second world's larger producer and exporter.<sup>9</sup>

The high price paid for cocoa on the global market, as well as Ivorian ties with France and foreign investment in the country, made Côte d'Ivoire one of the most prosperous countries in West Africa up until the 1990s.<sup>10</sup> However, cocoa prices

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<sup>5</sup> International Labour Organization (ILO), *Accelerating Action Against Child Labour: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2010), 56. Child labour is defined by the ILO as: 'work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development. It refers to work that: is mentally, physically, socially or morally dangerous and harmful to children; and interferes with their schooling by: depriving them of the opportunity to attend school; obliging them to leave school prematurely; or requiring them to attempt to combine school attendance with excessively long and heavy work'. See: <http://www.ilo.org/ipecc/facts/lang--en/index.htm> (last accessed 10 December 2013).

<sup>6</sup> International Labour Organization, *Tackling Hazardous Child Labour in Agriculture: Guidance on Policy and Practice* (Geneva: ILO, 2006), 2. Available at: <http://www.ilo.org/ipeccinfo/product/viewProduct.do?productId=2799> (last accessed 16 October 2013).

<sup>7</sup> *Ibid*, 15.

<sup>8</sup> Susannah Palk, 'Bittersweet Times for Ivory Coast's Cocoa Industry', *CNN* (Atlanta: September 30, 2010). Available at: <http://edition.cnn.com/2010/BUSINESS/09/30/ivory.coast.cocoa/index.html> (last accessed 10 May 2013); Paul Robson, *Ending Child Trafficking in West Africa: Lessons from the Ivorian cocoa sector* (London: Anti-Slavery International, 2010), 10.

<sup>9</sup> Paul Robson, *ibid*, 10.

<sup>10</sup> Central Intelligence Agency (CIA), 'The World Factbook: Côte D'Ivoire'. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/iv.html> (last accessed 7 May 2013).

started falling in the mid-1980s and political turmoil since the military coup of 1999 seriously damaged the economy (which is fundamentally based on agricultural production) and slowed foreign investments.<sup>11</sup> For all these reasons, today Côte d'Ivoire only ranks 171th out of 187 countries on the United Nations Development Programme (UNDP) 2014 Human Development Index. It has a life expectancy at birth of 50.72 years and a gross national income (GNI) per capita based on purchasing power parity (PPP) of \$2,774,27 (USD).<sup>12</sup>

The issue of the exploitation of children in cocoa plantations got international exposure at the end of the 1990s; a 2000 report entitled 'Slavery: A Global Investigation', produced by True Vision of London and shot by film-makers Brian Edwards and Kate Blewett, emphasised the inhumane conditions in which children and adolescent boys – at times also trafficked from neighbouring countries – lived while harvesting cocoa in Ivorian plantations.<sup>13</sup> While estimates must always be used cautiously, UNICEF Côte d'Ivoire makes reference to 200,000 children exploited in cocoa plantations and, in many cases, also transnationally or internally trafficked from neighboring Mali, Burkina Faso, Togo or from central and northern parts of Côte D'Ivoire.<sup>14</sup> These estimates are backed up by Anti-Slavery International's recent report based on the accounts of 61 young people from Mali and 72 from Burkina Faso who have worked in the Ivorian cocoa plantations, which claims that trafficking remains a significant issue.<sup>15</sup>

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<sup>11</sup> Paul Robson, *ibid*, 11.

<sup>12</sup> UNDP, 'Human Development Report 2014' (New York: UNDP, 2014), 162. Available at: <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf> (last accessed 3 November 2014).

<sup>13</sup> The documentary is available on the website of Free the Slaves at: <https://www.freetheslaves.net/SSLPage.aspx?pid=320> (last accessed 12 May 2013).

<sup>14</sup> UNICEF Côte D'Ivoire, 'Fighting Child Trafficking'. Available at: [http://www.unicef.org/wcaro/WCARO\\_CI\\_Prog\\_En\\_ChildTrafficking.pdf](http://www.unicef.org/wcaro/WCARO_CI_Prog_En_ChildTrafficking.pdf) (last accessed 7 May 2013).

<sup>15</sup> Paul Robson, *Op.cit*, 14.

### **3. The Harkin-Engel Protocol and the Recourse to ATCA: Much Ado About Nothing?**

At the end of the 1990s, the wide denunciation of the exploitation of children and young boys in cocoa plantations led to two major initiatives. Firstly, in September 2000 the Government of Côte d'Ivoire and the Government of Mali signed a *Cooperation Agreement on Combating Transborder Trafficking in Children* to fight against trafficking in children across their common border.<sup>16</sup> Secondly, two of the largest groups in the chocolate and cocoa industry, namely the World Cocoa Foundation and the Chocolate Manufacture Association, concluded with the support of US Senator Tom Harkin and Congressman Eliot Engel a voluntary plan of action - the so-called *Harkin-Engel Protocol* - aimed at eliminating the WFCL from cocoa plantations.<sup>17</sup>

However, the main reason why the chocolate and cocoa industry voluntarily promoted the adoption of the Harkin-Engel Protocol was most probably to avoid the passing of legislation by the US Congress. In July 2001, the House of Representatives had in fact passed bill H.Amdt.142, which would have provided the US Food and Drugs Administration with \$250,000 for the development of slave-free labelling requirements for cocoa production.<sup>18</sup> Since it seemed certain that the bill would have passed at the Senate as well, the chocolate and cocoa industry lobbied to stop the process - which would have resulted in the adoption of binding rules<sup>19</sup> - and instead proposed the conclusion of a voluntary plan of action, the so-called *Harkin-*

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<sup>16</sup> UNICEF Innocenti Research Centre, 'Child Trafficking in West Africa: Policy Responses' (Florence: UNICEF, 2002), 11. Available at <http://www.unicef-irc.org/publications/pdf/insight7.pdf> (last accessed 3 November 2014). This bilateral treaty was followed by a Multilateral Cooperation Agreement to Combat the Trafficking of Children in West Africa signed on 27 July 2005 by Benin, Burkina Faso, Ivory Coast, Guinea, Liberia, Mali, Niger, Nigeria and Togo and a Regional Multilateral Cooperation Agreement to Combat the Trafficking of Children in West and Central Africa that entered into force the subsequent year. See: UNODC, 'Toolkit to Combat Trafficking in Persons' (Vienna: UNODC, 2008), 161-162. Available at [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375\\_Ebook%5B1%5D.pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf) (last accessed 3 November 2014).

<sup>17</sup> Chocolate Manufacturers Association, *Op.cit.*

<sup>18</sup> Tiaji Salaam-Blyther, Nicolas Cook, and Charles Hanrahan, 'Child Labor in West African Cocoa Production: Issues and U.S. Policy' (Washington D.C.: Congressional Research Service, 2005), 13.

<sup>19</sup> Sumana Chatterjee, 'Chocolate Firms Launch Fight Against "Slave Free" Labels', *Philadelphia Inquirer* (1 August 2001).

*Engel Protocol*. The latter would have, in practice, resulted in more freedom of action for the chocolate and cocoa industry, while leading the long-term process towards the eradication of the WFCL from cocoa plantations.

The goal of the *Harkin-Engel Protocol* had to be reached through a series of steps, including the acknowledgment by all the relevant stakeholders of the existence of the WFCL and the establishment of a foundation, namely the International Cocoa Initiative (ICI).<sup>20</sup> The ICI was created in 2002 as a partnership among all the relevant stakeholders, including NGOs, trade unions, cocoa producers and chocolate corporations. Its aim is to implement field projects, to identify best practices in the fight against the WFCL, and to develop “standards of public certification” on cocoa production and processing, attesting that they are free from the WFCL.<sup>21</sup> The deadline for the certification system to be put in place had initially been set as 1 July 2005.<sup>22</sup> Unfortunately, this deadline was not respected and, in a joint statement, Senator Harkin and Congressman Engel indicated that a system of certification covering 50% of the cocoa farms in Côte d’Ivoire and Ghana had to be developed by 1 July 2008.<sup>23</sup> This new deadline was not respected either, as by that date the data collection on approximately 50% of the cocoa farms had been completed, but the same could not be said for the independent certification system. A final deadline was set at the end of 2010 for the development of a system of certification covering all the cocoa farms in Côte d’Ivoire and Ghana.<sup>24</sup> However, the

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<sup>20</sup> Tulane University - Payson Centre for International Development and Technology Transfer, ‘Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labour in Côte D’Ivoire and Ghana’ (New Orleans: Tulane University, 2011), 32. Available at: <http://www.childlabor-payson.org/Tulane%20Final%20Report.pdf> (last accessed 15 May 2013).

<sup>21</sup> See the International Cocoa Initiative’s website at: <http://www.cocoainitiative.org/> (last accessed 7 May 2013).

<sup>22</sup> Tulane University, *Op.cit.* 8.

<sup>23</sup> Tom Harkin and Eliot Engel, ‘Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate/Cocoa Industry on Efforts to Address the Worst Forms of Child Labor in Cocoa Growing’ (July 1, 2005). Available at: [http://www.childlabor-payson.org/meetings/Ghana\\_Consultative\\_Meeting\\_2010/Documents5.html](http://www.childlabor-payson.org/meetings/Ghana_Consultative_Meeting_2010/Documents5.html) (last accessed 4 May 2013).

<sup>24</sup> Tom Harkin and Eliot Engel, ‘Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate and Cocoa Industry on the Implementation of the Harkin-Engel Protocol’ (June 16, 2008). Available at: [http://www.childlabor-payson.org/meetings/Ghana\\_Consultative\\_Meeting\\_2010/Documents4.html](http://www.childlabor-payson.org/meetings/Ghana_Consultative_Meeting_2010/Documents4.html) (last accessed 3 May 2013).

same year a *Framework of Action to Support Implementation of the Harkin-Engel Protocol* was adopted, resulting in a dilution of the final aim of eliminating the WFCL from cocoa plantations and in a postponement of the deadline to 2020.<sup>25</sup> The Framework instead proposes to reduce the WFCL in both Ghana and Côte d'Ivoire by 70% in aggregate by that deadline.<sup>26</sup> It remains unclear whether the efforts would equally target cocoa plantations in both countries or, as it is feared, they would be mainly directed at Ghanaian ones, since the country has not suffered from the civil war and general instability that has instead affected neighbouring Côte d'Ivoire.

In October 2006, Tulane University was commissioned by the US Department of Labour to impartially assess the efforts of the relevant stakeholders in implementing the *Harkin-Engel Protocol* and to scientifically research the WFCL in cocoa plantations in Côte d'Ivoire and Ghana. The research the institution conducted confirmed the existence of a child labour problem in the cocoa sector in both countries.<sup>27</sup> As regards, in particular, Côte d'Ivoire, a projected total of 817,921 children worked in Ivorian cocoa-related activities in the twelve months before the 2008-2009 survey conducted in the country. The survey also showed that children are sometimes exposed to the WFCL, that hazardous work was frequently reported and that there were some instances of child trafficking and forced labour.<sup>28</sup> This survey led the researchers of Tulane University to conclude that:

Industry's and other funding of ICI and of other initiatives has not been sufficient in light of its commitment to eliminate WFCL in the cocoa sectors in [...] Côte

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<sup>25</sup> The Framework of Action is available at: [http://www.cocoainitiative.org/images/stories/Harkin-Engel/Cocoa Framework of Action 9-12-10 Final.pdf](http://www.cocoainitiative.org/images/stories/Harkin-Engel/Cocoa%20Framework%20of%20Action%209-12-10%20Final.pdf) (last accessed 16 October 2013).

<sup>26</sup> The main purpose of the Framework of Action is as follows: 'By 2020, the worst forms of child labor as defined by ILO Convention 182 in the cocoa sectors of Côte d'Ivoire and Ghana will be reduced by 70 percent in aggregate through joint efforts by key stakeholders to provide and support remediation services for children removed from the worst forms of child labor, including education and vocational training, protective measures to address issues of occupational safety and health related to cocoa production, and livelihood services for the households of children in cocoa growing communities; the establishment and implementation of a credible and transparent sector-wide monitoring system across cocoa growing regions in the two countries; and the promotion of respect for core labor standards'.

<sup>27</sup> Tulane University, *Op.cit.* 13.

<sup>28</sup> *Ibid.*, 7.

d'Ivoire as per Article 1 of the [Harkin-Engel] Protocol. In addition other important provisions of the Protocol have not yet been realized.<sup>29</sup>

The insufficient status of implementation of the Harkin-Engel Protocol according to Tulane University is summarised in the following table.<sup>30</sup>

<b>Article</b>	<b>Harkin-Engel Protocol Deliverables</b>	<b>Status</b>
1	<ul style="list-style-type: none"> <li>a. Commit significant resources</li> <li>b. Acknowledge problem</li> </ul>	<ul style="list-style-type: none"> <li>a. Insufficient</li> <li>b. Yes</li> </ul>
2	Form Multi-Sectoral Advisory Group to: <ul style="list-style-type: none"> <li>a. Research labour practices</li> <li>b. Formulate appropriate remedies</li> </ul>	<ul style="list-style-type: none"> <li>a. Yes, in part</li> <li>b. No</li> </ul>
3	Issue Joint Statement recognising the need to: <ul style="list-style-type: none"> <li>a. End WFCL, and</li> <li>b. Identify positive developmental alternatives for children removed from the WFCL in the cocoa sector</li> </ul>	<ul style="list-style-type: none"> <li>a. Yes</li> <li>b. No</li> </ul>
4	Sign binding Memorandum of Cooperation (MOC) among major stakeholders on: <ul style="list-style-type: none"> <li>a. Research</li> <li>b. Information exchange</li> <li>c. Action to enforce the internationally-recognised and mutually agreed standards</li> </ul>	<ul style="list-style-type: none"> <li>a. Yes</li> <li>b. Yes</li> <li>c. No</li> <li>d. No</li> </ul>

<sup>29</sup> *Ibid*, 8.

<sup>30</sup> *Ibid*, 9.



	d. Independent means of monitoring and public reporting on compliance with those standards	
5	Establish joint foundation to execute: a. Field projects b. Clearing house on best practices to eliminate the WFCL	a. Yes b. No
6	Develop and implement credible, mutually-acceptable, voluntary, industry-wide standards of public certification	No

Ten years after the adoption of the Harkin-Engel Protocol, the cocoa and chocolate industry has failed to demonstrate that the voluntary plan produced any significant results in terms of the elimination of the WFCL. While the civil war in Côte d'Ivoire offers a partial justification, since it rendered more difficult the task of completing the mapping and certification process, the failure of the plan is evident.

For this reason, on 14 July 2005, in an effort to settle the issue of the exploitation of minors in cocoa plantations in Côte d'Ivoire, Global Exchange (an international human rights association) filed a complaint based on the 1789 US Alien Tort Claim Act (ATCA or ATS), on behalf of three Malian children allegedly subjected to forced labour in cocoa plantations.<sup>31</sup> The complaint was filed against three important chocolate multinational corporations: Nestlé, Cargill and Archer Daniels Midland.<sup>32</sup> The plaintiffs claimed that they had been trafficked from Mali and that they had to work in a cocoa plantation for 12-14 hours per day with no pay and little food, were obliged to sleep in groups in locked rooms and were also subjected

<sup>31</sup> Michael Koebele, *Corporate Responsibility Under the Alien Tort Statute: Enforcement of International Law Through US Torts Law* (Leiden: Martinus Nijhoff Publishers, 2009), 134–136.

<sup>32</sup> *Doe v. Nestlé*, 748 F. Supp.2d 1057, 1144 (C.D. California, 2010).

to beatings. However, on 8 September 2010, the District Court of California concluded that:

...corporations as such may not presently be sued under Sosa and the Alien Tort Statute. There is no support in the relevant sources of international law for the proposition that corporations are legally responsible for international law violations. International law is silent on this question: no relevant treaties, international practice, or international caselaw [*sic*] provide for corporate liability. Instead, all of the available international law materials apply only to states or natural persons. Sosa's minimum standards of definiteness and consensus have not been satisfied.<sup>33</sup>

Therefore, recourse to ATCA did not guarantee compensation for the three Malian children who had allegedly been trafficked and exploited in cocoa plantations. However, it should also be noted that the case was submitted on the basis of violations of general human rights norms and the prohibition of forced labour; the case of the three children could have instead been considered as a case of the WFCL, which might meet the Sosa standard.<sup>34</sup> Moreover, as clarified by van Ho: 'The decisions of the courts of appeals are binding only on those district courts within their circuit and not on one another. This sometimes results in "circuit splits", where the interpretation and application of the ATS varies between regions'.<sup>35</sup> Finally, the 9<sup>th</sup> Circuit Court stated in *Sarei v. Rio Tinto* that ATCA does not have to be interpreted in a restrictive way, so that it does not exclude corporate liability;<sup>36</sup> however, on the other hand, in *Kiobel v. Royal Dutch Petroleum Co.*, the US Supreme Court recently concluded that the Statute does not have extraterritorial effects, thus making it more difficult to submit claims under it, as they should also be effectively connected to US territory, so as not to be considered as having an extraterritorial nature.<sup>37</sup>

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<sup>33</sup> *Ibid*, 61. The reference to Sosa is related to the 2004 Supreme Court's judgment in *Sosa v. Alvarez-Machain*, in which the specific requirements for bringing a complaint under ATCA were clarified.

<sup>34</sup> Michael Koebele, *Op.cit*, 139.

<sup>35</sup> Tara van Ho, 'Transnational Civil and Criminal Litigation', in Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (London: Routledge, 2014), 58.

<sup>36</sup> *Sarei v. Rio Tinto*, 671 F. 3d 736 (9th Circuit 2011) 19341 § 8.

<sup>37</sup> Tara van Ho, *Op.cit*, 62.

Therefore, while the ATCA *door* remains partially open, the need to explore more comprehensive approaches and paths for the purpose of eliminating child trafficking and the WFCL from cocoa plantations appears urgent and unavoidable.

#### **4. The *Shame and Blame Approach* and Chocolate Companies' Recent Actions**

While previous attempts aimed at solving the problem of child labour exploitation have failed and it might seem that there is no way out, recently, three major chocolate producers decided to become directly involved in the issue. The first to openly announce its plan was Nestlé, which in 2011 commissioned research on its cocoa supply chain to an independent organisation, the Fair Labour Association (FLA), for the purpose of verifying whether it was child labour free. The investigation demonstrated that there were various violations and that Nestlé's supply chain was not child labour-free; therefore, an innovative plan of action was put in place for the purpose of eliminating the problem.<sup>38</sup> Hershey, one of the major US producers, quickly followed Nestlé and at the beginning of 2012 announced a pledge of \$10 million (USD) over the next 5 years to improve living conditions in cocoa plantations and fight against child labour exploitation.<sup>39</sup> Finally, in April 2012 Ferrero announced the eradication of human trafficking, the WFCL and adult forced labour from cocoa farms it had commercial agreements with, to be obtained through an independent and credible third party verification of the standards in cocoa plantations.<sup>40</sup>

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<sup>38</sup> CNN, 'Nestlé Advances Child labor Battle Plan', *CNN Freedom Project* (June 29, 2012). Available at: <http://thecnnfreedomproject.blogs.cnn.com/category/chocolates-child-slaves/> (last accessed 13 May 2013).

<sup>39</sup> David Ariosto, 'Hershey pledges \$10 million to improve West African cocoa farming, fight child labor', *CNN Freedom Project* (January 31, 2012). Available at: <http://thecnnfreedomproject.blogs.cnn.com/2012/01/31/hershey-pledges-10-million-to-improve-west-african-cocoa-farming-fight-child-labor/> (last accessed 10 May 2013).

<sup>40</sup> CNN, 'Ferrero Sets date to end cocoa slavery', *CNN Freedom Project* (Atlanta: April 20, 2012). Available at: <http://thecnnfreedomproject.blogs.cnn.com/2012/04/20/ferrero-sets-date-to-end-cocoa-slavery/> (last accessed 10 May 2013).

These chocolate companies announced their decisions shortly after a series of events, including the release of the last report by Tulane University, the final conclusions reached by the District Court of California, and the airing – on 20 January 2012 – of the documentary ‘Chocolate’s Child Slaves’, directed by CNN Reporter David McKenzie.<sup>41</sup> CNN also dedicated a specific page to the topic on the website of its Freedom Project,<sup>42</sup> devoted to eradicating contemporary forms of slavery worldwide and launched a *challenge*, inviting readers to create their dish using fair trade chocolate.<sup>43</sup> Other actors, including, in particular, civil society and consumers’ organisations, have also recently raised awareness on the plight of children exploited in cocoa plantations, and are promoting specific campaigns, such as, for instance, the *10 Campaign*,<sup>44</sup> and the *Raise the Bar*<sup>45</sup> campaign. The European Parliament also showed interest in the issue and in 2012 it adopted a Resolution on child labour in the cocoa sector.<sup>46</sup>

All these initiatives promoted by different actors point to the fact that the time *is* right for consistent action aimed at eliminating the WFCL from cocoa plantations. The need for a coherent plan and a co-ordinated approach is clear, so as to avoid a waste of time and of economic and human resources, as well as overlapping activities and scarce results. In this framework, and taking into consideration the failure of the Harkin-Engel Protocol, the question is: what role can international law play in pushing towards a more responsible production chain? The answer is, according to this author, twofold: it implies, on one hand, reliance on the

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<sup>41</sup> For more information, see: <http://thecnnfreedomproject.blogs.cnn.com/2012/01/19/child-slavery-and-chocolate-all-too-easy-to-find/> (last accessed 12 May 2013).

<sup>42</sup> See: <http://thecnnfreedomproject.blogs.cnn.com/category/chocolates-child-slaves/> (last accessed 5 May 2013).

<sup>43</sup> See: <http://thecnnfreedomproject.blogs.cnn.com/> (last accessed 5 May 2013).

<sup>44</sup> For more information, see: <http://www.10campaign.com/> (last accessed 7 May 2013).

<sup>45</sup> This campaign is specifically directed at Hershey, which is accused of having ‘trailed behind its competitors when it comes to ensuring its chocolate products are made without the use of forced and child labor’ and is promoted by 41 consumer owned grocer cooperatives and natural food retailers. For more information, see: <http://www.raisethebarhershey.org/> (last accessed 6 May 2013).

<sup>46</sup> European Parliament, ‘Resolution of 14 March 2012 on child labour in cocoa sector’. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0080&language=IT&ring=B7-2012-0126> (last accessed 13 May 2013).

existing standards of international law that determine relevant obligations for Côte d'Ivoire on an international plane, and on the other, the development of a new instrument of international law setting a specific roadmap for the final result of the elimination of the WFCL from cocoa plantations to be achieved as soon as possible.

## **5. Côte d'Ivoire's International Obligations Under International Slavery, Human Rights, Labour and Trafficking Law**

Côte d'Ivoire has ratified many international treaties that, if properly respected and implemented, might contribute to alleviate the plight of children exploited in cocoa plantations. In the field of international slavery law, Côte d'Ivoire ratified both the 1926 Slavery Convention<sup>47</sup> and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,<sup>48</sup> in 1961 and 1970 respectively. As regards international human rights law, Côte d'Ivoire ratified the key instruments in the field, including the Convention on the Rights of the Child in 1991,<sup>49</sup> and its Optional Protocol on the Sale of Children, Child prostitution and Child Pornography<sup>50</sup> in 2011. Finally, Côte d'Ivoire also ratified some important conventions in the field of international labour law promoted by the International Labour Organization (ILO). Among them, six deserve to be specifically mentioned: ILO Convention No.29 on Forced Labour in 1960;<sup>51</sup> ILO Convention No.105 on the Abolition of Forced Labour in 1961;<sup>52</sup> ILO Convention No.138 on the Minimum Age for Admission to Employment in 2003;<sup>53</sup> ILO Convention No.182 on the Worst Forms of Child Labour in 2003; ILO Convention No.110 on Plantation Workers in 1960; and ILO Convention No.129 on Labour Inspections in Agriculture in 1987.

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<sup>47</sup> 60 LNTS 253.

<sup>48</sup> 266 UNTS 3.

<sup>49</sup> 1577 UNTS 3.

<sup>50</sup> 39 ILM 1285.

<sup>51</sup> 39 UNTS 55.

<sup>52</sup> 320 UNTS 291.

<sup>53</sup> 1015 UNTS 297. Upon ratification of this Convention, Côte d'Ivoire indicated 14 years of age as the minimum age for admission at work.

In 2012, Côte d'Ivoire also ratified the UN Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, in Particular Women and Children.<sup>54</sup> The UN Trafficking Protocol contains obligations for States Parties in four broad fields: prosecution, protection, partnership and prevention of human trafficking, including child trafficking. While the UN Trafficking Protocol has been criticised for the lack of strong measures aimed at protecting trafficking victims,<sup>55</sup> it is nonetheless believed that the ratification and implementation of this treaty by Côte d'Ivoire is a fundamental first step in the eradication of child trafficking and the exploitation of minors in cocoa plantations.

It is worth recalling that Côte d'Ivoire has an obligation to guarantee the respect of the measures included in all these treaties. Failure to do so determines the state's international responsibility for a wrongful act.<sup>56</sup> In this framework, the Ivorian efforts aimed at adopting a modern and sound law based on international law standards in the fields of child trafficking, the WFCL and the sale of children, namely Law 2010-272 of September 2010 on the Interdiction of Trafficking in Persons and the Worst Forms of Child Labour,<sup>57</sup> is to be applauded.<sup>58</sup>

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<sup>54</sup> 40 ILM 335 (*hereinafter* the UN Trafficking Protocol).

<sup>55</sup> See: UNHCHR, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women* (2000), UN Doc. E/CN.4/2000/68, 7; Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford: Oxford University Press, 2008), 63.

<sup>56</sup> International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts' (2001).

<sup>57</sup> Loi n. 2010-272 du Septembre 2010 Portant Interdiction de la Traite et des Pires Formes de Travail des Enfants. Available at : <http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/85243/95376/F693526342/CIV-85243.pdf> (last accessed 14 May 2013).

<sup>58</sup> In its 2012 Trafficking in Persons Report, the US Department of State recognised this effort and moved the country from Tier 2 Watch List to Tier 2. The country was placed on the Tier 2 Watch List in 2010 and – because of the precarious situation – it was recognised as a special case and it was not included in any tier in 2011. See: United States Department of State, 'Trafficking in Persons Report' (2012), 131. Available at: <http://www.state.gov/documents/organization/192594.pdf> (last accessed 12 May 2013); United States Department of State, 'Trafficking in Persons Report' (2011), 392-393. Available at: <http://www.state.gov/documents/organization/164453.pdf> (last accessed 12 May 2013).

Finally, reference can also be made to the 2011 *Guiding Principles on Business and Human Rights* promoted by the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights, Professor John Ruggie.<sup>59</sup> Notwithstanding the fact that they belong to the realm of *soft law* standards, the Guiding Principles are *inter alia* re-affirming states' obligations in the field of international human rights law with a focus on business enterprises. As clarified by the Commentary to the first principle, namely the states' duty to protect, such an obligation requires that they 'take appropriate steps to prevent, investigate, punish and redress private actors' abuse [and] they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication'.<sup>60</sup>

## **6. Ending the Worst Forms of Child Labour in Cocoa Plantations: Direct Obligations for TNCs?**

Since the Peace of Westphalia (1648), the world order has been founded on sovereign states as fundamental actors in the system of international relations. On the other hand, the possibility of identifying direct obligations for TNCs under international law is still in a phase of embryonic development and many international law experts do not consider them as subjects of international law.<sup>61</sup>

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<sup>59</sup> UN Doc. A/HRC/17/31 of 21 March 2011. Available at: <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (last accessed 13 May 2013). The Guiding Principles are based on the *Protect, Respect and Remedy Framework*, as a way of better managing the human rights challenges existing in this sector. The Framework is based on three key principles: the states' duty to protect individuals against human rights violations within their jurisdiction; the corporate responsibility to respect human rights; and the need to guarantee a greater access to an effective judicial and non-judicial state or non-state remedy.

<sup>60</sup> *Ibid*, *Commentary to Guiding Principle No.1*.

<sup>61</sup> Antonio Cassese and Malcom Evans do not take them into consideration among the subjects of international law and Jack Donnelly even claims that imposing direct human rights obligations on TNCs would be wrong. François Rigaux states unequivocally: '[T]ransnational corporations are neither subjects nor quasi-subjects of international law. [...] Transnational corporations – whether public or private – are legal agents subject to the jurisdiction of states, and are affected by the rules of international law only when these are mediated by a state legal order'. On the other hand, however, there are also a few more progressive scholars. For instance, Manuel Vásquez claims that: 'current international law does not *directly* impose a significant number of obligations on private corporations' and Jan Klabbers generally recognises companies as subjects "in that their investments tend to be protected under international law". See: A. Cassese, *International Law* (Oxford: Oxford

However, as clarified by Gatto, ‘the modalities of acquiring legal personality, the extent, scope and the precise consequences of acquiring it are not specifically defined’.<sup>62</sup> The tendency tend to be instead to guarantee at least a partial recognition whenever a certain entity already enjoys either rights or obligations under international law.<sup>63</sup>

TNCs are today fundamental actors in the system of global governance and under-estimating their power and resources would be a great mistake, if not a lost chance. As recognised by Karns and Mingst, multinational corporations control ‘resources far greater than those of many states [and] [t]he world’s largest TNCs account for four-fifths of world industrial output’.<sup>64</sup> Moreover, Vandenhole clarifies well the (im)balance of power among different actors on the international plane in claiming that:

[W]hile territorial States legally bear the primary responsibility for human rights violations, they are not always able (nor willing) to live up to their human rights obligations. When it comes to issues of poverty and the lack of realisation of economic, social and cultural rights, the territorial State sits not always in the driving seat: decisions of other, equally powerful actors, such as the international economic institutions, transnational corporations and/or other States may have a much larger and profound impact on the realisation of socio-economic human rights than the territorial State has.<sup>65</sup>

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University Press, 2005); Malcom Evans (ed.), *International Law* (Oxford: Oxford University Press, 2010); Jack Donnelly, *International Human Rights* (Boulder: Westview Press, 2013), 156; François Rigaux, ‘Transnational Corporations’, in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* (Paris and Dordrecht: UNESCO and Martinus Nijoff Publisher, 1991), 129; Carlos Manuel Vásquez, ‘Direct vs. Indirect Obligations of Corporations Under International Law’ (2005) 43, *Columbia Journal of Transnational Law*, 927, 932; Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), 69.

<sup>62</sup> Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations Under EU Law and International Law* (Cheltenham: Edward Elgar, 2011), 53.

<sup>63</sup> Jan Klabbers, *Op.cit.*, 68.

<sup>64</sup> Margaret P. Karns and Karen A. Mingst, *International Organizations: The Politics and Processes of Global Governance* (London: Rienner, 2010), 20.

<sup>65</sup> Wouter Vandenhole, ‘Emerging Normative Frameworks on Transnational Human Rights Obligations’, *EUI Working Papers* (RSCAS 2012/17). Available at: [http://cadmus.eui.eu/bitstream/handle/1814/21874/RSCAS\\_2012\\_17.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/21874/RSCAS_2012_17.pdf?sequence=1) (last accessed 12 May 2013).



Some *soft law* frameworks and instruments were already developed under international law for the purpose of identifying key standards for TNCs, including, in particular, the UN Global Compact and its 10 basic principles adhered to by more than 10,000 corporations and other stakeholders in more than 130 countries of the world,<sup>66</sup> the already mentioned 2011 *Principles of Business and Human Rights*,<sup>67</sup> and the *OECD Guidelines for Multinational Enterprises*.<sup>68</sup> They all deserve to be taken into full consideration, even if they only make some *soft* steps into the direction of direct obligations for TNCs under international (human rights) law. However, these frameworks cannot be considered as the maximum reachable point under international law in constraining the activities of corporations for the sake of human rights, because they possess the same strength as the Harkin Engel Protocol. Therefore, while they represent important and unavoidable first steps in the right direction, there is still a long walk through uncertain fields.

The discussion on the development of international obligations for TNCs should start from one unavoidable premise: that they are recognised as having at least limited international personality. In this framework, one might compare TNCs to *sui generis* entities, including, in particular, the Sovereign Order of Malta and the International Committee of the Red Cross. Due to historical and humanitarian

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<sup>66</sup> For more information on the UN Global Compact, see: <http://www.unglobalcompact.org/AboutTheGC/index.html> (last accessed 12 May 2013).

<sup>67</sup> The Principles propose that business enterprises have in place policies and processes founded on three key principles: a policy commitment, a due diligence process and available remedies. According to Guiding Principle No.16, the policy commitment should be promoted by the most senior level of the business enterprise, it should be publicly available and distributed both internally and externally and it should be operationalised through relevant policies and procedures. As explained in Guiding Principle No.17, the process of human rights due diligence comprehends 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'. Guiding Principles 18-21 are clarifying actions needed for the purpose of implementing the human rights due diligence process, and Guiding Principle No.22 involves a responsibility to remedy when the business enterprise recognises that it caused or contributed to the determination of an adverse human rights impact. The last two Guiding Principles included in the second section require business enterprises to respect international human rights standards wherever they conduct their activities and to establish priorities for action that take into account the seriousness of the human rights impacts that they caused or contributed to determine.

<sup>68</sup> The Guidelines were first adopted in 1976 and have been updated five times since then. The most recent update was made in 2011. OECD, 'OECD Guidelines for Multinational Enterprises' (Paris: OECD, 2011). Available at: <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf> (last accessed 5 May 2013).

reasons, these entities are recognised as having a limited legal personality under international law.<sup>69</sup> Therefore, the issue might be to understand whether justification based on the various reasons that led to the recognition of a limited international personality for such bodies might also be similarly applied to TNCs.

In this respect, TNCs' global reach, power and resources are all factors that should be taken into consideration when claiming that these actors ought to be recognised as having a limited personality under international law that would allow them to accept international obligations. Scheinin's recent proposal that the World Court of Human Rights – upon acceptance by the relevant actors – might adjudicate cases brought not only against states, but also against international organisations and TNCs<sup>70</sup>, seems to be moving in this direction.

Therefore, in consideration of the recent failure of all the other attempts aimed at eliminating the exploitation of children from cocoa plantations, the idea of drafting a binding instrument of international law containing basic rules and standards appears to be a possible alternative for guaranteeing that the problem will finally be eradicated. States producing cocoa, as well as states in which the most important cocoa and chocolate TNCs are based, should promote action in this field. In this respect, TNCs in the field of chocolate and cocoa should be given the chance to accept obligations under the treaty as third parties to it. Such acceptance should be made in a written form and would bind the relevant TNCs as to the results to be achieved. While this possibility is not envisaged, but also not expressly prohibited, by the 1969 Vienna Convention on the Law of Treaties (VCLT)<sup>71</sup> (which, in Section 4, only refers to states as possible third parties to a treaty), such extension to TNCs should be founded on the premise that these actors ought to be granted a limited

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<sup>69</sup> Antonio Cassese, *Op.cit.*, 132–133.

<sup>70</sup> The Statute of the World Court of Human Rights was recently drafted by Martin Scheinin, with Julia Kozma and Manfred Nowak. See: Martin Scheinin, 'International Organizations and Transnational Corporations at a World Court of Human Rights' (2012) 3/4, *Global Policy*, 488–491. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1758-5899.2012.00204.x/pdf> (last accessed 12 May 2013).

<sup>71</sup> 1155 UNTS 331.

subjectivity under international law. In this respect, the basic rule included in Article 35<sup>72</sup> could be applied *mutatis mutandis* to TNCs.

This cocoa treaty should be based on international human rights and child labour standards and it should contain a clear commitment by all the relevant parties to contribute to ending child labour, child trafficking and the WFCL in cocoa plantations. While the preamble should make reference to all the relevant international treaties already ratified by Côte d'Ivoire, as well as to the *Guiding Principles on Business and Human Rights*, the main body should include specific measures dedicated to the prevention of and the fight against the use of children as labourers in cocoa plantations, a reference to short, medium and long term goals to be reached and a clear indication of relevant deadlines.

The cocoa treaty should also provide for the creation of a community development and recovery fund. This fund should be used, on one hand to finance the construction of fundamental infrastructures (such as roads, schools and hospitals) and, on the other, to guarantee the recovery (including the right to education, professional training, healthcare and appropriate accommodation) and reintegration into society of children who are or have been exploited in cocoa plantations. As third parties to the cocoa treaty, TNCs should accept to financially contribute to the community development and recovery fund. Another fundamental measure that should be formally accepted by TNCs would determine a duty to clearly trace the supply chain, so as to guarantee transparency to consumers and to send a message to plantation owners that those resorting to child labour will not be able to sell their products.

The cocoa treaty should also contain an obligation for all the relevant actors involved – including states and TNCs –to work towards the identification of a fair minimum price for cocoa to be set by the Ivorian institutions every year and the

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<sup>72</sup> That is: 'An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.

provision of sanctions – to be specifically provided by law – for those actors identified as not having respected it. This measure would indirectly target the problem of the demand for disposable labour by plantation owners, as it would allow them to be better paid for the cocoa they produce. However, to be effective, it should also be accompanied by more stringent checks on plantations and enforcement of laws against the exploitation of children and child trafficking.

Finally, the cocoa treaty should include rules on the creation of an independent monitoring mechanism, shaped on the basis of the UN human rights monitoring bodies. All the parties should orally testify in front of this body and submit reports to it every year, for the purpose of assessing the steps made for achieving the results indicated by the cocoa treaty. Recommendations should be formulated by this body to the various actors, for the purpose of pushing them towards reaching the aim of eliminating the WFCL from cocoa plantations as soon as possible but pecuniary sanctions should be imposed on them whenever they fail to guarantee the proper implementation of the treaty and the respect of the relevant deadlines.

## **7. Concluding Remarks**

The time seems right: recent journalists' reports, NGOs and consumer associations' campaigns and experts' reports on the issue were followed by announcements by three big chocolate companies – namely Nestlé, Hershey and Ferrero – that they are willing to promote much needed action and to pledge funds to eliminate child labour from cocoa plantations, a phenomenon that shames us all. Therefore, as a way to avoid a lack of coordination, a waste of time and resources or a duplication of efforts, TNCs efforts should be incorporated in a binding international law framework that would allow all the relevant actors in the field to work together towards the elimination of the WFCL from cocoa plantations.

Therefore, it is fundamental to seize the day and involve TNCs in a much-needed pragmatic project aimed at introducing the idea that corporations might have limited obligations under international law and must do their best to respect them. The adoption of a cocoa treaty should consequently be promoted by relevant states involved in this issue and should be drafted in a way that allows for TNCs to formally accept some of the obligations arising out of the treaty as third parties to it. In this way, through a coordinated action by all the relevant actors involved in this issue, it is reasonable to believe that a major step in the right direction of eliminating the WFCL from cocoa plantations would finally be made.