

# **Human Rights' Violations in Global Supply Chains: Problems and Solutions in Common Law Systems**

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## **Introduction**

- The Paradigm Example of Human Rights & Labour Violations
- Public International Law
- Tort Law
- Contract Law
- Private International Law
- Summary of main legal challenges
- Normative Solutions

## **The Paradigm Example of Human Rights' Violations**

- TNC located in Global North or West
- Global Supply Chain Management
- Shift in global production processes from parent-overseas subsidiary companies: vertical disintegration
- Through chains of commercial contracts whereby TNC
- At one or more steps removed from...
- Suppliers, contractors, sub-contractors located in...
- Global south, e.g. Ruritania, where human rights and labour standards are woefully inferior

## **The Paradigm Example of Human Rights' Violations**

- Practice of TNC incorporation of CSR policies, Supplier Code of Conduct and other soft law norms, e.g. ILO standards or UN Global Compact
- Human rights or labour violations in Ruritania caused by local sub-contractor or supplier:
  - Substandard wages
  - Modern slavery
  - Poor workplace conditions
  - Child labour

## **The Paradigm Example of Human Rights' Violations**

- Death or injury to individuals and/or workers via suppliers or sub-suppliers in supply chain
- Potential for TNC liability in Home State where human rights and labour standards are higher?

## **Public International Law**

- Principle of State sovereignty
- Rejection of extraterritoriality
- International law norms, e.g. ILO
- General rejection of TNC as duty-bearer

## Tort Law

- Law of negligence – main concern is indeterminate liability, e.g. US *Walmart* case (572 F 3d 677 (9<sup>th</sup> Cir 2009))
- TNC as not having committed actionable wrong, e.g. *KiK* case, 10 Jan 2019
- Subject to *Chandler v Cape plc* [2012] 1 WLR 3111
  - Superior knowledge of TNC
  - Reliance by injured employees
  - Intervention/control by TNC
- Cf *Thompson v Renwick Group Plc* [2015] BCC 855 – appointment of H&S director to a subsidiary's board by parent did not give rise to duty of care to employee of subsidiary

## **Contract Law**

- Privity of contract doctrine
- Notwithstanding the express incorporation of CSR and other policies in commercial contracts
- Some exceptions recognised
  - Transferred loss doctrine
  - Unauthorised agency doctrine
  - Contracts for the benefit of another
  - Statutory exceptions



## **Contract Law**

- These exceptions are reflective of the following policy considerations
  - Physical or financial protection of weaker parties
  - Ensuring recovery of loss caused by contractual breach
  - Commercial necessity
- On this basis, should/could privity be bypassed?
- Adaptation of *jus quaesitum tertio*? Third party beneficiary theory

## **Private International Law**

- Governing law: Tort
  - Rome II Regulation
    - Lex loci delicti – Ruritania*
    - Subject to exception where both the TNC and injured individual have their habitual residence in the same country*
- Jurisdiction: Tort
  - Brussels I Recast Regulation
    - Domicile*
    - Registered office, place of incorporation or place of formation*

## **Private International Law**

- Governing law: Contract
  - Rome I Regulation
    - Choice of Law – TNC unlikely to specify Ruritania*
- Jurisdiction: Contract
  - Brussels I Recast Regulation
    - Choice of court agreement*
    - TNC unlikely to specify Ruritania*

## **Main Legal Challenges**

- Principle of State Sovereignty
- Rejection of extraterritoriality
- Law of negligence in tort law and attribution of actionable wrong to TNC
- Separate legal personality
- Lex loci delicti
- Jurisdictional limitations
- Privity of contract

## Normative solutions

- Dual liability – *Viasystems (Tyneside) Ltd. v Thermal Transfer (Northern) Ltd.* [2006] 2 WLR 428
- Network liability
- Production liability as a counterpart to product liability: notion of 'cheapest cost avoider'
- Imposition of criminal liability on TNCs similar to section 7 of the Bribery Act 2010
- Such extraterritoriality would involve a simple modification to the Modern Slavery Act 2015

## **Conclusions**

- Formidable obstacles to addressing TNC Accountability Gap
- Creative solutions possible through adaptations of tort law, contract law, private international law, etc.
- Political will may be absent if State where TNC is located is concerned about adverse economic effects and incentives
- Difficult political choices involved