

# Business and human rights

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## II. Valorisation Addendum

- A. (Relevance) What is the social (and/or economic) relevance of your research results (i.e. in addition to the scientific relevance)?

My research results are socially relevant as they aim at regulating the relationship between multinational enterprises and the global society. Both of them went through enormous changes as a result of globalisation. Enterprises are no longer simple associations of people that get together to conduct business, but they are rather supranational entities leading the global economy. At the same time, in a more than ever globalised world, individuals are not only connected to their national dimension, but they are increasingly becoming part of a global community. One could describe such relationship as of powerful vs. powerless non-State actors acting in a State-centric international community. Despite these changes, the relationship between the global society and multinational enterprises is still deregulated. The only laws taking this relationship into account are domestic, and therefore applicable within national boundaries. In recent years, States from both the developed and developing world are struggling to address the issue of business and human rights. A number of scholars, stakeholders, companies, NGOs, and individuals are proposing different solutions to this issue. The ultimate goal of my thesis is to balance the overbroad power of multinational enterprises and the powerless status of human beings in the global arena. It does so by empowering powerless stakeholders with effective remedies against multinational corporations.

My research results are economically relevant as they suggest that companies switch from the current race to the bottom to a race to the top in terms of guaranteeing minimum standards for the

stakeholders detrimentally affected by their activities. First, my research results suggest reconsidering transnational companies in economic, instead of legal, terms. The business literature defines multinational enterprises as “[...a] cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy”<sup>1248</sup>, while the legal literature often takes into consideration each corporation in such cluster as a separate legal entity that has in principle no relationship with the other members of the same corporate group. This thesis proposes to construct the liability of multinational enterprises around their economic definition. It argues that the economic analysis of transnational corporate groups correctly identifies the power such companies have. Second, my proposals for legal change, included in chapter four of the manuscript, have the potential to change the economic rationales currently driving European multinational companies investing in developing countries. If international, European Union, and domestic laws would correctly identify multinational enterprises as single economic units, and therefore hold them liable when they abuse human rights extraterritorially, European transnational companies would take human rights into greater consideration when they invest abroad. In the long term, this could change the attitude of transnational enterprises. While Western companies are currently racing to the bottom in order to maintain competitive prices and high-quality products, if forced to produce in a socially responsible way, they could drive the global economy to a race to the top in guaranteeing protection for the stakeholders affected by their industrial activities. This could have enormous impact as it would use globalisation as a driving force to meet higher standards of protection, instead of lower conditions, for the stakeholders affected by industrial activities.

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<sup>1248</sup> Vernon (n 17) 114; Vagts (n 15) 740.

**B. (Target groups) To who, in addition to the academic community, are your research results of interest and why?**

My research results are of interest to the following groups.

First, my research results are of interest to business and human rights litigators that are unsuccessful in holding European multinational enterprises accountable in domestic courts for their extraterritorial human rights abuses. Examples of such litigators are law firms and NGOs, such as for instance, the law firm Leigh Day in the United Kingdom and the European Center for Constitutional and Human Rights in Berlin. My research suggests that the focus of human rights litigators should switch from the liability of companies to the responsibility of States. It proposes a pathway to file complaints against home States at the ECtHR for their failure to provide stakeholders with effective remedies against multinational enterprises incorporated within their territory.

Second, my research results are of interest to judges sitting both in domestic courts and at the European Court of Human Rights. My research demonstrates that the failure of European States to provide effective remedies for the victim of human rights abuses committed by multinational enterprises may violate the European Convention on Human Rights. Judges could use my thesis in applying the European Convention on Human Rights to States that fail to provide effective remedies against companies incorporated within their jurisdictions.

Third, my research results are of interest to European legislators that would like to regulate the activities of multinational enterprises incorporated within their territory. As discussed in chapter four of the thesis, a number of countries are moving

toward the recognition of the parent companies' extraterritorial obligations for the human rights abuses perpetrated by their subsidiary. Very recently, on February 21, 2017, France has included in its commercial code two articles that recognise such extraterritorial obligation of French companies, which my manuscript applauds. My thesis provides guidance as to the drafting of future business and human rights legislation that would comply with the European Convention on Human Rights while guaranteeing effective remedies for the stakeholders affected by corporate activities.

Fourth, my research results are of interest to powerless stakeholders that are left at the margins of globalisation and are often unable to fight for their rights. My research encourages them to take part in the transnational legal process in order to have an impact in shaping future international and human rights law. It suggests the powerless to use domestic and international courts as a tool for legal change. It encourages them to file suits at the national level against European enterprises, and at the international level against States for their failure to provide them with effective remedies against such transnational companies.

Fifth, last but not least, my research results are of interested to transnational enterprises as they would raise awareness as to the potential liabilities that such companies may incur in if they fail to act in a socially responsible way. Differently from a number of other scholarly work urging companies to act responsibly, my thesis takes the different approach to urge States to hold enterprises accountable. In this sense, the manuscript illustrates what liabilities companies abusing human rights may incur in the proximate future.

**C. (Activities/Products) Into which concrete products, services, processes, activities or commercial activities will your results be translated and shaped?**

My research results may be translated in the following processes.

First, my thesis proposes an innovative business and human rights litigation strategy which may be the basis for a future case filed at the European Court of Human Rights. Human rights advocates could put this litigation strategy in place by filing a test case against a European State at the ECtHR. Under the ECHR, States have a positive obligation to secure that corporate groups respect human rights. Human rights advocates should argue that such an obligation includes the duty to protect individuals against extraterritorial abuses committed by multinational companies and the duty to fulfil corporate socially responsible policies. The ultimate goal of human rights advocates should be to obtain an ECtHR's decision detailing the positive obligation of States to secure that European corporate groups respect human rights while operating extraterritorially. In the affirmative, European States would have to secure effective remedies against multinational companies in domestic courts for human rights victims. This would open the door to extensive litigation against European multinational corporations abusing human rights in developing countries.

Second, my thesis enables the victims of human rights abuses committed by multinational enterprises to take part in the transnational legal process. According to Harold Koh "[...]ransnational legal process describes the theory and practice of how public and private actors ⊃ nation-States, international organizations, multinational enterprises, non-governmental organizations, and private individuals ⊃ interact in a variety of public and private, domestic and international fora to make,

interpret, enforce, and ultimately, internalize rules of transnational law<sup>1249</sup>. Multinational enterprises have already taken part in such transnational legal process by influencing, with their economic power, the making of domestic and international law. Instead, stakeholders, who are often powerless individuals, have little opportunity to take part in such transnational legal process. My thesis proposes an avenue for stakeholders to take part in such process by using European home States' domestic courts and the European Court of Human Rights as tools for legal change.

Third, my research results may be translated in a legislative process that would regulate the liability of multinational enterprises when they abuse human rights. My thesis suggests States adopt a number of plausible legal reforms at both the national and international level. These include recognising the direct application of human rights law among private parties in combination with either establishing an international court or empowering domestic courts to hold companies responsible for human rights abuses. An alternative solution could also be to apply existing national laws to multinational corporations extraterritorially. This would entail a reform of both the conflict of laws regulations currently applicable in the European Union and the tort and company laws that are limiting the liability of European holding companies for the extraterritorial torts committed by their subsidiaries.

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<sup>1249</sup> Koh (n 2) 183–184.

**D. (Innovation) To what degree can your results be called innovative in respect to the existing range of products, services, processes, activities and commercial activities?**

Currently, there are a number of business and human rights approaches that advocate for different solutions to address the human rights abuses committed by multinational enterprises. My thesis takes into account all of these approaches and builds on them to propose an innovative litigation strategy to hold transnational companies responsible for human rights abuses.

The first approach focuses on the positive obligation of States to ensure the rights of stakeholders affected by the extraterritorial activities of private actors. A number of scholars argue that States have an extraterritorial positive obligation to ensure that enterprises respect human rights. Against this background, this thesis builds on such a general extraterritorial positive obligation of the States, to elaborate a precise litigation strategy for human rights victims to hold multinational enterprises accountable. It proposes to bring a test case before the ECtHR so that human rights victims could benefit from the positive obligation of States to secure their rights against multinational companies recognised by the ECtHR.

The second approach proposes to litigate cases in national courts on the basis of domestic tort law, company law and international law, including both hard and soft law. This thesis is relevant when such cases are unsuccessful in domestic courts. It argues that when human rights victims are unable to obtain redress at the national level, human rights litigators should file complaints against States at the ECtHR for lack of effective legal remedies against European multinational companies.



The third approach argues that the international community should recognise, through a binding international treaty, the human rights obligations of multinational enterprises towards individuals, regardless of their nationality. It advocates for the creation of a global human rights court that could assess whether multinational corporations abuse human rights. Although this thesis considers the global human rights tribunal proposal as a possible solution to address the lack of effective judicial remedies against multinational companies abusing human rights, it recognises that such solution is unlikely to be adopted any time soon. This manuscript takes into account that a number of countries and NGOs have unsuccessfully attempted to adopt a treaty including binding obligations for multinational companies.

The fourth approach focuses on voluntary CSR instruments, instead of legally binding obligations. This soft law approach is intended to encourage businesses to comply with the recommendations of quasi-judicial bodies and to adopt, often after consultation with NGOs, internal codes of conduct in compliance with human rights. This thesis recognises the value of CSR policies and initiatives aimed at encouraging voluntary compliance with human rights norms by multinational companies. However, the manuscript analyses the cases of transnational companies that are unwilling to comply with human rights voluntarily. It argues that the current state of the law fails to guarantee effective judicial remedies for stakeholders affected by corporate activities and, therefore, it is necessary to change the status quo through strategic litigation against European States. The thesis recognises that, under current international law, multinational companies have a mere soft law responsibility, instead of binding obligations, to respect human rights and it proposes to direct human rights litigation against States as the sole duty bearers towards the stakeholders affected by corporate activities.

**E. (Schedule & Implementation) How will this/these plan(s) for valorisation be shaped? What is the schedule, are there risks involved, what market opportunities are there and what are the costs involved?**

Implementation Plan:

- 1) I plan to disseminate my dissertation among both business and human rights litigators and judges at the European Court of Human Rights. I will send my dissertation free of charge to some of the leading business and human rights litigators, such as the European Centre for Constitutional and Human Rights and the law firm Leigh Day and hope to inspire them to implement the litigation strategy put forward in my thesis into practice. I will also send it to a number of judges at the European Court of Human Rights in the hope that they will find my interpretation of the European Convention on Human Rights convincing and will consider applying it to business and human rights cases.
- 2) I submitted a panel proposal, entitled "The Obligation of the Home State: Access to Remedy for Extraterritorial Human Rights Abuses", to the 2017 United Nations Forum on Business and Human Rights, which will focus on "Access to Remedy for business-related human rights impact – the third pillar of the UN Guiding Principles on Business and Human Rights". If my proposal is accepted, I would like to present my Ph.D. research as part of the panel and share my research results with the broad range of stakeholders attending the 2017 United Nations Forum on Business and Human Rights. By disseminating my research, I hope to inspire legislators to reform the tort and company law rules currently regulating the liability of multinational enterprises for extraterritorial

human rights abuses, and the stakeholders detrimentally affected by the activities of businesses to file complaints against companies in European States.

- 3) On the basis of the report of the degree committee, I would like to publish my thesis as a book to disseminate it across the academic community. My research built up on a rich variety of business and human rights bibliography. Now that it is completed, the goal of my thesis is to become one fundamental piece of research in business and human rights that will help others to move forward in constructing the future responsibility of multinational enterprises. I hope academics will build up on my research to elaborate additional avenues for legal change and to put forward concrete proposals as to how the liability regime applicable to multinational enterprises should change.
- 4) During the incoming years, I plan to capitalise on the research results of my dissertation to propose a plan for legislative reform as to the liability of multinational companies. In my thesis, I demonstrated that European home States have an extraterritorial obligation to provide effective remedies for the victims of human rights abuses detrimentally affected by companies incorporated within their jurisdiction. I would like to develop a post-doctoral research on the legislative reforms that would be necessary to ensure that victims have such effective remedies against multinational companies. Specifically, my postdoctoral research will compare the different liability regimes applicable to multinational enterprises in human rights and competition law. The ultimate goal of this project will be to propose an innovative accountability framework for transnational corporations on the basis of competition law solutions.