Transnational Business and Human Rights Disputes: A Court-Centric Framework of Analysis

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ABSTRACT

This thesis explores the role of domestic courts in addressing human rights due diligence in resolving transnational business and human rights ("BHR") disputes within the context of parent-subsidiary relationships. Specifically, it investigates how courts in the home state interpret and apply established legal frameworks, encompassing international law, national corporate law, and tort law, to resolve disputes where subsidiary activities in compliance with host state law result in human rights impacts. The study addresses two legal issues: the conflict of human rights standards between home and host states; and the responsibility of parent corporations for human rights impacts resulting from their subsidiaries' operations.

Firstly, corporations often find themselves obliged to adhere to host state laws even when they conflict with the human rights standards of the home state. This legal issue primarily concerns the negative aspect of human rights due diligence, which requires courts to address applicable human rights standards before determining whether human rights, as asserted by victims, have been violated.

Secondly, corporate structures often involve establishing subsidiaries in foreign jurisdictions to benefit from an entity shield against liability risks. This practice prompts an examination of how courts can impose a due diligence duty on parent corporations to prevent human rights impacts resulting from their subsidiaries' operations. Unlike the first issue, this legal question entails a positive duty that does not correspond directly to substantive human rights. Consequently, courts must seek positive rules when establishing this duty and emphasise the conduct of a duty-bearer rather than the outcome of human rights impacts.

The thesis applies the analytical framework – termed the "court-centric" framework – to examine the two legal issues through the lens of domestic courts in the home state. The primary focus of this framework is on the interplay between different areas of laws surrounding BHR disputes and the balance of the interests of all parties concerned. This framework is distinct from the UN Guiding Principles on Business and Human Rights, which appear to prioritise human rights over other interests.

Addressing the first issue, the framework examines the interconnection of human rights balancing by national courts and international relations. It offers a nuanced understanding of the challenges in balancing human rights with other interests on an international scale.

Through the proposed refinement, the framework paves the way for guided cooperation and understanding between states in resolving challenges in the BHR context.

Turning to the second legal issue concerning corporate responsibility for human rights impacts from subsidiary operations, this framework emphasises the role of national courts in applying and interpreting corporate and tort law. It offers a pragmatic avenue by which to establish a positive duty of due diligence for parent corporations to ensure the protection of human rights.

The court-centric framework of analysis contributes to the evolving BHR studies by offering a nuanced perspective on the role of national courts in addressing transnational disputes. It promotes corporate accountability and advances the implementation of human rights due diligence in business practices.

CONTENTS

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AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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ABBREVIATIONS

ACtHPR – African Court on Human and Peoples' Rights

BHR – business and human rights

CESCR – Committee on Economic, Social and Cultural Rights

CSDDD – Corporate Sustainability Due Diligence Directive

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

HRC – Human Rights Committee

HRDD – human rights due diligence

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

IACtHR – Inter-American Court of Human Rights

OHCHR – Office of the High Commissioner for Human Rights

OECD – Organisation for Economic Co-operation and Development

UDHR – Universal Declaration of Human Rights

UK – United Kingdom

UN – United Nations

UNGPs – UN Guiding Principles on Business and Human Rights

US/USA –United States of America

CHAPTER 1
Introduction

In March 2018, two Cambodian villagers initiated a class action claim against a Thai sugar conglomerate in a Thai court. They alleged that the sugarcane production of the conglomerate's wholly owned subsidiary in Cambodia, operating under a cultivation concession granted by the Cambodian government, exceeded the area limitation prescribed by Cambodian law. Consequently, the villagers were illegally forced by the Cambodian government to abandon their homes and agricultural land, resulting in a breach of their right to an adequate standard of living under Article 11(1) of the International Covenant on Economic, Cultural and Social Rights.[1]

In response, the conglomerate asserted strict adherence to legal protocols, maintaining that the selection of sparsely populated areas and the subsequent land concession process had followed Cambodian law. These procedures purportedly followed the guidance of local and national government officials based on principles enshrined in formal project agreements with governmental authorities.[2]

This transnational business and human rights ("BHR") case in my home country, Thailand, inspired me to investigate the global practice of how courts in the home state where parent corporations are established can resolve this type of dispute in the context of parent-subsidiary relationships. These disputes arise when a subsidiary operating in the host state is compelled to rely on the host state's actions or observe its law and this results in human rights abuses.

At the international level, the UN Guiding Principles on Business and Human Rights ("UNGPs") establish the concept of a corporate responsibility to respect human rights which encompasses corporations' own operations and those of their subsidiaries. This responsibility entails two primary dimensions of due diligence. The first concerns corporate

[1] At the time of writing (30 June 2024) this case is still pending in the court of first instance. This sugar firm is a sugar supplier for several global giant firms in the sweet and beverage sectors. For a case brief in English, see Inclusive Development International, 'Case Brief: Class Action Lawsuit by Cambodian Villagers Against Mitr Phol Sugar Corporation' <https://www.inclusivedevelopment.net/wp-content/uploads/2020/12/Mitr-Phol-Class-Action-Case-Brief.pdf> accessed 30 June 2024.

[2] A response at the time when a complaint was made to the National Human Rights Commission of Thailand (in 2012) in the same incident. See 'Mitr Phol Group Response to Alleged Human Rights Abuses and Seizure of Land by Sugar Companies in Cambodia' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/mitr-phol-group-response-to-alleged-human-rights-abuses-and-seizure-of-land-by-sugar-companies-in-cambodia/> accessed 30 June 2024.

operations and reflects a negative duty to refrain from infringing human rights; the second involves parent corporations preventing their subsidiaries' operations from impacting negatively on human rights and contributes to a positive duty to take appropriate steps to ensure such prevention. These two dimensions of due diligence are significant in framing the analysis in this thesis based on the difference in their obligatory natures.

To fulfil this responsibility, the UNGPs recommend that a corporation should have a policy commitment, conduct due diligence, and enable the remediation of any adverse human rights impact stemming from such operations.[3] The due diligence conduct encompasses identifying, preventing, and mitigating human rights impacts arising from the corporate operations and those of its subsidiaries.[4]

However, the UNGPs have no binding legal effect, necessitating national law to establish responsible conduct as a duty for corporations. As a result, several countries enacted legislation imposing a human rights due diligence duty on corporations, covering all conduct recommended in the UNGPs.[5] In this thesis, the reference to "human rights due diligence" for corporations encompasses this broad scope and so covers all responsible conduct under the UNGPs concept of "corporate responsibility to respect human rights" unless otherwise required by the context.[6]

Like other countries with modern legal systems, Thailand recognises the separate corporate entity doctrine in corporate law and upholds the duty of care in its negligence law. However, it lacks legislation specifically imposing the human rights due diligence duty on corporations, either parent companies or subsidiaries. Despite this legislative vacuum, international human rights law imposes a human rights due diligence obligation on national courts, as organs of state, to protect human rights against corporate abuse.[7] The courts are urged to interpret existing laws, such as corporate and tort law, to safeguard human rights. This represents another facet of human rights due diligence, which stems from an

[3] UNGPs, Principles 15-24.

[4] Chapter 5, Sections 2.1 and 3 explore and unpack the concept of human rights due diligence for corporations under the UNGPs.

[5] See below, Section 3.

[6] This broad scope of "human rights due diligence" aligns with the current understanding illustrated in due diligence legislation. See Chapter 5, Sections 2.2 and 3.1.

[7] Chapter 5, Section 1 explains this obligation as the human rights due diligence duty of states under international human rights law.

international human rights obligation on courts to protect human rights from violation by non-state actors, including corporations.

The Thai case above is one of the scenarios illustrating the dilemma facing corporations in transnational BHR disputes. They are obliged to rely strictly on government actions and adhere to the regulations of the host state which, due to forced relocation, inevitably affect their citizens' right to an adequate standard of living. This problem is significant, as evidenced by a study report of the European Parliament addressing a wave of large-scale farmland acquisitions for plantation agriculture in Africa, Asia, and Latin America, and highlighting numerous reports of land dispossession and evictions associated with this issue in several countries.[8] The likelihood of forced relocation persists and necessitates the accountability of corporations in acquiring land.

Scenarios comparable to this corporate dilemma arise when corporations acquire land for infrastructure projects or mineral exploration in countries where national law allows the government to seize land with a view to attracting the company's operations and regardless of the landowners' consent.[9] The host state law creates dilemmas in other settings where non-compliance results in criminal offences, such as restricting freedom of speech regarding the host state's public orders or limiting privacy rights regarding information disclosure to protect national security in the context of the host state.[10] On one hand, non-compliance risks legal offence; on the other, compliance risks violating human rights.

The business operations in the conflicted areas can also create a different dilemma. For instance, the recent coup in Thailand's neighbour, Myanmar, has posed a significant challenge for several Thailand-based corporations.[11] Having invested in Myanmar before the coup, these corporations now face not only the potential withdrawal of shareholding investments due to investors' concerns about human rights abuses[12] but also potential

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[8] Lorenzo Cotula, 'Addressing the Human Rights Impacts of "Land Grabbing"' (European Parliament 2014) EXPO/B/DROI/2014/06 16.

[9] 'Community Relocation' (*Human Rights and Business Dilemmas Forum - Dilemmas*) <https://hrbdf.org/dilemmas/community-relocation/> accessed 30 June 2024.

[10] Chapter 2, Section 3 illustrates this scenario.

[11] A scholar described the business operation in Myanmar after a coup in 2021 as a "red line" situation where human rights protection is not feasible, and corporations should not enter the market. See Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 Leiden Journal of International Law 389, 402.

[12] For example, the Norwegian Government Pension Fund Global withdrew its investment in stocks of two listed companies within a group of the energy conglomerate due to a concern that the conglomerate's activities with the Myanmar state-owned company could finance military operations and human rights abuses. See The

allegations of human rights abuse by the Burmese people in the Thai courts on the basis of their having supported activities during the military coup.

These dilemmas, arising from the corporate obligation to adhere to the host state's acts or law, often lead to potential human rights violations. In these disputes, the parent corporation is the primary target in the claims.[13] Consequently, corporations face litigation in their home countries, which leaves the national courts with the challenge of addressing human rights abuses linked to the subsidiaries' operations in foreign countries.

Despite the lack of legislation imposing a due diligence duty on corporations, cases brought to courts demand the interpretation of established laws. This involves considering the interplay of various legal disciplines, including international law, international human rights law, corporate law, and tort law, in enforcing the duty of due diligence for corporations to fulfil states' obligations to protect human rights.

In the main, literature addressing BHR focuses on the regulatory framework of "corporate responsibility" or "human rights due diligence" for corporations as outlined in the UNGPs, often overlooking the complementary role that courts can play, especially in the absence of specific legislation imposing a due diligence duty on corporations in disputes.[14] Furthermore, there is a gap in addressing how courts can navigate the conflict of human rights standards in transnational BHR disputes involving corporate dilemmas and not addressed by the specific due diligence legislation.

This thesis therefore aims to understand how courts in the home state can apply existing law to address these corporate dilemmas in transnational BHR disputes. It focuses on the parent-subsidiary relationship where subsidiary activities influenced by host state laws or acts lead to human rights abuses. To achieve this, this thesis adopts the analytical framework, which I term the "court-centric" framework, as it centres on the role of national courts in the home

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Council on Ethics, the Norwegian Government Pension Fund Global, 'Recommendation to Exclude PTT PCL and PTT Oil and Retail Business PCL from Investment' <https://files.nettsteder.regjeringen.no/wpuploads01/sites/275/2022/12/Rec-PTT-ENG.pdf> accessed 30 June 2024.

[13] There are several reasons why victims turn to the parent corporations in the home state, including the insolvency of a subsidiary, financial stability of a parent corporation, and the ineffective access to a remedy in the host state. See Radu Mares, 'Liability within Corporate Groups: Parent Companies Accountability for Subsidiary Human Rights Abuses' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 250; Rolf Weber and Rainer Baisch, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (2016) European Business Law Review 669, 671.

[14] See below, Section 6.1.

state. The framework primarily navigates the interaction between various legal disciplines involved in disputes and finds a balance of interests among all concerned actors – the home state, host state, corporations, and victims.[15]

Drawing from the two obligatory natures of due diligence, courts need to address two primary legal issues. First, corporations, including both parent companies and subsidiaries, often find themselves obliged to adhere to host state laws even when they conflict with the home state's human rights standards. However, victims rely on the home state standards in claiming against corporations. This issue primarily concerns the negative aspect of human rights due diligence – to refrain from infringing human rights – prompting courts to address applicable human rights standards before determining whether human rights as asserted by victims have been violated.

Second, within the parent-subsidiary relationship, corporate structures often involve establishing subsidiaries in foreign jurisdictions to benefit from an entity shield against liability risks.[16] This practice prompts examining how courts can impose a due diligence duty on parent corporations to prevent human rights impacts caused by their subsidiaries' operations. Unlike the first issue, this legal question entails a positive duty that does not correspond directly to substantive human rights. Consequently, in establishing this duty, courts must seek positive rules which emphasise the conduct of a duty-bearer rather than the outcome of human rights impacts.

Section 1 further explains the court-centric analytical framework. Section 2 considers the normative justification of corporate responsibility for human rights impacts. Section 3 briefly introduces the current stage of legal development concerning the BHR context, highlighting the necessity for the court-centric framework. Section 4 formulates assumptions, identifies the research problems, and outlines how to address them. Section 5 details the methodology and analytical structure. Finally, in Section 6, the original contributions of this thesis to the BHR field of study are delineated.

[15] See below, Section 1.

[16] Weber and Baisch (n 13) 671.

1. The Court-Centric Framework of Analysis

This section introduces the court-centric analytical framework used in this thesis. It provides the aims of this framework, sets out the scope of the BHR context it will address, and offers justifications for its significance.

The field of BHR study does not fit exclusively in any established areas of legal scholarship, such as international law, international human rights law, constitutional law, or corporate and tort law, although all these are relevant. Instead, this field integrates these legal domains into a specific field, which cannot be adequately addressed by any of them alone. The core element of this field is the interplay between these areas of law.

The court-centric framework applied in this thesis focuses on this interplay. It mirrors the judicial role by applying and interpreting the "established" and "existing" legal principles in different legal areas to address human rights due diligence for corporations in transnational BHR disputes.[17] Therefore, it is not intended to create a novel legal principle through judicial decisions. For this reason, the court-centric framework of analysis is primarily grounded in doctrinal methods, with a predominant reliance on legal positivism.[18]

This framework focuses solely on the substantive legal issues within transnational BHR disputes and does not explore questions of jurisdiction. Two legal issues from the BHR setting that this framework aims to analyse in this thesis are the conflict of human rights standards between states, and the establishment of parent corporations' positive due diligence duty for the operations of their subsidiaries.

Addressing the conflict of human rights standards requires a judicial balance between the need for human rights protection, justification for the host state's laws restricting human rights, and the corporate obligation to adhere to such laws in doing business. Courts typically apply the proportionality principle in assessing whether restrictions on human rights imposed

[17] There are some court decisions in the BHR disputes in which courts impose liability on someone arguably for the purpose of justice since there is no legal support for the court's reasoning. For example, in *Hempel AS v the Norwegian State*, the Norwegian Supreme Court ruled that the parent corporation must be responsible for the subsidiary's activities in polluting the environment even though the pollution had occurred before it acquired the subsidiary. See Beate Sjåfjell, 'The Courts as Environmental Champions: The Norwegian Hempel Cases' (2016) 13 European Company Law 199.

[18] See below, Section 5.

by the state respond appropriately to legitimate public interests.[19] This framework examines the application of this judicial tool in resolving such conflict.

Establishing the positive due diligence duty of corporations requires positive law or due diligence legislation. However, in the absence of such legislation, this thesis argues that courts are obliged to ensure that corporations will not impact negatively on human rights through applying the existing law.[20] Courts in several jurisdictions interpret corporate and tort law to impose liability on parent companies as regards their subsidiaries' obligations – for example, piercing the corporate veil and the duty of care.[21] These legal principles, originating in judicial interpretation of existing law, potentially influence corporations to avoid the risk of liability by taking appropriate measures to oversee their subsidiaries.

It is essential to note that applying the court-centric framework to address human rights due diligence is not intended to replace legislation; rather it proposes that the judicial role can complement legislation when no specific due diligence legislation applies to corporations in dispute.[22] The absence of specific legislation also prevents courts from imposing criminal liability,[23] which is why this analytical framework is restricted to civil liability disputes.

The analysis also focuses on the court's adjudicative function in resolving disputes between private parties, which is common across all jurisdictions and legal systems. Despite being based on the law of the United Kingdom ("UK"),[24] the positive duty analysis concentrates

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[19] Thomas Cottier and others, 'The Principle of Proportionality in International Law' NCCR Trade Working Paper No 2012/38 (The National Centre of Competence in Research 2012) 5 <https://www.wti.org/media/filer_public/9f/1b/9f1bd3cf-dafd-4e14-b07d-8934a0c66b8f/proportionality_final_29102012_with_nccr_coversheet.pdf> accessed 30 June 2024. See also Chapter 3, Section 2.

[20] Nigel Rodley, 'International Human Rights Law' in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 784–785. See also Chapter 5, Section 1.

[21] Chapter 6, Section 1.

[22] This thesis recognises several flaws in legal development through court decisions, including credentials, certainty, and information. The certainty issue in courts needs time for *stare decisis* and precedent. Also, most of the people involved in the adjudication process are lawyers and the decisions rely on the specific facts and evidence proved in the courtroom. This results in the weak credentials and information relied for the rule established by courts. However, the political nature of legislatures is also a point weakening the law-making process since it allows for corporate influence. See Peter Cane and Volkmar Gessner, *Responsibility in Law and Morality* (Bloomsbury Publishing 2003) 6–10.

[23] A fundamental principle in criminal law is that a person must not be subject to criminal prosecution and punishment without law established prior to their actions. (In Latin: *nullum crimen nulla poena sine lege.*) This principle is recognised as one of the fundamental human rights under Article 15 of the International Covenant on Civil and Political Rights.

[24] See below, Section 5.

on applying and interpreting the existing corporate and tort law without delving into the law-making function of courts in the common law system.

Other judicial roles which may be specific to certain jurisdictions, such as the power of judicial review to test the constitutionality of legislative enactments and the legitimacy of government action, are irrelevant within this framework in that these judicial powers apply only within the domestic context. Although this thesis may discuss the case of the *ILVA Steel Plant* in the Italian Constitutional Court which involves these judicial powers,[25] its primary purpose is for comparison and to better understand the court's difficulties in balancing human rights and the state's justifications for restricting these rights. Therefore, the analytical framework in this thesis remains universally applicable and extends to the civil law system.[26]

Lastly, while this framework aims to protect human rights, its primary function lies in upholding the cornerstone of the judicial role in rendering justice to disputing parties. Human rights are initially established from the perspective of one-sided victims' rights and the state's duties; they cannot be translated as justice.[27] This claim is evidenced by the instances where it becomes necessary to limit certain human rights to protect broader societal interests or address pressing public concerns. Within the realm of horizontal relationships between private parties, individual rights must be balanced against a reciprocal respect for the rights of others.[28] As a result, this framework seeks to balance the diverse interests of all stakeholders involved without assuming the primacy of human rights.

However, this does not mean that this analytical framework advocates equal treatment of all interests. It nonetheless underscores the necessity for courts to reassess human rights with each relevant interest within this specific context through the interplay of relevant laws. This approach may differ from the UNGPs, which focus primarily on victims and their human rights[29] and have, arguably, influenced a considerable body of the existing literature in this

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[25] The Italian Constitution Court, Decision No 58/2018 (the case of the ILVA Steel Plant). See Chapter 2, Section 1.

[26] See below, Section 5. See also Chapter 6, Section 5.

[27] Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 The Annals of the American Academy of Political and Social Science 10, 11.

[28] See below, Section 2. See also Chapter 3, Section 2.1.1.

[29] Ruggie observed that his mandate in developing the UNGPs was to focus on identifying legal and practical barriers that are particularly relevant for victims of corporate-related human rights abuses, and the appropriate approaches to lower them. See John G Ruggie, 'UN SRSG for Business & Human Rights Remarks for ICJ Access to Justice Workshop' (2009) 5.

BHR field and, in particular, its emphasis on promoting the due diligence duty for strengthening human rights protection.[30]

Given that human rights obligations are traditionally owed by states rather than private parties, applying the court-centric framework to address the corporate duty to respect and protect human rights requires further justification. The following section addresses why corporations should be held accountable for human rights impacts and briefly reviews early attempts at establishing corporate responsibility.

2. Normative Justifications for Corporate Responsibility and the Early Stage of the BHR

This section offers normative justifications underpinning corporate responsibility for human rights impacts stemming from corporate operations. It also provides an overview of the early development of the BHR context and human rights due diligence.

Traditionally, human rights obligations are vested in states rather than private parties. They are aimed at limiting state power and, eventually, requiring states to take positive measures to ensure an environment, which enables all people to enjoy their human rights.[31] Why corporations, as private parties, must be held responsible for human rights impacts demands normative justification. Several scholars tackle this issue from the perspective of corporations and their activities as well as human rights.[32]

The first and widely acknowledged justification stems from the power of corporations. It is recognised that the increasing power and resources of corporations often exceed those of states, so justifying the application of the state's human rights obligations to corporations.[33]

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[30] See below, Section 6.1.

[31] Inter-Parliamentary Union, *Human Rights* (2016) 19 <https://www.ipu.org/resources/publications/handbooks/2016-10/human-rights> accessed 30 June 2024; Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights' (2011) 2 Journal of European Tort Law 221, 225; John Douglas Bishop, 'The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations' (2012) 22 Business Ethics Quarterly 119, 119.

[32] From the perspective of courts, another question is why courts should apply the law to hold corporations responsible for human rights impacts. It requires a different justification arising from courts' obligation under international human rights law. I explore extensively in Chapter 5, Section 1.

[33] Jilles LJ Hazenberg, 'Transnational Corporations and Human Rights Duties: Perfect and Imperfect' (2016) 17 Human Rights Review 479, 485; van Dam (n 31) 222; Rodley (n 20) 795.

Second, as regards the moral and legal implications of human rights for corporations, it is argued that duties under human rights law for private individuals take two distinct forms. The first form of duties is to society or the state to obey state law, which is vertical in nature in that they are enforced by the state's organs representing society.[34] The second consists of correlative duties to respect the human rights of others, which create a horizontal relationship between private parties. This implies that these human rights obligations exist even if not explicitly mentioned in human rights law.[35]

From this justification, a question arises whether corporations should have the same duties as individuals in that they are legal entities established by law. This involves questioning the moral agent status of corporations. Mayer comments that it would not be prudent to allow corporations to promote their well-being while expecting individuals to care for something or someone.[36]

Justifying human rights duties for corporations needs to recognise that corporations exist only through the cooperation and commitment of society. They are "social giants" whose activities significantly affect people's lives and society as a whole.[37] Corporations can be "morally accountable" because they can apply moral reasoning in decision making and have the capacity in the decision-making process to control the structure of policies and rules.[38] Therefore, they must be subject to moral evaluation. If they fail, they deserve moral criticism; if they cause harm, they deserve moral condemnation.[39] As moral agents, corporations might have indirect moral obligations, including preventing harm to members of the public.[40]

The third justification concerns the unfair competition in international free trade. It is observed that the balance between free trade and human rights is fundamentally flawed and that there is a need to ensure the application of the same standards in business practice

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[34] John H Knox, 'Horizontal Human Rights Law' (2008) 102 The American Journal of International Law 1, 1–2.

[35] ibid 2. See also Chapter 3, Section 2.1.2.

[36] Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (OUP 2018) 150.

[37] Thomas Donaldson, *Corporations and Morality* (Prentice-Hall 1982) 42.

[38] ibid 30.

[39] ibid 57.

[40] ibid 33–34.

worldwide. In this view, the most powerful drive for holding corporations responsible is the need to eliminate unfair competition within the market and to create a level playing field.[41]

Lastly, from an economic perspective, the cost of production should bear not only the "blood of the workman" but also the "blood of other victims" who are not employed by the manufacturer. From this perspective, the production costs should reflect the actual manufacturing costs to society by internalising these external costs of production.[42]

These normative considerations underscore the necessity for corporate responsibility in the event of human rights impacts. For this reason, the international community began to highlight concern over human rights abuse by corporate activities as far back as the late 1960s. This led to early efforts to establish an international code of conduct for transnational corporations in the mid-1970s.[43] During this period, the concept of "business and human rights" began to gain prominence as a call for corporate responsibility.[44]

Subsequently, there have been several attempts to regulate corporate responsibility but all have failed, arguably in the face of corporate opposition.[45] However, public awareness of corporate involvement in two significant incidents towards the end of the 1990s – apartheid in South Africa and Shell's involvement in gross human rights violations in the Niger Delta – reshaped business attitudes.[46]

During this period, the concept of due diligence expanded from limited corporate risk assessment for financial and commercial transactions, to a more crucial role in ensuring that corporate activities align with public concerns, including human rights.[47] This due diligence concept is a procedural mechanism for corporations to fulfil their corporate responsibilities

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[41] van Dam (n 31) 226–227.

[42] Gerhard Wagner, 'Tort Law and Human Rights' in Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains*, vol 6 (Springer International Publishing 2021) 213–214, 217.

[43] Peter Muchlinski, 'The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights' (2021) 6 Business and Human Rights Journal 212, 213–214; Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (2014) 6.

[44] Muchlinski (n 43) 213–214.

[45] Martens documentes a range of negative influences of corporations on the attempts to regulate corporate activities, tracing this analysis from the time of the UN Code of Conduct to the adoption of the UNGPs and extending to the early stage of the draft legally binding treaty. See Martens (n 43).

[46] Muchlinski (n 43) 215–216.

[47] Olga Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2014) 32 Netherlands Quarterly of Human Rights 44, 49–50.

by ensuring that their activities do not directly or indirectly lead to human rights violations.[48] In 2011, the UN Human Rights Council adopted the UNGPs, marking a significant milestone in formalising corporate responsibility and human rights due diligence.[49] The analysis in this thesis revolves around the development of the BHR context from this point.

The following section introduces the concept of corporate responsibility under the UNGPs and acknowledges its inadequacy in establishing duties for corporations to respect human rights. The voluntary nature of the UNGPs' corporate responsibility leads to ongoing efforts to transform it into a binding corporate obligation.

3. Current Stage of Legal Development Concerning Corporate Responsibility

The attempts to establish a formal instrument on corporate responsibility in the BHR context made substantial progress when the UNGPs were adopted by the UN Human Rights Council in 2011. This section highlights that the voluntary nature of the UNGPs' corporate responsibility concept prompts the need for internationally binding instruments to regulate corporations and domestic mandatory due diligence legislation.

The UNGPs rest on three pillars: the state's duty to protect; corporate responsibility to respect human rights; and the state's duty to provide access to effective remedies.[50] Although the first and the third pillars reiterate states' duties to protect human rights under international human rights law, some considerations – for example, regulating extraterritorial activities[51] – are still mere guidelines. The second pillar differs from the others as it provides a framework for how corporations respect human rights under the idea of "corporate responsibility" since the UNGPs do not aim at having corporations bear any legal obligation at an international level.[52] This "respect" pillar of the UNGPs is crucial to the analysis in this thesis.

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[48] ibid 50.

[49] For the background to the development in business and human rights. See Muchlinski (n 43); Martens (n 43) 6–18.

[50] UNGPs, Principles 1, 11 and 25 respectively.

[51] UNGPs, Principle 2.

[52] Martin-Ortega (n 47) 55. Ruggie argues that imposing the full range of duties on corporations directly under international law reduces the discretionary space of individual governments and would result in "endless strategic gaming and legal wrangling on the part of governments and companies alike". See John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 The American Journal of International Law 819, 826.

Under the foundational principles of the UNGPs "respect" pillar, business enterprises "should" respect internationally recognised human rights, and this responsibility exists "over and above" compliance with national laws and regulations protecting human rights.[53] This notion extends to any adverse human rights impacts from the operations of others with whom corporations have a business relationship, regardless of their ownership or structure.[54] It can be affected by making policy commitments, conducting human rights due diligence, and enabling remediation.[55] Consequently, both parent corporations and subsidiaries bear responsibility for human rights impacts arising from their operations, while the responsibility of parent corporations is further extended to impacts from the operations of their subsidiaries.

Several flaws in corporate responsibility to respect human rights have been identified. Not only are there flaws in the development of the UNGPs,[56] but their content is also vague.[57] This responsibility is founded on social expectations rather than international legal obligations or other standards,[58] given that the foundational principle sees this responsibility as "over and above" compliance with national laws and regulations protecting human rights.[59] Also, failure to comply with human rights due diligence under the UNGPs entails no legal consequences for corporations.[60] These flaws are directly addressed by the analytical framework in this thesis by establishing the due diligence duty for corporations.

Considering the need for corporate responsibility for human rights impacts, the voluntary nature of the UNGPs opens the door to further development in establishing a human rights

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[53] UNGPs, Commentary to Principle 11.

[54] UNGPs, Principles 13 and 14.

[55] UNGPs, Principles 15-24.

[56] The UNGPs were developed without engaging the victims affected by the business activities. Also, the UNGPs adoption was by consensus in the UN Human Rights Council consisting of only 47 states (of the 193 states represented in the UN General Assembly). In a 2008 debate, the South African delegate expressly stated that his country could not join the consensus but would not call for a vote. During its 2011 adoption, the Ecuadorian envoy delivered a strong speech virtually declaring Ecuador's departure from the consensus, but then stated that Ecuador would not seek a vote "out of regard of the five sponsoring countries". See Carlos López, 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 69–71.

[57] Chapter 5, Section 3 discusses the vagueness of the corporate responsibility concept relevant to the context of this thesis.

[58] López (n 56) 59.

[59] UNGPs, Commentary to Principle 11.

[60] López (n 56) 61.

due diligence obligation for corporations.[61] At the international level, there has been an initiative to develop a legally binding instrument under which states are obliged to regulate the activities of all corporations within their territory, jurisdiction, or otherwise under their control, and requires corporations to undertake human rights due diligence.[62]

At the domestic level, several countries – especially in Europe – have enacted legislation obliging corporations operating within the territories, to conduct human rights due diligence.[63] However, their scope of application varies from one jurisdiction to another.[64] At the regional level, the European Union has recently enacted the Corporate Sustainability Due Diligence Directive ("EU CSDDD"), imposing obligations on corporations and those generating a net turnover at the specified level in the member states to conduct human rights due diligence.[65]

The development trends for regulating corporate responsibility focus on the enactment of national due diligence legislation. However, under the legislation in various European states, several companies are still exempted from these duties due to the limited scope of its application in that in certain countries, the legislation applies only to specific types of human rights, while other countries limit their legislation's application to corporations with employees exceeding a specified threshold.[66] In addition, these European states are in the minority when compared with the number of UN member states.

Therefore, it is still the remit of the courts to ensure human rights protection, provide a remedy, and ensure a just outcome for all parties in a situation where corporations in disputes

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[61] There are also views supporting the voluntary nature of corporate responsibility under the UNGPs by emphasising the nature of human rights obligations of states, the concept of corporate responsibility that requires prevention of human rights abuse by others, and the normative concept of shareholder primacy. For example, see Bishop (n 31); Denis G Arnold, 'Corporations and Human Rights Obligations' (2016) 1 Business and Human Rights Journal 255, 267–275.

[62] Open-ended Intergovernmental Working Group (OEIGWG), '2023 Updated Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' art 6.

[63] For example, the French Corporate Duty of Vigilance Law 2017; the UK Modern Slavery Act 2015; the Dutch Child Labour Due Diligence Act 2019; the Swiss Responsible Business Initiative 2021; the German Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains 2021; and the Norwegian Transparency Act 2021.

[64] Chapter 5, Section 2.2.

[65] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EC) 2023/2859. See also Chapter 5, Section 2.2.

[66] Chapter 5, Section 2.2.

have no duty under specific due diligence legislation. To achieve this, courts need to apply and interpret other existing laws governing human rights and corporate liability to regulate corporate behaviour in this setting. It is, therefore, necessary to understand the interplay between the relevant legal domains in this highly interdisciplinary field of study. The following section outlines the assumptions and research questions for this analysis.

4. Assumptions, Thesis Outline, and Research Questions

This section elaborates on four fundamental assumptions underpinning further analysis and outlines the thesis and the research questions.

4.1 Four Assumptions

The analysis in this thesis relies on four assumptions: the existence of court jurisdiction in adjudicating disputes; the definition of "subsidiary" and its separate entity status; the meaning of responsibility; and the dual aspects of human rights due diligence for corporations. These assumptions also clarify what aspects are not addressed in the thesis.

Firstly, the court-centric framework of analysis focuses primarily on the substance of disputes,[67] leaving the jurisdiction of national courts in the home state over disputes beyond its scope. Therefore, this thesis is developed on the assumption that there are no disputes regarding court jurisdiction. It is worth noting that this jurisdictional issue may present obstacles for victims seeking redress in the home state's courts.[68] The draft legally binding instrument attempts to resolve these obstacles by requiring state parties to establish their jurisdiction if human rights abuses are perpetrated by corporations domiciled in their territory or jurisdiction, and limiting the application of the *forum non conveniens* doctrine.[69]

Secondly, this thesis does not address the meaning of the "subsidiary". It adopts the definition in the UK Companies Act 2006, which governs the vast dimensions of the controlling power of the parent corporation over the subsidiary. Under the Act, a company is considered a subsidiary if the parent company: (i) holds a majority of the voting rights; (ii) has the right to appoint or remove a majority of its board of directors; or (iii) controls

[67] See above, Section 1.

[68] Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses - Towards a Fairer and More Effective System of Domestic Law Remedies' (2014) 68–70.

[69] Open-ended Intergovernmental Working Group (OEIGWG) (n 62) art 9.

alone, pursuant to an agreement with other members, a majority of the voting rights in the subsidiary.[70] Therefore, the critical point of this relationship is the parent corporation's power to control, at the levels of either shareholders or the board of directors of the subsidiary, through shareholding or arrangement. Also, this thesis treats the subsidiary as an entity distinct from its parent corporation due to the absence of specific due diligence legislation applicable to the disputes.[71]

Thirdly, the term "responsibility" is strictly interpreted in the legal sense rather than the moral sense. The critical difference between the two concepts is that authoritative institutions must direct legal responsibility by making, applying, and enforcing the law,[72] while moral responsibility does not have such morality-enforcing institutions.[73] Since the analytical framework of this thesis centres on the role of the courts as law-enforcing institutions applying established and existing law in adjudicating disputes, only responsibility in the legal sense that amounts to a duty and has sanctions or liability attached to it is necessary for this thesis.[74] Consequently, there must be a positive rule imposing corporate responsibility and this thesis suggests where courts can find it.

Fourthly, the concept of human rights due diligence for corporations under the UNGPs involves two aspects of corporate involvement. First, a negative duty requiring corporations to refrain from violating human rights; and second, a positive duty obliging corporations to ensure that the operations of other parties with whom they have business relationships do not cause any human rights impacts.[75]

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[70] Section 1159 (1) of the UK Companies Act 2006.

[71] Chapter 5, Section 3.2 sets out further justifications.

[72] Cane and Gessner (n 22) 6–7.

[73] ibid 11.

[74] Differentiating between two responsibility concepts does not diminish the importance of moral responsibility as they can complement each other. In moral conflict, the legal aspect defines positions and specifies obligations. Legal frameworks can shape perceptions of responsibility within the moral domain. Additionally, legal obligations and liabilities applicable today might not suit future situations due to societal change. Courts play a crucial role in refining laws by integrating moral responsibility through legal interpretation. See Tony Honoré, 'The Dependence of Morality on Law' (1993) 13 Oxford Journal of Legal Studies 1, 12–17; Cane and Gessner (n 22) 14–16.

[75] Chapter 5, Sections 1.2 and 3.3 and Chapter 6, Section 3 discuss this point extensively to justify the sources of this duty.

The negative duty is relatively unproblematic for courts in imposing relevant duties as it stems from individuals' human rights.[76] Courts can interpret concepts within domestic law, such as "fault" or "negligence" in civil liability, to protect human rights under the notion of the horizontal human rights obligation.[77] This aspect of negative duty leads to the first question in the courtroom: whether human rights as urged by the victims have been breached by the alleged corporate activities.

Both parent corporations and subsidiaries can bear this negative duty. In transnational BHR disputes, victims' claims are grounded in the home state's standards of human rights, while corporations must adhere to the standards of the host state which restrict human rights. The main challenge in the legal issue for courts arises from varying human rights standards among states. They must determine which standards apply to the dispute before assessing whether there has been a breach of negative duty. If the human rights standards of the home state are not applicable, corporations cannot be called to account for breaching the human rights at issue.

The positive aspect of human rights due diligence relates to corporations' duties to protect human rights from violation by other parties with whom they have business relationships. In this context, due diligence involves parent corporations taking appropriate steps to ensure that their subsidiaries do not cause or contribute to any human rights impacts.[78] Unlike the negative duty, the positive duty focuses on the conduct of parent corporations rather than the outcome.

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[76] Economic, social, and cultural rights, e.g., the right to an adequate standard of living, are often classified as positive human rights which states must provide and fulfil. Typically, corporations do not have such a corresponding positive duty under human rights frameworks. However, in horizontal relationships, the recognition of these rights for individuals can generate a negative duty for others to refrain from interfering with them. The forced relocation cases against corporations in Thailand and other countries, as discussed in the introduction, are grounded in this negative duty.

While some argue that, in certain circumstances, corporations may also bear positive duties corresponding to positive human rights, this view remains contentious. Such obligations might arise, for example, when corporations act as governments in providing public services, especially in monopolistic situations. However, this thesis intentionally excludes this perspective due to its controversial nature and its limited occurrence. For further study, see Justine Nolan and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' (2009) 87 Journal of Business Ethics 433, 443–444; Olivier De Schutter, 'Corporations and Economic, Social, and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (OUP 2014) 204–208.

[77] Schutter (n 76) 199.

[78] Hazenberg considered this positive aspect in the UNGPs as "imperfect special duties" because they require positive action (special duties) but leave room for discretion for corporate performance (imperfect duties). This thesis recognises the voluntary nature of corporate responsibility in the UNGPs, necessitating a positive rule to make it mandatory (perfect duties). See Hazenberg (n 33) 491.

This phenomenon raises a further question in the courtroom. Are parent corporations responsible for human rights impacts stemming from their subsidiaries' operations irrespective of the answer to the first question? Since this positive aspect does not directly correlate to substantive human rights, the critical legal issue is to establish the legal source of the positive duty to be imposed on parent corporations.

This thesis addresses these two primary legal issues: the application of the human rights standards of the home state; and the establishment of a positive duty of due diligence for parent corporations. The analysis of these issues follows the outline and research questions described in the following subsection.

4.2 Research Questions and Thesis Outline

This thesis addresses the central research question: How can courts in the home state address transnational business and human rights ("BHR") disputes where subsidiaries' activities, adhering to host state actions or laws, lead to human rights impacts? The thesis answers this question by analysing established legal frameworks to resolve two legal challenges within these disputes: the application of the human rights standards of the home state; and the establishment of a positive due diligence duty for parent corporations concerning their subsidiaries' activities. The following outline provides a roadmap for addressing these issues in the subsequent chapters.

Chapter 2 presents actual cases illustrating the complexities of corporate dilemmas in transnational BHR disputes. These transnational cases demonstrate how host state laws restricting human rights can create conflicts of human rights standards. Meanwhile, corporations are compelled to adhere to these laws. For comparison, Chapter 2 also introduces a domestic dispute, which involves complexities in balancing interests but lacks differences in human rights standards between states. The cases discussed in this chapter set the scene for further analysis.

Chapter 3 explores international human rights law principles – indivisibility, interdependence, interrelatedness, and universality – together with the proportionality principle, which courts typically use in traditional human rights disputes. The chapter examines how these principles and judicial tools address conflict in human rights standards between states. The examination highlights the limitations in the transnational BHR setting

due to the absence of a norm shared by the two standards which can govern the balancing exercise.

Chapter 4 examines the resolution of conflicts in human rights standards between states. It emphasises the need to prioritise one rule over another rather than balancing conflicting interests. The chapter discusses the relevance of the choice of law rules and the act of state doctrine in guiding the courts' selection. It argues that the inherent difficulty stems from the unclear extent of human rights protection that home state courts may justify invoking the public policy exception for ignoring the justification of the actions or laws of the host states. To address this, it proposes clarifications to the public policy exception regarding human rights by advocating for the consideration of human rights deemed absolute under the home state's law as a guiding framework for courts to invoke this exception.

As a result, courts cannot apply the home state's standards of non-absolute human rights to disputes. This presents a valid justification for corporations to adhere to host state laws or actions. This potentially contributes to a negative response to whether (non-absolute) human rights are breached by corporate activities. Furthermore, the application of the home state's absolute human rights standards does not automatically result in the parent corporations' involvement in the breach if the evidence cannot show their involvement in the activities of their subsidiaries, which are considered separate entities.

However, in either circumstance, human rights impacts exist. This is where parent corporations may bear responsibility under the positive due diligence duty to identify, prevent, or mitigate the human rights impacts related to the operations of their subsidiaries. This corporate duty is established in positive law in that it does not arise from human rights. By connecting this positive duty to corporate conduct, the absence of a human rights violation by the subsidiary does not negate the existence of this duty, and failure to fulfil this positive duty can result in corporate liability.

Chapter 5 explores the human rights due diligence obligation of states in international human rights law so as better to understand why courts must hold parent corporations responsible for human rights impacts arising from their subsidiaries and contrast this state due diligence with the due diligence concept applicable to corporations. The chapter also analyses the due diligence concept under the UNGPs, due diligence legislation in France and Germany, and the EU CSDDD, to ensure a better understanding of the place and extent of corporate due

diligence that courts need to impose a positive duty on parent corporations by interpretating existing corporate and tort law.

Chapter 6 suggests how courts can impose a positive duty of due diligence on parent corporations and aligns with the findings in Chapter 5. With a focus on UK jurisdiction,[79] the chapter explores parent corporations' liabilities under corporate and tort law before justifying the focus on tort law. The chapter critically assesses the judicial reasoning of UK court judgments on parent corporations' duty of care in the BHR context. It proposes refinements by acknowledging the multiple aims of tort law which serve as liability rules for compensation and guidance rules to regulate behaviour. The "rights model" of tort law advocated by Stevens is used to substantiate this proposal.[80]

Chapter 7 is the thesis conclusion. It highlights the implications of the thesis findings. Based on these outlines, the following section explains the methodology and analytical structure of this thesis.

5. Methodology and Analytical Structure

The methodology used in the analysis in this thesis primarily adopts the doctrinal approach with a positivist orientation. This is clear from the emphasis on the adjudicative role of courts in applying established and existing law to create order, and the legal implication of the term "responsibility". Throughout this thesis, legal doctrines are formulated objectively by examining the existing legal rules, tracing legal precedents, and interpreting legislative provisions.

Various areas of legal discipline shape the legal norms in the BHR field of study. Their doctrinal settings are subjects of study and aid in identifying legal norms relevant to the research questions.[81] However, when positive law on the topics no longer provides answers – for example, the proportionality principle, the public policy exception for rules under

[79] See below, Section 5.

[80] Robert Stevens, *Torts and Rights* (OUP 2007).

[81] Ian Donbinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 20–21.

private international law, and the duty of care notion – the thesis applies the most authoritative theories on the relevant legal instrument.[82]

This method aims to address legal uncertainties, which might be considered a weakness in the judicial role under the analytical framework of the thesis. Two manifestations of "uncertainties" are involved: the application of legal norms; and the hierarchy in their application.[83] Uncertainty as regards application arises from the vagueness of legal concepts, while uncertainty as regards hierarchy stems from the interaction between different norms at different levels (international and domestic) across different jurisdictions and disciplines.

Despite the transnational nature of the BHR context, this thesis refrains from comparative analysis due to the evolving nature of the field and the need for internationally recognised norms. Although this methodology remains consistent throughout the thesis, different analytical structures are used to address the application of human rights standards and the positive due diligence duty.

The primary challenge in the human rights standards aspect arises from differences in human rights standards between the home state and the host state. The analysis centres on international human rights law and cannot rely solely on the law and practice of a single jurisdiction. Instead, actual cases, practical examples from various jurisdictions, and the practices of international human rights tribunals provide the best illustrations to identify the challenge of diversity in the transnational BHR context.

In contrast, the positive due diligence duty requires an examination of the corporate liability regime in national law, including mandatory due diligence legislation and corporate and tort law. While the focused scenario is transnational BHR disputes, the enforcement of due diligence duty must rely on the home states' domestic law.

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[82] Chapter 3, Section 2 explores the proportionality principle in human rights within domestic constitutional courts and international human rights tribunals. Chapter 4, Section 2 defines the extent of the public policy exception for the choice of law rules and the act of state doctrine by recognising the universality principle under international human rights law. Chapter 6, Sections 2.1 and 4.1.1 address the intersection between the duty of care notion in tort law and due diligence, circumventing the fundamental principle of separate corporate entity doctrine in corporate law and the limitation of domestic judicial power under the choice of law rules and the act of state doctrine.

[83] These two forms of legal uncertainty are introduced in Yalnazov's work. See Orlin Yalnazov, *Precedent and Statute: Lawmaking in the Courts versus Lawmaking in Parliament* (Springer Fachmedien 2018) 51–85.

In this respect, the analysis relies on the corporate and tort law of the UK due to its long history of case law in these areas. Under the common law system, UK case law undeniably influences courts in other common law jurisdictions. However, reliance on the UK corporate and tort law does not preclude the extension of the analysis to civil law jurisdictions as they share fundamental principles in these legal domains.[84]

Corporate law concepts – for example, the separate corporate entity and limited liability – are foundational in corporate law worldwide, while principles such as piercing the corporate veil are products of judicial interpretation applicable in exceptional circumstances. Although courts cannot create law in civil law systems, they apply other established legal principles, such as implicit agency and duty of care under negligence law, to achieve similar outcomes.[85]

In the tort law of many countries, the principles governing negligence share common elements, including the existence of a duty of care, breach of the standard of care, occurrence of damage, and causation between breach and injury. However, determining a duty of care hinges on judicial interpretation.[86]

In addition, several standards of corporate practice developed in the UK are widely recognised[87] and the UK serves as the home state for numerous transnational corporations operating businesses through subsidiaries in other jurisdictions. This notwithstanding, there has not yet been mandatory due diligence legislation for human rights in general.[88] This holds considerable potential for legal development regarding corporate responsibility for human rights impacts in corporate groups and parent-subsidiary relationships.

Although the actual cases in the transnational disputes discussed in Chapter 2 belong to jurisdictions other than the UK, none of them has delivered a decision on the merits, and the

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[84] The broad concepts of separate corporate entity doctrine in corporate law and the duty of care in negligence law are common in jurisdictions having modern legal systems. This point will be justified again in Chapter 6, Section 5 when I consider how the proposal in this thesis can be applied in other jurisdictions.

[85] For the comparative analysis of piercing the corporate veil in Belgium, France, Germany and the Netherlands, see Karen Vandekerckhove, 'Piercing the Corporate Veil' (2007) 4 Kluwer Law International 191. For Switzerland, see Weber and Baisch (n 13) 690.

[86] Chapter 6, Section 5.

[87] For example, the UK corporate governance code was the basis of the OECD Principles of Corporate Governance. See Colin Mayer, 'The Governance of Corporate Purpose' [2021] SSRN Electronic Journal 7.

[88] There is a call for this legislation in the UK. See 'Mandatory Human Rights Due Diligence in the UK: To Be or Not to Be?' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/blog/mandatory-human-rights-due-diligence-in-the-uk-to-be-or-not-to-be/> accessed 30 June 2024.

legal implications in the case discussed are not relevant to this thesis.[89] Therefore, the background to these cases helps simplify an understanding of the interaction between different legal concepts and crystallise the analysis in this thesis.

Lastly, it is essential to recognise the limitations of the approach and proposal offered in this thesis. While it offers an alternative perspective to address the issue of incoherent doctrines in different areas of law relevant to the BHR context, the practical implementation of the proposed framework remains subject to the internal policies of each specific state and the independent discretion of relevant national courts.

Courts in some states may exercise greater restraint than others, particularly when disputes involve values closely tied to state policy, when conflicts arise between equally compelling principles or when political tensions between states are at play. In such cases, courts may defer decision-making to the executive or legislative branches. With this recognition, the analytical framework in this thesis adopts a balanced approach that avoids direct engagement with political tensions while emphasising the judiciary's role in interpreting norms, addressing legal gaps and ensuring accountability in transnational BHR disputes.

Also, the emphasis on legal positivism undeniably attracts the challenge of ignoring moral principles in shaping the law.[90] However, legal positivism offers a clear and objective framework, which supports the analytical focus on the judicial role in this thesis.

On these grounds, this thesis offers an original take on several aspects of the BHR field of study as emerges from the following section.

6. Original Contributions

The analysis in this thesis is grounded in various normative frameworks across different legal disciplines. However, it is essential to spell out that this thesis does not analyse these disciplines comprehensively. Rather, it focuses on their interaction through real dispute scenarios in the transnational BHR context.

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[89] Chapter 2, Sections 2 and 3.

[90] Daniel Weinstock, 'Legal Positivism Special Section: McGill Companion to Law' (2020) 66 McGill Law Journal 115, 115.

The thesis introduces an original framework that focuses specifically on the role of national courts in resolving transnational BHR disputes involving complexities within parent-subsidiary relationships, together with a distinctive tension when corporations are obliged to follow the host state's laws that restrict human rights. This framework fills a gap in existing literature which focuses predominantly on other approaches, such as legislation or disputes lacking this tension. It delves into judicial involvement in balancing the interests of all concerned parties and explores how the existing legal concepts interact potentially to address this complex scenario. With this framework, this thesis is distinct from earlier contributions which by-and-large do not explore the court's role in disputes involving such tension in depth.

This section elaborates on the original contributions this thesis brings to the BHR field, particularly as regards the analytical framework (Subsection 6.1) and the interaction between the established and existing legal concepts (Subsections 6.2 and 6.3).

6.1 The Court-Centric Framework of Analysis Addressing Corporate Obligations to Adhere to Host State Law

The court-centric framework presented in this thesis and the scenarios selected for analysis represent an original contribution. The use of scenarios for analysis is inspired by Palombo's work,[91] which uses case studies from well-known BHR incidents in her analysis.[92] She focuses on victims' rights to claim and states' duties to protect human rights in the context of European home states. However, the case studies in her work do not address scenarios involving corporate dilemmas, which are the focus of this thesis. Also, her work does not extensively explore the court's role or propose alternatives for national courts to apply them in resolving crucial issues. Based on this focus, the framework and the focused scenarios in this thesis offer insights that her work does not.

Within the BHR context, most existing literature typically begins with discussions on corporate responsibility and human rights due diligence, as recommended by the UNGPs or mandated by specific legislation in various countries. Apart from those which focus on an

[91] Dalia Palombo, *Business and Human Rights: The Obligations of the European Home States* (Hart Publishing 2020).

[92] The cases are: (i) the Bangladeshi building collapse (Rana Plaza Tragedy) involving workplace abuses; (ii) the Chevron-Texaco Ecuadorian case concerning environmental degradation and oil pollution; and (iii) the Nigerian case concerning militarised commerce.

historical study to understand the development of these concepts and their rationale and effects,[93] early works pre-mandatory due diligence legislation often critique the flaws in the language of the UNGPs and the inadequacy of voluntary responsibility opting rather for legally binding concepts.[94]

Certain scholars focus on how domestic corporate and tort law can enforce corporate responsibility through regulatory reform,[95] while others emphasise their limitations.[96] Additionally, others critique specific court decisions involving BHR disputes from the perspective of the extant law or the corporate responsibility concept.[97]

Since the enactment of due diligence legislation, the focus of the study has shifted to consider the legal model within legislation and its effectiveness in addressing corporate responsibility.[98] Recently, there has been a growing acknowledgement that legislation alone is insufficient to address corporate responsibility. This has seen an increase in studies exploring alternative approaches to complement efforts at due diligence legislation.[99]

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[93] For example, Muchlinski (n 43); Martens (n 43).

[94] See Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013); Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 899; Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 Melbourne Journal of International Law 1.

[95] See van Dam (n 31); Barnali Choudhury and Martin Petrin, 'Parent Company Liability' in *Corporate Duties to the Public* (CUP 2019); Mares (n 13); Wagner (n 42).

[96] See Zerk (n 68).

[97] See Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape Plc' (2013) 76 The Modern Law Review 603; Barnali Choudhury, 'Enforcing International Human Rights Law Against Corporations' in I Tourkochoriti et al (eds), *Comparative Enforcement of International Law* (Forthcoming) <https://digitalcommons.osgoode.yorku.ca/all_papers/372/> accessed 30 June 2024.

[98] See Sandra Cossart, Jerome Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All Developments in the Field' (2017) 2 Business and Human Rights Journal 317; Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4 Business and Human Rights Journal 265; Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International & Comparative Law Quarterly 789; Gabriela Quijano and Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) 6 Business and Human Rights Journal 241; Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6 Business and Human Rights Journal 550; Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption' (2021) 6 Business and Human Rights Journal 141.

[99] See Deva (n 11); Barnali Choudhury, 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough' (2023) 8 Business and Human Rights Journal 180; Marianna Leite, 'Beyond Buzzwords: Mandatory Human Rights Due Diligence and a Rights-Based Approach to Business Models' (2023) 8 Business and Human Rights Journal 197; Julia Dehm, 'Beyond Climate Due Diligence: Fossil Fuels, "Red Lines" and Reparations' (2023) 8 Business and Human Rights Journal 151.

From these observations, it is plausible that a substantial portion of the existing literature in the BHR study may be influenced by the concept of corporate responsibility under the UNGPs, which focuses primarily on promoting due diligence to ensure human rights protection. The court-centric framework of analysis adopted in this thesis offers a distinctive approach by applying the existing law to resolve the substantive issues arising in transnational BHR disputes. This approach recognises the diversities among societies and emphasises the importance of balancing all interests in the BHR context rather than concentrating solely on holding corporations responsible for human rights impacts.

In addition, the specific scenarios examined in this thesis have been interpreted in certain scholarly works as a situation where due diligence cannot be achieved.[100] However, none of these works investigates how courts can effectively address these issues.[101] The scenarios considered in this thesis bear significant weight as they contribute to the question of human rights standards, which requires consideration of the application of human rights in the dispute and the balance between human rights protection, the justification for the host state's law, and the corporate obligation to comply with that law. Significantly, it justifies distinguishing two obligatory forms of due diligence, emphasising the conduct-oriented nature of a positive duty on parent corporations as regards their subsidiaries' operations. This point has, arguably, been overlooked in earlier works in this field.

6.2 Defining Scope of the Public Policy Exception: Connecting to Absolute Human Rights

The conflict of human rights standards arises from the host state laws or acts interfering with human rights. Adjudication of transnational BHR disputes involving corporate dilemmas requires courts to verify such laws or actions by foreign states. However, the choice of law rules and the act of state doctrine restrict judicial power to challenge the legality of another state's acts or laws unless they are contrary to the public policy of the forum state.

Public policy serves as a tool for governmental institutions to address public problems that fall within the common interests of society.[102] This thesis explores the extent to which human rights protection is encompassed within the public policy exception for the choice of law

[100] See Quijano and Lopez (n 98) 252; Deva (n 11) 402.

[101] In Deva's work, he suggests drawing a red line to limit the business activities in this situation. However, his suggestion involves a regulatory framework which is not the judicial role. See Deva (n 11) 406.

[102] Chapter 4, Section 2.

rules and the act of state doctrine. While there have been scholarly discussions on this issue, this thesis contributes by providing deeper insights into specific transnational BHR disputes involving corporate obligations to adhere to host state laws, which have not yet received the necessary attention.

Chapters 3 and 4 specifically delve into this aspect by considering the universality principle of international human rights law which acknowledges the value of cultural relativism in balancing the sovereign power of both the home and host states. Chapter 4 asserts that balancing human rights and the laws of foreign states, which restrict human rights, is obscured by the term "public policy". This phenomenon necessitates that courts balance the protection of human rights and the need to value host state policy as required by international comity. The chapter argues that the absolute nature of certain human rights should serve as a guiding framework for delineating the extent of the public policy exception in matters related to human rights.[103]

With this clarity of human rights protection as the public policy exception, the thesis proposes an original framework for balancing three critical demands in transnational BHR disputes: the protection of human rights; host state law restricting human rights; and corporate interests in doing business by adhering to host state law. This balancing framework acknowledges the diversity among nations as regards prioritising and restricting rights and harmonises the public policies of the home and host states.

6.3 Alignment between Due Diligence Duty and Duty of Care of Parent Corporations

In this thesis, applying established and existing law to impose a positive due diligence duty on corporations requires an understanding of the different goals of tort law.[104] The thesis navigates two goals: compensation (to remedy damages); and deterrence (to dictate corporate behaviour). It argues that these two goals each addresses a different dimension of due diligence. Compensation can address the negative duty stemming from the corporations'

[103] Chapter 4, Section 2.

[104] They encompass corrective justice, compensation, restoring the *status quo ante*, distributive justice, and optimal deterrence. See Benjamin Shmueli, 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) University of Michigan Journal of Law Reform 745, 751–757.

own operation, while deterrence should address the positive duty to protect human rights from the operations of the subsidiaries.[105]

This thesis originally contends that the UK courts' reluctance to impose a duty of care on parent corporations for the activities of their subsidiaries arises not from the separate corporate entity doctrine but from an excessive focus on compensation in tort law.[106] Furthermore, it applies the "rights model" advocated by Stevens, which acknowledges multiple purposes of tort law to address due diligence for parent corporations in the scenario where corporations must observe the host state law.[107] This issue is addressed in Chapter 6.

This introductory chapter has provided the background of the analytical framework in this thesis and justified the application of the doctrinal research method with an emphasis on legal positivism. It has also highlighted the transnational BHR scenarios involving corporate dilemmas, which this thesis addresses, together with a background to developments in the BHR field of study and the original contribution this thesis will make to fill in the gap in this field. The following chapter substantiates the significance of the scenarios presented through the actual cases and sets the scene for further analysis.

[105] Chapter 6, Section 2.

[106] ibid.

[107] Chapter 6, Section 3.

CHAPTER 2

Setting the Scene: Corporate Dilemmas in Transnational BHR Disputes

Introduction

The preceding chapter introduced the court-centric framework as an analytical tool by which to examine transnational business and human rights ("BHR") disputes, specifically within the context of parent-subsidiary relationships. It underscored the pivotal role of the home state's national courts when addressing complex scenarios involving host state laws or acts restricting human rights.

This chapter illustrates these scenarios using real cases to show how the host state's laws or actions can contribute to dilemmas for corporations in their transnational business activities and complicate the adjudication of transnational BHR disputes. The corporate obligation to adhere to host state acts or laws challenges the applicability of human rights raised by victims. This compels courts to address the human rights standards that apply in these disputes.

Traditionally, conflicts in human rights arise between two different rights, different instances of the same rights, or between different rightsholders.[1] In exceptional circumstances, one rightsholder may face two conflicting human rights – for example, in the case of euthanasia where the right to life and the right to die conflict.[2] Resolving this conflict requires each state to determine its domestic policy to deal with the question through laws and regulations.

From this point, conflicts regarding individuals' human rights are elevated to the public level. The nation's policies and political aims are called in to determine the extent of human rights protection. As Nickel correctly points out, different countries experience different treatment of rights.[3] They possibly recognise the value of each human right differently. This

[1] Several works have examined the conflict of human rights in this general context. For example, see James Griffin, 'When Human Rights Conflict' in *On Human Rights* (OUP 2008); Stijn Smet, 'Introduction—Conflicts of Rights in Theoretical and Comparative Perspective' in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights* (OUP 2017); Xiaobing Xu and George Wilson, 'On Conflict of Human Rights' (2006) 5 Pierce Law Review 28.

[2] Xu and Wilson (n 1) 34.

[3] James Nickel, 'Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights' (2008) 30 Human Rights Quarterly 984, 987.

perspective – which reveals different standards in different societies – challenges the universality of human rights.[4]

It is here where international human rights law becomes relevant in addressing these disparities. In Europe, Africa, and America, supranational judicial bodies have been established to address this variety of standards.[5] Resolving conflicts requires weighing the competing factors,[6] and courts often play a pivotal role[7] on both domestic and international levels.

Conflicts in traditional human rights disputes involve states. At the international level, the relevant supranational judicial bodies can hear these disputes and compel states to comply with their obligations under relevant international human rights instruments. At the domestic level, states are parties to human rights claims, and disputes adjudicated by national courts have no transnational element. However, as we shall see in Section 1, this does not imply an absence of difficulties, especially when other legitimate reasons for the states' activities are significant.

The horizontal human rights obligations in the transnational BHR context create a conflict scenario distinct from the traditional one. As we saw in the Thai case at the outset of this thesis,[8] corporations must rely on the host state's concession process to identify and acquire land for sugarcane production. However, this process affects people living in the area subject to the concession. Under international human rights law, the host state has an obligation to ensure an adequate standard of living for its people. However, corporations become a target for the litigation of human rights violations, although they have no control over the host state's concession process.

The root of the problem lies in the laws or acts of the host state, lowering human rights standards below those internationally recognised and contributing to the conflict between human rights standards in the home and host states.[9] While corporations rely on the standard

[4] Chapter 3, Section 1.2 explores this issue in further detail.

[5] Namely, the European Court of Human Rights, the African Court on Human and Peoples' Rights, and the Inter-American Court of Human Rights, respectively.

[6] Griffin (n 1) 57.

[7] Xu and Wilson (n 1) 33.

[8] Chapter 1, Introduction.

[9] Griffith, Smit, and McCorquodale identified eight types of conflict between international human rights standards and national law or practice that corporations typically encounter. They are: (i) cases where national

in the host state, victims ground their claims on the internationally recognised standard adopted by the home state. This conflict of human rights standards in the transnational BHR context raises two significant dilemmas.

The first relates to corporations. While the victims' rights are significant, corporations have no choice but to abandon their business opportunity, ignore others' rights, or risk committing an offence for non-compliance. In the Thai case above, the corporations (both the parent company and its subsidiary) must rely on the government process in identifying land and granting concessions. Their involvement in the disputed land arises post-violation. Even if they were aware of the violation of rights before they acquired the land, their only option is to walk away from the opportunity – a move which fails to prevent such a violation as the host state may offer the land to other business operators.

The second dilemma involves the home states' national courts since the actions or laws interfering with human rights belong to a foreign country where the violation occurs. Adjudicating transnational BHR disputes with corporate dilemmas in this context requires courts to hold that the human rights standards of the home state, as invoked by victims, apply to the disputes before determining whether those rights have been breached.

In traditional human rights disputes between states and citizens, national courts of those states can balance the need for human rights protection and the justification offered by the government for restricting them by calling on the proportionality principle within the domestic context of those states.[10] However, national courts in one state have limited jurisdiction to scrutinise other states' justification for their acts or laws. The same applies to the adjudication in the Thai sugarcane production case, which necessitated the court to address whether the right to an adequate standard of living under Thai law applied in that the host state carried out the forced eviction within their powers and territory. Significantly, the government of the host state was not a party to the dispute.

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law or practice contradicts these standards; (ii) cases where national law falls short of these standards; (iii) cases where information about national law is not publicly available; (iv) inconsistencies between laws in different jurisdictions; (v) absence of relevant national laws; (vi) absence of relevant national enforcement mechanisms; (vii) lack of access to a national assessment of compliance with international human rights standards; and (viii) lack of uniformity of international standards. See Arianne Griffith, Lise Smit and Robert McCorquodale, 'Responsible Business Conduct and State Laws: Addressing Human Rights Conflicts' (2020) 20 Human Rights Law Review 641.

[10] See below, Section 1. See also Chapter 3, Sections 2.1, 2.2 and 3.1.

This chapter presents real-life cases illustrating human rights conflicts based on the laws or government actions that restrict human rights in the operational area. It is essential to emphasise that the discussion focuses on situations where corporations are obliged to rely on the host state's actions or comply with its laws. Therefore, the conflicts stemming from lower standards in the host states, which do not prevent corporations from conforming to higher standards, are not the central focus as they do not present a dilemma for corporations. For example, the host state may lack regulations restricting child labour, but corporations are not prevented from voluntarily refraining from using child labour in their businesses.[11] Also, the aim of the case discussion in this chapter is to understand the nature of conflicts in the context of their background rather than the legal implications and outcomes of relevant court decisions.

Section 1 explores a domestic BHR dispute in the Italian Constitutional Court, *ILVA Steel Plant*. This case relates to national laws that promote economic growth for specific business activities while impacting on human rights. Although this scenario lacks a transnational element, it is crucial in illustrating the challenges stemming from the primary conflict between business purposes and human rights protection and serves as a helpful comparator in further analysis.

Section 2 addresses an incident involving Kaweri Coffee Plantation Limited, a subsidiary of a German coffee corporation, allegedly implicated in forced eviction in Uganda to promote the establishment of a coffee plantation which occurred before the corporate acquisition of land. This case raises issues related to transnational business activities, particularly regarding the corporations' reliance on the land provision processes of the host state. The background to this incident is comparable to the sugarcane production activities in the Thai court above.[12]

Section 3 examines transnational dilemmas involving the activities of two technology corporations. Cisco sold its surveillance product to the host state government, while Yahoo! disclosed its users' data to law enforcement agencies in the host state. The host state used Cisco's products and the data disclosed by Yahoo! for crime prevention within its political context, leading to the arrest and detention of members of anti-government groups. Based

[11] See the specific instances concerning the problem of forced and child labour in Uzbekistan notified to the National Contact Points (NCPs), 'List of Specific Instances of NCPs Concerning Forced and Child Labour in Uzbekistan' <https://mneguidelines.oecd.org//database/searchresults/?q=(Host:(Uzbekistan))> accessed 30 June 2024.

[12] Chapter 1, Introduction.

on these facts, the corporations were accused of aiding and abetting the violation of freedom from torture of those arrested. These two cases highlight scenarios where normal operations in compliance with host state laws that restrict human rights for national security reasons may violate internationally recognised human rights.

The *Kaweri*, *Cisco*, and *Yahoo!* cases were deliberately selected for their illustrative value in exploring the complexities of transnational BHR disputes, particularly the dilemmas corporations face in upholding human rights. The *Kaweri* case exemplifies the role of courts in addressing corporate accountability for ex-post-facto involvement in human rights impacts initially caused by the host state, especially in areas with limited governance and enforcement of human rights. The *Cisco* and *Yahoo!* cases highlight the challenges of balancing corporate responsibility with geopolitical tensions, where courts often encounter limitations. Collectively, these cases capture diverse human rights categories and provide a comprehensive foundation for examining the interplay between human rights values, corporate accountability, and the practical constraints faced by courts in transnational BHR disputes. They also underscore the importance of a nuanced understanding of human rights due diligence by distinguishing between corporations' negative and positive obligations.

Section 4 synthesises key insights gleaned from the cases discussed in the chapter and provides an overarching understanding of the issues. This sets the stage for further analysis. Section 5 concludes this chapter.

1. Conflicts in Domestic BHR Disputes: Balancing Economic Growth and Human Rights

This section presents an actual situation where domestic law promoting economic growth challenges the value of human rights. While not having a transnational character, the case exemplifies that the economic benefits of business activities promoting people's well-being may not justify the disregard of other human rights.

In the case of the *ILVA Steel Plant*,[13] the Italian Constitutional Court weighed the conflict between victims' rights to health and environmental protection, on the one hand, and national

[13] The Italian Constitution Court, Decision No 58/2018. For further details of this case, see Maddalena Neglia, 'Striking the Right(s) Balance: Conflicts between Human Rights and Freedom to Conduct a Business in the ILVA Case in Italy' (2020) 5 Business and Human Rights Journal 143; Maddalena Neglia, 'The Environmental Disaster and Human Rights Violations of the ILVA Steel Plant in Italy' (FIDH 2018).

economic growth and job availability for citizens, on the other. In this case, the conflict extended beyond a clash between the national economic purpose and the victims' rights to involve a conflict between the executive's support for business and the judiciary's protection of human rights.

In this case, the ILVA Steel Plant contributed to adverse effects on the environment which led to the declaration of the surrounding area as a high-risk environmental crisis zone.[14] In 2012, the judiciary ordered the seizure of the plant's operation area on the basis of ILVA knowingly and wilfully continuing with polluting activities for profit in violation of public health and safety standards.[15]

However, in challenging this judicial order, the Italian government permitted the plant to resume operations by adopting a series of decrees. The initial decree granted the plant the right to continue production for 36 months, citing its status as a "strategic plant for national security".[16] The decree also mandated compliance-monitoring under the "Integrated Environmental Authorisation" procedure. The Italian Constitutional Court considered this decree a legitimate exercise of executive power aimed at establishing a reasonable balance between safeguarding health and employment without resulting in excessive detriment to health.[17]

At the end of this continuation period, the court was requested to review another decree enabling ILVA's operations despite the judicial seizure order. The court struck a balance between the government's interest in production – which was aligned with economic principles set out in the Constitution – and the protection of fundamental rights guaranteed by the same Constitution. Recognising the absence of a hierarchy of fundamental rights, the court emphasised the "primary" nature of rights relating to health and a healthy environment.[18] According to the court, a compromise demands a strict justification and thorough evaluation of the balance between various rights. Therefore, compliance with

[14] Neglia, 'Striking the Right(s) Balance' (n 13) 145; Neglia, 'The Environmental Disaster and Human Rights Violations of the ILVA Steel Plant in Italy' (n 13) 7.

[15] ibid.

[16] Neglia, 'Striking the Right(s) Balance' (n 13) 145–146; Neglia, 'The Environmental Disaster and Human Rights Violations of the ILVA Steel Plant in Italy' (n 13) 7.

[17] Neglia, 'Striking the Right(s) Balance' (n 13) 146; Neglia, 'The Environmental Disaster and Human Rights Violations of the ILVA Steel Plant in Italy' (n 13) 7–8.

[18] Neglia, 'Striking the Right(s) Balance' (n 13) 147–148.

constitutional principles mandates that economic and commercial activities respect fundamental rights as a minimum and essential condition.[19]

The *ILVA* case is a traditional human rights dispute involving the state's actions due to the primary contention relating to the issuing of decrees. The court balanced human rights against the government's economic objectives and the nation's prosperity thoroughly. It prioritised the victims' rights over the claims of the importance of business to the nation's security and economic wealth. This case also shows that justifications for infringing on human rights deemed acceptable today (the decision for the first decree) may not necessarily remain acceptable in the future (the decision for the second decree).

The rights to health and a healthy environment are inextricably linked to the right to life and prohibit public authorities from endangering individuals or impacting on their life expectancy. As Italy is a signatory to the European Convention on Human Rights, the European Court of Human Rights stipulates positive obligations concerning the right to life, including the regulation of industrial activities that pose potential risks to human lives.[20] This right holds intrinsic value for all human beings and cannot be derogated from even in the case of justification regarding national security or emergency that threatens the nation.[21]

The adjudication of this case rests primarily on public law and revolves around the government's actions in issuing law decrees. Suppose the case concerned remedies for the victims under tort law and the corporation replaces the state as defendant. The question arising is whether the weight apportioned to the nation's economic interest remains equally significant as when the government is a direct party to dispute – provided that it is not the primary issue in the civil liability dispute and the government permits the corporation to operate its business.

Regardless of the outcome, domestic courts must weigh and balance conflicting interests in their jurisdiction under their constitutional norm. Add a further complexity by assuming that ILVA is a subsidiary of a corporation in another country and the case for compensation comes before a court in that country. That court would be required to justify the economic interests of the state where the operations occur. This scenario raises the question of which tools

[19] ibid; Neglia, 'The Environmental Disaster and Human Rights Violations of the ILVA Steel Plant in Italy' (n 13) 31.

[20] European Court of Human Rights, 'Guide on Article 2 of the Convention – Right to Life' 12.

[21] ICCPR Articles 4 and 6, ECHR Article 2.

would be appropriate for national courts in one state when considering the needs and interests of another state. The two following sections consider this problem in greater detail.

2. Transnational Dilemmas from Host State Actions before Corporate Involvement

This section explores a scenario where corporations acquire land in foreign states for their operations, for example, agricultural production, mining and exploration, or infrastructure projects. In doing so, corporations need to rely on the host state's authority to select and provide designated areas or permission for business activities. However, such a process may lead to compulsory eviction of populations in those areas, which the host state must resolve through its applicable laws before transferring the land to corporations. Nevertheless, people dissatisfied with the outcome of the decision by their state may bring a claim against the corporations, alleging corporate activities as the cause of a violation of their right to an adequate standard of living – a human right guaranteed by the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").

The Thai case introduced at the outset of this thesis illustrates this scenario. However, as the case is still pending in the court, this section introduces a comparable scenario involving a coffee plantation in Uganda for further analysis. Although there is a slight difference in that the claim in the Ugandan case was not brought against the parent corporation in the home state court, the parent corporation is unavoidably questioned regarding its accountability.

The case involves the coffee plantation of Kaweri Coffee Plantation Limited ("Kaweri"), a wholly-owned subsidiary of German Neumann Kaffee Gruppe in Uganda.[22] In 2000, the Ugandan government initiated a plan to modernise agriculture focusing on coffee. On 18 August 2001, the Ugandan army violently expelled 401 local indigenous families – some 2,041 individuals – from their land in several villages to allow the government to lease the

[22] The factual background of this case is based on a factsheet and a report produced by an international human rights organisation, FIAN. See FIAN Germany, 'Human Rights Violations in the Context of Kaweri Coffee Plantation/Neumann Kaffee Gruppe in Mubende/Uganda: Long-Term Impacts of a Forced Eviction without Compensation' (2019) 6–7 <https://www.fian.org/files/files/HR_violations_in_the_context_of_Kaweri_Coffee_Plantation_in_Mubende.pdf> accessed 30 June 2024; FIAN Netherlands, 'Land Grabbing in Uganda' (2012) <http://wphna.org/wp-content/uploads/2014/04/2012-07-FIAN-land-grabbing-in-Uganda-Fact-sheet.-Mubende.pdf> accessed 30 June 2024.

land to Kaweri, which subsequently used that land to establish the largest coffee plantation in East Africa.[23]

This land eviction resulted in the displacement of communities and resulted in the local people suffering increased illnesses and deaths due to the loss of shelter and access to clean water, and inadequate healthcare. The forced eviction severely impacted the human rights of the affected communities, including their rights to food, water, housing, healthcare, and education.

In August 2002, the evictees brought a claim against the Government of Uganda and Kaweri to a High Court in the host state.[24] They asserted that they had been forcibly removed from their lawfully occupied land. They contended that the corporate defendants were vicariously liable for their displacement and should compensate them for the unlawful eviction and property losses.[25]

The judgment was rendered in March 2013. It found against the violent eviction and recognised the legal rights of the evictees to the land under customary law.[26] The court unequivocally condemned Kaweri's activities and recognised the duty of its parent corporation to respect human rights and ensure fair treatment of the indigenous people. However, the court acquitted all the defendants and placed all the blame on Kaweri's lawyers for giving poor legal advice and demanded that the law firm compensate the 2,041 evictees to the tune of approximately 11 million Euros.[27]

In 2015, however, this case was overturned by the Court of Appeal and remanded to the High Court. In 2019, the High Court ordered mediation between all parties involved. While 258 (of 401) families agreed to a compensation offer from the Ugandan government, as of

[23] FIAN Netherlands (n 22).

[24] *Baleke Kayira Peter & 4 Ors v Attorney General & 2 Ors* (Civil Suit No 179 of 2002).

[25] Danwood M Chirwa and Christopher Mbazira, 'Constitutional Rights, Horizontality, and the Ugandan Constitution: An Example of Emerging Norms and Practices in Africa' (2020) 18 International Journal of Constitutional Law 1231, 1247.

[26] ibid.

[27] FIAN, 'Ugandan Court Orders Compensation Be Paid to Evictees of the Kaweri-Coffee-Plantation' <https://fian.org/en/press-release/article/ugandan-court-orders-compensation-be-paid-to-evictees-of-the-kaweri-coffee-plantation-576> accessed 30 June 2024.

October 2023, the promised funds had not been paid to them and the court ruling for the remaining families was still pending.[28]

Alongside this claim, in 2009, an activist group and an NGO filed a complaint against the parent corporation with the German National Contact Point for the OECD Guidelines for Multinational Enterprises,[29] based on its activities in Uganda through its subsidiary. The National Contact Point observed that there was no evidence to suggest that the parent corporation acted in bad faith in acquiring the land for its subsidiary's plantation. It also acknowledged the parties' willingness to engage in the judicial process and out-of-court settlement and encouraged them to work together to strengthen the trust relationship between corporations and the affected parties.[30]

In 2015, the UN Committee on Economic, Social and Cultural Rights considered Uganda's initial report on the implementation of the ICESCR. The Committee expressed specific concerns about this case and the fact that to date, the legal redress that the inhabitants could obtain did not include restitution of land rights.[31]

Based on the factual background of the *Kaweri* case, the acquisition of land needs to rely on the process conducted by the host state's government, and the corporations (both the parent company and its subsidiary) are not involved in that process. However, the acts of the host state in acquiring the land for lease to the corporations are questionable as a violation of human rights.[32] The corporations are in these circumstances alleged to be vicariously liable for the evictions conducted by the host state.

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[28] Knut Henkel, 'Landgrabbing in Uganda: Urteil besser spät als nie' *Die Tageszeitung: taz* (18 October 2023) <https://taz.de/!5963708/> accessed 30 June 2024.

[29] Chapter 5, Section 2.1 provides descriptive information about these OECD Guidelines and their relevance to corporate responsibility to respect human rights.

[30] The final declaration (in German) issued by the German NCP concluding the specific instance–30 March 2011 <https://www.bmwk.de/Redaktion/DE/Beschwerdefaelle-NKS/Abschliessende-Erklaerung/wake-up-and-fight-gegen-neumann-gruppe.pdf?__blob=publicationFile&v=1> accessed 30 June 2024.

[31] CESCR, 'Concluding Observations on the Initial Report of Uganda' [UN Doc E/C.12/UGA/CO/1 (2015)].

[32] A scholar observed that a variety of land acquisition patterns stem from the prevailing land tenure system. The absence of adequate legal recognition and documentation of land rights poses a recurring challenge because local landholders are vulnerable to the threat of dispossession, and companies are at the risk of disputes and conflicts. See Lorenzo Cotula, 'Addressing the Human Rights Impacts of "Land Grabbing"' (European Parliament 2014) EXPO/B/DROI/2014/06 14.

This pattern of human rights violations conducted by the host state is evident in various incidents when the host states wish to attract foreign investment.[33] Regardless of corporate attempts to uphold a human rights responsibility policy, their acquisition of the land is manifestly at the expense of evictees.

The dilemma illustrated in this situation stems from the acquisition of the non-occupied land from the host state. However, corporations are asked to be accountable for events before they are involved without any chance of changing what happens. All they can do in this situation is to terminate the relevant agreement with the host state or request the host state's representation and warranty of non-violation of human rights through agreement clauses. However, the best action in the eyes of victims may be for the corporations to pay compensation for acts they had no part in.

The litigation in the *Kaweri* case was in the host state's court, and the host state's government was also a defendant. In delivering judgment, the Ugandan court needed first to establish the existence of the forced eviction and the people's rights to own land before considering whether those rights had been breached by the forced eviction and whether the defendants were involved in such breach. Suppose this claim is brought against the parent corporation before courts in the home state. In that case, the courts need to consider the existence of the victims' rights before establishing the breach, aligning with the pattern followed by the Ugandan court.

The critical question that courts in the home state need to consider is what authority they have to address the national policies of foreign states that results in forced relocation of their people for the prosperity of the nation, and how the home state's courts can determine that such evictions constitute a breach of human rights by corporations, given that the host state undertakes the eviction before corporate involvement. And, if some compensation for the land has been paid to evictees, how the home state's courts should determine the appropriateness of the compensation paid. Taking our Ugandan example, it is essential to note that the state's resource constraints may limit the advancement of the right to an adequate standard of living[34] and that the Ugandan government needs to promote the

[33] For example, several cases of forced eviction for copper and cobalt mining sites in the Democratic Republic of Congo are documented. See Amnesty International, 'DRC: Powering Change or Business as Usual?' (Amnesty International 2023) 33–89 <https://www.amnesty.org/en/documents/afr62/7009/2023/en/> accessed 30 June 2024.

[34] ICESCR, Article 2 para 1. See also Chapter 3, Section 2.1.1.

general welfare in its democratic society by following a national plan to modernise agriculture.

I base my further analysis on this assumption of litigation in the home state against the parent corporation to make it comparable to the Thai case and align with the focus on the role of the home state's courts under the analytical framework of this thesis. This assumption is necessary to avoid directly criticising the ongoing disputes in the Ugandan and Thai courts.[35]

The following section illustrates a different scenario of a corporate dilemma where the activities of corporations become critical factors in the violation of human rights recognised under the International Covenant on Civil and Political Rights ("ICCPR"). However, corporations have no choice but to adhere to the host state's laws.

3. Transnational Dilemmas from Host State Laws Compelling Corporate Activities

This section introduces cases where corporations conducting regular businesses adhere to laws or government orders of host states that eventually restrict human rights. The corporate dilemma in this situation differs from the previous section in that the activities of corporations in observing laws and orders are crucial factors contributing to the human rights violations. These legal restrictions are primarily justified by concerns of national security and societal unity. To ensure their effectiveness, law enforcement agencies may need to improve their technology to keep pace with threats and cooperate with business operators, primarily through information sharing. This is where the tension arises.

This section explores two cases involving technology companies. In the first case, Cisco sold its products to the host state, which the state then used to monitor political dissident activity. The second case involves the internet service provider, Yahoo!, which disclosed email information and user content to the government authorities upon their mandates. Both cases

[35] Cases brought before the home state's courts against parent corporations pertaining solely to the right to an adequate standard of living, like the Thai court case, are very limited. In this context, cases involving corporate participation in the pre-acquisition process, especially when they knowingly facilitate brutal eviction or engage in corrupt practices, are not considered corporate dilemmas in this thesis. Instead, they are clearly categorised as indirect corporate actions resulting in human rights violations and frequently involve other fundamental human rights, such as the right to life and freedom from torture.

led to the same outcome – the arrest, conviction, and imprisonment of members of anti-government groups.

While the information and communication technology business may not have traditionally been associated with the BHR context, operators nowadays face a heightened risk of violating human rights in what is an expansive and borderless industry. As with the *Kaweri* case, the cases discussed in this section serve as practical illustrations of the need to consider all legal areas surrounding the BHR context holistically rather than engaging in separate investigations.

The Cisco Case: Doe et al v Cisco Systems, Inc

In the *Cisco* case,[36] the plaintiffs brought an action in a US court alleging that Cisco helped the Chinese government build a computer system known as the "Golden Shield". This system was used to track and prosecute political dissidents, particularly members of the Falun Gong movement. While the claims were based on two specific pieces of legislation in the US – the Alien Tort Statute and the Torture Victim Protection Act – the background to this case underlines the challenges faced by corporations operating in a foreign jurisdiction.

The plaintiffs alleged that during the 1990s, the Chinese Communist Party proposed establishing the Golden Shield system.[37] Cisco was selected to develop the system, which was completed in 2001 and put into operation nationwide by June 2003.[38] The plaintiffs contended that Cisco had been aware of the oppressive purposes of the Golden Shield system and had played a significant role in its creation, which was tailored to the Chinese authorities' objectives. The system aimed to establish online surveillance capabilities to suppress dissent in China with a focus on the Falun Gong movement.[39]

Consequently, Cisco and its subsidiary, Cisco China Networking Technologies, Ltd, were alleged to have aided, abetted, and conspired with the Chinese Communist Party and public security officers by providing significant assistance through the creation of a customised

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[36] *Doe I v Cisco Systems, Inc (District Court for the Northern District of California)* [2014]; *Doe I v Cisco Systems, Inc (Court of Appeals for the Ninth Circuit)* [2023]. For further detail on this case, see 'Cisco Systems Lawsuits (Re China)' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/cisco-systems-lawsuits-re-china/> accessed 30 June 2024.

[37] *Doe I v Cisco Systems, Inc (District Court for the Northern District of California)* (n 36) 3.

[38] ibid.

[39] ibid 4.

security system. They had been aware of and intended that their assistance would contribute to the human rights abuses against members of Falun Gong, leading to the arrest, arbitrary detention, torture, and killing of the plaintiffs and their colleagues.[40]

Cisco argued that its operation was to build equipment to global standards to facilitate the free exchange of information, and that the equipment sold in China was the same as that sold in other nations worldwide and was in strict compliance with US government regulations.[41]

The case was initially dismissed in the US District Court in 2014 as the allegations lacked sufficient ties for a US court to hear the claims under the Alien Tort Statute. In the court's opinion, the mere creation of the Golden Shield system tailored for Chinese authorities, even if directed and planned by Cisco in the US, did not show that human rights abuses in China against the plaintiffs bore a sufficient connection with the US. The court indicated the necessity for a more substantial link showing that tortious acts were planned, directed, or executed in the US.[42]

Later, the plaintiffs filed a motion for reconsideration of the case.[43] Despite the District Court's denial of the plaintiffs' request, the Court of Appeals remanded the claims for further proceedings.[44] According to the Court of Appeals, the standard for knowledge – *mens rea* – is met when a defendant acts with knowledge that his or her actions will contribute to the commission of a crime, or with an awareness of a substantial likelihood that those actions would assist in committing a crime. It is not necessary for the aider or abettor to know the precise crime intended or that it was in fact committed. If he or she is aware that one of several crimes will likely be committed, and one of those crimes is committed, the standard has been met.[45]

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[40] ibid 4–5.

[41] 'Cisco Rejects Falun Gong "China Online Spying" Lawsuit' *BBC News* (24 May 2011) <https://www.bbc.com/news/world-asia-pacific-13516027> accessed 30 June 2024.

[42] *Doe I v Cisco Systems, Inc (District Court for the Northern District of California)* (n 36) 9–11.

[43] This was after the Court of Appeals ruled in *Nestle I*, 755 F.3d 1013, that the allegation regarding the involvement of US corporations in international law violations abroad was sufficient to meet the *mens rea* requirement for an aiding and abetting claim under the Alien Tort Statute. See the procedural history in *Doe I v Cisco Systems, Inc (Court of Appeals for the Ninth Circuit)* (n 36) 17.

[44] *Doe I v Cisco Systems, Inc (Court of Appeals for the Ninth Circuit)* (n 36).

[45] ibid 59.

The court asserted that Cisco was aware of the Chinese authorities' goal to use the Golden Shield system to target Falun Gong members. Furthermore, it was widely acknowledged in the news at the time that the authorities' efforts involved severe violations of international law – torture and arbitrary detention in particular.[46] As a result of the Court of Appeals' order to remand the claim, the *Cisco* case is ongoing.

The Yahoo! Case: Xiaoning et al v Yahoo! Inc et al

In the *Yahoo!* case,[47] it was alleged that Yahoo! had provided Chinese law enforcement agencies with access to private email records, messages, and other information regarding the plaintiffs' online activities. This information allegedly contained pro-democracy literature and led to the arrest, prosecution, conviction, and ten-year imprisonment of the plaintiffs.

The claims were based on the violation of the US Alien Tort Statute, the Torture Victims Protection Act, and the Communication Privacy Act. The plaintiffs asserted that their detention resulted from a human rights abuse that was aided and abetted by Yahoo! and its Hong Kong subsidiary.

Yahoo! sought to dismiss the complaint arguing that plaintiffs' claims were not justiciable based on the act of state doctrine, the political question doctrine, and principles of international comity. Yahoo! further contended that the court should dismiss the plaintiffs' claims as they had not joined the People's Republic of China – a necessary party.

Commentators observed that Yahoo!'s activities differed from those of other service providers. Yahoo! transferred its email service to servers in China, requiring them to comply with Chinese law, while other internet service providers maintained their servers outside China.[48] The law in question is the State Secrets Law.[49] Also, in 2002, Yahoo! signed the "Public Pledge on Self-Discipline for the Chinese Internet Industry" in terms of which it

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[46] ibid 61–62.

[47] *Xiaoning et al v Yahoo!, Inc et al* [2007] District Court for the Northern District of California C 07-2151 CW. Note that the summary of this case relies on publicly available sources due to the lack of access to the complete decision. See 'Yahoo! Lawsuit (Re China)' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/yahoo-lawsuit-re-china/> accessed 30 June 2024; 'Xiaoning v. Yahoo!, Inc., No. C 07-2151 CW' (*Casetext Search*) <https://casetext.com/case/xiaoning-v-yahoo> accessed 30 June 2024.

[48] Gerald Venezia and Chiulien C Venezia, 'Yahoo! and the Chinese Dissidents: A Case Study of Trust, Values, and Clashing Cultures' (2010) 6 Journal of Business Case Studies (JBCS) 30.

[49] ibid.

agreed to monitor and censor electronic communication that could threaten national security or disrupt social stability.[50]

In October 2007, the court partially granted the plaintiffs' motion for initial and jurisdictional discovery and postponed its decision on Yahoo!'s motion to dismiss until the completion of the discovery. This decision led to a subsequent private settlement agreement between the parties.

Setting the Scene for Transnational Dilemmas Stemming from Host State Laws

Corporations' actions in these two cases were in the ordinary course of their businesses and involved the sale of IT equipment and the disclosure of user information to the authorities for crime prevention within the host state context.[51] These cases underscore the tension arising from host state law, albeit with subtle differences in the degrees of tension.[52]

The sale activities in the *Cisco* case were not legally required by domestic law. However, the issue arose from Cisco's knowledge that its products might be used for human rights abuse, although such actions were not considered abusive in the host state. In contrast, the disclosure of information in the *Yahoo!* case was mandated directly by the host state's law.[53]

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[50] ibid.

[51] There are instances where corporations indirectly facilitate human rights abuses by third parties through activities outside their normal business operations. In the *Chiquita* case, the parent corporation was involved in payments made to a paramilitary organisation that engaged in extrajudicial killing and torture. Similarly, in the *Anvil Mining* case, the parent company was accused of complicity in human rights abuses for providing logistical support to the Congolese military in their fight against a small group of rebels which resulted in severe human rights abuses against civilians. In the *Kalma* case, corporations were alleged to have paid the police and offered logistical assistance which contributed to harm inflicted on villagers during two outbreaks of unrest and violence. These cases involved indirect corporate actions outside their normal operations by aiding and abetting human rights abuse by third parties, which are not scenarios addressed in this thesis. See 'Chiquita Lawsuits (Re Colombia, Filed in USA by US Nationals)' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/chiquita-lawsuits-re-colombia-filed-in-usa-by-us-nationals/> accessed 30 June 2024; 'Anvil Mining Lawsuit (Re Complicity in Dem Rep of Congo, Filed in Canada)' (*Business & Human Rights Resource Centre*) < https://www.business-humanrights.org/en/latest-news/anvil-mining-lawsuit-re-complicity-in-dem-rep-of-congo-filed-in-canada/> accessed 30 June 2024; *Kalma & Ors v African Minerals Ltd & Ors* [2020] EWCA Civ 144 [2].

[52] A number of discussions of the *Cisco* and *Yahoo!* cases focus on the application of the US Alien Tort Statute. For a discussion of the human rights balance in the *Cisco* case, see Greg Walton, *China's Golden Shield: Corporations and the Development of Surveillance Technology in the People's Republic of China* (Rights & Democracy 2001). In respect of the human rights balance in the *Yahoo!* case, see Brian R Israel, '"Make Money Without Doing Evil?" Caught Between Authoritarian Regulations in Emerging Markets and a Global Law of Human Rights, U.S. ICTs Face a Twofold Quandary' (2009) 24 Berkeley Technology Law Journal 617; Theresa Harris, 'Settling a Corporate Accountability Lawsuit Without Sacrificing Human Rights: Wang Xiaoning v. Yahoo!' (2008) 15 Human Rights Brief 5.

[53] Note that the situation in the *Cisco* case highlights an issue that the EU Directive on Corporate Sustainability Due Diligence fails to address. Due to the limited scope of the "chain of activities" definition, corporations are not obliged to address, prevent, or remedy adverse impacts from the use of their product after it has been

In both cases, the only way for corporations to uphold human rights would be to cease business operations in that country, as the host state law recognises political aims and national security, potentially lowering human rights standards and putting corporations at risk of being accused of human rights abuses.[54]

This restricted choice facing corporations emphasises the necessity to comply with domestic law. Home state courts must balance human rights protection with the justifications behind the host state laws restricting human rights and the corporate obligations to adhere to these laws.

The ongoing *Cisco* case might offer avenues through which the victims could pursue their claim in the US, and its legal implications are potentially applicable to the victims in the *Yahoo!* case if were to be initiated today. However, the *Cisco* case has not yet concluded on the merits of the claims that Cisco is responsible for the harm. Therefore, it might be too early to infer the victims' victory in the *Cisco* case at this stage. Significantly, the basis of claims in both *Cisco* and *Yahoo!* is particularly relevant to the US-specific Alien Tort Statute and the Torture Victims Protection Act. The absence of these specific laws in other jurisdictions could make addressing corporate responsibility more challenging.

Similar scenarios could arise involving companies domiciled in different jurisdictions and operational areas. For example, during the 2011 internet and telecommunication blackout in Egypt, a UK-based telecommunication corporation justified its actions regarding potential human rights violations by explaining that it had legal advice to follow the instructions of the Egyptian authorities to shut down the mobile network. The company claimed that the authorities had the legal authority to require compliance and that failure to comply with such

purchased. The directive's obligation for the downstream chain is limited to business partners directly carrying out activities for or on behalf of the corporation. See Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EC) 2023/2859, Article 3(1) point (g). See also Anti-Slavery International, 'Anti-Slavery International Key Takeaways from the European Parliament's Corporate Sustainability Due Diligence Directive Text' (2023) 4; 'Corporate Sustainability Due Diligence Directive Gets through Vote from Council of the EU' <https://www.osborneclarke.com/insights/corporate-sustainability-due-diligence-directive-gets-through-vote-council-eu> accessed 30 June 2024.

[54] This is a situation that a commentator has termed the "red line" suggesting that there should be limits on business activities as it is not "realistic to respect all human rights" in such circumstances, and refraining from conducting business activities or avoiding entry into certain markets is the best approach to guaranteeing human rights. See Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 Leiden Journal of International Law 389, 402–406.

instructions could result in imprisonment and suspension of the corporation's operating licence.[55]

Consequently, business operations in host states with laws restricting human rights warrant consideration as to how the court-centric framework could address corporate responsibility. Because of *Cisco*'s ongoing status, this thesis uses a scenario based on the *Yahoo!* case for further analysis. The *Yahoo!* case also underscores stronger pressure on corporations to engage in the alleged activities.

It is important to note that *Yahoo!'s* alleged business activities involved the disclosure of personal information, which interfered directly with the victims' privacy rights, while the torture was committed by a third party and beyond Yahoo!'s control. However, the victims in the *Yahoo!* case based their claims on absolute rights, alleging that the corporation had aided and abetted in the torture. As this thesis addresses corporate responsibility from a civil liability perspective under the court-centric framework,[56] further analysis will tackle both rights.

The following section brings together the cases discussed in this chapter to offer an understanding of their variations and coherence in structure and the nature of corporate dilemmas. This synthesis sets the stage for further analysis.

4. Synthesising Case Studies: Grasping Structural Variations and Corporate Dilemmas

This section captures all the key aspects of three cases – *ILVA*, *Kaweri*, and *Yahoo!* – discussed in the preceding sections. It explains their relevance to further analysis in the thesis.

The *ILVA* case represents a domestic scenario of traditional human rights conflict in which national courts are authorised by their national law to scrutinise the acts or laws of their governments that restrict the human rights of their citizens. It highlights the challenges that courts encounter in striking a balance between protecting human rights and the state's

[55] Vodafone Group Plc, 'Response on Issues Relating to Mobile Network Operations in Egypt' 22 February 2011 <https://media.business-humanrights.org/media/documents/files/media/documents/vodafone-statement-re-egypt-22-feb-2011.pdf> accessed 30 June 2024.

[56] Chapter 1, Section 1.

justification for restricting human rights in the interest of broader public welfare based on a constitutional norm of the state.

The *Kaweri* and *Yahoo!* cases, when considered from the home state courts' perspective,[57] introduce further difficulties due to corporations' involvement and engagement in transnational business activities. Unlike the domestic scenario in the *ILVA* case, these additional factors pose challenges for home state courts when balancing the need for human rights protection and the acts or laws of other states that affect the human rights of their citizens without the host states as parties to disputes.

The *Kaweri* and *Yahoo!* cases have three things in common. Firstly, foreign corporations conduct business in the relevant host states through subsidiaries. Secondly, their subsidiaries' activities in the host states are connected to the human rights impacts on the victims. Thirdly, the host states' acts or laws lower their human rights standards below those internationally recognised, and corporations can do nothing but rely on, comply with, or adhere to them. This third point amounts to a corporate dilemma in transnational BHR disputes.

However, the human rights at stake in these two cases have certain differences. The *Kaweri* case relates to the right to an adequate standard of living under the ICESCR. In contrast, in the *Yahoo!* case, the victims initiated their claim on freedom from torture, an absolute human right under the ICCPR which cannot be derogated from under any circumstances. Another relevant right stemming from Yahoo!'s activities is the privacy of correspondence, also recognised under the ICCPR, albeit not absolute in nature.

A further distinction lies in the involvement of corporations amounting to corporate dilemmas. In the *Kaweri* case, the corporate reliance hinges on the actions of the host state in providing the non-occupied land which was completed before the corporations acquired and possessed the land. However, in the *Yahoo!* case, Yahoo! relies on the laws of the host state that compel them to act in a certain way. Corporate action becomes a critical factor contributing to human rights abuse.

[57] I base my analysis of the *Kaweri* case on the ground that victims bring their claims against parent corporations in the home state courts based on the same incident. See above, Section 2.

The *Yahoo!* case illustrates a heightened dilemma for corporations due to their awareness of the likely impacts resulting from their activities, and the rights at stake are more fundamental, as derogation from rights under the ICCPR is stricter than under the ICESCR.[58] Consequently, the further analysis in this thesis will centre on the transnational dilemma in the *Yahoo!* case while using the *ILVA* case for comparison to highlight the complexities of corporate involvement and the transnational element. The findings will then be applied to the facts of the *Kaweri* case where business reliance was placed on the acts of the host state.

Concentrating on the *Yahoo!* and *Kaweri* cases does not exclude analysis from the legal perspective of other jurisdictions, as this thesis focuses solely on their background, not their legal implications. These cases can help exemplify the consideration of both negative and positive duties of due diligence.

5. Conclusion

This chapter introduces scenarios illustrating conflicts between national laws and human rights from domestic perspectives in the *ILVA* case in Section 1, to transnational disputes in the *Kaweri* and *Yahoo!* cases in Sections 2 and 3. The chapter establishes scenarios for further analysis under the court-centric framework with a focus on the background of the *Yahoo!* case, comparing it with the *ILVA* case before applying the findings to the *Kaweri* case if brought to the home state court.

When exploring these scenarios, the court-centric framework will assess the conflict of human rights standards in Chapters 3 and 4, a critical legal issue in addressing the negative duty of due diligence for corporations compelling them to refrain from infringing on human rights. This underscores the applicability of human rights standards urged by victims, as the challenges are posed by the corporate dilemma stemming from the host state's acts or laws. Chapters 5 and 6 explore the parent corporation's positive due diligence duty to prevent human rights impacts from the subsidiary operations in these transnational scenarios.

[58] Chapter 3, Section 2.1.1.

CHAPTER 3
Navigating Human Rights Principles and Proportionality Concept

Introduction

The previous chapter explored transnational business and human rights ("BHR") disputes, highlighting situations where corporations operating through subsidiaries in host states are faced with a dilemma. The corporations must adhere to host state laws or rely on host state actions restricting human rights.[1] Consequently, their operations in these host states can inadvertently lead to accusations of human rights violations and render them subject to claims in home state courts. In these claims, victims rely on the home state's human rights standards, while corporations are obliged to rely on the standards of the host state. This clash of human rights standards places corporations in a predicament as they cannot avoid contributing to human rights impacts without abandoning their business opportunities.

Human rights of victims, whether under home state or host state standards, correspondingly create negative duties for corporations (both parent companies and their subsidiaries), to respect and refrain from interfering with these rights.[2] Therefore, courts need to address an initial legal issue of whether the human rights standards of the home state, as asserted by victims, apply in the cases before them before determining the factual issue of whether the corporate activities infringe on human rights. Without rights, there can be no violation of these rights.

This chapter addresses the application of human rights within the court-centric framework of analysis developed in Chapter 1.[3] Given that this thesis centres around the corporate responsibility concept in the UN Guiding Principles on Business and Human Rights ("UNGPs"), the reference to human rights has a specific focus on the International Bill of Human Rights: the Universal Declaration of Human Rights ("UDHR"); the International Covenant on Civil and Political Rights ("ICCPR"); and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[4] These are all UN human rights

[1] Chapter 2, Sections 2 and 3.

[2] Chapter 1, Section 4.1

[3] Chapter 1, Section 1.

[4] UNGPs, Commentary to Principle 12.

instruments, which provide a concrete justification for examining UN principles of human rights in addressing the issue at hand.

Consequently, this chapter explores the principles of international human rights law: indivisibility; interdependence; interrelatedness; and universality. These principles are directly relevant to the prevalence and uniformity of human rights and hold the potential to address the conflict of human rights standards.[5] This chapter moves on to consider the application of the judicial tool – termed the "proportionality" concept – which courts typically apply to weigh and balance human rights against the state's justification for restricting them. It examines how all these principles and proportionality apply to the clash of human rights standards in transnational BHR disputes.

Section 1 explores the principles of international human rights law. Section 2 examines the proportionality concept, traditionally applied in human rights disputes involving states as defendants, to consider the state's justification for interfering with human rights.

Section 3 applies the proportionality concept, while still recognising the international human rights principles, to the BHR disputes discussed in the previous chapter.[6] It highlights potential barriers in applying proportionality to the transnational BHR context stemming from the ambiguity regarding the governing norms relied upon by home state courts in striking a balance between human rights and other values of the host state when restricting human rights. Section 4 concludes this chapter.

1. Principles of International Human Rights Law

Under international human rights law principles, human rights are described as indivisible, interdependent, interrelated, and universal.[7] This section explores how these principles address the conflict of human rights standards between home and host states in the BHR context.

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[5] These principles reflect the nature of human rights under the UN human rights instruments. However, there are other sets of human rights principles, such as those considering conceptual premises of human rights, encompassing freedom, fairness, justice, participation, accountability, and the private sphere. See Nigel Rodley, 'International Human Rights Law' in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2018) 790–795.

[6] Chapter 2, Section 4.

[7] 'Vienna Declaration and Program of Action' (UN Doc A/CONF157/23-EN 1993) para 5.

The principles of "indivisibility, interdependence and interrelatedness" emphasise that no human rights can be fully realised without recognising all other human rights. Although these terms are often used interchangeably in international human rights law,[8] understanding their historical development reveals nuanced differences.

The principle of indivisibility can be traced back to the initial division of the ICCPR and the ICESCR in the early 1950s.[9] The division of these two covenants led to critique regarding the perceived inferiority of economic and social rights compared to civil and political rights.[10] To counter this, the principle of "indivisibility" was introduced, emphasising the equal importance of economic and social rights.[11] This principle was articulated in the 1968 Proclamation of Teheran[12] and reaffirmed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 (the "Vienna Declaration").[13]

Statements about "interdependence" and "interrelatedness" were added to the Vienna Declaration to address situations where countries endorsed most human rights but rejected specific ones, such as women's rights or political participation rights.[14]

The universality of human rights was first enshrined in the UDHR. According to its preamble, the UDHR aims to establish "a common standard of achievement for all peoples and

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[8] Daniel J Whelan, 'Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights' [2008] Economic Rights Working Papers 1.

[9] Daniel J Whelan, 'Indivisible Human Rights and the End(s) of the State' in Kurt Mills and David J Karp (eds), *Human Rights Protection in Global Politics. Global Issues Series* (Palgrave Macmillan 2015) 69.

[10] ibid.

[11] James Nickel, 'Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights' (2008) 30 Human Rights Quarterly 984, 985.

[12] 'Proclamation of Teheran' (UN Doc A/CONF32/41 1968). This proclamation was issued at the close of the first UN international conference on human rights convened for assessment of the UDHR on the 20-year anniversary of its adoption. Its paragraph 13 reiterates that "[s]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible".

[13] 'Vienna Declaration and Program of Action' (n 7). This declaration was issued at the close of the World Conference on Human Rights, which was the second UN international conference on human rights and which is widely regarded as a landmark event in the field. While not legally binding, it holds substantial moral weight and signifies the commitment of UN members to support the UN's functions in the field of human rights and to promote universal respect for international human rights standards. Notably, it recommended the establishment of the UN High Commissioner for Human Rights, which the UN General Assembly then created in December 1993. The key principle reiterated in its paragraph 5 asserts that "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".

[14] Nickel (n 11) 985.

all nations", regardless of nationality, sex, ethnic origin, colour, religion, language, or any other status.

These principles are essential for understanding the complexities of human rights standards and hold significant relevance for our analytical framework in addressing transnational BHR disputes. They offer insights for addressing conflicts between different standards by recognising variations in human rights standards among states based on different values recognised in respective societies. The principles of indivisibility, interdependence, and interrelatedness provide a framework for prioritising rights within one society, while universality addresses the varying recognition of specific rights among different societies.

In the transnational BHR context, these principles necessitate courts in the home state to acknowledge the differences in human rights standards in the host state. This includes understanding how certain rights may be prioritised, derogated from, or restricted differently from those in the home state. This emphasises the need for a nuanced approach to resolving conflicts of human rights standards.

Subsection 1.1 explores the principles of indivisibility, interdependence, and interrelatedness, while Subsection 1.2 examines the universality principle. These principles provide flexibility in prioritising human rights among themselves and against non-human rights values within societies, thus recognising the diversity of human rights recognition and interpretation in different societies. However, this flexibility does not imply permission for states to act arbitrarily or disregard the underlying purposes of these principles.

1.1 Indivisibility, Interdependence, and Interrelatedness

At the international level, the UDHR enshrines civil and political rights in articles 3 to 21 and economic, social, and cultural rights in articles 22 to 28. Since the UDHR is an aspirational instrument, its non-binding nature requires further work to ensure effective enforcement, leading to international covenants.

However, the political tension of the Cold War was a major reason for splitting the ICCPR and the ICESCR for each group of rights.[15] While the Western market economies prioritised

[15] Vašák classifies three generations of human rights. The first generation comprises "negative rights" roughly corresponding to civil and political rights; the second, consisting of economic, social, and cultural rights, in the main requires positive action by the state. Vašák also recognises a third generation of human rights known as solidarity human rights, such as a right to a healthy environment, which are based on a universal attitude aimed

civil and political rights, the Eastern economies underlined economic, social, and cultural rights.[16] The separation resulted from negotiations to resolve these political tensions, although the UDHR did not distinguish between them.[17]

This separation led to the perceived difference in obligations between the two covenants. The ICCPR imposes "respect and ensure" obligations (negative obligations) on states. In contrast, the ICESCR mandates them to "take steps" (positive obligations) to fulfil the covenant's provisions.[18] Economic, social, and cultural rights have been criticised for their non-absolute, non-justiciable, and the lack of immediacy in the application which allows gradual implementation and is often costly and vague.[19]

Several attempts have been made to blur the distinction between the two groups of rights. The treaty bodies monitoring the covenants' implementation advocate for the indivisibility, interdependence, and interrelatedness of all human rights.[20] The enjoyment of all human rights is interlinked,[21] leading to references to civil, cultural, economic, political, and social rights collectively.[22]

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at fostering worldwide peace and collaboration among states. These rights necessitate collective action from individuals as well as states and other political entities. However, this thesis will not discuss solidarity human rights as its focus is on illustrating the different values of human rights corresponding to the two covenants referenced by the UNGPs. For further reading, see Karel Vašák, 'A 30-Year Struggle; the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' [1977] UNESCO Courier 29.

[16] Whelan (n 8) 7–8; OHCHR, 'Frequently Asked Questions on Economic, Social and Cultural Rights' (2008) Fact Sheet No 33 9.

[17] OHCHR (n 16) 9.

[18] Spasimir Domaradzki, Margaryta Khvostova and David Pupovac, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 20 Human Rights Review 423, 425.

[19] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 159–160.

[20] Gauthier de Beco, 'The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities' (2019) 68 International & Comparative Law Quarterly 141, 143–144; OHCHR (n 16) 10.

[21] Hernández-Truyol demonstrates the interconnectedness by contending that the rights to free expression, free association, and free exercise, which are civil and political rights, lack efficacy in isolation and require the existence of health, education, and social security rights, which are economic and social rights. Similarly, these health, education, and social security rights would be mere illusions without the presence of peace and environmental rights (the third-generation rights) to support them. Additionally, "trade union rights and property rights can be viewed as either (or both) civil and political or social and economic rights". See Berta Esperanza Hernández-Truyol, 'International Law, Human Rights, and LatCrit Theory: Civil and Political Rights: An Introduction' (1996) 28 The University of Miami Inter-American Law Review 223, 224.

[22] OHCHR (n 16) 10.

Additionally, a tripartite framework of obligations – respect, protect, and fulfil – challenges the traditional view that the two sets of rights involve different obligations.[23] This framework applies to economic, social, and cultural rights before extending to civil and political rights.[24] Specifically, a duty to respect comprises a primarily negative commitment to abstain from interfering with rights; a duty to protect is to prevent third parties from interfering with rights; a duty to fulfil is to assure the gradual realisation of rights.[25] The duty to fulfil can be subdivided into facilitating, providing, and promoting obligations.[26]

These concepts of indivisibility, interdependence, and interrelatedness of human rights reflect the global reality that each right is significant, and their effectiveness depends on the existence of one another. The interconnected nature of human rights emphasises their collective importance in the global context. However, questions remain as to the extent of these principles, particularly whether all human rights have equal value or whether they are hierarchical.

While the traditional approach emphasised the equal value of rights and required integrated application, current practice suggests a nuanced understanding.[27] By adding the "interdependent" and "interrelated" notions, the gradual evolution of the "indivisibility" concept from the 1968 Proclamation of Teheran[28] to the 1993 Vienna Declaration[29] signals a shift towards acknowledging the different degrees of relativity between various human rights.

The terms "interdependence" and "interrelatedness" suggest less connectivity between rights compared to the term "indivisibility".[30] This allows for greater flexibility in prioritising one

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[23] This tripartite framework is significant in our consideration of the human rights due diligence obligation of states in Chapter 5, Section 1.1, which stems directly from the state's duty to protect human rights.

[24] Beco (n 20) 144.

[25] Markus Vordermayer-Riemer, 'The International Covenant on Economic, Social and Cultural Rights' in *Non-Regression in International Environmental Law: Human Rights Doctrine and the Promises of Comparative International Law* (Intersentia 2020) 56.

[26] ibid 57.

[27] Beco (n 20) 147.

[28] 'Proclamation of Teheran' (n 12) para 13.

[29] 'Vienna Declaration and Program of Action' (n 7) para 5.

[30] Nickel observes that indivisibility and interdependence are not the same thing, although they suggest supporting relations between different things. In his view, many more rights are interdependent than indivisible. He considers indivisibility as an extreme form of interdependence due to the bidirectionally supporting relationship. See Nickel (n 11) 987.

set of rights over another by examining how two sets of rights are intertwined and so potentially enhancing the realisation of other rights.[31] When examining the interconnectedness of each right with every other right, the degree of supporting relation can vary, inevitably requiring further consideration of the social arrangement within a society,[32] which may be different from one to another.[33]

In the transnational BHR context, this thesis advocates for the prioritisation of rights, which highlights significance of societal arrangements. It acknowledges that the host state may prioritise certain rights differently from the home state, recognising that human rights are shaped not only by their moral dimension but also by political and legal frameworks.[34] The host state's approach to prioritising human rights may lead to different standards – a complexity that this thesis aims to address.

For example, consider a scenario where corporations are involved in a hydroelectric power dam project initiated by the host state to improve its citizens' living standards.[35] Such a project, controlled by the host state, may lead to the displacement of local communities and disruption of ecosystems, which in turn affect other human rights such as the right to housing, food, the environment, or health. However, when dissatisfied victims bring a claim alleging corporate involvement in violating their right to housing and a healthy environment against corporations in the home state court, clarity on the hierarchy of rights becomes

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Similarly, Whelan unpacks this "tripartite formulation" asserting that each term serves a distinct purpose in the context of human rights. According to Whelan, interdependency is suitable to describe relationships between certain rights, while interrelatedness focuses on connections between broader categories of right and the institutional functions. The goal is to align institutions and procedures for economic, social, and cultural rights more closely with those accorded to civil and political rights. Regarding indivisibility, Whelan views it as "conceptual, symbolic and political", giving some sense of the mistake in division, separation, and categorisation. See Whelan (n 8) 2, 6 and10.

[31] Beco (n 20) 148.

[32] Nickel examines this societal aspect within the framework of the quality of implementation. In his view, the effective implementation of a right may demand, and concurrently offer, more substantial support for and from other rights. Conversely, low-quality implementation offers less support to and requires less support from other rights. A system of rights compelled by low-quality implementation typically exhibits low levels of interdependence among its rights. See Nickel (n 11) 991–994.

[33] Several circumstances can reflect the conflict of two human rights, in which states prioritise one right over another and may differ between states. For instance, the issue of same-sex marriage often raises a conflict between the freedom of religion and the non-discrimination right. Similarly, disclosure of medical records in the trial raises a conflict between privacy and the right to a fair trial.

[34] See below, Section 2.1.1.

[35] The purpose of the state in this hypothesis sets it apart from the *Kaweri* case concerning agricultural production, as previously discussed in Chapter 2, Section 2. In the *Kaweri* case, there is no clear indication of how the host state's project could uphold any specific human rights. Therefore, only non-human rights normative considerations are involved, which cannot be considered within the framework of prioritising rights under the principles of indivisibility, interdependence, and interrelatedness.

essential. This claim necessitates that courts first determine the existence of the victims' rights in situations where the host state needs to uphold the same rights but for a wider group of people. The principles of indivisibility, interdependence, and interrelatedness suggest that within the societal arrangement of the host state, the rights of victims may be subordinate to the rights that the host state intends to uphold.

These principles guide home state courts in addressing conflicts of human rights standards stemming from the different prioritisation of rights in transnational BHR disputes by recognising differences in societal arrangements within the host state. However, this recognition does not imply that the host state can establish societal norms without limits when prioritising one right over another, especially considering their obligations under international human rights law to respect, protect, and fulfil human rights. If this were not so, the fundamental purpose of these principles to recognise and foster all human rights systematically would be undermined.

Returning to the example of a hydroelectric project, if the preference given to the right to an adequate standard of living for a broader community threatens not only the rights to food and housing of individuals but also the right to life due to coerced eviction, the significance of the infringed rights changes. Therefore, the interconnected nature of specific rights in disputes is significant in determining the level of prioritisation. However, these principles do not offer clear guidance to home state courts in establishing this as prioritising depends on the arrangements within each society.

The following subsection focuses on specific human rights better to understand how their value can vary across societies and acknowledging the non-human rights normative considerations, such as national security or economic interests, inherent to particular societies, irrespective of the notion of universality.

1.2 Universality

Another important principle in international human rights law is universality, asserting the universal application of human rights to all human beings everywhere in the same way, regardless of personal or societal circumstances or any other status. The conflict of human rights standards between states, resulting in a corporate dilemma, directly challenges this assertion. This subsection highlights that the universality of human rights cannot disregard

each nation's cultural, historical, and political background. This means that human rights may not always automatically prevail over other values upheld by states.

Since the adoption of the UDHR, there have been challenges asserting that human rights are derived from "Western" ideology and can, therefore, not be considered universal.[36] Critics argue that some human rights are incompatible with, for example, the Islamic culture and religion.[37] The diversity in cultures and histories among different nations results in a plurality of human rights standards.

The Vienna Declaration acknowledges such differences while emphasising universality and the state's duty to protect human rights.[38] This recognition stems from challenges primarily raised during the Vienna Conference, notably from Asia.[39] The 1993 Bangkok Declaration of the Regional Meeting for Asia, recognised in the Vienna Declaration's preamble, emphasises that human rights, though universal, "must" be considered within the dynamic process of international norm-setting in light of national and regional particularities, various historical, cultural, and religious specificities.[40] Additionally, it reaffirms the right of all countries to determine their political systems.[41]

Similarly, during another regional meeting – this time for Latin America and the Caribbean – the 1993 San José Declaration acknowledges in its preamble the "rich cultural heritage based on a combination of various people, religions and races". But this declaration did not go further as those in the Bangkok Declaration.[42]

Consequently, the universality of human rights enshrined in the UDHR by the words "everyone has a right to …" or "no one shall be …" is questioned in practice. Many states

[36] Romuald R Haule, 'Some Reflections on the Foundation of Human Rights–Are Human Rights an Alternative to Moral Values?' (2006) 10 Max Planck Yearbook of United Nations Law Online 367, 385.

[37] ibid. See also Christina M Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 Human Rights Quarterly 740, 748.

[38] 'Vienna Declaration and Program of Action' (n 7) para 5.

[39] Cerna (n 37) 744.

[40] 'Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 29 March–2 April 1993' (UN, 1993) para 8.

[41] ibid 6.

[42] 'Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights, San Jose, Costa Rica, 18–22 January 1993' (UN, 1993).

define restrictions on human rights in their domestic law based on the cultures, histories, and political systems they uphold.[43]

The recognition of diversity in international human rights law also results in states refraining from ratifying or entering reservations to international human rights treaties upon ratification.[44] Considering the ICCPR as our example, several countries, including Thailand, Indonesia, and Lao PDR, reserve the interpretation of the right of self-determination under Article 1 paragraph 1 of the ICCPR to follow the Vienna Declaration.[45] Bahrain, Mauritania, and Qatar reserve the dominance of Islamic Shariah over some rights in the ICCPR, for example, freedom of religion, women's status, and the right to marry or divorce.

While several countries, including Brunei, Malaysia and Singapore, have not ratified the ICCPR,[46] fundamental human rights in these countries can be protected under customary international law. This renders certain rights obligatory for all states, irrespective of their treaty obligations. This applies notably to a number of civil and political rights. Certain rights are also protected as norms of peremptory or *jus cogens* norms, including the freedom from torture and slavery, genocide, and the crime of apartheid.[47]

The diversity that different states uphold contributes to many versions of human rights recognition under the universality principle. Taking Singapore as an example, its approach explicitly prioritises societal goals over individual rights, emphasising social order and rapid

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[43] Taking freedom of expression as our example, several countries have legislation that restricts freedom of expression based on their historical and contemporary contexts. For instance, many countries in Europe, such as France and Germany, criminalises the Holocaust denialism and the display or dissemination of Nazi-related content. South Korea's National Security Act criminalises support, encouragement, or praise for anti-government organisations, notably those associated with North Korea. Vietnam's cybersecurity law empowers the government to delete or block access to data infringing national security and it criminalises propaganda against the Socialist Republic of Vietnam. In Thailand, the *lèse majesté* offence (Section 112 of the Thai Penal Code) which involves insulting or defaming the monarchy, remains an integral part of the country's legal history and is still effective nowadays. In 2017, Germany enacted the Network Enforcement Act (*Netzwerkdurchsetzungsgesetz, NetzDG* – also called the "Facebook Act") to combat online hate speech and fake news on social networks.

[44] Note that there are limits on making reservations. For further detail, see International Law Commission, 'Guide to Practice on Reservations to Treaties, 2011' (2011) Report of the International Law Commission on the work of its sixty-third session. The status of the international human rights treaties and the reservation made by the party state can be found at <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en> accessed 30 June 2024.

[45] The Vienna Declaration considers the denial of the right of self-determination as a violation of human rights. However, this right shall not be construed as authorising or encouraging any action, which would dismember or impair, totally or in part, the territorial integrity or political unity of the sovereign. See 'Vienna Declaration and Program of Action' (n 7) para 2.

[46] Information as of 30 June 2024 <https://indicators.ohchr.org/>.

[47] Anders Henriksen, *International Law* (3rd edn, OUP 2021) 33-34,165; Rodley (n 5) 779–780.

economic growth for the majority's interests due to its geographical needs as an island state and its economic weakness and the high unemployment, poverty, and homeless rates at the time of decolonisation.[48]

In its 2021 report to the UN Human Rights Council, Singapore's government explained that it considers the nation's specific circumstances, requiring it to maintain harmony and equality in this diverse population as a small, densely populated, multi-racial, the very religiously diverse country in the world.[49] However, this approach has faced criticism, particularly from Western countries who voice concerns about LGBT rights, freedom of speech, and capital punishment.[50]

This thesis intentionally refrains from defending any moral, political, or legal reading of human rights. Rather, it seeks to reflect this reality of human rights universality while emphasising the existence of a political perspective but not denying fundamental moral norms attached to certain human rights.[51] It underscores that human rights may vary among states due to sources of the state's obligations, reservations, interpretation, or exceptions used by each state, contingent upon the values it recognises. Therefore, the universality of international human rights law should be seen as flexible and able to accommodate the diverse cultures and experiences of each nation.

Turning to universality in the BHR context, corporations cannot refuse to comply with law that impose restrictions based on a nation's specific historical, political, or cultural context. However, the state's ability to limit human rights does not imply limitations without

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[48] Melanie Chew, 'Human Rights in Singapore: Perceptions and Problems' (1994) 34 Asian Survey 933, 934–935.

[49] 'Singapore National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21' A/HRC/WG.6/38/SGP/1 para 12.

[50] European Parliament, 'Report Containing a Motion for a Non-Legislative Resolution on the Draft Council Decision on the Conclusion, on Behalf of the European Union, of the Partnership and Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part' (2019) (15375/2018 – C8-0026/2019 – 2018/0403M(NLE)) paras 6–8.

[51] It is said that human rights are significant in upholding the value of all human beings. So, all human rights have moral worth. See Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22 Business Ethics Quarterly 739, 741. However, the initial conception of certain human rights may not have been driven by moral principle. For further discussion on the moral and political dimensions of human rights, see Section 2.1.1 below. For the opposing view against the idea of attaching moral value to all types of human right, see Joseph Raz, 'Human Rights in the Emerging World Order' [2009] Transnational Legal Theory 19, 42–46; Charles R Beitz, *The Idea of Human Rights* (OUP 2009) 5; Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus' (2016) 1 Business and Human Rights Journal 21, 23–24; Donal Nolan and Andrew Robertson, 'Rights and Private Law' (Social Science Research Network 2011) SSRN Scholarly Paper ID 3085135 37.

boundaries – otherwise, the universality principle would have no place in international human rights law. This notwithstanding, the principle of universality does not dictate how to balance human rights with other values that states uphold. As emerges from the judicial deliberation in the *ILVA* case discussed in Chapter 2,[52] courts typically use the proportionality principle to determine whether the state's acts or laws restricting human rights for legitimate purposes are necessary and proportionate to human rights that must be sacrificed.

The principles of indivisibility, interdependence, interrelatedness, and universality introduce the possibility of prioritising one right over others, contingent upon the social framework within each state and acknowledge the diversity among nations arising from variations in non-human-rights values they recognise, contributing to different interpretations and restrictions on human rights. Differences in societal arrangements and recognised values among states can lead to diversity in prioritising and restricting rights. Consequently, conflicts may arise between human rights standards upheld by the home and host states and result in corporate dilemmas in transnational BHR disputes.

However, these principles lack specific guidance on establishing limitations for prioritising rights and balancing restrictions on rights. The subsequent sections will examine a judicial device frequently used to balance conflicting interests within domestic constitutional rights and international human rights disputes and assess its potential to address the existing gap in navigating the conflicting human rights standards in the transnational BHR context.

2. Proportionality in Human Rights Conflicts

This section aims to understand the "proportionality" and "balancing" concepts, which courts frequently use to justify their discretion when addressing conflict between a right and competing interests.[53] These two terms are often used interchangeably. This thesis recognises "proportionality" as a judicial methodology (broad concept) by which to adjudicate conflicts between different values, while balancing is one of the judicial tools (narrow concept) used to strike a balance between conflicting values. This understanding aligns with the pragmatic

[52] Chapter 2, Section 1.

[53] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review Rights, Balancing & Proportionality' (2010) 4 Law & Ethics of Human Rights 140, 142.

approach to be discussed[54] where "proportionality in the narrow sense" is recognised as the "law of balancing".[55]

Under the proportionality principle, measures applied by the state to restrict rights must fulfil three criteria: suitability; necessity; and proportionality in the narrow sense. Firstly, the measure must be suitable for achieving its intended purpose. Secondly, it must be necessary, meaning that no alternative measure is available that would result in less interference with rights. Finally, the importance of the purpose that the state aims to achieve must be proportionate to the interference with rights resulting from the measure.[56]

The national constitution guarantees human rights in the domestic context. Therefore, constitutional rights are akin to human rights. The proportionality principle serves as the standard for balancing rights to determine whether state interference with rights is justified in constitutional and human rights disputes at both the domestic and international levels.[57] Sieckmann has even argued (and defended in his work) that the proportionality concept is a universal human rights principle, emphasising its universal standard of rationality applied to human rights adjudications.[58] Consequently, discussions concerning state interference with human rights necessitate a consideration of proportionality.

The proportionality concept resolves conflicts between human rights and public interests by assessing the degree of their relative coexistence.[59] The development of the concept of

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[54] See below, Section 2.2.

[55] Other scholars also apply this logic. For example, see Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 International Journal of Constitutional Law 709, 711–715; Alain Zysset and Antoinette Scherz, 'Proportionality as Procedure: Strengthening the Legitimate Authority of the UN Committee on Economic, Social and Cultural Rights' (2021) 10 Global Constitutionalism 524, 538. However, some scholars may reason differently. For example, Porat and Cohen-Eliya view balancing and proportionality as having the same function, but the balancing identifies the infringement of rights without dividing the concept into the sub-tests. See Iddo Porat and Moshe Cohen-Eliya, *Proportionality and Constitutional Culture* (CUP 2013) 16–17.

[56] See below, Section 2.2.

[57] Kai Möller, 'Towards a Theory of Balancing and Proportionality: The Point and Purpose of Judicial Review' in *The Global Model of Constitutional Rights* (OUP 2012) 99; Jan Sieckmann, 'Proportionality as a Universal Human Rights Principle' in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer International Publishing 2018) 3; Thomas Cottier and others, 'The Principle of Proportionality in International Law' NCCR Trade Working paper 2012/38 (The National Centre of Competence in Research 2012) 5 <https://www.wti.org/media/filer_public/9f/1b/9f1bd3cf-dafd-4e14-b07d-8934a0c66b8f/proportionality_final_29102012_with_nccr_coversheet.pdf> accessed 30 June 2024.

[58] Sieckmann (n 57) 3.

[59] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468, 474.

proportionality is contributed by rational thought of corrective and distributive justice.[60] According to Aristotle, corrective justice represents mathematical equality in bipartite transactions, while distributive justice involves proportionate equality based on each participant's share and the governing distribution criterion.[61] We shall later see that this governing criterion is significant in justifying the balance between incommensurable interests.[62]

The modern development of the proportionality concept can be traced to the post-World War II era. At the time, the German Federal Constitutional Court applied proportionality to all rights included in the Basic Law (the German Federal Constitution), except the right to human dignity in Article 1.[63] The concept then migrated to European laws, including the European Convention on Human Rights ("ECHR") and legal systems in various jurisdictions worldwide.[64]

However, there is an opposing view on balancing human rights through the proportionality principle. In the United States, courts tend to highlight individual liberty and mistrust state intervention. They emphasise the constitutional text and its original meaning, contending that balancing introduces instability to constitutional protection, making it contingent on various circumstances determined by the outcome of the balancing process.[65]

Subsection 2.1 observes these conflicting theoretical views between the balancer (interest-based theory) and the absolutist (rights-based theory)[66] before justifying balance in the

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[60] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2011) 175; Thomas M Poole, 'Proportionality in Perspective' [2010] SSRN Electronic Journal 8.

[61] Ernest J Weinrib, 'Corrective Justice' in *The Idea of Private Law* (OUP 2012) 57.

[62] See below, Section 2.2.3.

[63] Barak (n 60) 180. Further information regarding the historical development of the proportionality concept can be found in Chapter 7 of his book.

[64] ibid 181–210; Cottier and others (n 57) 5; Laura Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable' in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer International Publishing 2018) 26.

[65] Cohen-Eliya and Porat conducted a study on the historical origins of American balancing and German proportionality. They justified the difference by pointing out that the American balancing entered a system in which constitutional guarantees were already in place and judicial activism to protect rights was an established norm. See M Cohen-Eliya and I Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 International Journal of Constitutional Law 263, 283–284.

[66] The terms "balancer" and "absolutist" are used in the work of Stavros Tsakyrakis. See Tsakyrakis (n 59) 470. These two views can be classified based on their focus as "interest-based" and "rights-based" views, respectively. The balancer advocates balancing all interests, while the absolutist upholds the supremacy of rights.

transnational BHR context. Subsections 2.2 and 2.3 examine the pragmatic approach to proportionality in domestic constitutional and international human rights laws perspectives, respectively.

2.1 Balancer versus Absolutist

The concept of proportionality serves as a judicial tool for adjudicating constitutional and human rights conflicts except under the US constitutional system.[67] The debates surrounding the balancer and absolutist views play a pivotal role in applying proportionality in human rights disputes. In this subsection, I aim to sketch this theoretical debate before justifying the application of proportionality in the transnational BHR context.

From the balancer's perspective, Alexy's "A Theory of Constitutional Rights"[68] contributes significantly to the discussion. Alexy argues that the rational application of constitutional rights necessitates a proportionality analysis.[69] He distinguishes between rules and principles and asserts that rules are definitive commands while principles are "optimization requirements" which signify that something is realised "to the greatest extent possible given the legal and factual possibilities".[70]

From this perspective, principles can be satisfied to different degrees, and this appropriate degree of satisfaction is determined not only by what is factually achievable but also by what is legally permissible.[71] This provides the link with proportionality.[72] Alexy argues that norms conferring constitutional rights can be classified as both rules and principles – albeit

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[67] The US constitutional jurisprudence uses the strict scrutiny test which accords rights a "special normative force" in which their restriction can only be justified under exceptional circumstances. However, it is arguable that this phenomenon merely places a significant burden on the state to convince a court of the necessity of limiting a fundamental right. Aligning with this view, Cohen-Eliya and Porat argue that the US Supreme Court also applied the so-called "balancing", which has some features similar to proportionality as it entails a "comparison between the impairment of the right and the importance of the governmental interest". See ibid; Porat and Cohen-Eliya (n 55) 18.

[68] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010).

[69] Robert Alexy, 'Constitutional Rights, Proportionality, and Argumentation' in Jan Sieckmann (ed), *Proportionality, Balancing, and Rights*, vol 136 (Springer International Publishing 2021) 1.

[70] Alexy, *A Theory of Constitutional Rights* (n 68) 47; Alexy 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 1–2; Robert Alexy, 'Constitutional Rights and Proportionality' [2014] Revus (Online) 51, 52. Alexy observes that the most common criterion for distinguishing between rules and principles is generality. Principles are norms of relatively high generality, while rules are norms of relatively low generality. See Alexy, *A Theory of Constitutional Rights* (n 68) 45.

[71] Alexy, *A Theory of Constitutional Rights* (n 68) 47–48.

[72] Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 2. Below, Section 2.2 elaborates on elements of proportionality to understand how they can determine factual and legal possibilities.

that their concepts are not synonymous.[73] While conflict between rules can be resolved by declaring one rule invalid, conflict between principles can be resolved through balancing in which one principle is held to outweigh another without invalidating either principle.[74]

Habermas – positing the absolutist view – focuses on the distinction between norms and values. He advocates that norms place equal obligations on everyone, but values are considered "intersubjectively shared preferences".[75] Habermas opposes transforming rights into goods and values as they must compete with others at the same level for priority.[76] He argues that only values can be subject to weighting and balancing.[77]

In addition to the volatility of rights in balancing, the absolutist raises questions about the objects to be weighed, how they are to be weighed, and what entity is responsible for the balancing exercise, the judiciary or the legislature.[78] In response, Möller emphasises that proportionality is a moral concept requiring moral reasoning.[79] In his view, judges are generally required to consider whether the referred national law and policy interfering with human rights are justified by developing a "moral argument about the acceptable balance of reasons".[80]

My goal in this thesis is to justify applying the "balancer" approach in transnational BHR disputes while acknowledging these relevant debates on proportionality in human rights adjudication. In the transnational BHR disputes which raise corporate dilemmas, the core values of human rights are still at the outset based on the victim's claim and the human rights

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[73] Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131, 133.

[74] Alexy, *A Theory of Constitutional Rights* (n 68) 50–51. This assertion forms a basis of our analysis in the subsequent chapter as transnational BHR disputes involve not only the assessment of proportionality between human rights and other interests but also the choice of rules. This consideration necessitates a reformulation of the balancing framework.

[75] Jürgen Habermas, *Between Fact and Norm: Contributions to a Discourse Theory of Law and Democracy* (2nd edn, MIT Press, Cambridge, Massachusetts 1996) 255.

[76] ibid 259.

[77] ibid.

[78] Tsakyrakis (n 59) 470.

[79] Möller's thesis aligns with the balancer's perspective, even though he disagreed with Alexy's ideas on proportionality on several points, such as the classification of constitutional rights as principles. In his view, constitutional rights are more accurately characterised as rules by defining the right more narrowly and providing specific exceptions. Möller also challenges Alexy's concept of a "logical and necessary" connection between principles and balancing. He claims that it is not feasible to optimise fundamental moral rights in the same way that one would optimise a financial profit. Instead, Möller suggests that conflicts of rights can be addressed through moral argumentation. See Kai Möller, 'Balancing and the Structure of Constitutional Rights' (2007) 5 International Journal of Constitutional Law 453.

[80] Möller, 'Proportionality: Challenging the Critics' (n 55) 717.

values that the home state recognises. However, the transnational and civil claim character of the disputes require recognition of the political dimension of human rights that create varieties of human rights standards, which are plausible under international human rights law principles, among the states.[81] The absolutist perspective fails to acknowledge this in that it denies the prioritisation of other values over human rights.

These transnational and civil claim phenomena involve multi-layered interests that can impact on human rights. The first layer involves the host state's restrictions (through acts or laws), while the second layer concerns the corporation's obligation to adhere to these restrictions. Therefore, I am of the view that balancing human rights with these two interests necessitates a two-pronged balancing exercise.[82]

The first balance, between human rights and the host state's restrictions, aims to determine the applicability of the home state's human rights standards to disputes. The second balance, between human rights and corporate obligations, seeks to determine whether corporate activities breach the human rights identified in the first balance. The analytical framework of this thesis focuses primarily on the first balance because it directly involves a legal issue. In contrast, the second balance concerns a factual issue requiring evidence to prove whether corporate activities breach human rights as established in the first balance. However, it is not uncommon for courts to exercise balance in both stages, albeit the standards may differ.

The first balance typically applies the proportionality principle, while the second balance involving the civil liability claim may require other standards, such as reasonableness or the standard of a reasonable person, which also involve balancing under different structures and considering other factors. However, nothing prohibits the application of proportionality as part of this reasonableness assessment.[83]

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[81] See above, Section 1.

[82] I imply the two balances from the court' decisions in horizontal human rights obligations discussed in Section 2.1.2 below. In these decisions, courts need to interpret the extent of the relevant rights under constitutional norms before determining whether the act of defendant violates such rights.

[83] In Alexy's view, proportionality or balancing is distinct from reasonableness. Reasonableness is conceptualised as an abstract idea that requires all relevant factors to be correctly assembled in relation to each other to justify the judgment. Balancing embodies the essence of reasonableness. However, the outcome of balancing may not be reasonable if the balancing is exercised subjectively. Möller further distinguishes proportionality from reasonableness by asserting that it incorporates the fundamental value of human rights, such as human dignity, freedom and equality, into the balancing process. In contrast, reasonableness primarily emphasises a procedural approach to decision making. It suggests that certain actions may be deemed valid if an informed and intelligent individual, acting in good faith and after careful consideration, would deem them as such, without necessarily emphasising the substantive value of human rights. Zysset and Scherz consider

These two balances are exercised sequentially as the outcome of the first balance affects the validity of the interests of corporations in relying on the acts or laws of the host state in the second balance. In this respect, the host state's restrictions and the corporate obligation to adhere to host state acts or laws do not compete directly and there is no need for a balance between them.

Subsection 2.1.1 further justifies applying the balancer's view in transnational BHR disputes. It emphasises the consideration of the principles of international human rights law and an understanding of the political dimension of human rights. Given that proportionality is developed predominantly to address states' obligations as regards constitutional and human rights, Subsection 2.1.2 justifies the transformation of the human rights balance to civil claim disputes in the BHR context, particularly as regards the horizontal human rights obligations for corporations. This observation aims to justify the use of proportionality to determine the applicability of the home state's human rights standards in BHR disputes. The "how-to" balance is a different issue which I address later.[84]

2.1.1 Many Concepts of Human Rights: Moral versus Political

The initial balance in the BHR context involves the interaction between human rights and justifications by the host state for acts or laws that restrict these rights. It is necessary to recognise that human rights have moral, political, and legal dimensions.[85] Despite moral

proportionality as the most reasonable option, not the ultimately correct one. See Robert Alexy, 'The Reasonableness of the Law' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer Netherlands 2009) 7–8; Kai Möller, 'Beyond Reasonableness: The Dignitarian Structure of Human and Constitutional Rights' (2021) 34 Canadian Journal of Law & Jurisprudence 341, 345–350; Zysset and Scherz (n 55) 538.

[84] See below, Section 2.2.

[85] Macklem delineates the multifaceted nature and functions of human rights in moral, political, and legal concepts. The moral account advocates human rights as protecting fundamental needs, while political theory emphasises human rights' function as integral to global politics without the inherent requirement of aligning with moral theory. This political perspective serves as justification for understanding the arena of the internal affairs of a state and those internal affairs should be interfered or assisted. In contrast, the legal perspective justifies existence of human rights in international law. Macklem exemplifies this with the international human right to food, enshrined in the ICESCR, whose legal status arises from binding obligations in the ICESCR. Similarly, the right to development is recognised as a legal human right by the UN General Assembly declaration. These rights are established by law before reintroducing them in moral and political form. For further reading, see Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015) ch 1.

Buchanan observes that international legal human rights can be justifiable even in the absence of a corresponding moral right. In his illustration, the legal right to healthcare can be justified on the grounds that it prevents great social upheaval that would otherwise result from treatable or preventable diseases, that it promotes social solidarity, that it contributes to economic prosperity, and that it is an important ingredient of a decent society. It is therefore a mistake to assume that legal rights, if they are justified, must be justified by reference to corresponding moral rights. See Allen Buchanan, 'Why International Legal Human Rights?' in

concerns raised by absolutists, the indivisibility, interdependence, interrelatedness, and universality of human rights acknowledge the different approaches of states in prioritising or restricting rights, influenced by the societal framework and cultural relativism.[86] Consequently, human rights in the BHR context must be defined and interpreted on the basis of diverse domestic policies and cultures.

The moral perspective of human rights stems from autonomous reasoning applied to claims made by autonomous individuals.[87] This perspective ties the function of human rights with personal autonomy and normative ethics, and views human rights through the lens of individualism. However, in a democratic society, every member contributes to creating political rules for their collective living.[88] These rules, created by people to govern themselves, establish the moral ideal of democracy which is recognised as "political autonomy".[89] This political autonomy represents a contemporary view of the role of human rights in practical terms, i.e., engaging with political involvement.[90]

According to Möller, individuals are authors of their laws at the political level, yet each is the author of his or her life at the individual level.[91] When personal and political autonomies are directed differently, exploring how they can be integrated and harmonised rather than

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Rowan Cruft, Wenqing Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 246.

Similarly, Raz criticises a right to education on the basis that it is nonsensical to conclude that people have such rights by virtue of their humanity alone. If this were not so, it follows that the cave dwellers in the Stone Age had that right. See Raz (n 51) 40.

[86] See above, Section 1.

[87] Jan Sieckmann, 'To Balance or Not to Balance: The Quest for the Essence of Rights' in Jan Sieckmann (ed), *Proportionality, Balancing, and Rights*, vol 136 (Springer International Publishing 2021) 116.

[88] This thesis considers that corporations can have autonomy. Although it may not be the right place to defend this position, some general observations may be necessary. Corporations can have autonomy in two senses. The first considers a corporation as a society in which its members collectively set the rules for establishing and operating that corporation. In this sense, the function of corporate autonomy will be similar to the political autonomy of the state. In another sense, corporate autonomy is similar to that of an individual because the corporation is also a member of a society with the power to join in creating the society's rules and political autonomy. The corporate autonomy that I am referring to here is the latter. Jackson observes that corporations are more likely to merit associational rights if their internal governance carries democratic credentials. However, corporate rights can also threaten outsiders; therefore, such associational rights must be limited unless the corporation adopts some internal governance mechanisms that can prevent it from overstepping. See Katharine Jackson, 'Corporate Autonomy: Law, Constitutional Democracy, and the Rights of Big Business' (Columbia University 2019) ch 3.

[89] Möller, 'Towards a Theory of Balancing and Proportionality' (n 57) 100.

[90] For the debate between personal and political autonomies based on the works of James Griffin's *On Human Rights*, John Rawls's *The Law of Peoples*, and Charles Beitz's *The Idea of Human Rights*, see James W Nickel, 'Assigning Functions to Human Rights: Methodological Issues in Human Rights Theory' in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).

[91] Möller, 'Towards a Theory of Balancing and Proportionality' (n 57) 100.

leading to conflict becomes essential. Without such a harmonised account, genuine clashes of values arise.[92] Möller's thesis on the relationship between personal and political autonomies aims to integrate the significant roles of both.[93] He posits that the primary objective of political autonomy is to safeguard the conditions necessary for personal autonomy by specifying spheres of autonomy for all citizens on an equal basis. Political autonomy is considered legitimate if these spheres are determined in a reasonable manner (not the majority or correct way). In this pursuit of political autonomy, there may be a compromise on personal autonomy.[94]

This political account is reflected in international human rights instruments. While certain civil and political rights – for example, the right to life, the prohibition of torture and slavery, ex-post-facto criminal law, and the right to recognition – are absolute,[95] others might be derogated from in times of public emergency threatening a nation's life.[96] In addition, other rights, such as the freedom of religion or belief, freedom of expression, and the right of peaceful assembly can be limited to the public goals, representing political autonomy, to protect national security, public order, public health, or morals.[97] Some restrictions are more specific to the rights, such as the limitation of freedom of expression on the ground of respecting the rights or reputation of others.[98]

Similarly, the enjoyment of economic, social, and cultural rights can be limited by national law, which aligns with the nature of these rights and aims to promote general welfare in a democratic society.[99] Additionally, the state may invoke resource constraints as a limitation to advancing these rights.[100] Some economic, social, and cultural rights may be restricted on

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[92] ibid 102.

[93] ibid 101–102.

[94] In formulating this framework, Möller contests several existing notions regarding the relationship between personal and political autonomies. These include the supremacy of either political or private autonomy, the necessity of protecting private autonomy to ensure the legitimate procedural condition of political autonomy, and the concepts of reasonableness and public reason. ibid 102–122.

[95] ICCPR, Articles 6, 7, 8, and 15.

[96] ICCPR, Article 4. Note that the Human Rights Committee has suggested the extension of the list of non-derogable rights to include the right to non-discrimination. See the HRC General Comment No 29 (CCPR/C/21/Rev.1/Add.11) para 8.

[97] ICCPR, Articles 18 para 3, 19 para 3(b), 21 and 22 para 2.

[98] ICCPR, Article 19 para 3(a).

[99] ICESCR, Article 4. For extensive discussion on the application of this limitation, see A Muller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review 557, 569–591.

[100] ICESCR, Article 2 para 1.

grounds other than those mentioned in the ICESCR. For example, trade union rights outlined in Article 8 of the ICESCR are among those most frequently derogated from in times of emergency.[101]

Given this link between human rights and political considerations, there is no justification for anchoring human rights solely in the moral dimension, as advocated by the absolutists. As Zysset and Scherz put it, the normative significance of political autonomy is no less than that of personal autonomy.[102] This becomes particularly evident in transnational BHR disputes emphasised in this thesis.[103] The actions or laws of one state restricting human rights are adjudicated by another state's courts. This demands thoughtful consideration of political justifications, not only for the host state's restriction of human rights but also for the home state's intrusion into the host state's actions or laws. As defendants in these transnational BHR disputes, corporations come up against limitations when challenging the actions or laws of the host state. These practical realities, stemming from the political autonomy of the host state, must be recognised by home state courts when adjudicating human rights asserted by victims.

Human rights are not always universal and there is no predetermined formula for prioritising rights.[104] When the moral dimension of human rights protecting personal autonomy, and the political dimension of human rights protecting societal goals, are in conflict, harmonisation of both dimensions necessitates the application of the political dimension insofar as it restricts the moral dimension of human rights of citizens in a reasonable manner. The balancing approach, which considers broad interests including the state's justification for restricting rights, proves more appropriate in transnational BHR disputes and enables the balance between human rights and justification for restriction.

As BHR disputes are civil claims without state involvement as a party, the next consideration is whether balancing rights and their restrictions is necessary, particularly when civil liability claims in BHR disputes may rely on other standards. The next subsection justifies the

[101] Muller (n 99) 597.

[102] Zysset and Scherz (n 55) 535.

[103] Chapter 2, Sections 2-3.

[104] See above, Section 1.

transformation of human rights balance between human rights and restrictions discussed here to BHR disputes under which corporations have horizontal human rights obligations.

2.1.2 Human Rights Balancing of Horizontal Human Rights Obligations

The central question here is whether balancing human rights with other state interests discussed in the previous subsection is required in BHR disputes involving the horizontal human rights obligations of corporations.

The concept of the horizontal effect of human rights initially emerged in the discussion of domestic constitutional rights. The German Federal Constitutional Court appears to be a pioneer in challenging the traditional interpretation of constitutional rights as state obligations by introducing the theory of "*Drittwirkung*" (third-party effect) which asserts that constitutional rights can influence private relationships.[105]

Gardbaum identifies three dimensions in the horizontal effect of constitutional rights: (i) direct horizontal effect, where a constitutional right binds the conduct of a private actor directly; (ii) indirect horizontal effect of constitutional rights due to the regulatory measures of the governments to fulfil their positive duties in protecting individuals; and (iii) indirect horizontal effect due to the impact of constitutional rights and values on "private law and private litigation".[106] The last category is typically relevant in transnational BHR disputes, which this thesis emphasises.[107]

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[105] Rolf Weber and Rainer Baisch, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (2016) European Business Law Review 669, 675.

[106] Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Mark Tushnet and Vicki C Jackson (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 237.

[107] The direct horizontal effect and indirect horizontal effect of constitutional rights apply to BHR disputes when there are explicit constitutional or legislative provisions directly binding corporations to act in certain way to protect human rights. The mandatory due diligence legislation, for example, can fall within the indirect horizontal effect of constitutional rights due to the regulatory measures. Also, in these two dimensions of horizontal effect, courts generally do not apply proportionality to adjudicate disputes between private parties. However, this is not the case this thesis considers as it aims to focus on the case where there is no such the legislation applicable to corporations in disputes. Corporate obligations to respect human rights in this thesis arise in correlation to rights of individuals under private law. See ibid 238–239.

The three judgments of the German Federal Constitutional Court – the *Lüth* case,[108] the *Lebach* case,[109] and the *Titanic* case[110] – have been referenced in considering the indirect horizontal effect of human rights within the framework of a domestic constitution. In these cases, complaints were brought to the Constitutional Court challenging the judgments of ordinary courts in private law disputes. The Constitutional Court reviewed the judgments of the ordinary courts by interpreting the scope of the rights under constitutional norms before assessing how this interpretation was reflected in the decisions of the ordinary courts.

This two-pronged structural approach applied by the Constitutional Court signifies a method for acknowledging constitutional norms in private disputes, particularly in assessing the horizontal obligations arising from constitutional rights. This two-pronged approach forms a basis for a two-pronged balancing process in transnational BHR disputes whereby courts first assess the extent of the relevant human rights and then apply this framework to address private disputes.

In all three cases, the Constitutional Court explicitly emphasised the duty of ordinary courts under the Constitution to apply and interpret civil law norms following constitutional rights.[111] In these cases, the Constitutional Court relied on the balancing exercise, even though the term "proportionality" may not have been expressly mentioned, to resolve the

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[108] Decision of the Federal Constitutional Court, BverfGE 7, 198 (Lüth Decision) (1958). The full text of this case (in German) can be found at <https://www.servat.unibe.ch/dfr/bv007198.html> accessed 30 June 2024. In this decision, the applicant sought the prohibition of a film created by a director who played a prominent role during the Nazi era. The freedom of expression and professional reputation of the movie director were weighed equally in the balance. The German Federal Constitutional Court asserted that constitutional rights must be considered in this private dispute, advocating for the application of a balancing test. For further reading, see Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 73) 132–134; Stephan Jaggi, 'Lüth Case (Ger)' *Oxford Constitutional Law* (2016) paras 1–7 <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e556> accessed 30 June 2024

[109] Decision of the Federal Constitutional Court, BVerfGE 35, 202 (Lebach Decision) (1973). The full text of this case (in German) can be found at <https://www.servat.unibe.ch/dfr/bv035202.html> accessed 30 June 2024. In this decision, the court balanced the right to the privacy of the criminal against the freedom of the press regarding a public broadcaster who intended to produce a documentary movie about the applicant and his crime. See also Lars Lindahl, 'On Robert Alexy's Weight Formula for Weighing and Balancing' in *Rights: Concepts and Contexts* (2017) 175–181.

[110] Decision of the Federal Constitutional Court, BVerfGE 86, 1 (Titanic Decision) (1992). The full text of this case (in German) can be found at <https://www.servat.unibe.ch/dfr/bv086001.html> accessed 30 June 2024. In this case, the court struck a balance between the freedom of the press and the right to privacy of the individual in question as regards the labelling of the individual a "born murderer" and the classification as one of the most embarrassing personalities. See also Alexy, 'Constitutional Rights and Proportionality' (n 70) 56; Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 73) 137; Robert Alexy, 'Discourse Theory and Fundamental Rights' in Agustín José Menéndez and Erik Oddvar Eriksen (eds), *Arguing Fundamental Rights*, vol 77 (Springer Netherlands 2006) 25.

[111] Decision of the Federal Constitutional Court, BVerfGE 7, 198 (Lüth Decision) (1958) paras 21–24; Decision of the Federal Constitutional Court, BVerfGE 35, 202 (Lebach Decision) (1973) para 42; Decision of the Federal Constitutional Court, BVerfGE 86, 1 (Titanic Decision) (1992) para 35.

conflict between the rights of private parties and their limitations based on constitutional norms.[112]

While the term "proportionality" may seem unfamiliar in the private law system,[113] it does not mean it is a stranger to balancing. In legal reasoning in civil liability cases, one finds the exercise of balancing and prioritisation, especially when several considerations underlie the different goals of tort law,[114] encompassing corrective justice, compensation, restoring the *status quo ante*, distributive justice, and optimal deterrence.[115]

Therefore, balancing human and constitutional rights and their restrictions has been proven to be an effective device in civil law disputes involving horizontal human rights obligations, and it is potentially applicable to BHR disputes. The remaining question in the BHR context is not whether to balance but how to balance. As elaborated in the following two subsections, the pragmatic approach of balancing in domestic courts, human rights treaty bodies, and international human rights tribunals can provide the practical framework for balancing procedures.

2.2 Pragmatic Approach to the Balancing

This subsection illustrates the pragmatic approach to balancing competing interests in domestic constitutional rights disputes, relying on the proportionality concept advocated by Alexy.[116] His proportionality principle is regarded as the "most important doctrinal tool in rights adjudication".[117] As we shall see in this and the following subsection, national courts, human rights treaty bodies, and international human rights tribunals commonly invoke proportionality, aligning with the principle proposed by Alexy, as the proper method for the

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[112] Gardbaum notes the reason why courts do not "straightforwardly" apply the standard of proportionality to cases involving the indirect horizontal effect stemming from value of private law, "although perhaps they could". According to Gardbaum, constitutional courts primarily aim to ensure that ordinary courts properly consider constitutional rights and values in their routine proceedings. This objective is best achieved by downplaying the constitutional aspect of such cases, especially in legal systems where ordinary courts lack jurisdiction in this constitutional domain. See Gardbaum (n 106) 239–240, 246.

[113] Donal Nolan, 'Negligence and Human Rights Law: The Case for Separate Development' (2013) 76 Modern Law Review 286, 296.

[114] Benjamin Shmueli, 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) University of Michigan Journal of Law Reform 745, 748.

[115] ibid 751–757. Chapter 6, Section 3 elaborates further on the judicial balancing concerning the reasonableness notion.

[116] Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 2; Alexy, 'Constitutional Rights and Proportionality' (n 70) 52; Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 73) 135.

[117] Möller, 'Beyond Reasonableness' (n 83) 342.

adjudication of the rights to assess whether restrictions affecting human rights imposed by the domestic government respond to legitimate public interests appropriately and proportionately. This is why Alexy's thesis of proportionality is worth considering in determining the applicability of the home state's human rights standards in transnational BHR disputes.

According to Alexy, the concept of proportionality consists of suitability, necessity, and proportionality in the narrow sense.[118] The suitability element requires assessing whether a measure that interferes with a right is suitable for achieving its objective. The necessity element considers an alternative measure that results in less interference with rights. And proportionality in the narrow sense analyses whether such a measure places any excessive burden on the individual, compared with the benefit it aims to secure.[119] The first two elements arise from the essence of the balanced principles as "optimization requirements relative to what is factually possible". In contrast, the last element stems from the fact that principles are "optimization requirements relative to what is legally possible".[120] Each of the three elements is explored in the following three subsections.[121]

2.2.1 Suitability Element

The suitability element evaluates whether a measure that interferes with rights is suited to achieving its objective. This element helps exclude a measure that obstructs the realisation of rights while failing to achieve its intended goal. In Alexy's hypothesis, a measure (M) is adopted to promote one principle (P_1). This M will not be suitable if it cannot serve its

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[118] Alexy, *A Theory of Constitutional Rights* (n 68) 66. Note that there is a view advocating the addition of the legitimate goal of principles to the proportionality concept. However, for this thesis, the legitimate goal is subsumed within the suitability element. Additionally, I intend to analyse the conflict when the corporation has legitimate interests (in observing domestic law). Therefore, such an additional element is not required in my analysis. See Möller, 'Proportionality: Challenging the Critics' (n 55) 711–712.

[119] Tsakyrakis (n 59) 474.

[120] Alexy, *A Theory of Constitutional Rights* (n 68) 67.

[121] Note that national courts in different jurisdictions may differ slightly from this proportionality concept but their cornerstone is similar. For example, in UK, Lord Bingham held in *Regina v Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent)* considering five questions when determining proportionality of interference with the rights to privacy under Article 8 of the ECHR: (i) Does the proposed measure constitute interference with human rights? (ii) If yes, are the consequences of the interference significant enough to potentially trigger the possible restriction under Article 8? (iii) If yes, is the interference in accordance with the law? (iv) If yes, is the interference necessary in a democratic society for national security, public safety, economic well-being, disorder or crime prevention, health or morals protection, or safeguarding the rights and freedoms of others? (v) If yes, is the interference proportionate to the legitimate public end sought to be achieved? See *Regina v Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent)* [2004] UKHL 27 (House of Lords) [17].

purpose in promoting P_1 while obstructing the realisation of another principle (P_2). Therefore, P_1 and P_2, taken together, suggest the omission of *M*. [122]

To illustrate how it works, Alexy refers to a decision of the German Federal Constitutional Court[123] concerning a law requiring the applicant for a falcon hunting licence to prove his knowledge of weapons and pass a shooting test as required of applicants for a general hunting licence. The court held that the shooting examination for falconers is not suited to promoting the "proper exercise of these activities as intended by the legislator". Therefore, the falconer's general freedom of action guaranteed by the Constitution is violated without any substantially apparent reason. On this basis, the law was declared disproportionate and unconstitutional.[124]

In this case, the promotion of the proper exercise of falcon hunting (P_1) cannot be achieved by regulating such licence conditions (*M*). Instead, such regulation (*M*) interferes with the freedom of action guaranteed by the Constitution (P_2). The measure will pass the suitability test only if it promotes the specified goal to a certain degree.[125] Only then will the necessity element be considered.

2.2.2 Necessity Element

Under the necessity element, two measures (M_1 and M_2) are compared. Given that they are equally suitable as they can generally serve the same principle (P_1), the one that generates less interference with the other principle (P_2) must be chosen.[126] Under this condition, P_1 and P_2, taken together, require that the less intrusive means of interfering be applied.[127]

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[122] Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 2; Alexy, 'Constitutional Rights and Proportionality' (n 70) 53; Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 73) 135.

[123] Decisions of the Federal Constitutional Court, BVerfGE 55, 159 (Falconry Hunting Licence Decision) (1980). The full text of this case (in German) can be found at <https://www.servat.unibe.ch/dfr/bv055159.html> accessed 30 June 2024.

[124] Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 2–3; Alexy, 'Constitutional Rights and Proportionality' (n 70) 53.

[125] Alexy admits that cases in which the laws are declared unconstitutional on the ground of unsuitability, are rare. See Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 3.

[126] Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 3; Alexy, 'Constitutional Rights and Proportionality' (n 70) 53; Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 73) 135–136.

[127] ibid.

However, this element assumes no third principle (P_3) is negatively affected by adopting the means chosen. If there is a P_3, there is a need for balancing in the next step.[128]

Alexy provides an example of the German Federal Constitutional Court's decision on the food law.[129] As a background, puffed rice was used to create Easter Rabbits and Santa Claus figures. The government, aiming to protect consumers from confusingly taking those puffed rice sweets as chocolate products, announced a regulation banning puffed rice sweets. The court held that consumer protection could be upheld equally effectively but less incisively by a duty to label. The ban was therefore inconsistent with the necessity element and disproportionate.[130] It was declared unconstitutional as violating freedom of occupation under the Constitution.

In this case, the protection of the consumer (P_1) could be achieved by either banning the use of puffed rice (M_1) or requiring the product to be labelled (M_2). Both means lead to an equal outcome in promoting P_1. However, the M_1 option affects the constitutional right of freedom of occupation (P_2), while the choice of M_2 contributes less negatively to that constitutional right. Consequently, the adoption of M_1 could not pass the necessity test.

Two points in the BHR context are worth highlighting. Firstly, the existence of a third principle negatively affected by the less restrictive measures renders the necessity element unnecessary.[131] The issue for our consideration is whether having three demands in the transnational BHR disputes based on human rights protection, justification for host state acts or laws and the corporate obligation to adhere to them, fall under this condition. Generally, such a condition applies when the less restrictive measures have disadvantages, such as requiring more resources or imposing a burden on a third party.[132] These disadvantages become the third principle in the balancing exercise. Let me explain this by means of an example.

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[128] ibid.

[129] Decision of the Federal Constitutional Court, BVerfGE 53, 135 (Chocolate Easter Bunny Decision) (1980). The full text of this case (in German) can be found at <https://www.servat.unibe.ch/dfr/bv053135.html> accessed 30 June 2024.

[130] Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 3; Alexy, 'Constitutional Rights and Proportionality' (n 70) 54.

[131] Alexy, *A Theory of Constitutional Rights* (n 68) 400.

[132] Möller, 'Proportionality: Challenging the Critics' (n 55) 714–715.

Further considering Alexy's example of food law case, let us assume that the paper for printing labels is manufactured from wood, which becomes a scarce resource in the nation.[133] The need to reduce the burden on limited resources becomes a third principle (P_3) as part of the proportionality assessment. In this regard, consumer protection (P_1) is neutral to any measures because both banning products (M_1) and affixing labels (M_2) can achieve this goal. However, although requiring labels (M_2) contributes less negatively to the constitutional right of occupational freedom (P_2), it is necessary to consider whether the more intrusive measures by banning products (M_1) should be permitted in that it reduces the burden on public resources (P_3). This point takes us out of the field of optimisation relative to what is factually possible between two measures and into the balancing stage to consider the greatest possible realisation relative to what is legally possible. It is necessary to consider whether the need for consumer protection (P_1) and the limited resources (P_3), taken together, justify the intrusion on occupational rights (P_2) due to the banning of products (M_1).[134]

Transnational BHR disputes in this thesis involve human rights protection, state justification of their actions or laws, and corporate obligations. However, the last two principles are aligned on the same side at the same point against the need for human rights protection. Business operations complying with host state acts or laws restricting human rights serve both host state justification and corporate obligations equally. Neither of them is negatively impacted by the less intrusive measures, if available, under this necessity element because such less intrusive measures must pass the suitability test to achieve these two purposes. Therefore, this phenomenon does not create the third principle in the balancing framework.

The second observation in the BHR context concerns advocacy for the "red line", signifying clear boundaries to restrict corporations from operating businesses or entering markets when preventing human rights impacts is not possible.[135] The question in our BHR setting can be whether the abandonment of business opportunities based on the red line restriction, can be

[133] Due to space limitation, this assumption is made by analogy from another example given by Alexy. See Alexy, *A Theory of Constitutional Rights* (n 68) 400.

[134] Möller observed that solving this third principle in the balancing stage is an approach in Germany, while the Canadian approach is to solve this problem in this necessity stage by concluding that the more restrictive measure is really necessary. He believed that the German approach is preferable for reasons of structural clarity. See Möller, 'Proportionality: Challenging the Critics' (n 55) 714.

[135] Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 Leiden Journal of International Law 389, 402,406.

an alternative measure contributing to less intrusive interference with human rights when considering this necessity element.

It is essential to understand that an alternative measure must pass the suitability test before it will trigger the necessity consideration. Therefore, the "not-to-operate" option is not considered valid as an alternative means – it cannot satisfy the suitability test to justify host state actions or laws and the corporate obligation.

Once the means in question can pass both suitability and necessity tests, the analysis enters its final phase – proportionality in the narrow sense.

2.2.3 Proportionality in the Narrow Sense

The first two elements of proportionality focus on the means (*M*). This third element will shift the focus to the competing principles in questions (P_1 and P_2 and other *P*). At this stage, the critical point is to determine which of the two (or more) principles takes priority when the specific means are applied.[136]

Alexy terms this stage the "law of balancing".[137] Under his notion, the greater degree of interference with one principle requires the greater importance of the other.[138] Therefore, an intensive interference with principle P_1 cannot be justified if the significance of satisfying the corresponding principle P_2 is low.[139] In the context of human rights, a balance must be struck between the harm caused to human rights and the benefits of the infringing measure.

Alexy's law of balancing involves three stages. The first stage considers the intensity of interference by establishing the degree of non-satisfaction or detriment of the first principle, P_1. The second stage considers the importance of satisfying the competing principle P_2. The

[136] Möller, 'Proportionality: Challenging the Critics' (n 55) 715.

[137] It is also known as "Ad Hoc Balancing". See Jochen von Bernstorff, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing Is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014).

[138] Alexy, *A Theory of Constitutional Rights* (n 68) 102.

[139]Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (n 69) 4; Alexy, 'Constitutional Rights and Proportionality' (n 70) 54.

final stage considers their relationship to each other and answers whether the extent of satisfying principle P_2 outweighs the detriment of principle P_1.[140]

The absolutist criticises Alexy's doctrine, especially at this balancing step, as it requires courts to compare incommensurable principles.[141] Legg illustrates this problem by asking whether to eat an apple or a pear or become a lawyer or a doctor.[142] Indeed, the two objects in Legg's example are not comparable or measurable.

The balancing proposed by Alexy, hinging on the optimisation of the competing value, may also create some ambiguity, especially when the two principles require maximisation since the two principles on balance in human rights conflicts cannot be assessed through profit as in the economic context.[143] In response, Alexy acknowledges that there is no standard unit of measurement enabling direct comparison, but this does not imply incomparability. Such comparability only requires "a common point of comparison" drawing from the moral perspective (in addressing moral questions) or the legal perspective (in addressing legal questions).[144] This common point of view for comparison is significant, especially when exercising the balance between the two principles, as it is required to signify what they share.

Cohen-Eliya and Porat provide a clear illustration in their work.[145] They refer to a dog show in which different types of dogs compete for the title of the best dog. It is not sensible to compare bulldogs and schnauzers. In practice, the best bulldog and the best schnauzer are considered in terms of how closely they align with the respective ideal species without direct comparison. Therefore, the common point of view in this contest focuses on the ideal form of each dog species, determining which one comes closest to that point. This approach involves understanding the purpose of choice before making a decision.

Additionally, I am of the view that Legg's examples may not be suitable for comparing with the two legitimate goals that require balancing in the human rights context. Legg's examples

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[140] Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 73) 136.

[141] Niels Petersen, 'Alexy and the "German" Model of Proportionality: Why the Theory of Constitutional Rights Does Not Provide a Representative Reconstruction of the Proportionality Test' (2020) 21 German Law Journal 163, 165; Andrew Legg, 'Proportionality: Determining Rights' in *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 184–185.

[142] Legg (n 141) 184.

[143] Möller, 'Balancing and the Structure of Constitutional Rights' (n 79) 461–462.

[144] Alexy, 'The Reasonableness of the Law' (n 83) 10–11.

[145] Cohen-Eliya and Porat (n 65) 269.

rely on objects with no range of significant degree and impact. However, the two principles subject to a balance have different degrees of interference and effect. Balancing is not making a choice; it is the determination of the correct point at which the means in question can serve one legitimate goal without unnecessarily and excessively interfering with another goal.

In balancing human rights and restrictive measures, Alexy relies on "their importance for the constitution".[146] This concept of importance for the constitution consists of a common point of view under the constitution and a scale of whatever kind represents the classes for evaluating the constitutional gains and losses.[147] Such conception justifies determining the intensity of interference with rights and the degree of importance of restrictions before considering their relationship.

Aligning with Alexy, Barak attaches the idea of the "relative social importance" to each of the principles to be balanced. Under his notion, the assessment is placed on the importance to society of the benefit gained by realising the restrictive measure's goal, rather than the importance to society of preventing the limitation of human rights.[148] Under this notion, it is not the specific principles that are balanced but the marginal advantage of the goal restricting rights and the importance of preventing the limits to the rights.[149] Endicott observes that Barak's approach is influenced by his background as a judge, applying social importance as a single criterion in solving the incommensurability problem rather than balancing two things directly.[150]

Therefore, proportionality allows judgments on incommensurable ways of thinking and facilitates comparisons across dissimilar aspects.[151] Human rights have a moral dimension representing personal autonomy, and political and legal dimensions representing the political autonomy of a given society.[152] It is plausible to argue that Alexy's concept of the "importance for constitution" and Barak's concept of the "relative social importance" have

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[146] Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 Ratio Juris 433, 442.

[147] ibid.

[148] Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 Law & Ethics of Human Rights 1, 7–8.

[149] ibid 8.

[150] Timothy Endicott, 'Proportionality and Incommensurability' in Bradley W Miller, Grant Huscroft and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 317.

[151] David M Beatty, 'Proportionality' in *The Ultimate Rule of Law* (OUP 2004) 169.

[152] See above, Section 2.1.1.

the common goal of addressing integration and harmonisation of significant roles of personal and political autonomies in society.[153]

Considering the above idea of proportionality, the following subsection observes how UN treaty bodies and international human rights courts apply the proportionality principle in practice.

2.3 Proportionality in Rights Adjudications by UN Human Rights Treaty Bodies and International Human Rights Courts

It is widely recognised that domestic constitutional law shapes international human rights law and *vice versa*.[154] The proportionality concept supports this recognition as it has transitioned from its origin in Germany to become a procedural rule in UN treaty bodies and international human rights courts.

This subsection provides an overview of the balancing exercise in international human rights organisations exercising the judicial role in adjudicating human rights. It primarily aims to highlight the recognition of proportionality in the rights adjudication at the international level, offering the potential to address a conflict of human rights standards in the transnational context. Subsection 2.3.1 discusses proportionality recognised in the UN human rights treaty bodies, while Subsection 2.3.2 considers the approach in international human rights courts.

2.3.1 Proportionality in the Practice of UN Human Rights Treaty Bodies

As this thesis focuses on human rights under the UN human rights treaties, namely the ICCPR and the ICESCR, it is necessary to grasp how proportionality is recognised in their treaty bodies – the Human Rights Committee ("HRC") and the Committee on Economic, Social and Cultural Rights ("CESCR").

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[153] Möller argues that it is necessary to develop a moral argument about the relation between the two values before making decision on their precedence. However, in the strong incommensurability between two principles having equivalent moral basis – in his example, freedom of the press and privacy – it is a matter of choice and the principle of democracy should allow branches other than the judiciary to do this. Therefore, as the degree of strong incommensurability increases, the significance of judicial review diminishes. See Möller, 'Proportionality: Challenging the Critics' (n 55) 720–722.

[154] Barak (n 60) 202–203.

The ICCPR and the ICESCR provide several grounds for restricting certain rights, with the ICCPR allowing derogation from some rights in specific circumstances.[155] Therefore, applying such derogations and restrictions cannot avoid a balancing process. Although there is no reference to proportionality in the ICCPR and the ICESCR, the treaty bodies of these two covenants have acknowledged the application of the proportionality principle in considering the invocation of derogations and restrictions, through their general comments, and their deliberations on individual communications serving before them.

General comments serve as practical guidance provided by the committees to states on their understanding of states' obligations under relevant covenants. It involves protracted discussion over several sessions of the committees.[156] In addition, the first optional protocol to the ICCPR and the optional protocol to the ICESCR allow individuals to submit their complaints, so-called "communications", to the committees for their review on the ground of rights violations by states.[157] While decisions resulting from the committees' review of these communications are not legally binding,[158] their procedure mirrors judicial practice, ensuring parties an opportunity to address each other's arguments and avoiding double jeopardy for repeated claims.[159] Furthermore, these decisions provide authoritative interpretations of the relevant treaties.[160]

Several general comments of the HRC regarding the ICCPR demonstrate the application of the proportionality principle in their compliance consideration. For example, general comment No 27, regarding freedom of movement, explicitly states that restrictive measures, permitted under Article 12 paragraph 3 of the ICCPR, must follow the principle of proportionality. These measures must be appropriate to achieve their protective function, the least intrusive among those available to achieve the desired result, and proportionate to the protected interest.[161] Similarly, general comment No 37, regarding the right of peaceful

[155] See above, Section 2.1.1.

[156] Rodley (n 5) 801.

[157] Optional Protocol to the ICCPR, Article 2; Optional Protocol to the ICESCR, Article 2.

[158] Optional Protocol to the ICCPR, Article 5 para 4; Optional Protocol to the ICESCR, Article 9 para 1.

[159] Optional Protocol to the ICCPR, Articles 4 and 5 paras 1-2; Optional Protocol to the ICESCR, Article 3 para 2(c) and Article 6.

[160] Rodley (n 5) 801.

[161] HRC, General Comment No 27 (CCPR/C/21/Rev.1/Add.9) para 14.

assembly, outlines similar details regarding how proportionality operates when restrictions to this right are imposed.[162]

However, some general comments by the HRC may refer to proportionality in applying restrictions or derogations, although they do not articulate details of how such proportionality applies. These include the HRC general comment No 34 regarding freedom of opinion and expression, under which the restriction of this right specified in Article 19 paragraph 3 of the ICCPR "must conform to the strict tests of necessity and proportionality".[163] Proportionality also applies to the grounds for the derogation from rights, which hinge on the exigencies of the situation.[164]

The HRC also referred to the proportionality principle in deliberations on several communications concerning human rights restrictions under the ICCPR. For example, in a decision adopted in October 2023, the HRC considered a communication claiming that the state order deporting the author from the special municipality and declaring him *persona non grata* (undesired person) due to his conviction on several offences violated his freedom of movement and was degrading treatment and discrimination. In its deliberation, the HRC considered that a difference in treatment between persons shall be discriminatory if "there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized".[165]

In another communication concerning the freedom of expression and the right to peaceful assembly, the HRC also applied general comment No 34, suggesting that restrictions on the freedoms of opinion and expression and the right to peaceful assembly should not be unnecessary or disproportionate.[166]

Regarding the ICESCR, a general limitation clause allows the limitation of rights by national law, aligning with the nature of these rights and aiming to promote the general welfare in a democratic society.[167] Under its general obligation clause, states must take steps by all

[162] HRC, General Comment No 37 (CCPR/C/GC/37) para 40.

[163] HRC, General Comment No 34 (CCPR/C/GC/34) para 22.

[164] HRC, General Comment No 29 (CCPR/C/21/Rev.1/Add.11) para 4.

[165] SEH v Netherlands, Communication No 3236/2018 (decision adopted on 31 October 2023) para7.9.

[166] Koreshkov v Belarus, Communication No 2168/2012 (decision adopted on 9 November 2017) paras 8.3–8.5.

[167] ICESCR, Article 4.

appropriate means progressively to realise the full rights under the ICESCR to the maximum of available resources.[168] This obligation "to take steps" and "by all appropriate means" under the ICESCR signifies the positive obligations on states and the variety of their choices provided that steps are taken towards the realisation of rights.[169] The progressive realisation of rights suggests variability over time in fulfilling obligations, and the availability of resources for states becomes another condition implicitly allowing states to invoke resource constraints as a limitation to advancing these rights.[170] As such, the nature of state obligations and the limitations must be balanced to substantiate the reasonable point at which states should fulfil these obligations. However, it is academically controversial whether structural proportionality can be applied as a tool for such balancing under the ICESCR.

For example, Möller asserts that constitutional rights law primarily applies proportionality to negative civil and political rights rather than socio-economic rights and positive obligations because any limitations of the latter rights will always be suitable and necessary to serve the legitimate goal of resource conservation.[171] In his view, only the stage of proportionality in the narrow sense applies which results a different version of the balancing test.[172] Similarly, Grohmann argues that the reasonableness review is often associated with socio-economic rights, while proportionality is predominantly discussed concerning the restriction of civil and political rights.[173] In this respect, reasonableness is far more vague without a governing structural framework.[174]

In contrast, several scholars have advanced the idea that a structural framework of proportionality can strengthen the rights under the ICESCR. Clérico highlights the significance of the suitability and necessity elements of proportionality by considering several aspects, such as quantitative, qualitative, and probabilistic.[175] Zysset and Scherz reflect on the application of proportionality applied in the CESCR's decision on a

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[168] ICESCR, Article 2 para 1.

[169] Brian Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 Human Rights Law Review 275, 281.

[170] ibid 282.

[171] Kai Möller, 'Proportionality' in *The Global Model of Constitutional Rights* (OUP 2012) 179.

[172] ibid.

[173] Nils-Hendrik Grohmann, 'Tracing the Development of the Proportionality Analysis in Relation to Forced Evictions under the ICESCR' (2022) 22 Human Rights Law Review 1, 3.

[174] ibid 4.

[175] Clérico (n 64).

communication involving forced eviction and the rights to adequate housing[176] in addressing the tension between personal and political autonomy, requiring the state to ensure that such limitations are grounded in political autonomy and restrict personal autonomy as minimally as possible.[177]

Despite this scholarly debate, the CESCR has recognised the need for proportionality as an integral part of reasonableness by using the term "reasonableness and proportionality" in practice. In the CESCR general comment No 7 regarding forced eviction and the right to adequate housing, the eviction is justified if carried out in strict compliance with international human rights law and in line with the "principles of reasonableness and proportionality", although there is no guidance on the meaning of these two principles.[178] In respect of non-discrimination under the ICESCR, the CESCR suggests that its assessment of the permissible scope of differential treatment is also based on "a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects".[179]

In addressing communications, the Optional Protocol to the ICESCR provides a standard of reasonableness for the CESCR's deliberations in considering the steps taken by states.[180] However, this standard of reasonableness often extends to proportionality. In a communication concerning forced eviction, the principles of reasonableness and proportionality recognised in its general comment No 7 were also echoed in its decision adopted on 20 June 2017,[181] while some scholars argue that this decision aligns with structural proportionality.[182] After this decision, the CESCR examined another communication regarding the rights to adequate housing, explicitly applying structural proportionality to the general limitation clause under Article 4 of the ICESCR.[183]

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[176] Ben Djazia et al v Spain, Communication No 5/2015 (decision adopted on 20 June 2017).

[177] Zysset and Scherz (n 55) 540–543.

[178] CESCR, General Comment No 7 (E/1998/22, annex IV) para 14.

[179] CESCR, General Comment No 20 (E/C.12/GC/20) para 13.

[180] Optional Protocol to the ICESCR, Article 8 para 4.

[181] Ben Djazia et al v Spain, Communication No 5/2015 (n 176) para 13.4.

[182] Zysset and Scherz (n 55) 541–543.

[183] Rosario Gómez-Limón Pardo v Spain, Communication No 52/2018 (decision adopted on 5 March 2020) para 9.4.

Considering the practices of both the HRC and CESCR, it is reasonable to conclude that the UN treaty bodies recognise the proportionality principle, although there is no reference to the principle in the ICCPR or the ICESCR. The following subsection considers practice in international human rights tribunals to grasp how the proportionality principle is recognised in their adjudication.

2.3.2 Proportionality in the Practice of International Human Rights Courts

This subsection provides an overview of the balancing exercise in international human rights courts,[184] highlighting their alignment with the proportionality concept. The European Court of Human Rights ("ECtHR"), the Inter-American Court of Human Rights ("IACtHR"), and the African Court on Human and Peoples' Rights ("ACtHPR") regularly apply the proportionality concept to strike a fair balance between the social interest that the state aims to promote and the individual rights invoked.

In Europe, the ECtHR has recognised that interference with qualified rights is possible if it is "necessary in a democratic society" to protect one of the enumerated public policy interests.[185] Balancing in the ECtHR arises from a problem in interpreting the ECHR.[186] Two judicial techniques are used to resolve conflicts of rights in the ECtHR. The first is the "definitional" (or "categorical") approach which focuses on a careful stipulation of the scope or applicability of the relevant rights to avoid overlap. The second is "proportional balancing" which aims to resolve conflicts by acknowledging the relevance of the conflicting

[184] I base this observation on three encyclopedia articles, each analysing the balancing approach applied by a specific international human rights court. See Başak Çali, 'Balancing Test: European Court of Human Rights (ECtHR)', *Oxford Public International Law* (2018) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3426.013.3426/law-mpeipro-e3426> accessed 30 June 2024; Lucas Lixinski, 'Balancing Test: Inter-American Court of Human Rights (IACtHR)', *Oxford Public International Law* (2019) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3425.013.3425/law-mpeipro-e3425> accessed 30 June 2024; Adamantia Rachovitsa, 'Balancing Test: African Court on Human and Peoples' Rights (ACtHPR)', *Oxford Public International Law* (2020) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3636.013.3636/law-mpeipro-e3636> accessed 30 June 2024.

[185] Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 International Journal of Constitutional Law 466, 466.

[186] Steven Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 The Cambridge Law Journal 412, 416.

rights more broadly but weighing them in the "particular factual" context.[187] Our point is the latter.[188]

The proportionality approach of the ECtHR involves a three-pronged test in its analysis of the validity of interference with the qualified rights and aims to protect the rights of another or the broader public interest.[189] First, the court asks whether the domestic law that imposed the limitation was foreseeable or accessible.[190] The second question is whether the restriction pursues the legitimate aims (public and private interests) listed under the qualified rights.[191] The final question is whether such limitation is proportionate to the aim pursued.[192]

In considering this proportionality requirement, the court also considers the remaining scope for exercising the rights, the proportionality of the restricted behaviour, the possibility of using a less restrictive measure, the burden on a particular individual, and the severity of any sanction involved.[193] Also, the notion of necessity (in a democratic society) implies a

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[187] Ian Leigh, 'Reversibility, Proportionality, and Conflicting Rights: Fernández Martínez v. Spain' in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights* (OUP 2017) 220.

[188] Another aspect of balancing in the ECtHR involves the margin of appreciation doctrine. This doctrine allows the court to defer to the balancing exercise conducted by domestic courts or parliament without further scrutiny if there is no European consensus on the scope of a right or condition for its legitimate restriction. However, this doctrine is specific to the judicial framework of international human rights courts and does not apply in our BHR setting where adjudication falls under the role of domestic courts. This is not discussed further here. For further reading on the connection between the margin of appreciation and proportionality, see Legg (n 141) 192–198.

[189] Çali (n 184) paras 16–19. A commentator observed that the proportional balance of the ECtHR does not align precisely with Alexy's theory as it prioritises the means-end test rather than developing a structural framework. In his view, the role of the domestic court in striking the balance is more effective. See Gerards (n 185) 469-470. Another commentator submitted that the proportionality test applied in the ECtHR is not always consistent and not followed in all cases. See Andreas Follesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 International Journal of Constitutional Law 359, 365.

[190] In *Maestri v Italy*, the ECtHR adjudicated the interference with the right to freedom of assembly and association under article 11 of the ECHR, conditioning that if the interference is not prescribed by law, the court does not deem it necessary. See *Maestri v Italy* [2004] ECtHR [GC] 39748/98 [43].

[191] In *Merabishvill v Georgia*, the ECtHR found that proof of a legitimate aim for a restriction can be based on various grounds. Once the state can prove that the interference pursues at least one aim, this test is satisfied. See *Merabishvili v Georgia* [2017] ECtHR [GC] 72508/13 [294–297].

[192] In *The Sunday Times v United Kingdom*, the ECtHR explained its task in considering whether the interference was "necessary in the democratic society". It must determine whether the interference was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". See *The Sunday Times v the United Kingdom (no 2)* [1991] ECtHR 13166/87 [50(d)].

[193] Jeremy McBride, *The Doctrines and Methodology of Interpretation of The European Convention on Human Rights by the European Court of Human Rights* (Council of Europe 2021) 52–55.

pressing social need.[194] In a case where various human rights conflict, the court recognises the need for equal respect for both rights and the balance struck must seek to retain their essence.[195]

In the IACtHR, the proportionality analysis is applied to balance human rights against other interests, including other private parties' rights.[196] For the non-absolute rights, the American Convention on Human Rights determines the scope of their restrictions,[197] which can be translated into the "three-pronged test". It requires that: (a) the restriction is required by law (legality); (b) the law is enacted for the general interest (purpose of restrictive measure); and (c) the law is tailored for the achievement of that interest (a necessity in a democratic society and proportionality). The third prong is where the court applies the balancing.[198]

In *Castañeda Gutman v México*,[199] the court provides a three-step guideline to evaluate whether the restrictive measures comply with the third prong: (i) the existence of a social and essential social need; (ii) the least restrictive appropriate mechanisms to regulate the right; and (iii) proportionality of the interest that is justified and adaptation to the achievement of the legitimate purpose.[200] In its 2021 advisory opinion, the IACtHR reaffirmed that the interference "must be established by law – formally and materially – pursue a legitimate purpose, and comply with the requirements of suitability, necessity and proportionality".[201]

The ACtHPR follows a practice similar to the two international human rights courts above. In *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania*,[202] the court established the three-pronged test under

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[194] *Handyside v the United Kingdom* [1976] ECtHR 5493/72 [48]; *The Sunday Times v the United Kingdom (no 2)* (n 192) para 50(c).

[195] Çali (n 184) para 32.

[196] Lixinski (n 184) para 1.

[197] Article 30 of the American Convention on Human Rights: "Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

[198] Lixinski (n 184) paras 6–7.

[199] *Castañeda Gutman v México*, 6 August 2008, IACtHR Series C No 184. The full text of this case can be found at <https://www.corteidh.or.cr/docs/casos/articulos/seriec_184_ing.pdf> accessed 30 June 2024.

[200] Lixinski (n 184) para 23.

[201] IACtHR Advisory Opinion, OC-28/21 [7 June 2021] Requested by the Republic of Columbia para 114.

[202] *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania* [2013] ACtHPR Application No 009, 011 of 2011.

the influence of the proportionality concept in the ECtHR and IACtHR. According to the court, the restriction must: (i) be prescribed by law; (ii) serve a legitimate aim; and (iii) be proportionate to the aim pursued.[203]

International human rights courts consistently use proportionality to balance conflicts between human rights and state interests. The inherent adaptability and universal applicability of proportionality shows its potential to address complex tensions within human rights jurisprudence.

Proportionality becomes a significant tool for courts in adjudicating human rights disputes both domestically and internationally. However, this principle conventionally focuses on the traditional human rights disputes in which states are the defendants. Although it potentially applies to the relationship between private parties under the horizontal effect theory when courts consider the value of rights and their limitation, adding the transnational element to BHR disputes adjudicated by domestic courts makes its application more difficult. The following section illustrates this difficulty by applying the proportionality concept to real-life cases discussed earlier in Chapter 2.

3. Addressing Corporate Dilemmas in BHR Disputes through Proportionality: Success in Domestic, Shortcomings in Transnational Context

The previous two sections explored the principles of international human rights law and showed that despite their interconnectedness and universality, human rights can be prioritised and restricted following the social arrangement within a given society. Consequently, how one state implements laws or acts to uphold one right or interest may differ from other states. In human rights disputes, it falls to the relevant courts to use the proportionality concept to assess whether such laws or actions are proportionate to the goals they aim to achieve and the human rights that must be sacrificed. This proportionality concept can be applied to the horizontal human rights obligation as courts must consider the permissible restriction before determining a breach of rights.

This section analyses how the proportionality concept can be applied to balance the competing demands in transnational BHR disputes: human rights; the justification of host states for acts or laws restricting human rights; and the corporate obligation to adhere to acts

[203] ibid 106, and 107.1.

or laws. Alexy's three-pronged test for proportionality – suitability, necessity, and balancing – will be applied to the domestic case *ILVA*[204] in Subsection 3.1 and to the transnational cases, *Kaweri* and *Yahoo!*[205] in Subsection 3.2. This application shows that proportionality can work well in domestic BHR cases. However, it faces challenges in transnational BHR disputes due to different values recognised among nations and the ambiguity of societal norms that courts should rely on to assess conflicting principles.

3.1 Balancing in Domestic BHR Disputes

The *ILVA* case involved the Italian Constitutional Court's consideration of the legitimacy of government regulations supporting the continuation of business activities, which caused environmental pollution and violated human rights, on the basis of their significance for the national economy. The court can apply the proportionality concept to balance the purpose of state regulation to allow the continuation of business and the purpose of human rights under the constitutional norm within the context of the specific nation.

However, if we consider the *ILVA* case from the aspect of the civil liability claims under tort law, assuming the corporation was a defendant in a remedy claim made by victims and its operations, a means alleged to violate human rights, complied with the government's permission under regulations. In such a case, human rights must be balanced against the corporation's interests and government purposes.

This hypothetical case presents the civil law aspect of disputes involving the horizontal human rights obligations of corporations. As suggested in the decisions of the German Federal Constitutional Court on the horizontal effect of human rights, it is the ordinary court's duty under the Constitution to apply and interpret civil law to address the rights of citizens by recognising the fundamental value of the Constitution.[206]

Under this notion, courts need to consider the relevant precedents of the Constitutional Court, which have assessed the value of relevant rights infringed and the possible restriction under their constitutional norms. In this respect, the Italian Constitutional Court in the *ILVA*

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[204] Chapter 2, Section 1 (the *ILVA* case involving the steel plant operation causing the unhealthy environment).

[205] Chapter 2, Sections 2 (the *Kaweri* case relating to the acquisition of land provided by host state through forced eviction), and 3 (the *Yahoo!* case concerning disclosure of internet users' information as required by law enforcement agencies).

[206] See above, Section 2.1.2.

case held that economic and commercial activities must respect fundamental rights as a minimum and essential condition.[207] In civil cases, courts need to consider this constitutional norm of prioritising rights when determining whether corporate activities infringe on rights.

Having established the scope of rights to be adjudicated, courts can then respond to the question of the infringement of rights (according to their scope defined by constitutional norms). Proportionality may not be the standard of assessment in civil law, but it can be applied at the courts' discretion as a part of the reasonableness examination. In such a case, proportionality begins with the suitability question: whether the means can serve its purposes. Business operations can be the means to achieve the corporation's business in compliance with national law and the country's economic improvement, and, as a result, it can respond to the suitability element of proportionality.

Next, the necessity element requires the consideration of an alternative that can achieve the same goal (the corporate operation in compliance with national law and the country's economic improvement) but with less interference with human rights.[208] This element guides the negative answer to this question in that the corporation can improve its plant to promote environmental-friendly conditions. Therefore, the operation of the business cannot pass the necessity test and there is consequently no need to move on to the next element – proportionality in the narrow sense.

Analysing the necessity element in this way corresponds to the UNGPs and other responsible business standards, which require corporations to follow the internationally recognised standard to the fullest extent possible.[209] Given that it is necessary to consider the next step of proportionality due to the lack of an alternative to achieve the corporate purpose,[210] proportionality in the narrow sense can also be analysed in this setting by taking into account the extent of rights in the decision of the Italian Constitutional Court in the *ILVA* case, and

[207] Chapter 2, Section 1.

[208] Such an option does not mean that the corporation has a choice not to operate its business since this choice cannot serve business and national economic purpose; it cannot be regarded as an alternative under the proportionality concept.

[209] UNGPs, Commentary to Principle 23; OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023) ch I. 'Concepts and Principles' para 2.

[210] The necessity test only considers whether the measure applied is necessary to achieve the legitimate aim it pursues. Therefore, if there is no environmentally friendly way or other less restrictive measures, and the operation can serve the corporation's business growth and the country's economic aim, the necessity test is satisfied.

considering whether the business activities are within the permissible scope suggested by the Constitutional Court's decision.

Therefore, applying the proportionality concept to domestic BHR disputes is practical. The following subsection demonstrates challenges in applying proportionality to transnational BHR disputes due to their transnational nature.

3.2 Balancing in Transnational BHR Disputes Where Host State Laws or Acts Restrict Human Rights

The *Kaweri* and *Yahoo!* cases discussed in Chapter 2[211] exemplify transnational disputes in which corporate activities must rely on the host state acts (in the *Kaweri* case) or observe the host state laws (in the *Yahoo!* case). These acts or laws of the host state result in restrictions on human rights, which reduce the standards to below those internationally recognised. This can potentially result in a conflict of human rights standards between the home state and the host state.

In these cases, corporate activities in compliance with host state acts or laws without choice become the basis for claims brought before the home state courts against corporations on the ground that such activities violate human rights recognised in the home state.[212] Courts need to address these host state restrictions to determine the applicability of the home state's human rights standard to the dispute before considering whether corporate activities breach such human rights in terms of the home state standard, as asserted by the victims.

This subsection highlights the limitations of proportionality in addressing these transnational BHR disputes involving this corporate dilemma. The analysis first focuses on the *Yahoo!* case as it manifests a more severe corporate dilemma due to corporate obligation under national law to conduct the relevant activities with an awareness of their potential impact on human rights. Conversely, the corporate dilemma in the *Kaweri* case stems from the *ex post facto* involvement of corporations.

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[211] Chapter 2, Sections 2 and 3.

[212] As observed in Chapter 2, Sections 2, the discussion of the *Kaweri* case in this thesis assumes the facts that the dispute was submitted to the home state courts against the parent corporation based on the same background.

In the *Yahoo!* case, the corporation was mandated to disclose internet data and user activity containing pro-democracy literature to law enforcement agencies. This disclosure resulted in the arrest and detention of the plaintiffs. Two "victim" human rights were involved: freedom from torture; and privacy of correspondence.[213]

In domestic disputes, courts rely on domestic constitutional norms to consider a boundary of these rights before considering their infringement. However, in transnational BHR disputes involving a conflict of rights standards between states, the involvement of two constitutional and societal norms of the home and host states complicates the issue in considering norms to be applied as a common point of view in exercising the balance between rights and the need for their restriction.

This process is crucial before considering the infringement of rights. Without this structural clarity of the rights, courts cannot justify their reasoning on infringement. To substantiate this claim, consider proportionality as part of the standard of assessment in the civil liability claim in the *Yahoo!* case.[214] The disclosure of users' data to enforcement agencies can serve the corporate obligation and the host state's justification to protect national security. Therefore, the disclosure can pass the suitability test. Also, no other less severe alternative for the corporations can serve these purposes. As a result, the disclosure of users' content can satisfy the necessity element.[215]

However, proportionality encounters problems at the balancing stage due to the lack of applicable governing norms shared by the rights and the restrictions. While the significance of human rights is globally recognised, international human rights law permits certain flexibility and diversity among nations.[216] Courts need to balance human rights or individual interests representing personal autonomy against collective interests representing political autonomy demanding restrictions.[217]

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[213] The claim was made based on the grounds of the corporation's aiding and abetting torture. However, this analysis presents this background as neutral since it is arguable that the alleged torture is an act of the third party.

[214] As discussed earlier in Section 2.1, US courts are likely to uphold the supremacy of constitutional rights, emphasising the constitutional text and its original meaning. Therefore, the need for balancing must be presumed for the purpose of this analysis.

[215] As noted earlier in Section 2.2.2, the third principle in this case is not negatively affected by the means. Therefore, the necessity element is still required.

[216] See above, Section 1.

[217] See above, Section 2.1.1.

The nature of the two autonomies is incommensurable. Alexy justifies the weight and balance between them through the "common point of view" notion, while Barak coins the term as "relative societal norms". For Alexy it is their importance to the Constitution; for Barak it is their importance to society. By relying on the view they share, the intensity of interference with rights and the significance of competing interests can be considered.[218]

We can observe that the "societal norms" are significant not only as a justification controlling the prioritisation of rights and restrictions under the principles of international human rights law,[219] but also as a controlling device in the balancing process. In this case, the asserted standards of human rights belong to the home state, while the justification for restriction and corporate obligation depends on the host state. Therefore, a critical point lies in determining the extent to which the society can be defined, whether as a specific nation (China in this case) or the international community (to include the US view).

Moreover, applying an international community scope necessitates an acknowledgement of cultural relativism under the principles of international human rights law. However, there are no guidelines on how far such an acknowledgement should go. This phenomenon introduces a challenge for courts in determining the norms commonly shared by the two principles that courts must rely on to assess them. Consequently, proportionality encounters limitations due to the lack of governing norms shared by both sides of the balance, requiring refinement for the transnational BHR context.

The same holds true in the *Kaweri* case in which the right to an adequate standard of living is fundamental to the dispute. The corporate acquisition of land provided by the state serves its business purpose and helps the host state achieve its plan to improve its economy. No alternative for the corporation may contribute to less interference with human rights because all they do is acquire unoccupied land, while the non-acquisition of land cannot achieve the purposes of the host state and the corporations.

Under the ICESCR, human rights are seen as flexible due to the state's obligation to achieve the realisation of rights progressively, the variety of options for complying with the state's obligations, the dependence on available resources to fulfil the obligations, and the broad

[218] See above, Section 2.2.3.

[219] See above, Section 1.

scope of limitation.[220] The question is which society's norms will govern the balance between the home state's standards of human rights and the host state's necessity for forced eviction.

Therefore, the conventional concept of proportionality applied in human rights adjudications cannot function in transnational BHR disputes, which have a unique conflict of human rights standards between the two states. While the proportionality principle effectively addresses conflicts within UN treaty bodies and international human rights courts, these tribunals resolve their conflicts by interpreting relevant covenants or regional human rights treaties where states accept the jurisdiction of those tribunals and commit to adhering to their decisions.[221] Therefore, balancing rights and restrictions relies on their importance to relevant human rights instruments. In the BHR disputes, there is no such meeting of minds and international human rights law cannot serve this purpose as its principles allow for the difference.

Considering Alexy's distinction between rules and principles discussed earlier in Section 2.1 above, the difference in human rights standards between states appears to become a question of conflict of rules that must be resolved by declaring one rule invalid rather than a conflict of principles which requires balancing.[222] This is because domestic courts cannot intrude into the justification for host state acts or laws due to the lack of norms governing the balancing exercise.

Building on this, the following chapter argues that international comity, which is grounded in the respect for the sovereignty of other states, formulates the choice of law rules and the act of state doctrine that guide courts in selecting standards. However, the ambiguity surrounding the public policy exception in both the act of state and choice of law poses challenges for courts. Nonetheless, balancing remains inherent in "public policy" as an exception to these rules based on international comity as a point of view shared by the states

[220] See above, Section 2.3.1.

[221] For the ECtHR, see Article 46 of the European Convention on Human Rights. For the IACtHR, see Article 68 of the American Convention on Human Rights. For the ACtHPR, see Article 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[222] Alexy, *A Theory of Constitutional Rights* (n 68) 48–50.

involved. Clarity regarding the extent of the public policy exception in the case of human rights is essential.

4. Conclusion

This chapter has considered the application of human rights principles to address conflicts of human rights standards between states. It also explored the potential usefulness of the proportionality concept – a tool commonly applied in adjudicating traditional human rights disputes – to balance competing interests in transnational BHR disputes.

In Section 1, we started by emphasising the principles of the indivisibility, interdependence, interrelatedness, and universality of human rights, while also acknowledging the typical variation in human rights standards among states. Section 2 explored the proportionality concept and advocated for its application in the BHR context where a balance between human rights protection, the justification for host state actions or laws restricting human rights, and corporate obligations to adhere to them is crucial.

Section 3 put this proportionality concept to the test by introducing actual cases of BHR disputes. While this revealed the effectiveness of proportionality in domestic disputes, it uncovered challenges in the transnational BHR context. These challenges stem from the ambiguity regarding the extent of the society whose norms should underlie the balancing exercise. This was seen to complicate the application of proportionality.

The following chapter highlights that this conflict between human rights standards in states must be resolved by calling on standards under the choice of law rules and the act of state doctrine rather than by balancing. These doctrines limit the power of municipal courts to judge on the justification raised by “other” states for their laws or acts. However, courts may invoke a public policy exception to disregard such justifications and apply their own laws or standards. The chapter argues for establishing a yardstick of public policy concerning human rights as an exception to such rules. The reformulation of the balancing framework is grounded in this established public policy exception.

CHAPTER 4

Towards a Balancing Framework for Human Rights in Transnational BHR Disputes

Introduction

The preceding chapter explored the applicability of a home state's human rights standards in transnational business and human rights ("BHR") disputes in which corporations are compelled to adhere to the host state's acts or laws that restrict human rights. This consideration is pivotal in establishing a negative obligation for corporations to refrain from infringing rights as it depends on the application of human rights standards of the home states. The previous discussion navigated the principles of indivisibility, interdependence, interrelatedness, and universality of human rights, which allow for variations in the prioritisation and restriction of rights across states based on differing societal values and political structures.[1]

Furthermore, the chapter examined the concept of proportionality, commonly used by courts in traditional human rights disputes involving states, to balance human rights with competing interests.[2] It also considered how this concept applies to horizontal human rights obligations of private parties and outlined a two-step balancing exercise.[3] The first step involves balancing restrictions against human rights recognised by the national constitution, while the second step evaluates the activities of private parties against the human rights standards established in the first balance.

However, applying this balance to transnational BHR disputes poses challenges due to disparities in human rights standards between home and host states. Typically, the balancing exercise relies on societal norms shared by principles on both sides of the scale.[4] However, in transnational BHR disputes, the extent of society whose norms shall govern the balance is ambiguous, whether as the host state, the home state, or the entire world,[5] given that human rights are global concerns.

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[1] Chapter 3, Section 1.

[2] Chapter 3, Section 2.

[3] Chapter 3, Section 2.1.2.

[4] Chapter 3, Section 2.2.3.

[5] Chapter 3, Section 3.2.

This chapter focuses on the relevance of the choice of law rules and the act of state doctrine in transnational BHR disputes. It argues that the conflict of human rights standards between two states involves a conflict between rules rather than principles. According to Alexy, rules and principles are norms as they suggest "what ought to be the case".[6] However, they offer different types of reason for judgments. By nature, rules are narrow and strict; they are definitive commands requiring "exactly what it demands be done". Principles, on the other hand, are broad and comprehensive; they require that something be realised to the fullest extent possible considering the legal and factual possibilities.[7] Therefore, the conflict of rules requires invalidating one rule. This demands thorough consideration of how the exception to the rule can apply. The conflict of principles, in its turn, requires balancing two principles with varying degrees of satisfaction without invalidating either.[8]

In an example of the conflict of rules, Alexy discusses a case from the German Federal Constitutional Court involving conflicting laws on shop opening hours.[9] Federal law permitted shops to open from 7 am to 7 pm, while regional law prohibited shops from opening on Wednesday after 1 pm. Since the rules contradicted one another, the court invoked a constitutional provision (Basic Law, Article 31) asserting the supremacy of federal law, thereby invalidating the regional law without requiring a balancing exercise.[10]

In transnational BHR disputes, conflicting human rights standards between home and host states create a challenge. The "standards" of human rights are more specific than "human rights", signifying laws that generate negative obligations to refrain from interfering with rights. The discrepancy of laws between home and host states mirrors cases in the German Federal Constitutional Court where a constitutional norm establishes the supremacy of federal law in resolving such conflicts. Therefore, addressing conflicts in human rights standards between home and host states requires similar governing rules.

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[6] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010) 45.

[7] ibid; Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131, 131; Robert Alexy, 'Constitutional Rights and Proportionality' [2014] Revus (Online) 51, 52.

[8] Chapter 3, Section 2.1. See also Alexy, *A Theory of Constitutional Rights* (n 6) 49–51.

[9] Decision of the German Federal Constitutional Court, BVerfGE 1, 283 (Shop Closing Law Decision) (1952). The full text of this case (in German) can be found at <https://www.servat.unibe.ch/dfr/bv001283.html> accessed 30 June 2024.

[10] See Alexy, *A Theory of Constitutional Rights* (n 6) 49.

This argument is built on acknowledging the act of state doctrine and the choice of law rules.[11] Grounded in the international comity principle,[12] they provide directions for courts to respect the sovereignty of foreign states in their actions or determine which law must govern disputes.[13] However, they share a similar exception. If the acts or laws of the host state are manifestly incompatible with the public policy of the home state, courts in the home state can refuse to respect those acts or laws.[14] But the extent of the public policy exception remains unclear, and this poses a challenge for home state courts to adopt specific standards.

In curtailing the extent of public policy regarding human rights, this chapter argues that the balance between the home state's human rights standards and the host state's restrictions exists in this setting, concealed behind the term "public policy" that belongs to both states. Balancing these two public policies can be effected on the basis of international comity as a common point of view for comparison between the public policies of the two states.[15]

For this chapter, unless otherwise provided by the context, public policy means the tool one state establishes to address and resolve its public problems.[16] Success in adjudicating rights requires an objective justification for courts.[17] This, in turn, necessitates the court-centric

[11] In transnational BHR disputes, states are not parties. Therefore, the state immunity doctrine derived from the sovereign equality of states as customary international law is not relevant since this doctrine is a procedural rule advocating that "a state cannot be sued before a foreign court unless it consents". It relates to immunity *ratione personae*, not immunity *ratione materiae.* See James Crawford, 'Sovereignty and Equality of States' in *Brownlie's Principles of Public International Law* (OUP) 433; Anders Henriksen, *International Law* (3rd edn, OUP 2021) 97; Thomas H Hill, 'Sovereign Immunity and the Act of State Doctrine: Theory and Policy in United States Law' (1982) 46 Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law 118, 120; Zia Akhtar, 'Act of State, State Immunity, and Judicial Review in Public International Law' (2016) 7 Transnational Legal Theory 354, 356.

[12] Adrian Briggs, *The Conflict of Laws* (OUP 2019) 32; James Edelman and Madeleine Salinger, 'Comity in Private International Law and Fundamental Principles of Justice' in Andrew Dickinson and Edwin Peel (eds), *A Conflict Of Laws Companion* (OUP 2021) 330, 336; 'The Act of State Doctrine–Its Relation to Private and Public International Law' (1962) 62 Columbia Law Review 1278, 1282–1283; Fausto de Quadros and Henry Dingfelder Stone, 'Act of State Doctrine' *Oxford Public International Law* (2021) paras 6, 9 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1374> accessed 30 June 2024.

[13] See below, Section 1.1.

[14] See below, Section 1.2.

[15] See below, Section 2.2.1.

[16] See below, Section 2. Note that public policy discussed in this chapter does not include those being regarded as "crystallised rules of public policy" and falling into the scope of the overriding mandatory rule exception, which must be applied regardless of the normal rule of the conflict of laws. See Lawrence Collins and others (eds), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell/Thomson Reuters 2012) para [1-053]–[1-062].

[17] Laura Clérico, 'Proportionality in Social Rights Adjudication: Making It Workable' in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer International Publishing 2018) 32.

framework of analysis to identify the extent of this public policy when it comes to human rights while still acknowledging the principles of international human rights law and the political dimension of human rights.[18]

This chapter is divided into four sections. Section 1 examines judicial restraints under the act of state doctrines and the choice of law rules and their relevance in transnational BHR disputes. Section 2 explores the public policy exception and its extent as regards human rights in the transnational BHR context. Section 3 reformulates the balancing framework by analysing the *Kaweri* and *Yahoo!* cases. Section 4 serves as a conclusion.

This chapter advances scholarly debate on human rights protection as the public policy exception to the choice of law rules and the act of state doctrine by extending it to transnational BHR disputes. It further provides additional depth through practical application to actual cases. Its original contribution to the BHR field of study lies in offering a nuanced understanding of the public policy exception to human rights protection in transnational BHR disputes in light of international human rights law principles and the significance of proportionality.

1. Restraints on Jurisdiction of National Courts in Assessing Acts or Laws of Foreign States: Their Relevance to Transnational BHR Disputes

This section explores the restraints on courts' jurisdiction in assessing foreign laws or acts of foreign governments in transnational BHR cases. It explores the relevance of the act of state doctrine and the choice of law rules, which provide home state courts with guidance in addressing acts and laws of the host state.

The act of state doctrine, developed in common law jurisdiction as a judicial rule, prevents national courts in one state from reviewing the legitimacy of acts performed by foreign states within their own territory.[19] The choice of law rules, as part of private international law,[20] are well-established rules that direct national courts to determine which laws should be

[18] Chapter 3, Section 2.1.1.

[19] Akhtar (n 11) 356; Clyde Crockett, 'The Relationship between the Act of State Doctrine and the Conflict of Laws and Choice-of-Law Rules' (1989) 10 NYLS Journal of International and Comparative Law 309, 309; Hill (n 11) 123; 'The Act of State Doctrine-Its Relation to Private and Public International Law' (n 12) 1280.

[20] Other branches of private international law concerns court jurisdiction and enforcement of foreign judgment. See Briggs, *The Conflict of Laws* (n 12) 5.

applied to civil law disputes when there is a conflict between the laws of two countries.[21] Both the act of state doctrine and the choice of law rules are grounded, *inter alia*, in the principle of international comity.[22]

Comity becomes relevant to the judicial power to adjust the reach of domestic substantive law, exercise discretionary abstention when facing actual or foreseen jurisdictional conflicts, and assume the validity of foreign laws and actions.[23] Therefore, the act of state doctrine and the choice of law rules share a common foundation, resulting in judicial restraints in assessing acts or laws of other states.

Both the act of state doctrine and the choice of law rules apply to civil law disputes in the transnational context. Before elaborating on how they operate, it is necessary to justify their relevance to transnational BHR disputes. Subsection 1.1 considers this aspect, while Subsection 1.2 provides a narrative consideration of the principles of each.

1.1 Relevance of the Act of State and Choice of Law in Transnational BHR Disputes

Discussions of human rights and their restriction are primarily relevant to public law in that they govern the state-citizen relationship. However, transnational BHR disputes fall under private law where courts adjudicate rights and obligations between private parties. While cases involving horizontal human rights obligations may blur the line between public and private law,[24] the distinction remains crucial for practical adjudication.[25]

In the *ILVA* case,[26] proportionality was used to establish the extent of human rights and restrictions. This formed the basis for determining whether corporate activities infringed

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[21] ibid.

[22] Adrian Briggs, *Private International Law in English Courts* (OUP 2014) para 3.137–3.141; Briggs, *The Conflict of Laws* (n 12) 32; Edelman and Salinger (n 12) 330, 336; Quadros and Stone (n 12) paras 6, 9; 'The Act of State Doctrine-Its Relation to Private and Public International Law' (n 12) 1282–1283. Note that a key justification for the conflict of laws is the reasonable and legitimate expectations of the parties to a transaction or an occurrence. However, the comity doctrine has been used as a tool for reshaping the rules of the conflict of laws. See Collins and others (n 16) paras [1-005]–[1-016].

[23] Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals' (2017) 50 Cornell International Law Journal 578, 586.

[24] Michel Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction' (2013) 11 International Journal of Constitutional Law 125, 127; Hugh Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law' in Hans Micklitz (ed), *Constitutionalization of European Private Law: XXII/2* (OUP 2014) 34.

[25] Collins (n 24) 34.

[26] Chapter 3, Section 3.1.

upon victims' rights. Although these rights are framed by public law, they correspondingly generate negative obligations for everyone – including corporations – to respect them through the court's interpretation of private law.[27]

Consequently, the BHR context inevitably requires consideration of private law norms governing the source of the obligations that corporations owe to victims in non-contractual relationships. Given their transnational nature, the relevance of the act of state doctrine and the choice of law rules emerges clearly. The *Kaweri* and *Yahoo!* cases exemplify how these judicial restraints impact on transnational BHR disputes.[28]

Both cases involved tort claims under private law in which determining the applicability of the home state's human rights standards required the courts to address justifications for the host state's acts (forced eviction in the *Kaweri* case, and the mandate of law enforcement agencies in the *Yahoo!* case) or laws (the State Secret Law in the *Yahoo!* case) on which the corporate activity relied. From the perspective of the home state's courts, these acts or laws constitute actions by foreign states (through their government or parliament) in transnational BHR disputes which the act of state doctrine aims to address.

Furthermore, human rights standards implemented by each state directly shape their private law in that they address relationships between private parties under the horizontal effect theory.[29] In transnational BHR disputes, tort law addresses breaches of non-contractual obligations. However, only legally recognised human rights can generate corresponding negative obligations for corporations to refrain from interfering with those rights.

This is where the choice of law rules guide which law between two states should establish the scope of corporate obligations owed to victims in transnational BHR disputes. The conflict of laws in this setting involves the private law, more specifically the source of non-contractual obligations in private-party relationships.[30]

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[27] Unlike states, private actors cannot directly have constitutional obligations under constitution or human rights obligations under human rights law. See Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Michigan Law Review 387, 394; Olivier De Schutter, 'Corporations and Economic, Social, and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (OUP 2014) 199.

[28] Chapter 2, Section 4.

[29] Chapter 3, Section 2.1.2.

[30] Briggs observes that choice of law is dependent on the very private law notions of consent and obligation. He responded with meanings of the non-contractual obligations under the Rome II Regulation (EU choice of

Both the act of state doctrine and choice of law rules restrain courts in their adjudicative role. The following subsection examines how they operate in court adjudication.

1.2 Observations on the Act of State Doctrine and Choice of Law Rules

This section provides a brief description of the act of state doctrine and the choice of law rules and is aimed at providing a deeper understanding of how they constrain courts in the exercise of their discretion when addressing the applicability of the human rights standards of the home state in transnational BHR disputes.

The act of state doctrine exists only in certain common law jurisdictions, for example the US and the UK.[31] It is considered a rule of common law, rather than of international law, and has the effect of denying private rights.[32] This doctrine limits a domestic court's power to interfere in the actions of another state within its own territory.[33] In the US, the act of state doctrine was developed to avoid complicating foreign affairs[34] and has been refined to apply only when determining the validity of a foreign state's act is essential.[35]

In the UK, courts follow three rules when applying the act of state doctrine. First, courts recognise and do not question the effect of a foreign state's legislation or other laws concerning any acts within that foreign territory. Second, courts recognise the effect of an act by a foreign state's executive within its own territory. Third, courts avoid deciding on challenges to acts of a foreign state that involve matters beyond the scope of municipal judges – for example, waging war, concluding treaties, or the annexation or cession of territory.[36]

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law rules for non-contractual obligations) by dealing with the meanings of "non-contractual" and "obligations", separately. In his view, the term "obligations" has an autonomous meaning that may extend to non-contractual obligations outside the law of tort. See Adrian Briggs, 'The Impact of Recent Judgments of the European Court on English Procedural Law and Practice' (University of Oxford Faculty of Law Legal Studies Research Paper Series, 2005) 5; Briggs, *Private International Law in English Courts* (n 22) paras 8.40–8.46.

[31] Other common law jurisdictions – for example, Canada – may not recognise the act of state doctrine. See *Nevsun Resources Ltd v Araya* (2020) SCC 5 (Supreme Court of Canada) 167–168.

[32] Akhtar (n 11) 356.

[33] Philippa Webb, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2018) 340; Quadros and Stone (n 12) para 2.

[34] Quadros and Stone (n 12) para 6.

[35] ibid 8.

[36] Massimo Lando, 'Reframing the English Foreign Act of State Doctrine' [2023] The Modern Law Review 3. Note that in *Belhaj and another v Straw and others*, the Lord Justices expressed divergent opinions on the

These three rules applicable to the UK's act of state doctrine are subject to the public policy exception, including cases where foreign states violate human rights or commit severe breaches of international law.[37] Arguably, this public policy exception is significant as it mitigates the impact of this doctrine on the right to a fair trial under the European Convention on Human Rights ("ECHR").[38]

Applying the act of state doctrine to the *Kaweri* and *Yahoo!* cases, home state courts are directed to respect the host states' justification for forced eviction (in the *Kaweri* case) or enacting the State Secret Law and assuming the mandate to disclose personal information and users' email content (in the *Yahoo!* case). Consequently, the home state's standards of human rights cannot apply unless courts consider such human rights as a matter falling within the home state's public policy.

As the act of state doctrine is limited to certain jurisdictions, it is necessary to consider the choice of law rules that are widely acknowledged in various jurisdictions – albeit possibly with different effects[39] – when dealing with the conflict of laws between two states. They are a set of rules established to ascertain the applicable law for determining the rights and obligations of parties in civil and commercial disputes involving foreign elements.[40] However, they do not provide how courts determine rights and obligations as this depends on the applicable law.[41]

Transnational BHR disputes, such as those in the *Kaweri* and *Yahoo!* cases, are grounded in tort claims which require the courts to consider the non-contractual obligations corporations owe to "victims".[42] Depending on national law governing the choice of law rules, courts in tort claims may generally be required to apply the law of the place where wrongful conduct

established act of state doctrine. See *Belhaj and another v Straw and others* [2017] UKSC 3 per Lord Mance [35–43], per Lord Neuberger [121–125,166–172], Lord Sumption [228, 234]. The discussion here relies on Lord Neuberger's opinion.

[37] Quadros and Stone (n 12) paras 9–10; Lando (n 36) 3.

[38] Lando (n 36) 24–27.

[39] There is debate regarding the nature of choice of law as private international law, which questions its level of "privateness" and "internationality", as it generally relies on national laws, with a very few international conventions on the issue to guide courts on the applicable law. Additionally, conflicts involve laws of more than one state, embodying different objectives, values, or policies of states that are in conflict. See Symeon C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (OUP 2014) 291–292.

[40] Briggs, *The Conflict of Laws* (n 12) 5; Crockett (n 19) 311.

[41] Symeonides (n 39) 291; Crockett (n 19) 311.

[42] See above, Section 1.1.

occurs (*lex loci delicti commissi*), the law of the place of injury (*lex loci delicti*), or the law of the place in which the damage occurs (*lex loci damni*).[43]

Our point does not concern what applicable law should be chosen. Instead, it is a limitation of judicial discretion in choosing the applicable law, as courts are expected to follow the given directions.[44] There would be no issue for this thesis were the choice of law to direct home state courts to apply home state law to transnational BHR disputes. After all, such a direction aligns with the claims asserting corporate obligations to respect human rights under the home state law, which are more stringent than those of the host state. However, this is generally not the case.

Applying the possible choices of law for tort claims to the *Kaweri* and *Yahoo!* cases would likely result in the application of the law of the host state, where wrongful conduct, injury, and damage occur. Consequently, corporations are under no obligation to refrain from violating human rights as recognised in the home state as the human rights standards of the home state are not applicable.

Like the act of state doctrine, the choice of law rules include the public policy exception. This exception authorises home state courts to deny the application of the host state law if it is necessary to protect or promote the home state's public interests. Taking EU law on the choice of law rules as an example,[45] the general rule for tort dictates that national courts apply the law of the country where the damage occurred.[46] However, there is an exception which allows courts to disregard the specific law if its application is manifestly incompatible with the public policy of the forum state.[47]

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[43] There are other models of choice-of-law rules in tort disputes, such as the model which gives choices to victims. This model is followed by article 11.2 of the draft legally binding instrument as of July 2023, see Open-ended Intergovernmental Working Group (OEIGWG), '2023 Updated Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises'. See also Symeonides (n 39) 313–316.

[44] Briggs, *The Conflict of Laws* (n 12) 5; Crockett (n 19) 311.

[45] I select EU law on choice of law rules for illustration because the process of establishing these rules involved resolving disagreements among member states. Furthermore, as a regional law, it holds wide recognition due to its application to all EU members. See Symeon C Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 The American Journal of Comparative Law 173, 187–188.

[46] Article 4(1) of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation). Symeonides observes that the outcome of application of the law of the place in which damage occurs under this provision does not differ from the law of the place of injury, but with an extension to the place of direct physical impact. See ibid 187.

[47] Article 26 of Rome II Regulation (EC) No 864/2007. Note that there is a concept of overriding mandatory provisions under which a legal rule of the forum state is regarded as crucial to safeguard its public interests

I do not aim to delve into the relationship between the act of state doctrine and the choice of law rules as it is not directly relevant to this thesis.[48] Their principles guide courts in addressing the conflict of human rights standards between the home and host states instead of balancing by prioritising one rule over another. These principles also lead to the same outcome as courts are restricted from exercising discretion to scrutinise host state acts or laws limiting human rights and potentially leading to the non-applicability of the home state's human rights standards to disputes.

Therefore, the primary focus here is on the public policy exception shared by both principles. The critical question is whether, given their guarantee by the constitutional law of many states, the protection of all human rights can be seen as a public policy matter of the home state which potentially allows home state courts to ignore the rationale for the host state's restrictions on any human rights.[49]

If the protection of all human rights is broadly included under the public policy exception, it leaves no place for recognition of cultural relativism in international human rights law. However, if not all human rights protection can be classified under the public policy exception, a further question arises regarding the benchmark for this classification in the transnational BHR context. This benchmark is essential to guide the standard applied in adjudication.

The act of state doctrine and the choice of law rules, which should provide a clear direction for courts on the applicability of the home state's human rights standard to transnational BHR disputes, contribute to another challenge attributable to the unclear extent of the public policy exception they share. While this exception can be a tool for harmonising differences

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irrespective of the law otherwise applicable. This thesis does not address the mandatory rule exception as it does not allow for court discretion. See Article 16 of Rome II Regulation (EC) No 864/2007.

[48] Crockett considers several theories that explain the relationship between the act of state doctrine and the choice of law rules. One perspective views the act of state doctrine as choice-of-law rules, treating the state's act as a law that must be applied to address specific issues. Another theory asserts that the act of state doctrine requires applying a foreign state's law to determine the effect of its action, presuming the foreign law validates and enforces the action. The third view suggests that the act of state doctrine comes into play only if the choice of law rules direct the application of the foreign state's law. Lastly, some consider the act of state doctrine as a distinct set of conflict of laws rules other than choice-of-law rules. See Crockett (n 19) 310–311.

[49] For example, the Supreme Court of Canada held in *Winnipeg School Division No 1 v Craton* that "human rights legislation is of a special nature and declares public policy regarding matters of general concern". See *Winnipeg School Division No 1 v Craton* (1985) 2 SCR 150 (Supreme Court of Canada) 156.

between nations,[50] it can also lead to uncertainty and unpredictable court decisions.[51] Clarity on its extent is essential in the transnational BHR context. The next section offers an idea of the public policy exception in human rights.

2. Rethinking Public Policy Concerning Human Rights in the Transnational BHR Context

While transnational BHR disputes inherently involve private parties in civil liability claims, the invocation of public policy as an exception by home state courts explicitly signifies the presence of home state public interests, which must be safeguarded from the risks posed by the acts of foreign governments or the application of foreign law.[52] Consequently, conflicts in transnational BHR disputes extend beyond private interests to include broader public and state interests.[53]

This section explores the scope of human rights that may shape the public policy of the home state and serve as a basis for courts to invoke the public policy exception to the act of state doctrine and the choice of law rules in the transnational BHR disputes. For clarity, reference to private international law in this section includes the act of state doctrine. Although it is not traditionally categorised as part of private international law, it shares certain similarities such as the notion of comity and the public policy exception, especially as regards its impact on civil law disputes.[54]

Public policy serves as a tool for addressing public problems in the common interest of the public[55] and are ultimately addressed by governmental institutions.[56] This framework of

[50] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201, 202.

[51] ibid 203.

[52] Symeonides (n 39) 313–314.

[53] ibid 335.

[54] See above, Section 1.

[55] The term "public problems" was used in a work by Vázquez and Delaplace. See Daniel Vázquez and Domitille Delaplace, 'Public Policies from a Human Rights Perspective: A Developing Field' SUR–International Journal on Human Rights 33. I adopt the same term to emphasise that public interests discussed here must be considered problems rather than solely encompassing what is in the interest of the public. As written by Lord Wilberforce in *British Steel Corp v Granada Television Ltd* [1981] AC 1096, 1168: "There is a wide difference between what is interesting to the public and what it is in the public interest to make known."

[56] ibid 34–35.

public policy is essential for our further consideration. Notably, the term "governmental institutions" signifies particularity in each state's approach to public policy.

Vázquez and Delaplace observe the formation of public policy by exemplifying the evolving nature of public problems through cases concerning the subordinate status of women and historical violence against women. Although these were long regarded as social problems, they had to be resolved privately as they were not considered public problems.[57] However, they have now been recognised as public problems in several, albeit not all, states. This evolution demonstrates that public problems can change over time. Once appropriately established, various solutions will be explored before reaching a public policy conclusion to address them.[58]

The transnational BHR disputes emphasised in this thesis involve the public policies of two states. For the host state, public policy is raised as a justification for restricting human rights in the interest of the public and the state. For the home state, it is a justification for upholding human rights protection by rejecting the host state's justification for restricting human rights. The public policy exception focuses on the extent of the home state's public policy with the aim of harmonising the policies of the two states.

In the *Kaweri* and *Yahoo!* cases, the host state's public policies were aimed at fostering the national economy in *Kaweri* and protecting the integrity of the political system in *Yahoo!*. Conversely, the home state's public policies focused on protecting the right to an adequate standard of living in *Kaweri*, and on safeguarding privacy and freedom from torture in *Yahoo!*. The public policy exception necessitates home state courts to consider whether there is a need to uphold the home states' public policies to protect rights while ensuring the legitimacy of the host state's public policies to restrict rights.

This consideration may create ambiguity in interpreting the purpose of the public policy exception. On one hand, the exception reflects the rights and values the home state seeks to protect. On the other hand, it engages with the host state context by evaluating whether the host state's measures or actions infringe upon those rights and values, thereby signifying the boundary of permissible restrictions.

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[57] ibid 35.

[58] ibid.

While this interpretive tension is acknowledged, it is necessary to emphasise that the public policy exception operates within the framework of judicial restraint aimed at upholding the principle of sovereignty. Although this exception prioritises the value recognised by the home state that warrant protection, it must also account for the sovereignty of other states. Consequently, not all public policies of the home state can serve as grounds for courts to invoke the public policy exception. The following analysis thoughtfully integrates these two perspectives into the evaluation of the public policy exception.

Public policy of the home state serves as an exception which allows courts to scrutinise the acts of host states or limit the application of host state law involving corporate obligations to respect the victims' human rights.[59] This public policy exception has faced criticism in private international law for providing courts with "excessive and unguided power" which results in difficulty in identifying its content or predicting the consequences of its application.[60]

Several commentators have proposed thresholds for the public policy exception in private international law. Nutting suggests limitation through legislative action, allowing courts to refuse rights obtained abroad only if the statute mandates them to apply the law of the forum.[61] Mills considers factors such as the proximity of the forum state, the relativity of norms, whether they are shared or absolute norms, and the severity of the breach.[62]

Debates on considering human rights protection as the public policy exception under private international law involve two views. The first highlights the nature of an exception and advocates limiting the application of the public policy exception through restrictive interpretation. Another view emphasises the fundamental significance of human rights and advocates that the protection of any human rights should be counted in the public policy exception without any interpretation. A brief introduction to these debates can provide a framework for further discussion.

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[59] See above, Section 1.2.

[60] Mills (n 50) 202. See also several critics of the discretion of courts in asserting public policy in the choice of law in John Bernard Corr, 'Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes' (1985) 39 University of Miami Law Review 647, 650–651.

[61] Charles B Nutting, 'Suggested Limitations of the Public Policy Doctrine' [1935] Minnesota Law Review 196, 203.

[62] Mills (n 50) 207–218.

The first view argues that the public policy exception should be sustained restrictively and only in exceptional circumstances, regardless of human rights issues. Failing this it would replace existing rules and have a general effect.[63] Even if the incorrectness of applicable rules is apparent, the court's consideration that the relevant host state rules are invalid in both substance and conclusion is insufficient justification for invoking public policy. There must be a conflict with fundamental legal principles.[64] This view represents the current judicial practice in the context of human rights issues in private international law.[65]

In *Dieter Krombach v André Bamberski*, the Court of Justice of the European Union ("CJEU") considered the application of the public policy exception under the EU Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. In this case, the civil claim ruling that sought enforcement stemmed from criminal charges. The court in the state of origin imposed a custodial sentence on the defendant with a civil claim ruling for compensation. The defendant was unrepresented by counsel as he was held in contempt for failing to attend the hearing.[66] The critical point is whether the denial of the right to be defended can be grounds for the state where enforcement is sought to invoke the public policy exception.

The CJEU stressed the necessity of restricting the application of the state's public policy as an exception to recognising and enforcing foreign judgments. The court specified that the variance in the proceeding of another state, prompting the forum state's court to invoke public policy, must be at "an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle".[67] In this case, the court considered the right to be defended a fundamental principle the violation of which constitutes grounds for invoking the public policy exception.[68]

An opposing view against the restrictive interpretation of the public policy exception argues for the preference of human rights. It asserts that the need to safeguard any human rights

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[63] ibid 204–206; Jan Oster, 'Public Policy and Human Rights' (2015) 11 Journal of Private International Law 542, 550.

[64] Juan José Álvarez Rubio and Katerina Yiannibas, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 60.

[65] See below, Section 2.1.3.

[66] *Dieter Krombach v André Bamberski* [2000] Court of Justice of the European Union Case C-7/98 [12–15].

[67] ibid 21, 37. See also Oster (n 63) 552; Dalia Palombo, *Business and Human Rights: The Obligations of the European Home States* (Hart Publishing 2020) 68.

[68] *Dieter Krombach v André Bamberski* (n 66) paras 38–45.

falls within the scope of the public policy exception without restriction.[69] Under this claim, when disputes involve human rights, home state courts can invoke the public policy of the home state as an exception to private international law without the need for any interpretation. It argues for the broad inclusion and full consideration of human rights and emphasises their fundamental moral value. Further justifications of this view will be discussed and countered below.

From these debates, it emerges clearly that the public policy exception should generally be restricted. It is equally clear that human rights protection can fall under the public policy exception. The only problem is whether human rights protection should be conditional on the restrictive interpretation of the public policy exception or should be considered without interpretation. Based on the analysis in the previous chapter, this section argues for the first view of the restrictive interpretation of the public policy exception in the transnational BHR context.

This argument emphasises a variety of societal norms recognised in the principles of international human rights law and in the harmonisation of different (moral, political, and legal) norms of human rights.[70] Subsection 2.1 details these justifications. Subsection 2.2 advances an argument to set the threshold of the public policy exception. It suggests considering the absolute nature of certain human rights as a yardstick for identifying the boundary of the unacceptable infringements on fundamental principles, enabling home state courts to invoke the public policy exception.

2.1 Understanding "Public Policy" concerning Human Rights

This section highlights the fundamental relevance of moral, political, and legal dimensions of human rights in shaping public policy involving human rights,[71] countering claims that the need to protect any human rights can justify invoking the public policy exception. The "seriousness" of the breach of each specific human right is critical in classifying which situation should fall within the public policy exception in transnational BHR disputes.

[69] Oster (n 63) 552–553.

[70] Chapter 3, Sections 1 and 2.1.1.

[71] Chapter 3, Section 2.1.1.

However, this seriousness remains subjective and depends on the court's discretion. The discussion will be presented in three subsections.

Subsection 2.1.1 argues that public policy as regards human rights is nothing other than "regular" human rights. The human rights considerations that we explored in the previous chapter involving the clash of the moral and political dimensions of human rights are reconsidered in this public policy context.[72] Subsection 2.1.2 argues that the absolutist view, which rejects balancing human rights, influences and advocates human rights protection being regarded as part of the public policy exception without interpretation. Subsection 2.1.3 reflects the current practices concerning this public policy exception under private international law. It highlights the "seriousness of the breach" and the "nature of rights" in defining the public policy exception involving human rights.

2.1.1 Alignment between Human Rights and Public Policy concerning Human Rights

A study reveals that courts generally apply three main categories of normative considerations under public policy: fundamental moral norms; community norms expressed in statutes and the common law; and community norms independent of statutes and the common law.[73] The first category relies on universal moral norms and fundamental principles of international law, including fundamental human rights norms. The other two categories are based on community interests which might be expressed in a statute.[74]

These normative grounds for public policy in the human rights context align with the moral, legal, and political dimensions of human rights previously explored to justify the need to balance human rights with political reasons for restriction.[75] The conflict between different dimensions of human rights necessitates careful consideration of how they can be harmoniously integrated.

The public policy exception under the act of state doctrine and the choice of law rules requires home state courts to consider whether the public policy of the host state stemming from their community norms requiring restriction of human rights is manifestly of a degree

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[72] Chapter 3, Section 2.1.1.

[73] Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14 Journal of Private International Law 130, 134.

[74] ibid 134–144.

[75] Chapter 3, Section 2.1.1.

unacceptable to the home state's public policy of upholding and protecting human rights. Put it into our context: home state courts need to consider whether the public policy of the host state to promote its national economy that results in forced eviction (in the *Kaweri* case), or to protect its national security, inherently limiting the human rights of its citizens (in the *Yahoo!* case) is sufficiently unacceptable to the home state's fundamental norms of relevant human rights.

Determining this "unacceptable degree" requires courts to balance the home state's policy with the host state's policy. This consideration reroutes us to the tension between the moral values of human rights (as upheld by the home state's policy) and the political perspective of human rights (as recognised by the host state's policy).[76] The previous consideration of balancing human rights can help guide responses to whether human rights should be subject to the restrictive interpretation of the public policy exception and how to interpret it.

The term "public policy" as a new take on the conflict of human rights standards does not change our consideration that fundamental moral norms of human rights can be subject to limitation. The debate between balancers and absolutists needs to be highlighted again here.[77] This thesis follows the balancer's approach, arguing that the need for human rights protection cannot automatically take preference as an exception in private international law. Like other public policy issues, it can be subject to restrictive interpretation of this public policy exception.

The following subsection highlights the influence of absolutist views on the claim for human rights preference in the public policy exception. Our findings in the previous chapter will counter each of the absolutist's arguments in this public policy context.

2.1.2 Influence of Absolutist View in Public Policy involving Human Rights

The absolutist's view prioritises all human rights above other values[78] and significantly influences the rejection of the need to interpret the public policy exception concerning human rights protection. This view asserts that the need to safeguard any human rights should justify invoking the public policy exception in private international law.

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[76] Chapter 3, Section 2.1.1.

[77] Chapter 3, Section 2.1.

[78] Chapter 3, Section 2.1.

For example, Oster argues for an absolutist view. He contends that the state's duty to protect human rights excludes any interpretation of public policy in matters related to human rights.[79] Consequently, the expectations of the litigating parties, or principles such as comity, mutual recognition, and reciprocity which are rooted in private international law, cannot be considered inherent limitations on human rights.[80] In his view, "private international law has to operate within the framework of human rights, and not *vice versa*."[81]

For Oster, there are three main arguments: the obligation of courts to protect human rights; the optimal effects of human rights; and the human rights norm as individual interests. The first argument, rooted in the positivist approach, contends that domestic constitutions and international conventions mandate that human rights are binding on all tripartite powers of the home state. This demands thorough consideration in the application of private international law as regards human rights.[82] This thesis argues that this perspective is accurate in cases such as *ILVA* previously discussed[83] without impacting on the legitimacy of another state's policy or decision.[84] The compliance with this obligation of the home state courts to protect human rights while negatively impacting on the validity of another state's laws or actions in the transnational BHR context, demands further examination.

We have extensively explored that international human rights law principles allow for the recognition of historical, political, and cultural diversity and acknowledge differences between nations in prioritising or restricting rights.[85] Suffice it to say that the standard of human rights applied in one country can vary, with reduced protection in certain circumstances specific to that country. Therefore, the claim that human rights are universally prioritised in all circumstances, particularly in transnational disputes, is doubtful.

The second absolutist argument for human rights primacy is structural and claims that human rights set objectives for states as ultimate principles rather than mere state obligations. It

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[79] Oster (n 63) 552.

[80] ibid.

[81] ibid 552–553.

[82] ibid 553.

[83] Chapter 3, Section 3.1.

[84] This thesis supports the assertion of the binding obligations of all branches of state under international human rights law to protect human rights. This is explored in Chapter 5, Section 1. However, the supporting analysis in this thesis does not impact another state's policy or decision.

[85] Chapter 3, Sections 1 and 2.1.

advocates their optimal observance in the application of law, including private international law, through the public policy clauses.[86] The third argument is normative and contends that human rights are individual rights, not state interests. Therefore, human rights protection is not at states' disposal.[87]

These two arguments consider human rights in general, focusing on their aspirational goals without looking into the reality of societal structures that, in certain circumstances, necessitate the protection of collective autonomy by limiting personal autonomy. They ignore the specific characteristics of each human right and emphasise only the moral dimension of human rights. Several human rights are intertwined with political considerations, which allows for their derogation in times of public emergency threatening a nation's life or for their restriction under specific circumstances through national legislation necessary to protect collective autonomy.[88]

Furthermore, human rights primacy in the public policy exception focuses predominantly on the home state as the guarantor of human rights protection. Oster suggests that proportionality and indirect horizontal effect of human rights already mitigate any potential impact of a "floodgate" of litigation by requiring courts to consider the applicable human rights in a balancing exercise.[89]

However, this perspective appears to overlook the specific challenges posed by transnational BHR disputes arising from the lack of a governing norm, a common point of view, or a relative societal norm common to the home state's justification for protecting human rights and the host state's justification for restricting human rights.[90] Such a norm is necessary for courts in the balancing stage of proportionality to determine the degree of interference with rights, the significance of justification for restriction, and their relative coexistence. The absence of this shared norm brings us to the discussion of the act of state doctrine and the choice of law rules, together with their public policy exception, in this chapter.

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[86] Oster (n 63) 553.

[87] ibid.

[88] Chapter 3, Section 2.1.1.

[89] Oster (n 63) 554–555.

[90] Chapter 3, Sections 2.2.3 and 3.2.

Implementing the notion of the primacy of human rights implies that the higher standard of the home state's court must always prevail regardless of any justification for restricting rights provided by the host state, even if those restrictions are permitted by the principles of international human rights law or deemed necessary to protect the personal autonomy of a wider group of individuals. Consequently, the assertion of human rights primacy in this public policy context appears to be shrouded in doubt.

For these reasons, this thesis contends that merely asserting the necessity for human rights protection as justification for invoking the public policy exception in private international law is misguided. It is driven by the aspirational goals and moral norms of human rights and fails to provide adequate justification for domestic courts rendering justice in transnational BHR disputes.

In addition to the counterarguments detailed earlier, it is essential to emphasise the limited connection to the home state in transnational BHR disputes, such as those in the *Kaweri* and *Yahoo!* cases[91] in which the only link was the domicile of parent corporations as defendants. All other aspects exist outside the home state, including the alleged activities, victims' residences, the impact of violations, and the domiciles of subsidiaries as direct wrongdoers. This scenario prompts the question of proximity to the disputes – one of the underlying principles of choice of law rules. The application of home state public policy to the entire dispute must indicate the home state's authority over the disputes satisfactorily.[92] Attempts to justify the home state's human rights norms by this tenuous connection is questionable.

This phenomenon necessitates courts to restrict the effect of domestic law even in human rights disputes, and presume the validity of foreign laws and actions unless they significantly conflict with the home state's optimal principles. The claim that the protection of any human rights can fall within the scope of the public policy exception without the need for restrictive interpretation is unjustified in the transnational BHR context.

We now arrive at an affirmative response to whether human rights protection should be subject to a restrictive interpretation of the public policy exception. Another question is how to interpret the public policy exception as regards human rights. A pragmatic approach by courts in response to this question involves considering what criteria can justify the need to

[91] Chapter 2, Section 3.

[92] Mills (n 50) 211.

safeguard human rights as part of the public policy exception in private international law. The following subsection considers this judicial practice.

2.1.3 Nature of Rights and Seriousness of Violations: Critical Factors of Public Policy Exception

The judicial practice of interpreting the public policy exception concerning human rights under private international law does not consider proportionality directly. Instead, the seriousness of human rights violations is critical. We can see this in the *Dieter Krombach v André Bamberski* case before the CJEU regarding the right to be defended, which highlights the degree of unacceptability to the state's legal order. The following three cases in English courts suggest considering the "seriousness" of the breach of human rights and the nature of the relevant rights.

In *Empresa Nacional De Telecomunicaciones SA v Deutsche Bank AG*,[93] the English Commercial Court ruled on the scope and impact of the act of state doctrine. In this case, it was submitted that there had been a breach of international law when the Bolivian state compulsorily acquired shares in a Bolivian company without paying compensation. The court recognised that a "very grave breach" of fundamental universal human rights or violations of international law are matters of public policy. However, no rule of international law – whether regarding a human right or otherwise – prohibits the compulsory acquisition of property by a state without compensation, at least where there is no element of racial or religious discrimination involved.

In *Kuwait Airways Corp v Iraqi Airways Co*,[94] Iraq attacked Kuwait and seized a Kuwait Airways Corporation ("KAC") aircraft. The aircraft was subsequently flown to Iraq for operation by Iraqi Airways Corporation ("IAC"). The Iraqi government violated international law and UN Security Council resolutions by transferring all KAC's assets to IAC. The House of Lords held this was a "gross violation of established rules of international

[93] *Empresa Nacional De Telecomunicaciones SA v Deutsche Bank AG* [2009] EWHC 2579 (QB), [2009] All ER (D) 182 (Nov). Due to limited access to the full judgment in this case, this case summary relies on a journal article. See Gautam Bhattacharyya, Linsey Macdonald and George Hoare, 'Judicial Restraint and Abstention: A Recent Application of the "Act of State Rule"' (2010) 25 Journal of International Banking Law and Regulations 140.

[94] *Kuwait Airways Corp v Iraqi Airways Co & Anor* [2002] UKHL 19.

law", and enforcement of this law would be "manifestly contrary to the public policy of English law".[95]

In *Oppenheimer v Cattermole*,[96] the issue was whether the appellant should be entitled to tax exemption on a German pension under a double tax treaty agreement. One of the considerations was the appellant's German citizenship in light of the 1941 Nazi government decree depriving Jewish émigrés of their German citizenship and confiscating their property. The House of Lords held that the decree was contrary to English public policy as a law of that nature "constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."[97]

All three cases above highlight instances where the laws or actions of other states affect the rights and obligations of private parties in disputes. They show that not all types of human rights can be automatically considered to qualify as the public policy exception. Courts must assess the nature of specific rights involved and the seriousness of violations. This assessment leads to the necessity of balancing the value of relevant rights within the home state context against the adverse impacts caused by the host state's acts or laws. Consequently, the sovereignty of the host state in enacting such laws or actions must also be respected and integrated into this consideration.

Examining these three cases reveals a common theme – the deprivation of private property. However, the second case is more complex as it involves armed conflict and property confiscation during a war and impacting on fundamental rights such as the right to life. The third case, rooted in the Nazi regime, addresses crimes against humanity by denying nationality and freedom of thought. These two cases underscore the need to protect individuals' rights during relevant situations. This distinguishes them from the first case which solely concerned property rights without additional fundamental human rights breaches.

In line with this notion, a leading authority on conflict of laws has contended that the impact of the ECHR influences the UK Supreme Court to ignore foreign law if it represents a

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[95] ibid 29.

[96] *Oppenheimer v Cattermole (Inspector of Taxes)* [1975] UKHL TC_50_159.

[97] ibid 214.

"serious" infringement of human rights.[98] Despite this, the absence of a clear benchmark for determining the "seriousness" of the breach and the "specific nature" of the right still complicates the classification of the public policy exception concerning human rights. Arguably, these factors are subjective to the court's discretion. This phenomenon still causes uncertainty for courts in choosing the standard to be applied in transnational BHR disputes.

The following subsection argues that the inclusion of the term "public policy" in relation to human rights and their restriction provides a governing norm which makes balancing on the basis of proportionality possible. Through the application of proportionality, it is suggested that the absolute nature of specific human rights can be seen as an alternative framework for courts to justify invoking the public policy exception in the case of human rights violations in the transnational BHR context.

2.2 Reframing Public Policy in Transnational BHR Context

This section refines the understanding of the public policy exception in transnational BHR disputes. It builds on the argument in the previous subsection, which stressed the importance of a restrictive interpretation of the public policy exception. While recognising the significance of considering the nature of certain human rights and the seriousness of the violation, it acknowledges the challenge of subjectivity in assessing these factors. This section proposes integrating the principle of proportionality into the consideration of the public policy exception to address this challenge.

In transnational BHR disputes, the lack of a shared perspective between the home state's human rights standards and the host state's restrictions complicates the application of proportionality to a conflict of human rights. Establishing a shared norm becomes significant in assessing the intensity of rights infringements and the significance of competing interests before considering their coexistence.[99] This prompts the question of which norm courts should apply.

The discussion in this section is divided into two subsections. Subsection 2.2.1 proposes formulating the public policy exception through the lens of the proportionality principle. This approach suggests anchoring the public policy exception in the absolute human rights

[98] Collins and others (n 16) para [5–005].

[99] Chapter 3, Section 2.3.

recognised by the home state. Subsection 2.2.2 provides further justification for this proposition, specifically highlighting the "seriousness" of rights violations and acknowledging the political dimension of human rights.

2.2.1 Formulating Public Policy Exception through Proportionality

The concept of proportionality cannot effectively balance the home state's human rights with the host state's restrictions in transnational BHR disputes, primarily because they do not have a shared notion. This section argues that incorporating the term "public policy" into the discourse on human rights and restrictions establishes a governing norm of international comity. This norm, in turn, facilitates the application of proportionality, particularly in the case of proportionality in the narrow sense.

While comity is a highly malleable concept with no universally accepted definition in law,[100] it can serve a crucial role in explaining the rationale behind rules and their development.[101] Fundamentally, comity embodies the principle of respecting the territorial sovereignty of other nations.[102] It requires courts to balance conflicting public and private interests, "considering any conflict between the public policies of the domestic and foreign sovereigns".[103]

Applying proportionality to weigh and balance the public policies regarding human rights can concretise courts' reasoning behind invoking the public policy exception. In doing so, courts must consider the principle that the norm of international comity aims to protect. While constitutional norms aim to protect constitutional rights from interference, international comity shifts the focus to protecting the public policy of the host state from intrusion by the home state. This necessitates scrutiny of the home state's public policy that the invocation of the public policy exception aims to achieve.

In addressing the invocation of the public policy exception in transnational BHR disputes, courts must consider the impact on the degree of interference in the host state's policy rather than evaluating the justification of its policy. They need to articulate the aims they seek to

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[100] Collins and others (n 16) para [1–008].

[101] Briggs, *Private International Law in English Courts* (n 22) para 3.138; Edelman and Salinger (n 12) 327.

[102] Edelman and Salinger (n 12) 327; Joel R Paul, 'Comity in International Law' (1991) 32 Harvard International Law Journal 1, 6.

[103] Joel R Paul, 'The Transformation of International Comity' (2008) 71 Law and Contemporary Problems 19, 19.

achieve by invoking the public policy exception, such as fulfilling the home state's obligation to protect human rights, urging the host state to adhere to international human rights obligations, providing remedies to victims, or regulating corporate behaviour. In this respect, the "seriousness" of human rights violations, while considering the nature of specific rights, cannot justify court intervention as it does not explicitly reveal the aims pursued by courts in invoking the public policy exception. Instead, it merely contributes to the significance of the established justifications.

Once the justification for invoking the public policy exception has been established, proportionality is applied to ensure the invocation of the public policy exception remains proportional to the intrusion on the host state's public policy.[104] The first question is whether invoking the public policy exception can adequately support the home state's justification. In this context and given the lack of jurisdiction of domestic courts over other states and the non-participation of the host state in the disputes, demanding that the host state observe international human rights obligations cannot be accomplished through invoking the public policy exception. However, other justifications – such as fulfilling the home state's obligation or providing remedies to victims and regulating corporate behaviour – can be addressed through this invocation.

The necessity test further examines whether alternative means exist within the court's authority to achieve the same result without invoking the public policy exception. If alternative measures exist under the national law of the home state, the invocation cannot pass the necessity test in this proportionality structure. As this thesis later clarifies how courts can uphold corporate responsibility through established and existing law, such as piercing the corporate veil and the duty of care,[105] indirectly regulating the conduct of corporations and providing remedies, the only justification for invoking the public policy exception that remains at this necessity stage is the observation of courts' obligation to protect human rights.

The examination then considers the significance of this remaining justification compared to the degree of interference in the host state's public policy. The nature of rights and the seriousness of violation can be one consideration in the significance of this established justification. The more stringent conditions under which the home state can restrict rights

[104] Chapter 3, Section 2.2.

[105] Chapter 6, Sections 1 and 3.

contribute to a lesser degree of interference with the public policy of the host state.[106] Conversely, the flexibility for derogation from or restriction of rights signifies a greater degree of interference with the public policy of the host state.

Human rights can be categorised into absolute, derogable, and qualified rights. Absolute human rights – no limitation or interference for any reason – cannot be derogated from or suspended, even in a state of emergency. In contrast, derogable rights can be suspended in specific circumstances, such as in times of public emergency threatening the nation's life. Qualified rights may be subject to interference to protect others or the broader public interest.

Based on the classification of human rights and the principle of proportionality in balancing public policies on human rights under the international comity norm, this thesis proposes using the absolute nature of human rights as a framework for home state courts to invoke the public policy exception under the choice of law rules and the act of state doctrine. While absolute rights are not public policy themselves, they provide a guiding standard for defining the scope of the exception and emphasising the optimal values that the home state aims to uphold.

The absolute nature of human rights represents a degree of significance which even the home state cannot restrict or derogate from for any reason. However, if the home state can restrict or derogate from these rights, the justification for such actions must be left to the host state, as home state courts cannot impose their norms to judge the norms of the host state which may differ from those of the home state.

This proposition of the public policy exception is formulated through structural reasoning of proportionality. It recognises the political dimension of human rights and reconciles the home state's political autonomy to define and protect absolute rights with the host state's political autonomy to impose restrictions on rights. The following subsection substantiates this claim.

[106] This interpretation echoes Mills's consideration that the stricter the interpretation of a norm, the less tolerance there is for divergence. See Mills (n 50) 213.

2.2.2 Supporting Justifications for Grounding Public Policy Exception in Absolute Human Rights

Several justifications support the narrow interpretation of the public policy exception in transnational BHR disputes and limiting it to the protection of absolute human rights. In addition to the structural consideration of proportionality, this limitation can be justified by examining the nature of absolute rights, harmonisation between the political autonomies of the host and home states, recognition of the diverse backgrounds under the international human rights principles, and the social contract theory.

Firstly, the absolute nature of rights emphasises their highest priority within a state and that they prevail over any other interest. Absolute rights should remain inviolable even if overriding them may seem necessary in the public interest.[107] In contrast, while non-absolute human rights are of fundamental importance, they are subject to limitations to accommodate the broader public interest.[108]

Certain rights, such as freedom from torture,[109] slavery,[110] genocide,[111] imprisonment for contract breaches,[112] the prohibition on the retrospective operation of criminal laws,[113] and the right to be recognised as a person before the law,[114] are considered absolute.[115] The Human Rights Committee has also suggested extending this list to include the right to non-discrimination.[116] While states may have differing obligations under the ICCPR,[117] these civil and political rights are protected by customary international law as peremptory norms or *jus cogens*, imposing obligations on all states irrespective of their treaty commitments.[118] As a result, they are grounded in a conception shared universally.[119] These ICCPR's absolute

[107] Merris Amos, *Human Rights Law* (2nd edn, Hart Publishing 2014) 14.

[108] ibid 15.

[109] ICCPR, Article 7.

[110] ICCPR, Article 8(1) and (2).

[111] ICCPR, Article 6(3).

[112] ICCPR, Article 11.

[113] ICCPR, Article 15.

[114] ICCPR, Article 16.

[115] ICCPR, Article 4.

[116] The HRC General Comment No 29 (CCPR/C/21/Rev.1/Add.11) para 8.

[117] Chapter 3, Section 1.2.

[118] Henriksen (n 11) 165; Nigel Rodley, 'International Human Rights Law' in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2018) 780.

[119] Mills (n 50) 214–215.

rights intrinsically embody fundamental moral values, and deprivation a society of these rights directly affects the legitimacy of the political process in that society.

In BHR disputes, victims often rely on the human rights standards of the home state to support their claims. Therefore, it is unlikely that the standards the home state sets for absolute rights would be lower than those of the host state. When home state courts invoke the public policy exception, they apply their own legal standards in determining which human rights are absolute.

It is essential to note that reference to legal standards explicitly hinges on the legal obligations that the home state courts seek to uphold by invoking the public policy exception. Therefore, the application of the home state's position in determining absolute rights applies only when the home state exceeds international human rights obligations, not when it falls short of them. These legal obligations also entail the exclusion of state practices – for example, sanctioning torture as a counterterrorism measure[120] – which lie beyond the authority of courts and may raise questions of obligation fulfilment. Such practices by the home state cannot alter the absolute nature of the right as a legal obligation.

Furthermore, the emergence of new sub-rights under absolute rights provisions, such as the right to healthcare inherent in the rights to life and freedom from torture or degrading treatment,[121] cannot be considered part of the public policy exception. This strict interpretation of absolute rights is significant in the BHR context because the implication of absolute rights directly triggers the public policy exception that affects the public policy of the host state.

The second supporting argument is that grounding the public policy exception in the framework of absolute rights recognises the political dimension of human rights and reconciles the political autonomies of both the home and host states. Home state courts may invoke their public policy as an exception if the human rights in question are considered absolute rights within their legal context. However, if these human rights are not deemed

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[120] Kai Möller, 'Beyond Reasonableness: The Dignitarian Structure of Human and Constitutional Rights' (2021) 34 Canadian Journal of Law & Jurisprudence 341, 348.

[121] In *N v UK*, the European Court of Human Rights struck a balance between the state's right to expel foreigners and the risk of death and life expectancy due to the ill-health of an individual. The court ruled that there was no breach of the prohibition of torture or degrading treatment if the applicant was sent to her hometown. See *N v The United Kingdom* - 26565/05 [2008] ECHR 453, [2008] European Court of Human Rights 26565/05 [44].

absolute, as they may be derogated from or restricted, courts must recognise the host state's reasons for establishing its public policy in limiting or derogating from human rights.

Consequently, the political autonomy of the home state to define and protect absolute human rights and the political autonomy of the host state to limit or derogate from non-absolute human rights can be reconciled. This reconciliation does not imply that the public policy exception requires the restriction of non-absolute human rights. Instead, it reflects the principle of international comity, which underpins private international law and restrains courts from interfering with the political autonomy of the host state in imposing such restrictions.

Instead of including all types of human rights or interpreting public policy based on a subjective assessment of the severity of violations, restrictions on absolute rights signify severe threats to the optimal values recognised in the home state and acceptable international norms. They are rights that must be fully guaranteed all the time.[122]

However, this interpretation does not preclude the home state from implementing mandatory due diligence legislation to regulate the extraterritorial activities of its corporations.[123] Although certain human rights may not be absolute, states can regulate business activities outside their territories to ensure that their corporations will not violate these rights, creating a *sui generis* character or the overriding mandatory legislation that their corporations must follow at all times.[124]

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[122] Note that the UNGPs' interpretive guide broadly defines "gross human rights abuse" to include acts such as genocide, torture, enforced disappearance, arbitrary and prolonged detention, and systematic discrimination. Furthermore, economic, social, and cultural rights may be deemed gross violations if they are grave and systematic, such as violations taking place on a large scale or targeting specific population groups. However, this interpretation does not impact on the argument presented here as the UNGPs address the term in a general sense, encompassing all conflating ideas of corporate responsibility but without considering the context of public policy. Additionally, the reference to economic, social, and cultural rights differs from the focus of this thesis which centres on the corporate adherence to host state acts or laws, to contest the applicability of the home state's standards of human rights. See OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012) 6.

[123] Chapter 5, Section 2.2 explores this legislation in selected countries.

[124] In *Brown v New Zealand Basing Ltd*, the New Zealand Supreme Court addressed a dispute arising from an employment agreement, governed by Hong Kong law, which mandated retirement at age 55. The appellants argued that the prohibition against age-based discrimination should prevent forced retirement before age 65. The court ruled that "statutory employment rights have a *sui generis* character" and their application is distinct from the governing law of the employment agreement. The prohibition against discrimination is a "free-standing right", indicating that it applies to actions taken in New Zealand regardless of whether New Zealand law governs the employment relationship. See *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245.

The third justification arises from the principles of international human rights law. Linking this exception to absolute human rights fully recognises the diverse backgrounds of states under the principles of indivisibility, interdependence, interrelatedness, and universality of human rights.[125] These principles acknowledge that societal arrangements may vary from state to state, potentially leading to differences in the prioritisation of rights or restriction of certain rights.

Lastly, this interpretation aligns with the social contract theory, where relevant policies – either the public policy of the home state in determining absolute human rights or the public policy of the host state to derogate from or restrict non-absolute human rights – are based on the recognised values of a specific community. Social contract theory justifies social rules through the consent of society members and contribute to the state's political autonomy in defining its policies. Although several theorists offer different perspectives on this consent, they generally agree that the social contract theory is confined to the sovereign boundaries of a state.[126]

Therefore, the host state's public policy of derogating from or restricting human rights should be considered contingent upon the values recognised in that host state. The absolute nature of specific human rights provides a justifiable criterion for guiding home state courts in invoking the public policy exception to ignore the host state's justification, especially in the transnational BHR context. This proposition facilitates balancing the political wills of both the home and host states under the international comity norm and offers adequate justification for invoking the public policy exception.

It is crucial to note that, particularly in transnational BHR disputes, this proposition is considered only in the context of the choice of law rules and the act of state doctrine. Therefore, it may not be appropriate in the cases where other norms are shared by the home and host states. For example, in the *Dieter Krombach v André Bamberski* case before the

[125] Chapter 3, Section 1.

[126] This thesis may not be the right place to argue or defend any idea of the social contract theory. However, it is necessary to make a general observation to defend this claim. Hobbes, for instance, justified sovereignty through a social contract involving a covenant among individuals and the authorisation of a group of persons. The covenant forms the institution of a sovereign, and the authorisation implies consent to the content of the contract provided by the group of persons. Locke theorised that people unanimously form a society and accept the majority's preferences regarding the form of government. Rousseau further extended this concept by emphasising that consent must be given to the actual outputs of government. See David Gauthier, 'Symposium Papers, Comments and an Abstract: Hobbes's Social Contract' (1988) 22 Noûs 71, 72–73; Benjamin Radcliff, 'The General Will and Social Choice Theory' (1992) 54 The Review of Politics 34, 36, 40.

CJEU regarding the enforcement of a foreign judgment discussed earlier,[127] the CJEU interpreted a Convention to which both states were party and found the right to be defended as fundamental – albeit non-absolute – as an integral part of the right to a fair trial under the ECHR. Significantly, both states in the CJEU case were parties to the ECHR which requires the same standards of human rights in both states. Therefore, when considering the harmonisation of their public policies concerning human rights issues, the ECHR takes on the form of a shared value between the two states.[128]

With this proposed framework of the public policy exception concerning human rights in mind, the following section applies this proposition to resolve a conflict of human rights standards in transnational BHR disputes involving corporate dilemmas. Concurrently, this will determine whether certain conduct by corporations in compliance with the host state's act or law have breached their negative obligations to refrain from infringing on human rights as asserted by victims.

3. Reformulating a Balancing Framework to Address Transnational BHR Disputes

The ambiguity surrounding the public policy exception within the act of state doctrine and the choice of law rules poses challenges for national courts in the home state when applying its human rights standards in transnational BHR adjudication. Building on the proposition that connects the public policy exception with human rights considered absolute by the home state, this section aims to reformulate a balancing framework to address conflicts in human rights standards between the home state and the host state in transnational BHR disputes.

The reformulated balancing framework addresses the conflict between human rights on one side and host state acts or laws restricting human rights together with the corporate obligation to adhere to them on the other. In this regard, host state law and corporate obligations are not inherently in conflict. The framework involves a two-step balancing process: first, striking a balance between human rights against the host state's acts or laws; and second, balancing human rights against corporate obligations. The outcome of the first balance informs the framework for the second balance in considering the potential breach of human rights by

[127] See above, Introduction to Section 2.

[128] Mills (n 50) 214.

corporations. This thesis primarily concerns the first step – identifying whether the home state's human rights standard applies to disputes as asserted by victims.

The second step, involving factual issues and requiring proof of evidence, is not the primary focus of this thesis. However, for a comprehensive understanding, several assumptions must be made and discussed. Although the second step in the balancing exercise may not necessarily require a proportionality analysis – there might be other standards, such as reasonableness – proportionality can still be regarded as one of several factors for achieving such standards.[129] In this regard, the stage of proportionality in the narrow sense under the proportionality principle is no longer necessary in the second balance as courts must apply the standard identified in the first step.[130]

Each step in the balancing exercise is addressed in Subsections 3.1 and 3.2, respectively. The two transnational BHR disputes used on the analysis, the *Yahoo!* and *Kaweri* cases,[131] are applied to illustrate the application of this reformulated framework.

3.1 The First Balance: Applicability of Human Rights Standard of the Home State

Starting with the first step in balancing two principles – the human rights standards of the home state and the restrictions imposed by the host state – the direct application of proportionality is precluded as there is no shared governing norm between the two standards.[132] This means that the courts must invalidate one of them.[133]

The act of state doctrine and the choice of law rules drawn from the concept of international comity, become relevant at this stage and guide the courts in their determination of which human rights standards should take precedence.[134] They provide courts with direction in selecting standards, potentially requiring prioritisation of the host state's restriction over the

[129] Chapter 3, Section 2.1.

[130] This may differ from domestic BHR disputes, as seen in the *ILVA* case discussed earlier in Chapter 3, Section 3.1. In that case, courts may examine the corporate conduct whether it falls within the permissible scope of non-absolute rights. However, in transnational BHR disputes, courts apply the home state standard only to absolute rights, signifying the non-infringement under any circumstance. For non-absolute human rights, courts are directed to apply host state standard and they are not authorised to justify the range of the permissible scope of rights within the host state's context.

[131] Chapter 2, Section 4.

[132] Chapter 3, Section 3.2.

[133] See above, Introduction to the current Chapter.

[134] See above, Section 1.1.

human rights standards of the home state. However, courts may argue that the acts or laws of the host state in disputes are incompatible with the public policy of the home state.[135]

In this respect, the earlier consideration of balancing two public policies leads us to conclude that the absolute nature of certain human rights can guide courts in invoking the public policy exception.[136] This results in the application of the home state's human rights standards to the dispute only in cases involving absolute human rights. For non-absolute rights, courts must follow the general rule, and respect the actions of the host state or apply the host state's laws governing the negative obligation of corporations to refrain from interfering with human rights.

The *Yahoo!* case involved two human rights: freedom from torture; and the right to privacy of correspondence. Under the ICCPR, freedom from torture is recognised as an absolute human right, while the right to privacy may be subject to derogation. Therefore, in the first balance, the considerations applicable to these two rights are different.

Courts may invoke the public policy exception and apply their human rights standards to the dispute only in cases involving freedom from torture which is absolute under international human rights law. For the right to privacy, courts can apply the home state's human rights standards only if the home state's laws treat this right as absolute – without the possibility of derogation or restriction for any reason. Failing this, courts must respect the acts of the host state or apply the host state's laws in considering the scope of this right of victims along with the corresponding negative obligation of corporations to respect it.

Applying the same analytical framework to the *Kaweri* case, the right to an adequate standard of living is not absolute – its application depends on the conditions in each state to advance it progressively. Consequently, the conditions attached to this right by the home state cannot be applied to the victims and the human rights standards of the home state do not apply to the dispute.

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[135] See above, Section 1.2.

[136] See above, Section 2.2.

The determination of the application of the human rights standards to the dispute will provide a framework for courts to consider the second step in achieving a balance and are addressed in the following subsection.

3.2 The Second Balance: Corporate Violations of Human Rights

In the second balance, human rights and the corporate obligation of doing business in adherence to the host state's acts or laws must be weighed and balanced. Several facts need to be assumed as this balancing step depends on the proof of evidence. Generally, other standards – for example, reasonableness or a reasonable person – may apply. However, proportionality can be one of many factors in considering reasonableness.[137] In this regard, the final stage of proportionality – proportionality in the narrow sense – is no longer necessary as the outcome of the first step establishes a framework for this consideration.

The non-application of the human rights standards of the home state to the dispute results in corporations no longer having a corresponding obligation to respect human rights to the degree recognised in the home state. Again, we consider this second balance through proportionality in the context of the *Yahoo!* and *Kaweri* cases. We have already identified the legal standard to be applied in the first step of balancing. Our further consideration is divided into two scenarios: the case of absolute rights (freedom from torture in the *Yahoo!* case); and the case of non-absolute rights (privacy in the *Yahoo!* case and a right to an adequate standard of living in the *Kaweri* case).

Beginning with the absolute right in the *Yahoo!* case, the corporate activities allegedly violating human rights are the disclosure of user information. Let us assume that the evidence submitted to the courts proves that such disclosure contributes to corporate involvement in violating freedom from torture by aiding and abetting the third party's conduct. In that case, corporations cannot invoke the need for adherence to host state law due to the non-recognition of the host state's restriction of this right in the home state. Applying proportionality to the second balance will be as follows:

The suitability test assesses whether such disclosure can serve the corporate obligation of doing business in compliance with the host state law. The answer is likely affirmative. The necessity test then examines whether there are any alternative measures that would result in

[137] Chapter 3, Section 2.1.

less interference in this freedom from torture while still allowing the corporations to conduct business in compliance with host state law.

Again, let us assume that the disclosure is deemed necessary as no other option allows corporations to continue their business as usual without complying with the host state law. In such a case, the examination should proceed to the phase of balancing under the test of proportionality in the narrow sense, consisting of three subtests: the intensity of interference with rights; the importance of satisfying the competing interests; and the relationship between the previous two elements.

However, I argue that this narrow-sense proportionality test is no longer applicable. This is because compliance with the host state law, which corporate activities aim to achieve, is no longer valid due to the priority of the home state standard in protecting freedom from torture as determined in the first step. Courts must uphold this standard in preference to the host state's justification. Therefore, the freedom from torture, which may be sacrificed by corporate disclosure, must always outweigh the host state's law restricting human rights.

As a result, where the home state recognises the human rights at issue as absolute and the evidence proves corporate involvement in the breach of that absolute human right, corporations must be subject to civil liability. Under no circumstances can observing the host state's restriction of rights be deemed proportional to the infringement of absolute human rights (freedom from torture).

This outcome signifies that corporations cannot evade responsibility for violations of absolute human rights once their involvement has been proved. Recalling advocacy for drawing a "red line" to establish a boundary restricting corporations from operating businesses or entering markets when preventing human rights impacts is not possible.[138] I am of the view that grounding the public policy exception in the framework of absolute rights recognised in the home state can help establish this boundary through judicial power.

The second scenario involves a case of non-absolute human rights. Assume that the evidence in the *Yahoo!* case cannot establish corporate involvement in the breach of freedom from torture – for example, a third party (the host state government) breaks the causal chain

[138] Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 Leiden Journal of International Law 389, 402, 406. See also Chapter 3, Section 2.2.2 and Chapter 5, Section 3.

between corporate conduct and damage. The relevant human right at stake can be a privacy right, likely considered non-absolute in the home state.

Applying proportionality to this situation, the disclosure of user content is deemed appropriate to achieve the need for conducting business adhering to host state law, provided it does not exceed the host state's requirements. The necessity test depends on whether corporations have alternative options or whether the host state law provides any exceptions that could result in less interference with privacy rights.

Courts can consider any exceptions under host state law when assessing necessity. If any exception results in less harm to victims, corporations must choose that option, even if it entails additional costs or complexity.[139] This interpretation aligns with the UNGPs' recommendation to uphold human rights to the fullest extent possible.[140] If corporations have no alternative, the corporate obligation to observe host state law is deemed necessary.

However, for the step of proportionality in the narrow sense, this thesis argues that the proportionality principle does not require narrow-sense proportionality in this situation. Instead, courts need to concentrate on the elements of suitability and necessity. The following four justifications support this claim.

Firstly, home state courts have no power to assess the justification behind host state laws that corporations are obliged to follow because human rights restricted by host state law do not form part of the guiding framework for courts to invoke the public policy exception in the first step balancing. Secondly, as nationals of the host state, victims are also subject to the same law. Thirdly, corporations are obliged to conduct their activities in accordance with the law, with no alternative but to risk committing an offence by violating such domestic law. Lastly, this second step balancing does not involve assessing the state's actions, which are intended to serve public interests and would require a traditional proportionality test. Arguably, although there may be various degrees of care that corporations can exercise and proportionality in the narrow sense could apply, this issue is addressed by the necessity test as corporations must choose the least harmful option available.

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[139] Mitigation of infringement impact is not relevant here as it does not change the fact of human rights violations. Unlike the positive duty to be explored in Chapter 6, Section 3 where mitigation is crucial, the negative duty does not require this element.

[140] UNGPs, Commentary to Principle 23.

Therefore, in the second situation where a human right is not absolute, courts can examine whether the alleged conduct (disclosure) aligns with the requirements of the law. If the conduct complies with the extent of the host state law that restricts human rights and no alternative measure could cause less harm to victims, then corporations have a sufficient defence against allegations of breaching non-absolute human rights (privacy rights). Consequently, corporate conduct would not violate the victims' non-absolute human rights.[141]

The same analysis of non-absolute human rights applies to the *Kaweri* case which involved the non-absolute right to an adequate standard of living. Applying the suitability test requires considering whether acquiring the non-occupied land can achieve the corporate obligation of doing business while relying on the host state's actions in providing land. The answer to this question is likely affirmative. The necessity test asks whether any other options can contribute to less interference. In this regard, non-acquisition of land cannot be considered an option since it fails the suitability test, which requires this option to achieve the corporate obligation of doing business in compliance with the law. If no other option exists, such land acquisition would not be considered a breach of the victims' rights. There is no further need to balance proportionality in the narrow sense.

I acknowledge that proposing a non-breach outcome in the case of non-absolute human rights may encounter challenges, particularly from absolutists who prioritise the morality of human rights over other values. However, I have addressed and justified this by acknowledging the political dimension of human rights and the diversity among states.[142] These are intrinsic aspects of practical human rights discourses.

While the court-centric framework of analysis presented in this thesis provides alternative considerations grounded in structural reasoning by which national courts can address the conflict of human rights standards in transnational BHR disputes, it is essential to recognise that other factors, particularly those derived from the specific facts in disputes – for example, corporate malice or the adverse effects on the home state's territory – may also come into

[141] This conclusion holds importance for the subsequent examination of imposing the positive obligation of due diligence on parent companies through national tort and corporate law. It implies that subsidiaries bear no responsibility, preventing courts from attributing accountability to parent companies for harm to victims through the piercing of the corporate veil and vicarious liability. See Chapter 6, Section 2.1 for further details.

[142] See above, Section 2.2

play. The implementation of these structural considerations remains within the independent discretion of national courts, taking into account the nuances and particularities of each case.

As a result of proportionality in the second situation, courts may be precluded from determining that corporate activities breach human rights. However, under international human rights law, states are obliged to protect human rights from corporate abuse and provide remedies for human rights harm suffered by victims. The following two chapters explore the human rights due diligence duty as a positive obligation that courts must impose on parent corporations domiciled within their jurisdiction to hold them accountable for human rights impacts caused by their subsidiaries' operations. Importantly, this duty exists independently of whether human rights have been breached as it does not correspond to substantive human rights.

4. Conclusion

This chapter addresses the challenge of balancing the home state's human rights standards with the host state's restrictions in transnational BHR disputes, given that proportionality does not apply. It argues that this conflict requires prioritising one rule over another rather than balancing them. The focus remains on considering the infringement of human rights as asserted by victims, and the corresponding negative duty of corporations to refrain from infringing such rights.

Section 1 underscores the significance of the act of state doctrine and the choice of law rules in guiding courts' selection of human rights standards in transnational BHR disputes. These rules typically dictate the application of the host state's human rights standards. However, they include a public policy exception, which permits courts to ignore the host state's standards if they manifestly conflict with the home state's public policy.

Section 2 considers debates on the scope of the public policy exception concerning human rights and justifies a narrow interpretation of the public policy exception to limit its application to the protection of human rights recognised as absolute by the home state. This proposition, developed on the structural idea of proportionality, acknowledges the diversity among nations in prioritising and restricting rights and harmonises public policies of the home and host states.

Building on this interpretation, Section 3 applies a two-step balancing process in analysing the *Yahoo!* and *Kaweri* cases. The first step involves determining whether human rights are absolute and invoking the public policy exception only for the protection of absolute rights. The second step balances human rights and corporate interests, with proportionality serving as one factor in assessing reasonableness. Consequently, the corporate necessity to adhere to host state acts or laws cannot justify the infringement of absolute human rights. However, corporations may not be held liable for interfering with non-absolute human rights if they adhere to the host state restrictions, regardless of any human rights impacts.

Despite the non-violation outcome for non-absolute human rights, human rights impacts occur. There is still a positive duty of due diligence for parent corporations to ensure that their subsidiaries do not cause such impacts. This duty does not correspond to any substantive human rights. In the absence of due diligence legislation, courts are obligated to impose this positive duty by interpreting established national law. The next two chapters explore why, in what situations, to what extent, and how courts can impose this positive duty on parent corporations under corporate and tort law frameworks.

CHAPTER 5

Human Rights Due Diligence: Obligation of Courts and Duty of Corporations

Introduction

The previous two chapters examined the applicability of the human rights standards of the home state in transnational business and human rights ("BHR") disputes to determine whether the corporate activities in the host state violate human rights, particularly in cases where corporations must adhere to host state acts or laws that restrict victims' human rights. These restrictions result in the host state's human rights standards differing from those of the home state. Only applicable human rights standards can generate negative duties for parent corporations and their subsidiaries and oblige them to refrain from interfering in these rights.[1]

This phenomenon necessitates evaluating victims' human rights along with the justifications for host state restrictions and corporate adherence to those restrictions. This results in a two-step balancing process for horizontal human rights obligations. The first step involves balancing home state standards of human rights with host state restrictions; the second step balances rights against corporate obligations to adhere to the host state restrictions.[2] However, the principle of proportionality – which typically applies to the first balancing exercise – faces limitations due to the lack of a governing norm shared by the human rights standards of the two states.[3]

This absence of a governing "balancing norm" leads to a claim that the conflict of human rights standards between states requires prioritising one rule over another rather than balancing them. Chapter 4 explored the relevance of the act of state doctrine and the choice of law rules in providing direction for courts in selecting the applicable human rights standards.[4] However, the ambiguity surrounding the public policy exception necessitates further consideration.[5]

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[1] Chapter 1, Section 4.1.

[2] Chapter 3, Section 2.1.

[3] Chapter 3, Section 3.2.

[4] Chapter 4, Section 1.1.

[5] Chapter 4, Section 1.2.

Chapter 4 also proposed to limit the invocation of the public policy exception by using human rights deemed absolute by the home state – for example, the right to be free from torture – as a guiding framework for courts.[6] This framework enables courts to deny the application of the host state's justifications for restrictions in cases involving absolute human rights and apply the standards of the home state. However, courts should defer to host state justifications for restricting non-absolute human rights, such as privacy or the right to an adequate standard of living.[7]

Consequently, courts can hold corporations accountable for violating absolute human rights as dictated by the home state standards. For non-absolute human rights, disputes must be governed by the human rights standards of the host state, signifying that corporations adhering to the host state's restrictions cannot contribute to the violation of these rights as asserted by the victims.[8] However, the human rights impact on victims persists but cannot be addressed on the basis of the negative duty.

The focus now shifts to addressing the positive duty of parent corporations to prevent their subsidiaries from causing negative human rights impact. This requires corporations to take appropriate steps to ensure that their subsidiaries' operations do not result in human rights impact. The critical question in this and the following chapters is how the home state's courts can establish this positive duty for parent corporations.

This question is grounded in the international human rights obligations on states to protect human rights[9] and form the cornerstone of the "protect" and "remedy" pillars of the UN Guiding Principles on Business and Human Rights ("UNGPs").[10] As state organs, courts must protect human rights from corporate abuse and provide access to remedies.

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[6] Chapter 4, Section 2.2.2 provides the following justifications: (i) status of the highest priority of rights; (ii) recognition of political dimension of human rights and harmonisation of the political wills of both states; (iii) recognition of the difference between nations under the international human rights law principles; and (iv) alignment with social contract theory.

[7] Chapter 4, Section 2.2.2.

[8] Chapter 4, Section 3.

[9] See below, Section 1.1.

[10] UNGPs, Principles 1 and 25. Note that the term "remedy" has two aspects, procedural and substantive. The former is the process by which arguable claims of human rights violations are heard and decided, while the latter is the outcome of the proceedings, the relief granted to the successful claimant. See Dinah Shelton, *Remedies in International Human Rights Law* (OUP 2015) 16. In this thesis, "remedy" refers to its substantive aspect unless otherwise stated in the context.

Under the horizontal human rights obligation,[11] courts can impose a negative duty on corporations to refrain from interfering with human rights by interpreting notions of fault or negligence in civil liability law.[12] However, imposing a positive duty on parent corporations and holding them liable for their subsidiaries' conduct require a different positive rule.[13] This responsibility is integral to the concept of human rights due diligence ("HRDD") for corporations. It requires parent corporations to exercise due care over their subsidiaries' activities to address, prevent, and mitigate human rights impacts. Importantly, it is not a duty corresponding to substantive human rights; it exists irrespective of whether human rights have been breached.[14]

Human rights due diligence for corporations was initially introduced in the UNGPs as a component of the corporate responsibility to respect human rights. It involves identifying, assessing, and mitigating human rights risks in a company's own operations and those of others linked to its products, services, or operations. However, the UNGPs are not legally binding, and non-compliance carries no legal consequences.[15]

The need to hold corporations responsible for the human rights impacts ranges from corporate power exceeding that of states, to moral and legal implications of human rights, unfair competition in international free trade, and internalisation of the external costs of production.[16] Consequently, several countries, including France and Germany, have enacted laws mandating corporations to exercise due diligence and prevent human rights impact.[17] A trend of establishing a due diligence duty for corporations has focused on developing legislation.[18]

This chapter argues that courts are also obliged under international human rights law to protect human rights from violation by corporations. In the absence of due diligence legislation, courts must impose a positive duty of due diligence on corporations through the

[11] Chapter 3, Section 2.1.2.

[12] Olivier De Schutter, 'Corporations and Economic, Social, and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (OUP 2014) 199.

[13] Chapter 1, Section 4.1.

[14] See below, Section 3.3. See also Chapter 1, Section 4.1.

[15] UNGPs, Principles 11–24.

[16] Chapter 1, Section 2.

[17] See below, Section 2.2.

[18] Chapter 1, Section 3.

interpretation of established law, such as corporate or tort laws, aligning with the purposes of the due diligence concept.[19]

This argument recognises the practical limitations of international soft law and national HRDD legislation and suggests that judicial power must be leveraged to hold corporations accountable for the human rights impacts, thereby contributing to a stronger protection of human rights. As some commentators have observed, legislation alone is inadequate to ensure that companies respect human rights and states should use all available regulatory measures.[20] However, it should not be considered a call to rely solely on the courts' role to ensure state compliance with the duty to protect human rights from business-related abuses. Courts alone cannot implement all aspects of human rights due diligence.[21]

The comprehensive analysis of the court-centric framework in establishing the positive duty of due diligence for corporations as regards their subsidiaries' conduct cannot be fully addressed within a single chapter. Central questions in this chapter include "why", "in what situations", and "to what extent" courts must impose the positive duty on parent corporations. The question of "how" will be addressed in the following chapter.

This chapter begins by exploring the rationale for judicial intervention in addressing human rights due diligence. It then examines the concept of human rights due diligence to understand the situation and the extent to which courts are obliged to establish a positive duty for corporations. The next chapter addresses how courts can fulfil this duty by identifying challenges within national corporate and tort law that hinder courts from establishing the positive duty. It proposes the refinement of the court's reasoning in judicial precedents regarding the duty of care in negligence law for parent corporations regarding the operations of their subsidiaries. The aim of tort law to direct the behaviour of societal members rather than to compensate the victims' loss is emphasised. The rights model of tort law, advocated by Stevens is applied to show the efficacy of this approach in holding parent

[19] In Chapter 6, Section 4.1.1, I argue that it is the law of the place of incorporation that applies to establish corporate conduct.

[20] Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 Leiden Journal of International Law 389, 390. Choudhury shared the same view and proposed to reconceptualise corporate law to address this insufficiency. See Barnali Choudhury, 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough' (2023) 8 Business and Human Rights Journal 180, 181.

[21] See below, Section 3.1. See also Chapter 6, Section 4.2.

corporations accountable for human rights impact stemming from the operations of their subsidiaries.[22]

The analysis framework proposed in this thesis focusing on the court's role in adjudicating the transnational BHR dispute, is original. Although the rights model and the aims of tort law, proposed in the following chapter as the suggested solution are existing notions in tort law, their examination within the BHR context and emphasis on their effectiveness in addressing the positive due diligence duty to bridge the gap of variations in human rights standards among different states are an original contribution to the BHR field of study.

This chapter is divided into four sections. Section 1 emphasises the national courts' role and the state's obligations under international human rights law. Section 2 briefly describes the human rights due diligence concept under the UNGPs and examines international and national efforts to transform this concept into domestic hard law with specific attention to limitations. Section 3 addresses several vague issues in the due diligence concept and outlines the substantive extent of the positive duty that courts can impose on corporations. Section 4 concludes the discussion in this chapter.

1. The Role of National Courts in Human Rights Due Diligence: Upholding States' Obligations

This section addresses why courts are obliged to impose a positive duty of due diligence on parent corporations concerning the human rights impacts stemming from their subsidiaries' operations. It argues that, as an organ of state, the courts have an obligation to protect human rights from corporate abuse. This obligation is commonly referred to as the due diligence obligation of states under international human rights law. While distinctions exist in their nature, understanding this state obligation can provide insight into how human rights due diligence for corporations should be interpreted.

International law governs the rights and obligations of states in their international relations. The primary rules of international law are treaties, international custom, and general principles of international law. The secondary rules consist of judicial decisions and the teachings of the most highly qualified publicists of the various nations.[23] The primary rules

[22] Chapter 6, Section 3.

[23] Article 38 of the Statute of the International Court of Justice.

create binding and enforceable obligations, while the secondary rules help us to understand and apply the content of the primary rules deriving either from treaty, custom or the general principles.[24]

As regards international human rights law, all members of the UN are party to the UN Charter, which obliges member states to promote respect for and observance of human rights.[25] Most states are bound to the International Bill of Human Rights – the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") – that UNGPs aim to protect. However, there may be slight differences in how customary international law and treaties are interpreted, and treaty obligations of some states are modified by reservations.[26]

The obligation of states to protect human rights extends beyond harm the states themselves cause. Under international human rights law, states have a due diligence obligation to ensure that non-state actors do not violate human rights.[27] While international tribunals can apply the due diligence obligation directly to states in human rights disputes, national courts cannot do the same to corporations in transnational BHR disputes as corporations are not subject to this obligation under international human rights law.

Subsection 1.1 provides a concise explanation of the due diligence obligation resting on states and courts to protect human rights from corporate abuse. Subsection 1.2 explores how this obligation on states differs from and connects to due diligence for corporations under the UNGPs. Subsection 1.3 then considers judicial methods for imposing a due diligence obligation on corporations to fulfil the state's due diligence obligation.

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[24] Anders Henriksen, *International Law* (3rd edn, OUP 2021) 22; Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2018) 99.

[25] Nigel Rodley, 'International Human Rights Law' in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2018) 777–778.

[26] UDHR is not a treaty. Additionally, fundamental human rights, most of which are specified in the ICCPR, are safeguarded under customary international law, making them obligatory for all nations, irrespective of their treaty obligations. See Henriksen (n 24) 165; Rodley (n 25) 788.

[27] Rodley (n 25) 784–785.

1.1 States' Due Diligence Obligations under International Human Rights Law

The concept of due diligence is relevant in all nine core UN human rights treaties.[28] According to the Human Rights Committee, states are obliged to exercise due diligence in fulfilling their duties of ensuring human rights protection. This represents a positive obligation on states in a horizontal dimension, meaning that states are responsible for protecting individuals from other individuals.[29]

Although the obligation to conduct human rights due diligence may not be explicitly stated in international human rights treaties, the jurisprudence of international human rights bodies and courts has consistently affirmed its existence.[30] States may breach their obligations to protect human rights by failing to exercise due diligence to prevent, punish, investigate, or rectify the harm caused by private persons. Consequently, although states cannot be directly responsible for human rights harm caused by non-state actors, they can be indirectly responsible if they fail to meet their due diligence obligation.[31] This obligation relates to conduct, not results, and focuses primarily on states' behaviour.[32]

Within the UN human rights treaty system, the tripartite framework of duties to respect, protect, and fulfil is frequently used.[33] The duty to respect concerns the negative obligations

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[28] ILA Study Group on Due Diligence in International Law, 'First Report' (ILA 2014) 14.

[29] Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13) (2004), para 8.

[30] For example, in *Velazquez Rodriquez v Honduras*, the Inter-American Court of Human Rights [Judgment of 29 July 1988, Inter-Am Ct HR (Ser C) No 4 (1988) para 172] opined that a state could be held liable for human rights violations caused by a third party if the state failed to exercise due diligence to prevent the violation or to respond appropriately after the violation occurred. In *Opuz v Turkey*, the European Court of Human Rights [Application No 33401/02, Judgment of 9 June 2009] held that the Turkish government violated the ECHR and was liable for not taking action to protect victims of domestic violence caused by a family member. In *Joaquín David Herrera Rubio et al v Colombia* [Communication No 161/1983 (decision adopted on 2 November 1987) para 11] the Human Rights Committee found that the state party was responsible for the human rights violations that occurred, even though they were committed by the military forces and further that the state party had failed to exercise due diligence to prevent the violations or to respond appropriately after they occurred. See also Robert McCorquodale and Lise Smit, 'Human Rights, Responsibilities and Due Diligence: Key Issues for a Treaty' in David Bilchitz and Surya Deva (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (CUP 2017) 217.

[31] Rodley (n 25) 784–785. See also, Olga Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2014) 32 Netherlands Quarterly of Human Rights 44, 45; Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 899, 900, 904–905; Björnstjern Baade, 'Due Diligence and the Duty to Protect Human Rights' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 92.

[32] ILA Study Group on Due Diligence in International Law 'Second Report' (ILA 2016) 2–3; Baade (n 31) 97.

[33] ILA Study Group on Due Diligence in International Law, 'First Report' (n 28) 15–16. See also Chapter 3, Section 1.1.

of states in terms of which governmental actors must refrain from violating human rights. Unlike the other two duties, this duty to respect does not depend on the degree of diligence exercised since it concerns the conduct of the state's organs and agents and not other non-state actors.[34] The duty to protect denotes the positive obligations of the state to undertake preventive measures aimed at reducing or eliminating violations of human rights by non-state actors.[35] The duty to fulfil, on the other hand, relates to the provision and promotion of human rights.[36]

The UNGPs are developed on the basis of this tripartite framework,[37] and their "protect" and "remedy" pillars reflect the state's duty to protect.[38] Therefore, the UNGPs reiterate states' human rights obligations and provide further recommendations and practical guidance on how states can observe their obligations in the horizontal dimension. The soft law status of the UNGPs does not diminish states' obligations under international human rights law.

Accordingly, states are bound by international human rights law to refrain from infringing human rights and to protect those rights from violations caused by other non-state actors, including corporations. Since national courts "are inseparable from the state",[39] they have the same duty to protect human rights from business-related abuse. As recognised in the Vienna Declaration, an independent judiciary and legal profession are crucial for the complete and non-discriminatory realisation of human rights.[40]

Under the *pacta sunt servanda* principle, states must uphold their international obligations and, according to the "Alabama" principle of international law, states must structure their national legal systems to perform these obligations effectively.[41] Even in the dualist state, the need for states to adhere to domestic law cannot justify non-compliance with

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[34] ibid 15. As discussed in Section 1.2 below, the due diligence obligation of states does not include the conduct of their own organs or agents.

[35] Heike Krieger and Anne Peters, 'Due Diligence and Structural Change in the International Legal Order' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 369.

[36] ILA Study Group on Due Diligence in International Law, 'First Report' (n 28) 15–16.

[37] UNGPs, General Principles.

[38] UNGPs, Principles 1 and 25.

[39] André Nollkaemper, 'The Independence of the Domestic Judiciary in International Law' (2006) XVII Finnish Yearbook of International Law 3.

[40] 'Vienna Declaration and Program of Action' (UN Doc A/CONF157/23-EN 1993) para 27.

[41] André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 11.

international obligations.[42] International tribunals consistently prioritise international obligations over national laws in cases of conflict.[43] Therefore, national courts cannot give effect to national law over the performance of states' international human rights obligations.[44]

However, states are not parties to transnational BHR disputes, and the due diligence concept under the UNGPs does not have a binding effect on corporations. The following subsection emphasises the differences and interrelation in the due diligence concept for states and corporations.

1.2 Distinctions and Connections between State and Corporate Due Diligence

The state's duty to protect human rights entails a positive obligation to prevent human rights abuse by non-state actors and contributes to the due diligence obligation of the state under international human rights law. While there are distinctions between due diligence for states and corporations, understanding how the concept operates in the context of state obligations helps clarify human rights due diligence for corporations under the UNGPs' respect pillar. This section explores both the differences and links between these concepts.

Due diligence for states primarily relates to the proactive involvement in preventing human rights impacts by non-state actors and represents the state's positive obligation. However, if an abuse of human rights results directly from the state's actions regarding its duty to respect human rights, due diligence is not the applicable measure. Instead, national and international human rights law provide states with other tests for their actions that cause adverse human rights impact, such as "necessity, proportionality, and legislation of general application aimed at a legitimate purpose".[45]

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[42] The Alabama principle was developed in an arbitration claim against Great Britain, which is a dualist state. For further study, see Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54 The International and Comparative Law Quarterly 1; United Nations, 'Alabama Claims of the United States of America against Great Britain. Award Rendered on 14 September 1872 by the Tribunal of Arbitration Established by Article I of the Treaty of Washington of 8 May 1871' in United Nations, *Reports of International Arbitral Awards,* vol XXIX (United Nations 2011).

[43] Eileen Denza, 'The Relationship between International and National Law' in MD Evans (ed), *International Law* (5th edn, OUP 2018) 384.

[44] Nollkaemper (n 41) 11.

[45] ILA Study Group on Due Diligence in International Law, 'Second Report' (n 32) 32.

In contrast, due diligence for corporations addresses both their own actions, which may cause or contribute to human rights impacts, and the actions of others that result in the human rights impacts linked to the corporations' operations, products, or services arising from business relationships.[46] Therefore, the due diligence concept of corporations encompasses both the negative obligation to refrain from specific actions and the positive obligation to take steps to prevent others' actions. This duality will be examined in detail later.[47]

Arguably, states have legally established duties to respect (negative duty) and protect (positive duty) human rights, negating the need to explicitly establish a negative obligation within the due diligence concept for states. However, corporations lack such direct human rights duties.[48] Therefore, the negative obligation of human rights must be incorporated within due diligence for corporations. This point leads to the next consideration regarding the legal basis for establishing the due diligence obligation of corporations in the absence of specific legislation.

Although corporations can be held accountable for human rights obligations under the horizontal effect doctrine,[49] these obligations typically involve negative duties, which require corporations to refrain from infringing human rights and focus on remedying the harm suffered by victims rather than dictating the conduct of corporations. Establishing the positive duty of corporations concerning third parties' conduct requires a distinct legal basis.

In this regard, it is necessary to consider the nature of this positive duty resting on corporations. Full compliance with the positive duty to prevent the human rights impacts caused by others' activities under the due diligence concept (meeting a "reasonable" degree of conduct as assessed by an objective standard) does not guarantee that harm to human rights will not occur. Unlike the negative duty, this positive duty of due diligence is not directly correlated with substantive human rights that can bind corporations under the

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[46] UNGPs, Principle 13.

[47] See below, Sections 2.1.2 and 3.3.

[48] Inter-Parliamentary Union, *Human Rights* (2016) 19 <https://www.ipu.org/resources/publications/handbooks/2016-10/human-rights> accessed 30 June 2024; Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights' (2011) 2 Journal of European Tort Law 221, 225; John Douglas Bishop, 'The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations' (2012) 22 Business Ethics Quarterly 119, 119.

[49] The horizontal effect doctrine expands the scope of human rights protection beyond the traditional understanding of state obligations in that it allows individuals to hold other individuals accountable for violating their human rights. See Chapter 3, Section 2.1.2.

horizontal effect doctrine.[50] Therefore, the positive duty involving impacts from others' activities hinges on the conduct of the duty-bearer, while the negative duty concerning the impacts from corporations' own activities in the horizontal effect doctrine hinges on the outcome of human rights impacts. This understanding is significant for further discussion.[51]

While the obligatory nature of the due diligence concept in international human rights law is evident, it does not undermine the understanding that the UNGPs' due diligence framework for corporations is primarily a recommendation for states to adopt and for corporations to follow voluntarily. However, when states actively implement the UNGPs, they can move closer to fulfilling their due diligence obligation.

In response to this voluntary gap, some jurisdictions have implemented mandatory HRDD legislation. Furthermore, the European Union has recently enacted the Corporate Sustainability Due Diligence Directive ("EU CSDDD" or "EU Directive") for this purpose.[52] However, such legislation and the directive are limited in their scope of application, often on the basis of criteria which include corporate size. This point contradicts the UNGPs, which expect all corporations to exercise due diligence regardless of their size.[53] Therefore, in the absence of specific legislation governing corporate conduct, it becomes imperative for the judicial branch of states to fulfil the state's obligation to protect human rights from corporate abuse by imposing the due diligence duty on corporations.

1.3 Judicial Methods of Upholding Human Rights Due Diligence for Corporations

Legislation can directly impose a human rights due diligence duty on corporations by specifying details of conduct, corporate obligations, and liability for non-compliance.

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[50] Having said this, it does not mean that the positive duty creates strict liability for corporations as it is still subject to assessment against reasonableness in considering fault. Chapter 6, Section 3 explains this point.

[51] See below, Section 3.3.

[52] See below, Section 2.2. There have been several attempts to have international law establish this duty for corporations, but none has yet reached a conclusion. The only achievement is the enactment of domestic law in certain jurisdictions, such as France, Germany, and Norway, and the recent adoption of the EU CSDDD in the European Union. Other countries may have legislation regarding the corporate HRDD duty on some specific human rights issues. For further study, see Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International & Comparative Law Quarterly 789; International Organisation of Employers and Konrad Adenauer Foundation, *Key Developments in Mandatory Human Rights Due Diligence and Supply Chain Law: Considerations for Employers* (2021) <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=156042&token=ee1bad43bfa8dbf9756245780a572ff4877a86d5> accessed 30 June 2024.

[53] See below, Section 2.2.1.

However, as we shall see shortly,[54] the limits of their application result in the exclusion of certain companies from this obligation regardless of the severity of human rights impacts they might cause, contribute to, or be involved in through their products, services, or operations. Additionally, this legislation has been enacted only in certain counties, signifying that corporations in other countries do not have a similar obligation.

Despite the horizontal effect doctrine permitting courts to address the negative duty correspondingly arising from human rights by holding corporations responsible for the impact from their operations, its limits become apparent due to differences in societal arrangement between states resulting in differences in their human rights standards.[55] Consequently, there is a need to explore how the home state's courts can impose the positive duty of due diligence for corporations, particularly in the absence of specific legislation.

Under the human rights due diligence concept, corporations are expected to prevent their subsidiaries, as separate entities with whom they have a business relationship,[56] from causing or contributing to negative human rights impact. Courts must apply and interpret established national laws, such as corporate and tort law to achieve this purpose. Under these laws, principles such as piercing the corporate veil and the enterprise theory can affect parent corporations' liability for their subsidiaries' operations. The due diligence concept is also a modality attached to a duty of care,[57] which can be established through negligence law.[58] The application of these legal concepts can be used to enforce the positive duty of due diligence for corporations. Chapter 6 explains how courts can do so in detail.[59]

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[54] See below, Section 2.2.1.

[55] Chapter 4, Section 3.

[56] Below, Section 3.2 addresses the subsidiaries' status as separate or single entities of their parent corporations.

[57] Anne Peters, Heike Krieger and Leonhard Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 1–2.

[58] Duty of care involves both negative and positive obligations. Under the horizontal human rights obligation, courts can uphold the corporate duty to respect human rights through the direct application of the duty of care in the negative dimension where corporations are expected to refrain from infringing rights by their own conduct. Therefore, this is an obligation of outcome. In this sense, there is no need to have a modality attached to the duty of care notion. Our point is different because the positive obligation expects corporations to take appropriate steps to protect human rights against harm caused by third parties (subsidiaries). Therefore, this is an obligation of conduct requiring a modality for establishing a touchstone of this duty of care. This matter is justified later when applying the rights model in Chapter 6, Section 3.

[59] Chapter 6, Sections 1–3.

These domestic law concepts can be applied to corporations as private parties.[60] By applying national laws governing corporations and tort to impose liability on corporations regarding the human rights impacts from actions of their subsidiaries, states can effectively discharge their obligations. In light of the non-binding nature of due diligence for corporations, the questions that remain for our consideration are "in what situations", "to what extent", and "how" courts can apply national laws to establish this positive duty resting on corporations for the actions of their subsidiaries.

It is essential to grasp the essence of the due diligence concept for corporations and identify the shortcomings of mandatory due diligence legislation in achieving its objectives. This understanding can help frame when and the extent to which courts should exercise judicial power to uphold due diligence – especially as regards positive obligations – by interpreting national laws. The following section briefly discuss the substantive standards of the due diligence concept for corporations as set out in the UNGPs and the legislation of certain jurisdictions.

2. The Human Rights Due Diligence Duty of Corporations

The UNGPs establish the human rights due diligence concept for corporations, which includes not only a corporation's operations but also those of its subsidiaries and companies within its supply chain. The positive obligation under the concept of due diligence regarding these subsidiary operations is our focus. The previous section suggested that in the absence of the specific due diligence legislation applied to corporations in disputes, courts are obliged to exercise their power to uphold the human rights due diligence concept by the application of national law.

Before considering how courts can do this, it is necessary to understand the concept of due diligence, especially in the parent-subsidiary relationship, as well as its current state of implementation and the limitations of legislation imposing this duty on corporations. This

[60] Apart from the interpretation of national laws, the Supreme Court of Canada in *Nevsun v Araya* held the parent company liable for forced labour in the subsidiary's operations by considering the protection of claimants' relevant human rights as customary international law norms that have a binding effect on corporations. However, this reasoning is questionable in finding customary international law norms without the well-established practice of states and binding corporations to international law. See *Nevsun Resources Ltd v Araya* (2020) SCC 5 (Supreme Court of Canada); Barnali Choudhury, 'Enforcing International Human Rights Law Against Corporations' in I Tourkochoriti et al (eds), *Comparative Enforcement of International Law* (Forthcoming) <https://digitalcommons.osgoode.yorku.ca/all_papers/372/> accessed 30 June 2024.

section addresses the situation where courts must exercise their role by interpreting national law to uphold a positive duty of due diligence.

Subsection 2.1 briefly describes this concept under the UNGPs and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 2023 ("OECD Guidelines"). In Subsection 2.2, the HRDD legislation in France and Germany and the EU CSDDD are explored as examples of legislation that imposes a due diligence duty on corporations. These pieces of legislation were selected because they do not limit their application to specific business sectors or narrow types of human rights, unlike other legislation such as the Swiss Responsible Business Initiative and the UK Modern Slavery Act. [61] The discussion of the legislation will focus on how they fall short of the ultimate aims of the UNGPs.

2.1 Observations on Human Rights Due Diligence under the UNGPs and the OECD Guidelines

As the "first ever business and human rights instrument formally adopted by an intergovernmental organization",[62] the UNGPs introduced the concept of "corporate responsibility to respect human rights" in their respect pillar.[63] One of its components is to recommend that corporations exercise human rights due diligence in their operations. This concept was further developed in the OECD Guidelines, which set out non-binding principles and standards for responsible business conduct by multinational enterprises.

The OECD Guidelines were updated in 2011 to include a new human rights chapter consistent with the UNGPs. This provides a comprehensive approach to due diligence and responsible supply chains.[64] The OECD adopted the Due Diligence Guidance for Responsible Business Conduct in 2018 to assist enterprises in implementing the due

[61] The Swiss Responsible Business Initiative compels corporations to report on human rights and environmental standards and conduct due diligence when it comes to child labour and the procurement of minerals from a conflict area. The UK Modern Slavery Act tackles slavery, servitude, forced or compulsory labour, and human trafficking.

[62] Peter Muchlinski, 'The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights' (2021) 6 Business and Human Rights Journal 212, 212.

[63] The meaning of "respect" in the UNGPs concept is not distinct from "non-infringement" in the conventional human rights dialogue. See John Gerard Ruggie and John F Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 European Journal of International Law 921, 925.

[64] OECD, *OECD Guidelines for Multinational Enterprises,* (2011 edn, OECD) Foreword.

diligence recommendations under the UNGPs.[65] This guidance provides details, practical actions, and examples of recommended conduct in different situations. Thus, the framework of corporate responsibility and the due diligence process in the UNGPs was replicated in the OECD Guidelines and explained in the context of multinational enterprises' responsible conduct.[66]

In 2023, the OECD Guidelines were updated to address urgent social, environmental, and technological priorities facing societies and businesses, such as climate change, biodiversity, technology, business integrity, and supply chain due diligence.[67] However, this update does not significantly affect human rights due diligence in the parent-subsidiary relationship that we are considering.

This thesis is grounded in UN human rights instruments and principles. Furthermore, the scope of the OECD Guidelines is limited to the members of the OECD and adopts a distinct approach of enterprise theory by treating a multinational enterprise and its subsidiary as a single entity.[68] In this light, the foundation for our discussion rests predominantly on the UNGPs. However, reference to relevant paragraphs from the OECD Guidelines is provided in the footnotes for contextual clarity. This subsection highlights the scope of application of the due diligence concept and its substance.

2.1.1 The Scope of Application

The scope of application of the UNGPs' corporate responsibility can be divided into scope *ratione materiae* and scope *ratione personae*.

Scope *ratione materiae* refers to the subject matter of the UNGPs. The UNGPs aim, as a minimum, to protect all human rights recognised by the International Bill of Human Rights together with the core principles of fundamental rights set out in the International Labour

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[65] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) Foreword. Note that the OECD has also developed guidance for specific sectors, such as the minerals, agriculture, garment and footwear supply chains, and financial sectors.

[66] John Gerard Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) 22 The Brown Journal of World Affairs 99, 105.

[67] OECD Guidelines, Foreword.

[68] OECD Guidelines, ch I 'Concepts and Principles' para 4. For the enterprise theory, see Chapter 6, Section 1.1.

Organization's Declaration on Fundamental Principles and Rights at Work.[69] However, as this thesis focuses on the UN human rights instruments, particular emphasis will be placed on the International Bill of Human Rights, which consists of the UDHR, the ICCPR, and the ICESCR.[70]

Scope *ratione personae* refers to entities subject to the UNGPs' corporate responsibility. The UNGPs apply to all business enterprises and call on them to respect internationally recognised human rights. This responsibility exists "over and above" compliance with national laws and regulations.[71]

This scope of application also extends to any adverse human rights impacts linked to corporations' business relationships, regardless of ownership or structure.[72] Notably, the business size, sector, operational context, ownership, or structure are not necessary for the existence of this responsibility but can be used as factors, together with the severity of human rights impacts, in assessing the required degree of measures implemented to counter the human rights violation.[73]

2.1.2 Human Rights Due Diligence as Responsible Corporate Conduct

The UNGPs recognise three dimensions of corporate involvement involved in adverse human rights impacts:[74] (i) causing impacts by committing human rights harm without the involvement of the third parties; (ii) contributing to impacts by influencing or facilitating third parties to cause human rights harm; or (iii) impacts directly linked to a company's operations, products, or services without its contribution.[75] These dimensions of involvement – cause, contribution, and link – are significant in further developing mandatory HRDD legislation.

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[69] UNGPs, Principle 12; OECD Guidelines ch IV 'Human Rights' Commentary para 44.

[70] UNGPs, Commentary to Principle 12.

[71] UNGPs, Commentary to Principle 11.

[72] UNGPs, Principle 13. The 2023 updated version of the OECD Guidelines limits this extension to publicly traded companies within enterprise groups. See OECD Guidelines ch II 'General Policies' Commentary para 9.

[73] UNGPs, Principle 14.

[74] According to the interpretive guide to the UNGPs, the adverse human rights impact "occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights". See OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012) 5.

[75] UNGPs, Principle 13; OHCHR (n 74) 16–17; OECD Guidelines ch IV 'Human Rights' paras 2–3.

As addressed previously,[76] the first two dimensions stem from corporations' operations, and reflect the negative obligation of due diligence to refrain from infringing on human rights. Conversely, the last dimension arises from the operations of third parties and impose a positive obligation of due diligence that corporations must fulfil by taking proactive steps to prevent these parties from causing human rights impacts.

To fulfil their responsibility to respect human rights, corporations should have a policy commitment, conduct due diligence, and enable the remediation of any adverse human rights impact they have caused or to which they have contributed.[77] Implementing these components of conduct must be "proportionate" to the company's size and circumstances.[78] Small corporations are not exempted from this responsibility. The OECD Due Diligence Guidance further suggests that larger corporations or broader ranges of products and services require more formalised and extensive systems to identify and manage risks effectively.[79]

The policy statement to respect human rights should be developed by experts, approved by senior management, implemented, and publicly disclosed and communicated.[80] Due diligence conduct under the UNGPs is a process to identify, prevent, mitigate, and account for how a corporation addresses its adverse human rights impacts. This process should include "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed".[81]

The due diligence process addresses two scenarios involving human rights impacts: potential and actual. The company must assess human rights risks and use the information received to respond appropriately to the risk finding. Potential impacts require preventive or mitigating measures, while actual impacts should be subject to immediate action to reduce negative consequences and remediation.[82]

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[76] See above, Section 1.2.

[77] UNGPs, Principles 15–24; OECD Guidelines ch IV 'Human Rights' paras 4–6.

[78] UNGPs, Principles 15; OECD Guidelines ch II 'General Policies' Commentary para 19, and ch IV 'Human Rights' para 5.

[79] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (n 65) 18.

[80] UNGPs, Principle 16; OECD Guidelines ch IV 'Human Rights' Commentary para 49.

[81] UNGPs, Principle 17; OECD Guidelines ch IV 'Human Rights' Commentary para 50.

[82] UNGPs, Principle 19.

If the corporation causes or contributes to such impacts, its responsibility requires active engagement in remediation or cooperation with other actors for redress. However, if the impact stems from the others' operations that are directly linked to its operations, products, or services through a business relationship without its cause or contribution, the corporation is not required by the UNGPs to provide remediation.[83] By this concept, failure to perform the negative obligation of due diligence requires the corporation to provide a remedy, while the positive obligation does not require this. Therefore, the corporate responsibility to provide a remedy is proportionate to the extent of its involvement in human rights harm.[84] Significantly, this signifies that the positive obligation of due diligence does not aim at providing a remedy.[85]

It is worth noting that in the UNGPs, the term "due diligence" has a narrow scope as one of the corporate responsible conducts, distinct from policy establishment and remediation, with a focus on the process of identifying, preventing, mitigating the human rights impacts, and accounting for how these impacts should be addressed.[86] The "corporate responsibility to respect human rights" as articulated in the UNGPs is a broad term which includes all these aspects.[87] In contrast, the OECD Guidelines (and legislation to be considered later)[88] covers all aspects within the term "due diligence".[89] Unless otherwise provided by the context, subsequent reference to "due diligence" in this thesis implies a broad scope encompassing policy establishment, the due diligence process, and remediation.[90]

These responsible conducts under the UNGPs apply to all corporations. However, meeting their responsibilities may vary based on size, business sector, operational context, ownership

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[83] UNGPs, Commentary to Principle 22; OECD Guidelines ch IV 'Human Rights' Commentary para 51.

[84] Ruggie and Sherman (n 63) 927.

[85] This consideration is significant for further discussion of the guidance-rule aspect of the tort law purpose in Chapter 6, Section 2.

[86] UNGPs, Principle 15. Note that this narrow meaning of human rights due diligence is still maintained in the 2023 updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. See Open-ended Intergovernmental Working Group (OEIGWG), '2023 Updated Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' art 1.8.

[87] UNGPs, Principle 15.

[88] See below, Section 2.2.

[89] OECD Guidelines ch II 'General Policies' at Commentary para 15. See also, French Commercial Code, Article L225–102-4 (I) para 4; the German Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chain 2021, Section 3(1); EU CSDDD, Article 5(1).

[90] See also Section 3.1 below, regarding the limited framework of the due diligence concept that can be addressed by courts without specific due diligence legislation.

and structure, and the severity of the human rights impacts.[91] The degree of prevention or mitigation also depends on the corporation's involvement in potential human rights impacts.[92] The interpretive guide of the UNGPs further clarifies that the implementation process should be proportionate to the severity of human rights risks associated with corporate operations and should consider factors such as scale (gravity), scope (number of affected individuals), and irremediability of harm.[93] In terms of corporate size, larger corporations likely have more complex relationships, which are subject to increased risks and require advanced policies and processes to address them.[94]

The yardstick for the expected standard must consider these factors collectively. However, they are designed to address not only parent corporations' responsibility for subsidiary conduct but also other relevant BHR issues. These include the negative obligation based on direct cause or contribution to harm by corporations, and the positive obligation regarding supply chain relationships.

Accordingly, corporate responsibility to respect human rights under both the UNGPs and the OECD Guidelines requires corporations to address any human rights impacts, be they actual (post-event) or potential (forward-looking). These impacts may occur at any level of their business activities, including those arising from the operations of subsidiaries[95] or other parties whose activities are linked to their products, services, or operations through their business relationships.[96] The degree of conduct can vary depending on several factors, including corporate size.[97]

Both the UNGPs and the OECD Guidelines require voluntary compliance from corporations.[98] Since their implementation, the UNGPs have been criticised as lacking

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[91] UNGPs, Principle 14; OECD Guidelines ch IV 'Human Rights' para 5.

[92] UNGPs, Principle 19.

[93] OHCHR (n 74) 19.

[94] ibid 19–20.

[95] Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 Business and Human Rights Journal 179, 185–186. It is important to recognise that while subsidiary operations can fall under the UNGPs' corporate responsibility, there is a question as to whether, given that a subsidiary is often regarded as a separate entity, these operations should be seen as part of the corporation's own operations or as operations of a third party. This question is addressed in Section 3.2 below.

[96] UNGPs, Principle 13; OHCHR (n 74) 16–17; OECD Guidelines, ch IV 'Human Rights' paras 2–3.

[97] UNGPs, Principle 14; OECD Guidelines, ch IV 'Human Rights' para 5.

[98] The OECD Guidelines establish the National Contact Points ("NCPs") system to provide grievance mechanisms and remediation avenues. These operate independently of domestic hard law or jurisdictional

legally binding obligations for businesses and lacking international forums where victims can file claims against business actors.[99] They also fail to address how corporate responsibility relates to domestic legal principles, such as a corporation as separate legal entity, limited liability, and the duty of care in negligence law.[100] In light of the state's obligations to protect human rights, the voluntary nature of compliance and unclear relationship with national laws highlight the need for legally binding mechanisms to ensure corporate responsibility and the implementation of the due diligence concept. The following subsection explores legislation in selected jurisdictions.

2.2 Human Rights Due Diligence Legislation

The UNGPs and the OECD Guidelines are considered soft law as there are no sanctions or legal enforcement for non-compliance with the recommended due diligence concept. However, they are widely accepted as international standards for responsible business conduct.

As this thesis argues for the essential role of the judiciary in upholding due diligence for corporations, there is a need for hard law, at either the domestic or international level (for the monist-system state), to establish and enforce due diligence duties. Some European countries have passed legislation to formalise the due diligence duty for corporations and there has been a regional directive aimed at implementing such law within member states.[101]

This section examines the extent to which the due diligence concept is enshrined in legislation. To this end, the French and German legislation and the EU Directive are explored as examples of how this concept is recognised. The French Corporate Duty of Vigilance Law, enacted in 2017, added two new articles to the Commercial Code of France ("French

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constraints and adhere to their own set of rules. While lacking enforcement or sanctioning power, decisions by NCPs are publicly available and can significantly influence stakeholders and a corporation's reputation. See OECD Guidelines, 'Commentary on the Implementation Procedures of the OECD Guidelines' paras 39–45. See also Ashley L Santner, 'A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future' (2011) 43 George Washington International Law Review 375, 384; Dalia Palombo, *Business and Human Rights: The Obligations of the European Home States* (Hart Publishing 2020) 54.

[99] Muchlinski (n 62) 220.

[100] Nicola Jägers, 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?' (2011) 29 Netherlands Quarterly of Human Rights 159, 162.

[101] See nn 52 and 61.

Vigilance Law"),[102] while Germany introduced the Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains in July 2021 ("German HRDD Law").[103] In Europe, the EU CSDDD was recently adopted by the European Council and the European Parliament and entered into force on 25 July 2024,[104] mandating Member States to transpose it into national law by 26 July 2026.[105] This legislation generally aligns with the due diligence concept outlined in the UNGPs and the OECD Guidelines.

These examples were selected for analysis because they do not limit their scope of application to specific types of human rights or business sectors. It is worth noting that the EU CSDDD lists specific human rights in regard to which companies can have due diligence obligations. This list is to help ensure the legitimacy of referring to international instruments that are legally binding solely on the states.[106] However, this classification does not affect the scope *ratione materiae* of application regarding human rights recognised by the International Bill of Human Rights. Instead, it acknowledges a limitation of horizontal human rights obligations.[107]

The analysis in this subsection focuses on the limitations of legislation in fully achieving the purposes of the UNGPs. Courts can address these limitations and ensure the performance of the state's obligation to protect human rights. Subsection 2.2.1 discusses how legislation regards corporate size as a determining factor in establishing whether a corporation has a

[102] Ordinance No 2017-1162 of 12 July 2017 art 11 <https://www.legifrance.gouv.fr/codes/id/ LEGIARTI0000 35181820/2017-07-14> accessed 30 June 2024. Note that this thesis relies on the automated English translation of the internet browser when referring to the legal text.

[103] Reference to the legal text in this thesis relies on the English translation of the Act provided by the Federal Ministry of Labour and Social Affairs <https://www.bmas.de/EN/Services/Press/recent-publications/2021/ act-on-corporate-due-diligence-in-supply-chains.html> accessed 30 June 2024.

[104] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EC) 2023/2859.

[105] EU CSDDD, Article 37(1).

[106] EU CSDDD, Article 3(1) point (c) and Annex, Part I. See also Permanent Representative Committee, 'Note on Proposal for a Directive on Corporate Sustainability Due Diligence' (30 November 2022) 10524/1/22 Rev 1 [Interinstitutional File No 2022/0051(COD)] paras 33–34. Note that some commentators argue against having this list. They suggest that companies should conduct a preliminary assessment of all potential human rights risks and impacts across their operations and value chains. They can then prioritise the most significant risk areas based on severity and likelihood for ongoing assessment. See Amnesty International, 'Closing the Loopholes: Recommendations for an EU Corporate Sustainability Law Which Works for Rights Holders' (*Amnesty International*, 15 May 2023) 14.

[107] Permanent Representative Committee (n 106) para 34.

due diligence duty. This differs from the original purpose of the concept. Subsection 2.2.2 raises the issue of factors used to assess the degree of due diligence conduct required.

2.2.1 The Scope *Ratione Personae* of Application

In the context of the UNGPs and the OECD Guidelines, the due diligence concept requires corporations to address potential and actual adverse human rights impacts in which they are involved, whether by causing harm, contributing to it, or having their products, services, or operations linked to such impacts through their business relationship. This includes the parent-subsidiary relationship.[108] When the due diligence concept is enacted into the legislation, the French Vigilance Law, the German HRDD Law, and the EU Directive follow the same approach[109] – save for the scope of application based on the size of corporations.

This legislation restricts the scope *ratione personae* to corporations that exceed certain size thresholds on the basis of the number of employees.[110] Importantly, the specific figures used in these pieces of legislation vary. The EU Directive also includes turnover criteria for consideration.[111] This scope differs from the UNGPs and the OECD Guidelines, which expect all corporations to adhere to the due diligence concept regardless of size.

Under the UNGPs and the OECD Guidelines, corporate size is merely a factor to be used in assessing the scale and complexity of the measures implemented by corporations to fulfil their responsibility. According to the records of their enactment, the inclusion of size thresholds in these laws reflects a compromise between business competitiveness and the protection of rights.[112] As a result, several corporations are not bound by the due diligence

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[108] See below, Section 3.2.

[109] French Commercial Code, Article L225-102-4 (I) para 3; German HRDD Law, Section 2(2), (5), (7) (8) and 3(1); EU CSDDD, Article 1(1).

[110] French Commercial Code, Article L225-102-4 (I) para 1; German HRDD Law, Section 1(1); EU CSDDD, Article 2.

[111] EU CSDDD, Article 2.

[112] For the idea of the political disagreement in each piece of legislation, see Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2021) 22 Human Rights Review 109, 115–116; David Weihrauch, Sophia Carodenuto and Sina Leipold, 'From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act' (2023) 17 Regulation & Governance 909, 919–920; Permanent Representative Committee (n 106) paras 12–14. For the political disagreement in the EU CSDDD prior to the final text being adopted by the European Council, see also Jon McGowan, 'After Delays, EU Approves Corporate Sustainability Due Diligence Law' (*Forbes*, 15 March 2024) <https://www.forbes.com/sites/jonmcgowan/2024/03/15/after-delays-eu-approves-corporate-sustainability-due-diligence-law/> accessed 30 June 2024; 'Corporate Sustainability Due Diligence Directive Gets through Vote from Council of the EU' (*Osborne*

duty under the legislation regardless of the severity of harm they might cause. This lack of obligation is justified solely by political will, which means that a situation may arise in which states fail to fulfil their obligation under international human rights law to protect human rights from corporate abuse.

2.2.2 The Scope of Due Diligence Duty – An Issue of Assessment Factors

Under the UNGPs and the OECD Guidelines, it is recommended that corporations conduct due diligence to address potential and actual adverse human rights impact. This diligence is categorised into three main areas: policy formulation; due diligence process; and remediation.

These three primary forms of conduct are reflected in the French Vigilance Law, the German HRDD Law, and the EU Directive. Additionally, the UNGPs also suggest that corporations communicate externally on how they address human rights impacts,[113] while the OECD Guidelines have a dedicated chapter on the disclosure of business activities, including HRDD policies and processes.[114] In line with this concept, all three pieces of legislation impose a due diligence disclosure duty on corporations.[115]

However, assessing whether the corporation's conduct meets the appropriate degree of diligence requires an intermediary to assess the conduct against objective standards. The UNGPs and the OECD Guidelines recognise that the appropriateness of conduct can vary depending on factors such as the corporation's size, its involvement, and the severity of the impacts. The French Vigilance Law is silent as regards the "reasonableness" or "appropriateness" of the measures implemented. These terms must be clarified by legal practice and court rulings in individual disputes.[116] This differs from the German HRDD Law and the EU Directive, which suggest relevant factors for assessment aligning with the UNGPs and the OECD Guidelines except that business size is not explicitly mentioned.

Clarke, 15 March 2024) < https://www.osborneclarke.com/insights/corporate-sustainability-due-diligence-directive-gets-through-vote-council-eu> accessed 30 June 2024.

[113] UNGPs, Principle 21.

[114] OECD Guidelines ch III 'Disclosure'.

[115] French Commercial Code, Article L225-102-4 (I) para 5; German HRDD Law, Section 10; EU CSDDD, Article 16.

[116] British Institute of International and Comparative Law and others, *Study on Due Diligence Requirements through the Supply Chain Part III, Country Reports* (Publications Office of the European Union 2020) 65.

The German HRDD Law introduces additional considerations: a corporation's ability to influence the party directly responsible for human rights risks; the probability of a violation; and the nature of the causal contribution to the risks.[117] The EU Directive also considers proportionality between the aims of due diligence and the severity of the situation, along with the measures reasonably available to the corporation. This includes considering specific circumstances, such as the nature and extent of the impact, as well as relevant risk factors.[118] Like the UNGPs, these factors in the German HRDD Law and the EU Directive are designed to address all relevant issues concerning business operations beyond a parent-subsidiary relationship. These issues include the negative obligation, where corporations are held accountable for directly causing or contributing to harm, and the positive obligation regarding relationships within supply chain.[119] There is no explicit guidance on how each factor can be applied in a specific situation.[120]

The above legislation creates direct duties for corporations falling within the legislation by imposing legal consequences on non-compliance. The French Vigilance Law implements judicial measures to compel compliance[121] and sets a standard of conduct and a duty of care for corporations.[122] This enforcement and liability model differs from the German HRDD Law, which relies solely on public enforcement procedures and imposes no civil liability for violations of the duty.[123] The EU CSDDD strikes a balance between the French Vigilance Law and the German HRDD Law by requiring member states to impose sanctions for non-compliance[124] and enable civil liability if the non-compliance with prevention or mitigation

[117] German HRDD Law, Section 3(2).

[118] EU CSDDD, Article 3(1) points (o) and (u).

[119] The German HRDD Law and the EU CSDDD also address environmental issues, not merely human rights.

[120] This problem is addressed in the context of a parent-subsidiary relationship in Section 3.3 below and is explored in greater detail in Chapter 6, Section 3.

[121] French Commercial Code, Article L225-102-4 (II). See also Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption' (2021) 6 Business and Human Rights Journal 141, 149.

[122] French Commercial Code, Article L225-102-5 para 1.

[123] German HRDD Law, Sections 3(3) and 24. See also Giesela Rühl, 'Cross-Border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act' in Borg-Barthet, Živković et al (eds), *From Theory to Practice in Private International Law: Gedächtnisschrift for Professor Jonathan Fitchen* (Hart Publishing 2024) 164.

[124] EU CSDDD, Article 27.

obligations has caused or contributed to an adverse impact and damage to the legal interest of other persons protected under domestic law.[125]

Despite the binding character of the legislation, these laws fall short of fully achieving the aims of the UNGPs. They restrict the scope of application based on the size of corporations and refrain from explicitly referring to the size factor for assessing the reasonable or appropriate degree of corporate conduct – which deviates from the original purpose of the concept.[126] As a result, certain corporations are not governed by the legislation.

The gaps in the HRDD legislation could be closed by amending the legislation. However, this is not our focus. This thesis argues that courts are obliged by international human rights law to protect human rights by applying and interpreting existing law to address due diligence for corporations, particularly in situations where there is a lack of legislation, which imposes a due diligence duty on corporations in disputes.

We have seen how courts address the aspect of negative obligation under the due diligence concept through civil liability law and the horizontal effect doctrine. However, this approach falls short in transnational BHR cases when corporations must rely on the host state standards of non-absolute human rights.[127] The positive obligation has the potential to address due diligence for parent corporations concerning their subsidiaries' operations in the same setting, given that the appropriate conduct of corporations in responding to the actual or potential human rights impacts is a cornerstone of the consideration.

However, courts are limited in their ability because they are in the main involved after violation and cannot directly force corporations to change their behaviour. This leads to the next question about the extent to which courts can apply the existing law to uphold the positive duty of due diligence. The following section clarifies the scope of due diligence that

[125] EU CSDDD, Article 29.

[126] In addition, several commentators have raised concerns about the effectiveness of the EU CSDDD in protecting human rights. These concerns cover topics such as the burden of proof for victims, the exhaustive list of covered human rights possibly omitting some rights, and the narrow definition of the chain of activities excluding the use of products after sale. However, these concerns fall outside the scope of this thesis. For further study, see Anti-Slavery International, 'Anti-Slavery International Key Takeaways from the European Parliament's Corporate Sustainability Due Diligence Directive Text' (2023); Amnesty International (n 106).

[127] Chapter 3, Section 3.1 and Chapter 4, Section 3.

courts can uphold in the parent-subsidiary relationship, tackles the status of subsidiaries and addresses the vagueness of due diligence.

3. The Extent that Courts Can Impose the Human Rights Due Diligence Duty on Parent Corporations

The previous section provides a narrative of the due diligence concept in the UNGPs, the OECD Guidelines, and HRDD legislation in certain jurisdictions. These frameworks require corporations to establish policies addressing actual or potential adverse human rights impacts stemming from their operations and those of other companies linked to their products, services, or operations through business relationships. Corporations are further expected to implement these policies by identifying, preventing, mitigating, and accounting for how they address such impacts, as well as providing or facilitating remediation for victims. Assessing compliance involves consideration of various factors and circumstances.

However, the applicability of legislation is limited to corporations of a certain size, leaving several corporations exempt from these obligations. This situation necessitates courts to step in and bridge the legislative gap by applying corporate and tort law to establish the due diligence duty for corporations.

This section addresses several vague issues within the due diligence concept for corporations. Subsections 3.1 to 3.3 will explore the scope of corporate "due diligence" within the context of judicial roles, the status of subsidiaries, and the conflation of ideas under the term "due diligence" respectively. These issues must be resolved to define the extent to which courts must interpret established law to enforce due diligence in the parent-subsidiary setting.

3.1 Consideration of the "Due Diligence" Scope within Judicial Roles

The first issue concerns the term "due diligence" under the UNGPs, which differs from the OECD Guidelines and legislation. As observed earlier,[128] the term "due diligence" in the UNGPs referred specifically to identifying, preventing, and mitigating the human rights impacts and accounting for how they address them without encompassing policy

[128] See above, Section 2.1.2

establishment and remediation. However, this thesis adopts a broader scope, encompassing all conduct when referring to due diligence.

Nevertheless, recognising this broad scope does not imply that all elements can be maintained within the judicial role in the absence of HRDD legislation. Courts primarily play a reactive role in responding to cases brought before them. Unlike legislation, courts lack the authority to establish criteria for corporate policies, specify disclosure and reporting requirements, or impose liabilities beyond civil law for non-compliance with due diligence. These aspects of due diligence cannot be addressed through courts' interpretation of corporate and tort law.

While the judicial role cannot replace the legislative role, it can serve as a vital complement, particularly as an indispensable force in fulfilling the obligation of states to ensure stronger human rights protection. This is because courts can hold corporations accountable for human rights abuses. They can provide compensation to victims through damage awards, raise awareness of issues, and exert pressure on corporations to change their behaviour through rulings condemning human rights abuses.[129] The corporations' due diligence obligations also empower courts to issue injunctions to prevent potential harm.

3.2 Consideration of the "Subsidiary" Status

As previously discussed, subsidiary operations may fall within the scope of corporations' involvement in the human rights impacts.[130] However, the UNGPs do not explicitly clarify whether subsidiary operations should be categorised as part of parent corporations' conduct or as third-party conduct. While a commentator suggested that the UNGPs include subsidiaries by using the term "business enterprises" and considering their relationship and activities directly linked to parent corporations' products, services, or operations,[131] these two justifications lead to different outcomes. The former treats subsidiaries as integral parts of parent corporations, while the latter recognises subsidiaries as separate entities in their own rights.

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[129] Mauro Bussani and Marta Infantino, 'The Many Cultures of Tort Liability' in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law* (Edward Elgar Publishing 2021) 19.

[130] See above, Section 2.1.2.

[131] Cassel (n 95) 185–186.

Under the UNGPs, corporations are responsible for their own conduct and must provide remediation for the harm they have caused or to which they have contributed. However, they are not obliged to remediate the human rights impacts caused by other companies.[132] In contrast, the OECD Guidelines and the German HRDD Law explicitly apply the enterprise theory considering subsidiaries' activities as those of parent corporations.[133] Meanwhile, the EU CSDDD addresses companies' operations, those of their subsidiaries and their business partners within the chain of activities separately throughout the legislation.

The existence of the separate corporate entity doctrine in domestic corporate law and the absence of specific HRDD legislation necessitates courts to treat subsidiaries as entities separate from their parent corporations.[134] This recognition is vital in untangling the conflated ideas within the due diligence concept in the following subsection, particularly in establishing a positive duty to resolve transnational BHR disputes with corporate dilemmas from conflicts in non-absolute human rights standards between two states.

3.3 Conflated Ideas within the Due Diligence Concept for Corporations

For corporations, "due diligence" combines several conflicting legal concepts into one term without clarification. The first combination, directly related to the status of subsidiaries, involves the issues of the corporations' actions and those of third parties. Although due diligence generally includes positive conduct, its underlying concept mixes negative and positive duties for corporations.[135]

As discussed earlier,[136] when considering the corporations' conduct that causes or contributes to human rights impacts, corporations have a direct negative duty to refrain from interfering with those rights. Courts can impose liability for failing to conduct due diligence through horizontal human rights obligations. In this context, due diligence reinforces the

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[132] UNGPs, Principle 22.

[133] OECD Guidelines ch I 'Concepts and Principles' para 4. See also, German HRDD Law, Section 2(6).

[134] I recognise advocacy for the enterprise liability theory and its potential within corporate law. I further explore this theory and highlight its shortfall within transnational BHR disputes with corporate dilemma in Chapter 6, Sections 1.1 and 2.1.

[135] Deva observed that corporate responsibility under the UNGPs blurs the lines between a company's duties to "respect" and "protect" human rights. This results in considering situations where adverse human rights impacts stemming from a company's own operations and those stemming from business relationships similarly. In his view, a higher standard of responsibility is needed for the former as due diligence as a standard of conduct is insufficient. See Deva (n 20) 399.

[136] See above, Section 1.2.

existing negative duty of corporations, which corresponds to substantive human rights. Therefore, due diligence can be considered a duty of outcome that holds corporations accountable for violating human rights.

We have seen the limitations of addressing the negative duty aspect in transnational BHR disputes with corporate dilemmas due to the conflict of non-absolute human rights standards and corporate obligation to rely on the host state's restrictions.[137] Considering this challenge and the subsidiary status discussed in the previous subsection, treating parent corporations and their subsidiaries as single entities does not change the result that corporations have no duty under the home state's human rights standards.

However, when considering the duty to prevent subsidiaries, as separate entities, from interfering with human rights, which does not correspond to any substantive human rights, due diligence becomes a duty of conduct to prevent harm by third parties. This shift from the duty of outcome to the duty of conduct suggests a potential approach to hold corporations accountable for the human rights impacts stemming from their subsidiaries' operations. The mix of duties of outcome and conduct in due diligence aligns with the aims of tort law, which include compensating for loss and directing behaviour to deter the continuation of harm.[138] Further analysis in the following chapter is grounded on this perspective.

The next conflation is the use of the terms "prevention" and "mitigation" together without clear differentiation or priority.[139] These terms are arguably combined to address both potential and actual harms. However, in the context of the judicial role primarily addressing actual harms, it is necessary to distinguish whether such harm can be prevented before it occurs, which is the preferred scenario, and whether its effects can be mitigated either before or after its occurrence.

The UNGPs and the OECD Guidelines emphasise that corporations should follow internationally recognised human rights standards to the fullest extent possible.[140] Accordingly, prevention should take precedence, while mitigation should only be considered when prevention is not possible or has failed, resulting in actual harm in disputes. In the

[137] Chapter 4, Section 3.

[138] Chapter 6, Section 2.

[139] Deva tackles the issue of a combination of prevention and mitigation in the sense that allows corporations to use the cost-benefit analysis to choose mitigation over prevention. See Deva (n 20) 399.

[140] UNGPs, Commentary to Principle 23; OECD Guidelines ch I 'Concepts and Principles' para 2.

latter case, mitigation does not release corporations from their liabilities arising from a failure to fulfil their preventive duty.

Situations where human rights impact cannot be prevented may stem from the business nature or operational area, such as climate change risk in the fossil fuel industry, workers' rights in the gig economy, public health issues in the tobacco business, public safety concerns in the arms and weapons sector, or human rights issues in specific operation areas as exemplified in the *Yahoo!* case where corporations need to observe domestic law restricting human rights.[141]

A commentator proposed establishing a "red line" framework to address these challenges, determining specific activities that corporations should avoid or responsibly disengage from in such situations.[142] This thesis has previously highlighted that connecting the public policy exception under the act of state doctrine and the choice of law rules, to the absolute nature of rights can help identify this red line through the role of courts.[143] This framework ensures that certain rights should never be violated under any circumstances. However, it primarily addresses negative obligations related to absolute rights in transnational BHR disputes. Courts have limited authority to establish the red line, particularly regarding positive obligations.

While negligence law recognises that exercising reasonable care may sometimes involve discontinuing certain activities,[144] I argue that this consideration applies primarily to the human rights risks stemming directly from a corporation's own operations rather than those stemming from the shareholding link in the parent-subsidiary relationship. In the positive obligation within the parent-subsidiary context, parent corporations are liable because they fail to take appropriate steps to prevent human rights impacts from their subsidiaries' operations. Holding parent corporations accountable for their subsidiaries' activities is justified based on their control, as they are expected to exercise this control to ensure human

[141] Deva (n 20) 402. See also, Gabriela Quijano and Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) 6 Business and Human Rights Journal 241, 252; Julia Dehm, 'Beyond Climate Due Diligence: Fossil Fuels, "Red Lines" and Reparations' (2023) 8 Business and Human Rights Journal 151.

[142] Deva (n 20) 406.

[143] Chapter 4, Section 3.2.

[144] Edwin Peel and others, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) para [6-022].

rights protection. Disengaging from subsidiaries by removing such control can exacerbate the situation rather than improve it.

The last problem of conflation is that several forms of conduct are included in the positive duty of due diligence, all of which must be "proportionate" to the company's size, sector, involvement, severity of human rights impact, and other circumstances. This necessitates courts to assess whether the relevant conduct by corporations meets a reasonable degree of diligence. However, the factors provided by the UNGPs, the German HRDD Law and the EU Directive for assessing reasonableness of corporate conduct are broadly prescribed for all conduct under the due diligence concept.

The notion of reasonableness is inherently adaptable when dealing with various interests within a specific context.[145] It serves as a fundamental requirement at every stage of judicial reasoning.[146] Although there is no concrete benchmark for determining reasonableness in fulfilling the due diligence duty, not even in legislation, suggested factors can ensure that the reasonableness is judged objectively by not relying on the subjective element of corporations.

In the following chapter, I argue that the corporate decision to exercise shareholding control over subsidiaries is subjective as regards corporations, and the considerations of the reasonable person standard in negligence law may provide valuable insights into assessment factors. However, it is necessary to determine what conduct is considered explicitly before applying these factors.[147]

4. Conclusion

This chapter has argued that in the absence of mandatory human rights due diligence legislation, courts are obliged to exercise their role in applying established law to uphold due diligence for corporations. The analysis focused primarily on the positive obligation of due diligence for parent corporations within the parent-subsidiary relationship so as to resolve transnational BHR disputes stemming from the conflict of human rights standards between

[145] Neil MacCormick, 'Reasonableness and Objectivity' (1999) 74 Notre Dame Law Review 1575, 1577.

[146] Olivier Corten, 'The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions' (1999) 48 The International and Comparative Law Quarterly 613, 613.

[147] Chapter 6, Section 3.

the home and host states. It addressed three main questions: “why”; “in what situations”; and “to what extent” courts are obliged to do so.

Section 1 addresses the “why” question and stresses that national courts are obliged under international human rights law to protect human rights from business-related abuse. By applying and interpreting established national law to advance the aim of the human rights due diligence concept outlined in the UNGPs, courts can contribute to ensuring corporate accountability for human rights impacts.

Section 2 explores the due diligence concept under the UNGPs, the OECD Guidelines, the legislation in France and Germany, and the EU Directive. While the UNGPs and the OECD Guidelines provide voluntary principles and recommendations for human rights due diligence, there is a growing recognition of the need for mandatory rules to enforce due diligence. However, examples of mandatory legislation fall short of fully achieving the aims of the UNGPs as they may restrict the scope *ratione personae* of application resulting in exemptions for certain corporations. Therefore, situations where legislation imposing a positive duty on corporations in the parent-subsidiary relationship is lacking encompass cases when existing legislation is not applicable to corporations in disputes. In these situations, there is an obligation on the courts to interpret national law and bridge these gaps, so as to align national law with the due diligence concept.

Section 3 draws the extent of due diligence in the parent-subsidiary setting by addressing the limits of the judicial role and various vague issues within the due diligence concept under the UNGPs. These include the extent of the term “due diligence” within the judicial role, the status of subsidiaries within the UNGPs framework, and the conflation of conflicting concepts within due diligence.

The next chapter addresses the remaining question of how courts can apply and interpret national corporate and tort law to impose a positive obligation on parent corporations to ensure that the activities of their subsidiaries will not cause or contribute to negative human rights impacts. It explores the practical challenges and potential solutions by focusing on the duty of care as the cornerstone for establishing this positive duty for parent corporations through the courts.

CHAPTER 6
Imposing a Positive Duty of Due Diligence on Parent Corporations through the Courts

Introduction

The previous chapter explored the concept of human rights due diligence ("HRDD") for corporations and distinguished it from the due diligence obligations of states under international human rights law.[1] Due diligence, as conceptualised by the UN Guiding Principles on Business and Human Rights ("UNGPs"), holds corporations responsible for identifying and addressing actual or potential human rights impacts resulting from their own operations or those of other companies, linked to their products, services, and operations through business relationships.[2]

Impacts from subsidiary operations fall within the scope of this corporate responsibility.[3] In the court-centric framework of analysis, the status of subsidiaries is that of entities separate from parent corporations.[4] The essence of due diligence regarding third-party activities linked to corporations lies in the conduct-oriented nature of the positive obligation and requires an assessment of the appropriate degree of corporate diligence.[5] This assertion forms the foundation for the analysis in this chapter.

While the due diligence concept under the UNGPs lacks legal enforcement, its implementation serves as a measure for states to fulfil their obligation to protect human rights from corporate abuse.[6] Consequently, several countries have enacted HRDD legislation, mandating corporations to exercise human rights due diligence in their business operations.

However, their scope of application is often limited to certain categories of human rights, specific industries, or corporations' size determined by factors such as the number of

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[1] Chapter 5, Section 1.

[2] UNGPs, Principle 13; OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012) 16–17.

[3] OHCHR (n 2) 22.

[4] Chapter 5, Section 3.2.

[5] Chapter 5, Sections 1.2, 2.1.2 and 3.3.

[6] Chapter 5, Section 1.1.

employees or turnover.[7] Therefore, there may be no HRDD legislation or it may not apply to certain disputes.

The lack of applicable HRDD legislation prompts the argument that as state organs, national courts are obliged under international human rights law to protect human rights from corporate violations. This proposition does not seek to replace legislation with judicial decisions but suggests that judgments can complement the absence of applicable legislation.[8]

As is explained below in Section 1 of this chapter, courts can compel corporations to undertake due diligence in respect of their subsidiaries' operations by interpreting corporate and tort law to hold them accountable.[9] This analysis necessitates a consideration of domestic law. While this thesis focuses on the UK jurisdiction due to its well-established case law on corporate and tort matters and its potential for legal development and influence regarding corporate accountability, it does not limit the analysis solely to UK courts or common law systems, as most countries share fundamental principles in these legal domains.[10]

A central question addressed in this chapter is how courts can apply corporate and tort law to impose a due diligence duty on corporations for their subsidiaries' activities without specific HRDD legislation applicable to corporations in dispute. In response, this chapter focuses on the positive duty of due diligence, which is a conduct-based obligation that engages corporations to address human rights impacts proactively and assess the appropriate degree of corporate diligence. While due diligence for corporations includes the negative obligation, it alone cannot address disputes with corporate dilemmas stemming from a conflict of non-absolute human rights standards in the home and host states.[11]

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[7] Chapter 5, Section 2.2.1. Note that the figures of these thresholds differ from one country to another.

[8] Several limits of judicial approach are recognised in Chapter 1, Section 1 and Chapter 5, Section 3.3.

[9] Barnali Choudhury and Martin Petrin, 'Parent Company Liability' in *Corporate Duties to the Public* (CUP 2019) 97–111; Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 774–782; Radu Mares, 'Liability within Corporate Groups: Parent Companies Accountability for Subsidiary Human Rights Abuses' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 451–457; Rolf Weber and Rainer Baisch, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (2016) European Business Law Review 669, 684–691; Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses– Towards a Fairer and More Effective System of Domestic Law Remedies' (2014) 45–48.

[10] Chapter 1, Section 5. Below, in Section 5, justifies how the analysis in this chapter may develop to apply to civil law jurisdictions.

[11] Chapter 4, Section 3.2.

Section 1 addresses challenges arising from the separate corporate entity doctrine and examines potential corporate and tort law principles recognised by courts to overcome these challenges. Section 2 justifies the focus on tort law within this chapter, highlighting its purpose in guiding behaviour and pointing out UK court practice in hesitating to impose a duty of care based on shareholding control because of their focus on the appropriateness of imposing liability rather than establishing the expected standard of conduct. However, the analysis does not deny the effectiveness of potential approaches other than the duty of care in certain circumstances.[12]

Section 3 explores the "rights model" in tort advocated by Stevens,[13] which separates the consideration of losses from the sources of duty that form the foundation for establishing the victims' right to claim in the event of a breach of duty. This model acknowledges the function of tort in guiding behaviour and enables the courts to apply tort law to shape expected corporate conduct without concerns about inappropriate liability for corporations.

To concretise its effectiveness, the scenario in the *Yahoo!* case will serve as an example in this analysis before applying the findings to the *Kaweri* case.[14] Concurrently, it also addresses a question posed in Chapter 4 regarding the home state courts' ability to hold parent corporations accountable for the harm caused by the operations of their subsidiaries when non-absolute human rights are not breached due to the subsidiaries' compliance with host-state restrictions.[15]

Section 4 acknowledges potential challenges and limitations, while section 5 suggests how this proposition can be advanced to address other contemporary issues, such as supply chain

[12] The foundation of UK corporate law is legislation, while UK tort law evolves through judicial decisions. Since this thesis prioritises the role of courts over legislation, the focus on tort law highlights the courts' involvement in establishing the corporate responsibility norm. For useful literature addressing structural elements and goals of corporate law that threaten human rights, see Barnali Choudhury, 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough' (2023) 8 Business and Human Rights Journal 180.

[13] Robert Stevens, *Torts and Rights* (OUP 2007). For critiques of this work, see Peter Cane, 'Torts and Rights by Robert Stevens' (2008) 71 The Modern Law Review 641; John Murphy, 'Rights, Reductionism and Tort Law' (2008) 28 Oxford Journal of Legal Studies 393; Philip H Brodie, 'Robert Stevens, Torts and Rights Oxford: Oxford University Press (Www.Oup.Com), 2007.' (2009) 13 Edinburgh Law Review 534; Dan Priel, 'That Can't Be Rights (Review of Robert Stevens's 'Torts and Rights')' (2011) 2 Jurisprudence 227.

[14] Chapter 2, Section 4.

[15] Chapter 4, Section 3.2.

and environmental impacts, and how it can apply to other jurisdictions. Finally, Section 6 concludes the findings in this chapter.

The analysis of the rights model of tort in the business and human rights ("BHR") context, its emphasis on conduct obligations rather than substantive human rights, and its effectiveness in addressing discrepancies in human rights recognition among states offer a novel perspective in BHR studies.

1. Observations on Judicial Practices Circumventing Separate Corporate Entity Doctrine in the BHR Context

In the corporate group context, there are several reasons why victims of the subsidiary operations turn to parent corporations for a remedy – for example, subsidiaries' insolvency or inadequacy of access to remedies in host states.[16] However, human rights violations caused by subsidiaries cannot be directly attributed to their parent corporations as they are distinct legal persons.[17] In the absence of specific legislation, this phenomenon poses a challenge to upholding due diligence for corporations as regards their subsidiaries' activities.

This section aims to provide insights into current judicial precedent regarding the liabilities of parent corporations for their subsidiaries' operations and their limitations in transnational BHR cases. The potential liabilities of parent corporations can encourage them to exercise their due diligence to prevent or mitigate the human rights impacts arising from their subsidiaries' operations and so avoid liability.

From a domestic law perspective, a company's registration establishes its separate legal personality,[18] and the liability of its members for the company's debt is limited to the value of their subscribed shares.[19] This principle is known as the "entity" doctrine, established in *Salomon v A Salomon & Co Ltd*,[20] which held that a limited liability company is legally

[16] Other reasons include the ineffectiveness of remedy mechanisms in the host state, the lack of access to legal aid and information, the structural complexity of the group of companies, and the procedural burden of proof. See Mares (n 9) 448–450; Zerk (n 9) 63–88.

[17] Petrin and Choudhury (n 9) 772; Mares (n 9) 446; Zerk (n 9) 45–46.

[18] Section 16 of the UK Companies Act 2006.

[19] Note that in addition to the limited liability company, there are also the unlimited liability company and the "limited-by-guarantee" company in the UK. However, they will not be considered in this thesis. See Section 3 of the UK Companies Act 2006.

[20] *Salomon v A Salomon & Co Ltd* [1897] AC 22.

distinct from its shareholders.[21] Once the company has been legally incorporated, it has its own rights and liabilities.[22] This separation results in asset partitioning, which shields shareholder assets from company creditors and *vice versa.*[23] Corporate groups extend this concept by allowing each entity to maintain a distinct status. Despite controlling subsidiaries, parent corporations still enjoy limited liability while prioritising group benefits.[24]

As a result, a parent corporation can direct its high-risk activities to its subsidiary or instruct its subsidiary to participate in harmful activities that are likely to result in human rights violations.[25] In short, a parent corporation can take advantage of the asset partitioning benefits and avoid liability to the victims for the subsidiary's actions.[26]

Two approaches emerge from judicial decisions to overcome the separate corporate entity doctrine: piercing the corporate veil together with the enterprise theory under corporate law and the duty of care under tort law. In this chapter, I term these the "corporate law approach" and the "tort law approach" respectively.[27] The former "indirectly" attributes liability to parent corporations for their subsidiaries' actions, while the latter "directly" imposes liability on corporations based on their duty of care in subsidiary operations. However, current judicial practice restricts the application of these approaches within the BHR context. A narrative of these two approaches is necessary to understand their recognition by the courts. Subsections 1.1 and 1.2 respectively offer concise explanations of each approach.

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[21] Radu Mares referred to this effect as a "two-step" process: the shielding of assets and the limited liability as a second protection for the shareholders. See Mares (n 9) 446–447.

[22] *Salomon v A Salomon & Co Ltd* (n 20) 31.

[23] Paul Davies, Sarah Worthington and Chris Hare, *Gower: Principles of Modern Company Law* (11th edn, Sweet & Maxwell 2021) para [7–006]. Hansmann, Kraakman, and Squire describe this effect as the "entity shielding" and "owner shielding" rules. The entity shielding rule protects a company's assets from the personal creditors of its shareholders, while the owner shielding rule protects the personal assets of shareholders from the company's creditors. See Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119 Harvard Law Review 1333, 1337–1340.

[24] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34 Cambridge Journal of Economics 837, 848; Davies, Worthington and Hare (n 23) paras [7–005], [7–022].

[25] Choudhury (n 12) 186.

[26] This consideration is crucial not only for the parent-subsidiary relationship but also for the global supply chain and its governance. Business partners within the chain of activities operate as entities separate from corporations, but their activities within the chain can significantly impact the economy and society, including human rights. Below, in Section 5, it also observes how to advance the proposition in this chapter to address the supply chain issue.

[27] Reference to these two approaches in this thesis focuses on the judicial roles in applying the existing law to address the separate corporate entity issue. There are other pathways to reaching the same result, such as legislation.

1.1 The Corporate Law Approach and Its Limits

The entity doctrine, which upholds separate corporate entity and limited liability, prevents subsidiary creditors, including victims, from seeking compensation from parent corporations even if the subsidiary lacks adequate funds to meet its liabilities in full.[28] Despite the potential impact of the corporate group structure on innocent victims in the BHR setting, UK courts have consistently upheld the entity doctrine.

In *Adams v Cape Industries Plc*,[29] litigants challenged the separate corporate entity doctrine to enforce a US court decision stemming from a high-profile case involving asbestos dust in mining business which resulted in illness among the subsidiary's employees, against the parent corporation. The litigants argued that the parent corporation's presence in the US could be established through the single economic unit doctrine, which considered the subsidiary's presence sufficient, and by invoking the principle of piercing the corporate veil. They alleged that the subsidiary was a mere façade of the parent corporation. However, the court emphasised that it could not ignore the *Salomon* principle based solely on perceived justice[30] before rejecting the litigants' arguments.[31]

The two principles under the corporate law approach invoked in this case – the piercing of the corporate veil and the single economic unit (also known as the enterprise theory) – are recognised by courts to circumvent the separate corporate entity doctrine. However, courts limit their application to specific circumstances.

For the piercing of the corporate veil, courts recognise the potential of this principle in certain circumstances to hold parent corporations accountable for their subsidiaries' liabilities by looking beyond the corporate personality.[32] This typically occurs when a corporate façade is used to conceal the truth or evade obligations.[33] However, the chances of success in piercing

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[28] Sarah Worthington and Sinéad Agnew, *Sealy & Worthington's Text, Cases, and Materials in Company Law* (OUP 2022) 62.

[29] *Adams v Cape Industries Plc* [1990] Ch 433.

[30] ibid 536.

[31] The facts that the court relied on include: (i) the subsidiaries were separate entities, not branch offices; (ii) the level of supervision or control was typical in a parent-subsidiary relationship; (iii) the subsidiaries conducted their own business operations; (iv) the subsidiaries earned profit and paid tax in the US; (v) one company in the corporate group arrangement was owned by a third party, while another was not located in the US. See ibid 532–549.

[32] Worthington and Agnew (n 28) 64.

[33] My intention is to highlight the problem of this doctrine in the BHR context. I do not discuss all aspects of this matter in detail. See, in general, Brenda Hannigan, *Company Law* (5th edn, OUP 2018) paras [3–16]–[3–

the corporate veil is limited in practice as courts have maintained the separate corporate entity doctrine by adopting a restrictive position towards holding the corporate members liable and emphasising the value of corporate group structures as a tool for dividing liability risks and protecting the parent corporation from exposure to such risks.[34]

The signal case law for understanding the current application of the principle of corporate veil piercing is *Prest v Petrodel Resources Ltd and others*[35] in which the UK Supreme Court laid down a policy principle on the "façade" and restriction of veil piercing. Lord Sumption delivered the judgment by narrowing down the extent of the corporate veil piercing principle,[36] observed its incoherence in UK case law,[37] and distinguished the concealment and evasion principles behind the term "façade" or "sham" used in previous court decisions.[38]

The concealment principle is that using a company or a group of companies to conceal the identity of the actual actors will not prevent the courts from identifying them as their identity is legally essential. In these circumstances, the court does not reject the "façade" but rather looks behind it to uncover the truth that the corporate structure conceals.[39] However, the evasion principle suggests that the court may ignore the corporate veil if there is a legal right against the person that exists independently of the company's involvement and a company

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46]; David Kershaw, *Company Law in Context: Text and Materials* (2nd edn, OUP 2012) 46–57. The following three cases exemplify this implication. The first case concerns the concealment, while the other two involve the evasion of obligation.

In *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, the House of Lords considered whether a company incorporated in England (Continental) could be deemed an enemy entity due to its German shareholders and directors. Daimler, a purchaser of tyres from Continental, sought clarification on whether payment would violate the law on trading with the enemy. The court held that the company had acquired the enemy character based on control.

In *Gilford Motor Company v Horne* [1933] Ch 935 CA, Horne, a former managing director of Gilford, breached a non-solicitation clause by soliciting Gilford's customers through a competing company he founded. The court considered his company a "cloak or sham" to evade legal obligations.

In *Jones v Lipman and Another* [1962] 1 WLR 832, Lipman attempted to avoid his obligation to transfer property to Jones by transferring it to a company in which he and his law clerk were the only shareholders and directors. The court granted an order for specific performance against Lipman and the company.

[34] Choudhury and Petrin (n 9) 99.

[35] *Prest v Petrodel Resources Limited and others* [2013] UKSC 34.

[36] ibid 16.

[37] ibid 18–26.

[38] ibid 28–33. Note that Lady Hale considered, at para 92, whether it is possible to classify all the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion. See also Christian A Witting, *Liability of Corporate Groups and Networks* (CUP 2018) 317; Hannigan (n 33) para [3–33].

[39] *Prest v Petrodel Resources Limited and others* (n 35) para 28.

is interposed to defeat or frustrate the enforcement of such rights.[40] Significantly, no avenue exists to hold that person liable.[41]

The Supreme Court revisited the *Prest* decision in *Hurstwood Properties v Rossendale Borough Council*,[42] tightening the evasion principle by differentiating between avoidance and evasion while questioning its application to forward piercing. In the *Hurstwood* case, the respondents leased their properties to a newly established company to avoid business rate tax and shift the tax burden to the company, which was then liquidated without paying tax. The authority argued for piercing the corporate veil, observing the corporate practice as the evasion of an existing obligation under *Prest.*

The court cautiously questioned, without directly addressing, whether, given that the existing obligations of shareholders operate reversely, the "evasion principle" applied to forward piercing so enabling a company's liability to be extended to its shareholders.[43] The court then opined that "evasion" must rise to the degree of an abuse of separate corporate personality. However, tax law does not prohibit the transfer of property. Therefore, the transfer does not constitute an abuse of corporate personality.[44] Regarding "existing" liability, the court observed that the tax liability incurred up to the date of transfer remained with the parent company, while the subsidiary incurred the new tax liability thereafter.[45]

Within the BHR context, the analysis primarily concerns the evasion of obligations. However, establishing a subsidiary with a legitimate purpose actively to operate certain businesses for profit while enjoying asset partitioning benefits provided by corporate law, is seen as neither an attempt by a parent corporation to evade obligations nor a mere façade. Furthermore, the parent corporation had no pre-existing obligations to victims before establishing the subsidiary. Instead, this is a claim stemming from the subsidiary's liability towards the parent corporations. As observed in *Hurstwood*, it is questionable whether the evasion principle can apply to this forward-piercing claim. Significantly, in transnational

[40] ibid.

[41] ibid 35–36.

[42] *Hurstwood Properties (A) Ltd and others (Respondents) v Rossendale Borough Council and another (Appellants)* [2021] UKSC 16.

[43] ibid 66–70.

[44] ibid 74.

[45] ibid 75.

BHR disputes, tort claims arguably offer an alternative avenue for seeking redress which precludes reliance on piercing the corporate veil.[46]

The enterprise theory is a further avenue available under the corporate law approach, which emerges in the corporate group context. Unlike corporate veil piercing, which focuses on the abuse of the corporate form, the enterprise theory directly addresses the issue of limited liability.[47] It advocates attaching liability to the group rather than the individual companies.[48]

The enterprise theory argues that the purposes of limited liability, such as facilitating investment, reducing shareholders' monitoring costs, diversifying share capital, or protecting the absentee from exercising shareholding power, apply to individual shareholders and do not extend to the corporate groups, especially those with a single shareholder.[49] Even in the case of a public corporation, unlimited liability does not burden the capital markets except by lowering share prices to reflect the entire social costs of corporate operations.[50]

This theory argues that group members, particularly those with a single shareholder, behave as a single entity from an economic standpoint since they act to benefit the parent corporation and the entire group.[51] The central feature in forming the group is "control" or "controlling influence", representing power to direct the affairs of other companies.[52] Following this premise, the enterprise theory holds other group members accountable for the subsidiary's

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[46] A commentator observed that piercing the corporate veil is not only "unprincipled" but also "rare in tort case". One explanation is that the term "existing" obligation appears to exclude most tortious claims. See Choudhury and Petrin (n 9) 99; Choudhury (n 12) 191; Witting (n 38) 317–318.

[47] Glen Wright, 'Risky Business; Enterprise Liability, Corporate Groups and Torts' (2017) 8 Journal of European Tort Law 54, 61.

[48] Hannigan (n 33) para [3–48].

[49] Petrin and Choudhury (n 9) 780–781; Davies, Worthington and Hare (n 23) paras [7–003]–[7–005]. See also Phillip Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 The Journal of Corporation Law 573, 623–626.

[50] Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 The Yale Law Journal 1879, 1933; Petrin and Choudhury (n 9) 780.

[51] Adolf A Berle, 'The Theory of Enterprise Entity' (1947) 47 Columbia Law Review 343, 344. Scholarly discussion on the enterprise theory and the concept of corporate groups originated with the German regulation of corporate groups, *Konzernrecht.* For relevant literature on the enterprise theory in various jurisdictions and a comparative study, see Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 214–246; Klaus J Hopt, 'Groups of Companies: A Comparative Study on the Economics, Law and Regulation of Corporate Groups' (2015) Max Planck Institute for Comparative and International Private Law and ECGI; Wright (n 47) 62–69.

[52] Philip I Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (OUP 1993) 59–60.

actions.[53] Consequently, accountability can be extended to the parent and sister companies of that subsidiary as other group members.

Scholarly discussion on the enterprise theory focus on its applicability to tort creditors of a subsidiary, as contractual creditors can safeguard their interests more effectively through contract and negotiation.[54] Therefore, it becomes a promising avenue by which to address the victims access to a remedy in the BHR context in that it lifts the burden of proof regarding the parent corporation's involvement and allows victims to seek redress from the entire group.[55]

However, the enterprise theory is not recognised as a distinct ground for parent company liability in current UK court practice. In *DHN Food Distributors v Tower Hamlets LBC*,[56] the UK Court of Appeal recognised the enterprise theory and treated the parent and subsidiary companies as a single economic unit by adjudicating the corporate group's right as a single entity to claim against the defendant for the loss of business opportunity due to the compulsory purchase of the business premises held by one company in the group but causing business interruption for the whole group that relies on the premises. However, this case addresses the group's rights, not the group's liability. Significantly, this decision was criticised for lack of foundational principles and limited by later decisions.[57]

Therefore, the current judicial practice limits the potential of the corporate law approach to address the positive obligation of due diligence for parent corporations concerning their subsidiaries' activities through parent company liability. Considering its potential to compel corporations to exercise due care for their subsidiaries' conduct if they wish to avoid liability, the question is whether the court's reasoning in applying the corporate law approach should

[53] Dearborn (n 51) 210.

[54] Mares (n 9) 462. For examples of scholarly discussion, see Choudhury and Petrin (n 9) 120–123; Wright (n 47) 70–71; Hansmann and Kraakman (n 50); Dearborn (n 51) 251–255.

[55] There have been several proposals to define the scope of application for the enterprise theory, considering various elements such as the nature of obligations, the corporate identity of shareholders, the extent of control within the group, the scope of liabilities among shareholders, and the circumstances under which this theory can be applied. However, these discussions are not the focus of my thesis, and I intend to exclude them. Nevertheless, the findings of this thesis illustrate its limits in applying to the positive obligation of due diligence. For a comprehensive overview of these debates, see Choudhury and Petrin (n 9) 116–118; Mares (n 9) 462–465.

[56] *DHN Food Distributors v Tower Hamlets LBC* [1976] 1 WLR 852.

[57] See *Woolfson v Strathclyde Regional Council* [1978] SC (HL) 90, 95–97; *Adams v Cape Industries Plc* (n 29) 532–537.

be refined to serve the positive obligation of due diligence. This question will be addressed[58] after considering judicial practice under the tort law approach in the following subsection.

1.2 The Tort Law Approach and Its Limits

Another approach by which to circumvent the separate corporate entity doctrine involves directly imposing a duty on parent corporations under tort law. Several scholars have commented that tort law, which focuses on victim compensation, aligns with human rights norms protecting individuals' primary interests, including life, health, and freedom.[59] Although there are arguments against converging tort and human rights,[60] these objections hinge on traditional human rights norms where public authorities are the defendants. This basis differs from the BHR context where corporations are private parties.

Within tort law, there is a proposal to apply the principle of vicarious liability to reinforce the due diligence concept and hold corporations accountable for their subsidiaries' actions akin to the employer-employee relationship.[61] However, this proposal faces resistance due to concerns about disrupting established tort law principles and the complexities of labelling one company the servant of another.[62] This concept also requires the subsidiary's wrongdoing and, as a result, it cannot fully address the responsibility of parent corporations in a situation where subsidiaries follow host state laws restricting non-absolute human rights.[63]

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[58] See below, Section 2.1.

[59] For example, see Gerhard Wagner, 'Tort Law and Human Rights' in Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains*, vol 6 (Springer International Publishing 2021) 218–219; Tom Bingham, 'Tort and Human Rights', *The Business of Judging* (OUP 2000) 171; Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights' (2011) 2 Journal of European Tort Law 221, 243.

[60] For example, see Donal Nolan, 'Negligence and Human Rights Law: The Case for Separate Development' (2013) 76 Modern Law Review 286, 302; Marc A Loth, 'Corrective and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim' (2015) 22 Maastricht Journal of European and Comparative Law 788, 789; Allan Beever, 'Corrective Justice and Personal Responsibility in Tort Law' (2008) 28 Oxford Journal of Legal Studies 475, 476. See also *Smith v Sussex Police* [2008] UKHL 50; *Michael and others (FC) (Appellants) v The Chief Constable of South Wales Police and another (Respondents)* [2015] UKSC 2.

[61] Phillip Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (2015) 31 Journal of Professional Negligence 276, 277, 288, 295–297.

[62] Wagner (n 59) 225.

[63] Chapter 4, Section 3.2.

Another proposal is to apply the concept of strict liability, coupled with a due diligence defence, to uphold due diligence.[64] This concept is sometimes called the rebuttable "presumption of liability".[65] It is predominantly discussed within a legislative framework, not a judicial one.[66] Corporations may also regard the due diligence defence as a safe harbour, which may lead to a checklist-based approach in that they may merely complete the list of defending grounds to sidestep legal claims rather than exercising due diligence.[67]

Notably, both vicarious and strict liability regimes do not permit the assessment of corporate diligence before imposing liabilities. Consequently, neither vicarious nor strict liability is suitable for reflecting the positive obligation of due diligence for parent corporations in the examined context.

Commentators have further argued that "due diligence" is not a free-standing obligation but a modality attached to the duty of care.[68] Although this argument is based on state obligations under international law, the due diligence concept for states deepens our understanding of the positive obligation of due diligence for corporations.[69] Within tort law, the negligence concept recognises this duty of care.

Negligence involves establishing a duty of care owed by defendants to claimants, a breach of that duty, and non-remote damage caused by the breach.[70] The duty of care seeks to

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[64] Choudhury and Petrin (n 9) 113–115; Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International & Comparative Law Quarterly 789, 796.

[65] OHCHR, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability' (2018) A/HRC/38/20/Add.2 8; Amnesty International and Business & Human Rights Resource Centre, 'Creating a Paradigm Shift. Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse' (2017) 7. Note that this term differs from the assumption of responsibility, which establishes a duty of care as discussed below in Sections 3 and 5 of this chapter. The presumption of liability establishes the statutory duty and presumed liability, shifting the burden of proof on the breach of this duty to corporations to demonstrate that they could not prevent the harm caused by the controlled subsidiary. However, the assumption of responsibility serves as a ground for establishing a duty of care without presuming liability. Therefore, victims still bear the burden of proof that the corporation has breached the established duty of care.

[66] Examples of this strict liability approach are the UK Bribery Act 2010, Article 7, and the Swiss Responsible Business Initiative (proposed by a broad coalition of Swiss civil society organisations in 2016 but later rejected due to the lack of support on the cantonal vote). See Bueno and Bright (n 64) 796.

[67] ibid 790; Peter Muchlinski, 'The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights' (2021) 6 Business and Human Rights Journal 212, 224.

[68] Anne Peters, Heike Krieger and Leonhard Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 2.

[69] Chapter 5, Section 1.2.

[70] Edwin Peel and others, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) para [5-002].

determine whether the alleged tortfeasor bears a legal duty to exercise care towards the claimant. This question encompasses both the standard and the duty of care. The standard of care assesses whether the defendant's actions create an unreasonable risk of harm to others, often objectively determined by applying a "societal standard" that reflects the behaviour expected by a reasonable person.[71]

In the context of this thesis, if courts recognise the concept of human rights due diligence as the societal standard, it could serve as an objective standard of care which corporations are expected to follow.[72] However, a significant challenge arises when establishing this standard as a legal duty of care. This challenge involves precisely defining to whom corporations owe this responsibility and determining the boundaries of this obligation, particularly regarding the individuals or groups who can claim against corporations under this standard.[73]

After the unsuccessful efforts of the corporate law approach in the *Adams* case, litigants attempted to establish parent corporations' duty of care to ensure that their subsidiaries' operations will not infringe any internationally recognised substantive human rights of the victims.[74] In UK tort law, the *Caparo* case sets a general guideline for establishing a duty of care using the three-fold criteria: foreseeability of harm; proximity between claimants and defendants; and reasonableness to impose an additional category of a duty upon one party to benefit another.[75] A commentator has observed that the common law framework of the duty of care is open to recognising a duty of care for corporations to conduct human rights due diligence provided that this duty meets the reasonableness criteria, considering community expectations and evolving social standards.[76]

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[71] Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007) 84. On the other hand, the subjective standard evaluates the defendant's behaviour entirely in terms of his abilities, whereas strict liability judges the defendant exclusively on whether he caused the harm suffered by the claimant. See ibid 81.

[72] van Dam (n 59) 236–243; Gabriela Quijano and Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) 6 Business and Human Rights Journal 241, 247.

[73] Beever, *Rediscovering the Law of Negligence* (n 71) 119.

[74] For example, see *Lubbe and Others and Cape Plc and Related Appeals* [2000] UKHL 41; *Chandler v Cape Plc* [2012] EWCA Civ 525; *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635; *AAA & others v Unilever Plc and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532; *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20; *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2021] UKSC 3. Note that all these cases rejected the imposition of duty solely by reason of being a parent company.

[75] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[76] Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 Business and Human Rights Journal 179, 189.

However, in *Vedanta Resources PLC & Anor v Lungowe & Ors* – the current authoritative precedent – the UK Supreme Court declined to apply the *Caparo* test by relying on the *Home Office* ruling and justifying that parent company liability for subsidiary activities is not a distinct category within the common law of negligence.[77] Some background to the *Home Office* and *Vedanta* decisions require further consideration.

In the *Home Office* decision,[78] the Home Office took boys from a detention centre to an island where some boys escaped and damaged a yacht owned by Dorset Yacht Company. This case established a duty of care for the Home Office concerning the conduct of the third parties (the boys) relevant to our context of the conduct of a subsidiary, an entity distinct from the parent corporation. The main question was whether the Home Office was responsible to the claimant for the damage caused to a yacht by the boys under its control.[79] The House of Lords applied the "neighbour principle" suggesting that a duty of care should generally apply unless there is a valid reason to exclude it.[80]

Typically, a person is not responsible for the actions of someone who is not their employee or acting on their behalf. In this case, the House of Lords determined whether the boys' actions could break the chain of causation between the Home Office's negligence and the company's damage.[81] Instead of applying the principle of *novus actus interveniens* (a new intervening act that breaks a causal chain of the defendant's act and the claimant's harm), the House considered whether the boys' actions were "highly likely to happen" and the damage was in the "immediate vicinity",[82] before concluding that the Home Office should reasonably have anticipated that the boys, lacking skill, might take a boat and cause damage.[83] Therefore, the Home Office owed a duty of care to Dorset Yacht Company because the damage caused by the boys was reasonably foreseeable.

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[77] *Vedanta Resources PLC & Anor v Lungowe & Ors* (n 74) para 56. Note that the *Vedanta* ruling was subsequently reaffirmed in *Okpabi & Ors v Royal Dutch Shell Plc & Anor* (n 74).

[78] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

[79] ibid 1026.

[80] ibid 1027.

[81] ibid.

[82] ibid 1030.

[83] ibid.

In the *Vedanta* case, both the Court of Appeal[84] and, subsequently, the Supreme Court[85] addressed the jurisdictional and duty of care issues. The subsidiary of Vedanta, Konkola Copper Mines ("KCM"), discharged toxic substances into waterways in Zambia. The Zambian villagers brought this claim to the UK court against both Vedanta and KCM. The Court of Appeal affirmed that Vedanta owed a duty of care to those directly affected by KCM's action if "additional circumstances" were shown – for example, Vedanta assuming direct responsibility for establishing relevant policies or exercising control over KCM's operations.[86] The Court of Appeal applied the three-fold test of foreseeability, proximity, and reasonableness from the *Caparo* case while emphasising the need for additional circumstances, including Vedanta's knowledge and expertise.[87] Evidence revealed Vedanta's oversight and control over subsidiaries.[88]

Vedanta and KCM appealed to the Supreme Court but their appeal was dismissed. The Supreme Court explicitly held that being a shareholder does not impose a duty to control subsidiary operations, relying on the holding in *AAA & others v Unilever Plc and Unilever Tea Kenya Limited* which declined the existence of a special doctrine imposing legal responsibility on parent companies for the actions of their subsidiaries.[89] The court also rejected the application of the *Caparo* test as parent company liability for its subsidiary activities is not a distinct category in negligence law.[90] Instead, the court followed the precedent set in the *Home Office* decision.[91] The court concluded that Vedanta had assumed responsibility for maintaining environmental standards based on published materials asserting its role in establishing group-wide environmental control and sustainability standards.[92]

According to these two cases, the courts emphasised the importance of control over the third-party wrongdoer and the foreseeable risk caused by the wrongdoer's activities. Applying the

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[84] *Lungowe & Ors v Vedanta Resources Plc & Anor* [2017] EWCA Civ 1528.

[85] *Vedanta Resources PLC & Anor v Lungowe & Ors* (n 74) para 102.

[86] *Lungowe & Ors v Vedanta Resources Plc & Anor* (n 84) para 83.

[87] ibid 69.

[88] ibid 84.

[89] *Vedanta Resources PLC & Anor v Lungowe & Ors* (n 74) paras 49–50; *AAA & others v Unilever Plc and Unilever Tea Kenya Limited* (n 74) para 36.

[90] *Vedanta Resources PLC & Anor v Lungowe & Ors* (n 74) para 56.

[91] ibid 54.

[92] ibid 61.

Home Office ruling to the *Vedanta* case, the risk must be within the immediate vicinity in creating a "special relationship" between the defendants (parent corporations) and the claimants (victims) concerning the actions of third parties (subsidiaries).

However, the *Vedanta* decision limits the meaning of "control" to the actual control exercised, requiring active participation of parent corporations in the subsidiary businesses either by interfering or controlling their operation, providing guidance, or portraying themselves, through published material, as exercising supervision and control over their subsidiaries.[93] Mere control of shareholding is insufficient to establish such a special relationship to create a duty owed by parent corporations to the victims.[94] The outcome of the *Vedanta* decision may seem a step closer to addressing the positive obligation based on the fact-finding of active participation of the parent corporation in the subsidiary activities. However, it is, in fact, a decision that moves away from the aims of due diligence by discouraging parent corporations from involving themselves in subsidiary activities to avoid the risk of the duty of care.[95]

There is an opposing view from the corporate law standpoint which is against applying the *Home Office* ruling to establish this duty for corporations. This approach contends that, unlike the Home Office, a parent company does not exert "direct and immediate" control over its subsidiary but controls through its voting rights or group policies.[96] In light of the importance of establishing parent company responsibility, which was highlighted earlier in the introduction to this chapter and this section, I argue that accepting this duty for parent corporations is a preferred approach to upholding due diligence. However, there remains a need for clarification as to why the *Home Office* decision may not be applicable to control based solely on shareholding, a point that the Supreme Court in the *Vedanta* case did not explicitly address.

The *Home Office* decision relied on the concept of the "immediate vicinity" to refute the *novus actus interveniens* principle (a new intervening act) if it can be shown that the

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[93] ibid 49, 53.

[94] This slightly differs from the *Chandler* case in which the Court of Appeal imposed such responsibility on the basis of foreseeability (ought to have knowledge) of harm. The intervention of the subsidiary's business is an example of the possible grounds for creating such foreseeability. See *Chandler v Cape Plc* (n 74) para 80.

[95] Wagner (n 59) 226–227.

[96] Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape Plc' (2013) 76 The Modern Law Review 603, 614.

intervening actions were likely the result of the defendant's negligence.[97] In the *Home Office*, the defendant (the Home Office) and the third-person wrongdoer (the boys under their control) are distinct persons, comparable to parent corporations and subsidiaries. The nature of vertical group companies allows parent corporations to control subsidiaries, comparable to the Home Office's ability to control the boys' conduct, foresee the risk from their subsidiaries' operations, and have a direct interest in their success and losses. Arguably, these abilities and interests link parent corporations and anyone within the immediate vicinity of the subsidiaries' operations.

Imposing a duty of care on the Home Office affects the Borstal system and the open prison policies, necessitating a balance between the interests of innocent victims of crime and the benefits of the Borstal system.[98] Similarly, the court in *Vedanta* (and also the *Unilever* on which the *Vedanta* relied) should carefully balance the competing interests of a wider group of innocent victims whose rights might be infringed by the subsidiary activities against the value of limited liability, which benefits a specific group and fosters economic growth.[99] Instead of simply concluding that no such corporate responsibility exists in law, this balance should be exercised, especially considering that the value of limited liability may not apply to a subsidiary with a single shareholder.[100] Significantly, majority shareholding represents not only a power to control but also an ultimate power to prevent human rights impacts from subsidiary actions.

Consequently, the court's reliance on the *Home Office* decision to define the boundary of the duty of care while limiting the definition of "control" to active involvement, without justification for excluding the shareholding control other than invoking non-special rule, raises doubts. The court's reasoning in the *Vedanta* case also implies that parent corporations might have avoided this duty by neglecting their subsidiaries.[101] This justification deviates

[97] *Home Office v Dorset Yacht Co Ltd* (n 78) 1030.

[98] John Bell, *Policy Arguments in Judicial Decisions* (OUP 1983) 44–46.

[99] Such a balance in a tort claim to evaluate the value of human rights is plausible. As observed in Chapter 3, Section 2.1.2, courts can exercise balance concerning the value of human rights in the tort claims involving the horizontal obligations of substantive human rights. Furthermore, as discussed below in Section 2 of this chapter, the underlying ideas of tort law include the guidance rules concept, which is aimed at detering the continuation or repetition of harm by dictating expected behaviour. This is a point where tort law can complement due diligence.

[100] See above, Section 1.1.

[101] Wagner (n 59) 226–227.

from the concept of human rights due diligence which expects that corporations actively address and prevent human rights impacts arising from the activities of their subsidiaries.

Therefore, current judicial practice limits the application of corporate and tort law approaches to address the positive obligation of due diligence. To fulfil the state's obligation to protect human rights, courts must refine their reasoning within these approaches to incorporate the due diligence concept. Refining either approach to impose liability for subsidiary actions compels corporations to exercise due care in preventing human rights impacts from their subsidiaries' operations.

The following section justifies the proposal of this chapter to refine the court's reasoning in the tort law approach by identifying the limits of the corporate law approach in aligning with the positive obligation of due diligence while recognising dual functions of tort law: liability rules; and guidance rules. It also highlights that the courts' reluctance to impose a duty of care based on shareholding control is not due to the separate corporate entity doctrine, but the emphasis placed on the function of the liability rules in tort law.

2. The Tort Law Approach to Upholding the Positive Obligation of Due Diligence

Due diligence for parent corporations encompasses addressing human rights impacts resulting from the operations of their subsidiaries. The lack of HRDD legislation necessitates that courts observe their international obligations to protect human rights by imposing this duty on the parent corporations through either corporate or tort law approaches. However, the current judicial practice within these approaches demonstrates the court's reluctance to hold parent corporations liable based solely on shareholding, even when they wholly own a subsidiary. Refining either of these approaches can force corporations to exercise due care in preventing human rights impacts from their subsidiaries' operations to avoid the risk of liability.

This section argues that the tort law approach should be a primary focus for this refinement. This proposition aligns with the predominant approach in litigation against corporations, which emphasises the "duty of care" rather than "piercing the veil".[102] This emerges from numerous cases after the failure of the corporate law approach in the *Adams* decision, including the *Lubbe*, *Chandler*, *The Renwick Group*, *Unilever*, *Vedanta*, and *Okpabi*

[102] van Dam (n 59) 248.

cases.[103] Subsection 2.1 will justify this argument before pointing out the real influence on the court's reluctance to impose a duty of care based on shareholding control in Subsection 2.2.

2.1 Prioritising the Tort Law Approach over the Corporate Law Approach

This section argues for the tort law approach to uphold the positive obligation of due diligence in protecting human rights. Before considering the limits of the corporate law approach, this section highlights certain alignments between tort law and the due diligence concept. While tort law primarily aims to provide compensation for damages, human rights claims serve to uphold fundamental human rights standards.[104] Despite their disparities in primary aim, tort law can improve the effectiveness of addressing human rights violations, complementing human rights law.[105] This functional consideration of tort law aligns with the purpose of corporate due diligence as a tool by which states can fulfil their obligation to protect human rights.[106]

The obligatory nature of due diligence for corporations encompasses negative and positive obligations. The negative aspect requires corporations to be accountable for human rights impacts arising from their own conduct by refraining from causing or contributing to human rights impact. The positive aspect requires corporations to identify, prevent, and mitigate human rights impacts arising from the operations of their subsidiaries. Significantly, only the human rights impacts stemming from the negative aspect require a remedy.[107] These differences lead to an argument about the two obligatory natures of due diligence: the duty of outcome for the negative duty; and the duty of conduct for the positive duty.[108] The focus here is on the positive duty as the duty of conduct.

In light of these two obligatory natures of due diligence, the normative principles underpinning tort law encompass two main objectives: compensating individuals who have suffered harm or loss (the remedy purpose); and preventing the continuation or repetition of

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[103] See n 74.

[104] *Smith v Sussex Police* (n 60) paras 138–139.

[105] Bingham (n 59) 171; van Dam (n 59) 243.

[106] UNGPs, Principle 3.

[107] Chapter 5, Section 2.1.2.

[108] Chapter 5, Section 3.3.

harm by dictating expected behaviour (the deterrence purpose).[109] I refer to these two aspects of tort law as the "liability rules" and the "guidance rules", respectively.[110]

The liability rules see tort law as a system for distributing losses and reject the idea that compensation indicates a tortfeasor being held accountable for breaching his or her obligation to act in certain ways towards victims.[111] Under the liability rules, claimants' legal rights are the primary focus and compensation aims to rectify the interference with rights.[112] The application of the liability rules can justify corporations' horizontal human rights obligations in a case of direct cause or contribution to human rights impacts by providing compensation in response to the direct infringement of rights.

In contrast, the guidance rules consider tort law as a set of rules indicating permissible and prohibited actions.[113] Its consideration is grounded in conduct, sanctioning the breach of such conduct through civil liability.[114] Therefore, the guidance-rule concept aligns with the positive obligation of due diligence and enables courts to direct corporate behaviour by holding them responsible for failure to address, prevent, or mitigate the harm caused by their subsidiaries to the victims' rights.

There is, however, an opposing view to this separation of tort principles. Stapleton argues that courts adjudicate duty disputes in negligence by considering a broad range of legal concerns within an incident thus creating a separate incident rule. This explains why not all individuals injured by a violation can sue in a particular incident.[115] It is essential to clarify that this separation does not imply that the purpose of deterrence inherent in the guidance rules can operate independently from the remedy purpose. This is because the consequential

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[109] GL Williams and BA Hepple, *Foundations of the Law of Tort* (2nd edn, Butterworths 1984) 28.

[110] These two terms are used in a work by Goldberg and Zipursky. See Benjamin C Zipursky and John CP Goldberg, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 Fordham Law Review 1563.

[111] ibid 1563.

[112] Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2 Oxford Journal of Legal Studies 30, 31.

[113] Zipursky and Goldberg (n 110) 1563–1564.

[114] Cane, 'Justice and Justifications for Tort Liability' (n 112) 32–33.

[115] Jane Stapleton, 'Evaluating Goldberg and Zipursky's Civil Recourse Theory' (2006) 75 Fordham Law Review 1529, 1534, 1542–1544.

loss to victims remains a pre-requisite for establishing a claim in negligence,[116] and a breach of guidance rules leads to compensation as a sanction for the breach of conduct.

However, this separation is necessary for understanding the prioritisation of purposes, reflecting the different sources of duty between outcome and conduct. Under the liability rules, the duty of care (for the outcome) stems from the rights that are infringed, while the duty of care (for conduct) under the guidance rules does not arise from the rights but from the failure to observe reasonable conduct expected by society.

Based on these frameworks, I argue that the dual functions of tort law can capture the characters of both the negative and positive obligation of due diligence. The guidance rules concept of tort remains targeted at imposing a positive duty on corporations and emphasises their responsibility to exercise reasonable care and diligence in overseeing the actions of their subsidiaries. Significantly, the duty of care under tort law does not necessarily correspond to any pre-existing rights, aligning with the positive duty of due diligence which does not correspond to substantive human rights.[117] This understanding emphasises the potential for the guidance rules to operate within the duty of care.

Furthermore, the duty of care under the tort law approach allows the evaluation of breaches as to whether the corporate diligence in overseeing their subsidiaries falls short of the expected standard, aligning with the assessment requirement under the positive obligation of due diligence. Additionally, as will be shown in Section 3, the duty of care can effectively address the responsibility of parent corporations where courts cannot attribute fault to their subsidiaries due to their adherence to host state laws restricting non-absolute human rights. This is because the breach of parent company duty does not hinge on the existence of subsidiary obligations.

In contrast, the corporate law approach fails to achieve the features of assessment and independence from the subsidiary's obligation inherent in the positive obligation of due diligence. Although piercing the corporate veil and the enterprise theory may extend liability from subsidiaries to parent corporations, they face challenges when courts cannot hold subsidiaries liable for human rights impacts due to conflicting non-absolute human rights

[116] Peel and others (n 70) para [5–002]; Stevens (n 13) 11.

[117] Peel and others (n 70) para [5–008].

standards.[118] In the absence of subsidiary liability, nothing can be extended to parent corporations. Additionally, the conduct-based obligation requires assessing the appropriate degree of corporate diligence over subsidiary operation, which is not a factor in the extension of liability to parent corporations under the corporate law approach.

Furthermore, piercing the corporate veil challenges the fundamental principle of corporate personality under corporate law. Integrating the positive obligation of due diligence into this principle may disrupt other corporate law concepts – shadow directors, for example[119] – that are closely tied to the separate corporate entity doctrine. Although scholarly discussion of the enterprise theory focuses on tort creditors, crafting factors for its application in specific disputes remains challenging due to its absence in corporate law legislation.[120]

Justifying a focus on the duty of care does not diminish the value of piercing the corporate veil, enterprise theory, or other tort principles as they remain efficacious – albeit in limited circumstances. They may prove effective when courts can hold subsidiaries liable and so extend the liability to the parent corporations. In certain situations, they can complement the tort law approach to enhance the efficacy of the positive duty of due diligence.

For example, attributing responsibility to the parent corporation under the duty of care is still limited in providing redress if the parent corporation transfers all assets to another subsidiary. Also, such a parent corporation might be a holding company without other assets. In such cases, the corporate law approach can address this situation by piercing the veil of the holding company to reach its shareholders or treating the assets of another subsidiary as belonging to the parent corporation in the case of asset manipulation.

Consequently, the duty of care offers a more appropriate response to human rights due diligence in the parent-subsidiary relationship. It will be a focus of further analysis on how judicial reasoning should be refined to integrate the positive obligation of due diligence. In

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[118] Chapter 4, Section 3.2.

[119] In terms of Section 251(1) of the UK Companies Act, the term "shadow director" refers to "a person in accordance with whose directions or instructions the directors of the company are accustomed to act." It is plausible that the involvement of a parent company in influencing the decisions of directors concerning external relationship may not be exempted from classification as shadow directors if it places itself in breach of duty to the subsidiary – e.g., directing policy that is not in the best interests of the subsidiary. See Davies, Worthington and Hare (n 23) para [10–011]; Hannigan (n 33) paras [7–28]–[7–29].

[120] Scholarly debate on the enterprise liability theory has not focused on the court's role. There are also various elements required to define the application of this theory. Considering these factors together with the existence of corporate law legislation, I argue that the emergence of this theory in corporate law requires the legislative approach. Failing this, corporate law will be put at risk of uncertainty. See also n 55.

this respect, it is necessary to understand the real influence on the courts' reluctance to impose the duty of care based on the mere shareholding control in the *Vedanta* case.

2.2 Courts' Reluctance to Impose Duty of Care Based on Shareholding Control

Having understood the dual functions of tort law and its role in upholding the positive obligation of due diligence, this section considers the court's reluctance to establish a duty of care for parent corporations regarding the operations of their subsidiaries based on bare shareholding control. This thesis argues that such reluctance stems, in the main, from the influence of the liability-rule concept in tort law, which prioritises compensation for loss over considerations of reasonable conduct.

In its essence, tort law holds a defendant liable for causing a claimant's loss unless there is a legitimate justification.[121] The duty of care serves as a "control device" to limit liability for negligence.[122] However, there is some controversy regarding establishing this duty, which reflects divergent views on the appropriate extent of liability.[123] Stevens terms this liability framework the "loss" model as liability is rooted in the fact that the wrongdoer caused the claimant's loss and it would be unjust if he or she did not have to compensate the claimant for this harm.[124] The duty of care provides a basis for the defendant's immunity from liability for carelessly causing loss.[125] As a result, liability for loss is presumed and the duty of care constitutes a ground for rebuttal.[126]

This presumption is often seen in court deliberation. Applying the central question in the *Home Office* decision[127] to the *Vedanta* case, the critical consideration is whether the parent corporation had any duty of care owed to victims that could lead to compensating them for their losses. In this consideration, the reasonable expectation that parent corporations should

[121] Stevens (n 13) 1.

[122] Peel and others (n 70) para [5-009]; Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) 30–31.

[123] Peel and others (n 70) para [5–009]; Weir (n 122) 31.

[124] Stevens (n 13) 2.

[125] ibid.

[126] Cane, 'Torts and Rights by Robert Stevens' (n 13) 641–642.

[127] The preliminary issue is "whether the Home Office or these Borstal Officers owed any duty of care to the respondents capable of giving rise to a liability in damages". See *Home Office v Dorset Yacht Co Ltd* (n 78) 1025–1026.

compensate for the losses caused by their subsidiary's activities is intertwined with the reasonable conduct expected by society and the establishment of their duty of care.

This presumption of liability, along with the duty of care as a counterpoint, aligns with the liability-rule concept of tort law, which aims to address the infringement of rights by rectifying loss. It emphasises the loss of the victim's rights in assessing the necessity of the duty of care and prevents the full acknowledgement of the conduct aspect. This notion may support a negative obligation of due diligence, viewing the loss of rights as an outcome that should be remedied. However, it explicitly differs from a positive obligation of due diligence regarding impact from third parties' activities, which is fundamentally a duty of conduct requiring the performance of the duty-bearer beyond the expected standard, irrespective of actual harm.[128]

Building on the liability rules, establishing a duty of care for parent corporations poses the risk of their being excessively burdened. Under negligence law, liability is triggered when a duty of care is established and the breach can be justified by proof, on a balance of probabilities, that their conduct falls short of any degree below the requisite standard of care.[129] Under the but-for test in tort law, the defendant must be liable in full for all losses caused by the breach, regardless of whether there is another factor inflicting the same losses.[130] While the loss to the victims caused by two or more defendants is single and indivisible, all defendants must be jointly and severally liable for the victims' total losses.[131]

From this tort law structure, the likelihood or probability standard of proof based on the preponderance of evidence in the tort dispute results in the risk of parent corporations being held liable for the total loss of the victims, although the breach of their duty falls slightly short of the standard of care. Such a light burden of proof to show the slight shortfalls of the expected standard for full compensation invites litigation claims against corporations. Consequently, imposing the duty of care on parent corporations subjects them not only to the risk of unlimited harm caused by subsidiary actions and the excessive burden of joint

[128] Chapter 5, Sections 1.2 and 2.1.2.

[129] Weir (n 122) 67.

[130] Peel and others (n 70) para [7–007]; Weir (n 122) 71–72.

[131] Peel and others (n 70) para [22–001].

and several liability, which is not proportionate to the degree of the breach, but also the litigation burden of defending the flood of claims.

I am of the view that this phenomenon inevitably influences the court's policy to avoid imposing a general duty of care on parent corporations. Instead, it crafts conditions where the duty should be imposed on the basis of the active exercise of control as illustrated in the *Vedanta* case.[132] By upholding the separate corporate entity doctrine and denying the existence of the special rule for parent company responsibility, courts can limit this corporate risk of unlimited and excessive liability inherent in tort law.

However, this reasoning appears to favour corporations without adequately accounting for the guidance-rule concept of tort law, the negative impacts of corporate activities on victims, and the fact that parent corporations are in the best position to prevent harm through actively exercising their shareholding control. It also undermines the standard of care and behaviour expected of corporations as courts are not required to assess whether the corporate conduct meets the standard of a reasonable person as regards breach. This phenomenon also renders the standard of a reasonable person subjective in corporations' decisions regarding exercising such shareholding control.[133]

By shifting focus from the liability rules to the guidance rules, tort law can dictate how parent corporations should act to prevent impacts stemming from subsidiary operations in the parent-subsidiary relationship.[134] The following section contends that the rights model of tort law – which recognises both the liability and guidance rules – can fully serve the positive obligation of due diligence by assuming the duty of corporations based on their shareholding control. This model can emphasise the expected standard of corporate conduct and enables an assessment of the appropriateness of corporate diligence.

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[132] Courts typically consider policies that they deem appropriate when assessing the proximity element of the duty of care, which establishes a legal relationship between the defendants and the claimants to create a duty owed by the former to the latter. For literature that lists and analyses judicial policies in the duty of care comprehensively, see Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998); Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25 Oxford Journal of Legal Studies 33. For scholarly debate on the use of the policy-based arguments to the duty of care, see James Plunkett, *The Duty of Care in Negligence* (Hart Publishing 2018) 152.

[133] See below, Section 3.2.

[134] Zipursky and Goldberg (n 110) 1564.

3. Rights Model in Tort Law: Addressing the Positive Obligation of Due Diligence

Unlike the liability-rule concept which aims to compensate for losses, the guidance-rule concept in tort law centres on principles prescribing appropriate conduct to prevent harm to others. It can address the positive obligation of due diligence that emphasises the conduct of parent corporations rather than the victims' harm.

Aligning with this separation of the functions of tort law, Stevens has advocated for the rights model in UK tort law as a framework for protecting rights.[135] This section explores Stevens's concept of the rights model in negligence law and suggests how courts can apply it to uphold due diligence.[136] The discussion is divided into three subsections following the negligence law structure: primary rights and duties; breach; and remedy. The *Yahoo!* case is used as an example throughout this discussion. The findings in this section are then applied to the *Kaweri* case.[137]

3.1 Primary Rights and Duties

Stevens argues that consideration of the right to claim (whether there has been a breach of primary rights) should be distinct from the secondary right to a remedy as a response to the wrong committed.[138] The right to claim involves two main issues: primary rights; and breach of such rights. This section emphasises the primary rights.

Stevens observes that in negligence law, the primary rights that require protection extend beyond those everyone must respect, such as the right to life, bodily safety, and property. These rights have a negative character; they create duties for all to refrain from infringement.[139] I refer to this category as "universal rights". In the context of due diligence, these rights correspond to the negative obligations of due diligence that corporations must observe by refraining from interfering in them.

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[135] Stevens (n 13) 9.

[136] There are also other tort scholars who advocate theories aligning with the rights model of tort. For example, the Civil Recourses Theory of John CP Goldberg, and Benjamin C Zipursky. See Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2000) 6 Legal Theory 457; Zipursky and Goldberg (n 110).

[137] Chapter 2, Section 4.

[138] Stevens (n 13) 2.

[139] ibid 9.

However, some primary rights may arise from duties that stem from the voluntary actions of duty-bearers. These duties may arise through explicit expressions, such as contracts or promises, or through implicit conduct for which societal norms assume responsibility.[140] They can only be enforced against those with specific duties.[141] I refer to this category of primary rights as "specific rights".[142] These specific rights can represent the positive obligations of due diligence that are the focus of our discussion in this chapter.

Understanding the different natures of these primary rights is necessary. This is because a breach of specific rights can be claimed upon proof of consequential loss, which often involves harm to a person or property. This phenomenon might lead to the misconception that the relevant specific rights are the same as universal rights.[143] This is not the case as specific rights involve not only refraining from injuring persons or properties but also taking appropriate steps to protect them. A scenario may be necessary for clarity.

This scenario involves a blind individual, B, being guided by A to cross the road. However, A suddenly leaves B in the middle of the road due to an urgent matter. B is then hit by a car and suffers an injury. In this regard, B's right to his body is considered a universal right that generates a corresponding duty to refrain from infringing upon it – a negative duty. Under the loss model or the liability-rule concept, courts would consider whether A owes any duty to B that could lead to compensation for B's loss. The loss suffered by B is intertwined in considering A's duty of care.

However, A did not directly breach B's universal rights under the rights model. Instead, A owes and breaches a duty to ensure B's safety. This duty is inferred by the expectation of society based on A's prior voluntary conduct of leading B to the middle of the road. It generates a corresponding right for B to be ensured of his safety. It is a specific right enforceable against A, as a duty-bearer, for taking appropriate steps to ensure B's safety. The bodily injury suffered by B is merely a consequential loss resulting from the breach of his specific right. It follows that establishing a duty of care can be based on the conduct

[140] ibid 9–14.

[141] ibid 10. See also Donal Nolan, 'Assumption of Responsibility: Four Questions' [2019] Current Legal Problems 123, 136.

[142] In Stevens's terms, the former is referred to as the rights good or exigible "against the rest of the world" and the latter is referred to as the rights exigible only against the person making the "undertaking".

[143] Stevens (n 13) 11.

society expects from A in a given situation without the need to consider the loss suffered by B.

The *Yahoo!* case illustrates the limitations of the loss model and shows how the rights model can fill these gaps so that the analysis is not fictitious. A brief background to the case is again necessary here.[144] Yahoo! was sued in its home state on the basis of actions taken by its Hong Kong subsidiary in providing the Chinese government with email contents and information related to two dissidents. This led to their subsequent arrest and imprisonment. The claim alleged that both the parent corporation and subsidiary knowingly aided and abetted these human rights abuses.

The universal rights at stake were the freedom from torture and the privacy of correspondence, both recognised by international human rights law. The former is an absolute human right, while the latter is non-absolute.[145] Under the loss model, the focus is on the harm caused to these human rights. This prompts the consideration of whether the parent corporation owes a duty of care to the victims that could lead to compensation for the negative impacts on these rights caused by its subsidiary's activities.

At first glance, the breach of freedom from torture stems from the action of the Chinese government – i.e. an intervening action that may break a causal link between subsidiary conduct (disclosure) and infringe freedom from torture. It is the absolute human right that the home state's court can impose its standard of human rights in considering the breach of rights if the evidence can establish the involvement of the parent corporation and the subsidiary.[146]

However, if the evidence does not show the involvement of the parent corporation, only the subsidiary may be held liable under the horizontal human rights obligation. In this setting, the liability of the subsidiary has already been established. Therefore, refining the courts' reasoning to apply the piercing of the corporate veil, the enterprise theory and vicarious liability may extend the subsidiary's liability to the parent corporation.[147] Furthermore, as will be discussed shortly, the rights model can address the parent corporation's responsibility

[144] Chapter 2, Section 3.

[145] Chapter 4, Section 2.2.2.

[146] Chapter 4, Section 3.2.

[147] However, these approaches do not reflect a positive obligation of due diligence that we are considering as there is no assessment of the appropriateness of relevant conduct.

in this setting, given the existence of human rights impact stemming from the subsidiary's infringement of freedom from torture.

As regards the right to privacy, the home state's court cannot hold the subsidiary liable for disclosing user contents as the non-absolute human rights standards of the two states differ.[148] Without the liability of the subsidiary, the application of the corporate law approach and vicarious liability in tort law to hold its parent corporation accountable is undermined. Under the liability rules, it is also doubtful whether courts would impose a duty of care on the parent corporation if the actions of the subsidiary are not considered a breach of rights and if the existing loss might not be compensable through the subsidiary. This is because the appropriateness of liability for loss is a condition for considering the establishment of the duty of care.

The positive obligation of due diligence tackles this issue by establishing responsibility for corporations to identify, prevent, and mitigate these human rights impacts. If a parent corporation could have mitigated this foreseeable risk of mandatory disclosure[149] but failed to do so, this is precisely what a positive due diligence duty seeks to address. Under the rights model, if this due diligence concept for parent corporations is recognised – at the discretion of the court – as a societal norm of the home state, courts can interpret the relevant conducts of parent corporations through the lens of this norm to assume corporate responsibility for addressing and mitigating this risk.[150] This assumed responsibility of corporations creates a corresponding right for victims to receive mitigation of the mandatory disclosure risk – a specific right distinct from the universal right to privacy.

This societal norm involves the behaviour expected of parent corporations domiciled within the home state's jurisdiction and so is a reflection of the norm within the home state.[151] It distinguishes itself from those considered previously in the conflict of the societal norms in

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[148] Chapter 4, Section 3.2.

[149] For example, a parent corporation may require its subsidiary to seek a court order before disclosure. Alternatively, it can implement screen-out technology to detect risky contents and warn users accordingly, or at least notify them when disclosure occurs.

[150] In the UK, although there has not yet been HRDD legislation, the human rights due diligence concept and the corporate responsibility under the UNGPs are widely acknowledged as evidenced by the call for this legislation. See 'Mandatory Human Rights Due Diligence in the UK: To Be or Not to Be?' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/blog/mandatory-human-rights-due-diligence-in-the-uk-to-be-or-not-to-be/> accessed 30 June 2024.

[151] This point is significant in circumventing the challenge from the choice of law rules. See below, Section 4.1.1.

prioritising and restricting human rights[152] and the conflict of public policies concerning human rights in the public policy exception.[153] In those instances, we discuss norms related to human rights recognition and their restriction within the context of the negative obligation, focusing on the outcomes of rights infringements.

Assume that the positive obligation of due diligence is fully recognised within the home state. Corporate decisions to establish subsidiaries in high-risk areas and maintain control through shareholding can lead to assumed responsibility under this concept. These corporate decisions grant the corporation not only the exclusive ability to control but also the exclusive ability to address, prevent, and mitigate the risk of mandatory disclosure in the subsidiary operations through such control. Shareholding is also generally disclosed in the registry and can often be inferred from the subsidiary's name. Holding out this shareholding to the public demonstrates the parent corporation's ability to control the subsidiary and assures individuals affected by its operations that such control will be appropriately exercised.[154] Therefore, the duty can be assumed from the shareholding control and places an obligation on corporations to exercise due care and mitigate the disclosure risk. This duty then generates a corresponding right for the victims to have the disclosure risk prevented and mitigated.

The assumption of corporate responsibility is not novel in UK courts. The Court of Appeal decisions in *Chandler* and *The Renwick Group* (pre-dating the *Vedanta* case) analysed establishing a duty of care rooted in the assumption of responsibility.[155] However, the court in these two cases declined to assume such a duty solely on the ground of their being parent corporations. As in the *Vedanta* case, the court focused on active control that could lead to foreseeability of the risk and reliance on this active control by subsidiaries and victims.[156]

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[152] Chapter 3, Section 1.

[153] Chapter 4, Section 2.

[154] Stevens observes that the claimant's reliance is not required to assume this responsibility. See Stevens (n 13) 14–15. See also Nolan (n 141) 153–156.

[155] The case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4 established that a duty of care exists for statements based on the undertaking that assumes a duty. This assumption of responsibility extends to situations where the defendant undertakes a task or service for the claimant. However, courts have also recognised similar responsibility even in the absence of a contractual obligation between the parties in several cases, including *Chandler* and *The Renwick Group*. For further reading on the assumption of responsibility, see Plunkett (n 132) 58–65; Nolan (n 141); Kit Barker, Ross Grantham and Warren Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart Publishing 2015).

[156] In *Chandler*, the Court of Appeal emphasised that the duty cannot be attributed solely to the parent company's status or control. The court focused on the extent to which the corporation exercised control over the subsidiary and the measure taken by the subsidiary to protect the victim from harm with assumption of responsibility on the corporation's part. The court held that the parent company is liable when certain factors are present: (i) the company and its subsidiary have similar businesses; (ii) the company has or ought to have superior knowledge on some relevant aspect of health and safety in the particular industry; (iii) the parent

As pointed out in the previous section,[157] linking this duty to active control is a mere judicial policy aimed at avoiding the risk of unlimited or excessive liability.

Such a duty for corporations from this assumption of responsibility does not qualify as strict liability. There is still the need for reasonable foreseeability of human rights risk. Consequently, responsibility will be attributed to parent corporations only if they ought to have foreseen the risks by exercising appropriate control over their subsidiary.[158] Although the assumption of responsibility can help release the victims from the burden of proving active corporate involvement in the subsidiary operation to establish the duties of corporations and corresponding specific rights of victims, there is yet another burden of proof concerning the breach of this specific right, which is a further element for establishing the victims' right to claim. The following subsection discusses this point.

3.2 Breach of Primary Rights and the Standard of a Reasonable Person

The previous section introduced two categories of primary rights under the rights model of tort law: universal rights and specific rights. By recognising due diligence for corporations as a societal norm, courts can assume a positive duty vesting in corporations and arising from their voluntary shareholding. This duty entails identifying, preventing, mitigating, and assessing how corporations address human rights impacts that may arise from their subsidiaries' operations and generating a corresponding primary (specific) right for victims.

In establishing the victims' right to claim under the rights model, these primary rights must have been breached. This section focuses on establishing a breach of primary rights or a breach of duty of care in the context of negligence law and the standard of the "reasonable person".

In UK tort law, the standard of a reasonable person is applied to assess a breach of duty of care, determine fault and, consequently, liability for damages. This standard generally

company knew, or ought to have known of the unsafe working system; and (iv) the company knew or ought to have foreseen that the subsidiary or its employees would rely on its superior knowledge for protection. The court in *The Renwick Group* followed the same analysis and recognised that the list of factors is not exhaustive. See *Chandler v Cape Plc* (n 74) paras 69, 73–80; *Thompson v The Renwick Group Plc* (n 74) paras 29–37.

[157] See above, Section 2.2.

[158] The foreseeability test in tort is relevant at every stage of establishing a duty of care, as well as in determining a breach of duty and remoteness of damages. Discussing foreseeability here is to determine the breach and the extent of liability. It differs from how the courts in the *Chandler* and *The Renwick Group* cases applied foreseeability to define the boundary of the duty of care. See Peel and others (n 70) para [7–033].

involves considering the qualities of a reasonable person, establishing the standard of care the reasonable person would take, and assessing whether the defendant's actions fall below that standard.[159] Assume that an act or omission of corporations falls below the objective standard of care set by the reasonable, alert, mature, and considerate person in that position. In that case, it constitutes a breach of duty.[160]

The question of the qualities of a reasonable person is a question of law.[161] UK tort law applies a uniform standard of the reasonable person to individual defendants regardless of their personal circumstances.[162] Factors such as elderliness, mental health, or insanity are not valid excuses for negligence since all individuals are held to the same standard.[163] This makes the reasonable person concept objective and independent of the defendant's situation.[164]

However, the court's reasoning in the *Vedanta* decision – rejecting corporate duty in the case of non-active shareholding control[165] – implies double standards for a reasonable (corporate) person based on a subjective condition, i.e. whether corporations exercise their shareholding control. This reasoning appears to deviate from the conventional approach of objective and uniform standards of a reasonable person. However, the court's refusal to establish this duty in the first place immunises courts from the need to address how this subjective standard can be justified in the breach question.

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[159] ibid [6–005].

[160] Weir (n 122) 57.

[161] Peel and others (n 70) para [6–005].

[162] The reasonable person standard, rooted in the positive framework, is based on an average person with whom an actual person can be compared. However, challenges arise due to disparities between this standard and those being judged. For instance, feminists argue the masculine nature of this standard may not apply to women, while other egalitarians question its applicability concerning age or mental qualities. Other normative approaches challenging the positive concept include the cost-benefit consideration that focuses on the cost of precaution against the probability and the severity of harm, and the equal freedom approach that highlights the need for protecting rights. However, these challenges are subject to criticism. This thesis avoids engaging in these debates and instead focuses on a uniform and objectively appropriate standard for corporations in the BHR context. For further reading, see Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (OUP 2003); Alan D Miller and Ronen Perry, 'The Reasonable Person' (2012) 87 New York University Law Review 323.

[163] Peel and others (n 70) para [6–009].

[164] Williams and Hepple (n 109) 114; Weir (n 122) 61; RA Buckley, *The Modern Law of Negligence* (Butterworths 1988) 24.

[165] See above, Sections 1.2 and 2.2.

The rights model can ensure uniform application of the reasonable person standard by imposing a duty of care as regards human rights impact arising from subsidiary operations on all corporations with the ability to control, regardless of their subjective decisions. This phenomenon aligns with the UNGPs, which emphasise that all business enterprises must respect human rights.[166]

Maintaining a single standard for the reasonable person does not imply the existence of a fixed formula for determining reasonable care as it varies depending on the facts of each dispute. The question arises as to what factors should be included in drawing the yardstick of reasonable conduct that the reasonable person would have taken. The consideration of factors that can be included is a legal question, while the amount of care or degree of conduct that the reasonable person would have taken is a factual one.[167]

As discussed earlier, factors specified in the UNGPs and the due diligence legislation collectively constitute benchmarks for assessing expected standards.[168] However, they are suggested to address not only parent corporations' responsibility for subsidiary conduct but also other relevant BHR issues, including the direct cause or contribution to harm and supply chain relationships. Additionally, the legislation in Germany and the EU Directive include environmental issues. Therefore, applying these factors to the parent-subsidiary relationship requires further thought.

Since the factors in negligence law are comparable to those concerning operational context and the nature of risks in the due diligence concept, the considerations of the standard of care in negligence law may provide valuable insights. Firstly, the nature of primary rights and duties in the rights model is significant. As observed by Stevens, specific rights may require a higher standard of conduct than universal rights, as the law is less concerned with preserving the defendant's liberty of action due to the defendant's voluntary undertaking.[169] Therefore, courts can place greater emphasis on protecting specific rights.

Secondly, the reasonable person standard is evaluated in the context of parent corporations, being attributed with such knowledge deemed reasonable at the time of the alleged breach

[166] UNGPs, Commentary to Principle 14.

[167] Peel and others (n 70) para [6–005].

[168] Chapter 5, Sections 2.1.2, 2.2.2 and 3.3.

[169] Stevens (n 13) 114–115.

of duty.[170] Therefore, the usual practice of corporations that was acceptable in the past without keeping up to date cannot be an excuse. A reasonable person has also the same competence for corporations with specialised skills or knowledge.[171]

Thirdly, the risks must be reasonably foreseeable to constitute a tort claim.[172] I believe that this "reasonable foreseeability" element is crucial in the BHR context for defining what human rights risks can fall within the scope of the due diligence duty of corporations. Significantly, this element can respond to the evolving nature of human rights risks and their changing scopes as the new risks can be included once they are reasonably foreseeable.

Once the human rights risks are reasonably foreseeable, assessing the reasonableness of a reasonable person's conduct involves weighing various factors to determine the appropriate degree of care. These factors include the size and probability of risks, where a lower likelihood of risk implies a higher likelihood that a reasonable person would ignore and *vice versa*.[173] Severity of risk, utility of conduct and the cost of precautions are also considered.[174]

Balancing all these factors to objectify the reasonableness notion in tort requires common sense without an established formula. Therefore, non-compliance with general practices may imply negligence, but mere compliance with industrial practice may not necessarily justify achieving the standard of a reasonable person.[175] Furthermore, breach of duty standards depends on the distinct circumstances of each case as there are no precedent-setting decisions.[176] These considerations are still generalised and may not explicitly provide an objective view of factors involved in addressing due diligence in the parent-subsidiary context.

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[170] Peel and others (n 70) paras [6–007]–[6–008].

[171] ibid [6–016]–[6–017].

[172] ibid [6–020].

[173] ibid [6–023].

[174] ibid [6–024]–[6–026].

[175] ibid [6–033]; Weir (n 122) 62. This point has been recognised in the EU Directive on Corporate Sustainability Due Diligence, Article 29(4). Note that there is an exception in tort law – the "Bolam" principle – in the context of medical professionals. This principle permits reliance on general practices as established in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

[176] Peel and others (n 70) para [6–031].

Due diligence encompasses identifying, preventing, mitigating, and assessing how corporations address human rights risks.[177] Each aspect involves different factors in determining breach and fault. Considering our previous discussion of the proportionality principle,[178] it is necessary to identify a specific measure or conduct before the balancing process begins. Following this logic, it is crucial to determine the specific conduct in question rather than referring to the broad term of due diligence before considering whether corporations have breached their duty by failing to perform such specific conduct. Since assessing the degree of conduct is a factual question, further discussion needs to assume some facts for full comprehension.

Identification of human rights risks involves foreseeability. In negligence law, liability requires the loss to be reasonably foreseeable (known or ought to have been known).[179] This aspect concerns the overall foreseeability of a risk, not the likelihood of its occurrence or the exact risk of a particular injury.[180] In tort cases, only extremely rare and highly unlikely risks are considered not reasonably foreseeable.[181]

Emphasising reasonableness in foreseeability is significant because the due diligence concept requires corporations to address and foresee human rights risks, the scope of which can be changed to respond to the evolving nature of societal needs in human rights protection. On one hand, it means this duty is not owed to the world; on the other hand, non-foreseeability can still result in breaching this duty if it is unreasonable. Therefore, ignorance cannot serve as an excuse for non-prevention or non-mitigation, an aspect which the reasoning in the *Vedanta* decision cannot address.

Taking the *Yahoo!* case, it would be unlikely for the parent corporation to argue that it could not foresee the risk of mandatory disclosure in the subsidiary operations since other players in the same industry opted not to do business in that country due to an inability to safeguard human rights.[182] Non-foreseeability of this risk, if asserted, would indicate a failure to

[177] Section 5, Section3.3.

[178] Chapter 3, Section 2.2.

[179] Peel and others (n 70) para [6–020].

[180] ibid [6–021].

[181] ibid.

[182] Google has refrained from providing email or blogging services in China because doing so would require compliance with Chinese law, potentially necessitating the provision of dissidents' personal information to Chinese authorities. See DeNae Thomas, 'Xiaoning v Yahoo! Inc's Invocation of the Alien Tort Statute: An

identify potential or actual harm in its subsidiary's operations and a breach of the due diligence duty regarding the identification of human rights risks in subsidiary operations.

The prevention aspect involves addressing the risks identified in the first aspect. In my view, the appropriateness of conduct under this aspect requires a consideration of probability, the seriousness of the risks, the utility of conduct, and the cost of taking precautions. If the impact is more likely or introduces more severe risks, more measures are required. Even if the frequency of the risk occurrence is low, the need for prevention remains high if the severity of risks is inversely related. When corporations cannot avoid the identified risks due to the nature of businesses or operational areas – as in the *Yahoo!* case – precautionary measures may be taken, and the duty to prevent the risk may shift to the duty to mitigate it.

Mitigation of risks applies when prevention is not possible in certain situations or when prevention fails, and actual harm occurs.[183] This mitigation aspect addresses human rights risks both proactively and reactively. Factors involved in the prevention apply to the mitigation, with added importance placed on the speed factor in the occurrence of harm.

It is worth noting that the qualifications of parent corporations, such as their size, may affect the measures taken since larger companies face higher risks due to complex business relationships and have greater capability to take precautionary steps due to their skills and knowledge. However, the influence of parent corporations over subsidiaries is not directly involved here as it is assumed that control can be exercised through shareholding.

Applying this consideration to the *Yahoo!* case, differences in human rights standards are critical, and prevention of mandatory disclosure is implausible. Therefore, mitigation is significant. Appropriate measures for mitigation can be implemented before harm occurs, such as establishing policies requiring subsidiaries to seek court orders from law enforcement agencies before disclosure or implementing technology to detect risky content of users and warn them of risks. Mitigation also includes measures after harm occurs, such as notifying users immediately upon disclosure.[184] Failure to do so results in a breach of

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Important Issue but an Improper Vehicle' (2008) 11 Vanderbilt Journal of Entertainment & Technology Law 211, 248.

[183] Chapter 5, Section 3.3.

[184] In negligence, reasonable care may involve merely warning of a particular risk or taking no action if that is reasonable. See Peel and others (n 70) para [6–022].

corporate duty to mitigate the human rights risks and a breach of users' corresponding right to have mitigation of disclosure risks and triggers their secondary rights to a remedy.

Another aspect of conduct in due diligence concerns assessing corporate policies, and the measures implemented to tackle human rights impacts. Aligning with this concept, the reasonableness notion in negligence law is evolving since the reasonable person keeps their knowledge up to date, although they may not learn new knowledge until it becomes widespread.[185] Therefore, it does not mean that risks that are unforeseeable or preventive and mitigating measures that are appropriate today will remain so, especially with the help of new technological advancement.[186] Consequently, the usual practice of corporations may serve as a baseline of conduct but may not necessarily meet the reasonableness requirement in a dispute as assessment occurs at the time of the alleged breach of duty.[187]

Once the reasonable degree of care exercised by the reasonable person has been established, any conduct falling below that degree results in a breach of corporate duty and triggers remedial rights for the victims. The following subsection considers how the secondary rights to remedy are considered.

3.3 Secondary Rights: The Remedy

Under the rights model, the breach of primary rights triggers the claimant's secondary rights to a remedy. In tort law, compensation for losses is the most common remedy. However, it is not the only option and not always the "next best" remedy available.[188] Under the rights model, the remedy must compensate for both directly infringed primary rights and the consequential loss of other rights, each subject to different conditions.

Direct loss of primary rights must be compensated through substitutive damages. In contrast, compensation for consequential loss requires assessment under a remoteness test and the application of the principle of reasonable foreseeability to determine which losses can be

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[185] ibid [6–018].

[186] British Institute of International and Comparative Law and others, *Study on Due Diligence Requirements through the Supply Chain.Part I, Synthesis Report* (Publications Office of the European Union 2020) 68–69.

[187] Peel and others (n 70) para [6–007].

[188] Stevens observed that an injunction serves to enforce and protect primary rights, not the potential loss. Therefore, it should be considered as a means of enforcing rights, not a response to a tort. From this view, the rights model does not preclude an injunction to prevent the infringement of rights. As an alternative remedy, Stevens gave an example of an award quantified by the gain of the defendant. See Stevens (n 13) 57–60.

attributed to the wrong committed by parent corporations.[189] The direct loss is assessed at the time of breach, while consequential loss is evaluated at the time of judgment.[190]

It is, therefore, necessary to establish which rights are primary in the specific circumstance to ensure the appropriate scope of liability.[191] The value of relevant rights and consequential loss can be comprehensively recognised within this framework, while the loss model ignores this distinction.

Again, turning to the *Yahoo!* case, the parent corporation breached the specific right of the victims for mitigation of the disclosure risk, not the universal rights such as freedom from torture or privacy. The remedy must rectify the breach of this specific right. However, harm to privacy and freedom from torture are considered consequential losses and their compensation must be subject to the tests of foreseeability and remoteness.

This consideration does not exclude any incentive to comply with the duty as the conditions for foreseeability and remoteness are inherent in the consideration of damages in tort law, which requires defendants to compensate only for the foreseeable consequences of their negligence.[192] However, the rights model creates an additional remedy that requires substituting the infringed primary rights without being subject to these conditions. The substitutive damage for the loss of the specific rights is necessary in this setting to ensure legal consequences for this corporate duty to act.

In the *Yahoo!* case, if courts cannot hold a subsidiary liable for an infringement of freedom from torture due to the new intervening act by the Chinese government, which breaks the causal chain between the breach of subsidiary duty and harm, full mitigation cannot prevent this loss. Therefore, the link between the loss of freedom from torture and the breach may be considered too remote.

For the loss of privacy, it is necessary to identify the mitigating conduct the corporation must implement. If the request for a court order before disclosure is the appropriate measure, the non-implementation of this mitigating conduct results in the full loss of privacy as this is

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[189] ibid 152–153.

[190] ibid 69.

[191] ibid 167.

[192] Peel and others (n 70) para [7–037]; Weir (n 122) 77–78.

what may be prevented by having this mitigation. In this case, given the victims' fault in the consequential harm, contributory negligence can factor into the calculation of damages.

However, if the mitigating measure that is breached is merely the notification of disclosure, the loss of privacy cannot be entirely prevented by this notification measure. As such, failure to notify the disclosure may partially, but not significantly, affect the loss of privacy. In tort law, courts may grant nominal damages, a remedy designed to recognise the breach of a legal right resulting in no substantial injury.[193] By this means, the corporate duty and the victims' corresponding rights can be upheld, and corporate liability can be proportionate to the degree that the corporate conduct falls below the standard of care.

The rights model recognises the guidance-rule concept in tort law and enables courts to integrate the positive obligation of due diligence for establishing a duty of care, demanding corporations to take steps to prevent human rights impacts from the subsidiary activities. It can also find liability proportionate to the degree of breach as it depends on what could be prevented by performing a duty. Let us now consider how the rights model can apply to the *Kaweri* case.

In the *Kaweri* case, the dispute concerned the right to an adequate standard of living arising, in particular, from the forced eviction carried out by the host state's government. The subsidiary's only involvement was the acquisition of unoccupied land from the host state's government to establish coffee plantations. In this regard, the court cannot hold the parent corporation and its subsidiary liable for the infringement of human rights as the non-absolute human rights standards in the two states differ.[194] We are now shifting the focus to the positive obligation of due diligence for the parent corporation concerning this land acquisition by the subsidiary.

The positive duty of the parent corporation stems from its shareholding control in the subsidiary and necessitates the identification, prevention, and mitigation of human rights impacts arising from the subsidiary's operations – in particular the land acquisition. This duty confers specific rights on victims. The question of breach considers what actions a

[193] Peter Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998) 162. Stevens observes that nominal damages may be granted when a right is violated in an unimportant manner, rather than when the violation results in no consequential loss. This serves a purpose similar to substitutive damage as it does not aim to compensate for the loss incurred. See Stevens (n 13) 84.

[194] Chapter 4, Section 3.2.

reasonable (corporate) person would take to identify, prevent, and mitigate human rights impacts in this scenario.

It becomes necessary to establish the specific actions the parent corporation could have taken to prevent or mitigate the human rights impacts but failed to do so. Notably, non-acquisition of the land cannot be considered a viable measure, given the potential existence of forced evictions by the host state – in all likelihood, the land would simply have been transferred to other business operators as part of the host state's efforts to stimulate its economy.

For example, the disputes over forced eviction and inadequate compensation for displaced individuals are public knowledge. The parent corporation should have identified this risk and implemented mitigating measures before acquiring the land. One thinks here of securing a warranty from the host state government to ensure fair compensation for affected local villagers. This compensation should be no less than a specified rate based on the cost of living in the host state. An indemnification may be requested from the host state if the villagers demand compensation and the host state cannot show that the compensation received by such local villagers was fair.

In this regard, the result of the negotiation between the host state government and the corporation for the land acquisition may not allow these contractual clauses. However, as a minimum, the parent corporation should be able to present evidence to show their best efforts to implement these mitigating measures. Failure to do so constitutes a breach of the parent corporation's duty to mitigate the human rights risks and triggers the secondary rights of the victims to a remedy. In this regard, the specific right of the victims to have these risks mitigated must be rectified, while the universal right to an adequate standard of living represents the consequential loss that must be considered in deciding whether it is a foreseeable loss that can be prevented by specific conduct which was not undertaken.

The rights model is a promising avenue by which to advance corporate responsibility, particularly concerning the positive obligation of due diligence in the parent-subsidiary relationship. However, this proposition is not immune to challenges and limitations. The following section acknowledges these.

4. Challenges and Limitations

This section aims to acknowledge the potential challenges and limitations to my proposition of the rights model of tort law for upholding a positive duty of due diligence for parent corporations. Subsection 4.1 addresses possible challenges inherent in my proposal and provides my initial responses to them, while Subsection 4.2 considers limitations that are beyond the scope of the court-centric framework of analysis.

4.1 Challenges to the Rights Model for Upholding the Positive Obligation of Due Diligence

There are two main grounds for challenging my proposition: theoretical and consequentialist. While I offer initial responses, space constraints exclude a comprehensive examination.

4.1.1 Theoretical Challenges

The first theoretical challenge revolves around applying the deterrence theory in tort law. Some argue that the deterrence effect is, in fact, a result of the specific finding by the court rather than inherent to the law of negligence.[195] Also, the deterrence theory cannot explain other features in tort law, such as the possibility of contracting out of liability through insurance, and the survival of liability after the death of the individual wrongdoer.[196]

I argue that no single theory can cover all dimensions of tort law. The justice theory, for instance, requires compensation for every harm but neglects practical situations. For example, demanding compensation from a poor man for a minor fault may significantly impact his or her life, while the person receiving such payment did not suffer any significant loss as a result of the fault.[197]

Under the instrumentalist approach, it depends on how tort law is regarded as an instrument to reach different societal goals, commonly associated with compensation for injuries and loss, deterrence of harmful conduct, fair distribution of accidental risks and costs throughout society, and economic efficiency.[198] Tort law often appears to balance several approaches at

[195] Williams and Hepple (n 109) 139.

[196] ibid 141–142.

[197] ibid 137.

[198] Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 24.

once, but occasionally a situation arises where a single approach must be prioritised.[199] As Stevens observes, any attempt to develop a model account for any body of law will inevitably fall short of addressing all cases.[200]

The second theoretical challenge concerns the application of the assumption of responsibility concept, which lacks the assumption of test to identify the point at which voluntary conduct can be seen as the assumption of responsibility. Murphy observes that negligence cases based on this concept are controversial. He criticises Stevens for substantiating it with analogies from other private law areas – such as equity and bailment where the assumption of responsibility is straightforward – without examining the underlying principle.[201]

It is essential to acknowledge that in UK tort law, the assumption of responsibility is often considered fictitious or artificial. Several cases apply the assumption of responsibility concept based on an "impulse to do practical justice" even when the parties have never communicated with each other.[202] It is also suggested that critics of the assumption of responsibility who seek an objective test to justify the defendant's duty, set an excessively high standard because contract law also infers a manifestation of consent to an implied term and the legal obligation.[203] However, these debates do not contest the existence of circumstances where the consent to assume a legal duty to take care can be inferred. Furthermore, the need for an objective demonstration of such inferred consent is not supported by case law.[204]

The third theoretical challenge arises from the choice of law rules in transnational disputes. As previously discussed, the choice of law rules in tort cases potentially direct the application of the host state law, and we reframed the public policy exception asserting that home state courts can invoke only in a case of absolute human rights.[205] The question emerges of how

[199] Glanville William, 'The Aim of the Law of Tort' (1951) Current Legal Problems 137 quoted in Donal Nolan and Ken Oliphant, *Lunney & Oliphant's Tort Law: Text and Materials* (7th edn, OUP 2023) 19.

[200] Stevens (n 13) 348.

[201] Murphy (n 13) 403–404.

[202] Plunkett (n 132) 133.

[203] ibid 136.

[204] ibid 137–138.

[205] Chapter 4, Sections 1.2 and 2.2.

the home state courts can apply their norm of due diligence to establish a duty for corporations.

In response, the norm of corporate responsibility specifically targets parent corporations domiciled in the home state's jurisdiction.[206] Arguably, the issue of corporate duty can be approached from various angles, which result in different perspectives on the choice of law.[207] I argue that interpreting corporate conduct as implying an assumption of corporate responsibility establishes a standard of corporate behaviour, potentially falling within the law of the place of incorporation (*lex incorporationis*).[208] Home state law can apply on the basis of it having the closest connection to the issue, as the standard hinges on what home state courts expect of corporations established and domiciled within their jurisdiction.[209]

In this regard, courts can still apply the host state's law to consider tort claims, which typically include elements of duty, breach, and non-remote damages. However, determining the standard for establishing a duty of care and breach by parent corporations is another issue that must be subject to the law of the place of incorporation.

These are all theoretical challenges. The following subsection addresses challenges stemming from the consequences of upholding the positive duty for corporations.

4.1.2 Consequentialist Challenges

The consequentialist challenges inherent in this proposition may arise from two opposing perspectives that the analytical framework seeks to reconcile. On the one hand, corporations

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[206] See above, Section 3.1.

[207] Briggs examined the choice of law problem in piercing the corporate veil which is the closest situation to our issue. He observed that the outcome of the choice of law depends on the arguments presented. The *lex contractus* applies if the question is whether a contract can be enforced against the parent corporation, while the *lex incorporationis* applies when highlighting the corporate personality. For enforcing judgments against the parent corporation's asset, the *lex fori* governs, or it is possible to apply the equitable rule of the forum to lift the veil. See Adrian Briggs, *Private International Law in English Courts* (OUP 2014) para 10.28.

[208] Article 1(2)(d) of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation).

[209] Riley and Akanmidu argue that applying home state law to parental liability ensures consistency regardless of the location of damages, prevents unequal treatment based on jurisdiction, and safeguards the home state's regulatory rights over parent corporations. Additionally, it prevents a "race to the bottom" by host states in liability regulations and promotes effective regulation of both parent and subsidiary entities. See Christopher Riley and Oludara Akanmidu, 'Explaining and Evaluation Transnational Tortious Actions against Parent Companies: Lessons from Shell and Nigeria' (2022) 30 African Journal of International and Comparative Law 229, 248–251.

may prefer fewer obligations, while on the other hand, moral considerations of human rights require more stringent obligations for corporations.

The analytical framework of this thesis aims to maximise human rights protection within judicial authority.[210] Therefore, the discussion of consequentialist challenges primarily addresses those from the corporations' perspective, as challenges stemming from the moral dimension of human rights fall beyond this framework, representing the limitations that may require other legal mechanisms, such as legislation, for resolution. These are addressed after the challenges.

Three challenges from the corporation's perspective include the devaluation of limited liability, restricted autonomy, and the competitiveness of corporations. The first consequentialist challenge arises from corporate law, which fundamentally maintains the separate corporate entity doctrine and limited liability. Petrin highlights the need to balance fairness within the corporate context against the value of limited liability "as a vital element of company law and the economy at large".[211]

Several considerations within the enterprise theory directly counter the necessity for limited liability, especially in a company with a single shareholder and the negative effect of limited liability on non-contractual creditors.[212] These considerations form the basis for responding to this challenge. Furthermore, my proposal does not automatically translate as unlimited liability for parent corporations. Instead, it underscores the importance of a societal norm that requires corporations to exercise due diligence as the basis for interpreting and assuming responsibility. This norm also aligns with corporate law's consideration of the stakeholders' interests, which is a crucial element in a company's success.[213] Therefore, the liability for parent corporations remains limited so long as the corporations take appropriate steps to prevent the human rights impacts arising from their subsidiaries' operations.

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[210] Chapter 1, Section 1.

[211] Petrin (n 96) 615–616.

[212] See above, Section 1.1.

[213] Section 172 of the UK Companies Act 2006. Note that in the recent decision of the High Court regarding corporate policies on climate change, the court upheld the business judgment rule with a view that "it is for directors themselves to determine (acting in good faith) how best to promote the success of a company for the benefit of its members as a whole" by weighing all the considerations set out in Section 172. See *ClientEarth v Shell Plc and Others* [2023] EWHC 1897 (Ch) [28–29].

The second consequentialist challenge concerns a broader duty to take reasonable steps to confer benefits or protect the interests of others which might jeopardise the autonomy of duty-bearers more than would a more limited duty.[214] In response, while I propose extending the assumption of responsibility concept to parent corporations, my suggestion is limited to human rights due diligence. Notably, this proposal does not limit a corporation's ability to operate its business. Instead, it requires a corporation to include all the human rights risks in operational costs. This is the way to recognise tort law as an instrument for internalising the external cost of business, including human rights harm.[215] Therefore, it helps prevent the public from bearing the cost of such harm for business gain.

The third challenge arises regarding the competitiveness of corporations. With an acknowledgement that as a member of society, we need to accept the cost of ordinary risks reasonably incurred.[216] My response to this challenge consists of two points. First, my proposition is rooted in the reasonable person standard for evaluating corporate diligence. It does not automatically impose liability on subsidiary fault or victim harm.

Second, as regards competitive ability, this challenge will be sound only in the context of fair competition. My proposal is about encouraging a level playing field to eliminate unfair competition. Absent a binding duty, corporations can continue to apply double standards by conducting their business abroad through their subsidiaries in a manner that would not be accepted at home.[217] My proposal mitigates this issue.

While my proposition offers several supporting reasons and counters the mentioned challenges, it has limitations as indicated in the following section.

4.2 Limitations on the Rights Model to Uphold Positive Obligation of Due Diligence

My proposition on the rights model to uphold the positive obligation of due diligence has certain limitations that cannot be addressed within a court-centric framework of analysis.

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[214] Nolan (n 141) 144.

[215] This is one of the normative justifications for corporate responsibility concerning human rights. See Chapter 1, Section 2.

[216] Stevens acknowledges this point which provides that the determination of rights cannot be based solely on moral notions of blameworthiness. See Stevens (n 13) 108.

[217] van Dam (n 59) 227.

The first limitation stems from corporate engineering, which can complicate group structures or manipulate assets from the obligations. Although the rights model can hold parent corporations liable, they may be mere holding companies or lack assets to compensate victims. This is why I highlight in the first two sections that my proposal does not devalue the corporate law approach, which can address this problem by piercing the corporate veil or executing assets of other subsidiaries within the group under the enterprise theory to satisfy judgments against parent corporations.

The second limitation relates to the role of courts which cannot cover all the details of tort law and the due diligence concept comprehensively. This restricts the ability of this proposal to address the additional demands stemming from moral considerations of human rights. For example, certain barriers to a remedy in the BHR context that legislation could address, such as statutory limitations[218] or expensive proceeding costs of the victims,[219] cannot be solved through this proposal.

Additionally, unlike strict liability (or presumption of liability), the assumption of responsibility can merely release the victims' burden of proof on the active control of parent corporations over subsidiaries in establishing a duty for corporations. However, it cannot yet entirely shift the burden of proof for the question of breach, which is a barrier for the victims seeking redress in the BHR context.[220] Victims still need to establish their claim and prove specific conduct that the parent corporation could have taken to prevent or mitigate the human rights impacts but failed to do so.[221]

While my proposal ensures all parent corporations have a positive due diligence duty, breach and remedy determination still requires courts to balance corporate conduct against an

[218] The German *Kik* case can illustrate this problem when the host state's tort law sets a short time limit for making a tort claim. See Kristoffer Burck, 'The German KiK Case: From Failed Case Towards National Supply Chain Legislation' (*Public International Law & Policy Group*, 7 December 2020) <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/12/7/the-german-kik-case-from-failed-case-towards-national-supply-chain-legislation> accessed 30 June 2024; 'KiK Lawsuit (Re Pakistan)' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/kik-lawsuit-re-pakistan/> accessed 30 June 2024.

[219] These two points are issues that have been resolved by the EU Directive on Corporate Sustainability Due Diligence in Article 29(3).

[220] This point is also a flaw of the EU Directive on Corporate Sustainability Due Diligence. See Amnesty International, 'Closing the Loopholes: Recommendations for an EU Corporate Sustainability Law Which Works for Rights Holders' (*Amnesty International*, 15 May 2023) 41, 44; Anti-Slavery International, 'Anti-Slavery International Key Takeaways from the European Parliament's Corporate Sustainability Due Diligence Directive Text' (2023) 10–11.

[221] See above, Sections 3.2 and 3.3.

ordinary reasonable person standard and the remoteness test, respectively. This might introduce uncertainty in disputes and business practices. However, this issue exists regardless of legislation as the positive duty of due diligence always requires intermediaries to assess the degree of diligence due.

Lastly, although courts have an international obligation to protect human rights from corporate abuse, the success of this proposal still depends on how courts acknowledge the need for human rights due diligence for corporations within their jurisdictions and apply it as an expected standard of corporate conduct.

At the very least, this proposal recognises the positive duty of due diligence concerning subsidiary operations distinct from the negative duty rooted in substantive human rights. It can unify the standard of the reasonable person for corporations. It can offer a proportionate outcome aligned with the actual source of duty and conduct. Significantly, it offers the potential to address corporate accountability in the conflict of human rights standards in transnational BHR disputes.

This proposition can extend to address other contemporary issues such as the environment, climate change, and other corporate relationships, including the supply chain. Also, analysing the rights model and the positive obligation of due diligence within the context of UK law does not prevent its application to other jurisdictions. The potential of advancing this proposition is discussed in the following section.

5. Advancing the Rights Model for Corporate Responsibility

The rights model acknowledges the guidance-rule concept of tort law, which directs how corporations should behave. Due to the space limitation, this thesis needs to focus on the human rights impacts within the parent-subsidiary relationship in the context of UK law. However, its consideration can extend to other impact from business operations, such as the environment and corporate relationships within the supply chain. It can also guide national courts in other jurisdictions dealing with corporate responsibilities. This section notes this potential.

The first potential involves advancing this concept to other contemporary issues affected by corporate operations. The rights model requires acknowledging human rights due diligence as a societal norm within the home state. Courts then interpret the relevant voluntary conduct

of the parent corporation through the lens of such norms to assume corporate responsibility for identifying, preventing, and mitigating the human rights impacts from subsidiary operations.

The societal norm depends on the behaviour or beliefs commonly accepted and expected within society, playing a crucial role throughout this thesis. The societal norm for establishing the positive obligation focuses on the conduct of parent corporations. The norm that governs this conduct belongs to the home state, determining the expected behaviour of corporations established and domicile within their society. Incorporating societal norms to shape legal duties is a common practice as tort law is an integral component of the cultural framework in which it operates.[222]

Given that UK case law cannot provide insight into this thought, it is necessary to consider the judicial practices of other jurisdictions to understand how the societal norm can be incorporated in other contexts and its effectiveness. In the case of *Milieudefensie et al. v Shell*,[223] the Dutch court considered the corporate responsibility outlined in the UNGPs together with the importance of climate change and the responsibility of states for the energy transition to tackle the insufficiency of sustainability policy of the corporate group and establish a corporate obligation to reduce CO^2 emission.

In this case, the Dutch court incorporated the need to tackle climate change as a societal norm within its jurisdiction, with a recognition of state obligation, and directed its corporation to observe this norm. Considering the widespread concerns about human rights abuses by the supply chain and the need for corporations as chain leaders to address these issues, this model can potentially be extended to incorporate the due diligence concept into a corporate duty of care concerning supply chains. Therefore, this proposition can potentially address the new challenges in our evolving society.

However, extending the rights model to other contemporary issues by interpreting societal norms does not imply that the factors applied in one situation will suit all others. The standard of care exercised by the reasonable person must be adapted to suit the unique circumstances and relationships. For example, corporate influence over a subsidiary may not

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[222] Mauro Bussani and Marta Infantino, 'The Many Cultures of Tort Liability' in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law* (Edward Elgar Publishing 2021) 10.

[223] *Milieudefensie et al v Shell* ECLI:NL:RBDHA:2021:5339, Rechtbank Den Haag (2021) C/09/571932/HA ZA 19-379 (The Hague District Court).

be necessary for the parent-subsidiary relationship as it is in the corporate relationship with the supply chain. Further research is also necessary to frame the relevant voluntary conduct of corporations that contribute to the assumption of responsibility in other settings.

The second potential for advancement is related to applying this model in other jurisdictions. Although the analysis is based on UK tort law, the negligence law concept is common in other jurisdictions with modern legal systems. While tests for negligence vary from one jurisdiction or one context to another, they often include the following elements: (i) the existence of a duty of care towards an affected person; (ii) a breach of the applicable standard of care by the defendant; (iii) a resulting injury to the affected person; (iv) a causation between the breach and injury.[224]

In many jurisdictions, the duty of care is a creation of court interpretation. In civil law jurisdictions such as France and Germany, despite the legislature's best efforts to provide a clear and systematic legislative response to every situation that arises, legislative practice falls far short of this goal. As a result, courts are obliged to interpret the law.[225] Tort law falls within this phenomenon.

In France, the code provision of tort lacks specificity which compels courts to develop the relevant law on a case-by-case basis. As a result, the actual tort law exists outside the code.[226] In Germany, the duty concept was introduced into the notion of unlawfulness leading to the development of the renowned *Verkehrssicherungspflichten* by German courts. This principle can be tentatively summarised as the obligation for individuals who create potential sources of danger in daily life, whether through their actions or property that may impact the rights and interests of others, to take measures to ensure protection against the resulting risks.[227] Therefore, the analytical focus on UK tort law does not imply its exclusive relevance to UK courts or common law systems.

The rights model offers a promising approach to addressing corporate responsibility by recognising both negative and positive obligations of due diligence. By grounding human

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[224] OHCHR, 'Consultation Concept Note: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability' (2017) 6. See also Zerk (n 9) 44.

[225] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 83.

[226] ibid 154.

[227] Basil S Markesinis, John Bell and André Janssen, *Markesinis's German Law of Torts: A Comparative Treatise* (Hart Publishing 2019) 55–56.

rights due diligence in societal norms recognised within the home state, courts can infer a positive duty for corporations based on their shareholding control. Because this duty is contingent on conduct, it circumvents the problem of conflicting non-absolute human rights standards between states inherent in the negative obligation of due diligence. Significantly, this approach allows courts to enforce human rights due diligence immediately without the need for legislation. This proposal is made in the hope that presenting this concept as a procedural liability attached to corporate conduct will attract wider acceptance from businesses by placing the risk of liability under their control.[228]

6. Conclusion

This chapter addresses how home state's courts can interpret corporate and tort law to uphold due diligence for parent corporations as regards the human rights impacts caused by their subsidiaries' operations. The analysis focuses on the positive duty of corporations – i.e., a duty of conduct.

Section 1 explored the challenges posed by the separate corporate entity doctrine and limited liability under corporate law. It then examines the current precedents in UK courts as regards the piercing of the corporate veil, the enterprise theory, and the duty of care. All these principles can impose liability on parent corporations for their subsidiaries' operations which potentially compels corporations to oversee their subsidiaries' operations to avoid the risk of liability. However, the analysis reveals the restricted application of these principles in current judicial practice, which points to the necessity for a refinement of courts' reasoning to uphold the positive duty of due diligence for parent corporations.

Section 2 justified the emphasis on the duty of care as a target for refining courts' reasoning by recognising the dual functions of tort law – liability rules and guidance rules. While piercing the corporate veil and the enterprise theory may result in liability for the parent corporation, they do not consider the appropriate degree of parent corporation diligence. Significantly, these principles hinge on the existence of subsidiary obligations, which may not adequately address situations of corporate dilemma when courts cannot hold subsidiaries liable due to their compliance with the host state's non-absolute human rights standards. This section further argues that current precedent in UK courts primarily centres on the

[228] Muchlinski points out the business attitude in his work that the businesses will resist any extension of liability beyond a procedural liability for failure to exercise reasonable due diligence reporting. See Muchlinski (n 67) 224.

liability-rule concept in establishing the duty of care, leading to the court's reluctance to impose a duty on parent corporations based on shareholding control as the appropriateness for corporate liability is intertwined in establishing a duty of care.

Section 3 demonstrates the effectiveness in tort law of the guidance-rule concept in serving the positive obligation of due diligence for parent corporations. It explores the "rights model" advocated by Stevens in which the consideration of liability for loss is distinct from the determination of the duty of care. By recognising the need for human rights due diligence as a societal norm, courts can assume that duty of care for the subsidiary activities from shareholding control, imposing a duty of conduct on parent corporations.

Furthermore, assessing the breach of this duty requires an explicit determination of the specific conduct in question. Failing this, generalised factors used in negligence law and the due diligence concept may not be effectively applied. The breach of this duty then triggers the remedial rights of victims.

However, this proposition has challenges and limitations, particularly from the corporation's perspective, which expects fewer obligations, and the moral perspective of human rights, which demands more effective obligations and remedies. Section 4 acknowledges these challenges and limitations.

While the focus is on the parent-subsidiary relationship and human rights issues, Section 5 underscores the potential extension of the rights model to other aspects of the BHR context, such as supply chain conduct and environmental harm. Also, it explains how the application of the rights model can be extended to other jurisdictions. This approach can address evolving challenges from corporate operations in our dynamic society.

CHAPTER 7
Conclusion

Introduction

This chapter draws together the discussions in the preceding chapters to provide a conclusion to the central research problem of this thesis: How can courts in the home state address transnational business and human rights ("BHR") disputes where subsidiaries' activities which comply with host state acts or laws result in human rights impacts?

The thesis explores the nuanced understanding of human rights due diligence for corporations under the UN Guiding Principles on Business and Human Rights ("UNGPs"). While its analysis focuses on the respect pillar of the UNGPs, it also strengthens the state's obligations to protect human rights, thereby bolstering the protect and remedy pillars of the UNGPs.

A distinction is drawn between negative and positive obligations of due diligence based on corporate involvement in the human rights impacts. The negative obligation, arising from human rights, requires corporations to refrain from infringing directly on human rights. Consequently, courts can adjudicate disputes related to this obligation under the horizontal effect doctrine. This involves the application of civil liability law to address the horizontal human rights obligations. It represents an obligation of outcome considering the breach of rights.

In contrast, the positive obligation requires corporations to take appropriate steps to prevent the human rights impacts caused by the conduct of others which are connected to their products, services, and operations. Compliance with this positive obligation hinges on the adequacy of measures taken, regardless of whether the human rights impact occurs. Therefore, it represents an obligation of conduct in that it may be deemed to have been breached when corporate diligence falls below the required degree. Unlike the negative obligation, this positive obligation must be established by a positive rule, as it does not arise from substantive human rights.

Recognising this dual obligatory nature of due diligence is a cornerstone of this thesis, a concept that may not receive much attention in other works despite its significance. Building on this understanding, the thesis adopts a court-centric framework of analysis, which

emphasises the adjudicative role of national courts in applying established and existing laws to resolve disputes with a focus on relevant legal issues. This approach is crucial, especially in the absence of specific legislation on due diligence, stepping back from exclusive emphasis on individual autonomy of all human beings to account for all interests at stake within societies.

Illustrated by cases such as *Kaweri* and *Yahoo!*, these interests cover not only human rights recognised in international human rights instruments and corporate obligations to follow host state law, but also state interests in protecting collective values inherent within nations. The state's justification for implementing restrictions on human rights – either through actions or legislation – to protect collective autonomy and foster overall improvement within a society compels corporations to follow these restrictions.

The critical challenges arise in transnational BHR disputes when interests that a state aims to protect or foster within a given society differ from others resulting in different standards of human rights protection among states. Parent corporations establishing subsidiaries in other states confront challenges when their subsidiaries are compelled to comply with restrictions within the host state and for which the justification offered is not recognised in the home state. This phenomenon places corporations at risk of being held responsible for alleged human rights violations in their home state.

The thesis focuses on the legal issues stemming from corporate adherence to the host state's restrictions. As regards a negative obligation of due diligence, the legal issue relates to how courts determine the application of the home state's human rights standards that conflict with those of the host state. As regards a positive obligation, this thesis treats corporations and their subsidiaries as separate entities which requires courts to establish the duty of parent corporations to take appropriate steps to prevent human rights impacts stemming from their subsidiaries' operations.

This concluding chapter highlights the significance of this thesis in responding to practical challenges in transnational BHR disputes, in particular, in the absence of specific due diligence legislation. It underscores three key aspects: the analytical framework; the understanding of conflicting human rights standards between two states; and the establishment of a positive duty for corporations to take appropriate steps in preventing human rights impact.

1. The Need for the Court-Centric Framework of Analysis

Given the necessity of establishing a human rights due diligence duty for corporations, the prevailing approach is to enact legislation. However, this legislative approach is still limited to a few countries compared to the total number of UN members. Furthermore, there remains a legislative gap in which certain corporations may fall outside the scope of the legislation, arguably due to political influence within the legislative process. Consequently, the lack of applicable legislation on human rights due diligence may arise due to the absence of such legislation or the limitations of enacted legislation.

Within the international legal framework, states must protect human rights from violation by non-state actors, including corporations. As an organ of state, courts bear the responsibility to fill this legislative gap and protect human rights from corporate abuse. The adjudicative function of courts is pivotal in interpreting and applying existing law to shape societal behaviour. Their decisions offer an avenue for immediate effect without political interference, provided judicial independence is upheld.

Unlike legislatures which may prioritise the significance of human rights as a goal in shaping legislation, courts require a thorough understanding of the due diligence concept to interpret and apply the existing laws to serve their purpose so as to balance human rights with other interests of states and corporations involved in disputes. This court-centric framework of analysis is essential for understanding the practical barriers faced by courts in applying existing legal tools in transnational BHR disputes, which involve multiple legal areas with conflicting aims that must be balanced within specific situations. This framework aims to reveal how the interplay between different legal domains should be addressed.

While there might be some potential limitation of the court's reactive role in adjudicating a dispute before them, this judicial avenue emerges as a promising complement to legislation in strengthening corporate accountability. This thesis exposes the potential of the court-centric framework in addressing the pressing need for a due diligence duty for corporations. Its aim is to underscore the importance for policymakers of promoting awareness of this potential and to encourage its implementation.

2. Addressing the Conflict of Human Rights Standards between States

Transnational BHR disputes, as discussed in this thesis, stem from human rights restrictions in the host state, which are not recognised in the home state, and which result in a conflict of the human rights standards of the two states. While victims may assert corporate violations of human rights based on the home state's standards, corporations are bound by the standards of the host state. This situation necessitates courts to determine which standards prevail, as the inapplicability of the home state's standards can leave victims without rights and corporations without corresponding negative obligations.

The principles of the indivisibility, interdependence, interrelatedness, and universality of human rights suggest the prospect of prioritising and restricting rights based on societal values. However, they do not guide the extent to which restrictions are allowed. Courts often apply the proportionality concept to address this extent, assessing the suitability and necessity of measures restricting rights before weighing the benefits gained against the human rights that must be sacrificed. This balancing process relies on a common point of view shared by the conflicting principles as a governing norm for courts. This assists courts to determine whether a restricting measure falls within an appropriate range on the sliding scale between the two principles.

However, conflicts between the standards of the two states lack such shared norms, limiting the application of proportionality in these situations. This limitation leads to an argument that resolving this conflict requires invalidating one rule rather than attempting to balance them. Chapter 4 navigated the relevance of the choice of law rules and the act of state doctrine in guiding courts on the legal standard to apply in a dispute. While these rules typically suggest the application of the host state's standards, the public policy exception introduces ambiguity as it remains unclear whether it encompasses the protection of all or certain kinds of human rights. To address this, the chapter argued for using human rights deemed absolute by the home state's law as a guiding framework for courts to justify invoking this exception. This proposition aims to mitigate uncertainty surrounding this exception while recognising the political dimension of human rights and fostering harmony between the home state's public policies to protect human rights and the host state's public policies restricting them.

This finding underscores the need for nuanced approaches to transnational BHR disputes which recognises diverse legal and cultural contexts. It provides practical guidance to courts

and contributes to the ongoing debate on harmonising human rights protection across jurisdictions. This proposition not only addresses uncertainties in legal interpretation but also promotes consistency and coherence in applying human rights standards in transnational business activities while establishing clear boundaries for corporate engagement – in particular those concerning absolute human rights.

The likely outcome is that courts may not hold corporations accountable for violating non-absolute human rights if adherence to host state acts or laws is unavoidable. However, this consideration addresses only the negative obligation of due diligence for corporations.

3. Establishing the Positive Obligation of Due Diligence for Corporations concerning Subsidiary Operations

The thesis further explored the responsibility of parent corporations regarding the human rights impact stemming from their subsidiaries' operations. While both negative and positive duties are integral to human rights due diligence, the positive duty requires a positive rule in that it does not arise from substantive human rights. However, the lack of mandatory due diligence legislation necessitates courts to seek alternative means by which to establish this duty for parent corporations as regards human rights impact caused or contributed to by the operations of their subsidiaries.

This thesis emphasised courts' obligations to protect human rights by interpreting and applying existing laws to enforce this positive duty, particularly in the absence of specific legislation. It argued that these legislative *lacunae* necessitate that courts treat subsidiaries as distinct entities, imposing a positive duty of conduct on parent corporations rather than an outcome-based duty. It explored how courts could impose this positive duty, focusing on the duty of care in tort law and recognising dual functions of tort as liability rules for compensating harm and guidance rules for directing behaviour. These functions align with the negative and positive duties of due diligence.

Chapter 6 explored the "rights model" of tort law advocated by Stevens, which separates the appropriateness of imposing liability for loss from the consideration of duty of care. This model allows courts to recognise human rights due diligence as a societal norm and apply it to assume corporations' duty of care regarding the conduct of their subsidiaries from the shareholding control, regardless of whether or not that control is exercised.

As a result, courts can hold corporations accountable for human rights impacts stemming from their subsidiaries' operations, although courts cannot hold the subsidiary wrong in the negative obligations due to its adherence to host state standards of human rights. This approach can also make the liability of parent corporations proportionate to the degree of breach as it depends on what could be prevented by performing a duty.

Acknowledging that the role of tort law as guidance rules for regulating corporate behaviour within the duty of care not only promotes consistency and coherence in legal interpretation of the duty of care regarding human rights impacts arising from subsidiary operations, but also highlights the importance of active corporate participation in human rights protection. Significantly, it clarifies the responsibilities of parent corporations in ensuring human rights compliance throughout their global operations.

While this thesis focuses primarily on the parent-subsidiary relationship, the positive obligation it introduces can address other contemporary issues, including environmental impact and supply chain relationships. These issues can be established as norms recognised in the home state and can serve as grounds for imposing the duty of care on corporations. However, further study is needed to improve this potential, particularly in framing the voluntary conduct of corporations that constitutes the assumption of responsibility and ensures uniform application across different jurisdictions. Furthermore, in the main this thesis addresses the external relationship as regards responsibility towards victims. There is still a gap for further research on internal corporate governance, especially regarding the duties of directors of both parent corporations and their subsidiaries in this setting.

Having thoroughly examined the court-centric framework discussed in this thesis and its implications, let me conclude by revisiting the case in the Thai court, introduced in the first two paragraphs of the first chapter. In this case, a subsidiary of a sugar conglomerate acquired land for sugarcane production relying on the procedure followed by the host state which resulted in the forced eviction of local villagers. It is important to note that this consideration is based on limited facts without examining statements and evidence from all parties involved.

First, the choice of law requires the court to rely on the host state's laws regarding the right to an adequate standard of living, making it unlikely for the court to hold the parent corporation accountable in terms of the negative obligation of due diligence. However, despite this limitation, the human rights impact persists. Courts may interpret tort law to

impose a duty of care on the parent corporation regarding the land acquisition by its subsidiary if the positive aspect of due diligence is recognised as a societal norm of corporate conduct within Thailand.

In such a scenario, the court can directly address the conduct where the parent corporation falls short of the appropriate degree of diligence concerning its subsidiary in this specific activity, especially regarding the awareness that the host state's law limits the scope for concession. Any shortfall below this established degree allows the court to hold the parent corporation liable for losses that can be prevented by such conduct.

By addressing these complexities through a court-centric analytical framework, this thesis contributes to a deeper understanding of the legal challenges facing transnational BHR disputes. Its analysis offers viable pathways for bridging legislative gaps and reinforcing the imperative of corporate accountability in transnational business activities. Moving forward, this framework can serve as a foundational tool for policymakers, legal practitioners, and scholars dedicated to promoting responsible corporate conduct and advancing human rights protections.

CASES AND DECISIONS

Canada

Nevsun Resources Ltd v Araya (2020) SCC 5

Winnipeg School Division No 1 v Craton (1985) 2 SCR 150

Germany

Decision of the Federal Constitutional Court BVerfGE 1 283 (Shop Closing Law Decision) (1952)

Decision of the Federal Constitutional Court BVerfGE 7 198 (Lüth Decision) (1958)

Decision of the Federal Constitutional Court BVerfGE 35 202 (Lebach Decision) (1973)

Decisions of the Federal Constitutional Court BVerfGE 55 159 (Falconry Hunting Licence Decision) (1980)

Decision of the Federal Constitutional Court BVerfGE 53 135 (Chocolate Easter Bunny Decision) (1980)

Decision of the Federal Constitutional Court BVerfGE 86 1 (Titanic Decision) (1992)

Italy

The ILVA case Italian Constitution Court Decision No 58/2018

Netherlands

Milieudefensie et al v Shell ECLI:NL:RBDHA:2021:5339 Rechtbank Den Haag (2021) C/09/571932 / HA ZA 19-379 (The Hague District Court)

New Zealand

Brown v New Zealand Basing Ltd [2017] NZSC 139, [2018] 1 NZLR 245

Norway

Hempel AS v the Norwegian State decided by the Norwegian Supreme Court on 10 March 2010

Uganda

Baleke Kayira Peter & 4 Ors V Attorney General & 2 Ors Civil Suit No 179 of 2002 the High Court in Kampala, Uganda

United Kingdom

AAA & others v Unilever Plc and Unilever Tea Kenya Limited [2018] EWCA Civ 1532

Adams v Cape Industries Plc [1990] Ch 433

Belhaj and another v Straw and others [2017] UKSC 3

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

British Steel Corp v Granada Television Ltd [1981] AC 1096

Caparo Industries Plc v Dickman [1990] 2 AC 605

Chandler v Cape Plc (2012) [2012] EWCA Civ 525

ClientEarth v Shell Plc and Others [2023] EWHC 1897 (Ch)

Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd [1916] 2 AC 307

DHN Food Distributors v Tower Hamlets LBC [1976] 1 WLR 852

Empresa Nacional De Telecomunicaciones SA v Deutsche Bank AG [2009] EWHC 2579 (QB), [2009] All ER (D) 182 (Nov)

Gilford Motor Company v Horne [1933] Ch 935 CA

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] UKHL 4

Home Office v Dorset Yacht Co Ltd [1970] AC 1004, [1970] UKHL 2

Hurstwood Properties (A) Ltd and others (Respondents) v Rossendale Borough Council and another (Appellants) [2021] UKSC 16

Jones v Lipman and Another [1962] 1 WLR 832, [1962] 1 All ER 442

Kalma & Ors v African Minerals Ltd & Ors [2020] EWCA Civ 144

Kuwait Airways Corp v Iraqi Airways Co & Anor [2002] UKHL 19

Lubbe and Others and Cape Plc and Related Appeals [2000] UKHL 41

Lungowe & Ors v Vedanta Resources Plc & Anor [2017] EWCA Civ 1528

Michael and others (FC) (Appellants) v The Chief Constable of South Wales Police and another (Respondents) [2015] UKSC 2

Okpabi & Ors v Royal Dutch Shell Plc & Anor [2021] UKSC 3

Oppenheimer v Cattermole (Inspector of Taxes) [1975] UKHL TC_50_159, [1976] AC 249

Prest v Petrodel Resources Limited and others [2013] UKSC 34

Regina v Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent) [2004] UKHL 27

Salomon v A Salomon & Co Ltd [1897] AC 22, [1896] UKHL 1

Smith v Sussex Police [2008] UKHL 50

Thompson v The Renwick Group Plc [2014] EWCA Civ 635

Vedanta Resources PLC & Anor v Lungowe & Ors [2019] UKSC 20

Woolfson v Strathclyde Regional Council [1978] SC (HL) 90

United States

Doe I v Cisco Systems Inc (Court of Appeals for the Ninth Circuit) [2023]

Doe I v Cisco Systems Inc (District Court for the Northern District of California) [2014]

Xiaoning et al v Yahoo! Inc et al [2007] District Court for the Northern District of California C 07-2151 CW

The European Court of Human Rights

Handyside v The United Kingdom [1976] ECtHR 5493/72

Maestri v Italy [2004] ECtHR [GC] 39748/98

Merabishvili v Georgia [2017] ECtHR [GC] 72508/13

N v The United Kingdom [2008] ECHR 453, [2008] ECtHR 26565/05

Opuz v Turkey [2009] ECtHR 33401/02

The Sunday Times v The United Kingdom (no 2) [1991] ECtHR 13166/87

The African Court of Human and Peoples' Rights (“ACtHPR”)

Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania [2013] ACtHPR Application No 009, 011 of 2011

The Inter-American Court of Human Rights (“IACtHR”)

Castañeda Gutman v México 6 August 2008 IACtHR Series C No 184

IACtHR Advisory Opinion OC -28/21 [7 June 2021] Requested by the Republic of Columbia

Velazquez Rodriquez v Honduras, the Inter-American Court of Human Rights [Judgment of 29 July 1988, Inter-Am Ct HR (Ser C) No 4 (1988)

The Court of Justice of the European Union ("CJEU")

Dieter Krombach v Andre Bamberski Case C-7/98 Judgment of the CJEU of 28 March 2000

The Human Rights Committee ("HRC")

Joaquín David Herrera Rubio et al v Colombia Communication No 161/1983 (decision adopted on 2 November 1987)

SEH v Netherlands Communication No 3236/2018 (decision adopted on 31 October 2023)

Koreshkov v Belarus Communication No 2168/2012 (decision adopted on 9 November 2017)

The Committee on Economic, Social and Cultural Rights ("CESCR")

Ben Djazia et al v Spain Communication No 5/2015 (decision adopted on 20 June 2017)

Rosario Gómez-Limón Pardo v Spain Communication No 52/2018 (decision adopted on 5 March 2020)

Others

International Arbitral Award: Alabama Claims of the United States of America against Great Britain. Award Rendered on 14 September 1872 by the Tribunal of Arbitration Established by Article I of the Treaty of Washington of 8 May 1871

LEGISLATION AND INTERNATIONAL INSTRUMENTS

France

Commercial Code Articles L225-102-4 and L225-102-4 (added by Ordinance No 2017-1162 of 12 July 2017)

Germany

The Basic Law (Constitution)

The Network Enforcement Act (Netzwerkdurchsetzungsgesetz NetzDG) (2017)

The Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (2021)

Netherlands

The Child Labour Due Diligence Act 2019

Norway

The Transparency Act 2021

South Korea

The National Security Act 2011

Switzerland

The Swiss Responsible Business Initiative (2021)

Thailand

Penal Code Section 112

United Kingdom

The Companies Act 2006

The Modern Slavery Act 2015

The Bribery Act 2010

Vietnam

Cybersecurity Law 2018

International Instruments

Statute of the International Court of Justice Article 38

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

First Optional Protocol to the International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

European Convention on Human Rights

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation)

Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EC) 2023/2859

American Convention on Human Rights

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

Recommendations/Guidance of International Organisations

European Court of Human Rights, ‘Guide on Article 2 of the Convention – Right to Life’

The UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (2011)

The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012)

OECD Guidelines for Multinational Enterprises (2011)

OECD Due Diligence Guidance for Responsible Business Conduct (2018)

OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023)

Draft Instruments

Draft Legally Binding Instruments to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (as of 2023)

BIBLIOGRAPHY

Books and Articles

Akhtar Z, 'Act of State, State Immunitycne, and Judicial Review in Public International Law' (2016) 7 Transnational Legal Theory 354

Alexy R, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 Ratio Juris 433

—— 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131

—— 'Discourse Theory and Fundamental Rights' in Agustín José Menéndez and Erik Oddvar Eriksen (eds), *Arguing Fundamental Rights*, vol 77 (Springer Netherlands 2006)

—— 'The Reasonableness of the Law' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer Netherlands 2009)

—— *A Theory of Constitutional Rights* (Oxford University Press 2010)

—— 'Constitutional Rights and Proportionality' [2014] Revus (Online) 51

—— 'Constitutional Rights, Proportionality, and Argumentation' in Jan Sieckmann (ed), *Proportionality, Balancing, and Rights*, vol 136 (Springer International Publishing 2021)

Alston P and Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156

Amos M, *Human Rights Law* (2nd edition, Hart Publishing 2014)

Arnold DG, 'Corporations and Human Rights Obligations' (2016) 1 Business and Human Rights Journal 255

Baade B, 'Due Diligence and the Duty to Protect Human Rights' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020)

Barak A, ‘Proportionality and Principled Balancing’ (2010) 4 Law & Ethics of Human Rights 1

—— *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2011)

Barker K, Grantham R and Swain W (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart Publishing 2015)

Baxi U, ‘Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus’ (2016) 1 Business and Human Rights Journal 21

Beatty DM, ‘Proportionality’, *The Ultimate Rule of Law* (Oxford University Press 2004)

Beco G de, ‘The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities’ (2019) 68 International & Comparative Law Quarterly 141

Beever A, *Rediscovering the Law of Negligence* (Hart 2007)

—— ‘Corrective Justice and Personal Responsibility in Tort Law’ (2008) 28 Oxford Journal of Legal Studies 475

Beitz CR, *The Idea of Human Rights* (Oxford University Press 2009)

Bell J, *Policy Arguments in Judicial Decisions* (Oxford University Press 1983)

Berle AA, ‘The Theory of Enterprise Entity’ (1947) 47 Columbia Law Review 343

Bernstorff J von, ‘Proportionality Without Balancing: Why Judicial Ad Hoc Balancing Is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014)

Bhattacharyya G, Macdonald L and Hoare G, ‘Judicial Restraint and Abstention: A Recent Application of the “Act of State Rule”’ (2010) 25 Journal of International Banking Law and Regulations 140

Bilchitz D and Deva S, 'The Human Rights Obligations of Business: A Critical Framework for the Future', *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013)

Bingham T, 'Tort and Human Rights', *The Business of Judging* (Oxford University Press 2000)

—— 'The Alabama Claims Arbitration' (2005) 54 The International and Comparative Law Quarterly 1

Bishop JD, 'The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations' (2012) 22 Business Ethics Quarterly 119

Blumberg P, 'Limited Liability and Corporate Groups' (1986) 11 The Journal of Corporation Law 573

Blumberg PI, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press 1993)

Bonnitcha J and McCorquodale R, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 899

Briggs A, 'The Impact of Recent Judgments of the European Court on English Procedural Law and Practice' (University of Oxford Faculty of Law Legal Studies Research Paper Series, 2005)

—— *Private International Law in English Courts* (Oxford University Press 2014)

—— *The Conflict of Laws* (Oxford University Press 2019)

Brodie PH, 'Robert Stevens, Torts and Rights Oxford: Oxford University Press (Www.Oup.Com) 2007' (2009) 13 Edinburgh Law Review 534

Buchanan A, 'Why International Legal Human Rights?' in Rowan Cruft, Wenqing Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015)

Buckley RA, *The Modern Law of Negligence* (Butterworths 1988)

Bueno N and Bright C, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International & Comparative Law Quarterly 789

Bussani M and Infantino M, 'The Many Cultures of Tort Liability' in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law* (Edward Elgar Publishing 2021)

Çali B, 'Balancing Test: European Court of Human Rights (ECtHR)', *Oxford Public International Law* (2018) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3426.013.3426/law-mpeipro-e3426> accessed 30 June 2024

Cane P, 'Justice and Justifications for Tort Liability' (1982) 2 Oxford Journal of Legal Studies 30

—— *The Anatomy of Tort Law* (Hart Publishing 1997)

—— 'Retribution, Proportionality, and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998)

—— 'Torts and Rights by Robert Stevens' (2008) 71 The Modern Law Review 641

Cane P and Gessner V, *Responsibility in Law and Morality* (Bloomsbury Publishing 2003)

Cassel D, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 Business and Human Rights Journal 179

Cerna CM, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 Human Rights Quarterly 740

Chew M, 'Human Rights in Singapore: Perceptions and Problems' (1994) 34 Asian Survey 933

Chirwa DM and Mbazira C, ‘Constitutional Rights, Horizontality, and the Ugandan Constitution: An Example of Emerging Norms and Practices in Africa’ (2020) 18 International Journal of Constitutional Law 1231

Chng K, ‘A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws’ (2018) 14 Journal of Private International Law 130

Choudhury B, ‘Corporate Law’s Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough’ (2023) 8 Business and Human Rights Journal 180

—— ‘Enforcing International Human Rights Law Against Corporations’ in I Tourkochoriti et al (eds), *Comparative Enforcement of International Law* (Forthcoming) <https://digitalcommons.osgoode.yorku.ca/all_papers/372/> accessed 30 June 2024

Choudhury B and Petrin M, ‘Parent Company Liability’ in *Corporate Duties to the Public* (Cambridge University Press 2019)

Clérico L, ‘Proportionality in Social Rights Adjudication: Making It Workable’ in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer International Publishing 2018)

Cohen-Eliya M and Porat I, ‘American Balancing and German Proportionality: The Historical Origins’ (2010) 8 International Journal of Constitutional Law 263

Collins H, ‘On the (In)Compatibility of Human Rights Discourse and Private Law’ in Hans Micklitz (ed), *Constitutionalization of European Private Law: XXII/2* (Oxford University Press 2014)

Collins L and others (eds), *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell/Thomson Reuters 2012)

Corr JB, ‘Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes’ (1985) 39 University of Miami Law Review 647

Corten O, ‘The Notion of “Reasonable” in International Law: Legal Discourse, Reason and Contradictions’ (1999) 48 The International and Comparative Law Quarterly 613

Cossart S, Chaplier J and Beau de Lomenie T, 'The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All Developments in the Field' (2017) 2 Business and Human Rights Journal 317

Cottier T and others, 'The Principle of Proportionality in International Law' NCCR Trade Working Paper No 2012/38 (The National Centre of Competence in Research 2012) <https://www.wti.org/media/filer_public/9f/1b/9f1bd3cf-dafd-4e14-b07d-8934a0c66b8f/proportionality_final_29102012_with_nccr_coversheet.pdf> accessed 30 June 2024

Crawford J, 'Sovereignty and Equality of States' in *Brownlie's Principles of Public International Law* (Oxford University Press)

Crockett C, 'The Relationship between the Act of State Doctrine and the Conflict of Laws and Choice-of-Law Rules' (1989) 10 NYLS Journal of International and Comparative Law 309

Davies P, Worthington S and Hare C, *Gower: Principles of Modern Company Law* (11th edn, Sweet & Maxwell 2021)

Dearborn M, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195

Dehm J, 'Beyond Climate Due Diligence: Fossil Fuels, "Red Lines" and Reparations' (2023) 8 Business and Human Rights Journal 151

Denza E, 'The Relationship between International and National Law' in MD Evans (ed), *International Law* (5th edn, Oxford University Press 2018)

Deva S, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 Leiden Journal of International Law 389

Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013)

Domaradzki S, Khvostova M and Pupovac D, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 20 Human Rights Review 423

Donaldson T, *Corporations and Morality* (Prentice-Hall 1982)

Donbinson I and Johns F, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd ed, Edinburgh University Press 2017)

Edelman J and Salinger M, 'Comity in Private International Law and Fundamental Principles of Justice' in Andrew Dickinson and Edwin Peel (eds), *A Conflict of Laws Companion* (Oxford University Press 2021)

Endicott T, 'Proportionality and Incommensurability' in Bradley W Miller, Grant Huscroft and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014)

Follesdal A, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 International Journal of Constitutional Law 359

Gardbaum S, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Michigan Law Review 387

—— 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Mark Tushnet and Vicki C Jackson (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017)

Gauthier D, 'Symposium Papers, Comments and an Abstract: Hobbes's Social Contract' (1988) 22 Noûs 71

Gerards J, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 International Journal of Constitutional Law 466

Greer S, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 The Cambridge Law Journal 412

Griffey B, ‘The “Reasonableness” Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2011) 11 Human Rights Law Review 275

Griffin J, ‘When Human Rights Conflict’ in *On Human Rights* (Oxford University Press 2008)

Griffith A, Smit L and McCorquodale R, ‘Responsible Business Conduct and State Laws: Addressing Human Rights Conflicts’ (2020) 20 Human Rights Law Review 641

Grohmann N-H, ‘Tracing the Development of the Proportionality Analysis in Relation to Forced Evictions under the ICESCR’ (2022) 22 Human Rights Law Review 1

Habermas J, *Between Fact and Norm: Contributions to a Discourse Theory of Law and Democracy* (2nd edn, MIT Press, Cambridge, Massachusetts 1996)

Hannigan B, *Company Law* (5th edn, Oxford University Press 2018)

Hansmann H and Kraakman R, ‘Toward Unlimited Shareholder Liability for Corporate Torts’ (1991) 100 The Yale Law Journal 1879

Hansmann H, Kraakman R and Squire R, ‘Law and the Rise of the Firm’ (2006) 119 Harvard Law Review 1333

Harris T, ‘Settling a Corporate Accountability Lawsuit Without Sacrificing Human Rights: Wang Xiaoning v. Yahoo!’ (2008) 15 Human Rights Brief 5

Haule RR, ‘Some Reflections on the Foundation of Human Rights — Are Human Rights an Alternative to Moral Values?’ (2006) 10 Max Planck Yearbook of United Nations Law Online 367

Hazenberg JLJ, ‘Transnational Corporations and Human Rights Duties: Perfect and Imperfect’ (2016) 17 Human Rights Review 479

Henkin L, ‘The Universality of the Concept of Human Rights’ (1989) 506 The Annals of the American Academy of Political and Social Science 10

Henriksen A, *International Law* (3rd edn, Oxford University Press 2021)

Hernández-Truyol BE, 'International Law, Human Rights, and LatCrit Theory: Civil and Political Rights: An Introduction' (1996) 28 The University of Miami Inter-American Law Review 223

Hill TH, 'Sovereign Immunity and the Act of State Doctrine: Theory and Policy in United States Law' (1982) 46 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* / The Rabel Journal of Comparative and International Private Law 118

Honoré T, 'The Dependence of Morality on Law' (1993) 13 Oxford Journal of Legal Studies 1

Hopt KJ, 'Groups of Companies: A Comparative Study on the Economics, Law and Regulation of Corporate Groups' (2015) Max Planck Institute for Comparative and International Private Law and ECGI

International Organisation of Employers and Konrad Adenauer Foundation, *Key Developments in Mandatory Human Rights Due Diligence and Supply Chain Law: Considerations for Employers* (2021) <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=156042&token=ee1bad43bfa8dbf9756245780a572ff4877a86d5> accessed 30 June 2024

Inter-Parliamentary Union, *Human Rights* (2016) <https://www.ipu.org/resources/publications/handbooks/2016-10/human-rights> accessed 30 June 2024

Ireland P, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34 Cambridge Journal of Economics 837

Israel BR, '"Make Money Without Doing Evil?" Caught Between Authoritarian Regulations in Emerging Markets and a Global Law of Human Rights, U.S. ICTs Face a Twofold Quandary' (2009) 24 Berkeley Technology Law Journal 617

Jackson K, 'Corporate Autonomy: Law, Constitutional Democracy, and the Rights of Big Business' (Columbia University 2019)

Jägers N, ‘UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?’ (2011) 29 Netherlands Quarterly of Human Rights 159

Jaggi S, ‘Lüth Case (Ger)’, *Oxford Constitutional Law* (2016) <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e556> accessed 30 June 2024

Kershaw D, *Company Law in Context: Text and Materials* (2nd edn, Oxford University Press 2012)

Knox JH, ‘Horizontal Human Rights Law’ (2008) 102 The American Journal of International Law 1

Krajewski M, Tonstad K and Wohltmann F, ‘Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?’ (2021) 6 Business and Human Rights Journal 550

Krieger H and Peters A, ‘Due Diligence and Structural Change in the International Legal Order’ in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020)

Kumm M, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review Rights, Balancing & Proportionality’ (2010) 4 Law & Ethics of Human Rights 140

Landau I, ‘Human Rights Due Diligence and the Risk of Cosmetic Compliance’ (2019) 20 Melbourne Journal of International Law 1

Lando M, ‘Reframing the English Foreign Act of State Doctrine’ [2023] The Modern Law Review

Legg A, ‘Proportionality: Determining Rights’ in *The Margin of Appreciation in International Human Rights Law* (Oxford University Press 2012)

Leigh I, ‘Reversibility, Proportionality, and Conflicting Rights: Fernández Martínez v. Spain’ in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights* (Oxford University Press 2017)

Leite M, ‘Beyond Buzzwords: Mandatory Human Rights Due Diligence and a Rights-Based Approach to Business Models’ (2023) 8 Business and Human Rights Journal 197

Lindahl L, ‘On Robert Alexy’s Weight Formula for Weighing and Balancing’ in *Rights: Concepts and Contexts* (2017)

Lixinski L, ‘Balancing Test: Inter-American Court of Human Rights (IACtHR)’, *Oxford Public International Law* (2019) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3425.013.3425/law-mpeipro-e3425> accessed 30 June 2024

López C, ‘The “Ruggie Process”: From Legal Obligations to Corporate Social Responsibility?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013)

Loth MA, ‘Corrective and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim’ (2015) 22 Maastricht Journal of European and Comparative Law 788

MacCormick N, ‘Reasonableness and Objectivity’ (1999) 74 Notre Dame Law Review 1575

Macklem P, *The Sovereignty of Human Rights* (Oxford University Press 2015)

Mares R, ‘Liability within Corporate Groups: Parent Companies Accountability for Subsidiary Human Rights Abuses’ in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020)

Markesinis BS, Bell J and Janssen A, *Markesinis’s German Law of Torts: A Comparative Treatise* (Hart Publishing 2019)

Martens J, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (2014)

Martin-Ortega O, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2014) 32 Netherlands Quarterly of Human Rights 44

Mayer C, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press 2018)

—— 'The Governance of Corporate Purpose' [2021] SSRN Electronic Journal

McCorquodale R and Smit L, 'Human Rights, Responsibilities and Due Diligence: Key Issues for a Treaty' in David Bilchitz and Surya Deva (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017)

McGowan J, 'After Delays, EU Approves Corporate Sustainability Due Diligence Law' (*Forbes*, 15 March 2024)

Merryman JH and Pérez-Perdomo R, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Third, Stanford University Press 2007)

Miller AD and Perry R, 'The Reasonable Person' (2012) 87 New York University Law Review 323

Mills A, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201

Möller K, 'Balancing and the Structure of Constitutional Rights' (2007) 5 International Journal of Constitutional Law 453

—— 'Proportionality: Challenging the Critics' (2012) 10 International Journal of Constitutional Law 709

—— 'Towards a Theory of Balancing and Proportionality: The Point and Purpose of Judicial Review' in *The Global Model of Constitutional Rights* (Oxford University Press 2012)

—— ‘Proportionality’ in *The Global Model of Constitutional Rights* (Oxford University Press 2012)

—— ‘Beyond Reasonableness: The Dignitarian Structure of Human and Constitutional Rights’ (2021) 34 Canadian Journal of Law & Jurisprudence 341

Moran M, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press 2003)

Morgan P, ‘Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?’ (2015) 31 Journal of Professional Negligence 276

Muchlinski P, ‘The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights’ (2021) 6 Business and Human Rights Journal 212

Muller A, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’ (2009) 9 Human Rights Law Review 557

Murphy J, ‘Rights, Reductionism and Tort Law’ (2008) 28 Oxford Journal of Legal Studies 393

Neglia M, ‘The Environmental Disaster and Human Rights Violations of the ILVA Steel Plant in Italy’ (FIDH 2018)

—— ‘Striking the Right(s) Balance: Conflicts between Human Rights and Freedom to Conduct a Business in the ILVA Case in Italy’ (2020) 5 Business and Human Rights Journal 143

Nickel J, ‘Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights’ (2008) 30 Human Rights Quarterly 984

Nickel JW, ‘Assigning Functions to Human Rights: Methodological Issues in Human Rights Theory’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018)

Nolan D, ‘Negligence and Human Rights Law: The Case for Separate Development’ (2013) 76 Modern Law Review 286

—— ‘Assumption of Responsibility: Four Questions’ [2019] Current Legal Problems 123

Nolan D and Oliphant K, *Lunney & Oliphant’s Tort Law: Text and Materials* (7th edn, Oxford University Press 2023)

Nolan D and Robertson A, ‘Rights and Private Law’ (Social Science Research Network 2011) SSRN Scholarly Paper ID 3085135

Nolan J and Taylor L, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ (2009) 87 Journal of Business Ethics 433

Nollkaemper A, ‘The Independence of the Domestic Judiciary in International Law’ (2006) XVII Finnish Yearbook of International Law

—— *National Courts and the International Rule of Law* (Oxford University Press 2011)

Nutting CB, ‘Suggested Limitations of the Public Policy Doctrine’ [1935] Minnesota Law Review 196

Oster J, ‘Public Policy and Human Rights’ (2015) 11 Journal of Private International Law 542

Palombo D, ‘The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals’ (2019) 4 Business and Human Rights Journal 265

—— *Business and Human Rights: The Obligations of the European Home States* (Hart Publishing 2020)

Paul JR, ‘Comity in International Law’ (1991) 32 Harvard International Law Journal 1

—— ‘The Transformation of International Comity’ (2008) 71 Law and Contemporary Problems 19

Peel E and others, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014)

Peters A, Krieger H and Kreuzer L, ‘Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates’ in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020)

Petersen N, ‘Alexy and the “German” Model of Proportionality: Why the Theory of Constitutional Rights Does Not Provide a Representative Reconstruction of the Proportionality Test’ (2020) 21 German Law Journal 163

Petrin M, ‘Assumption of Responsibility in Corporate Groups: Chandler v Cape Plc’ (2013) 76 The Modern Law Review 603

Petrin M and Choudhury B, ‘Group Company Liability’ (2018) 19 European Business Organization Law Review 771

Plunkett J, *The Duty of Care in Negligence* (Hart Publishing 2018)

Poole TM, ‘Proportionality in Perspective’ [2010] SSRN Electronic Journal

Porat I and Cohen-Eliya M, *Proportionality and Constitutional Culture* (Cambridge University Press 2013)

Priel D, ‘That Can’t Be Rights (Review of Robert Stevens’s ’Torts and Rights’)’ (2011) 2 Jurisprudence 227

Quadros F de and Stone HD, ‘Act of State Doctrine’ in *Oxford Public International Law* (2021) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1374> accessed 30 June 2024

Quijano G and Lopez C, ‘Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?’ (2021) 6 Business and Human Rights Journal 241

Rachovitsa A, ‘Balancing Test: African Court on Human and Peoples’ Rights (ACtHPR)’, *Oxford Public International Law* (2020) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3636.013.3636/law-mpeipro-e3636> accessed 30 June 2024

Radcliff B, ‘The General Will and Social Choice Theory’ (1992) 54 The Review of Politics 34

Raz J, ‘Human Rights in the Emerging World Order’ [2009] Transnational Legal Theory 19

Riley C and Akanmidu O, ‘Explaining and Evaluation Transnational Tortious Actions against Parent Companies: Lessons from Shell and Nigeria’ (2022) 30 African Journal of International and Comparative Law 229

Rodley N, ‘International Human Rights Law’ in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018)

Rosenfeld M, ‘Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction’ (2013) 11 International Journal of Constitutional Law 125

Rubio JJÁ and Yiannibas K, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017)

Ruggie JG, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101 The American Journal of International Law 819

—— ‘UN SRSG for Business & Human Rights Remarks for ICJ Access to Justice Workshop’ (2009)

Ruggie JG and Nelson T, ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges’ (2015) 22 The Brown Journal of World Affairs 99

Ruggie JG and Sherman JF, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28 European Journal of International Law 921

Rühl G, ‘Cross-Border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act’ in Borg-Barthet, Živković et al (eds), *From Theory to Practice in Private*

International Law: Gedächtnisschrift for Professor Jonathan Fitchen (Hart Publishing 2024)

Santner AL, 'A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future' (2011) 43 George Washington International Law Review 375

Savourey E and Brabant S, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption' (2021) 6 Business and Human Rights Journal 141

Schilling-Vacaflor A, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2021) 22 Human Rights Review 109

Schultz T and Ridi N, 'Comity and International Courts and Tribunals' (2017) 50 Cornell International Law Journal 578

Schutter OD, 'Corporations and Economic, Social, and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (Oxford University Press 2014)

Shelton D, *Remedies in International Human Rights Law* (Oxford University Press 2015)

Shmueli B, 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) University of Michigan Journal of Law Reform 745

Sieckmann J, 'Proportionality as a Universal Human Rights Principle' in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer International Publishing 2018)

—— 'To Balance or Not to Balance: The Quest for the Essence of Rights' in Jan Sieckmann (ed), *Proportionality, Balancing, and Rights*, vol 136 (Springer International Publishing 2021)

Sjåfjell B, 'The Courts as Environmental Champions: The Norwegian Hempel Cases' (2016) 13 European Company Law 199

Smet S, ‘Introduction—Conflicts of Rights in Theoretical and Comparative Perspective’ in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights* (Oxford University Press 2017)

Stapleton J, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998)

—— ‘Evaluating Goldberg and Zipursky’s Civil Recourse Theory’ (2006) 75 Fordham Law Review 1529

Stevens R, *Torts and Rights* (Oxford University Press 2007)

Symeonides SC, ‘Rome II and Tort Conflicts: A Missed Opportunity’ (2008) 56 The American Journal of Comparative Law 173

—— *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press 2014)

‘The Act of State Doctrine-Its Relation to Private and Public International Law’ (1962) 62 Columbia Law Review 1278

Roberts A and Sivakumaran S, ‘The Theory and Reality of the Sources of International Law’in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018)

Thomas D, ‘Xiaoning v. Yahoo! Inc.’s Invocation of the Alien Tort Statute: An Important Issue but an Improper Vehicle’ (2008) 11 Vanderbilt Journal of Entertainment & Technology Law 211

Tsakyrakis S, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 International Journal of Constitutional Law 468

Van Dam C, ‘Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights’ (2011) 2 Journal of European Tort Law 221

Vandekerckhove K, ‘Piercing the Corporate Veil’ (2007) 4 Kluwer Law International 191

Vašák K, ‘A 30-Year Struggle; the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights’ [1977] UNESCO Courier 29

Vázquez D and Delaplace D, ‘Public Policies from a Human Rights Perspective: A Developing Field’ SUR - International Journal on Human Rights 33

Venezia G and Venezia CC, ‘Yahoo! and the Chinese Dissidents: A Case Study of Trust, Values, and Clashing Cultures’ (2010) 6 Journal of Business Case Studies (JBCS)

Vordermayer-Riemer M, ‘The International Covenant on Economic, Social and Cultural Rights’ in *Non-Regression in International Environmental Law: Human Rights Doctrine and the Promises of Comparative International Law* (Intersentia 2020)

Wagner G, ‘Tort Law and Human Rights’ in Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains*, vol 6 (Springer International Publishing 2021)

Walton G, *China’s Golden Shield: Corporations and the Development of Surveillance Technology in the People’s Republic of China* (Rights & Democracy 2001)

Webb P, ‘International Law and Restraints on the Exercise of Jurisdiction by National Courts of States’ in Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018)

Weber R and Baisch R, ‘Liability of Parent Companies for Human Rights Violations of Subsidiaries’ (2016) European Business Law Review 669

Weihrauch D, Carodenuto S and Leipold S, ‘From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act’ (2022) Regulation & Governance 909

Weinrib EJ, ‘Corrective Justice’ in *The Idea of Private Law* (Oxford University Press 2012)

Weinstock D, ‘Legal Positivism Special Section: McGill Companion to Law’ (2020) 66 McGill Law Journal 115

Weir T, *An Introduction to Tort Law* (2nd edn, Oxford University Press 2006)

Wettstein F, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22 Business Ethics Quarterly 739

Whelan DJ, 'Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights' [2008] Economic Rights Working Papers

—— 'Indivisible Human Rights and the End(s) of the State' in Kurt Mills and David J Karp (eds), *Human Rights Protection in Global Politics. Global Issues Series* (Palgrave Macmillan 2015)

Williams GL and Hepple BA, *Foundations of the Law of Tort* (2nd edn, Butterworths 1984)

Witting C, 'Duty of Care: An Analytical Approach' (2005) 25 Oxford Journal of Legal Studies 33

Witting CA, *Liability of Corporate Groups and Networks* (Cambridge University Press 2018)

Worthington S and Agnew S, *Sealy & Worthington's Text, Cases, and Materials in Company Law* (Oxford University Press 2022)

Wright G, 'Risky Business; Enterprise Liability, Corporate Groups and Torts' (2017) 8 Journal of European Tort Law 54

Xu X and Wilson G, 'On Conflict of Human Rights' (2006) 5 Pierce Law Review 28

Yalnazov O, *Precedent and Statute: Lawmaking in the Courts versus Lawmaking in Parliament* (Springer Fachmedien 2018)

Zipursky BC, 'Civil Recourse, Not Corrective Justice' (2000) 6 Legal Theory 457

Zipursky BC and Goldberg JCP, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 Fordham Law Review 1563

Zysset A and Scherz A, 'Proportionality as Procedure: Strengthening the Legitimate Authority of the UN Committee on Economic, Social and Cultural Rights' (2021) 10 Global Constitutionalism 524

UN and Treaty Bodies Documents

CESCR, 'Concluding Observations on the Initial Report of Uganda' [UN Doc E/C.12/UGA/CO/1 (2015)]

CESCR, General Comment No 7 (E/1998/22, annex IV)

CESCR, General Comment No 20 (E/C.12/GC/20)

HRC, General Comment No 29 (CCPR/C/21/Rev.1/Add.11)

HRC, General Comment No 27 (CCPR/C/21/Rev.1/Add.9)

HRC, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13)

HRC, General Comment No 34 (CCPR/C/GC/34)

HRC, General Comment No 37 (CCPR/C/GC/37)

OHCHR, 'Frequently Asked Questions on Economic, Social and Cultural Rights' (2008) Fact Sheet No 33

—— *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011)

—— *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012)

—— 'OHCHR Consultation Concept Note: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability' (2017)

—— ‘Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability’ (2018) A/HRC/38/20/Add.2

‘Proclamation of Teheran’ (UN Doc A/CONF32/41 1968)

‘Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 29 March-2 April 1993’ (UN, 1993)

‘Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights, San Jose, Costa Rica, 18-22 January 1993.’ (UN, 1993)

‘Singapore National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21’ (A/HRC/WG.6/38/SGP/1)

‘Vienna Declaration and Program of Action’ (UN Doc A/CONF157/23-EN 1993)

Reports

Amnesty International, ‘DRC: Powering Change or Business as Usual?’ (Amnesty International 2023)

—— ‘Closing the Loopholes: Recommendations for an EU Corporate Sustainability Law Which Works for Rights Holders’ (*Amnesty International*, 15 May 2023)

Amnesty International and Business & Human Rights Resource Centre, ‘Creating a Paradigm Shift. Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse’ (2017)

Anti-Slavery International, ‘Anti-Slavery International Key Takeaways from the European Parliament’s Corporate Sustainability Due Diligence Directive Text’ (2023)

British Institute of International and Comparative Law and others, *Study on Due Diligence Requirements through the Supply Chain.Part I, Synthesis Report* (Publications Office of the European Union 2020)

—— *Study on Due Diligence Requirements through the Supply Chain.Part III, Country Reports* (Publications Office of the European Union 2020)

Cotula L, 'Addressing the Human Rights Impacts of "Land Grabbing"' (European Parliament 2014) EXPO/B/DROI/2014/06

European Parliament, 'Report Containing a Motion for a Non-Legislative Resolution on the Draft Council Decision on the Conclusion, on Behalf of the European Union, of the Partnership and Cooperation Agreement between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part' (2019) (15375/2018 – C8-0026/2019 – 2018/0403M(NLE))

FIAN Germany, 'Human Rights Violations in the Context of Kaweri Coffee Plantation/ Neumann Kaffee Gruppe in Mubende/Uganda: Long-Term Impacts of a Forced Eviction without Compensation' (2019)

ILA Study Group on Due Diligence in International Law, 'First Report' (ILA 2014)

—— 'Second Report' (ILA 2016)

International Law Commission, 'Guide to Practice on Reservations to Treaties, 2011' (2011) Report of the International Law Commission on the work of its sixty-third session

McBride J, *The Doctrines and Methodology of Interpretation of The European Convention on Human Rights by the European Court of Human Rights* (Council of Europe 2021)

Open-ended Intergovernmental Working Group (OEIGWG), '2023 Updated Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises'

Permanent Representative Committee, 'Note on Proposal for a Directive on Corporate Sustainability Due Diligence' (30 November 2022) 10524/1/22 Rev 1 [Interinstitutional File No 2022/0051(COD)]

The Council on Ethics, the Norwegian Government Pension Fund Global, 'Recommendation to Exclude PTT PCL and PTT Oil and Retail Business PCL from Investment' (10 May 2022)

United Nations, 'Alabama Claims of the United States of America against Great Britain. Award Rendered on 14 September 1872 by the Tribunal of Arbitration Established by Article I of the Treaty of Washington of 8 May 1871' in United Nations, *Reports of International Arbitral Awards,* Vol XXIX (United Nations 2011)

Zerk J, 'Corporate Liability for Gross Human Rights Abuses - Towards a Fairer and More Effective System of Domestic Law Remedies' (2014)

News and Blogs

'Anvil Mining Lawsuit (Re Complicity in Dem Rep of Congo, Filed in Canada)' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/anvil-mining-lawsuit-re-complicity-in-dem-rep-of-congo-filed-in-canada/> accessed 30 June 2024

Burck K, 'The German KiK Case: From Failed Case Towards National Supply Chain Legislation' (*Public International Law & Policy Group*, 7 December 2020) <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/12/7/the-german-kik-case-from-failed-case-towards-national-supply-chain-legislation> accessed 30 June 2024

'Chiquita Lawsuits (Re Colombia, Filed in USA by US Nationals)' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/chiquita-lawsuits-re-colombia-filed-in-usa-by-us-nationals/> accessed 30 June 2024

'Cisco Rejects Falun Gong "China Online Spying" Lawsuit' *BBC News* (24 May 2011) <https://www.bbc.com/news/world-asia-pacific-13516027> accessed 30 June 2024

'Cisco Systems Lawsuits (Re China)' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/cisco-systems-lawsuits-re-china/> accessed 30 June 2024

‘Community Relocation’ (*Human Rights and Business Dilemmas Forum - Dilemmas*) <https://hrbdf.org/dilemmas/community-relocation/> accessed 30 June 2024

‘Corporate Sustainability Due Diligence Directive Gets through Vote from Council of the EU’ (*Osborne Clarke*, 15 March 2024) <https://www.osborneclarke.com/insights/corporate-sustainability-due-diligence-directive-gets-through-vote-council-eu> accessed 30 June 2024

FIAN, ‘Ugandan Court Orders Compensation Be Paid to Evictees of the Kaweri-Coffee-Plantation’ <https://fian.org/en/press-release/article/ugandan-court-orders-compensation-be-paid-to-evictees-of-the-kaweri-coffee-plantation-576> accessed 30 June 2024

FIAN Netherlands, ‘Land Grabbing in Uganda’ (2012) <https://archive.wphna.org/wp-content/uploads/2014/04/2012-07-FIAN-land-grabbing-in-Uganda-Fact-sheet.-Mubende.pdf> accessed 30 June 2024

Henkel K, ‘Landgrabbing in Uganda: Urteil besser spät als nie’ *Die Tageszeitung: taz* (18 October 2023) <https://taz.de/!5963708/> accessed 30 June 2024

Inclusive Development International, ‘Case Brief: Class Action Lawsuit by Cambodian Villagers Against Mitr Phol Sugar Corporation’ <https://www.inclusivedevelopment.net/wp-content/uploads/2020/12/Mitr-Phol-Class-Action-Case-Brief.pdf> accessed 30 June 2024

‘KiK Lawsuit (Re Pakistan)’ (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/kik-lawsuit-re-pakistan/> accessed 30 June 2024

‘Mandatory Human Rights Due Diligence in the UK: To Be or Not to Be?’ (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/blog/mandatory-human-rights-due-diligence-in-the-uk-to-be-or-not-to-be/> accessed 30 June 2024

‘Mitr Phol Group Response to Alleged Human Rights Abuses and Seizure of Land by Sugar Companies in Cambodia’ (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/mitr-phol-group-response-to-

alleged-human-rights-abuses-and-seizure-of-land-by-sugar-companies-in-cambodia/> accessed 30 June 2024

Vodafone Group Plc 'Response on Issues Relating to Mobile Network Operations in Egypt' 22 February 2011 <https://media.business-humanrights.org/media/documents/files/media/documents/vodafone-statement-re-egypt-22-feb-2011.pdf> accessed 30 June 2024

'Xiaoning v Yahoo!, Inc, No C 07-2151 CW' (Casetext Search) <https://casetext.com/case/xiaoning-v-yahoo> accessed 30 June 2024

'Yahoo! Lawsuit (Re China)' (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/yahoo-lawsuit-re-china/> accessed 30 June 2024