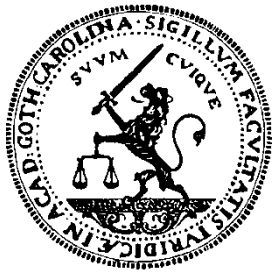

FACULTY OF LAW

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Restitution of Unjust Enrichments:

A Right to Remediation for Human Rights Abuses from Parent Companies

JURM02 Graduate Thesis

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Contents

Summary

As of today, there are no binding obligations under international human rights law for companies. Therefore, the UNGPs and the OECD Guidelines has emerged as soft law instruments which explains social and legal expectations on states and business in regards of human rights. According to the principles, states has the primary role in protecting human rights while business should respect human rights throughout their operations. By following these principles, states and business can prevent and mitigate human rights abuses by reducing domestic legal barriers.

In the past decades the international community have been concerned with the issue of multinational enterprises potential and actual adverse impacts on human rights throughout their transnational operations. Through affiliates, suppliers or contractors, business operations may occur in low cost manufacturing states where corruption is high, and rule of law is weak. Therefore, the host states may fail to provide right-holders with access remedy. In effect, this system sometimes benefits parent or buying companies at the expense of right-holders.

When human rights abuses have occurred within the operations of multinational enterprises, domestic courts have tried claims against parent companies in private and criminal law. However, the attempts have been less successful due to extraterritorial limitations in criminal law, limited liability of separate legal entities and difficulties with proving causality in tort law. The concept of unjust enrichment as a ground for restitution may provide the right-holders with an effective grievance that could fill the void uncovered in contract, tort and criminal law. This concept may thereby help strengthening legal frameworks for holding MNEs accountable and help victims of human rights abuses to obtain remediation from a parent company.

Sammanfattning

I dagsläget har inte företag några bindande förpliktelser för mänskliga rättigheter i internationell rätt. Istället har FN:s vägledande principer för företag och mänskliga rättigheter samt OECD:s riktlinjer för multinationella företag utvecklats. Enligt dessa principerna har staterna det primära ansvaret att skydda mänskliga rättigheter och företag har ett ansvar att respektera mänskliga rättigheter i hela deras verksamhet. Genom att följa dessa principerna kan stater och företag förebygga och lindra kränkningar av mänskliga rättigheter.

De senaste årtiondena har det internationella samfundet bekymrat sig över multinationella företags potentiella och faktiska negativa påverkan på mänskliga rättigheter genom sina transnationella verksamheter. I vissa fall förekommer det att multinationella företag är verksamma i stater där tillverkningskostnaden är låg, korruptionen hög och rättsstaten svag. Det innebär att värdstaten i vissa fall inte kan förse rättighetsbärarna med en saklig prövning och inte heller nå gottgörelse från det företag som har kränkt de mänskliga rättigheterna. I detta system förekommer det att moderbolag tjänar på rättighetsbärarnas bekostnad.

När mänskliga rättigheter har kränkts i ett multinationellt företags transnationella verksamhet, har inhemska domstolar fått till uppgift att ställa företagen till svars enligt civilrättsliga eller straffrättsliga principer. Dessvärre har rättighetsbärare haft svårt att få sin sak prövad på grund av begränsningar i straffrättslig jurisdiktion, principen om juridiska personers begränsade ansvar samt svårigheterna att bevisa skadeståndsrättsliga orsakssamband. Därför har det varit av vikt att undersöka andra grunder för talan utöver avtalsrätt, skadeståndsrätt och straffrätt. Principen om otillbörlig vinst kan erbjuda rättighetsbärarna en anledning att söka gottgörelse från moderbolag och därmed stärka den rättsliga ramen inom vilken multinationella företag kan hållas ansvariga för mänskliga rättighetskränkningar.

Preface

After four and a half years of studying at the Faculty of Law, this thesis marks the end of my student life and a start of a new chapter. I am very happy that I decided to study, especially law, otherwise I would probably not have met such good and supportive friends.

I want to show gratitude to some people in particular.

Dear Mom, thank you for always standing by and believing in me, for always making sure that I am not only doing my best, but always reminding me of what I have accomplished. I also want to show my gratitude towards my closest relatives as well, without your support I would not be the person that I am today.

Many thanks to my friends from Law School, especially Agnes, Erica, Felicia, Julia and Tilda who have given me great laughs and companionship throughout examination periods and life.

Last by not least, I want to thank my supervisor Radu Mares for inspiration, guidance and help throughout this project. Without your advice and expertise, I would not have come this far!

Lund, June 17, 2018.

Amanda Bergqvist

Abbreviations

Bill of Rights	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO Declaration	International Labour Organization's Declaration on Fundamental Principles and Rights at Work
ILO MNE Declaration	International Labour Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
MNC	Multinational Corporations
MNE	Multinational Enterprises
OECD	The Organisation of Economic Co-operation and Development
OECD Guidelines	The Organisation of Economic Co-operation and Development Guidelines for Multinational Enterprises
SRSG	Special Representative of the UN Secretary-General
UNCHR	UN Commission on Human Rights
UNGPs	UN Guiding Principles on Business and Human Rights

1 Introduction

1.1 Enriching Multinational Enterprises

The multinational enterprise (MNE) is an institution in both domestic and global affairs. With the increasing possibilities of investing in foreign companies and establishing affiliates across the world, the MNE is benefitting from the open global market.[1] Companies can be part of MNEs in where the legal entities are kept separate from each other's responsibilities but operate as one economic entity with the purpose of gaining profits. Since the gas leak in Bhopal, India in 1984, attention has been drawn to the issue of corporate accountability due to the involvement of MNEs in adverse impact on human rights through their operations.[2]

Even though the recognition of fundamental human rights across the globe have advanced since the Universal Declarations of Human Rights[3] (Bill of Rights), victims of human rights abuse still struggle with gaining access to remedies from corporations when abuses occur within MNEs operations. This upholds a system which benefits MNEs, especially the parent company, and sometimes at the expense of the human right-holders.

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[1] Not only are the MNEs benefitting from international trade and investment, also home and host states are benefitting through the supply of products and services and employment opportunities, see The Organisation of Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises,* OECD Publishing (2011), p. 14, available at: https://www.oecd-ilibrary.org/docserver/9789264115415-en.pdf?expires=1526213960&id=id&accname=guest&checksum=05A65322297009C5835B8678B80AD214. [Accessed 2018-05-13].

[2] *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984,* D.C. S.D. New York Opinion, 12 May 1986 (The United States).

[3] *Universal Declaration of Human Rights*, 'Bill of Rights', 10 December 1948, 217 A (III); International Labour Organization's (ILO) *Declaration on Fundamental Principles and Rights at Work,* 'ILO Declaration' (adopted 18 June 1988); *International Covenant on Civil and Political Rights*, 'ICCPR' (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; and *International Covenant on Economic, Social and Cultural Rights,* 'ICESCR', (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3.

How to address this issue has been discussed over the past decades. The first suggestion was to ensure that transnational corporations had similar responsibilities to protect human rights under international law as states.[4] This suggestion was abandoned by the international community and replaced with soft law instruments called the UN Guiding Principles[5] (UNGPs) and the OECD Guidelines.[6] The UNGPs and the OECD Guidelines do not create new binding obligations on states nor business, but they are relevant and necessary in the context to explain social and possible legal expectations society has on both states and business in protecting or respecting human rights.

The state has the primary role in protecting right-holders from abuse under international human rights law, and businesses have an obligation to respect human rights throughout its operations.[7] The states are required to provide laws and grievance mechanisms for right-holders to seek remedies from corporations when they have caused harm. Businesses are expected to comply with laws and regulations to prevent and mitigate any harms occurring within their operations. Many states provide judicial or non-judicial mechanism for human rights victims to access remedy, but in some states the legal system is ineffective, corrupt or legal barriers remain, thus in effect protecting companies from liability for human rights abuses. Therefore, academics have argued that there is a 'legal gap' and that a treaty on business and human rights could possibly bridge this legal gap.[8] This solution has also been discussed by the Human Rights Council in 2017, but no legally binding instrument has been adopted at this point.[9]

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[4] UN Commission on Transnational Corporations, *Draft UN Code of Conduct on Transnational Corporations,* 'the Draft Norms', UN Doc. E/1990/94.

[5] Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, 'UNGPs', U.N. Doc. A/HRC/17/31, March 21, 2011.

[6] OECD Guidelines.

[7] Pillar 2 of the UNGPs and in general OECD Guidelines.

[8] In general, see Surya Deva and David Bilchitz (red)., *Building a Treaty on Business and Human Rights: Context and Contours*, Cambridge University Press, 2017.

[9] See Human Rights Council, *Elements for The Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights Chairmanship of the OEIGWG established by HRC* Res. A/HRC/RES/26/9 (29/09/2017).

Since a treaty has not been adopted, attempts to seek remediation from parent companies have utilized concepts of piercing the corporate veil, direct liability in tort law or criminal liabilities of companies.[10] However, previous attempts have demonstrated the difficulties in holding the parent company responsible for acts or omissions by other legal entities. An alternative solution may be to shift the focus from contract, tort and criminal law to the law of restitution and the doctrine of unjust enrichment which could provide right-holders with the right to seek remedy from parent or buying companies.

1.2 Purpose

One of the great challenges in business & human rights is to establish legal accountability for multinational enterprises. Establishing legal accountability in international human rights law could help overcome legal barriers that protect parent companies of MNEs and makes it almost impossible for victims of human rights abuse to pursue redress. The purpose of this thesis is to explain the difficulties with attributing legal liability to parent companies under contract, tort and criminal law for actions of their subsidiaries, suppliers or contractors. By revisiting the principle of unjust enrichment and applying it to human rights law, my aim is to move beyond the previous attempts and explore restitution as a remedy.

1.3 Research Questions

For the purpose of this thesis, I will therefore answer three main questions:

- What are the multinational enterprises responsibilities under international human rights law?
- What are the rules of attribution in private law?

[10] See Human Rights Council, *Improving Accountability and Access to Remedy of Business-Related Human Rights abuse, Report of the OHCHR*, 10 May 2016, A/HRC/32/19.

- Could the concept of unjust enrichment assist in strengthening legal frameworks for holding MNEs accountable and help victims of human rights abuses to obtain remediation from a parent company?

1.4 Methodology and Material

To answer the research questions, I have used a traditional legal method and a comparative method. The UNGPs and the OECD Guidelines are not binding upon states nor business, but they serve as a benchmark of what to expect from states and business in respect of international human rights. Therefore, these instruments are used as a backdrop in explaining the on-going discussion on parent companies' responsibility for adverse human rights impacts in their global operations. Official documents, reports and academic writings have been taken into consideration to show the various approaches to the issue.

By comparing domestic law and practices from common and civil law jurisdictions, I elaborate and explain the latest developments on the subject of 'corporate accountability' in business and human rights. The purpose of the thesis is not to compare domestic laws and evaluate whether any domestic approach is preferable. A comparative perspective has been applied to achieve a greater understanding of the principles applied in private law and the themes that have shaped the approaches to remediation from parent companies for human rights abuses.

The doctrine of unjust enrichment is a concept in the law of restitution and a concept that common law academics are more familiar with than in civil law.[11] Therefore, the main material and sources on the doctrine are case law and academic writing from common law jurisdictions. The main sources covering details of the law of restitution and unjust enrichment can be traced

[11] Two academics that have contributed with their research on the concept are Andrew Burrows, Professor of the Law of England at the University of Oxford and the late Peter Birks, Regius Professor of Civil Law at the University of Oxford.

back to the mid 1900s. Applying unjust enrichment for the purpose of recovering enrichment to victims of corporate abuse, appeared in academic writings just before the UNGPs and the OECD Guidelines, and a few in the post-Principles period. It will take years for in-depth treatments of this subject to emerge in academics and official documents.

1.5 Previous Research and Delimitations

As the research in this project has advanced, the materials revealed that academics that have experimented with the doctrine of unjust enrichment has focused on the doctrine as a grievance in the context of international law, environmental law and human rights law.[12] But in respect of human rights, the context has been limited to indigenous peoples' rights. My aim with this thesis is to pick up where other academics have left of. Therefore, my research questions have not been narrowed down to any specific human right, thus applying the concept in a bigger context.

I have limited my research on the doctrine of unjust enrichment to grasp the essential aspects that are common in different jurisdictions without getting bogged down in peculiarities of each jurisdiction. The essentials should be enough to stimulate our thinking on parent liability and grasp the potential of unjust enrichment as a new basis for remedies.

[12] See Aura Weinbaum, 'Unjust Enrichment: An Alternative to Tort Law and Human Rights in the Climate Change Context', 20 Pac. Rim L. & Pol'y J., (2011) pp. 429–454, available at: http://heinonline.org/HOL/P?h=hein.journals/pacrimlp20&i=433. [Accessed 2018-04-09]; David N. Fagan, 'Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations', 76:2 N.Y.U.L Rev. (2001) p. 626–664, available at: http://heinonline.org/HOL/P?h=hein.journals/nylr76&i=644. [Accessed 2018-03-26]; Peter B. Oh, 'Veil-Piercing Unbound', 93 B. U. L. Rev. (2013) pp. 89–138, available at: https://dx.doi.org/10.2139/ssrn.1925009. [Accessed 2018-05-06]; and Charles Manga Fombad, 'The Principle of Unjust Enrichment in International Law', 30 Comp. & Int'l L. J S. Afr (1997) pp. 120–130 available at: http://heinonline.org/HOL/P?h=hein.journals/ciminsfri30&i=127. [Accessed 2018-04-17].

1.6 Structure

The first chapter (Chapter 2) covers the core features of the UNGPs and the OECD Guidelines to inform the reader on the current status of the responsibilities of states, business and international organisations in international law. In Chapter 3 I analyse and explain the fundamental rules of private law and what attributes liability to a parent company. Beside the rules of attribution, this chapter also covers a section of accountability concepts of piercing the corporate veil and inferring direct liability for parent companies.

Moving forward, in Chapter 4 I explain the core features of unjust enrichment and simultaneously applies the concept on cases touched upon in the previous chapters. The aim with this chapter is to exemplify previous cases and revisit unjust enrichment as a ground for restitution from parent companies. In the final chapter, Chapter 5, the reader will find my own thoughts and analysis of the findings that have been discussed throughout the thesis.

2 The Guiding Principles

The purpose of this chapter is to provide the reader with a background of the current developments in business and human rights with a focus on the UNGPs and the OECD Guidelines for Multinational Enterprises.[13] By comparing and explaining these instruments, my aim is to provide the reader with a relevant background of corporate accountability and the access to remedy under international human rights law.

During his mandate as a Special Representative, John G. Ruggie approached the business and human rights agenda with an idea of a policy-based soft law instrument. The previous work on the Draft UN Code of Conduct on Transnational Corporations (Draft Norms) as an attempt to form a binding treaty on business and human rights was abandoned by the international community.[14] The UNGPs is different from the Draft Norms because the purpose of the principles is not to create new obligations under international law, but clarifying the roles and duties of states, companies and international organizations in the business and human rights sphere.[15] The UNGPs are not legally binding upon states nor business, but they mark a breakthrough in itself because "[…] it is first time the UN member states adopted a common position laying down standards of expected behaviour from business with regard to human rights."[16] The OECD Guidelines are, just as the UNGPs, non-binding principles and standards for responsible business conduct in a

[13] The OECD, *OECD Guidelines for Multinational Enterprises,* 'OECD Guidelines'.
[14] Compare the Draft Norms with the UN Guiding Principles. The Draft Norms recognized that transnational corporations and other business enterprises had responsibilities for promoting and securing the human rights enshrined in the Bill of Rights.
[15] 'General Principles' in The UN Guiding Principles, p. 1 and *Introductory description of the Special Representative's mandate and the UN "Protect, Respect and Remedy" Framework,* Business & Human Rights Resource Centre, September 2010, 'the Introductory description of SRSG', available at: https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf. [Accessed 2018-01-31].
[16] Citing Radu Mares (red.), *The UN Guiding Principles on Business and Human Rights: foundations and implementation*, Martinus Nijhoff, Leiden, 2011, p 1.

global context.[17] These non-binding principles are multilaterally agreed, and a comprehensive code of responsible business conduct that governments of the OECD have committed to promoting.[18]

This chapter will be divided into three sections, following the three pillars of the UNGPs; the *state duty to protect*, *the corporate responsibility to respect*, and *access to remedy*. In this chapter, I will explain what can be expected from states and corporations under international human rights law, without creating new obligations on states and corporations.

2.1 State Duty to Protect Human Rights

Under international human rights law, the states have obligations to respect, protect and fulfil human rights within their territory and/or jurisdiction.[19] As described in the UNGPs, this includes the duty to protect against human rights abuses by third parties, including business enterprises.[20] The OECD Guidelines are addressed not only to states, but also directly to MNEs.[21] Under international human rights law, the states have both positive and negative obligations. Not only do the states have a negative obligation to refrain from abusing human rights, but the states also have positive obligations as a primary role in preventing and addressing corporate-related human rights abuses.[22] To fulfil its primary role, the state should consider policies, legislation and regulations to prevent negative human rights impacts caused by business enterprises.[23]

In order to prevent, investigate, punish and redress human rights abuses, the state is required to perform human rights due diligence. They should also

[17] OECD Guidelines, p. 3.
[18] OECD Guidelines, p. 3.
[19] Article 2 in ICCPR.
[20] See Commentary to Principle 1, UNPGs.
[21] OECD Guidelines, p. 3.
[22] See the Introductory Description of the SRSG.
[23] See Commentary to Principle 1, UNGPs.

encourage MNEs within their territory to observe the principles by enforcing laws and address legal gaps.[24]

The state's duty to protect human rights does not require regulating the extraterritorial activities of business domiciled within their jurisdiction, but neither are the state prohibited from doing so as long as there is a recognized jurisdictional basis.[25] However, the state's duty of promoting the OECD Guidelines does not stretch beyond the state's territory.[26] Extraterritorial protection of human rights is a debated subject and some are of the view that there is an increasing international recognition of the legal obligation on states to take action to prevent abuses by their corporations' activities overseas.[27] An extraterritorial protection is perhaps a compelling approach that could address human rights risks in host states where the protection of human rights is weak, or where the victims of corporate abuse do not have sufficient access to remedy. However, the debate is related to broader concerns of international law because an extraterritorial protection may interfere with the sovereign rights that states claim over their territory and private actors therein.[28]

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[24] Principle 3, 4, 5 and 6, UNGPs and OECD Guidelines, pp. 17–18.

[25] A recognized jurisdictional basis could be where abuses are committed by or against their nationals, see Commentary to Principle 2, UNGPs; and John G. Ruggie, *Just Business: Multinational Corporations and Human Rights,* W.W. Norton & Co., New York, 2013, pp. 84–85.

[26] OECD Guidelines pp. 3, 7–8, 67.

[27] See The OHCHR Report on *Improving Accountability and Access to Remedy of Business-Related Human Rights abuse,* which did not advocate for a extraterritorial protection; However others have advocate for extraterritorial protection of human rights, in ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,* Heidelberg, Germany, January 2013, available at: http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23. [Accessed 2018-05-10]; see Justine Nolan, 'Mapping the Movement: The Business and Human Rights Regulatory Framework' in Dorothée Baumann-Pauly (ed.), *Business and Human Rights: From Principles to Practice,* Routledge, Abingdon, 2016, p. 43.

[28] See Daniel Augenstein & David Kinley, 'Beyond the 100 Acre Wood: in which international human rights law finds new ways to tame global corporate power', 19:6 Int. J. H. R. p. 834, available at: https://doi.org/10.1080/13642987.2015.1006904. [Accessed 2018-02-05].

The state's duty to protect under the first pillar of the UNGPs consists of both positive and negative obligations, where the former obliges the state to take active measures to prevent human rights violations to occur, and the latter obliges the state to refrain from violating human rights. It has been pointed out in the UNGPs, that the state has the primary role to protect, respect and fulfil human rights. This duty is important since that the laws and regulations of the parent company's home state may not apply if the human rights violations have occurred in another state.[29]

2.2 Corporate Responsibility to Respect

As has been described in the previous section, the states have the primary obligation to protect human rights within their territory and/or jurisdiction.[30] Nevertheless, business enterprises should respect human rights.[31] Wherever MNEs operate, they should avoid infringing the human rights of others, address adverse human rights impacts if they are involved in such and perform human rights due diligence.[32] The corporate responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.[33] The corporate responsibility to respect exists independently of the states' abilities and/or willingness to fulfil their own human rights obligations and this responsibility exists over and above compliance with national laws and regulations protecting international human rights.[34]

The UNGPs and the OECD Guidenlines does not create any new or binding obligations on states nor MNEs, but MNEs should respect internationally recognized human rights such as those expressed in the Bill of Rights and

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[29] See Augenstein & Kinely, *Beyond the 100 Acre Wood,* pp. 836–837.
[30] OECD Guidelines, p. 22.
[31] According to Ruggie, the corporate responsibility to respect is widely held in societal expectations and in soft law instruments, see Radu Mares, 'A Gap in the Corporate Responsibility to Respect Human Rights', 36:3 Monash U. L. Rev., pp. 46–54, available at: http://heinonline.org/HOL/P?h=hein.journals/monash36&i=633. [Accessed 2018-05-10].
[32] Principle 11, UNGPs and OECD Guidelines pp. 19–20 and 31–34.
[33] See Commentary to Principle 11, UNGPs and OECD Guidelines, p. 19.
[34] See Commentary to Principle 11, UNGPs.

ILO instruments.[35] This list of human rights standards is not exhaustive and depending on circumstances, business enterprises may need to consider additional standards.[36]

While the UNGPs calls for all enterprises and companies to respect human rights, the OECD Guidelines also address business responsibilities, especially parent entities' responsibility in regards of ensuring strategic guidance of the enterprise, effective monitoring of management and to be accountable to the enterprise and shareholders as well as taking into account the interests of stakeholders.[37] The OECD Guidelines emphesizes that the principles should extend to enterprise groups and that operations in other jurisdicitons does not prevent them from setting up compliance and control systems where possible to their subsidiaries.[38] Furthermore, when an enterprise engage with suppliers and other entities in the supply chain they are encouraged to participate in industry-wide collabrotive efforts with other enterprises to coordinate supply chain policies.[39]

Read together with the MNEs due diligence responsibility in the UNGPs, both instruments implies that MNEs themselves can detect risks or human rights abuses within their transnatioanl operations, thus preventing harms from occuring or make sure that the entity are held accountable.[40]

2.3 Access to remedy

The state duty to protect human rights also includes a duty to take appropriate steps to ensure that when human rights abuses occur within their territory

[35] See Commentary to Principle 11, UNGPs; OECD Guidelines, pp. 31–34, 37; and ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,* 'ILO MNE Declaration', (adopted in November 1977, last revised in March 2017).
[36] For example, enterprises should respect the standards of international humanitarian law in situations of an armed conflict, see Commentary to Principle 11, UNGPs.
[37] OECD Guidelines, p. 22.
[38] OECD Guidelines, p. 22.
[39] OECD Guidelines, p. 25.
[40] OECD Guidelines, pp. 22–23 and Principle 15 and 17, UNGPs.

and/or jurisdiction, those affected should have access to remedy.[41] The appropriate steps can be through judicial, administrative, legislative or other means as long as they investigate, punish and redress business-related human rights abuses when they occur. If the states do not carry out their duty to ensure effective remedy, their duty to protect human rights may be rendered weak or meaningless.[42]

In the UNGPs, Ruggie used the terms of 'grievance' and 'grievance mechanism'. Grievance should be understood in a broad sense, thus covering many types of reasons for remediation, which is important in order to provide access to effective remedy for victims. The mechanism, through which access remedy is provided, can be administrated by a state agency or branch, or by an independent body on a statutory or constitutional basis and they may be judicial or non-judicial. For states who are adhering to the OECD Guidelines, they can provide access to remedy through National Contact Points (NCPs)[43]

The principles of access to remedy has both procedural and substantive aspects.[44] Effective grievance mechanism also plays an important role for the corporate responsibility to respect. If a business enterprise identify adverse human rights impacts which could constitute a crime, it is important that a grievance mechanism is put in place for the business enterprise to cooperate with, and to make sure that business enterprises will be held accountable for adverse human rights impacts they may have caused or contributed to.[45]

While the UNGPs itself does not provide the states with any implemention mechanism to report to or mediate through whenever abuses have occurred in operations of an MNE, the OECD Guidelines provide state with NCPs.[46] This

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[41] Principle 25, UNGPs.
[42] See Commentary to Principle 25, UNGPs.
[43] See Commentary to Principle 25, UNGPs; the purpose of the NCPs is to further the effectiveness of the Guidelines. They operate with core criterions of visibility, accessibility, transparency and accountability, OECD Guidelines, p. 71.
[44] Principle 25, UNGPs.
[45] See Commentary to Principle 22, UNGPs; and The Introductory description of the SRSG.
[46] OECD Guidelines, pp. 3 and 71.

is probably one of the greatest differences between the UNGPs and the OECD Guidelines, because this gives the states an incentative to co-operate with MNEs and address abuses that occur within their territory.[47]

In many ways the claimants have expanded possibilities to bring cases against business enterprises in the courts of the home country or to NCPs, but the practice remains contested.[48] Therefore, states should consider ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.[49] Practical and procedural barriers can be when the costs of bringing claims are too expensive and cannot be reduced to reasonable levels through government support, "market-based" mechanisms (litigation insurance and legal fee structures), or it is difficult for claimants to secure legal representation due to lack of resources.[50] There also exists a legal barrier when legitimate cases involving business-related human rights abuses is prevented from being addressed due to domestic criminal and civil laws, which for example facilitates the avoidance of legal responsibility by members of a corporate group.[51]

In contrast to the UNGPs, the OECD Guidelines is a package with an own implementation mechanism, but the OECD Guidelines is only recommendations directed against the adhering states, not the global community. Even if the OECD Guidelines may have more effect on states duty to protect human rights due to NCPs, legal barriers have to be reduced and effective grievance mechanism have to be put in place in all countries to overcome the issue of access to remedy from parent companies. Therefore,

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[47] The implementation mechanisms of NCP are under the responsibility of the Investment Committee of OECD who should oversee the functioning of the Guidelines, OECD Guidelines, p. 77.

[48] See Ruggie, *Just Business:* pp. 102–103. The OECD Guidelines are recommendations for the adhering countries of the OECD which recommend that each adhering State should put in place a 'NCP' which would serve as an implementation mechanism of the OECD Guidelines and provide mediation and conciliation to resolve issues that may arise, OECD Guidelines, p. 3.

[49] Principle 26, UNGPs.

[50] For more examples see Commentary to Principle 26, UNGPs.

[51] See Commentary to Principle 26, UNGPs.

the legal barriers of holding the parent company responsible for adverse human rights impacts is a demanding issue that requires work.

3 Corporate accountability

The UNGPs and OECD Guidelines clarify what is expected regarding businesses operations under international human rights law. The principles apply to all states and enterprises, no matter the size or the corporate structure.[52] This chapter is dedicated to the fundamental rules and principles in private law that governs the liability of a company within a corporate group. In the following sections I will examine *the rules of attribution* and the principles of *separate legal entities* and *limited liability*. The last two sections of this chapter are devoted to the doctrines of *piercing of the corporate veil* and *direct liability* which have challenged the basic rules of private law.

3.1 Legal Entities and Limited Liability

In private law, the corporation is a separate legal person with its own rights and obligations. The rights and obligations of the corporation is separate from its shareholders'. This principle is accepted internationally and has a long history in Anglo-American law.[53] Within an MNE, a shareholder may be an individual or another legal entity.

The principle of separate legal entities has derived from the construction of the 'legal person'. This construction in law and economics have created a fictional person who have rights and duties under law, much similar to the

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[52] See the General Principles, UNGPs; Ruggie, *Just Business,* p. 97–98; and OECD Guidelines, pp. 17–18.

[53] See Phillip I. Blumberg, 'Limited Liability and Corporate Groups', 11:4 J. Corp. L., (1986), p. 577, available at: http://heinonline.org/HOL/P?h=hein.journals/jcorl11&i=583. [Accessed 2018-02-19]; This is a rule in Swedish civil code, Chap. 1, 3§ Swedish Commercial Legislation (2005:551) (Aktiebolagslagen); See commentary of Sten Andersson, Svante Johansson and Rolf Skoglund, *Swedish Commercial Legislation* (12 June 2017, Zeteo, www.wolterskluwer.se/zeteo), available at: https://zeteo.nj.se/document/abl05komm_ablkkap01_s3_s1?anchor=xablkommq2005q551_1_kap_3_px. [Accessed 2018-03-06]; Swedish case law: NJA 1942 s 473, NJA 1947 s 647; NJA 2014 s 877 (Supreme Court Decisions); see Robert McCorquodale and Lise Smith, 'Human Rights, Responsibilities and Due Diligence' in Deva & Bilchitz, *Building a Treaty on Business and Human Rights: Context and Contours,* p. 229; and United Kingdom case law: *Salomon v. Salomon & Co Ltd* [1897] A.C 22 (H.L).

rights and duties of an individual. Thereby, a legal person has full legal capacity and can own shares in another company. By this construction, companies can merge into MNE's where each member of the enterprise is separate from the other's obligations.[54]

The MNE structure can be either equity-based or contract-based. An equity-based corporation makes a shareholder not liable for its subsidiary's deeds even though it owns the subsidiary by shares. A contract-based structure is a genuine separation between companies because the only relationship between the parent company and another entity is the contract.[55]

By these corporate structures, the MNE can reduce its economic risks which stimulates the economic activity of the enterprise.[56] On a global market, the MNE can be divided into separate legal entities within several jurisdictions.[57] The separation of legal entities reduces the transactions costs, protects the investments of shareholders by limiting their liability, and the entity can serve as a shield from personal creditors of the owners.[58] The MNE can benefit from this principle in several ways and protect shareholders, such as a parent company, from liability. Limited liability gives little incentive for parent companies to avoid high-risk projects that could infringe human rights because another legal entity would bear the real costs of such operations.

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[54] See Filip Gregor, *Principles and Pathways: Legal Opportunities to Improve Europe's Corporate Accountability Framework,* European Coalition for Corporate Justice, Brussels, 2010, available at: http://corporatejustice.org/documents/publications/eccj/eccj_principles_pathways_webuseblack.pdf. [Accessed 2018-02-26].

[55] See Radu Mares, 'Legalizing Human Rights Due Diligence and the Separation of Entities Principle' in Deva & Bilchitz, *Building a Treaty on Business and Human Rights: Context and Contours*, p. 270

[56] See the critical analysis of the positive economic implications of limited liability of corporations in Blumberg, *Limited Liability and Corporate Groups,* pp. 611–616.

[57] See Mares, *Legalizing Human Rights Due Diligence and the Separation of Entities Principle,* p. 266–267.

[58] See Andrew Verstein, 'Enterprise without Entities', 116:2 Mich. L. Rev. (2017) pp. 253–263, available at: http://heinonline.org/HOL/P?h=hein.journals/mlr116&i=265. [Accessed 2018-02-21].

Therefore, it is possible that a moral-hazard problem would occur within the MNEs operations.[59]

The principle of limited liability has a young history and cannot exist without the foundational principle of separating legal entities. This principle has positive implications on the MNE because it accepts that the liability of each entity is limited.[60] For the parent company this is important because it prevents the liability for harm from moving upwards in the value chain of the enterprise.[61] For the right-holders on the other hand, the principles of the separation of entities and limited liability are legal barriers in reaching the parent company for remediation.[62]

3.2 Rules of Attribution

The principle of separate legal entities and limited liability are the cornerstones in company law which makes the corporate form attractive to pursue trade both domestically and internationally. Almost anyone can start a company and the risks of the shareholders are relatively low due to the protection provided by these principles. The loss of the shareholder is limited to the amount invested in the company.

Under some circumstances corporate acts, such as the acts of a subsidiary, may lead to corporate liability of the parent company. In private law, there are rules of attribution which determine which acts are acts of the company. For example, there are rules concerning 'company agents' under which the company is liable for the acts of the agent, and rules about 'vicarious liability' which determine which acts of an employee constitute acts of the company.[63]

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[59] See Oh, *Veil-Piercing Unbound,* p. 100.

[60] See Phillip I. Blumberg, 'The Corporate Entity in an era of Multinational Corporations', 15:2 Del. J. Corp. L., (1990) pp. 285–286, available at: http://heinonline.org/HOL/P?h=hein.journals/decor15&i=291. [Accessed 2018-02-19]; and Blumberg, *Limited Liability and Corporate Groups*, p. 576.

[61] See Mares, *Legalizing Human Rights Due Diligence and the Separation of Entities Principle*, pp. 268–269.

[62] See section 2.2 above and Principle 26, UNGPs.

[63] See Brenda Hannigan, *Company Law,* 4th ed., Oxford University Press, 2016, p. 68.

Liabilities of the company is governed by rules of attribution in contract, tort and criminal law, and the rules of attribution vary depending on domestic laws and regulations. In general, the company can only be liable for the acts of an agent or employee if the agent or the employee act within its authority or employment.[64]

3.2.1 Contract Liability

Previous attempts have been made in attributing liability for harm caused by a legal entity within an MNE to a parent or a buying company. In contract law the basic situation that would invoke certain rules of attribution is when a parent or buying company has a business relationship with another legal entity (subsidiary, supplier or contractor) who have caused harm to right-holders. In order to hold the parent company liable for other legal entities harms, the court must unveil the 'company on top' from its limited liability.[65]

In some situations, the court may look at a principal-agent relationship between the parent company and another legal entity within an MNE. A subsidiary, supplier or other entity may negotiate or take corporate actions on behalf of the parent or buying company – i.e. act as an agent. In those situations, contractual liability attaches to the parent as the contracting party and not to the agent who have acted on behalf of the parent or buying company. Depending on the damages the third party may suffer or who has been the agent, common law and civil law differs in rules of attribution and possible remedies.[66]

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[64] See the rules of attribution in English common law in Hannigan, *Company Law,* p. 68–91; See Chap. 29–30 in Swedish Commercial Legislation (2005:551) governing rules of attribution in tort and criminal law.

[65] See Hannigan, *Company Law,* p. 68; piercing of the corporate veil will be discussed furtherer in section 3.3.1 'Piercing the Corporate Veil' below.

[66] Compare Hannigan, *Company Law*, pp. 69–70; and the Swedish Commercial Agency Act (1991:351) (Lag om handelsagentur). If a decision or contract have been negotiated by the company director or manager which have caused a third party a financial loss, the company may be liable in tort and not in contract. The plaintiff may seek compensation on the basis of 1§ Chap. 29 of the Swedish Commercial Legislation (2005:551) (Aktiebolagslagen); or if the financial loss has emerged due to a personal damage or property damage, the plaintiff may

In the context of business and human rights, the claimant must therefore argue that the parent company can be held liable in contract because the agent (most likely a subsidiary) have acted under its authority and the commitments were made within the capacity of the company.[67] In this context, the claimant must focus on the relationship between the entity that have caused the claimant harm and the parent company. To attribute harms to a parent in contract law would require the claimant to prove some sort of fraud or misrepresentation of the parent company by using another legal entity within the MNE for purposes of shielding themselves from liabilities.[68]

Not long ago, a garment factory in Bangladesh called Rana Plaza collapsed. The collapse of this building was the worst industrial accident in the world since the gas leak in Bhopal. The Rana Plaza collapse killed more than 1 100 workers and many more was seriously injured.[69]

The Rana Plaza garment factory was a part of several MNEs value chains, where the buyer companies or brands was located in the US and Canada. Due to these circumstances, two individuals filed complaints against J.C. Penny Corporation in a US court and against Loblaw in a Canadian court.[70] The principle of limited liability is fundamental, and the general rule is that a general contractor, such as J.C. Penny Corporation, is not liable for an independent contractor's acts or omissions, if they have not undertaken any such responsibilities according to the contract.[71] Neither J.C. Penny

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seek compensation on the basis of the Swedish Tort Liability Act (1972:207) (Skadeståndslag).

[67] See Hannigan, *Company Law,* p. 69 and 183.

[68] See Frank H. Easterbrook & Daniel R. Fischel, 'Limited Liability and the Corporation', 52 U. Chi. L. Rev. (1985), p. 112, available at: http://heinonline.org/HOL/P?h=hein.journals/uclr52&i=103. [Accessed 2018-05-15].

[69] See Justine Nolan, 'Rana Plaza: the collapse of a factory in Bangladesh and its ramifications for the global garment industry' in Dorothée Baumann-Pauly and Justine Nolan, *Business and Human Rigths: From principles to Practice* p. 27.

[70] *Rahaman v J.C. Penny Corp., Inc,* C.A. No. N15C-07-174 MMJ, (Superior Court of Delaware 4 May 2016); and *Das v George Weston Limited,* 2017 ONSC 4129.

[71] *Rahaman v J.C. Penny Corp., Inc.,* p. 7.

Corporation nor Loblaw had any control over their suppliers or sub-suppliers or used these independent contractors for shielding themselves from any liability that would arise through a contractual relationship with the claimants.[72]

Attempts in attributing a liability for harm to the 'company on top' have had limited success in regards of transnational operations and a part of the issue is related to the nature of MNEs. They are complex in their structures and for a claimant it is difficult to put forward proof of any circumstances that would 'lift the corporate veil' and invoke a contract liability for a parent or buying company. Due to these difficulties we may proceed with our next section on tort law.

3.2.2 Tort Liability

Tort litigations have been successful in holding MNEs liable for human rights violations in transnational operations[73] and corporate liability in tort have been the centre of discussion in many transnational litigations processes.[74] The question is whether a parent company or buying company can be liable in tort for acts or omissions of a subsidiary or supplier. In transnational litigation processes against a parent or a buying company, there may be cases in which managers of the parent or buying company actively contribute to the

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[72] *Rahaman v J.C. Penny Corp*.,; and *Das v George Weston Limited,* at para 539–540.

[73] For an overview of cases involving tort litigations, see Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States', 3 City U. H. K. L. Rev., (2011), pp. 1 and 4, available at: http://heinonline.org/HOL/P?h=hein.journals/ciunhok3&i=9. [Accessed 2018-05-11].

[74] See Philipp Wesche and Miriam Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK', Hum. Rts. L. Rev, 16 (2016), pp. 370–372 and 377, available at: https://doi.org/10.1093/hrlr/ngw004. [Accessed 2018-05-10]; *Kiobel v Royal Dutch Petroleum* 133 S.Ct 1659 (2013) (USA); *Friday Alfred Akpan v Royal Dutch Shell Plc* District Court of The Hague, 30 January 2013, Case No C/09/337050/HA ZA 09-1580 (The Netherlands); *Oguru v Royal Dutch Shell Plc* District Court of The Hague, 30 January 2013, Case No C/09/ 330891/HA ZA 09-0579 (The Netherlands); *Lubbe and Others v Cape Plc* and Related Appeals [2000] UKHL 41 (The United Kingdom); *Muhammad Jabir and Others v KiK Textilien und Non-Food GmbH* – 7 O 95/15 (District Court of Dortmund, settled out of court); and Case TR T 1012-13 (*Arica v Boliden)* (District Court of Skellefteå, Decision 8 March 2018).

harmful operations of the subsidiary or supplier. In other cases, the parent or the buying company do not actively contribute to the harmful acts but fail to prevent them.[75]

Tort law covers both vicarious liabilities and allegations based on the parent companies (or buying companies) own negligence in their 'duty of care' owed to the claimants. A company is a legal entity whose acts or omissions are committed through humans and not necessarily by a commercial agent with whom the company has a contractual relationship.[76] The general rule is that a principal is liable to a third party for damages caused by the agent or employee through act or omissions, when the agent or employee have acted within the scope of its authority or employment.[77] Vicarious liability is dependent on the act or omission of the agent or employee, not by act or omission of the company itself because the company has a strict responsibility for the harms caused by its agents or employees.[78] Taking the liability in tort further and place it in the context would suggest that a parent or a buying company can be held liable for damages of its subsidiary, supplier or contractor. According to the general rule, the owning or controlling parent company would be shielded from liabilities in tort due to the principle of 'limited liability' in private law.[79]

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[75] See Wesche and Saage-Maaß, *Holding Companies Liable for Human Rights Abuses*, p. 377.

[76] See Hannigan, *Company Law,* p. 70.

[77] Chap. 3, 1§ of the Swedish Tort Liability Act (1972:207) (Skadeståndslag); Mårten Schultz, Skadeståndslag (1972:207), 3 kap. 1 §, Lexino 2013-05-31, available at https://pro.karnovgroup.se/document/1390745/1. [Accessed 2018-03-06].; "(…) the general rule that the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment , although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them." *Lloyd v Grace, Smith & Co.,* [1912] AC 716, p. 737 (HL).

[78] 'Strict responsibility' means that the company has the responsible of its agents and employees acts even if the company itself have not done anything wrong, see Mårten Schultz, Skadeståndslag (1972:207), 3 kap. 1 §, Lexino 2013-05-31; NJA 1977 s. 639 (Swedish Supreme Court); and *Lloyd v Grace, Smith & Co.*

[79] See section 3.1. 'Legal entities and Limited Liability' above.

Attempts in making a vicarious liability claim have been made in common and civil law jurisdictions. Such attempts have been through the doctrine of 'piercing the corporate veil' and some attempts have been more successful than others.[80]

In the litigations after the collapse of Rana Plaza, the plaintiffs also claimed that Loblaw had been negligent in their 'duty of care' owed to the plaintiffs, based on the common law doctrine of vicarious liability.[81] The court concluded that Loblaw did not have the right, ability nor the duty to control the suppliers, sub-suppliers or sub-contractors, because they were not a part of the enterprise as agents, employees or contractors which could trigger that kind of liability.[82] Therefore, Loblaw could not be held vicarious liable for the acts taken by its suppliers, sub-suppliers nor sub-contractors.[83]

Another aspect of tort law is regarding the parent or buying company own contribution to the harm through their own negligence in their 'duty of care' owed to the claimant. Plaintiffs in a majority of transnational litigations argue that a parent or buying company should be liable in tort by its own negligence. In the past two decades some significant developments have been put forward in common law courts regarding the tort of 'negligence'.[84]

To successfully claim a tort of negligence, the claimant must show that the parent company had been negligent in its duty of care which would invoke a

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[80] The doctrine of 'veil piercing' will be examined in section 3.3.1. For example, see *Choc v Hudbay Minerals Inc* 2013 ONSC 1414 (Canada); NJA 2014 s 877 (Swedish Supreme Court); and *Prest v Petrodel Resources Ltd* [2013] UKSC 34 (Supreme Court).

[81] *Das v George Weston Limited*, at para 125.

[82] *Das v George Weston Limited*, at paras 459, 469, 470–471 and 481.

[83] *Das v George Weston Limited,* at paras 434–435, 457 and 537. In this decision the court examined laws of Bangladesh, Canada and England and came to the same conclusion in each of the analyses – that Loblaw did not owe a duty of care to the plaintiffs.

[84] For example, see *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, D.C. S.D. New York Opinion, 12 May 1986 (The United States); *Chandler v Cape Plc* [2012] EWCA Civ 525; *Caparo Industries Pic v Dickman* [1990] 1 All ER 568 (HL) (The United Kingdom). For more case law from the United Kingdom, see Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, p. 4.

direct liability on the parent company. Under English law, a duty of care arises for the parent company when a three-stage test is met, which will be examined furtherer in section 3.3.2 below.[85]

Tort law, especially the tort of negligence, has implications in reducing legal barriers to provide access to remedy in domestic courts. The remedy would be provided directly from the parent company or buying company to the claimant as a compensation for damages. To avoid claims, the parent company (and other companies at the top of the MNEs value chain) would have to oblige to its responsibility to respect human rights by pursuing due diligence throughout its value chain and actively engage in remediation through state-based grievance mechanisms.[86]

3.2.3 Criminal Liability

The third option for liability of the company, is through criminal liability. Criminal liability has been considered in transnational litigations involving MNEs but have had limited success in developing an effective grievance because of two main obstacles: some jurisdictions does not recognise criminal liability of legal persons, or domestic courts do not recognise extraterritorial jurisdiction for criminal defences.[87]

In English common law, a company can be a subject to criminal liability, but there are some limitations in the type of offences a legal entity can commit. The intention or knowledge of wrongdoing that constitutes a part of a crime (*mens rea),* and the action or conduct which is a constituent element of a crime *(actus reus)* can be sought in the relevant officer, agent or employee.[88]

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[85] *Chandler v Cape Plc,* at para 62; and *Caparo Industries Pic v Dickman.*
[86] See Pillar 2 and 3 in the UNGPs; and OECD Guidelines pp. 19–20 and 31–34.
[87] See Gwynne Skinner, Robert McCorguodale, Oliver De Shutter and Andie Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business,* December 2013, International Corporate Accountability Roundtable (ICAR), p. 15–16 and 47–52, available at: https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657dfa6a4963597fed598b/1483046398204/The-Third-Pillar-FINAL1.pdf [accessed 2018-05-11].
[88]See Hannigan, *Company Law,* p. 77.

Swedish civil law differs from English common law. According to Swedish law, a company cannot pursue a criminal act, only a natural person of the company can. A legal person cannot commit a crime and therefore a company cannot be criminally sanctioned, only sanctioned with a fine, forfeiture or a tort. Any criminal wrongdoings must have been done by a natural person, for example the director, manager or an employee of the company. Some acts are criminally sanctioned in the Swedish Commercial Legislation and these rules are *lex specialis* to the Swedish Penal Code.[89] A company can be sanctioned with a corporate fine or forfeiture due to a crime committed by a director, manager or employee of the company.[90] If a plaintiff claims that the company should be sanctioned with a corporate fine or forfeiture, the claim is civil and based on a vicarious liability.[91]

Attributing a criminal liability to a parent company or a buying company would require the claimant to establish that the parent or buying company itself have been involved in the actual crime or the parent or buying company have acted as a complicit in the crime of the subsidiary or supplier.[92]

States are not prohibited from applying extraterritorial jurisdiction, but neither required to provided extraterritorial protection.[93] However, holding a parent or a buying company liable in criminal law is not possible in all jurisdictions since some states do not recognise criminal offences of

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[89] 1§ Chap. 30 of The Swedish Commercial Legislation; The Swedish Penal Code (1962:700) (Brottsbalk); and Clas Bergström & Per Samuelsson, *Aktiebolagets grundproblem,* 5th ed. Norstedts Juridik, Stockholm, 2015, p. 122.

[90] Chap. 1. 3§ and 8§ of The Swedish Penal Code; See commentary by Magnus Ulväng, *Brottsbalk (1962:700), 1 kap. 3§,* Lexino 2017-08-18, available at: https://pro-karnovgroup-se.ludwig.lub.lu.se/document/2394339/1. [Accessed 2018-03-07].

[91] Chap. 1. 8§, and Chap. 36 (Fine and Forfeiture) of the Swedish Penal Code; Vicarious Liability in 3 Chap. 1§, Swedish Tort Liability Act.

[92] Such cases have been tried in both civil law and common law jurisdictions, for example: and *Doe et al. v Chiquita Brands Int'l, Inc.,* Case No. 12-14898-B (11th Circ. 2014) (the US); see also Danzer Group & SIFORCO lawsuits, DLH lawsuit and Chiquita Lawsuits in Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business,* pp. 47–48, 116–119 and 120–122.

[93] Principle 2, UNGPs; and OECD Guidelines pp. 3, 7–8, 67.

corporations.[94] Even if some jurisdiction do recognise extraterritorial jurisdictions for criminal offences the type of offences are often limited to international crimes, which do not cover all types of human rights abuses.[95] Therefore, criminal liabilities of parent companies are not particularly a preferable approach to obtain remediation from parent companies for human rights abuse caused by an affiliate or other business partner.

3.3 Accountability concepts

To effectively seek remedy from a company the claimant must establish a link between the company and the actor under the rules of attribution. In some cases, the claimants succeeded, but in too many cases the claimants have failed.[96] But some circumstances make it possible for the court to challenge the fundamental principles of private law. In the following sections I will discuss the concepts of 'piercing the corporate veil' and 'direct liability' which have received a lot of attention in the debate on parent company liability for human right abuses.

Some significant developments in parent company liability have been achieved within the domestic courts of Canada, the United Kingdom and Sweden, and these developments will be explored further in the following chapters.

3.3.1 Piercing the corporate veil

The fundamental rule in private law, is that no one is liable for the harms caused by another. By using complex corporate structures, shareholders such as parent companies, can protect themselves from legal liability when a

[94] For example, Sweden does not recognise criminal liabilities on legal entities, The Swedish Penal Code; and Bergström & Samuelsson, *Aktiebolagets grundproblem,* p. 122.
[95] See Skinner et a., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, p. 15–16 and 47–52.
[96] See for example regarding contract law *Rahaman v J.C. Penny Corp., Inc.*

supplier, subsidiary or contractor causes harm to right-holders.[97] This rule does not apply when the parent company have contributed to the harm itself, which requires the claimants to establish a link between the harm and the parent company's own contribution. If the parent company itself have contributed to the harm, then it can be held liable for human rights violations.[98]

Piercing the corporate veil is an exception to the rule of limited liability on reasons of fairness. If there would be no exception, injustice would be perpetrated if victims were left without remedy. In some cases, the circumstances might make it possible to overcome the limited liability and hold the shareholders, including parent companies, liable of harm caused by another entity within the MNE. This legitimate exception establishes an opportunity for the court to disregard the separateness of entities.[99]

Various jurisdictions have set forth tests where the plaintiffs can satisfy certain factors to pierce the corporate veil and the requirements have varied depending on domestic law. The doctrine of veil piercing have been used in both tort and contract, and there are three identified exceptions for disregarding the separateness of the entity. An exception exists if its supported by i) laws and regulations or a contract, or ii) when the subsidiary have acted as the parent company's agent, or iii) when the parent company exercises such dominion and/or control over the subsidiary that separate entities no longer exist, and the parent is using the subsidiary as a shield for fraudulent or improper behaviour.[100]

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[97] See Richard Meeran, 'The Unveiling of Transnational Corporations: A Direct Approach' in Michael Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations,* Kluwer Law International, The Hague, 1999, pp. 161–162.

[98] See Mares, *Legalizing Human Rights Due Diligence and the Separation of Entities Principle,* p. 269.

[99] See Mares, *Legalizing Human Rights Due Diligence and the Separation of Entities Principle*, p. 269.

[100] See Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups', 97:1 Cal. L. Rev. (2009), p. 203–204, available at: http://heinonline.org/HOL/P?h=hein.journals/calr97&i=197. [Accessed 2018-02-21]; and *Choc v. Hudbay Minerals,* para. 45; and NJA 2014 s. 877 (Swedish Supreme Court), the

According to Swedish case law, it is possible to pierce the corporate veil when: i) the company is under such control by the owner, or it does not operate as a separate entity of the owner[101], and ii) if the company is used by the owner to pursue improper behaviour which causes harm or damages to another company or person.[102] The Swedish Supreme Court has acknowledged that some circumstances may require the court to pierce the corporate veil, but that the principle is only established in practice and should not be used excessively.[103]

In the United Kingdom, the pathway to pierce the corporate veil has been more rocky and uncertain than in Swedish case law. The Supreme Court has been going back and forth discussing the concept of piercing the corporate veil but have concluded that some circumstances justify an exception to the rule of limited liability of separate legal personalities.[104]

Under the US common law, the plaintiffs must show that: i) the shareholder (for example a parent company) exercises dominion and/or control over the subsidiary whereby separate entities no longer exists; and ii) that the shareholder has engaged in harm that suggests, in the absence of piercing, that injustice will be perpetrated using the corporate form.[105]

Limited liability affects victims, because the concept may encourage MNEs to take greater risks of adverse human rights impacts by externalizing the costs that those risks may impose on the public.[106] By piercing the veil the

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court acknowledge that it may exist an exception to the rule of limited liability, especially when the case involves an involuntary creditor and when the company have been used for improper behaviour which have caused the creditor damages.

[101] NJA 1935 s 81 and NJA 1975 s 45 (Swedish Supreme Court Decisions).

[102] NJA 2014 s 877.

[103] NJA 2014 s 877, pp. 889–890.

[104] *Prest v Petrodel Resources* Ltd [2013] UKSC 34 (Supreme Court) at para 35; and *Salomon v Salomon & Co Ltd*.

[105] See Dearborn, *Enterprise Liability,* pp. 203–204.

[106] See Easterbrook & Fischel, *Limited Liability and the Corporation,* pp. 107–109.

parent company can be held liable for harms caused within their supply chain, the parent company will have to consider human rights impacts throughout its operations.

Because of the various factors that have to be met in the veil piercing test, the concept of veil piercing has met critique due to unpredictable outcomes in court.[107] Academics also believe that the concept has been ill-conceived.[108] Furthermore, academics have studied the court decisions, and the study have shown that the courts are reluctant to or appear not to be moving towards permitting piercing the veil in more cases.[109]

3.3.2 Direct liability

Piercing the veil can be complicated and the outcomes can be unpredictable in court. Therefore, plaintiffs have tried other ways to go about corporate liability of parent companies for harmed caused by a subsidiary, supplier or contractor. Another way to reach the parent company is through 'direct liability'. To trigger that kind of liability in tort, the plaintiff must establish a parent company's negligence. The plaintiffs must show that the parent company owed them a duty of care, and that the company had been negligent in its duty which would invoke direct liability on the parent company.[110]

Under English law, a duty of care arises for the parent company when a three-stage test is met. In the first stage, the claimant must show that there was sufficient proximity in the relationship between the parent company and its subsidiary. Secondly, the harm must be foreseeable for the parent company,

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[107] See in general the critique in Stephen M. Bainbridge, 'Abolishing Veil Piercing', 26:3 J. Corp. L. (2001), pp. 479–536, available at: http://heinonline.org/HOL/P?h=hein.journals/jcorl26&i=489. [Accessed 2018-02-21].

[108] See in general Oh, *Veil-Piercing Unbound,* pp. 89–138.

[109] Due to the debate, Robert B. Thompson did an empirical study on veil piercing and discovered that courts were more reluctant in piercing the veil in tort contexts than in contract contexts. He also concluded that "Courts do not appear to be moving toward permitting piercing in more and more situations.", Robert B. Thompson, 'Piercing the Corporate Veil: An Empirical Study', 76 Cornell L. Rev. (1990-1991), p. 1048, available at: http://heinonline.org/HOL/P?h=hein.journals/clqv76&i=1058. [Accessed 2018-02-21].

[110] See section 3.2.2. 'Tort liability' above.

and at last, it is fair, just and reasonable to impose a duty of care on the parent company.[111]

In general, to successfully attribute direct liability to the parent company, four conditions must be proved to exist:

1) The defendant had a duty of care owed to the claimant, and
2) That duty has been breached, and
3) The company's breach in their duty of care resulted in a damage or loss to the claimant, and
4) The damage suffered was not too remote to justify compensation in the circumstances.[112]

Keeping these conditions in mind, we ought to look at some of the case developments in both common and civil law jurisdictions. In the English case of *Chandler v Cape Plc* and the Canadian case of *Choc v Hudbay Minerals* the courts established that a parent company can be held directly liable for their subsidiaries actions if the parent company have failed in their duty of care owed to the subsidiary's employees or to people with whom the subsidiary has interacted with. These cases are of importance because it is the first time common law courts established a direct liability for parent company's due to harm caused by a subsidiary.[113]

In the case of *Chandler v Cape Plc* the Court of Appeal recognised that the relationship between the parent company and the subsidiary was closer than in a normal parent/subsidiary relationship. The relationship between Cape Plc

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[111] *Chandler v Cape Plc*, at para 62; and *Caparo Industries Pic v Dickman*.

[112] Jennifer Zerk, *Corporate Liability for Gross Human Rigths Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies,* report prepared for the Office of the UN High Commissioner for Human Rights (2013), p. 44, available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf. [Accessed 2018-02-28].

[113] *Chandler v Cape Plc,* at para 62; and *Choc v Hudbay Minerals,* at paras 24–25*:* See Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiarie's Violations of International Human Rights Law', 72:4 Wash. & Lee L. Rev., (2015), p. 1832, available at: http://heinonline.org/HOL/P?h=hein.journals/waslee72&i=1826. [Accessed 2018-02-26]

and its subsidiary met the second condition of 'sufficient proximity' in the parent/subsidiary relationship because of Cape Plc's strong involvement in the safety and health policy of its subsidiary's employees.[114]

Due to this relationship, the court was allowed to consider parent liability based on 'assumption of responsibility' for the health and safety practices of its subsidiary. Cape Plc's acts and omissions in this respect caused harm for the plaintiffs.[115] The harm consisted in the exposure of asbestos to the employee who later on suffered from a lung disease. Because of Cape Plc's involvement in the control of the health and safety in its subsidiary's business, the harm must have been foreseeable for Cape Plc and it could have, through its policy and strategy methods, prevented the subsidiary from exposing the employee to asbestos dust.[116] The Court of Appeal agreed with the lower court, that it was fair, just and reasonable for a duty of care to exist because of the sufficient proximity in the relationship between the parent and the subsidiary company.[117]

In the Canadian case of *Choc v Hudbay Minerals,* the claimants were not employees but indigenous people of the Mayan Q'eqchi', who was entitled to the lands where Hudbay Minerals pursued their mining operations through its subsidiary.[118] The subsidiary of Hudbay Minerals hired security people to protect the mining projects, and the security people committed grave human rights abuses against the indigenous people.[119]

The claimants argued that Hudbay Minerals whas directly liable for these abuses because of their negligence in the duty of care owed to the indigenous people. The Canadian court used a similar test as the court in *Chandler v Cape*

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[114] *Chandler v Cape Plc,* at paras 61, 72–75 and 79.
[115] *Chandler v Cape Plc*, at para 62.
[116] Cape Plc had a doctor who did research on the link between asbestos dust and asbestosis and related diseases, *Chandler v Cape Plc,* at paras 75–78.
[117] *Chandler v Cape PLC.*
[118] *Choc v Hudbay Minerals,* at paras 11–13.
[119] Grave abuses including killing and rapes *Choc v Hudbay Minerals,* at paras 4–7.

Plc, and established that Hudbay Minerals, might owe a duty of care to the claimant and that it is conceivable that Hudbay had been negligent in that duty. The defendants motion to dismiss the case was rejected and plaintiffs were allowed to proceed and bring evidence substantiating a duty of care exists and was breached.[120]

Recently, a Swedish court tried the case of *Arica Victims v Boliden Minerals*. Arica Victims, a Swedish firm representing 707 Chilean plaintiffs, claimed that Boliden was responsible for damages the residents of Arica in Chile have suffered due to negligent dumping and mismanagement of toxic waste from the Swedish company Boliden. [121] During the 1980s, especially between 1984–1985, Boliden extracted copper at their facilities in Sweden.[122] By these operations, Boliden collected a toxic waste containing high levels of arsenic, mercury, lead and cadmium. Boliden decided to export their toxic waste to Promel, a Chilean company. Promel were supposed to process the toxic waste at their facilities in the north east part of the town Arica but stopped with their operations and left the toxic waste at their facilities.[123] Arica Victims claimed that Boliden was directly liable for the damages the residents of Arica had suffered because Boliden had been negligent in their duty of care owed to the plaintiffs.[124] The Swedish court ruled in favour of Boliden, because Arica Victims failed to prove that the negligence dumping of toxic waste by Boliden had caused the poor health of the residents in Arica.[125]

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[120] The Canadian court called it the 'Anns test', *Choc v Hudbay Minerals*, at paras 57–75; and compare with *Chandler v Cape PLC*.
[121] *Arica v Boliden* Case TR T 1012-13 (District Court of Skellefteå, Decision 8 March 2018). This decision has been appealed by Arica Victims to the Court of Appeal in Umeå, Sweden, see press release by Arica Victims, Göran Starkebo, Jonas Ebbesson och Johan Öberg, 'Arica Victims överklagar Skellefteå tingsrätts dom i målet mot Boliden Mineral' (25 March 2018), http://caratlaw.se/pm-overklagande/. [Accessed 2018-05-17].
[122] *Arica v Boliden*, pp. 8–9.
[123] *Arica v Boliden,* pp. 8–9.
[124] *Arica v Boliden,* p. 17.
[125] *Arica v Boliden,* pp. 122–123.

The claimants succeeded in proving that Boliden owed the residents of Arica a duty of care, and that this duty had been breached.[126] Boliden pursued due diligence towards Promel, and findings by its own employees indicated that the toxic waste was not processed or properly taken care of, which could risk damages.[127] However, Arica Victims failed to prove that the breach of Boliden's duty had a causal link with the actual damages of the environment and the poor health of the residents.[128]

Corporate liability in tort is still under development and time-consuming litigation processes have been brought to courts in the United Kingdom and the Netherlands.[129] The cases are still on-going and applies to environmental damages caused abroad by subsidiaries to companies domiciled in the Netherlands and the United Kingdom. In one of the cases, the claimants have argued that not only does the parent company have a duty of care owed to the employees of its subsidiary, but also to those affected by their operations.[130] Depending on the outcomes of the courts decisions, a successful claim in the United Kingdom could have broader applications to other transnational human rights litigations in common law countries.[131] However, the predicaments are uncertain and simply speculations.

3.4 Summary

Academics and courts have been challenging the fundamental rules of private law by developing doctrines such as 'veil piercing' and using tort of negligence as a way to attach a liability to the top of the corporate structure,

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[126] *Arica v Boliden,* p. 134 and 137.
[127] Boliden had fail to act when their employees discovered that the toxic waste would be left uncovered and not processed furtherer by Promel. This discovery should have indicated that the operations could risk damaging the environment or the people living in the area, *Arica v Boliden,* p. 130.
[128] Arica v Boliden, pp. 122–123.
[129] *Friday Alfred Akpan et al v Shell*; *Okpabi v Shell*, [2017] EWHC 89 (TCC); *Longowe v Vedanta,* [2017] EWCA Civ 1528.
[130] *Friday Alfred Akpan et al v Shell; Okpabi v Shell*; and *Longowe v Vedanta.*
[131] *Okpabi v Shell*; and *Longowe v Vedanta.* See more about key-developments at http://www.bhrinlaw.org/key-developments.

grasping after a liability of a parent or a buying company. Attributing a corporate liability to a parent company has been a hurdle, but academics and courts have carried on in developing the doctrine of piercing the corporate veil and applying it in a transnational context. The outcomes in courts have varied and the most significant developments have appeared in common law courts. In common law, courts have the authority to form doctrines into law and they seem to be more willing to expand these rules than civil law courts.[132]

Academics have argued that there may be other ways to go about a parent company liability, arguing that abandoning previous attempts are the way forward.[133] Peter B. Oh[134], have argued that the doctrine of 'veil-piercing' have been ill-conceived and does not work as a legitimate exception to the fundamental rule of limited liability in private law.[135] The various conditions set forth in court in order to 'pierce the corporate veil', or the facts that have to be laid down in court to prove a tort claim, makes it difficult to attribute a liability to the parent company.[136] From a rule of law approach, claims in veil piercing and tort law are unpredictable and courts have been reluctant in piercing the corporate veil of MNEs.[137]

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[132] For example, compare the courts decisions of the Swedish Supreme Court in NJA 2014 s. 877 pp. 889–890, with the UK Supreme Court in *Prest v Petrodel Resources Ltd.*

[133] See in general Bainbridge, *Abolishing Veil Piercing,* pp. 479–536; and Skinner, *Rethinking Limited Liability* pp. 1769–1864.

[134] Professor in Law at the University of Pittsburgh. He writes and teaches in the areas of Agency & Partnership, Business Organizations, Corporate Finance, Law & Economics and Securities Regulation. His research focuses on i.a. corporate procedures and remedies.

[135] See in general Oh, *Veil-Piercing Unbound,* pp. 89–138.

[136] For example, in *Arica v Boliden* the claimants proved to the district court that the company had been negligent, but they failed to prove that the negligence contributed to or caused the harm.

[137] See Thompson, *Piercing the Corporate Viel: An Empirical Study,* pp. 1036–1074; and in *Choc v Hudbay Minerals* at paras 43–48, the Canadian court examined the conditions in 'veil-piercing' but concluded that both the plaintiffs and the defendants' references were primarily based on the direct liability of the defendant.

4 Revisiting an old concept

In the search for an effective grievance and access to remedy, the right-holders have stumbled on the finish line, failing to achieve remediation due to legal barriers in private law. Attempts have been made to reach beyond the principles of separate legal entities and limited liability through the rules of attribution and the concept of piercing the corporate veil. Attributing direct liability in tort to the parent or buying company and piercing the corporate veil are not effective enough because the outcomes are unpredictable and casual chains are difficult to prove in court.[138]

The origin of unjust enrichment is a theory of recovery whose task is to fill gaps left uncovered by traditional legal categories such as contract, tort and property law.[139] Unlike veil-piercing, the doctrine operates independent of the type of claim, corporation, or shareholder involved and is focused on the flow of unjust benefits.[140] The doctrine of unjust enrichment seems to fit in other non-traditional areas of law as well, for example in environmental law, international law and in human rights law.[141] It is possible that the doctrine does have a gap-filling function in the context of parent company liability in human rights law. Therefore, I will dedicate this chapter to revisiting a concept of unjust enrichment and apply it in the context of parent company liability for human rights abuses.

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[138] *Arica v Boliden Minerals:* it was possible to prove that Boliden had been negligent, but the plaintiffs failed to prove that the negligence caused them damages; and see Weinbaum, *Unjust Enrichment: An Alternative to Tort Law and Human Rights in the Climate Change Context,* pp. 438, 440–441.

[139] According to Birks, the principle of unjust enrichment belongs to the law of restitution, which is separate from 'contract' and 'tort', Birks, *Introduction to the Law of Restitution,* pp. 16; and David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations,* p. 629.

[140] See Oh, *Veil-Piercing Unbound,* pp. 123–124.

[141] See Weinbaum, *Unjust Enrichment: An Alternative to Tort Law and Human Rights in the Climate Change Context,* pp. 429–454; Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, pp. 626–663; Oh, *Veil-Piercing Unbound,* pp. 89–138; and Fombad, *The Principle of Unjust Enrichment in International Law*, pp. 120–130.

4.1 Unjust Enrichment

The right to compensation for harms caused by a company can traditionally arise in contract, tort or criminal law.[142] The theory behind the right to compensation is a loss-based recovery where the claimant has the right to compensation because the defendant has to make good a loss suffered by the claimant.[143] The law of compensation should not be confused with the law of restitution. Restitution is a gain-based recovery which covers an area of law in where we find the principle of unjust enrichment. A claim of unjust enrichment gives the claimant a right to restitution – a gain-based recovery.[144]

The definition of restitution is that something is to be given back, implying that to whom a restitution is to be made is to regain something which he or she previously had, and which passed from him or her to the other. The most common case is a mistaken payment – someone gains something by mistake which invokes a right to restitution to whom who made the mistaken payment. There are several principles in common law which gives one a right to restitution, some principles are based on wrongs, likes breach of contract or tort, while others are based on unjust enrichment, like a mistaken payment.[145]

Unjust enrichment can be explained as a causative event, an event from which rights arise. The right does not arise from something that is wrong, but rather from *an enrichment at the expense of the claimant*.[146] The principle of unjust

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[142] See in general 'rules of attribution' section 3.2 above.
[143] See Peter Birks, *Unjust Enrichment,* 2nd ed., Oxford University Press, Oxford, (2005), p. 3.
[144] See Birks, *Unjust Enrichment,* pp. 11–12.
[145] The right to restitution for a mistaken payment is also known as '*condictio indebiti*', Peter Birks, *An Introduction to the Law of Restitution,* Clarendon, Oxford, (1985) p. 12; and Andrew Burrows, *The Law of Restitution,* 3 ed., Oxford; Oxford University Press (2011), p. 9.
[146] Separating between restitution for wrongs and restitution for unjust enrichment, see Birks, *Unjust Enrichment,* pp. 20–22; and Burrows, *The Law of Restitution,* pp. 9–13.

enrichment is widely recognised in both common and civil law and it has a long history which can be traced back to Roman Law.[147]

The principle of unjust enrichment is also known as a 'corrective justice' which maintains the objective of set right injustice that have occurred between individuals. In this sense, the principle of unjust enrichment fits the objective of private law. Even if modern theories of unjust enrichment differ in detail, they do share a number of important core features.[148]

To successfully claim a right to restitution based on the principle of unjust enrichment, three elements must traditionally be proved in court; i) a receipt of a benefit, ii) enrichment at the plaintiff's expense and iii) unjust retention of the benefit.[149] The court must thereby ask themselves four questions:

i) has the defendant been *benefited* (ie, enriched)?
ii) was the enrichment *at the claimant's expense*?
iii) was the enrichment *unjust*?
iv) are there any *defences*?[150]

Depending on the jurisdiction, the elements of the principle of unjust enrichment may vary or require additional conditions to be met.[151] The first

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[147] "This is indeed by nature fair, that nobody should be made richer through loss to another *(cum alterius detrimento)*" and "It is fair by the law of nature that nobody should be made richer through loss and wrong to another *(cum alterius detrimento et iniuria)"* quoted in Birks, *An Introduction of the Law of Restitution*, pp. 22–23; see also Brice Dickson, 'Unjust Enrichment: A Comparative Overview', 54:1 Cambridge L. J. (1995), pp. 100–126, available at: http://heinonline.org/HOL/P?h=hein.journals/camblj54&i=118. [Accessed 2018-03-26].

[148] See Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason W. Neyers, Mitchell McInnes and Stephen G.A. Pitel (red.), *Understanding Unjust Enrichment,* Hart, Oxford, (2004), p. 97; and in general, the study of Dickson, *Unjust Enrichment: A Comparative Overview,* pp. 100–126.

[149] See Dickson, *Unjust Enrichment: A Comparative Overview,* pp. 105–106; and Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, pp. 640–641.

[150] Burrows has slightly modified the questions of Birks in *The Law of Restitution,* p. 27; comapare with Birks, *An Introduction to the Law of Restitution,* pp. 20–21.

[151] In general Dickson, *Unjust Enrichment: A Comparative Overview,* pp. 100–126; In Swedish civil law the principle has been much criticised and a subject for debate since there

three questions have to be answered affirmatively and the fourth negatively if the claimant are to be entitled to restitution.[152] The four questions will be examined furtherer in the following sections when applying the concept in context.

4.2 Has the parent company been enriched?

In the previous chapter of 'Private Law' some key cases in the debate of corporate liability and human rights were highlighted. In this chapter some of the cases will be approached in the light of the law of restitution. Revisiting the doctrine of unjust enrichment as a ground for restitution would allow us to change the focus from attributing liability, to questions of whether there is an unjust enrichment of the parent or buying company at the expense of the claimant. The doctrine of unjust enrichment does not take into account the relationships between the entities within the corporate group. Therefore, the claimant does not have to prove any causal link between the damage and the operations of the parent company. The only causal link of importance is between the transfer of benefit from the claimant to the parent company.

One of the first questions the court must ask, is whether the defendant has been enriched (or benefited). If the first question is not affirmed, there is no case of an unjust enrichment.[153] The concept of enrichment can be quite broad

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is no statutory provision nor independent legal institute of unjust enrichment in Swedish law. See Jan Hellner, *Om obehörig vinst särskilt utanför kontraktsförhållanden: Ett civilrättsligt problem i komparativ belysning,* Almqvist & Wiksell, Uppsala, (1950); and Hjalmar Karlgren, *Obehörig vinst och värdeersättning,* P A Norstedt & Söners förlag, Stockholm, (1982). See Mårten Schultz, *Nya argumentationslinjer i förmögenhetsrätten: Obehörig vinst rediviva,* SvJt, (2009) s. 946–959, available at: https://zeteo.nj.se/document/svjt_svjt2009_s79?searchItemId=15377831!2!svjt_svjt2009_s79. [Accessed 2018-03-28]; and Jori Munukka, *Är obehörig vinst en rättsprincip?,* Ny Juridik, Nr. 3 (2009), s. 26–34, available at: https://pro.karnovgroup.se/document/912361/1?frt=jori+munukka&hide_flash=1&page=1&rank=7. [Accessed 2018-03-28].

[152] See Burrows, *The Law of Restitution*, p. 27.

[153] See Burrows, *The Law of Restitution*, p. 27.

and the test of identifying an enrichment can vary.[154] In many cases the question of 'enrichment' passes by unnoticed because the defendant has usually received money, which is the measure of wealth.[155] In other circumstances it may be more difficult to distinguish any benefit on the defendant.

Peter Birks dedicated a great part of his career to the doctrine of unjust enrichment and concluded that an enrichment (or benefit) must be a material gain because the law of restitution is a gain-based recovery.[156] If not a material gain, an enrichment is at least something positive to the defendant, an accretion of wealth.[157] Generally speaking, an enrichment or benefit is a value of some sort that the defendant has received.[158]

Birks suggested that the courts may apply an objective and subjective test to examine whether the value transferred to the parent company is an enrichment. An enrichment or benefit can be either positively objective or negatively objective, and is a subjective benefit if the value at issue is an actual benefit to the receiving party.[159]

The concept of unjust enrichment is not as developed or even recognised as a legal principle in Swedish law and therefore Swedish academics have not yet established a sophisticated test of what could constitute a benefit. According to the Swedish principle, a benefit is an accumulation of the defendant's wealth which can be through means of money, objects or services.[160] A typical enrichment would consist in acquisition of ownership, transfer of

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[154] See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, p. 642; it can be identified as a material gain, see Birks, *Unjust Enrichment*, pp. 50–51.
[155] See Birks, *Unjust Enrichment,* p. 50.
[156] See Birks, *Unjust Enrichment,* p. 51.
[157] See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, p. 642.
[158] See Burrows, *The Law of Restitution,* pp. 44–45.
[159] See Burrows, *The Law of Restitution,* pp. 44–45 and 47.
[160] See Hellner, *Om obehörig vinst särskilt utanför kontraktsförhållanden,* p. 156.

another's property, saving of an expense by an appropriation of property or services, and relief of obligations.[161]

In the litigation processes after the collapse of Rana Plaza, it was clear that great MNEs are outsourcing their operations through a network of suppliers and contractors.[162] In the Canadian court the claimants argued that Loblaw benefitted from the construction of a supplier and contractor network in where they could produce clothing to cheap labour costs overseas.[163] These arguments may remind us of elements of the doctrine of unjust enrichment. However, the court could not find any circumstances pointing towards an enrichment at the expense of the claimants. Also, the claimants main purpose was to gain remediation by compensation of personal damages and not a restitution of benefits.[164]

In the Swedish litigations, Arica Victims wrote in their complaint that by exporting their toxic waste, Boliden tried to avoid their responsibility and save an expense by paying the Chilean company 10 million SEK, instead of paying approximately 760 million SEK for retaining their waste in Sweden.[165] These arguments were not relevant for the court in determine whether Boliden had been negligent, and the plaintiffs claimed a right to a loss-based compensation instead of a restitution of the value Boliden received at the claimant's expense.[166]

The enrichment can be determined by Birks system of objective and subjective benefits. An objective benefit can be negative as in the case of Boliden, where the company saved an expense by exporting their toxic waste

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[161] See Hellner, *Om obehörig vinst särskilt utanför kontraktsförhållanden*, p. 156.
[162] See *Rahaman v J.C. Penny Corp., Inc*; *Das v George Weston Limited;* and discussion under section 3.2.1 'Rana Plaza' above.
[163] *Das v George Weston Limited*, paras 269 and 272.
[164] See the difference between 'restitution' and 'compensation' in chapter 4 'Revisiting an old concept' above; *Das v George Weston Limited*, paras 269 and 272.
[165] *Arica v Boliden*; and Complaint Filed by Arica Victims against Boliden Minerals, District Court of Skellefteå, 12 September 2013, 'the Complaint by Arica Victims', pp. 49–50.
[166] *Arica v Boliden*; and the Complaint by Arica Victims, pp. 49–50.

to Promel in Chile for 10 million SEK instead of paying 760 million SEK for processing and detaining their waste in Sweden.[167] After the collapse of the Rana Plaza factory, the claimants could have argued in front of the Canadian court that Loblaw saved expenses through outsourcing to low cost manufacturing areas.[168]

Because both Boliden and Loblaw has saved an expense which they otherwise would have to pay for, the saving was a factual and legal necessary expense which makes the benefit inconvertible. In theory the benefit thereby passes the test of both objective and subjective benefits.[169]

If the enrichment is both objective and subjective, the next step is to determine *when* Boliden and the Canadian company was enriched. They were either enriched when they *received* the service or product, or when the benefit was *commenced*.[170]

The companies could arguably have been enriched when they received the service or product.[171] If the service or product was not yet received, it is possible to claim that the parent company was enriched when the benefit was commenced – because the claimant's work and time spent would count as a value transferred to the company.[172] If it would be difficult to identify a benefit with any degree of certainty, the court could look at certain

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[167] See Birks, *An Introduction to the Law of Restitution, pp. 116–12;* and Burrows*, The Law of Restitution*, p. 49

[168] See Birks, *An Introduction to the Law of Restitution*, pp. 116–124; Burrows, *The Law of Restitution*, pp. 49–51; and *Das v George Weston Limited.*

[169] See Birks*, An Introduction to the Law of Restitution*, pp. 116–124; and Burrows, *The Law of Restitution,* pp. 49–51.

[170] Scholars do not agree on whether it is enough that the benefit has commenced, see Birks, *An Introduction to the Law of Restitution,* pp. 126–127, 129 and 232; and the critique on the 'commenced' argument by Burrows, *The Law of Restitution,* pp. 45–47.

[171] See Burrows, *The Law of Restitution,* pp. 45–47.

[172] See Birks, *An Introduction to the Law of Restitution*, pp. 126–127, 129 and 232.

characteristics of wealth, such as capacity to produce income or transferability.[173]

A benefit can be either a service, object or money, and it is not impossible to evaluate the enrichment when the service is commenced because a save in expense is also an enrichment.[174] Perhaps it would be difficult to prove in court an enrichment in service (work and time spent by the claimant) as a saved expense (savings in work and time for the defendant) that would have reasonably incurred for the parent company if they would disregard the final product. The result is dependent on the question if a commenced service would pass the subjective test in court. In the case of Loblaw and Boliden, both companies would otherwise have had to hire their own employees, buying products from another company or pursue the contractual obligations themselves if not the claimants would have done so.[175]

When applying the first condition in the doctrine of unjust enrichment it seems possible to determine whether a company has benefited or been enriched even if it is through a network of supplier or contractor. Therefore, we may continue to the second element of an enrichment 'at the expense of the claimant'.

4.3 Is the parent company enriched on the claimant's expense?

If the first question of 'enrichment' is affirmed, the next question to examine is whether the defendant have been enriched 'at the expense of the claimant'. There are some issues that arise in the relation to this element. The first issue is related to 'correspondence' – does the element require a correspondence or

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[173] See Jack Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* 209 (1991), referred to in Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, p. 642.
[174] See Birks, *An Introduction to the Law of Restitution*, p. 126–127, 129 and 232; and Burrows, *The Law of Restitution*, pp. 44–45.
[175] See Birks, *An Introduction to the Law of Restitution*, pp. 116–124; and Burrows, *The Law of Restitution,* pp. 47–51.

equivalence between the claimant's loss and the defendant's gain? The second issue is regarding 'third party' constellations – can the claimant have restitution from the defendant when the benefit has been conferred by a third party?[176]

4.3.1 Correspondence

In some situations, the gain of the defendant is equal with the loss of the claimant, especially when the defendant has received money or an object. But a defendant can be enriched in a saved expense when he or she have received a service. Therefore, it is important to discuss whether the loss for the claimant must be equivalent with the gain of the defendant.

If the parent company has been enriched at the expense of the claimant, the benefit or enrichment has been taken from the claimant or from the claimant's property. This element does not require the claimant to prove equivalence between his or her loss and the gain of the defendant, or even a loss at all. The important fact is whether a transfer of value have passed from the claimant or the claimant's property to the defendant, and if the claimant has suffered any undesired consequence.[177]

Birks used the word 'subtraction' to explain the situation in where a defendant have gained something at the expense of the plaintiff. By using this word, Birks meant that a plaintiff is entitled to a restitution when it is proved that the plus to the defendant is a minus to the plaintiff.[178] Andrew Burrows agree with this basic rule but goes further. The plus on the defendant must not be

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[176] See Burrows, *The Law of Restitution,* p. 64.

[177] See Birks, *Unjust Enrichment,* p. 85; Burrows, *The Law of Restitution*, p. 66; and Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, pp. 644–645; and James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds.) Philosophical Foundations of the Law of Unjust Enrichment, Oxford University Press, New York (2009), p. 212–216, available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199567751.001.1/acprof-9780199567751. [Accessed 2018-04-09].

[178] See Birks, *An Introduction to the Law of Restitution,* p. 132.

equal with the minus of the plaintiff to establish an unjust enrichment.[179] According to Burrows, the claimant does not have to prove any loss at all, it is enough to establish that the unjust enrichment was at the expense of the claimant because the enrichment *came from* the claimant.[180]

The defendant has been enriched at the claimant's expense when the value has been transferred directly or indirectly from the claimant's assets or labour.[181] A gain can be the avoidance of a loss and loss can be a failure to obtain a gain. Also, a loss is not defined by monetary loss, the loss can be an undesired consequence for the claimant.[182]

The 'expense' element can be discussed through the collapse of Rana Plaza[183] by questioning who bears the risks of harm. The workers in the factory of Rana Plaza (and other unsafe working conditions around the world in low cost manufacturing countries) carries the risk of a factory collapse or other accidents. Even if there is 'just a risk', such a risk can materialise, as it did in Rana Plaza, and the workers suffers the undesired consequences of the buying companies risk-outsourcing.[184]

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[179] See Burrows, *The Law of Restitution,* p. 64.

[180] See Burrows, *The Law of Restitution,* p. 65; in other words, the enrichment must have been 'subtracted' from the claimant, see Birks, *An Introduction to the Law of Restitution,* p. 132; and Birks, *Unjust Enrichment,* p. 79–86.

[181] One approach is that 'at the expense of' requires the value to be transferred directly from the claimant to the defendant, see Edelman, *The Meaning of Loss and Enrichment*, pp. 212 and 213–216; Edelman's 'directness' requirement has been contested. Quoting Burrows, it is preferable to say that 'at the expense of' means that the gain to the defendant must comprise a transfer of value from the claimant which must be distinguished from a consequential gain resulting from that transfer, see Burrows, *The Law of Restitution,* p. 66.

[182] see Edelman, *The Meaning of Loss and Enrichment*, pp. 212 and 213–216.

[183] See section 3.2.1 and 3.2.2. above where the cases where discussed.

[184] Vagueness of the claimant's loss have been recognised in indigenous claims as well but can be defeated. "(…) The potential vagueness of these costs, however, does not defeat the expense element. The plaintiff's loss need not necessarily equate with the defendant's gain. Therefore, as long as the indigenous plaintiff incurs some loss, quantifiable or otherwise, the expense element can be satisfied." in Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations,* p. 645.

The Swedish civil law approach to the unjust enrichment concept is that there is no separate condition of 'at the expense of the claimant'. The first element of 'enrichment' can be perceived in common law as including a *transfer of value from the claimant* which can be transferred through means of risk-outsourcing in where the system of outsourcing pushes the risks to the bottom of the supply chain, onto workers and small suppliers, that cannot or are not capable of bearing such risks. However, there is no issue of 'correspondence' in civil law – an enrichment is at the expense of the claimant even if he or she has not suffered any loss. Instead, the burden of proof falls on the defendant to prove that he or she has a legal reason for keeping the enrichment.[185]

Even though unjust enrichment is underpinned by corrective justice which insinuate a requirement of an equivalence between a loss and a gain, the umbrella of corrective justice is sufficiently wide to include an approach of 'no correspondence'.[186]

If we apply the element of 'at the expense of the claimant' onto the case against Boliden, the value for Boliden is the saved expense in service due that they outsourced the processing of their toxic waste to a Chilean company. The value was transferred from the claimants because they suffered the undesired consequences of environmental damages and health issues due to the toxic waste that was left unprocessed in Arica. The people living in Arica are also missing out on a potential gain because they cannot work, make use of the lands, or live in the area due to the environmental damages in and around the Chilean village.[187]

The litigation processes after the collapse of Rana Plaza revealed that the parent companies did gain value by outsourcing their production. The suppliers and contractors could keep the production costs down by hiring

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[185] See Hellner, *Om obehörig vinst särskilt utanför kontraktsförhållanden*, pp. 170–172.
[186] See Burrows, *The Law of Restitution,* pp. 68–69.
[187] About earning profit from another's property by 'interceptive subtraction', see Birks, *Unjust Enrichment,* p. 85.

cheap labour in unsafe working conditions. All this at the expense of the claimants (and their families) who suffered the risks of unsafe working conditions and subsequently the physical damages and loss of friends and relatives when the risks materialised.[188]

In summary, it is possible to prove that a parent company has been enriched at the expense of the rights-holders, even if there is no equivalence between the loss of the claimant and the gain of the parent company.

4.3.2 Third parties

There is one question left to be examined – was the parent company enriched at the expense of the claimant when the benefit was conferred by a third party? In common law, scholars point of view differs. Edelman's approach implies that there has to be a direct link between the loss of the claimant and the gain of the defendant, while others argue that under some circumstances it is possible for the court to consider exceptions to this general rule of 'directness'.[189]

The general rule of a directness between the gain of the defendant and the loss of the claimant would exclude a right to restitution when there is a third party involved in the transfer of benefit. In the context of MNEs and victims of human rights abuses, the rights-holders would not be able to seek restitution from the parent company because the benefit was conferred to the parent from a supplier/subsidiary/contractor. Even if there is an unjust factor (for example duress or mistake) operating between the right-holder and the supplier, the right-holder would not receive a restitution from the parent company because there is no direct link between them.[190]

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[188] Edelman, *The Meaning of Loss and Enrichment,* p. 212–216.

[189] See Edelman, *The Meaning of Loss and Enrichment,* pp. 212 and 213–216; Birks, *An Introduction to the Law of Restitution,* pp. 135–140; Birks, *Unjust Enrichment*, p. 77; and Burrows, *The Law of Restitution,* pp. 75–85.

[190] The most typical example is when C confers a benefit on X who, as a consequence, transfers a benefit to D, and there is an unjust factor operating between C and X, thus D is the final receiver of the benefit. Or when X mistakenly pays D when he intended to pay C

In the context of transnational litigations, it would not be just for the parent or buying company to remedy both the third party who conferred the benefit to the parent, and also the claimant from which the benefit came from initially.[191] But fortunately, there is no rule without an exception. The element of 'at the expense of' can be satisfied although the defendant (parent company or buying company) is not *responsible* for the loss of the claimant.[192]

'Title and tracing' is probably the most common situation that would lead the court to disregard the general rule of directness. If a subsidiary within an MNE has received a benefit from a right-holder in an improper way (for example by stealing an object, made use of lands the subsidiary is not entitled to, or hired children for labour), and then conferred the benefit to the parent company, the right-holder is entitled to restitution from the parent company. Even if the parent company has received the benefit without doing anything wrong directly to the right-holder, they have benefited from the right-holder through a subsidiary who was not entitled to the benefit in the first place.[193]

This situation could be applied in the context of Boliden Minerals and the people living in Arica. Even if the claimants do not need to prove any wrongful conduct to successfully claim that the parent company have been

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because X owned money or intended to confer a gift to C, see Burrows, *The Law of Restitution,* pp. 70 and 71–74.

[191] See Burrows, *The Law of Restitution,* p. 70; and the argument that the sum of losses and gains must be zero, Birk's subtraction is a 'zero-sum game', Lionel D. Smith, 'Three-Party Restitution: A Critique of Birk's Theory of Interceptive Subtraction', 11 Oxford J. Legal Stud. (1991), pp. 481 and 483, available at: http://heinonline.org/HOL/P?h=hein.journals/oxfjls11&i=497. [Accessed 2018-04-10].

[192] See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations,* p. 644; Burrows have identified four exceptions; title and tracing, agency, some subrogation rights and interceptive subtraction, see Burrows, *The Law of Restitution,* pp. 75–85.

[193] The typical example is when something has been stolen from C by X, and X has conferred the stolen item to D. As long as C can prove his or her title and trace the specific benefit to D, C can successfully claim that C is entitled to restitution from D, See Burrows, *The Law of Restitution,* pp. 75–76.

enriched at their expense, the negligent processing and retaining of Bolidens waste by Promel in Arica would support their argument.[194]

The identified benefit conferred to Boliden is the saved expense by outsourcing the processing of their toxic waste. This has been conferred to Boliden through Promel, who is the contractor. This benefit is at the expense of the people in Arica because Promel was negligent in their processing and retaining of the toxic waste which led to damages on the environment and health issues for the people living in Arica. This approach would be possible to apply onto other cases as well.[195]

'At the expense of the claimant' is not an element that would have to be proved in civil law claims. Instead the parent company would have to prove a legal reason for keeping the benefit.[196] It is therefore possible that the court would affirm that a parent company has been enriched at the expense of a right-holder in both common and civil law jurisdictions.

4.4 Is the enrichment unjust?

The third element of the doctrine of unjust enrichment is to evaluate whether the enrichment at the expense of the claimant have been unjust. The court has two options when choosing the right approach to the 'unjust' element. In common law, the approach is that the claimant must establish that the defendant has been enriched at the claimant's expense due to an *unjust factor*.[197] Another approach, most common in civil law, is that an enrichment

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[194] See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, pp. 645–646.
[195] For example, Fagan applied this view onto the case of the indigenous claims in *Choc v Hudbay Minerals*, see Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations,* pp. 644–646.
[196] See Hellner, *Om obehörig vinst särskilt utanför kontraktsförhållanden,* pp. 170–172: and 'If these assets have been appropriated wrongfully, the current holder must proffer a valid explanation for retaining title', see Oh, *Viel-Piercing Unbound,* pp. 80–138.
[197] See Burrows*, The Law of Restitution*, pp. 86–87; and Birks, *An Introduction to the Law of Restitution,* chs 6–7 and 9.

should be restored if the defendant has been benefited on *absence of basis.*[198] The disregarding of unjust factors have also been discussed by common law scholars but has not been the preferred approach within common law jurisdictions.[199]

If the court would prefer the 'absence of basis' approach, the effect would be, that when the claimant has proved an enrichment at his or her expense, the defendant must prove that he or she has a legal reason for keeping the enrichment.[200]

In common law, the court would possibly apply the 'unjust factor' approach to the 'unjust' element, and the claimant would have to prove to the court that he or she has the right to restitution due to a factor that is considered unjust. Birks and Burrows have thoroughly analysed the most common unjust factors in English case law, but the list of possible unjust factors is not exhaustive.[201] The unjustness of the defendant's enrichment often comes from a reason or a circumstance which makes the retention of an enrichment unjust. A reason could be a dishonest act or intent, and a circumstance could be the duress of the claimant.[202]

In a claim made by a person who have been harmed in the operations of an MNE, the claimant could argue that the enrichment of the parent company is unjust because the benefit was due under duress. It is possible that the supplier

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[198] See Hellner, *Om obehörig vinst särskilt utanför kontraktsförhållanden,* pp. 174–186.
[199] Except Sweden, Germany and France also prefer the 'absence of basis' approach, see Burrows, *The Law of Restitution,* pp. 95–96; and Hellner, *Om obehörig vinst särskilt utanför kontraktsförhållanden,* pp. 26, 75 and 175.
[200] See Burrows, *The Law of Restitution*, pp. 97–98 and *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, at 408–409.
[201] Example of unjust factors are: duress, mistake, failure of consideration and no consent. See Burrows, *The Law of Restitution,* pp. 86–87 and chs 10–20; and an analyse of unjust factors in Birks, *An Introduction to the Law of Restitution,* chs 6–7 and 9.
[202] See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, pp. 646–647; Burrows, *The Law of Restitution*, pp. 86–87 and chs 10–20; and Birks, *An Introduction to the Law of Restitution*, chs 6–7 and 9.

threatened or pressured workers to continue working under bad conditions, otherwise the employing supplier would terminate their employment contract. Such an economical duress is a factor that would be considered unjust and thereby leaving the claimant with a right to restitution.[203] In the litigations after the Rana Plaza collapse, it was clear that the workers did not want to go back to work when they discovered that cracks appeared in the factory. When they refused to go back to work, they were threatened with termination.[204]

To make the claim even stronger, the claimants could point to the commission of a wrong, such as a tort committed by the parent company. The claimants would not be required to prove that the parent company had committed an actionable wrong, just that the wrongfulness supports the unjust retention of the benefit.[205] A claim in restitution on the ground of unjust enrichment against Boliden could arguably be supported by their negligence in due diligence investigations.[206]

In a civil litigation process, the court would look at the 'absence of basis' of the parent company's enrichment. If the parent company cannot provide for a legal reason, the assumption is that the enrichment at the expense of the claimant is unjust and the enrichment shall therefore be restored to the claimant.[207]

Whatever approach the court may take in determining whether the enrichment of a parent or buying company has been unjust, it is possible that the court

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[203] 'Economic duress' could also consist in threats to induce another to break a contract. For example, another party in the supplier/sub-supplier network or the employer of the worker, see Burrows, *The Law of Restitution,* pp. 257, 263–282.

[204] See victims statements in *Das v George Weston Limited,* at paras 89–92; and the procedural context in *Rahaman v J.C. Penny Corp., Inc.,* at para 1.

[205] See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, pp. 648–649; and Kit Barker, 'Unjust Enrichment: Containing the Beast', 15 Oxford J. Legal Stud (1995), p. 470, available at: http://heinonline.org/HOL/P?h=hein.journals/oxfjls15&i=471. [Accessed 2018-04-25].

[206] *Arica v Boliden,* p. 134 and 137.

[207] See Burrows, *The Law of Restitution*, p. 96; and Hellner, *Om obehörig vinst särskilt utanför kontraktsförhållanden*, p. 174.

may come to the conclusion that the parent company has been unjustly enriched because of human rights abuses in the operations of the MNE.

4.5 Are there any defences to the parent company's enrichment?

When the court has affirmed that the *enrichment at the expense of the claimant* was *unjust*, the last step is to examine the parent company's possible defences. A defence could be a fully or partial denial of an unjust enrichment or an acceptance of the cause of action thus defending that the liability should be reduced or eliminated.[208] There is no consensus in the distinction of denial or defences to unjust enrichment, and some scholars have argued that the doctrine of unjust enrichment does not recognise any distinction between these two.[209]

The view of different scholars may depend on how one is perceiving the term 'unjust' – do the claimant have to establish an unjust factor or does the defendant have to prove that he or she had a legal reason for keeping the enrichment at the expense of the claimant.[210] This thesis will not be concerned with the distinction between 'denial' or 'defences', but it is of importance to mention that the following examination of arguments can be viewed as either a 'denial' or a 'defence' depending on how one approach the 'unjustness' of the enrichment.

A defence to a claim of unjust enrichment can be aimed at first three elements of the doctrine. The defendant could argue that he or she have not been *enriched,* or that the enrichment was *not at the expense of the claimant*, or

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[208] See Helen Schott, 'Defence, Denial or Cause of Action? 'Enrichment Owed' and the Absence of Legal Grond' in Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith (eds.), *Defences in Unjust Enrichment,* Hart Publishing, Oxford, (2016), pp. 2–3 and 53–54.
[209] See Dyson et al., *Defences in Unjust Enrichment,* pp. 4–5.
[210] See section 5.4. above regarding 'unjust factors' or 'absence of legal basis' and Dyson et al., *Defences in Unjust Enrichment,* pp. 5–7.

that the enrichment was *just.*[211] In the following sections defences will be examined in relation to the three main elements of the doctrine of unjust enrichment and in the context of a parent company's unjust enrichment.

4.5.1 No enrichment

Defences to a claim of an 'enrichment' can be that the parent company accepts the cause of action (an unjust enrichment at the expense of the claimant) but argue that a restitution would be unacceptable.[212]

A defence in *change of position* is available for a defendant whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.[213] The typical decision is when a defendant was initially enriched at the claimant's expense but lost the enrichment (was disenriched).[214] A parent company such as Loblaw or J.C. Penny Corporation could argue that they were initially enriched, but due that they did not receive the product from the claimant because the factory collapsed, they lost the benefit because they could not deliver products to the consumers.[215] A contradicting aspect is that buying companies or parent companies could possibly already have accrued benefits from long term relationships with suppliers with unsafe working conditions, which would render this defence weak.[216] A claim in unjust enrichment is

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[211] Burrows have identified ten defences. For a detailed examination of each defense, see Burrows, *The Law of Restitution,* chs 21–22.

[212] See Burrows, *The Law of Restitution,* pp. 524–568.

[213] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580; *Storthoaks Riral Municipality v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1 (Canada); and *Bank of New South Wales v Murphett* [1983] 1 VR 489 (Australia).

[214] See Burrows, *The Law of Restitution,* p. 526; Birks, *An Introduction to the Law of Restitution,* pp. 410–415; and Dennis Klimchuk, 'What kind of Defence is Change of Position?' in Dyson et al., *Defences in Unjust Enrichment,* p. 71.

[215] In the case of *Das v George Weston Limited* and *Rahaman v J.C. Penny Corp., Inc*, the parent companies bought their products from the suppliers operating in the garment factory of Rana Plaza.

[216] In the German case *Muhammad Jabir and Others v KiK Textilien und Non-Food GmbH,* the retailer KiK had a long-term relationship with a supplier whose factory in Pakistan caught fire due to lack of fire and workplace safety precautions which killed more than 250 persons. KiK admitted that it purchased 75% of the factory's output and that the factory's growth was mainly due to this commercial relationship, see Wesche and Saage-Maaß, *Holding*

underpinned with corrective justice which not only goes for the claimant but also for the defendant, but if he or she is no worse without the enrichment, the claim for restitution should be accepted.[217]

Another way to defend oneself is to argue that it is difficult to establish an enrichment to the parent company. It may be difficult to identify any accretion of wealth to the parent company, or to prove that a benefit has been conferred from another entity within the MNE to the parent company.[218]

4.5.2 Not at the claimant's expense

A possible defence to the element of 'at the expense of the claimant' is the defence of 'passing on'. If accepted under the law of restitution, this defence requires the gain to the defendant to have been subtracted from the claimant. If the claimant has passed on the loss, the element of 'at the expense of' is nullified and it would be unjust to reverse the benefit to the claimant.[219]

To have any success in this defence, the defendant must prove that the claimant, by passing on its loss, have *avoided its own loss.* This argument may seem strong because there is no 'corrective justice' in a restitution from the defendant to the claimant if the claimant has avoided its own loss. In that case, the claimant would be unjustly enriched.[220]

However, there are two strong arguments against this defence. First and foremost, the claimant does not need to suffer any loss at all to prove that the defendant has been enriched at the expense of the claimant.[221] It is only sufficient to prove that there has been a transfer of value from the claimant to

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Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK, pp. 370–371.

[217] See Burrows, *The Law of Restitution*, p. 526.

[218] See section 4.2. above regarding the objective and subjective test of an enrichment to the defendant and section 4.3.2. about 'title and tracing' an enrichment.

[219] See Burrows, *The Law of Restitution,* pp. 614–615.

[220] See Burrows, *The Law of Restitution,* pp. 614–615.

[221] Regarding 'at the expense of' and 'correspondence' of loss in section 4.3.1. above.

the defendant. Also, if the loss has passed on from the claimant to another party, this does not deny the initial loss of the claimant. It is simplistic to argue that denying a restitution because the loss has passed on would be more just. The claimant could itself be liable to a claim in restitution due to the direct link between the claimant and the person the loss has passed on to. In such case, it is more in line with corrective justice to allow the claimant a restitution from the defendant which then can be passed on to the third person who suffered the final loss.[222]

This defence is probably not a strong defence for a parent company who is trying to shield themselves from reversing a benefit to the claimant. A right-holder would argue that the consequences they suffered due to human rights abuses cannot be avoided by passing their loss on to someone else. In the litigations after the Bhopal disaster, collapse of Rana Plaza and against Boliden Minerals – it is clear that the claimants have suffered physical and environmental damages. This type of damages is individual and cannot be passed on to another.

4.5.3 A just enrichment

The most preferable defence against a claim of unjust enrichment is perhaps that the enrichment is not truly unjust.[223] Several defences have been identified and a few of them will be examined in this section, namely: *counter restitution, bona fide purchase, dispute resolved* and *limitation.*[224]

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[222] See Burrows, *The Law of Restitution,* pp. 614–615.

[223] See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, p. 650.

[224] Apart from the defences mentioned, *incapacity* and *illegality* is also a defence against unjustness, see Burrows, *The Law of Restitution,* pp. 569–570, 573, 575–580, 581–583, 589, 601–602 and 604–605; Sonja Meier, 'Bona Fide Purchase as a Defence in Unjust Enrichment' in Dyson et al., *Defences in Unjust Enrichment,* pp. 255–257; and 575–580; and *Lipkin Gorman v Karpnale Ltd* (counter restitution); *R Leslie Ltd v Sheill* [1914] 3 KB 607 and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (incapacity).

A defence in 'counter restitution' is a defence that recognises a counter-claim of the defendant. The defendant has not been unjustly enriched if the claimant also benefited from the transfer or benefits.[225] A parent company such as Loblaw or J.C. Penny Corporation could argue that they bought products from a supplier who hired the claimant and that the investment in buying products from suppliers overseas have positive implications on the host state's economy, which affects the claimant in a positive way. It is therefore not more than just that the MNE should have benefited from the investment.[226]

Whether this argument is effective as a defence against an unjust claim can be discussed. Bangladesh as a nation did probably profit from investments by MNEs such as Loblaw and J.C. Penny Corporation and therefore some of the consequences of the investments are not unjust. But the picture is not fully drawn, because the people working in the factory and their families did probably not gain or benefit directly from the companies' investments in Bangladesh suppliers, instead they suffered the negative consequences of the investments. Therefore, the companies defence in a counter-claim would probably not deprive unjustness of their benefits.[227] Such a defence could though reduce the final gain-based recovery which is to be restored to the claimant.[228]

Another possible defence a parent company could use is 'bona fide purchase'. This is an absolute defence, which not only protects the defendant but also

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[225] See Burrows, *The Law of Restitution,* pp. 569–570.

[226] An MNE would probably go even further and defend themselves with corporate social responsibility (CSR) actions, such as investing in welfare and providing for healthcare etc. This does not undertake the unjustness of being enriched at the expense of the claimants because the individual necessary benefit from the CSR-actions. See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations,* pp. 650–653.

[227] See Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations*, pp. 650–651.

[228] A defense can be a full or partial denial and the final compensation that is returned back to the claimant can be a smaller amount than the claimant initially asked for. If the enrichment has passed the subjective test, the actual gain to the parent company may be smaller than it is seen objectively, see the discussion in section 4.2. 'Has the parent company been enriched?' above.

third parties who have received the benefit from the defendant. Not everyone agree that this defence is legitimate to an unjust enrichment claim, but it has been recognised by English courts.[229] A defence in bona fide purchase protects the defendant's reliance on his exchange transaction with a third party and not only from returning what the parent company received. [230] A parent company such as Boliden could have argued that they indeed benefited through the company Promel, but that they were in good faith when they signed the contract with the Chilean company and did not know that the enrichment flowing from the claimant was obtained in an improper way. It is possible that Loblaw, J.C. Penny Corporation and UCC could have used the same defence – they did not know about the conditions and the low wages within their supplier network and therefore their enrichment are not unjust.

However, Boliden would probably not succeed in such defence, because their employees did discover that Promel would not be able to pursue the processing of the toxic waste properly. The defence would neither shield Loblaw, J.C. Penny Corporation nor UCC from giving back what they unjustly gained. The claimants could easily prove that the parent companies did know about the risk of adverse human rights impacts within the supplier network or subsidiary's operations.[231] Another aspect is that the companies had a choice in pursuing the operations while the claimants probably did not due to economic duress.[232]

The two remaining defences are *dispute resolved* and *limitation.* These defences are not exclusive for the doctrine of unjust enrichment. They are

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[229] See Burrows, *The Law of Restitution*, pp. 573 and 575–580; and *Lipkin Gorman v Karpnale Ltd.*

[230] See Meier, *Bona Fide Purchase as a Defence in Unjust Enrichment*, pp. 255–257; Burrows, *The Law of Restitution,* pp. 573 and 575–580; and *Lipkin Gorman v Karpnale Ltd.*

[231] In the litigations against Loblaw, the claimants argued that the parent company knew about the insufficient working conditions and low wages, *Das v George Weston Limited*, para 126.

[232] In indigenous claims Fagan suggest that a defence in 'bona fide purchase' is weak because "The MNC presumably has a choice in pursuing the given venture, while the indigenous peoples most likely will not have a choice, for example, in giving up their land.", Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations,* p. 654.

defences that will lead to a courts dismissal of the case on procedural grounds. The defence in *dispute resolved* refers to the concept of *res judicata*. The claimant's case will be dismissed because the dispute has already been resolved. The defence in dispute resolved bars the 'floodgates of litigations' that may come with the various unjust factors that the claimant can consider in a claim of unjust enrichment.[233]

If the parent company and the claimants have made an agreement outside court, this agreement would bar future litigations due to the same actions. In the litigation processes against UCC and UCIL after the Bhopal disaster, the parent company UCC and the state of India agreed on a settlement outside court. In this settlement the MNE decided to pay the Indian government an amount of money and in return the government promised to quash any future litigations against the MNE. Such settlement would bar future litigations.[234]

Most claims have a period of *limitation,* after a certain period of time the defendant is free from legal actions taking place against him or her. The limitation period also works as an incentive for claimants to not sit on their claims but to pursue them as quickly as possible. Also, proving a cause of action may be more difficult the longer it takes for the claimant to pursue their legal actions. When the limitation period has passed a claim in unjust enrichment against the defendant will be barred.[235]

The limitations periods differ depending on jurisdiction. In the cases against UCC, Loblaw, J.C. Penny Corporation and Boliden the limitation period was not a strong defence and not a defence the parent companies could rely on. Sometimes the litigation processes takes time because of ineffective courts in

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[233] See Burrows, *The Law of Restitution,* pp. 601–602.

[234] Even if the government and the MNE agreed that no future litigations would take place, an Indian court did find the subsidiary and its executives criminal liable for the disaster, see *Union Carbide Corporation v. Union of India,* AIR 1992 SC 248 in Deva, *'Bhopal: the saga continues 31 years on'* p. 23.

[235] See Burrows, *The Law of Restitution,* pp. 604–605.

the host states and therefore the claims against the parent company in their home states will not be pursued until the first dispute has been solved.

In the case against Boliden the company did argue that the time period since the actual damages took place had already started a long time ago and that the court should dismiss the case. But the court did not dismiss the case due to limitation.[236]

For the purpose of preventing 'floodgates of litigations' to proceed, the concept of unjust enrichment does provide parent or buying companies with a few strong defences, especially a defence in 'dispute resolved' and 'limitation' to the element of unjustness.

[236] *Arica v Boliden,* pp. 49–51.

5 Conclusions

Under Chapter 2 I discussed the UNGPs and the OECD Guidelines. Both instruments are soft law instruments and the UNGPs is the only instrument that has been accepted by the international community in business and human rights. The framework provides the states with various possibilities to protect, respect and provide right-holders with access to remedy. The policies within the UNGPs are in most parts correspondent to the OECD Guidelines and together they imply that both states and business recognises that they have responsibilities in respect of human rights.[237] Even though the instruments are just policies they acknowledge different approaches to the business and human rights agenda. Therefore, it would be foolish not to take advantage of this multiplex policy frameworks and go beyond previous attempts such as piercing the corporate veil and attributing a direct liability to parent corporations. Just as Ruggie realised, there is not only one way but many ways in reducing legal barriers and provide victims of human rights abuses with access to remedy.[238]

The states duty to protect human rights and provide access to remedy is an obligation under international human rights law. There are no limits in how states could carry out their obligations, but extraterritorial legislations covering business operations overseas may interfere with other states right to regulate business operations within its territory. In somewhat the avoidance of interfering with state sovereignty has conquered the debate and the issue of right-holders possibility to seek redress for human rights abuse remains. In states where MNEs operates through suppliers or contractors, the host state often fails to live up to its obligations under international human rights law due to corruption or lack of sufficient support to claimants in litigation processes. Just because the access to remedy renders weak in the host state,

[237] See discussion under Chapter 2 'The Guiding Principles'.
[238] See discussion under Chapter 2.3 'Access to Remedy'.

the home state of the MNE cannot avoid its own obligations of reducing legal barriers and redress human rights abuses.

Academics and courts have realised that the law of restitution and the concept of unjust enrichment could fill a void that cannot be covered by tort, criminal or contract law. The ability to make a claim against a parent company on the ground of unjust enrichment would correct the injustice of enriching MNEs at the expense of right-holders. The effects the doctrine of unjust enrichment could have is dependent on the peculiarities of each jurisdiction and therefore the effects in practice need further studying. Especially in regards of civil law jurisdiction such as Sweden in where the concept is not as developed as in the United Kingdom and the US.

However, by grasping the essentials of the concept of unjust enrichment, the concept would not require the states to regulate business operations extraterritorially. Home states of the parent company would be allowed to provide victims with an access to remedy in restitution of unjust enrichments of the parent company when enrichments have incurred at the expense of right-holders. The parent company would be held liable based on its own unjust enrichments, and not due to acts or omissions of a supplier or contractor overseas. By reducing the home states legal barrier with a right to a gain-based recovery, it is possible to avoid infringing the sovereignty of the host state. Also, the concept of unjust enrichment does not exclude suppliers, subsidiaries or contractors from remediation because the elements of the doctrine is applicable on whoever the unjustly enriched party is. Last but not least, restitution from MNEs on the ground of unjust enrichment would relieve the right-holders from the burden that comes with proving a claim of piercing the corporate veil or holding a parent company directly liable. Such burdens affect the effectiveness of access to remedy.[239]

[239] In several cases the litigation processes have been time-consuming. For example, *Arica v Boliden* and *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984.*

There is no obligation for a parent company to pursue due diligence under international human rights law, even though both the UNGPs and the OECD Guidelines promote human rights due diligence. The concept of unjust enrichment would encourage parent companies to pursue due diligence to prevent themselves from benefitting at the expense of right-holders by any unjust factor. Through due diligence processes, a parent company would be able to identify factors such as economical duress in the state where the parent company have invested in a subsidiary, supplier or contractor. Encouraging business to pursue due diligence would also have effects on the 'moral-hazard' problem. Sufficient risk management could prevent businesses from continuing to outsource their risks to suppliers or contractors operating in countries with low manufacturing standards where rule of law is weak and corruption high.

The states can take comfort in that the international community and business itself believe that business has a responsibility to respect human rights throughout their operations. However, it is up to the states to provide both business and right-holders with the right tools. When existing rules and mechanisms are not sufficient to protect, respect and remedy human rights, there is nothing holding the states back from developing new policies or revisiting old concepts. The purpose of reducing legal barriers is to supply the right-holders with access to remedy and correct the unjustness of the system in where MNEs can operate without impediments. The concept of unjust enrichment is perhaps just another 'concept' in the corporate accountability context, but enabling various accountability concepts is important to sufficiently meet the social and legal expectations society has on both states and business. Unjust enrichment as a ground for restitution could assist in strengthening legal frameworks for holding MNEs accountable and help victims of human rights abuses to obtain remediation from a parent company, or any company within the MNE.

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