FACULTY OF LAW
Lund University

Henna Kjellberg

Bridging the Accountability Gap

A study of the civil liability of parent companies for business-related human rights abuse in Sweden, France and the United Kingdom

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Radu Mares

Semester of graduation: Period 1 Fall semester 2019

Contents

Summary

The lack of accountability for human rights violations arising out of the activities of multinational enterprises has been identified as a key impediment to the fulfillment of universal human rights and the corresponding access to remedy for victims. However, the last couple of years have witnessed an increasing movement to bridge the accountability gap on the national and international level.

The aim of the thesis is to clarify the possibilities of holding parent companies liable for business-related human rights abuse in Swedish, French and British civil law. France was the first country to embed mandatory human rights due diligence obligation into law with its 'Duty of Vigilance Law' in 2017, and the United Kingdom has received widespread coverage due to its landmark rulings on the direct liability of parent companies for business-related human rights abuse in their corporate groups.

Despite Sweden's commendable efforts on many human rights issues, there is as of yet no law that obligates Swedish businesses to respect human rights extraterritorially. The Swedish context is the focus of the study, which strives to identify the areas where corporate accountability for human rights abuse is lacking in Swedish civil law and suggest amendments based on the French and UK developments on business and human rights by employing a legal transplant method.

The study concludes that Sweden has in its existing legislation not clearly set out the expectation that Swedish parent companies should respect human rights in their global operations. There are also several barriers to the access to remedy for rights-holders seeking to make a tort claim against a Swedish parent company.

The study suggests introducing a mandatory human rights due diligence obligation for Swedish parent companies, either in the form of a law (inspired by the French initiative) or by incorporating a duty of care for Swedish parent companies towards stakeholders in the Swedish Companies Act (building on the UK notion of a duty of care). The study concludes that for Sweden to fulfil its responsibilities under the UNGPs, it should consider embedding the business respect for human rights into law.

Sammanfattning

Under de senaste åren har flera initiativ genomförts på både nationell och internationell nivå som syftar till att främja företags ansvar för brott mot de mänskliga rättigheterna. Frankrike införde år 2017 en lagstadgad skyldighet för franska bolag att utföra *human rights due diligence* i sina globala verksamheter och Storbritannien har blivit uppmärksammat för ett antal rättsfall där brittiska moderbolag hållits direkt ansvariga för människorättskränkningar begångna av dotterbolag i utlandet. Sverige har dock inte vidtagit några åtgärder för att i lag införa en skyldighet för svenska företag att respektera de mänskliga rättigheterna i sin verksamhet i utlandet.

Studien syftar till att klargöra möjligheterna för att hålla moderbolag skadeståndsrättsligt ansvariga för företagsrelaterade brott mot de mänskliga rättigheterna enligt svensk, engelsk och fransk civilrätt. Studien fokuserar huvudsakligen på företags ansvar för människorättskränkningar i en svensk kontext. Studien använder en rättsdogmatisk och komparativ metod för att identifiera de områden inom svensk civilrätt där ansvaret för företagsrelaterade brott mot de mänskliga rättigheterna kan förbättras genom rättstransplantationer med utgångspunkt i utvecklingen i Frankrike och Storbritannien.

Studien kommer fram till att Sverige inte lever upp till sitt ansvar i FN:s vägledande principer för företag och mänskliga rättigheter. I nuläget finns det ingen skyldighet för svenska företag att respektera de mänskliga rättigheterna i utlandet och det föreligger flera hinder för att utkräva ansvar och ersättning för företagsrelaterade människorättskränkningar.

Studien utmynnar i två alternativa förslag som syftar till att främja företags ansvar för människorättskränkningar samt tillgången till effektiva rättsmedel. Båda förslagen innebär en lagstadgad skyldighet för svenska moderbolag att utföra *human rights due diligence*, antingen genom införandet av en separat lag eller genom att införa en vårdplikt för svenska moderbolag gentemot rättighetshavare i aktiebolagslagen.

Preface

I would first like to thank my supervisor Radu Mares for his valuable insights and guidance throughout this process.

I would also like to thank Niklas Arvidsson for his much-appreciated thoughts and input on Swedish company law.

I would also like to thank Théo Jaekel and Linn Marthinussen for taking the time to discuss the topic of the thesis and for their valuable input.

Thank you, Erica and Elina, for the detailed language review and for improving this thesis. Thank you, Victoria, for your invaluable company during the highs and lows of this semester.

Thank you, Hilda and Hugo, for always supporting me.

Thank you, Paulina, for being by my side since day one.

Lund, January 2019

Henna Kjellberg

Abbreviations

Anns	The case of *Anns v. Merton London Borough Council*
ARA	The Annual Reports Act (1995:1554)
Caparo	The case of *Caparo Industries plc. v. Dickman*
Chandler	The case of *Chandler v. Cape plc.*
CSR	Corporate Social Responsibility
ECCJ	The European Coalition for Corporate Justice
ECHR	The European Convention on Human Rights and the Fundamental Freedoms
HRDD	Human Rights Due Diligence
LLCs	Limited Liability Companies
Lungowe	The case of *Lungowe v. Vedanta*
MNEs	Multinational Enterprises
NGOs	Non-governmental organizations
OECD	The Organisation for Economic Cooperation and Development
Okpabi	The case of *Okpabi v. Royal Dutch Shell*
SCA	The Swedish Companies Act (2005:551)
The Code	The French Civil Code
The culpa rule	The fault-based liability rule
The UK	The United Kingdom
The UN	The United Nations

The Vigilance Law	Law on the Corporate Duty of Vigilance for Parent and Instructing Companies
Thompson	The case of *David Thompson v. the Renwick Group plc.*
TLA	The Tort Liability Act (1972:207)
UNGPs	The United Nations Guiding Principles
Unilever	The case of *AAA & Others v. Unilever plc. and Unilever Tea Kenya Limited*

1 Introduction

During the past ten years, the issue of business and human rights has increasingly become subject to discussion on the global agenda. The adoption of the United Nations Guiding Principles on Business and Human Rights (henceforth 'the UNGPs') in 2011 marked an unprecedented step on the issue of corporate responsibility to respect human rights. Albeit not introducing any new international law obligations, the UNGPs clarify states' existing obligations to ensure that human rights and the fundamental freedoms are respected within their borders, and the respective responsibility of corporations to comply with national laws and respect human rights.[1]

Despite the UNGPs standing as a multilateral soft-law instrument, states have taken steps to ensure that the principles are implemented nationally since their adoption. The Swedish government developed an action plan on the implementation of the UNGPs in 2015,[2] and has since tasked national authorities with monitoring compliance with the principles and suggesting further measures where compliance is lacking or in need of improvement.[3]

Nevertheless, studies highlight that state implementation of the UNGPs fall short in one important aspect: corporate accountability for human rights violations is scarce, and remains a significant impediment to the fulfilment of two of the UNGPs three pillars – the state duty to protect human rights and ensuring access to remedy for victims of human rights violations.[4]

At present, international human rights law does not require states to take steps – judicial or otherwise – to prevent human rights violations committed abroad by businesses that are domiciled within the state or otherwise within their jurisdiction.[5] The business responsibility to respect human rights remains a non-binding international norm, which means that the possibilities

1 United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04 (UNGPs).
2 Utrikesdepartementet, *Handlingsplan för företagande och mänskliga Rättigheter* (Regeringskansliet 2015).
3 Statskontoret, 'FN:s vägledande principer för företag och mänskliga rättigheter – utmaningar i statens arbete (2018:8)' (Statskontoret 2018).
4 European Coalition for Corporate Justice (ECCJ), 'Key Features of Mandatory Human Rights Due Diligence Legislation' (ECCJ 2018) <https://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf> accessed 12th October 2019; Statskontoret (n 3); UNGPs.
5 UNGPs.

of holding corporations liable for human rights violations – and the access to remedy for victims – differ between jurisdictions.

The result is that multinational corporations often go unpunished for human rights violations committed abroad, but also on the national level, as human rights violations that are wholly or partly caused by private actors often occur in developing countries, where the rule of law is weak and the access to justice is lacking.[6]

However, efforts to bridge the accountability gap have started to gain momentum, as recent developments show that several countries have started to introduce elements of human rights due diligence (henceforth 'HRDD') into their legislations.[7] In light of these developments, the thesis strives to investigate the possibilities for holding parent companies liable under civil law when human rights violations are committed in their global operations.

The thesis will focus on the Swedish context, researching the modalities of holding parent companies liable for human rights violations committed abroad in current Swedish legislation and investigating potential amendments to the law using a comparative approach.

The thesis will therefore research and analyse landmark cases as well as emerging legislation and legislation proposals striving to tackle the accountability gap in different European countries (primarily France and the United Kingdom), drawing upon the findings made to analyse potential measures in the Swedish legal landscape.

1.1 Purpose and Research Questions

The purpose of the thesis is to investigate whether parent companies can be held directly liable for business-related human rights abuse committed abroad in accordance with Swedish civil law, and to suggest amendments or new legislative proposals where such is lacking.

This will be done in light of the developments in France and the United Kingdom (henceforth 'the UK') in regard to parent company liability for business-related human rights abuse. The thesis specifically assesses the French 'Duty of Vigilance Law' (Fr. *Loi relative au devoir de vigilance,*

[6] Mauro Bussani and Anthony J. Sebok, *Comparative Tort Law: Global Perspectives*, (Edward Elgar Publishing Limited 2015) 70.
[7] ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation' (n 4) 1.

henceforth 'the Vigilance Law')[8] and the notion of a duty of care for parent companies towards victims of business-related human rights abuse in UK case-law.

A number of research questions have been formulated in order to reach the purpose of the thesis. These can generally be divided into two main questions with respective sub-questions:

1. *Is there a possibility of holding parent companies directly liable for business-related human rights abuse under current Swedish civil law?*

    - Is Sweden complying with its obligations under international human rights law?

    - What are the implications in regard to the access to remedy for victims of business-related human rights abuse?

2. *What measures – through legislation, case-law or otherwise – have been used in France and the UK to establish parent company liability?*

    - What are the strengths and weaknesses of these measures?

    - Could any of these measures fit into the Swedish legal landscape?

1.2 Current State of Research

The means of holding parent companies liable for business-related human rights abuse has been discussed by several scholars. However, to the author's knowledge, no comparative study on corporate accountability has as of yet been carried out between France, the UK and Sweden.

Palombo[9] recently compared the notion of a duty of care in France, the UK and Switzerland, but a comprehensive study of the Vigilance Law and the UK case-law in regard to corporate accountability is not carried out.

[8] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Vigilance Law).

[9] Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French law, UK Precedents and the Swiss Proposals' [2019] 4 Business and Human Rights Journal 265.

In 2017, the Swedish government appointed the national authority *Statskontoret* with the task to assess Sweden's compliance with the UNGPs.[10] The report was released in 2018 and identified the main areas where Swedish (criminal and civil) law is lacking or in need of improvement in regard to the UNGPs, but also suggested potential amendments to the law for improved compliance.[11]

The thesis will to some extent build upon the report from *Statskontoret*, but goes further than the report by carrying out a comprehensive study of Swedish civil law and investigating potential amendments to the law in light of the British and French initiatives.

1.3 Method and Material

The method chosen consists of a mixture between a classical doctrinal research method and a comparative method. One of the purposes of using a doctrinal research method is to seek the solution to a specific legal problem through the interpretation and understanding of legal sources.[12] As such, different legal solutions aiming to bridge the corporate accountability gap will be looked at by studying legislation, case-law, preparatory works as well as legal doctrine and literature in the different countries.

Additionally, a comparative method using legal transplants will be employed. The comparative method of legal transplants was originally viewed as a way of improving national legislation by borrowing, or "transplanting", foreign legal solutions to the national legal system.[13] Legal transplants can be made within a legislative framework, such as when a state adopts a foreign law as its own, or in case-law, when seeking solutions to a specific legal scenario or problem by looking to foreign legal systems or legal doctrine.[14]

As such, the thesis will examine French and British solutions to the issue of parent company liability by interpreting relevant legislation and case-law and consider whether they could fit into the Swedish legal framework. Notable developments in other countries are however mentioned and count as part of the broader legal background of this study.

10 Palombo (n 9).
11 ibid 7.
12 Fredric Korling and Mauro Zamboni, *Juridisk Metodlära* (Studentlitteratur AB 2013) 21.
13 ibid 157.
14 ibid 158.

The UK was chosen in spite of its common-law system. Although the differences in legal culture can never be completely overlooked, the thesis strives to investigate how the specific legal issue of parent company liability has been addressed in the UK and France – not to compare the legal cultures in which these potential solutions exist.[15] Nevertheless, UK solutions to corporate accountability will be carefully weighed including suggesting potential adjustments to these for them to fit into a Swedish legal context.

The views and criticisms of legal scholars, civil society and national authorities in regard to the possibilities of holding parent companies liable for business-related human rights abuse will conclude each country-chapter. The aim is to incorporate the areas of improvement and suggestions of legal development raised when proposing amendments to Swedish civil law in the concluding discussion.

Sweden forms the main focus of the study and the backbone of the corporate accountability discussion that the thesis seeks to present. France and the UK have been chosen due to the recognition of their HRDD initiatives and significant cases on the field; France's adoption of the Vigilance Law in 2017 was the first initiative to embed human rights due diligence into legislation, whereas the UK has been recognized for its landmark cases on corporate liability for human rights abuse.

The material that will be used ranges from literature, academic journals and legal commentaries to cases and reports. As the business and human rights regime is relatively novel – including the corporate accountability initiatives presented in the thesis – most of the material written on the subject exists in the form of academic journals or articles.

Nevertheless, the thesis will base the chapters on the general tort law and the cases therein on French, British and Swedish literature alike. Most of the critical perspectives on the initiatives regarding corporate accountability in these countries will however be provided from academic journals and articles, as the views of scholars and academia on the subject can mainly be found there.

[15] Cf. Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 119-120.

1.4 Delimitations

The study is limited to three countries to allow for fruitful comparisons and an in-depth analysis of the findings. Including more countries in the scope of the investigation would potentially compromise the quality of the analysis.

A number of European countries, such as Switzerland, Germany and the Netherlands, have also taken initiatives on HRDD. Switzerland and Germany have current proposals, where the Swiss one is based on the French model.[16] It is however difficult to analyse their potential effects, since neither of the proposals has yet been adopted. The Dutch, German and Swiss initiatives will serve a contextual purpose to highlight the growing corporate accountability trend.

The study is limited to a time-span of the past ten years, as most of the landmark cases in the field of corporate accountability have taken place during that period.[17] Furthermore, the investigation will on the one hand primarily focus on the liability of legal entities rather than individual liability, and on the other hand on civil liability and not criminal liability.

One reason for excluding criminal liability is that there is no possibility of holding legal entities liable under Swedish criminal law, which would narrow down the scope of the investigation. Another is that more initiatives have arisen in the field of civil liability than criminal liability when it comes to linking HRDD obligations with corporate accountability in Europe, which allows for more fruitful comparisons and findings to be made.[18]

Furthermore, the thesis will only examine harms arising out of negligent misconduct and limit itself to personal injury, property damage and non-material harm, as these are the most relevant types of harms in situations of business-related human rights abuse. Willful misconduct is not examined, as business-related human rights abuse is often the result of negligent behavior and willful misconduct is mostly defined in criminal law, which falls outside the scope of the investigation.

[16] German draft law, *Act on the Regulation of Human Rights and Environmental Due Diligence in Global Value Chains* (2019), Ministry of Development and Cooperation (German Draft Law); Swiss Draft Law, *Responsible Business Initiative* (2016), Swiss Coalition for Corporate Justice (Swiss Proposal); Counterproposal by the Swiss Parliament, *CounterProposal to the Responsible Business Initiative adopted by the Parliament's Low Chamber* (2018) (Swiss Counterproposal).
[17] With the exception of *Lubbe and Others v. Cape plc. and Related Appeals* [2000] UKHL 41.
[18] ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation' (n 4) 2.

The study will only examine companies undertaking the corporate structure of limited liability companies (henceforth 'LLCs'). This is the most common corporate form amongst big companies, which means that situations of business-related human rights abuse in most cases arise out of the activities of LLCs.[19]

The thesis will not investigate the means of holding corporations liable for the wrongful acts of their subsidiaries through the principle of 'piercing the corporate veil' (Sw. *Ansvarsgenombrott)*.[20] The prospects of succeeding in holding a parent company liable in accordance with this principle is extremely limited in most European jurisdictions, and the existence of such a principle has not been judicially established, at least in Swedish law.[21] The thesis will instead focus on initiatives that aim to circumvent this principle. The thesis consequently focuses on a parent company's *direct* involvement in business-related human rights violations through its acts or omissions rather than holding it liable for the acts of its subsidiaries.[22]

Finally, the thesis will not delve into procedural matters (such as issues of jurisdiction, applicable law and of procedural capacity) in the Swedish legal system or in others. The issue of jurisdiction does not present any particular problem, as the focus of the thesis primarily concerns parent companies incorporated or domiciled in Sweden, and will therefore only be mentioned briefly in the chapter on the Business and Human Rights Regime.

The issue of applicable law is worthy of discussion, but will only be presented briefly in the background chapter as the main focus of the thesis is Swedish law. A lengthy discussion on the rules of Private International Law – which would include an assessment of the law of potentially any foreign jurisdiction – would risk compromising the focus of the thesis. After commenting the issue of applicable law in the chapter on the Business and Human Rights Regime, the thesis will presuppose that Swedish law is applicable.

[19] Martin Smicklas, *Associationsrättens grunder* (Författaren och Studentlitteratur 2012) 45.
[20] See more under Section 2.3.1.
[21] Clas Bergström and Per Samuelsson, *Aktiebolagets grundproblem* (Norstedts Juridik 2015) 250.
[22] Dorothée Baumann-Pauly and Justine Nolan, *Business and Human Rights: From Principles to Practice* (Routledge 2016) 258.

1.5 Terminology

The human rights and business discourse contains several important terms that will be used throughout the thesis. To facilitate the understanding of these, a short definition is provided for some of the most central terms below.

Human rights due diligence (HRDD)

Due diligence in the context of human rights and business entails the identification, prevention and mitigation of actual and potential adverse impacts by businesses, as well as the reporting on how the identified risks are addressed.[23]

Stakeholder(s)

A stakeholder is a person or group of persons who has an interest in, is able to influence, or is affected by the activities of a business.[24] As will be seen in the chapter on the Swedish Companies Act,[25] a stakeholder can be an investor or a shareholder in an LLC.

In a human rights context, impacted stakeholders can range from local communities, landowners, indigenous peoples and local workers to civil society organizations.[26] When carrying out HRDD, it is essential to consider the business' potential (adverse) impacts on stakeholders.

Rights-holder(s)

A rights-holder should be understood as a person or group of persons whose human rights have been impacted negatively by the activities of a corporation.[27] All rights-holders are also stakeholders, but not all stakeholders have been subject to adverse human rights impacts as a result of business activity.

Therefore, when speaking of an individual whose human rights have been infringed and who seeks to make a tort claim towards a parent company, the term "rights-holder" will be used. When speaking of persons or groups of persons who may be affected by the activities of a business, the term "stakeholder" will be used.

[23] Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (OECD 2011), Chapter II, paras. A11 and A12.
[24] International Finance Corporation (IFC), *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets* (IFC 2007), 10.
[25] See Section 5.1.1.
[26] OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (OECD 2015) 10.
[27] ibid 11.

Multinational enterprises (MNEs)

Multinational enterprises (henceforth 'MNEs') are to be understood as LLCs – small and large – that are established in several countries and that include units in the form of a parent company and independent business entities.[28]

1.6 Outline

The thesis will initially provide a contextual background to the issue formulation by going through the most important initiatives in the human rights and business regime as well as a short historical background. The Human Rights and Business Regime chapter concludes by highlighting some of the key barriers to corporate accountability.

The study is divided into three parts, where parent company liability in French, British and Swedish civil law is examined. The French and British chapters focus on the HRDD developments in the form of the Vigilance Law and landmark cases on parent company liability, whereas the Swedish chapter presents a broader consideration of the means of holding Swedish companies liable in current Swedish civil law. Each country-chapter concludes with the views raised by legal scholars, national authorities and civil society on the respective laws and case-law.

The Swedish chapter lays the ground for the concluding discussion, which is divided into two sections. The first section discusses whether Sweden is complying with its obligations under international human rights law, and the second discusses potential amendments to Swedish law based on the French and British initiatives.

[28] OECD, *OECD Guidelines for Multinational Enterprises* (n 22) Chapter I 5.

2 The Business and Human Rights Regime

2.1 The Emergence of Soft Law Principles on Business and Human Rights

2.1.1 Background

The period after the Second World War was marked by the rapid growth and power of transnational businesses globally.[29] This sparked fear amongst developing countries striving for economic independence, who felt threatened by the unbridled power of MNEs and the potential for political involvement in their internal affairs.[30]

The idea of implementing a code of conduct for MNEs was raised as early as 1972, and resulted in the establishment of a United Nations Commission and Centre on Transnational Corporations.[31] However, the conflicting views of developing countries and capital-exporting states on the legal form of the rules (binding or non-binding) resulted in the commission being dismantled ten years after its creation.[32]

However, the idea that the activities of MNEs should not remain unfettered lived on, and led to the adoption of soft-law principles on the activities of MNEs by several international organizations. The Organisation for Economic Cooperation and Development (henceforth 'the OECD') broke new ground with its Guidelines for Multi-National Enterprises in 1976,[33] which were followed by the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the ILO[34] in 1977.

As awareness of the adverse human rights impacts of business activities grew alongside the boom of new communications technologies, more initiatives on business and human rights followed. The creation of the

[29] Asia-Europe Meeting (ASEM) '14th Informal ASEM Seminar on Human Rights: Human Rights and Businesses Concept Paper' (ASEM 2014) <https://www.asef.org/images/docs/ASEM_HumanRightsSeminar_ConceptPaper_ASEM%20logo.pdf> accessed 5th December 2019.
[30] ibid.
[31] ibid.
[32] ibid.
[33] OECD, *OECD Guidelines for Multinational Enterprises* (n 22).
[34] International Labour Organization (ILO), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (ILO 2000).

United Nations (henceforth 'the UN') "UN Global Compact" in 1999 calls upon MNEs to incorporate ten principles concerning human rights, labour, anti-corruption and the environment.[35] The most renowned international initiative on the field of business and human rights as of yet is however the creation of the UNGPs.

2.1.2 The United Nations Guiding Principles on Business and Human Rights (the 'UNGPs')

In 2008, the Special Representative of the Secretary-General to the UN, John Ruggie, presented the UN Human Rights Council with a framework ('Protect, Respect and Remedy') on business and human rights after three years of intensive consultations.[36] The framework was comprised of three pillars:

1. The state duty to protect against human rights abuses by third parties, including businesses;
2. The corporate responsibility to respect human rights; and
3. The need for more effective access to remedies.[37]

The UNGPs are a means of operationalizing the framework presented by Ruggie, and were endorsed by the Human Rights Council in 2011.[38] The UNGPs clarify the existing responsibility of states to protect their citizens from human rights violations. In that sense, the UNGPs are largely a reflection of already legally binding norms of international human rights law.[39] However, the principles clarify the responsibility to protect individuals from human rights violations resulting out of the activities of businesses operating within states.

The human rights referred to in the UNGPs are meant to – at least – encompass those included in the International Bill of Human Rights and in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, of which Sweden has ratified both.[40]

[35] United Nations, *UN Global Compact* (UN 1999).
[36] Baumann-Pauly and Nolan (n 22) 43.
[37] UNGPs 1.
[38] Baumann-Pauly and Nolan (n 22) 43.
[39] Enact Sustainable Strategies (Enact), 'Företag och mänskliga rättigheter: påtagliga brister och luckor i svensk lag' (Enact 2018) 5.
[40] UNGPs 4.

Should a state fail to protect its citizens from corporate abuse that can be attributed to it or otherwise neglect to take the necessary steps to prevent, investigate, punish or redress human rights violations, it may be in breach of its international human rights law obligations.[41]

The UNGPs do not describe which steps a state is obligated to take in order to protect human rights, but nevertheless state that these should be of a preventative and remedial nature.[42] The measures can be policy-based, legislative, regulative or adjudicated, as long as they are undertaken with the aim to protect human rights.

In practice, the state duty to protect against corporate human rights abuse *inter alia* includes ensuring that laws are in place that have the aim or effect of obligating businesses to respect human rights, but also to make sure that there are no laws or policies that impede businesses to respect human rights, such as corporate law.[43]

Included in this duty is to clearly set out the expectation that businesses operating within and outside a state's borders should respect human rights.[44] As of now, states are not bound by international human rights law to regulate the extraterritorial activities of businesses, but are not prohibited from doing so either, as long as a jurisdictional ground can be established.[45]

The access to remedy for rights-holders includes judicial, administrative, legislative or other means of providing effective remedy.[46] The remedies provided should have the aim of neutralizing or restoring the injuries suffered, and may take the form of apologies, restitution, rehabilitation, punitive sanctions or financial or non-financial compensation.[47]

One such remedy is ensuring that effective domestic judicial mechanisms are in place.[48] The commentary to the UNGPs clarifies that a legal barrier to corporate related human rights abuse might include situations where a state's civil or criminal laws are designed in such a way as to facilitate the avoidance of accountability.[49]

[41] UNGPs 1.
[42] ibid.
[43] ibid 3.
[44] ibid 2.
[45] ibid.
[46] ibid 25.
[47] ibid.
[48] ibid 26.
[49] ibid.

The state obligation to protect human rights and to provide an effective access to remedy are mutually inclusive, as the significance of the former would be undermined without the latter. Ensuring that there are means of investigating, punishing and remediating corporate human rights abuses is a way of ensuring that the state's duty to protect against such abuse is meaningful.[50]

2.2 An Overview of National and International Initiatives

Since the adoption of the UNGPs in 2011, the business and human rights regime has witnessed increasing measures at the national and international level in the field of corporate accountability and improved access to justice for rights-holders. The European Coalition for Corporate Justice (henceforth 'the ECCJ')[51] speaks of a movement from voluntary and incentive-driven measures to an incorporation of HRDD into law in European and non-European countries.[52]

This section will review some of the most advanced initiatives taken by European countries on HRDD obligations for companies, thereafter moving on to mapping corporate accountability developments at the international level.

2.2.1 National initiatives

The Netherlands adopted a Child Labour Due Diligence Bill in 2019, which obligates companies that deliver products and services to the Netherlands two or more times a year to carry out HRDD in regard to child labour in their supply chains.[53] The law is expected to enter into force in 2020, and obligates companies to establish an action plan in accordance with the UNGPs when there is a "reasonable presumption" that their goods and services have been produced through child labour.[54]

[50] Enact (n 37) 15.
[51] The ECCJ is a European coalition that strives to endorse the corporate accountability discussion by coordinating European campaigns and the national platforms of NGOs, trade unions, consumer organisations and academics, see ECCJ 'Key Features of Mandatory Human Rights Due Diligence Legislation' (n 4).
[52] ibid 1.
[53] MVO Platform, Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law (2019) <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> accessed 9th December 2019.
[54] ibid.

Germany has started working on a draft law on Human Rights and Environmental Due Diligence that requires companies to carry out HRDD, introducing sanctions for non-compliance in the form of fines, imprisonment and exclusion from public procurement procedures.[55]

The German National Action Plan to implement the UNGPs from 2016 further states that legislation embedding HRDD into law will be considered if less than half of major German companies have not voluntarily adopted HRDD measures by 2020.[56]

A notable initiative is the Swiss Responsible Business Initiative from 2018, which proposes civil liability for parent companies for corporate malpractice caused by their subsidiaries as well as an obligation to carry out human rights and environmental due diligence for large companies.[57] The proposal has since then been met with a counterproposal, both of which are under consideration by the Swiss Parliament at the time of writing.[58]

The first proposal suggests introducing a HRDD obligation for parent companies in the Swiss Constitution. It applies to all types of harms and any level of control exercised by parent companies over their company group.[59] The counterproposal limits the scope of the HRDD obligation to MNEs over a certain size and turnover and only applies to their subsidiaries as well as harm in the form of personal injury and property damage.[60] The counterproposal also limits the liability of parent companies by requiring that these have "effective control" over their subsidiaries to become accountable for business-related human rights abuse.[61]

[55] ECCJ, 'Evidence for mandatory HRDD legislation' (ECCJ 2019) 1 <https://corporatejustice.org/policy-evidence-mhrdd-may-2019-final_1.pdf> accessed 12th October 2019; Business & Human Rights Resource Centre, 'German Development Ministry drafts law on mandatory human rights due diligence for German companies' (Business & Human Rights Resource Centre 2019) <https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies> accessed 9th December 2019.
[56] The German Federal Foreign Office, *National Action Plan implementing the UN Guiding Principles and Human Rights 2016-2020* (The Federal Foreign Office 2017) 10.
[57] ECCJ, 'Evidence for mandatory HRDD legislation' (n 53) 1; ECCJ 'Another step towards the adoption of a mandatory HRDD bill in Switzerland' (2018) <https://corporatejustice.org/news/7046-another-step-towards-the-adoption-of-a-mandatory-hrdd-bill-in-switzerland> accessed 9th December 2019.
[58] Swiss Proposal; Swiss Counterproposal.
[59] Palombo (n 9) 277.
[60] ibid.
[61] ibid.

Common to both proposals is that Swiss law is explicitly stated to be applicable and that the burden of proof is reversed from the rights-holder to the parent company, who has to show that it has fulfilled its HRDD obligation to avoid direct liability for business-related human rights abuse arising out of the activities of its company group.[62]

2.2.2 International initiatives

In 2014, the UN Human Rights Council adopted a resolution to investigate the possibility of developing a business and human rights treaty in an attempt to bridge the accountability gap.[63] The resolution involves the establishment of an intergovernmental working group with the mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[64]

The initiative has faced fierce opposition from academia and the private sector alike. The International Organisation of Employers argue that the attempt to implement a binding treaty on business and human rights would undermine the current efforts of implementing the UNGPs locally.[65] Critics in academia have pointed out the difficulties of creating a treaty encompassing all industries and respective rights related to them.[66]

John Ruggie has also emphasised a few problems with adopting an international treaty on business and human rights. Firstly, Ruggie argues that the implementation of the UNGPs is still underway, and that an assessment of their implementation is yet to be carried out.[67] Ruggie argues that until such an assessment has been conducted – allowing for the Human Rights Council to identify areas of improvement – the international community should not attempt to draft an international treaty on business and human rights.[68]

[62] Palombo (n 9) 277.
[63] Baumann-Pauly and Nolan (n 22) 35.
[64] United Nations Human Rights Council (UNHRC), 'Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2014) UN Doc. A/HRC/26/L.22/Rev.1 ("Zero Draft" Treaty).
[65] International Organisation of Employers (IOE), 'Consensus on Business and Human Rights Is Broken with the Adoption of the Ecuador Initiative' (IOE 2014) <www.ioe-emp.org/index.php?id=1238> accessed 18th December 2019.
[66] Baumann-Pauly and Nolan (n 22) 71.
[67] John Ruggie, 'A UN Business and Human Rights Treaty?' [2014] Harvard Kennedy School of Government 2.
[68] Ruggie (n 65) 2-3.

Secondly, Ruggie accentuates the difficulties raised by critics of drafting a treaty covering all industries and consequently an extensive set of laws and interests. He argues that in order to encompass them all, the provisions would need to be of such a general nature that the treaty would be rendered meaningless from an accountability perspective.[69]

Finally, critics and Ruggie alike have pointed out the unlikelihood that a majority of UN member states will endorse the treaty.[70] Even if the treaty were to be adopted, there is no international system of its enforcement, and its enforcement on a national basis requires states to adopt extraterritorial jurisdiction in cases of business-related human rights abuses.[71]

2.3 Key Issues for Corporate Accountability

2.3.1 The issue of limited liability

The problem of holding MNEs accountable for their conduct in their home and foreign jurisdictions has been discussed for almost a century.[72] The main obstacle to achieving corporate accountability lies in the principle of separate legal personalities; an ancient principle in corporate law that sets out that each legal entity that forms part of an MNE is "a distinct and autonomous legal personality and is normally liable separately."[73] The principle, which is sometimes referred to as "the corporate veil", was originally meant to separate a corporation from its shareholders, meaning that the rights and liabilities of the corporations were separate and distinct from the rights and liabilities of its shareholders.[74]

The concept of limited liability came after the principle of separate legal personalities. Unlike the principle of separate legal personalities, the notion of limited liability was the result of a political movement intended to incentivize investors to put their money into corporations, so that these

[69] Ruggie (n 65) 3.
[70] Baumann-Pauly and Nolan (n 22) 71; Ruggie (n 65) 4.
[71] Ruggie (n 65) 4.
[72] Phillip Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' [2001] 24 Hastings International Comparative Law Review 297.
[73] Claire Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands' [2019] Business and Human Rights in Europe 212.
[74] Blumberg (n 71) 301.

could benefit from the technological boom happening at the time.[75] The two concepts are however similar in that they entail a separation of liability: the limited liability principle separated the investor from the liability for corporate debts that extended beyond his or her investment.[76] Since these principles arose, their original scope has extended to also apply to the separation of liability for debts between upper-tier companies and lower-tier subsidiaries.[77]

In practice, this means that a parent company cannot be held liable in situations where human rights violations are committed by its subsidiary abroad. The possibility to "pierce the corporate veil" is extremely limited in most European jurisdictions, and the prospects of success for a plaintiff in a civil lawsuit against a parent company are very narrow.[78]

As a result, other forms of holding parent companies liable for corporate abuse have arisen. The common law notion of a duty of care for parent companies and the imposition of a similar concept in the Vigilance Law are two examples of this; parent companies are held *directly* liable for their own wrongful acts and omissions related to their subsidiaries' harmful operations, without imposing a vicarious liability or piercing the corporate veil.[79]

2.3.2 The issue of jurisdiction

An essential prerequisite for raising a civil claim for action in Sweden is that the domestic court has jurisdiction to try the case. When the defendant is a parent company incorporated in the territory of a state within the EU, the Brussels I Regulation governing the issue of jurisdiction applies.[80]

The general rule in accordance with the Brussels I Regulation is that a court has jurisdiction over extraterritorial cases if the defendant is a company domiciled in a home state of the EU.[81] Jurisdiction over a civil claim for action towards a Swedish parent company for business-related human rights

[75] Blumberg (n 71) 301.
[76] ibid 302.
[77] ibid.
[78] Palombo (n 9) 267.
[79] Doug Cassell, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' [2016] 1 Business and Human Rights Journal 181.
[80] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) 2012 (OJ L351) (Brussels I Regulation).
[81] ibid, art 4.

abuse could therefore be ascertained based on the home-state rule in Brussels I.[82]

To clarify, jurisdiction in this regard only concerns that over parent companies – not their foreign subsidiaries – as the thesis investigates the possibility of holding parent companies liable irrespective of whether a claim for action could also be made towards the foreign subsidiary. As will be seen primarily in the UK case-law, the fact that a claim could be directed towards the subsidiary does not preclude accountability for the parent company.[83]

2.3.3 The issue of applicable law

What constitutes a tort is largely dependent on cultural and societal traditions and influences. The significance of tort law and tort liability therefore varies from country to country.[84] Determining which law is applicable to a tort suit for action can therefore significantly impact the prospects of success for an alleged rights-holder.

The general rule in accordance with the Rome II Regulation (which governs harm rising out of non-contractual obligations) is that the courts shall apply the law of the country in which the damage occurred.[85] The regulation contains a number of exceptions to this rule, the applicability of which would need to be argued in order to ensure that Swedish law is applied.

One exception concerns situations of environmental damage, in which the injured party can choose the law of the country in which the event "giving rise to the damage occurred."[86] In such a scenario, an injured party would need to argue that the event giving rise to the harm took place in the form of (for instance) instructions from a Swedish parent company or an omission to take appropriate steps to prevent the harm.

[82] Palombo (n 9) 269.
[83] Andrew Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary' Diligence' [2012] 71 The Cambridge Law Journal 478.
[84] Bussani and Sebok (n 6) 11.
[85] *Lex loci damni;* European Parliament and Council Regulation (EC) No 864/2007 (OJ 2007 L 199/40) of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation).
[86] Rome II Regulation, art 7.

Another exception is when the foreign law is contrary to the public policy (*ordre public*) or mandatory provisions in the law of the forum, in which case the domestic court can choose to apply the law of the forum.[87]

The issue of applicable law presents a hurdle for rights-holders to overcome, as they need to argue that Swedish law is applicable under one of the exceptions mentioned in the Rome II Regulation in lack of a current Swedish law on HRDD with extraterritorial application.

Furthermore, Swedish courts rarely invoke public policy or mandatory rules as an exception to the general rule of the place of injury, which means that there is no legal certainty that an exception would be applied by the court even if such a case could be argued.[88] Theoretically, a rights-holder could however argue that the protection of human rights should constitute an overriding mandatory rule that should be applied by the court.[89]

[87] Rome II Regulation, art 16 and 26.
[88] Mannheimer Swartling ’Promemoria till Utrikesdepartementet: Angående möjligheten för enskilda att inför svensk domstol föra talan mot svenska bolag till följd av kränkningar av mänskliga rättigheter begångna utomlands’ (Mannheimer Swartling 2015) 20.
[89] ibid 22.

3 France

In the wake of a factory collapse that claimed over a thousand lives in Rana Plaza, Bangladesh, the French government took action within the human rights and business field by drafting a law that would impose a mandatory HRDD obligation for parent companies.

The HRDD obligation is expressed as a legal duty of care for parent companies owed towards stakeholders, now known as the law on the corporate duty of vigilance for parent and instructing companies (the Vigilance Law).[90] This chapter will focus on the Vigilance Law and its introduction of a mandatory HRDD – or 'duty of vigilance' – for parent companies to prepare, publish, and effectively implement a vigilance plan.

The Vigilance Law was adopted in 2017, which means that the vigilance plans of companies have only recently started to be published. Due to the novelty of the law, there is as of yet no case-law on the implementation of the due diligence obligations it requires from companies. The chapter will instead provide a detailed presentation of the Vigilance Law as well as the civil liability under the law of tort, as elements of tort liability are included in the Vigilance Law.

The chapter concludes with a discussion on the fields of improvement of the law, ambiguities and the law's significance for the corporate accountability movement and the access to justice for rights-holders.

3.1 Legislation

3.1.1 The Law on Tort

Tortious liability in the French Civil Code (henceforth 'the Code') has – not taking into account the introduction of new provisions governing the field of liability for defective products in 1998 – only existed as five provisions since its introduction in 1804.[91] As a result, the notion and scope of civil liability has largely been developed by case-law.

[90] Surya Deva and David Bilchitz, *Building a Treaty on Business and Human Rights: Context and Countours* (Cambridge University Press 2017) 15; Vigilance Law.
[91] Eva Steiner, *French Law: A Comparative Approach* (2nd edn, Oxford University Press 2018) 250; John Bell, Sophie Boyron and Simon Whittaker, *Principles of French law*, (2nd edn, Oxford University Press 2008) 361.

Civil liability as outlined by the Code stands out by the general nature in which it is described. Articles 1240 and 1241 of the Code are complementary general clauses, which together outline the concept of civil liability:

Article 1240
Any act whatever of man, which causes damage to another, obliges the one through whose fault it occurred, to compensate it.

Article 1241
Everyone is liable for the damage he/she causes not only by his/her [intentional] act, but also by his/her negligent conduct or by his/her imprudence.[92]

Civil liability under the law of tort can therefore be ascertained under three conditions: a fault consisting of an infringement of a right or legitimate interest protected by the law, that the fault has led to damages, and that a causal link can be established between the two.[93] A person who claims to be the victim of a tort bears the burden of proof for proving that these conditions are met.[94]

In most cases, the central – and most difficult – element for a plaintiff to prove is that of causation between the conduct of the alleged tortfeasor and the resulting injury. In these situations, the plaintiff is faced with the challenge of proving to the court that the injury suffered would not have occurred were it not for the conduct of the alleged tortfeasor (known as the "but for"-test, which is further explained below). In more cases than not, this will mean that the plaintiff will lose, as the sequence of events leading to an injury are often "so obscure that, even with the best will in the world, it is not possible to draw any conclusions as to causation."[95]

The meaning of a causal relationship is not defined by the law of tort, and neither has it been specified in case-law. The French *Cour de cassation* therefore has a broad discretion as to what constitutes a causal relationship,

[92] Code Civil art 1240-1241 (C. civ).
[93] Walter van Gerven, Jeremy Lever and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart Publishing 2000) 58-59; Sťephane Brabant and Elsa Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' [2017] 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires 2.
[94] van Gerven et al. (n 92) 58.
[95] ibid 428.

and is usually generous in confirming the existence of a causal link between a tortious act and injury.[96]

However, doctrinal works argue that French courts employ two theories of causation that are originally inspired by German law, namely the equivalency theory (Fr. *Théorie de l'équivalence des conditions,* also known as *causa sine qua non* or the "but for" test) and the adequacy theory (Fr. *Théorie de la causalité adéquate*).[97] In short, the equivalency theory considers whether the damage would have occurred were it not for the conduct of the tortfeasor, taking into account all the events that qualify as causes to the damage, whereas the adequacy theory includes those causes which are considered to have played a significant part in contributing to the damage's existence.[98] The two are said to exist in French law, but the equivalency theory is the one that is most prominent in French case-law.[99]

There is however no consensus among scholars as to the application and interpretation of a 'pure' equivalency theory in French case-law. Some scholars argue that courts have been known to complement the equivalency theory with an 'explanatory theory', which, besides accounting for the conduct contributing to an injury, also requires the cause to *explain* the injury's existence.[100]

Naturally, the defendant is not unconditionally liable for torts, even if causation can be established between an act or omission and an injury. An alleged tortfeasor can argue that an event qualifies as a *cause étrangère,* in which case he escapes liability if he can prove that the act or omission contributing to the injury was outside of his or her control; that the injury was an unforeseeable consequence of the act or omission, and that it was unavoidable.[101]

Despite the lack of clarity regarding the specific requirements to establish causation, it has sometimes been referred to in regard to two elements in French case-law, namely directness and certainty.[102] The element of directness derives from the Civil Code, where damages are said to extend only to the "direct and immediate consequences of the breach of

[96] van Gerven et al. (n 92) 419.
[97] ibid 418 and 427.
[98] ibid 420.
[99] Geneviève Viney and Patrice Jourdain, 'Traité de droit civil sous la direction de Jacques Ghestin : Les conditions de la responsabilité' [1998] 51 Revue Internationale de la droit comparé 163-164 and 168-170.
[100] van Gerven et al. (n 92) 419.
[101] ibid 421.
[102] van Gerven et al. (n 92) 420.

contract."[103] Regardless of the article's reference to contractual damage, it is said to express a principle of directness that also applies to general tort law.[104] As for the element of certainty, it has been described by the *Cour de cassation* as a requirement that the fault of the defendant has to have contributed to the realization of an injury *with certainty*.[105]

Despite some authors believing that directness and certainty can be interpreted as elements of causation in French case-law, others argue that there are many cases where causation has been established by the court even though the harm is not a direct consequence of the defendant's conduct.[106] As such, some scholars argue that directness cannot be considered as requirement to establish causation under French tort law.[107]

French tort law follows a principle of full compensation, meaning that the compensation shall be equivalent to the damages caused by the tort and covers both material as well as non-material harm.[108] There are no specific rules in French tort law that regulate cases where there is more than one tortfeasor. Instead, these situations are regulated as multiple causes contributing to an injury. In such a scenario, French case-law has established that a defendant is liable for all of the damage an injured party has incurred as a result of several causes, as long as he or she cannot argue that the other cause was a *cause étrangère,* i.e. outside of his or her control, unforeseeable and unavoidable.[109]

In cases where the defendant cannot prove that the other cause qualifies as a *cause étrangère,* the rights-holder can claim compensation from him or her for all of the damages incurred by the multiple causes or choose to prosecute the tortfeasors separately. Consequently, in a situation where there are multiple causes, the defendants are obliged to compensate the claimant *in solidum* (in solidarity) for the damages caused.[110]

[103] C. civ. art 1151.
[104] van Gerven et al. (n 92) 418.
[105] Cass civ (2) 20 juin 1985, Bull.civ. 1985.II.125, 84-11.713.
[106] Patrice Jourdain, *Droit à réparation : Lien de causalité* (Juris-Classeur Civil 1993) 160.
[107] van Gerven et al. (n 92) 423.
[108] ibid 62.
[109] Cass civ (2) 4 mars 1970, Bull.civ. 1970.II.76, JCP 1971.II.16585, 68-12.124.
[110] Cass civ (2) 4 mars 1970, Bull.civ. 1970.II.76, JCP 1971.II.16585, 68-12.124; van Gerven et al. (n 92) 434-435.

3.1.2 The Vigilance Law

The Vigilance Law came into force in 2017 as a part of the French Commercial Code.[111] In brief, the Vigilance Law introduces a mandatory HRDD obligation for parent companies to oversee the activities of their offshore affiliates, entailing a direct liability for the parent company should appropriate measures not have been taken to prevent human rights or environmental abuses abroad.

The HRDD obligation of parent companies is expressed in three obligations: parent companies are required to establish a vigilance plan, ensure its effective implementation and to publish the plan and report on its implementation in the annual management report of the company.[112]

The explanatory memorandum of the draft law states that the Vigilance Law has a two-tier objective: to prevent tragic events caused by MNEs from occurring in France and abroad and to ensure that remediation is offered to the victims of human rights or environmental abuses.[113] Inspired by the UNGPs, the Vigilance Law stands out as the first initiative to embed HRDD into law, thus moving the concept of business and human rights from a sphere characterized by liability-free reporting initiatives into binding obligations with legal consequences should these be breached.[114]

This is particularly noticeable in that the Vigilance Law includes an obligation to not only establish a vigilance plan, but to implement it *effectively*, with the possibility of imposing penalties should it fail to do so. Further, the respective duty of companies to publish the plan and its implementation allows stakeholders to monitor compliance with the vigilance obligations.[115]

The Vigilance Law obligates companies that employ a minimum of five thousand employees themselves and in their direct and indirect subsidiaries by the end of two consecutive financial years, whose registered office is located within French territory, and companies with a minimum of ten

111 Vigilance Law.
112 Stéphane Brabant, and Elsa Savourey, 'French Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Perspective' [2017] 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires 5.
113 Assemblée Nationale (AN), proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre n° 2578 du 11 février 2015.
114 ibid.
115 Assemblée Nationale (AN), proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre n° 2578 du 11 février 2015 6.

thousand employees themselves and in their direct and indirect subsidiaries whose registered office is located within French territory or abroad, to establish and effectively implement a vigilance plan.[116]

There has been some uncertainty as to whether the requirement of having a registered office within French territory or abroad applies to the parent company or its subsidiaries.[117] The French Constitutional Court however issued a decision stating that these refer to the subsidiaries, meaning that the employee threshold includes subsidiaries whose offices are located in France as well as abroad.[118]

The scope of the vigilance plan reaches to include the operations of the parent company and all the subsidiaries and companies under its control. The Vigilance Law does not define what constitutes a subsidiary, but a definition is included in another article of the Commercial Code, stating that a subsidiary is "a company in which over half of the company capital is owned by another company."[119] When such a plan is established, the parent company is deemed to have met its obligations under the Vigilance Law.[120]

The Vigilance Law stipulates that the vigilance plan shall include *reasonable vigilance measures* with the aim of identifying risks and preventing severe impacts on human rights, fundamental freedoms, the health and safety of individuals and to the environment, resulting from the activities of the parent company and the companies under its direct or indirect control.[121]

Parent companies are however also obliged to include measures regarding the activities of their subcontractors or suppliers, when an established commercial relationship exists between them and when the stated risks are a result of the activities that are linked to that business relationship.[122]

Parent companies that fall under the scope of the Vigilance Law are therefore required to implement a plan that covers not only their own

116 Vigilance Law art 1 para 1.
117 Stéphane Brabant and Elsa Savourey, 'Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations' [2017] 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires 2.
118 Conseil Constitutionnel, décision n° 2017-750 DC du 23 mars 2017 Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre § 3.
119 Code de commerce, art L. 233-1.
120 Vigilance Law art 1 para 1.
121 Vigilance Law art 1 para 3.
122 Vigilance Law art 1 para 4.

activities, but the activities of companies under their direct or indirect control as well as subcontractors and suppliers with which they have an established commercial relationship. In order to determine which companies are included in the notion of control, the Vigilance Law makes reference to the meaning of the notion in article L. 233-16 II of the Commercial Code, which states that a company is considered to be under the control of another if it is exclusively controlled, in the sense that another company has decision-making power over the financial and operational policies of the controlled entity.[123] Exclusive control can be expressed in different forms, such as legal, contractual or *de facto* control.[124]

The fact that the Vigilance Law covers entities under the indirect control of another company means that as long as a parent company exercises a decision-making power over another entity (owns more than half of the shares or voting rights), the controlled company's activities must be considered in the vigilance plan regardless of whether it is a direct, second tier, or third tier subsidiary.[125]

It is unclear whether it is sufficient for the vigilance plan to include a consideration of the activities of the subcontractors and suppliers of the parent company, or whether the Vigilance Law obligates parent companies to include the potential risks resulting from the activities of the subcontractors and suppliers of those companies under its control.[126]

Ambiguity is also an issue as regards the commercial relationship to be considered; should an assessment be made of the relationship between the parent company and its subcontractors and suppliers, or stretch to include an assessment of the relationship between the subsidiaries and their respective subcontractors and suppliers?[127] It is still not entirely clear what is meant by the Vigilance Law, with the result that the number of entities whose activities are to be assessed in the vigilance plan varies greatly depending on how the wording of the law is interpreted.

The meaning of 'an established commercial relationship' is not elaborated on by the Vigilance Law, but is defined in another article of the Commercial Code as a "stable, regular commercial relationship, taking place with or

123 Sťephane Brabant, Charlotte Michon and Elsa Savourey, 'The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance' [2017] 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires 2.
124 Code de commerce, art L. 233-16, II, 1-3°.
125 Brabant et al. (n 122) 2.
126 ibid 3.
127 Brabant et al. (n 122) 3.

without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last."[128]

Furthermore, the companies are obliged to draft the plan together with company stakeholders, and, where appropriate, within multi-stakeholder initiatives at a subsidiary or territorial level. The vigilance measures to be included in the vigilance plan are outlined by the Vigilance Law as follows:

- A mapping of risks meant for their identification, analysis and prioritization;
- Procedures for the regular assessment of the situation of subsidiaries, subcontractors or suppliers with whom an established commercial relationship is maintained, in line with mapping of risks;
- Appropriate action to mitigate risks and prevent serious harms;
- An alert and complaint mechanism relating to the existence or realization of risks, established in consultation with the representative trade union organizations within the company;
- A scheme for monitoring the implementation of measures and evaluating their effectiveness.[129]

Companies falling under the scope of the Vigilance Law are required to publish their vigilance plans along with a report of their implementation, and include both of these in their annual management report.[130] Should a company fail to do so, or otherwise breach its duties arising from the Vigilance Law, the company is – following the general provisions on civil liability for torts set out in articles 1240 and 1241 of the French Civil Code – required to compensate any damage that the performance of those duties would have prevented.[131]

Consequently, should a parent company fail to establish an effective vigilance plan, which in turn leads to a human rights or environmental violation committed by an offshore subcontractor or supplier resulting in damages, the parent company has breached its due diligence obligation by

[128] Code de commerce art L. 442-6-I-5; Sandra Cossart, Jérome Chaplier and Tiphaine Beau de Lomenie, 'French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' [2017] 2 Business and Human Rights Journal 320.
[129] Vigilance Law art 1 paras 4-5.
[130] Brabant and Savourey, 'Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations' (n 116) 1.
[131] Vigilance Law art 2, para 1.

the Vigilance Law and can be held directly liable towards the victims of such abuse.[132]

Any person with standing can file an action of tort before the relevant jurisdiction. The costs are borne by the person convicted and the court may order the execution of its decision under a periodic penalty payment, the amount of which is decided by the judge.[133]

There are therefore two possible penalties that companies in breach of the Vigilance Law risk facing: a civil liability action or periodic penalty payments (fines that are to be paid daily or as otherwise decided).[134] Any person with standing can ask the relevant court to issue a periodic penalty payment to a parent company that has failed to comply with the Vigilance Law, after having been given a three month notice period.[135]

There was a third possibility of imposing a civil fine in the original draft of the Vigilance Law, but this was held to be unconstitutional by the French Constitutional Court as the breach for which it would be dealt (failing to establish, publish or effectively implement a vigilance plan) was considered too imprecise to meet the requirement that penalties be defined by law.[136]

A civil liability action would follow the general provisions on civil liability under the French law of tort (a fault consisting of an infringement of a right or legitimate interest protected by the law, harm, and a causal link between the two events), of which the alleged victim of such a tort bears the entire burden of proof. The potential success of such an action in practice will be discussed further below.

3.2 Analysis and Key Findings

The Vigilance Law is referred to as an important milestone in the corporate accountability movement.[137] The vigilance obligation imposed on parent companies by the Vigilance Law is also described as establishing a *duty of*

[132] Palombo (n 9) 276.
[133] Vigilance Law art 2 paras 2 and 4.
[134] Brabant and Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' (n 92) 1.
[135] ibid 4.
[136] Conseil Constitutionnel, décision n° 2017-750 DC du 23 mars 2017 Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre § 13.
[137] Sandra Cossart and Lucie Chatelain, 'What lessons does France's Duty of Vigilance law have for other national initiatives?' (Business & Human Rights Resource Centre 2019) <https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives> accessed 5th November 2019.

care, meaning an obligation to act with a standard of reasonable care in carrying out its operations, but also those carried out by its subsidiaries, subcontractors and suppliers falling within the scope of the Vigilance Law.[138]

Despite the Vigilance Law being commended for embedding HRDD into legislation, it has also been considered to be limited on several aspects. Firstly, it does not apply to all businesses – only the largest companies fall under the Vigilance Law's scope, which is estimated to cover around 150-200 companies overall.[139] At the same time, the Vigilance Law has been praised for its general nature; it applies to all sectors and is not focused on a particular issue, but covers a broad spectrum of rights.[140]

The scope of the Vigilance Law is an aspect that has been considered particularly unclear. The law has been criticized for being too vague in regard to which companies' activities are to be taken account for in the vigilance plan – is it only the activities of subcontractors and suppliers of the parent company that shall be included, or also the subcontractors and suppliers of the companies under its control?

Even considering that there is a definition of what constitutes an established commercial relationship in the French Commercial Code, a similar question is raised as to *which* commercial relationships should be taken into account; is it only those between the parent company and its subcontractors and suppliers, or does the Vigilance Law stretch to include those between its subsidiaries and their respective subcontractors and suppliers as well?

The answer to these questions depends on how the Vigilance Law is interpreted. Some scholars argue for a broader interpretation inspired by the UNGPs, arguing that the Vigilance Law is based on these principles as well as other international standards, and that it would be in line with the Vigilance Law's purpose to have an inclusive – rather than exclusive – approach.[141] However, as there is as of yet no case-law deriving from the Vigilance Law, it remains to be seen whether the courts will adopt a broad or restrictive approach in their interpretation of the law.

Furthermore, the French government has been criticized for not publishing a list of the companies affected by the Vigilance Law and for not having

[138] Cossart et al. 318.
[139] Brabant and Savourey, 'Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations' (n 116) 1.
[140] Cossart et al. 319.
[141] Brabant and Savourey, 'Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations' (n 116) 4.

established a compliance mechanism to ensure companies are *de facto* complying with it.[142] Non-governmental organizations (henceforth 'NGOs') such as Sherpa[143] are concerned that without clarity on which companies fall within the scope of the Vigilance Law, combined with a lack of governmental incentive to monitor its compliance, corporations that are required to comply with the Vigilance Law might fly under the radar.

The critique addressed to the French government seems to have had some effect, as the government recently declared that an assessment of the Vigilance Law's effectiveness will be undertaken, including the publishing of a list of the companies that are affected by the Vigilance Law.[144]

A central critique towards the Vigilance Law concerns the high burden of proof it entails for rights-holders seeking to make a civil liability claim against a parent company.[145] The Vigilance Law sets out that the civil liability potentially incurred by parent companies derives from the general tort provisions under the French Civil Code. Following these provisions, a claimant needs to prove causality between the failure to establish a vigilance plan and ensure its effective implementation and the damages caused.

The entire burden of proof lies on the claimant, as the obligation set upon parent companies according to the Vigilance Law is one of process and not of results, meaning that parent companies are not obliged to stop corporate abuse from occurring, but simply to take measures to prevent or mitigate the risk of it happening.[146] As a result, rights-holders will need to prove that the harm is directly linked to a company's failure to establish a vigilance plan, or otherwise that the damages derive from an existing vigilance plan that has not been effectively implemented, in order to receive compensation for damages.

This poses a troublesome burden for rights-holders seeking justice. Firstly, there is still no clarity on when a company is considered to have "effectively implemented" a vigilance plan, which makes it difficult for rights-holders to know what to look for when seeking to prove that a breach of the Vigilance

142 Sherpa, 'Le radar du devoir de vigilance: identifier les entreprises soumises à la loi' (Sherpa 2019) 13-14 <https://plan-vigilance.org/wp-content/uploads/2019/06/2019-06-26-Radar-DDV-16-pages-Web.pdf> accessed on the 21st October 2019.

143 Sherpa is a French civil society organization that was one of the main proponents for implementing the law on the corporate duty of vigilance for parent and instructing companies.

144 Sherpa, 'Le radar du devoir de vigilance: identifier les entreprises soumises à la loi' (n 141) 13.

145 Palombo (n 9) 266.

146 Brabant and Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' (n 92) 2; Cossart et al. 321; Palombo (n 9) 284.

Law has occurred. Notably, the ambiguity of this term and the rest of the definition of what constitutes a breach of the Vigilance Law ("the failure to establish and publish (…) a vigilance plan") contributed to the French Constitutional Court's dismissal of the civil fine penalty, as criminal sanctions need to be sufficiently clear and precise according to French criminal law. However, as some authors have pointed out, claimants seeking to take *civil* action against a parent company still need to prove that such a breach has occurred.[147]

Secondly, the fact that the civil liability that parent companies risk facing upon breaching the Vigilance Law is determined in accordance with general tort provisions presents further challenges for claimants seeking to take civil action against a company, in particular in regard to the element of causation, as neither case-law or legal doctrine in France present any clear views on how tort liability should be established.[148]

The fact that the *Cour de cassation* has not elaborated on what is required to fulfil the element of certainty makes it difficult for rights-holders to know what to focus on in their legal argumentation. Furthermore, the diverging views in French legal doctrine on whether the element of directness and certainty are relevant in establishing causation imply that no general conclusions can be drawn from French case-law regarding these elements. The same thing can be said for the different theories used to establish causation. The only theory that scholars seem to agree that the French courts apply when establishing causation is the equivalency theory.

3.2.1 Outcome and next steps

Despite the criticism directed at the Vigilance Law's high burden of proof for rights-holders, the fact that companies are obligated to publish the vigilance plan is considered a step in the right direction.[149] This means that rights-holders seeking to take civil action against a parent company can refer to the measures the company claimed to undertake in regard to human rights and environmental risks in its vigilance plan when arguing that it has failed in its vigilance obligations.[150]

147 Brabant and Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' (n 92) 2.
148 Vigilance Law art 2 para 1.
149 Sherpa, 'Vigilance Plans Reference Guide' (1st edn, Sherpa 2019) 11 <https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-VF-compressed.pdf> accessed 1 November 2019.
150 Sherpa, 'Vigilance Plans Reference Guide' (n 148) 11.

However, the hopes for increased transparency from corporations in communicating their due diligence measures to the public have been somewhat squashed by the vigilance plans that have been published so far. The vigilance plans have been criticized for being too brief in relation to the size of the corporations, which makes it difficult for civil society and rights-holders to grasp the measures the companies plan to take.[151]

Furthermore, French provisions on civil liability prevent actions from being brought up by any other party than those with standing, meaning that third parties cannot bring civil liability actions to French courts on behalf of victims in third countries.[152] This presents yet another difficulty for rights-holders, as a lack of knowledge of their rights and French procedural law might prevent them from seeking legal action in French courts. The access to justice is not made easier by the fact that MNEs often have complex structures with multiple players and long supply chains.[153]

These difficulties risk compromising one of the core objectives of the Vigilance Law: to provide remediation for victims of corporate abuses. Some scholars argue that an interpretation of causation between a breach of the vigilance obligation and the damages should be made in accordance with the UNGPs, which distinguish between situations where corporations have caused, contributed to or were linked to adverse impacts.[154] As there is no case-law based on the Vigilance Law in the present, a definitive answer on how causation will be interpreted by the courts cannot be given.

On the other hand, some scholars believe that the very existence of a possibility to hold corporations liable under French civil law implies a legal, financial and reputational risk that might act as an incentive for corporations to act in accordance with the Vigilance Law.[155] As such, the preventative objective of the Vigilance Law would somewhat be fulfilled.

Leaving the possibility of bringing about a civil liability action aside, civil society also has the possibility of arguing that a parent company should be issued a periodic penalty payment, the amount of which is decided by the court. As long as the claimant can prove that he or she has standing before the court, this option can be pursued irrespective of whether damages have

151 Sherpa, 'Vigilance Plans Reference Guide' (n 148) 10.
152 Brabant and Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' (n 92) 3.
153 ibid.
154 ibid.
155 Brabant and Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' (n 92) 4.

been caused, alleviating claimants from the cumbersome burden of proof presented by seeking a civil liability action.

Admittedly, the periodic penalty payment is of a more administrative nature as opposed to a civil liability action – and does consequently not offer the possibility of remediation for rights-holders – but can nevertheless serve as a means of ensuring that corporations comply with their vigilance obligations.[156]

As there is as of yet no case-law based on the Vigilance Law, it remains to be seen whether it will be effective in fulfilling its objectives of prevention and remediation. An interesting aspect to analyse in future proceedings is whether a corporation's breach of its vigilance obligations can be used as an argument to establish negligence under the French civil liability regime, particularly as the Vigilance Law makes explicit reference to the civil liability provisions under French tort law.

[156] Brabant and Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' (n 92) 4.

4 The United Kingdom

4.1 Legislation

4.1.1 English tort law and the notion of a "duty of care"

Unlike French and Swedish tort law, English tort law is not contained in a specific law or code. Instead, English tort law has largely been developed in case-law, which means that the general conditions for civil liability are to be found there.[157]

The English common law system classifies torts into different types, where the tort of negligence has become the most frequent after its development in the twentieth century.[158] The requirements for establishing negligence are as follows: the defendant owes a duty of care towards a group of persons of which the rights-holder was one; the defendant has breached his duty of care and the harm was a consequence of that breach.[159]

Determining whether a defendant owes a duty of care towards a plaintiff is central to the establishment of negligence under English law, as the concept of a "duty" that has been breached is "the chief ingredient of the tort."[160] This can either be expressed as a general duty of care in certain situations, or a duty of care that a particular defendant owes to a particular plaintiff in the circumstances of a specific case.[161]

There are few examples of general principles of negligence and a duty of care being expressed in English case-law. The "neighbour principle"[162] is often referred to as the closest thing English law has come to establishing a general principle of the tort of negligence.[163] However, cases after the one in which the neighbour principle was described have approached the notion of a duty of care in more general terms. In *Anns v. Merton London Borough Council* (henceforth '*Anns*'), a "two-stage test" was introduced for

157 van Gerven et al. (n 92) 50.
158 ibid 44.
159 ibid 45.
160 William Vaughan Horton Rogers, *Winfield & Jolowicz on Tort* (15th edn, Sweet & Maxwell 1998) 90-91.
161 ibid.
162 The neighbour principle describes who is to be considered a neighbour and that a duty of care is owed to persons falling under this description.
163 Bell et al. (n 90) 360; van Gerven et al. (n 92) 50.

establishing a duty of care.[164] The first step consisted of assessing whether there was a sufficient relationship of proximity between the alleged tortfeasor and the plaintiff, in the sense that the tortfeasor could expect that carelessness on his behalf would likely cause damage to the plaintiff.[165]

If the first step was fulfilled, a *prima facie* duty of care could be said to exist. The second step consisted of considering whether there were any circumstances that would reduce or limit either the duty of care owed to a group of persons or the damages suffered should such a duty be breached.[166]

The case of *Anns* received a lot of criticism and was later overruled.[167] Nevertheless, elements of the two-stage test describing a duty of care were echoed in *Caparo Industries plc. v. Dickman* (henceforth '*Caparo'*), where the House of Lords concluded that an accounting company did not owe a duty of care towards an investor who had based his investment decisions on its statements.[168] Three criteria were set-out by the court to determine whether the parent company owed a direct duty of care towards its employees:

1. Whether the damage was foreseeable;
2. Whether the relationship between the party owing the duty of care and the party to whom it is owned is one of proximity and
3. Whether it is fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.[169]

These criteria have later on received support by leading authors and have even been said to constitute settled law, being described as "the *Caparo*-test".[170] Notably, in the case of *Chandler v. Cape* explored below, the court makes reference to the *Caparo*-test in considering whether the parent company owed a direct duty of care towards the employees of its subsidiary. This case will be further analyzed in relation to the civil liability of parent companies in the case-law chapter.

[164] *Anns v. Merton London Borough Council,* [1978] A.C. 728, UKHL.
[165] ibid.
[166] ibid.
[167] *Murphy v. Brentwood District Council,* [1991] 1 AC 398, UKHL; van Gerven et al. (n 92) 52.
[168] Palombo (n 9) 273.
[169] *Caparo Industries plc. v. Dickman,* [1990] 2 AC 605, UKHL 618.
[170] Rogers (n 159) 96-99; Basil Markesinis and Simon Deakin, *Tort Law,* (4th edn, Oxford 1999) 83; Caparo *Industries plc. v. Dickman,* [1990] 2 AC 605; van Gerven et al. (n 92) 53.

4.2 Case-law

The chapter will initially present two domestic cases dealing with the notion of a parent company duty of care owed towards the employees of its subsidiary: *Chandler v. Cape*[171] and *David Thompson v. the Renwick Group.*[172] In these cases, both the parent company and the subsidiary are located in the UK, but they nevertheless present valuable considerations on parent company liability.

These cases will be followed by three transnational cases, all concerning a UK-domiciled parent company with a foreign subsidiary: *Okpabi v. Royal Dutch Shell*[173]*; AAA & Others v. Unilever plc. and Unilever Tea Kenya Limited*[174] and *Lungowe v. Vedanta.*[175] The transnational cases addressed issues of jurisdiction, not of the merits of the case. They therefore do not delve into the subject matter of a parent company's duty of care, but whether a *prima facie* case against the parent company can be established and whether the English court can establish jurisdiction over damage that occurred abroad.

As no transnational cases have been decided on the merits concerning a parent company's duty of care regarding its foreign subsidiaries by a UK court to date,[176] they are nevertheless included to gauge the possibility of establishing a new duty of care for parent companies and legal reasoning employed by the courts. This will provide context for the discussion on the civil liability of parent companies and will focus on the courts' comments on the parent companies' alleged duty of care.

4.2.1 Chandler v. Cape plc.

Chandler v. Cape plc. (henceforth '*Chandler'*) is a landmark case on the issue of parent company liability; it was the first case in the United Kingdom where the issue of parent company liability was established as precedent and damages were awarded to the plaintiff.[177]

[171] *Chandler v. Cape plc*, [2012] EWCA Civ. 525 (Court of Appeal, 25 April 2012).
[172] *Thompson v. the Renwick Group plc.* [2014] EWCA Civ. 635.
[173] *Okpabi & Ors v. Royal Dutch Shell plc. & Anor (Rev 1)* [2018] EWCA Civ 191; *Okpabi & Ors v. Royal Dutch Shell plc. & Anor* [2017] EWHC TCC 89.
[174] *AAA & Ors v Unilever plc. & Anor* [2018] EWCA Civ. 1532; *AAA & Ors v. Unilever plc. & Anor* [2017] EWHC 371.
[175] *Lungowe & Ors v. Vedanta Resources plc & Anor*, [2016] EWHC TCC 975; *Lungowe & Ors v. Vedanta Resources plc & Anor*, [2017] EWCA Civ. 1528; *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents),* [2019] UKSC 20.
[176] Palombo (n 9) 271.
[177] *Chandler;* Sanger (n 82) 479.

The plaintiff in the case, David Chandler, had worked for Cape Products (henceforth 'the Subsidiary'), a subsidiary of the parent company Cape (henceforth 'the Parent Company') loading bricks at a factory. Years later, the plaintiff claimed to have developed asbestosis[178] as a result of the dust he was exposed to when he worked for the Subsidiary, and therefore claimed that the Parent Company had breached its duty of care towards him.

The case was first considered by the High Court and later appealed to the Court of Appeal. The complaint concerned the Parent Company's omission to take steps or provide advice to the Subsidiary, which the plaintiff claimed had resulted in the injury suffered.[179]

The central issue the court had to consider was whether the Parent Company owed a direct duty of care towards the employees of its Subsidiary in regard to ensuring a safe working environment.[180] In considering this, the court considered a number of aspects, including the relationship between the Parent Company and the Subsidiary.

In assessing this relationship, the court concluded that the two companies were two separate entities, but that the Parent Company nevertheless controlled "some aspects of the business of [the Subsidiary]."[181] Some of the aspects that led to this conclusion were that the Parent Company, occasionally, was in charge of the management of the Subsidiary; that there were one or more directors of the Parent Company on the board of the Subsidiary; that the board meetings of the Subsidiary were held at the Parent Company's Head Office and not where the Subsidiary was located and that it was confirmed that the Subsidiary was an integrated member of the Parent Company's group of companies.[182]

The second thing the court had to consider was whether the Parent Company had a responsibility towards the employees of the Subsidiary in protecting them from the harm caused by the asbestos atmosphere.[183] The High Court concluded that the Parent Company had assumed responsibility for the employees of its subsidiary based on an application of the *Caparo*-test.[184]

178 An inflammation of the lungs due to exposure to asbestos fibers.
179 *Chandler* para 72.
180 ibid para 1.
181 ibid para 30.
182 ibid para 10.
183 ibid para 30.
184 ibid para 31.

In applying the *Caparo*-test, the High Court put emphasis on the fact that the Parent Company had knowledge and was fully aware of the harmful working conditions for its Subsidiary's employees as well as the risk of developing asbestos-related disease after exposure to asbestos dust, which was described by the court as 'obvious'.[185] As such, the Parent Company should have foreseen the risk of harm to the claimant.

Furthermore, it was the Parent Company – and not its subsidiaries – that drafted the policy regarding health and safety issues, and consequently the responsibility for preventing harm to the employees of its subsidiaries lay predominantly with the parent company.[186]

Together, these circumstances led the High Court to conclude that there was a sufficient degree of proximity between the claimant and the Parent Company.[187] The court did not go on to consider whether the existence of a duty of care was fair, just and reasonable, as the defendant had not presented such an argument. Nevertheless, the court stated that had such an argument been presented, he would have rejected it due to the obvious risk of harm presented by exposure to asbestos dust.[188]

As a result, the High Court concluded that the Parent Company owed a direct duty of care to the employees of its Subsidiary, as the criteria of foreseeability, proximity and that the duty of care should be fair, just and reasonable were satisfied.[189]

The court mentions that there is no general duty for a defendant to prevent third parties from harming one another.[190] Nevertheless, the court mentions that such a responsibility might be "attached" to the defendant in situations where there is "a relationship between the parties which gives rise to [such a] responsibility".[191]

Moreover, the High Court rejects the argument that a duty of care can only arise in cases where a parent company has absolute control over its subsidiary.[192] In the case at hand, the Parent Company owned the equity shares of the Subsidiary. However, the court states that a parent company

185 *Chandler* para 31.
186 ibid.
187 ibid.
188 ibid.
189 ibid para 32.
190 ibid para 63.
191 ibid.
192 ibid para 66.

does not have to - and is not likely to - have complete responsibility towards its subsidiary's employees.[193]

It was undisputed in the case that the system of work at the Subsidiary was defective and that the Parent Company was aware of the "systemic failure" consisting of the asbestos dust.[194] The court put emphasis on that the Parent Company had "superior knowledge" about the risk consisting of exposure to asbestos dust in claiming that the Parent Company owed a direct duty of care towards the employees of the Subsidiary.[195]

The superior knowledge on the asbestos risk of the Parent Company transformed into a responsibility to either advice its Subsidiary of the steps it had to take to ensure a safe working environment for its employees, or ensuring that these were taken.[196]

To conclude, the Court of Appeal agreed with the analysis made in the lower courts in regard to the *Caparo*-test. It was concluded that the Parent Company owed a direct duty of care towards the health and safety of its Subsidiary's employees, and that the breach consisted of the Parent Company's failure to advice on the precautionary measures to be taken by its Subsidiary.[197]

Additionally, the Court of Appeal added that a duty of care such as the one presented in this case can arise in situations in which one or more of the following circumstances is presented:

- "The businesses of the parent and subsidiary are in a relevant respect the same;
- The parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- The subsidiary's system of work is unsafe, and the parent company knew, or ought to have known; and
- The parent knew or ought to have foreseen that the subsidiary or its employees would *rely* on it using that *superior knowledge* for the employee's protection."[198]

193 *Chandler* para 66.
194 ibid para 77.
195 ibid.
196 ibid para 78.
197 ibid para 79.
198 ibid para 80.

4.2.2 David Thompson v. the Renwick Group plc.

The case of *David Thompson v. the Renwick Group plc.* (henceforth '*Thompson'*) also concerned a former employee seeking damages from exposure to asbestos dust. The plaintiff sought damages from the parent company, the Renwick Group plc. (henceforth 'the Parent Company'), of his former employer, David Hall & Sons Ltd. (henceforth 'the Subsidiary').[199]

The case was ultimately decided by the Court of Appeal. The High Court had ruled in favor of the plaintiff's claim, establishing that the Parent Company had assumed a duty of care towards him by taking control of the operation of its Subsidiary's daily business.[200]

The Court of Appeal disagreed. It considered that proximity between the Parent Company and the employees of the Subsidiary, and consequently a duty of care, could not be sufficiently established based on the circumstances raised by the plaintiffs. Firstly, it stated that a parent company's appointment of a director responsible for health and safety matters in the operations of its subsidiary is *not* sufficient to assume upon itself a duty of care.[201]

The court clarified that this situation was very different from that in *Chandler,* where a group medical advisor in charge of the health and safety of the group's employees and a scientist focusing on suppressing asbestos dust had been appointed by the parent company.

Nor did the fact that the Subsidiary was run as a division of the Parent Company and that the activities of the Subsidiary and Parent Company had been merged in some respect regarded as sufficient to establish proximity.[202] Consequently, the Court of Appeal ruled in favor of the Parent Company and allowed the appeal.

4.2.3 Okpabi v. Royal Dutch Shell plc.

The approximate 42,500 claimants in *Okpabi v. Royal Dutch Shell* (henceforth '*Okpabi'*) concerned claims for damages over oil pollution

199 *Thompson* paras 1–2.
200 ibid para 22.
201 ibid paras 24–25.
202 ibid para 38.

allegedly caused by Shell's Nigerian subsidiary (henceforth 'the Subsidiary') affecting the land and water of the Ogoni people.[203] The case was primarily settled on preliminary grounds, namely whether the claimants had a "real issue" with the chance of succeeding against the defendant for the court to try the case.[204]

In order to establish this, the case therefore also concerned the question on whether Royal Dutch Shell (henceforth 'the Parent Company'), owed a direct duty of care towards the Ogoni people in the form of taking appropriate steps to ensure that the oil spills did not cause foreseeable harm to the Ogoni people.[205]

The case was first tried by the High Court and later the Court of Appeal. On the duty of care, the Court of Appeal stated that the three-part test of proximity, foreseeability and reasonableness set out in the *Caparo*-case was not to be considered as a test that would, irrespectively of the facts of the case, yield an answer as to whether a duty of care was owed by a parent company or not.[206]

The High Court had dismissed the plaintiffs claim. On the issue of whether the Parent Company owed a duty of care towards the Ogoni people, the court had stated that the only case in which a parent company had been found to owe such a duty towards the employees of its subsidiary was in *Chandler*.

He elaborated that the circumstances in that case were quite different, as a crucial (but not the sole) factor in establishing a duty of care in *Chandler* was that the parent company had appointed a person with the specific function of being in charge of health and safety matters in regard to the employees of its subsidiary, therefore assuming a duty of care.[207]

The High Court, and later on the Court of Appeal, had nevertheless stated that the element of foreseeability in the *Caparo*-test was satisfied based on the evidence showing the frequency, location and scale of the oil spills from the Subsidiary's operations in Nigeria.[208]

On the element of proximity, the Court of Appeal stated that a distinction had to be made between a parent company that has control over the material

[203] *Okpabi* para 3.
[204] ibid para 179.
[205] ibid para 35.
[206] ibid para 24.
[207] ibid para 26
[208] ibid para 84.

operations of its subsidiary, and a parent company that issues mandatory group-wide policies or standards.[209] The Court of Appeal was of the opinion that the latter case could not give rise to a duty of care for a parent company.[210]

In the *Okpabi*-case, the Parent Company had issued group-wide policies and standards, *inter alia* in the form of sustainability reports and manuals that referred to the requirements for its global entities to comply with the Parent Company's "safety, environmental and social requirements."[211] The court did not consider this to be sufficient to conclude that the Parent Company had material control in the sense that it *exercised* control over the operations of the Subsidiary, but that it should be regarded instead as "high level guidance".[212]

The court stated that if the Parent Company had attempted to *enforce* the standards in the operations of its Subsidiary, it could be argued that it had exercised material control over its Subsidiary and that proximity could be established.[213] As this was not the case, the court concluded that the element of proximity was not fulfilled.[214]

Finally, the court dismissed the claimants' arguments that it was fair, just and reasonable to impose a duty of care on the Parent Company, not elaborating further on the subject besides stating that these were not very convincing.[215]

4.2.4 AAA & Others v. Unilever plc. and Unilever Tea Kenya Limited

AAA & Others v. Unilever plc. and Unilever Tea Kenya Limited (henceforth '*Unilever'*) concerned a number of 218 residents and employees of a tea plantation in Kenya that was owned by Unilever Tea Kenya Limited (henceforth 'the Subsidiary') of Unilever plc. (henceforth 'the Parent Company'), a parent company domiciled in the UK.

The claims regarded compensation for damage incurred as a result of an outbreak of violence in relation to the 2007 Presidential election in Kenya.

[209] *Okpabi* para 89.
[210] ibid.
[211] ibid para 91.
[212] ibid paras 122-123.
[213] ibid para 205.
[214] ibid para 127.
[215] ibid para 131.

The claimants alleged that the Parent Company had breached its duty of care towards them in not taking the necessary steps to protect them from violence.[216]

The Court of Appeal dismissed the claim on the grounds that proximity between the Parent Company and the claimants could not be established to a sufficient degree, and the claimants had therefore failed to show the court that the case had a reasonable prospect of success.[217]

The claimants argued that the Parent Company and its Subsidiary had failed to take the appropriate steps in the form of adequate crisis management plans to protect them against violence from surrounding tribes.[218] The High Court applied the *Caparo*-test, and reached the conclusion that it was apparent that the violence was not foreseeable for the Parent Company, as it had never happened before.[219]

The Court of Appeal never had to consider this element of the *Caparo*-test, as it dismissed the case already on the grounds of proximity. Importantly, the court declared that a duty of care for a parent company would only be imposed if general principles of tort law were satisfied in the particular case.[220]

Consequently, it considered that no specific principle existed in English tort law where a parent company would be considered responsible for the activities of its subsidiary that affect third parties, but that this would have be determined on a case-by-case basis.[221] The court went on to categorize the different situations where a parent company might assume such a duty of care, namely where:

- A parent company has taken over, or jointly controls, the management of the subsidiary's activity allegedly causing the damage or;
- A parent company has provided advice to its subsidiary on how to manage the risk in question.[222]

[216] *Unilever* para 2.
[217] ibid para 5.
[218] ibid para 12.
[219] ibid.
[220] ibid para 36.
[221] ibid.
[222] ibid para 37.

As the court considered that neither of these circumstances were met in the specific case, it dismissed the appeal.[223]

4.2.5 Lungowe v. Vedanta plc.

The claimants in *Lungowe v. Vedanta* (henceforth '*Lungowe'*) were a group of 1,826 Zambian citizens who claimed to have suffered injury as a result of pollution and environmental damage from discharges of a copper mine owned by a company based in Zambia, KCM, (henceforth 'the Subsidiary'), which is in turn part of a group of companies ultimately owned by Vedanta (henceforth 'the Parent Company'), which is incorporated and domiciled in England.[224]

The claim was made towards the Parent Company as well as the Subsidiary. The claims against the Parent Company were made on the basis of it breaching an alleged duty of care owned towards the claimants, arising from its high degree of control over the operations of its Subsidiary in Zambia.[225] The Parent Company argued that the court did not have jurisdiction over the case on the grounds of *forum non conveniens.*[226]

The case went up to the Supreme Court (previously the House of Lords) in London. On the issue of parent company liability, the court stated that it depended on whether it could be established that the Parent Company to a sufficient degree had intervened in the management of the mine owned by the Subsidiary to have incurred a common law duty of care or to be held statutory liable under environmental, mining and health laws in Zambia.[227]

The court then made reference to the fact that the claimants had tried to fit the case into the guidelines on establishing a duty of care brought forward in *Chandler*.[228] However, the court commented that although these indicia presented relevant considerations, they were not to be seen as a separate test or "straightjacket" for the establishment of a duty of care, but merely examples of circumstances in which such a duty may arise.[229]

Consequently, the Supreme Court concluded that parent company liability was not a new category of negligence which required the application of the

223 *Unilever* para 41.
224 *Lungowe* [2016] para. 2.
225 *Lungowe* [2019] para. 3.
226 *Lungowe* [2016] para. 4.
227 ibid para 44.
228 *Chandler* para 80.
229 *Lungowe* [2019] para 56.

Caparo-test.[230] Rather, the court considered that the question of parent company liability in the case could be determined in accordance with general principles of common law negligence liability.[231]

The court mentions that the *Unilever* and *Okpabi*-cases attempted to establish a general principle where a duty of care couldn't be attached to a parent company for simply laying out group-wide policies and guidelines.[232] The Supreme Court in *Lungowe* disagrees with the existence of such a principle, and adds that even if the mere drafting of group-wide policies would not be enough to ascertain a duty of care of a parent company towards third parties, a parent company may incur such a duty if it were to take active steps for their implementation in the company group, such as by training, supervision or enforcement.[233]

In summary, the court briefly mentioned that the published materials indicated that the Parent Company had sufficiently intervened in the activities of its Subsidiary and of the mine for there to be an arguable duty of care towards the claimants. In reaching this conclusion, the court put particular emphasis on the Parent Company's implementation of environmental and safety standards in the group by providing "training, monitoring and enforcement" of these.[234]

Importantly, the court clarified that it is not the *de facto* control over a subsidiary as constituted by e.g. ownership of a majority of the shares which is the decisive factor in establishing the existence of a duty of care for a parent company.

The fact that a parent company has an *opportunity* to intervene or take control over another company is not in itself equal to parent company liability for the activities of its subsidiary. Rather, the court elaborated that it is the extent to which a parent company takes advantage of this opportunity by intervening, controlling or supervising the operations of its subsidiary which is crucial in establishing a duty of care.[235]

230 *Lungowe* [2019] para 56.
231 ibid.
232 ibid para 52.
233 ibid para 53.
234 ibid para 61.
235 ibid para 49.

4.3 Analysis and Key Findings

The potential significance of the imposition of a duty of care for parent companies to exercise HRDD for bridging the accountability gap could be momentous should it be judicially recognized by English (and other common law) courts.[236] The cases presented above arguably make the case for a duty of care for parent companies to exercise due diligence in regard to the activities of the entities in its global operations, at least in common law jurisdictions.[237]

From an access to justice perspective, it can be stated that the cases exemplify that both employees, former employees and third parties affected by the operations of a foreign subsidiary can give rise to liability for the parent company.[238] However, the circumstances under which a parent company incurs a duty of care towards a group of persons affected by the operations of its subsidiary are far from clear in UK case-law.[239]

In *Chandler*, four factors were set out under which a parent company could incur a duty of care if fulfilled. Later cases have included further circumstances, such as that of the parent company's superior knowledge in regard to the potential risks arising out of the operations of its subsidiary.[240]

The courts seem to agree on that the issue of parent company liability – in spite of the indicia presented by *Chandler* – present relevant considerations, but that the facts of the case will play an important role in determining parent company liability. It is therefore difficult to discern the exact criteria for when a parent company assumes a duty of care. Nevertheless, there are some aspects that the courts have chosen to focus on when considering whether a parent company owes a duty of care to third parties or the employees of its subsidiary.

The notion of control between the parent company and its subsidiary is raised by the courts as an element of establishing a duty of care. Notably, *Chandler* has been argued to demonstrate that it is a parent company's "*relevant* control" of its subsidiary, and not the evidence of *de facto* control (e.g. in the form of ownership of shares), which is decisive in reaching this conclusion.[241]

[236] Cassell (n 78) 180.
[237] ibid 179.
[238] Bright (n 72) 5.
[239] Palombo (n 9) 274.
[240] Bright (n 72) 4.
[241] Sanger (n 82) 480; *Chandler* para 47.

This concept is elaborated upon in *Okpabi* and *Lungowe,* where the court states that it is not the opportunity for a parent company to take control over its subsidiary that is decisive in establishing a duty of care. Rather, it is the extent to which a parent company has intervened in the operations of its subsidiary by taking active steps for the implementation of group-wide principles or standards, for instance in the form of training, supervision and enforcement.

The court's focus on the element of control in *Chandler* has been criticized.[242] Scholars argue that there is no clarity given by the court as to what constitutes *relevant* control of a subsidiary's business, meaning that parent companies risk not knowing what amount of control over a subsidiary's business leads to an assumption of responsibility.[243]

Furthermore, scholars argue that the notion of control in a tort law and a company law context do not necessarily have the same meaning.[244] In the latter case, 'control' is often understood as owning a majority of the shares in another company, which is natural in parent company and subsidiary relationships.[245] Regardless of control in the form of majority shares, scholars argue that it lies in the interest of parent companies to exercise some level of influence or control in the operations of their company groups, for instance in the form of appointing directors or drafting group-wide policies.[246]

Importantly, *Chandler* demonstrates that a potential duty of care owed by a parent company to the employees of its subsidiary is not the same as the duty of care that the subsidiary owes to its employees.[247] As a result, establishing that a parent company owes a direct duty of care to a group of persons is not equivalent to piercing the corporate veil (as the parent company would not be vicariously liable for the acts of its subsidiary), as was also stated by the court in the case.[248]

Some scholars argue that the guidelines established by the case of *Chandler* as regards the control of a parent company over its subsidiary could also be

[242] Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v. Cape plc.' [2013] 76 The Modern Law Review 603 12; David Kershaw, *Company Law in Context* (2nd edn, Oxford 2012) 154.
[243] Petrin (n 241) 12.
[244] Petrin (n 241) 14; Kershaw (241) 154.
[245] ibid.
[246] ibid.
[247] Sanger (n 82) 480; *Chandler* para 47.
[248] *Chandler* para 69.

interpreted to apply to long-term supply contracts, which are not unusual in the operations of large transnational operations.[249] If interpreted in this way, the duty of care of the parent company would then extend to cover the employees of its suppliers as well as those of its subsidiaries.

An important case-law development that has been discussed by scholars is how the element of proximity has been considered by the English courts in establishing a duty of care owed by a parent company.[250] The *Caparo*-case coined this as an aspect to consider in regard to the relationship between the parent company and the claimant (the employee(s) or group of persons affected by the activities of its subsidiary) in 1990. The House of Lords put emphasis on whether the parent company had *assumed* a duty of care in regard to the claimant.[251]

This is contrasted by later rulings – both domestic and transnational – where the court instead considers the relationship between the parent company and its subsidiary in its assessment of whether the parent company has a relationship of proximity (and owes a duty of care) towards the subsidiary's employee.[252]

The most recent ruling at the time of writing, the *Lungowe*-case, has been argued to widen the circumstances of when a parent company can be held liable for the activities of its subsidiary.[253] This is primarily evidenced by the Supreme Court's statement that a specific test or set of circumstances cannot be applied as a 'straightjacket' to any situation of parental liability, but that a duty of care must be determined on the facts in each case. It is also supported by the court's criticism of the *Unilever* and *Okpabi* rulings for being too narrow in their dealings with parental liability.[254]

Although there is as of yet no transnational case that has been ruled on the merits of a potential duty of care owed by a parent company (as these have focussed on the issue of jurisdiction), the *Lungowe* judgment in particular marks an important development when it comes to parental liability in the

[249] Sanger (n 82) 480.
[250] Palombo (n 9) 273.
[251] ibid.
[252] The relationship between the parent company and its subsidiary in regard to the element of proximity is considered in *Chandler, Thompson, Lungowe, Okpabi and Unilever*.
[253] Simmons & Simmons, 'Mass tort case alert: Supreme Court hands down judgment in Lungowe and Ors v Vedanta Resource Plc and Konkola Copper Mines Plc' (Simmons & Simmons 2019) <https://www.simmons-simmons.com/publications/ck0bg637to4bq0b85mehy1du2/170419-mass-torts-case-alert> accessed 26th November 2019; Palombo (n 9) 274.
[254] Palombo (n 9) 274-275.

UK. The ruling by the Supreme Court opens the door for potentially any transnational torts committed by foreign subsidiaries of UK-domiciled parent companies to fall under the jurisdiction of English courts.[255]

From an access to justice perspective, this is positive news for rights-holders. The circumstances under which a parent company can be held liable for such abuse are however not clear, which might make it difficult to know what to focus on in a potential tort suit for negligence, as well as the clamaint's prospects of success.

The significance of a judicial recognition by UK courts that parent companies owe a duty of care to exercise HRDD cannot be overstated. Recognizing a HRDD for parent companies would be a means of ensuring that due diligence is carried out in regard to the potential human rights impacts of corporate groups, but it would also facilitate access to justice in the form of compensation for rights-holders.

Furthermore, scholars argue that legally recognizing a duty of care for parent companies would mean that businesses and states alike would act in compliance with the UNGPs on ensuring that effective remedies are provided for rights-holders, as it would constitute a potential remedy in tort suits for negligence.[256]

Some scholars argue that legally recognizing such an obligation would create a positive incentive for parent companies to monitor the activities of their subsidiaries in order to ensure that HRDD is carried out throughout the corporate group and that potential risks are prevented or mitigated.[257]

Contrastingly, the cases seem to indicate that a parent company has nothing to gain from availing itself of the opportunity to take active steps in the activities of its subsidiary, as this seems to be central to the establishment of proximity and consequently a duty of care. Some scholars believe that a judicial recognition of a duty of care would be a hollow victory, in that parent companies would take advantage of the due diligence obligation as a means to "check off boxes" in regard to the activities of their foreign subsidiaries.[258]

[255] Simmons & Simmons (n 252).
[256] Palombo (n 9) 180.
[257] Cassel (n 78) 182.
[258] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries: Violations of International Human Rights Law' [2015] 72 Washington & Lee Law Review 1828.

Additionally, current case-law on parent company liability for business-related human rights abuse puts a strong focus on the relationship between the parent company and its subsidiary in establishing proximity and consequently a duty of care. Scholars have pointed out that the closeness of this relationship becomes determining as to whether the parent company owes a duty of care towards third persons or employees affected by the activities of its subsidiary, which opens the possibility for parent companies to escape liability if the relationship with their subsidiaries is not sufficiently close.[259]

The Supreme Court's ruling in *Lungowe* seems to depart from the factors of foreseeability, proximity and reasonableness outlined in *Caparo* and previously relied on by the courts. Whether the *Lungowe* judgment has indeed widened the circumstances under which a parent company can be held liable for the wrongful acts of its subsidiary remains to be seen, although this seems to be the prediction of scholars and law firms alike.

[259] Palombo (n 9) 286.

5 Sweden

Unlike France, Sweden has not adopted a specific law on business and human rights.[260] Instead, the possibilities of holding parent companies domiciled or otherwise within the jurisdiction of Sweden responsible for the business-related human rights abuse must be found in existing Swedish civil law and legal principles.[261]

This section will attempt to answer one of the main research questions of the thesis, namely whether there is a possibility to hold Swedish parent companies liable for human rights violations committed by their foreign subsidiaries in current Swedish civil law.

The civil laws that will be examined are the Swedish Companies Act (henceforth 'the SCA')[262], the Tort Liability Act (henceforth 'the TLA')[263] and the Annual Reports Act (henceforth 'the ARA').[264] The laws have been identified as the most relevant provisions in regard to the focus of the thesis, namely examining the tort liability of parent companies for business-related human rights abuse. The SCA is the primary law that governs the rights and liabilities of Swedish companies. The TLA contains general rules on tort liability, and the ARA comprises a duty for larger Swedish companies to publish a sustainability report in regard to business and human rights.[265]

After the key civil laws have been assessed, the chapter concludes by summarizing the main findings in regard to parental liability in Swedish civil law as well as the perspectives of legal scholars, authorities and organizations alike on the current status of the law and its potential for legal evolution.

5.1 Legislation

5.1.1 The Swedish Companies Act (2005:551)

The SCA came into force in 2006 and regulates public and private LLCs.[266] The principle of limited liability is strongly embedded in the law and can be

[260] Enact (n 37) 5.
[261] ibid.
[262] The Swedish Companies Act (2005:551).
[263] The Tort Liability Act (1972:207).
[264] Annual Reports Act (1995:1554).
[265] ibid 10 §.
[266] SCA 1 ch 2 §.

identified already in the first chapter, where it is stated that the shareholders are not liable for the liabilities of the company.[267] Claims of tort can therefore as a general rule only be directed towards the company as a legal entity and not the individual shareholders.[268]

Parent companies, subsidiaries and company groups are defined in the SCA's first chapter. As a general principle, an LLC holds the legal status of a parent company, and another legal entity holds the status of subsidiary, if it owns more than half of the votes for all of the shares or entities in another legal entity, or otherwise has the exclusive right to exercise a decisive influence over another legal entity.[269] Together, the parent company and its subsidiary constitute a company group.[270]

The SCA contains no provisions obligating parent companies or other legal entities to respect human rights. Rather, the principal purpose of an LLC is to generate profit for its shareholders, which should permeate every decision made in the management of the company.[271] Having a different purpose than a commercial one is allowed, with the condition that it is incorporated in the company's Articles of Association.[272]

If a parent company were to introduce an obligation to respect human rights into its Articles of Association, a rights-holder could potentially argue that the parent company should be held accountable based on a breach of the Articles of Association – as a violation of the SCA, the ARA or the Articles of Association is a prerequisite for parent company tort liability according to the SCA.[273] However, introducing a different purpose than profit-generation is relatively rare, as most LLCs are managed with the aim of promoting and facilitating their economic activity, and the generation of profit therefore becomes an essential step in reaching that aim.[274]

5.1.1.1 The tort liability of shareholders

The tort liability for shareholders who have acted with gross negligence or willful misconduct resulting in harm for the company, another shareholder or *other persons* (usually a creditor) can only be ascertained in cases where the SCA, the ARA or the company's Articles of Association have been

[267] SCA 1 ch 3 §.
[268] Statskontoret (n 3) 54.
[269] SCA 1 ch 11 § para 1 pp. 1–4.
[270] SCA para 4.
[271] SCA 3 ch 3 §; Enact (n 37) 17.
[272] SCA 3 ch 3 §.
[273] SCA 29 ch 3 §.
[274] Carl Svernlöv, *Ansvarsfrihet* (2007 Norstedts Juridik) 104.

breached.[275] The persons or group of persons that are included in the scope of "*other persons*" has not been defined by the law, which suggests that even though the provision's intended target group is generally the creditors of a company, other stakeholders can be included by the term as well.[276]

However, the Swedish Supreme Court has stated that the delimitation of the term's scope should be interpreted in accordance with the purpose of which the relevant provision was created, which is a general principle of tort law known as 'the principle of an interest worthy of protection'. [277] A rights-holder therefore needs to prove that the harm corresponds to an interest protected by the provision that has been breached, for instance that the LLC has breached its purpose to respect human rights in its Articles of Association, granted that such a purpose is provided.

It is not clear whether the principle of an interest worthy of protection requires the interest to be protected by the purpose of a legal provision, or whether it is sufficient that the interest is protected by a 'norm' - in this case the purpose in an LLC's Articles of Association. If it is necessary to establish that the interest is protected by the aim of a legal provision in the SCA or ARA, a rights-holder would fall outside of the scope of interests protected by the law, as the tort provision purports to act as an extra protection for the interests of creditors by sanctioning actions that breach the provisions set up in the SCA and the Annual Reports Act for their protection.[278]

A parent company is by legal definition a shareholder in its subsidiary or subsidiaries. Unlike the CEO or the board of the company, a shareholder (in this case, a parent company) does not have an obligation to act in the interests of the company and neither does it owe duty of care towards the company, another shareholder or a third person, with the exception of situations where the shareholder has *contributed* to a breach of the laws mentioned in the previous paragraph.[279]

Furthermore, the SCA requires gross negligence in regard to the misconduct of a shareholder and consequently for tort liability to be established, whereas negligence suffices when it comes to the CEO or the board of the

[275] SCA 29 ch 3 §.
[276] SCA 29 ch 1 § Lexino 2019-11-01.
[277] Sw. *Normskyddsläran*. The principle has been developed by case-law and is applied by Swedish courts as a way of delimiting tort liability, see NJA 2013 s. 145; NJA 1991 s. 142; T 2977-18.
[278] Svante Johansson, *Svensk associationsrätt i huvuddrag* (12th edn, Norstedts Juridik 2018) 401; NJA 2014 s. 272 para 18; SCA 29 ch 3 § Lexino 2019-11-01.
[279] SCA 29 ch 3 § Lexino 2019-11-01.

company.[280] The negligence assessment of the shareholders is also made in accordance with general principles of tort law, and will be elaborated on in the chapter on the TLA.

5.1.1.2 The assessment of tort liability

The tort provisions in the SCA shall be applied and interpreted in accordance with general principles of tort law.[281] The threshold for incurring tort liability for a shareholder towards a third person is higher than that towards the company or a shareholder. In order to have a right to compensation, the SCA requires – on top of negligent or willful misconduct – that a breach of the SCA, the ARA or the Articles of Association has taken place.[282] In such a case, the potential liability incurred by a shareholder is attributed to him or her individually by assessing whether his or her harmful conduct was grossly negligent or willful.[283]

Furthermore, causality is required between the grossly negligent or willful misconduct (act or omission) of the shareholder and the respective harm.[284] This assessment is also made in accordance with general principles of tort law, where the question is whether the act or omission with sufficient certainty led to a certain consequence.[285] For causation to be established, general principles of tort law also require the harm to be the reasonable (adequate) result of a series of events triggered by the negligent or intentional act or omission.[286]

5.1.1.3 The right to compensation

Of significance to rights-holders is that compensation in accordance with the SCA's tort liability rules can only be granted for harm suffered in the form of pure economic loss.[287] This form of compensation is also regulated in the TLA, but there contains the limitation that the harm needs to be the result of criminal conduct.[288] The SCA consequently expands the scope of the application of pure economic loss.[289] The form of compensation aligns with the aim of certain provisions to protect creditors from negligent or

[280] SCA 29 ch 1 § para 1.
[281] Johansson (n 277) 403.
[282] SCA 29 ch 1 § para 1.
[283] Smicklas (n 18) 134.
[284] ibid 207.
[285] Carl Svernlöv, *Aktiebolagslagen: en översikt* (Norstedts Juridik 2014) 207; the principles of tort law will be presented further in the chapter on the Tort Liability Act.
[286] ibid.
[287] SCA 29 ch 1 § Lexino 2019-11-01.
[288] TLA 2 ch 2 §.
[289] SCA 29 ch 1 § Lexino 2019-11-01.

unlawful management of the company, from which the harm suffered is most likely financial loss.

In a situation where a claimant has suffered personal injury, property damage or non-material harm as a result of business-related human rights abuse, he or she must instead rely on the TLA and general principles of tort law, which will be elaborated on in the next sections.

5.1.2 The Annual Reports Act (1995:1554)

As of 2017, larger Swedish companies are legally obligated to establish and publish a sustainability report in accordance with the ARA.[290] The obligation applies to companies that fulfill more than one of the following requirements:

1. The company has more than 250 employees for each of the last two years;
2. The company's balance-sheet total has been more than 175 million SEK for each of the last two years;
3. The company's total annual turnover for each of the last two years has been more than 350 million SEK.[291]

The requirement to establish and publish a sustainability report was introduced as a means of complying with the EU-directive on non-financial reporting from 2014, obligating large corporations to report on the social and environmental impacts of their activities.[292]

Parent companies in a group of companies must establish a sustainability report that applies to the entire company group.[293] The report shall include information on environmental, social, employee, human rights and anti-corruption issues.[294] More specifically, the report shall include:

- The business model of the company;
- Company policies and due diligence procedures in regard to the issues mentioned;

[290] ARA 6 ch 10 §.
[291] ARA 6 ch 10 § pp 1–3.
[292] Council Directive (EU) 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Non-Disclosure Directive).
[293] ARA 6 ch 10 § para 3; ARA 7 ch 2 §.
[294] ARA 6 ch 12 § para 1.

- The results of these policies;
- The key risks of the companies' activities in regard to the issues mentioned and, where appropriate, the companies' business relationships, products or services that likely have negative impacts;
- How the company deals with the risks, and;
- Key performance indicators relevant to the business.[295]

If a company has no policies on sustainability issues, it must specify the reasons for this in the report.[296] The sustainability reporting provision therefore does not obligate companies that do not have human rights or sustainability policies to implement them. The scope of a company's reporting duty shall be determined in accordance with the circumstances of each individual case.[297]

Should a company neglect to establish a sustainability report, the financial statement is formally considered as incomplete.[298] As long as the financial statement is sent to the Swedish Companies Registration Office (Sw. *Bolagsverket*) in time, there are no legal repercussions for neglecting to establish a sustainability report.

The contents of the sustainability report are not monitored by the accountant or the Swedish Companies Registration Office. The company's accountant is only obliged to state whether a sustainability report has been established or not – not to verify if it fulfills the legal requirements.[299]

5.1.3 The Tort Liability Act (1972:207)

The TLA is a framework law consisting of non-mandatory rules. This means that other rules on tort liability (e.g. stipulated by other laws, in an agreement or by general principles of contract law) take precedence over those in the TLA.[300] The provisions on tort liability in the TLA consequently have a complementary or vicarious function, only regulating harm that arises out of non-contractual obligations in situations where an

[295] ARA 6 ch 10 § pp 1-6.
[296] ARA 6 ch 10 § para 3.
[297] ARA 6 ch 12 § para 3.
[298] ARA 8 ch 15 § para 1.
[299] ARA 6 ch 14 § para 1; Svenskt näringsliv, 'Vad innebär lagen om hållbarhetsrapportering?'<https://www.svenskhandel.se/contentassets/c368b07910fb43e0a2e941efcfbf67a5/faq-lag-om-hallbarhetsrapport.pdf> accessed 17th December 2019.
[300] TLA 1 ch 1 §; this also follows from the principle of *lex specialis.*

agreement that regulates issues of tort liability and compensation for damages does not exist.[301]

As the focus of the thesis is to investigate the potential tort liability for parent companies in situations where harm has been caused to a third party or employee of its subsidiary, the TLA forms the primary legal basis for a potential tort cause of action. However, general principles of tort law are also highly relevant when speaking of tort liability, and are not to be found in the TLA but in case-law.[302] Case-law has also become an important legal source for the interpretation of some of the TLA's key terms, such as intent, negligence and causality.[303]

The TLA divides the notion of harm into different categories: harm in the form of personal injury, harm in the form of property damage, harm in the form of pure economic loss, economic harm and non-material harm.[304] Pure economic loss is defined as financial loss that is incurred with no linkage to the two former harms.[305] Personal injury, property damage and non-material harm are not defined by the law, but have been given meaning in case-law, the preliminary works to the law and legal doctrine.

Two different types of tort liability exist in Swedish tort law: the liability for fault (*culpa,* Sw. *ansvar för eget vållande*) and strict liability or no-fault liability (Sw. *rent strikt ansvar*). The chapter will primarily focus on the former liability-form, as this is the most common form of liability for negligence and as there are currently no Swedish laws imposing a strict liability for parent companies in regard to business-related human rights abuse.

The chapter will also describe the tort liability assessment in accordance with the fault-based liability rule, the law's requirements of causation and adequacy and finally the right to compensation for the respective harms.

5.1.3.1 Personal injury and property damage

Damages to the person or property that are caused by negligence or intent provide a right to compensation for the injured party.[306] This provision is said to outline the fault-based liability rule (henceforth "the culpa rule"), which is a key principle in Swedish tort law that requires a harm to be the

301 Johansson (n 277) 393.
302 ibid 27.
303 ibid.
304 Sw: *personskada, sakskada, ren förmögenhetsskada, ekonomisk skada och ideell skada.*
305 TLA 1 ch 2 §; 2 ch 1 §.
306 TLA 2 ch 1 §.

result of negligent or willful misconduct.[307] In Swedish tort law, a "fault" is synonymous with causing an injury or harm through negligent or willful misconduct.[308]

Personal injuries encompass both physical and psychological harm to the human body, whereas property damage is understood as all physical harm to immoveable and moveable property.[309] Examples of personal injuries range from broken bones to depression and trauma, whereas some examples of property damage include loss of property as well as burnt or damaged homes to poisoned livestock and foodstuffs.[310]

5.1.3.2 Non-material harm

Non-material harm is not explicitly mentioned in the TLA, but is nevertheless included as a harm providing the right to compensation in the law's provision on infringement[311] and non-material harm resulting from personal injury.[312] Only the latter will be examined here, as the first form of non-material harm requires criminal conduct on behalf of the tortious party.

Non-material harm is defined negatively as harm that cannot be quantified in monetary terms.[313] The TLA describes it as:

> "Physical and psychological suffering of temporary nature (pain and suffering) or of permanent nature (disfigurement or other permanent disability) as well as specific disadvantages as a result of the harm."[314]

Pain and suffering refer to the physical and psychological discomfort suffered as a result of the personal injury, for instance during the time an individual receives treatment at a hospital.[315] A prerequisite for compensation in the form of non-material harm is therefore that a personal injury has been suffered. If the personal injury leads to death, compensation for pain and suffering can be attributed to individuals that had a particularly close relationship to the deceased.[316]

307 Bertil Bengtsson, TLA 2 ch. 1 § Lexino 2012-07-01.
308 Mårten Schultz, TLA 2 ch 1 § Lexino 2013-05-31.
309 Jan Hellner and Marcus Radetzki, *Skadeståndsrätt* (10th edn, Norstedts Juridik 2018) 101.
310 ibid.
311 TLA 2 ch 3 §.
312 TLA 5 ch 1 § 3p.
313 Schultz (n 307).
314 Erland Strömbäck, TLA 5 ch 1 § 3p Lexino 2012-07-01.
315 ibid.
316 Strömbäck (n 313).

Permanent disfigurement or other permanent disability are to be understood as any discomfort experienced as a result of harm that prevents the individual from living a normal life.[317] Some examples include loss of body parts, scarring, pain and memory loss or movement difficulties.[318]

5.1.3.3 The culpa rule

The culpa rule entails a harm that is caused by negligent or willful misconduct. The rule covers both acts and omissions leading to harm, even though positive action is the most common form of fault.[319]

Tort liability for an omission to act is generally described to be attributed only in exceptional circumstances.[320] If the tortious party has failed to act or exercise diligence in spite of a legal requirement (usually by law, a regulation or an agreement) imposing the party with an obligation to do so, the injured party is however normally entitled to compensation.[321] Should a law or regulation impose an individual with a duty to act or exercise diligence, and the party breaches this obligation, negligence is presumed.[322] There are consequently two requirements that need to be fulfilled for a tortious party to be held liable: that the act or omission is in breach of a legal requirement to act or exercise diligence, and that the misconduct was negligent or willful.[323]

Although negligent conduct in the form of positive action might be the case when it comes to the harmful activities of a subsidiary, situations concerning parental liability for business-related human rights abuse often concern a parent company's *omission* to act, i.e. failing to take the appropriate steps to prevent an adverse human rights impact from materializing.

The injured party bears the burden of proof that the tortious party has been negligent.[324] A rights-holder therefore needs to demonstrate that the parent company's omission to act was negligent, and thereafter that causality exists between the negligence and the harm that has arisen.

317 Strömbäck (n 313).
318 ibid.
319 Bengtsson (n 306).
320 Hellner and Radetzki (n 308) 109.
321 ibid.
322 Jan Hellner, 'Några synpunkter på culpabegreppet inom skadeståndsrätten' [1953] SvJT 609 and 620; Hjalmar Karlgren, *Skadeståndsrätt* (5th edn, Norstedt 1972) 60.
323 ibid.
324 Hellner and Radetzki (n 308) 143.

Swedish tort law relies on two assessments in order to determine if a harm was the result of negligent conduct: negligence in accordance with a negligence test, where a 'standard of conduct' can be derived from existing legal sources, and negligence based on applying a free negligence test, where such a standard cannot be found and the focus instead lies on the facts of the case.

5.1.3.4 The negligence test and a 'standard of conduct'

The *negligence test* considers whether an act or omission was negligent against the background of legal sources, primarily of legislative and regulatory nature (Sw. *handlingsnormsgrundande culpabedömning*).[325] These can be found in general provisions comprised in laws, but also in regulations issued by national authorities as well as in custom or case-law.

Although the negligence test is primarily made based on an assessment of norms of action or diligence in laws or regulations, the facts of the particular case also matter.[326] However, their significance decreases the richer the grove of legal sources that outline a particular norm for action or diligence.

If a general diligence norm can be found in case-law or the custom for a specific industry, a defendant would – similar to the common-law system – have to attempt to distinguish the case based on individual circumstances to generate a different result to previous cases.

There are currently no legal sources of legislative or regulatory nature imposing parent companies (or legal entities for that matter) with an obligation to respect human rights. Nor is there any Swedish case-law imposing Swedish parent companies with such an obligation. A rights-holder would therefore need to prove a parent company's negligence against another norm that imposes a standard of conduct.

One could for instance discuss whether complying with the UNGPs could be seen as custom or a standard of conduct in the businesses of Swedish LLCs. A quick look at some of the largest Swedish LLC's policies relating to human rights show that either HRDD, the UNGPs – or both – are frequently mentioned.[327] If carrying out business in accordance with the

[325] Hellner and Radetzki (n 308) 125.
[326] ibid 126.
[327] See e.g. the sustainability reports from H&M: "Where applicable, we base our policies and standards on international norms and well-recognised initiatives (…) these include the UN Guiding Principles on Business and Human Rights" H&M Group, 'Sustainability Report 2018' (H&M Group 2018) <https://sustainability.hm.com/content/dam/hm/about/documents/masterlanguage/CSR/201

UNGPs can be argued to constitute a custom for Swedish parent companies, a rights-holder could arguably claim that the parent company has been negligent by failing to carry out HRDD.

5.1.3.5 The free negligence test

Despite the existence of legal sources imposing a standard of conduct or diligence, Swedish courts are sometimes forced to complement their assessment by taking other circumstances into account. In situations where there are no norms of conduct found in legal sources, the courts must rely entirely on specific factors based on the facts of the case. This assessment is often named the "free negligence test" (Sw. *den fria culpabedömningen),* or *the Learned Hand formula.*[328]

The prospects of success for arguing that the UNGPs constitute a customary standard of conduct for Swedish businesses is unclear. An application of the free negligence test by a Swedish court could therefore be made, either to complement an assessment of negligence in accordance with a standard of conduct, or by concluding that such a standard does not exist.

There is a famous consideration made by an American judge (of which the *Learned Hand formula* receives its name) where the assessment of diligence in tort law is split into three factors:

1. "The likelihood that the conduct will cause harm to others;
2. The seriousness of the harm should this occur;
3. Balanced against the interest the tortious party must sacrifice to avoid the risk of harm."[329]

This is said to express a "cost and benefit" assessment of tort liability, where one weighs the costs of the measures taken to prevent a harm against the benefits of doing so.[330] However, the *Learned Hand formula* has later been criticized for its formalistic and rigid approach towards tort liability,

8_sustainability_report/HM_Group_SustainabilityReport_2018_Chapter6_Standards%26Policies.pdf> accessed 18th December 2019;
IKEA, 'IKEA Sustainability Report FY18' (IKEA 2018) "the UN Guiding Principles on Business and Human Rights are the foundation of our approach" <https://www.ikea.com/se/sv/files/pdf/b7/9c/b79cc907/ikea_sustainability-report_fy18.pdf> accessed 18th of December 2019; Volvo: "we strive to adapt our work in accordance with the UNGPs" Volvo Group, 'Års- och hållbarhetsredovisning 2018' (Volvo Group 2018) <https://www.volvogroup.se/content/dam/volvo/volvo-group/markets/global/en-en/investors/reports-and-presentations/annual-reports/ars-och-hallbarhetsredovisning-2018.pdf> accessed 18th December.

[328] Hellner and Radetzki (n 308) 129; Schultz (n 307).
[329] Schultz (n 307); Hellner and Radetzki (n 308) 125.
[330] Hellner and Radetzki (n 308) 130.

especially taking into account the difficulty of quantifying the scale of a harm in monetary terms.[331]

Instead, landmark cases from the Swedish Supreme Court are often used to illustrate an application of the free negligence test in Swedish tort law.[332] The cases demonstrate a clear deliberation by the court on specific factors (which bear resemblance to the ones in the *Learned Hand formula*) in making its assessment of whether the defendant was negligent, such as the nature and scale of the harm, the risk of the harm's realization and the costs of preventing it.[333] However, the Supreme Court has also attached importance to the foreseeability of the harm for the tortious party.[334]

Of particular significance in applying the free negligence test is the risk of harm; the bigger the risk and scale of the resulting harm of an act or omission, the stricter the requirement that a party undertakes an act or omission to prevent the harm.[335] Legal doctrine and case-law alike have attached particular importance to avoiding the risk of suffering personal injury to that of other harms.[336]

The tortious party's possibility to have foreseen the risk of a harm is assessed against the facts of the particular case (was there any particular circumstance that should have captured the attention of the tortious party in regard to the risk of harm?), but also the general situation.[337] The Supreme Court has stated that the possibility of the tortious party to foresee a risk for harm decreases if the likelihood that the harm should occur is small.[338]

The costs of preventing a harm refer to both financial costs as well as the trouble a person (legal or physical) needs to go through to prevent the harm from materializing.[339] Even though this is a circumstance the Supreme Court has considered in its application of the free negligence test, it has rarely been a factor that justifies action or inaction in situations where the harm concerns personal injury.[340]

One could imagine that risks in the form of human rights violations would not be treated lightly by a Swedish court (the nature of the harm is that of a

[331] Schultz (n 307).
[332] NJA 1981 s. 683; NJA 1967 s. 164; NJA 1974 s. 476; NJA 1987 s. 222.
[333] Schultz (n 307).
[334] This factor was particularly focused on in NJA 1974 s. 476.
[335] Hellner and Radetzki (n 308) 131.
[336] Hellner and Radetzki (n 308) 131; NJA 1974 s. 476; NJA 1993 s. 149.
[337] Hellner and Radetzki (n 308) 131–132; NJA 1977 s. 281.
[338] NJA 1976 s. 1.
[339] Hellner and Radetzki (n 308) 132.
[340] Hellner and Radetzki (n 308) 135.

fundamental human right) and would therefore be hard to justify from a cost-related perspective.

It is difficult to draw any general conclusions on the prospects of success in holding Swedish parent companies liable in accordance with an application of the free negligence test, as this would most likely depend on the facts of the particular case. One could however guess that a Swedish parent company's strongest defense would be to argue that the risks were not foreseeable, the success of which *inter alia* would arguably depend on the involvement and insight of the parent company into the operations of its subsidiary.[341]

5.1.3.6 The liability of organs (parental liability)

Tort liability in accordance with the culpa rule in 2 ch. 1§ TLA is generally attributed for a party's own fault.[342] However, in situations where a legal entity is an employer, it assumes responsibility for the negligent acts or omissions of employees that have a central role in the company's management (Sw. '*organställning'*).[343] In LLCs, these are usually the CEO and the board of the company.

In situations that concern the liability of organs or a principal, legal doctrine speaks of "cumulated *culpa*" or "anonymous *culpa*".[344] The principle entails that an injured party seeking to prove that the defendant has been negligent need not identify exactly *whom* (if the defendant is an LLC) in the defendant's organization that has acted negligently, simply that negligence has occurred in the defendant's organization.[345]

5.1.3.7 Causation

A prerequisite for tort liability is that a party's tortious conduct has caused the harm, regardless of whether the form of liability is strict or fault-based.[346] Legal doctrine speaks of two forms of causality in Swedish tort law: causality where an event is an *essential condition*[347] for the realization of another (the harm would not have occurred were it not for the event), and

341 This has been an essential factor in UK case-law regarding parent company liability for the acts or omissions of its subsidiaries, see Section 4.2.
342 Hellner and Radetzki (n 308) 147.
343 Prop. 1972:5, *med förslag till skadeståndslag m.m*. 471. (Prop.)
344 Mårten Schultz, TLA 3 ch 1 § Lexino 2013-05-31; Hellner and Radetzki (n 308) 155.
345 Schultz (n 343); NJA 1998 s. 390.
346 Hellner and Radetzki (n 308) 187.
347 Latin : *condition sine qua non.*

causality where an event is a *sufficient cause* for the realization of another (the event alone leads to the harm).[348]

Swedish case-law is not always clear on which form of causation has been considered to apply in a case, and the Swedish Supreme Court rarely considers causation in accordance with these terms.[349] What can be concluded from Swedish case-law on causation is that it is normally sufficient that an injured party proves that an event has *triggered* or contributed to a harm for causality to be established.[350]

Causation and adequacy

It is not sufficient that an event (act or omission) has contributed to a harm for liability to be established. Swedish tort law also requires causation to be *adequate*, meaning that the harm should be "a calculable and somewhat typical result of the tortious conduct."[351]

The adequacy requirement has the effect of delimiting tort liability.[352] The purpose of the requirement of adequacy is that tortious parties should not be held liable for harm that is random or incalculable; he or she should only account for the risks of harm that are reasonable.[353]

Examples of situations that have been considered "incalculable" include extreme weather conditions or natural phenomena such as earthquakes or tsunamis, but also financial collapse or third-party intervention that is extraordinary and unexpected that has resulted in harm.[354]

Causation and omission

Causation can be harder for an injured party to prove when the harm arises out of an omission rather than an act, as an act that has triggered a series of events leading to a harm are from an evidential perspective more easily identifiable.[355] In the case of an omission leading to a harm, the 'series of events' are hypothetical, and encompass all the alternative forms of action the tortious party should have undertaken to prevent the harm.[356]

348 Hellner and Radetzki (n 308) 189; NJA 2012 s. 597.
349 Schultz (n 307); The Swedish Supreme Court did however consider causation in relation to the notions of essential condition and sufficient cause, see NJA 2012 s. 597.
350 See NJA 1992 s. 740 I and II; NJA 1978 s. 281; NJA 2004 s. 746 I and II.
351 Prop. 22.
352 See Section 5.1.1.1 on 'the principle of an interest worthy of protection' as another means of delimiting tort liability.
353 Hellner and Radetzki (n 308) 196; Schultz (n 307).
354 Hellner and Radetzki (n 308) 200.
355 Hellner and Radetzki (n 308) 193.
356 NJA 2013 s. 145.

In a decision from 2013, the Swedish Supreme Court issued a ruling on causation in regard to an omission leading to harm that has been considered controversial by some legal scholars.[357] The case concerned the tort liability of a municipality for its decision to let a 13-year old girl live with her mother without keeping her under close surveillance. The girl was in the municipality's custody and had previously started several fires.

The court stated that it was sufficient for the injured party to show that an alternative action – of many – had been possible for the tortious party to undertake and, if it had been undertaken, would have lessened the risk for harm.[358] The court went on to state that, depending on the circumstances of the case, it could be presumed that an alternative course of action would have prevented the harm.[359] In such a scenario, the requirement for the injured party to prove causation and omission would be considered fulfilled, unless the defendant could show that an alternative course of action was not possible.[360]

It is however not clear under which circumstances such a presumption would occur, nor to what extent the judgment (which concerned a very different situation than the focus of the thesis) can be interpreted to apply to situations of parent company liability for business-related human rights abuse.

5.1.3.8 The right to compensation

According to Swedish procedural rules, the losing party in a judicial process must pay his and the counterparty's costs for the proceedings.[361] The purpose of providing compensation for damages is the attempt to restitute a harm suffered by restoring it to its original state.[362] The aim is that the injured party shall be put in the same economic situation that he or she was in before the harm had occurred.[363]

Swedish tort law adopts a restrictive approach for compensation of non-material harm as opposed to that for economic loss; pure economic loss is compensated as soon as tort liability can be established, whereas the non-

[357] Hellner and Radetzki (n 308) 193.
[358] NJA 2013 s. 145 para 58.
[359] ibid.
[360] ibid.
[361] Code of Judicial Procedure (1972:740) 18 ch 1 §.
[362] Hellner and Radetzki (n 308) 23.
[363] ibid 343.

material harm is normally said to require tort liability as well as a right to compensation by law or contract.[364]

This principle has however been subject to some exceptions. In four cases[365] from the Supreme Court, the court awarded damages for non-material harm without legal basis in cases where the Swedish state had violated an individual's rights in accordance with the European Convention on Human Rights and the Fundamental Freedoms (henceforth 'ECHR')[366] and the Swedish constitution.[367]

Compensation for non-material harm is usually small, and is generally decided in accordance with templates or by discretionary power.[368] The court stated that compensation for violations of ECHR should be somewhat higher than that which is normally awarded in Swedish law, in order to be consistent with the case-law of the European Court for Human Rights.[369] The compensation in the cases ranged from 20 000 SEK to 500 000 SEK.

In the case where a violation of a right in accordance with the Swedish Instrument of government had taken place, the court determined the size of the compensation based on the fact that it concerned a fundamental right and the longevity of the violation.[370]

5.2 Analysis and Key Findings

One of the main research questions of the thesis is whether there is a possibility to hold Swedish parent companies liable for human rights violations committed by their foreign subsidiaries in current Swedish civil law. Based on the overview conducted of the most relevant Swedish laws in regard to the activities of company groups of Swedish parent companies, it can be stated that there is currently no specific law in Swedish civil law regulating the tort liability of parent companies.

364 Hellner and Radetzki (n 308) 353.
365 NJA 2005 s. 462 (art 6 ECHR – right to a fair trial); NJA 2007 s. 295 (art 5.5 ECHR: right to liberty and security); NJA 2007 s. 584 (art 8 ECHR - right to respect for private and family life, home and correspondence); NJA 2014 s. 323 (Instrument of government, 2 kap 7 § - the right to not be deprived of one's nationality).
366 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (ECHR).
367 Instrument of government, 2 kap 7 §.
368 Mårten Schultz, TLA 5 ch 1 § Lexino 2013-05-31.
369 Schultz (n 367).
370 NJA 2014 s. 323; the claimant was awarded 100 000 SEK.

Neither does Swedish civil law contain any provisions obligating parent companies to conduct HRDD, with the exception of the ARA's requirement for companies over a certain size to establish and publish a sustainability report where the risk towards human rights and anti-corruption should be included.

This section will focus on the views, criticisms and suggestions of academia as well as national authorities and private actors on the current status of Swedish civil law in regard to this issue and how it can be amended to better comply with the UNGPs.

5.2.1 Parental liability in the SCA

Some scholars argue that the fact that the overarching purpose of LLCs is to generate profit could serve to justify human rights violations, and consequently impede Swedish LLCs from respecting human rights.[371] Even though there is a possibility to introduce a different purpose than to generate profit, scholars have pointed out that this possibility is not very likely to be realized in practice, as the purpose to generate profit is fundamental within company law and it might be hard to justify a deviation of this aim.[372]

Enact Sustainable Strategies (Enact)[373] has commented that the respect for human rights does not necessarily have to contradict the profit-purpose for LLCs, but could be argued to generate profit in a sustainable, long-term perspective.[374] *Enact* however also acknowledges that company boards might be reluctant to introduce such a purpose as it might take a long time before any profit can be recognized to satisfy impatient shareholders and creditors.

In practice, it is very unlikely that a parent company would introduce such an obligation into its Articles of Association on a voluntary basis. Furthermore, the practical effect of the requirement that a plaintiff needs to prove that an interest protected by the law has been breached makes it difficult for other stakeholders than creditors to bring about a successful tort claim.

As there are no provisions in the SCA or the ARA that regulate human rights, a rights-holder would find it hard to justify a violation of these laws

[371] Enact (n 37) 17.
[372] Enact (n 37) 17; Statskontoret (n 3) 53.
[373] Enact is a Swedish consultancy specialised in sustainable business development and responsible business, see Enact (n 37) 4.
[374] ibid 17.

and consequently establish tort liability for a Swedish parent company. Even theoretically, the prospects of success for an injured party supporting his or her claim on a commitment to respect human rights in the LLC's Articles of Association are not guaranteed, as it is not clear if the principle on interest worthy of protection would be fulfilled.

Enact has suggested that the scope of the board's duty of care should be extended to include situations of adverse human rights impacts.[375] The consultancy argues that a wider tort liability for board members of LLCs would contribute positively to the conduction of HRDD, as it would result in assessing, preventing and mitigating human rights risks becoming a higher priority for the company's management.[376]

Finally, even if an injured party were to successfully prove that a breach of the SCA had taken place and that the parent company had acted negligently, compensation is only granted for harm suffered in the form of pure economic loss. Compensation for personal injury, property damage or non-material harm – which are more likely to be the results of business-related human rights abuse – are not covered by the law. It is therefore difficult to imagine a situation where a tort claim based on a breach of the SCA would be relevant in situations of business-related human rights abuse.

5.2.2 Parental liability in the ARA

Tort liability for a breach of the ARA is regulated in the SCA. An injured party seeking to make a tort claim for damages based on the ARA would therefore face the same difficulties of proving that his or her interest is protected by the law and would not receive compensation for other harms than pure economic loss.

Furthermore, the transparency requirements for Swedish LLCs in the ARA could be clarified on several aspects. Notably, business relationships, products and services likely to have negative impacts on human rights need only be included in the report "where appropriate", which risks giving companies large discretion as to when – and if – negative human rights impacts are to be included, as well as the possibility to conceal negative impacts behind the pretext of irrelevance.

Additionally, no monitoring of compliance with the obligation to establish and publish a sustainability report is carried out; the ARA merely states that

375 Enact (n 37) 21.
376 ibid.

an accountant shall check if the report has been established. The fact that there are no repercussions for not establishing or publishing a sustainability report might result in Swedish companies lacking the incentive to comply with the law.

In light of these shortcomings, *Statskontoret* has suggested developing the sustainability requirement in the ARA, primarily in regard to greater clarity on the contents of the sustainability reports as well as the possibility to introduce sanctions for non-compliance with the requirement.[377]

5.2.3 Parental liability in the TLA

As the tort liability of parent companies for business-related human rights abuse is not regulated in any specific law, tort liability can be argued in accordance with the general provisions of the TLA. The TLA encompasses both negligent acts and omissions and – almost – all forms of harm, including personal injury, property damage and non-material harm related to personal injury.

Legal entities can be held liable for tortious acts or omissions of their "organs" (usually the CEO or the board), where the tortious act or omission is attributed to the legal entity. From an access to justice perspective, the existence of the "cumulative *culpa"* or "anonymous *culpa*" principle somewhat relaxes the burden of proof for the injured party, as he or she need only prove that *someone* in the parent company's management has been negligent.

5.2.4 Contractual fault-based liability

The discussion has so far revolved around a parent company's non-contractual liability. However, legal scholars have pointed out that a company's commitments to Corporate Social Responsibility (henceforth 'CSR') found in their sustainability reports or company policies can serve to enhance their duty of due diligence.[378] The commitment to CSR found in a Dutch company's code of conduct was even considered by the Court of Appeal of the Hague to present "the standard of overview and monitoring expected from the parent company."[379]

[377] Statskontoret (n 3) 136.
[378] Bright (n 72) 7.
[379] Bright (n 72) 7; Court of Appeal of the Hague ECLI:NL: GHDHA: 2015:3586.

The ARA obligates Swedish companies over a certain size to establish and publish sustainability reports, that shall *inter alia* include the company's policies and due diligence procedures on a number of issues, where the environment, human rights and anti-corruption are some of them.

A policy commitment to respect human rights by a Swedish company could be argued to give rise to a standard of conduct, or obligation to act, in accordance with the commitment. This could be accomplished by making a similar interpretation as the Dutch court, namely interpreting the policy commitment as a binding unilateral commitment, the deviation of which would presume negligence.

There are however currently no examples in Swedish civil law or case-law of such an interpretation, which makes it difficult to determine what the prospects of success of such a line of reasoning would have in a civil proceeding for damages.

5.2.5 Compensation and burden of proof

Statskontoret has highlighted that the limited possibility of receiving compensation for non-material harm in Swedish civil law is a significant barrier to access for justice for rights-holders.[380] The fact that the burden of proof lies entirely on the claimant in civil law procedures has also been considered burdensome and risky for rights-holders.[381]

Statskontoret and *Enact* have therefore recommended the Swedish government to look into amendments of the right to compensation for non-material harm as well as removing the high procedural costs incurred by the losing party in civil law procedures.[382]

5.2.6 Concluding remarks

To conclude, the possibilities of holding a Swedish parent company liable for business-related human rights abuse in its corporate group in accordance with Swedish civil law are very limited. The prospects of success for a potential rights-holder are vague at best; he or she would face an uphill battle proving that a Swedish parent company has acted negligently, as no

[380] Statskontoret (n 3) 144.
[381] ibid 125.
[382] Statskontoret (n 3) 125; Enact (n 37) 51.

standards of conduct imposing an obligation to carry out a HRDD currently exist in Swedish civil law.

A potential rights-holder's best hope considering the current state of the law is an application of the free negligence test, where the court would make an assessment based on the four factors of the nature of the harm, the risk of its realization, the costs of preventing it and its foreseeability. These factors would however be considered based on an overall assessment of the circumstances of the case, which means that they do not present any guarantee of success.

6 Concluding Discussion

The thesis set out to investigate and attempt to answer a number of research questions relating to the possibility of holding parent companies of MNEs liable for business-related human rights abuse in their global operations. The purpose of the thesis has been to carry out this investigation from a Swedish legal context, identifying areas where Swedish civil law is lacking in regard to parent company accountability for business-related human rights abuse and to suggest amendments based on the current initiatives in France and the UK.

The first research question has already been considered, concluding that there are currently limited possibilities of successfully bringing about a tort claim for business-related human rights violations against a Swedish parent company.[383] The legislative and case-law measures to establish parent company liability in France and the UK have also been investigated, including a critical discussion of their strengths and weaknesses.[384]

This section will build upon the findings made in regard to Swedish, French and UK civil law on parent company liability to examine whether Sweden is compliant with its obligations under international human rights law, the implications for rights-holders' access to remedy and suggestions of amendments to bridge the accountability gap.

6.1 Sweden's Compliance with its Obligations under International Human Rights Law

This discussion is based on the first and third pillar of the UNGPs, namely Sweden's responsibility as a state to protect against human rights abuse and to provide an effective access to remedies for rights-holders.

Although the UNGPs form an instrument of non-authoritative soft-law, they elaborate on the implications of existing – and legally binding – norms of international human rights law, and have been legitimized by states as a restatement of these.[385] Monitoring a state's compliance with the UNGPs

383 *Is there a possibility of holding parent companies liable for human rights violations under current Swedish civil law?* See Sections 1.1 and 5.2.
384 See Sections 3.3 and 4.2.
385 UNGPs (preamble) p 14.

can therefore arguably serve as an indication as to whether a state is fulfilling its obligations under the umbrella of international human rights law.

6.1.1 Current human rights obligations of Swedish parent companies

Sweden has an obligation to protect against business-related human rights abuse within its territory and jurisdiction. Included in this duty is *inter alia* the obligation to take the necessary steps to prevent, investigate, punish or redress human rights violations, for instance by ensuring that laws are in place that obligate businesses to respect human rights.

As Swedish civil law is currently designed, there is no law or provision obligating Swedish parent companies to respect human rights in their global operations. The only legally binding initiative related to corporate social responsibility in Swedish civil law is the obligation for Swedish companies over a certain size to establish and publish a sustainability report in the ARA.[386] Although increased transparency of the business activities and human rights impacts of MNEs is a step in the right direction, the provision is marked by several shortcomings, and does not presently provide rights-holders with the possibility of holding parent companies accountable for corporate malpractice.[387]

The fact that Sweden lacks a law or provision obligating businesses to carry out HRDD risks sending the message that the business respect for human rights is not a priority for the Swedish government. The clearest example of this is the fact that the respect for human rights falls outside the scope of protected interests by the most central laws governing the obligations of parent companies, namely the SCA and the ARA.

Presently, one could argue that Sweden has not "clearly set out the expectation" in accordance with pillar one of the UNGPs that Swedish parent companies operating within and outside Sweden's borders should respect human rights. The fact that the legally embedded commercial purpose of the SCA has even been criticised for *impeding* businesses to respect human rights further suggests that Sweden is in contradiction of the UNGP stating that states should not have any laws or policies that constrain businesses from respecting human rights, especially in corporate law.[388]

[386] See Section 5.1.2.
[387] See Section 5.2.2.
[388] UNGPs 3 (b).

6.1.2 Obstacles to the access to remedy for rights-holders

Compensation and bearing of costs
The judicial means of remediation for rights-holders in current Swedish civil law are scarce.[389] The right to compensation for non-material harm is not regulated in any law, and Swedish courts have been restrictive in granting a right to such compensation without legal basis. When such compensation has been granted, the amount has been relatively small.[390]

Furthermore, the fact that the losing party needs to bear his and his counterparty's costs means that bringing about a tort claim for damages in a Swedish court is a risky move for rights-holders. The effect risks being that rights-holders are scared off from bringing about a tort claim for action in a Swedish court, and consequently that access to justice cannot be effectively guaranteed.

Burden of proof and causation
Another legal obstacle for rights-holders seeking access to justice is the fact that the burden of proof in Swedish civil law cases lies on the claimant. As there is no law on business and human rights (and consequently no 'standard of conduct' against which negligence can be assessed), rights-holders will face an uphill battle trying to prove the negligence of a Swedish parent company.

Swedish tort law is not clear on what is required to prove causation for omissions leading to harm. The Swedish Supreme Court case from 2013 could be indicative of a relaxed burden of proof for rights-holders seeking to prove that an omission to act by a parent company has led to harm, where it would be sufficient to demonstrate that any alternative course of action would have prevented a harm – and that this could even be presumed depending on the facts of the case.[391] It is however not clear under which circumstances such a presumption would occur, nor to what extent the judgment (which concerned a very different situation than the focus of the thesis) can be interpreted to apply to situations of parent company liability for business-related human rights abuse.

389 On Sweden's obligation to ensure access to remedy, see Section 2.1.3.3.
390 With the exception of the cases where a violation of the rights in the ECHR had been breached by the Swedish state, where higher compensation was awarded to ensure consistency with the case-law of the European Court of Human Rights.
391 See Section 5.1.3.8.

No guarantee that Swedish law will apply
The issue of applicable law, although not considered in-depth by the thesis, nevertheless presents a crucial barrier to the access to remedy for rights-holders seeking to make a claim against a Swedish parent company. The fact that there is currently no Swedish law with extraterritorial application regulating the business respect for human rights means that rights-holders will need to prove that one of the exceptions in the Rome II Regulations is applicable, as the general rule of *lex loci damni* will otherwise apply.[392]

6.1.3 Concluding remarks

In summary, there are several areas of Swedish civil law where the incorporation of the UNGPs could be improved, not least when it comes to ensuring effective access to remedy for rights-holders.

The UNGPs state that a failure of a state to take the appropriate steps to prevent, investigate, punish and redress business-related human rights abuse *might* constitute a breach of its international human rights law obligations.[393] However, they also state that international human rights law presently does not obligate states to regulate the extraterritorial activities of businesses domiciled in their territory or jurisdiction.[394]

Although the UNGPs present a restatement of international human rights law, a state's non-observance of the principles cannot be said to equal non-compliance with international human rights law. Rather, the UNGPs seem to suggest that non-observance with the principles might indicate a breach of international human rights law, especially when human rights violations occur within a state's territory or jurisdiction.

However, whether Sweden is in breach of its international human rights law when it comes to human rights violations occurring in the global operations of Swedish parent companies is not obvious. Although there is nothing prohibiting Sweden from introducing a business obligation to respect human rights with extraterritorial reach, the UNGPs make it clear that the failure to do so is currently not in breach of international human rights law.

[392] See Section 2.3.3.
[393] See the commentary to UNGP 1.
[394] See the commentary to UNGP 2.

6.2 Amendments to Swedish Civil Law based on the French and British Initiatives

This section will discuss different approaches to enhance corporate accountability and access to remedy in Swedish civil law. The first measure proposes a HRDD law inspired by the French Vigilance Law. The second suggests introducing a duty of care for parent companies in the SCA, building on the UK notion of such a duty. Both measures are adapted to fit into the Swedish legal framework, and are improved based on the criticisms and ambiguities raised in the 'Analysis and Key Findings' section of each legislation.[395]

Regardless of choosing a French or UK-inspired measure, both impose a HRDD obligation for parent companies. A duty of care and HRDD are two sides of the same coin, as the effect of owing a duty of care towards rights-holders in practice is that HRDD must be carried out in the activities of parent companies' corporate group to protect rights-holders from harm. As such, one could argue that legislating a duty of care is simply another form of implementing a mandatory HRDD for parent companies.

Fitting into the Swedish legal framework
There is nothing in the Swedish legal landscape that contradicts the introduction of a specific law on HRDD. Unlike the French legal landscape, Swedish civil law is not comprised in a "Code", but this does not in itself present an issue in regard to the adoption of such a law. One could imagine that the civil liability of parent companies would be regulated in specific provisions of the law and would otherwise be complemented by the general framework of the TLA.

The central role played by the notion of a duty of care in UK negligence assessments does not have a counterpart in Swedish civil law. Nevertheless, the notion of a duty of care is not completely novel to the Swedish legal landscape, although it is not as widespread or established as in UK tort law.[396]

Although case-law is considered a legal source in Swedish law, it cannot compare to the fundamental role played by case-law in terms of legal development in common-law jurisdictions. In order to better adapt to the

[395] See Sections 3.3 and 4.3.
[396] The CEO and board of LLCs are said to owe a duty of care towards the shareholders and the LLC in accordance with their responsibilities in the SCA.

Swedish legal landscape, introducing a duty of care for Swedish parent companies could therefore be imagined either as a separate law or as a provision in the SCA, which already regulates the rights and liabilities of LLCs.

The form of the HRDD obligation
The most central aspect of a HRDD law is the introduction of an obligation for parent companies to conduct HRDD in their global operations. One could imagine the HRDD obligation taking the form of a vigilance plan that needs to be established and published by the parent company.

The advantage of translating the HRDD obligation into a published vigilance plan is primarily increased transparency for potential right-holders. An insight into a parent company's identified risks and respective procedures to mitigate and prevent could help to alleviate some of the burden of proof for rights-holders in terms of establishing a parent company's negligence. One could also imagine an introduction of a HRDD obligation in the already existing requirement to establish and publish a sustainability requirement in the ARA, in line with the proposal from *Statskontoret.*[397]

Compliance mechanism
Another way of addressing the risk of ambiguity is to monitor compliance with the law through a state-governed compliance mechanism. If the scope of the law only covers companies over a certain size or turnover, one could imagine the publication of a list of companies affected by the law's scope and whose HRDD plans would be assessed on a timely basis.

A compliance mechanism could ensure that HRDD plans that are considered incomplete or too ambiguous are amended by parent companies within a certain timeframe, for instance by introducing a penalty or fee for those who neglect to do so (similar to the French periodic penalty payment). This would not only provide greater clarity in regard to what is expected of the HRDD plans of parent companies but would arguably act as an incentive for parent companies to carry out proper HRDD and comply with the law.

The form of the duty of care
A duty of care for Swedish parent companies could take several forms. One possibility is to include a provision in the SCA stating that parent companies - regardless of size and turnover - owe a duty of care towards

[397] See Section 5.2.2.

rights-holders, but leaving the contents of such a duty to be shaped by the Swedish courts.

The disadvantages of leaving the interpretation of the notion of a duty of care to the courts are the same as in the UK; although some general indicia will probably be relied upon by Swedish courts, the interpretation would still largely be made on a case-by-case basis, which would decrease legal certainty for rights-holders and parent companies alike as to the application and interpretation of the law.

The alternative is to clearly state the circumstances under which a Swedish parent company assumes a duty of care towards a rights-holder in the legal provision. Such a definition could be inspired by the elements considered by British courts to establish a duty of care, such as proximity, foreseeability and reasonableness.

However, British courts have been criticised for being too ambiguous in their application of these elements, in particular in regard to what is meant by the element of control in establishing whether a parent company and its subsidiary have a relationship of proximity.[398] An introduction of a duty of care for Swedish parent companies could to some extent be adapted in accordance with this critique, for instance by including a clear definition of what is meant by control in establishing proximity.

As has been pointed out by scholars, what is meant by a parent company's control over its subsidiaries has been an essential element in establishing whether the parent owes a duty of care – and a respective HRDD – towards rights-holders. In the interest of bridging the accountability gap, including a broad definition of control, for instance in line with the Swiss proposal, is the most beneficial alternative for rights-holders seeking to make a tort claim against a Swedish parent company. Including a generous definition of control could also arguably act as a bigger incentive for parent companies to carry out HRDD, as the chances of owing a duty of care would increase.

Clear scope and definition

Firstly, introducing a clear definition as to the scope of the law or provision would improve predictability for MNEs and rights-holders alike. Where a French inspired HRDD law is envisioned, clearly stating which companies covered by the law, the activities that should be monitored and the commercial relationships that should be taken into account is central.

[398] See Section 3.3.

From an access to justice perspective, a broader scope as to the parent companies covered by the HRDD obligation or the duty of care is preferable. One could imagine that the obligation or duty of care would apply or be owed by parent companies regardless of size or turnover, and include a HRDD obligation stretching beyond the subsidiaries to the parent company's supply chain. In the interest of ensuring a greater access to remedy, the scope of a HRDD law or the SCA should be expanded to cover all types of harms arising out of corporate malpractice, including non-material harm.

Introducing clear definitions of key terms of the law is central to avoid ambiguities as to what is expected of parent companies covered by the law. In the case of a HRDD law, this could also avoid the risk of vigilance plans that are too brief or incomplete.

A reversed or split burden of proof

A key barrier to the access to justice for rights-holders is the high burden of proof posed on claimants in French, UK and Swedish tort law. Introducing a reversed burden of proof is the ideal option from an access to justice perspective. In cases of corporate malpractice, negligence would then be presumed unless the parent company is able to prove that proper HRDD has been carried out.

Even a split burden of proof inspired by the Swiss initiative would be an improvement as opposed to how the division of labor is currently formed in Swedish tort law. One could envisage that the rights-holder would need to prove some degree of control exercised by the parent company over its corporate group, triggering a respective burden to prove lack of control or that HRDD was carried out by the parent company.

Extraterritorial application

Another key barrier to the access to remedy is that there is no guarantee that Swedish law will apply. At the same time, there is nothing in international human rights law that prohibits Sweden from introducing an obligation for businesses to respect human rights that applies extraterritorially. Including such a provision in a HRDD law or in an already existing law would therefore ensure that rights-holders have access to remedy in Swedish courts.

Tort assessment

Although the tort assessment would still be made in accordance with general principles of Swedish tort law, introducing a HRDD or duty of care for parent companies facilitates the establishment of negligence for rights-

holders. The effect of a legally embedded HRDD or duty of care is that rights-holders would have a clear ‘standard of conduct’ expected of parent companies, the deviation of which constitutes negligence.

6.2.1 Concluding remarks

To conclude, both a French and UK-inspired measure would further corporate accountability and the access to remedy for rights-holders in Sweden. Both initiatives would send a clear message from the legislator that Swedish parent companies are expected to respect human rights not only in Sweden, but in their global operations.

The suggested amendments are designed with the interest of bridging the accountability gap and achieving a greater access to justice for rights-holders. As has been seen in France and Switzerland, proposals including a generous scope and liability for companies have struggled to secure approval from a legal policy perspective. It is outside the scope of this thesis to discuss the potential success of the amendments from a legal policy perspective, but it can be concluded that even a politically compromised version in line with the current French version or the Swiss counterproposal would represent a step forward in the corporate accountability movement for Swedish parent companies.

Bibliography

Literature and articles

Baumann-Pauly D and Nolan J, *Business and Human Rights: From Principles to Practice* (Routledge 2016)

Bell J, Boyron S and Whittaker S, *Principles of French law*, (2nd edn, Oxford University Press 2008)

Bergström C and Samuelsson P, *Aktiebolagets grundproblem* (Norstedts Juridik 2015)

Blumberg P, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' [2001] 24 Hastings International Comparative Law Review 297

Brabant S, and Savourey E, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' [2017] 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires

Brabant S, and Savourey E, 'French Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Perspective' [2017] 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires

Brabant S, and Savourey E, 'Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations' [2017] 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires

Brabant S, Michon C and Savourey E, 'The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance' [2017] 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires

Bright C, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands' [2019] Business and Human Rights in Europe 212

Bussani M and Sebok A.J., *Comparative Tort Law: Global Perspectives* (Edward Elgar Publishing Limited 2015)

Cassell D, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' [2016] 1 Business and Human Rights Journal 179

Cossart S, Chaplier J and Beau de Lomenie T, 'French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' [2017] 2 Business and Human Rights Journal 317

Deva S and Bilchitz D, *Building a Treaty on Business and Human Rights: Context and Countours* (Cambridge University Press 2017)

Gerven W van, Lever J and Larouche P, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart Publishing 2000)

Hellner J and Radetzki M, *Skadeståndsrätt* (10th edn, Norstedts Juridik 2018)

Hellner J, 'Några synpunkter på culpabegreppet inom skadeståndsrätten' [1953] SvJT 609

Johansson S, *Svensk associationsrätt i huvuddrag* (12th edn, Norstedts Juridik 2018)

Jourdain P, *Droit à réparation : Lien de causalité,* (Juris-Classeur Civil 1993)

Karlgren H, *Skadeståndsrätt* (5th edn, Norstedt 1972)

Kershaw D, *Company Law in Context* (2nd edn, Oxford 2012)

Korling F and Zamboni M, *Juridisk Metodlära* (Studentlitteratur AB 2013)

Mannheimer Swartling, 'Promemoria till Utrikesdepartementet: Angående möjligheten för enskilda att inför svensk domstol föra talan mot svenska bolag till följd av kränkningar av mänskliga rättigheter begångna utomlands' (Mannheimer Swartling 2015)

Markesinis B and Deakin S, *Tort Law,* (4th edn, Oxford 1999)

Palombo D, ‘The Duty of Care of the Parent Company: A Comparison between French law, UK Precedents and the Swiss Proposals’ [2019] 4 Business and Human Rights Journal 265

Petrin M, ‘Assumption of Responsibility in Corporate Groups: Chandler v. Cape plc.’ [2013] 76 The Modern Law Review 603

Ruggie J, ‘A UN Business and Human Rights Treaty?’ [2014] Harvard Kennedy School of Government

Rogers W.V.H., *Winfield & Jolowicz on Tort* (15th edn, Sweet & Maxwell 1998)

Samuel G, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014)

Sanger A, ‘Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary’ Diligence’ [2012] 71 The Cambridge Law Journal 478

Skinner G, ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries: Violations of International Human Rights Law’ [2015] 72 Washington & Lee Law Review 1769

Smicklas M, *Associationsrättens grunder* (Författaren och Studentlitteratur 2012)

Steiner E, *French Law: A Comparative Approach* (2nd edn, Oxford University Press 2018)

Svernlöv C, *Aktiebolagslagen: en översikt* (Norstedts Juridik 2014)

Svernlöv C, *Ansvarsfrihet* (2007 Norstedts Juridik)

Viney G and Jourdain P, ‘Traité de droit civil sous la direction de Jacques Ghestin : Les conditions de la responsabilité’ [1998] 51 Revue Internationale de la droit comparé 214

Official documents

Council of Europe

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

International Labour Organization (ILO)

International Labour Organization (ILO), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (2000)

Organisation for Economic Cooperation and Development (OECD)

OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (OECD 2015)

Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (OECD 2011)

The European Union (EU)

Council Directive (EU) 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Non-Disclosure Directive)

European Parliament and Council Regulation (EC) No 864/2007 (OJ 2007 L 199/40) of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation)

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) 2012 (OJ L351) (Brussels I Regulation)

United Nations (UN)

United Nations Office of the High Commissioner for Human Rights (OHCHR), ‘Guiding Principles on Business and Human Rights – Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) UN Doc HR/PUB/11/04 (UNGPs).

United Nations, *UN Global Compact* (UN 1999)

United Nations Human Rights Council (UNHRC), ‘Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ (2014) UN Doc. A/HRC/26/L.22/Rev.1

France

Assemblée Nationale (AN), proposition de loi relative au devoir de vigilance des socíeťes mères et des entreprises donneuses d’ordre n° 2578 du 11 féevrier 2015

Commission des affaires juridiques du Conseil des Etats, ‘*16.077 Droit de la société anonyme (projet 2)*

Commission des affaires juridiques du Conseil national, ’16.077’ Droit de la socíeťe anonyme’.

Conseil Constitutionnel, décision n° 2017-750 DC du 23 mars 2017 Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre

Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre

Germany

German Draft Law, *Act on the Regulation of Human Rights and Environmental Due Diligence in Global Value Chains* (2019), Ministry of Development and Cooperation

The German Federal Foreign Office, *National Action Plan implementing the UN Guiding Principles and Human Rights 2016-2020* (The Federal Foreign Office 2017)

Sweden

Enact Sustainable Strategies (Enact), ’Företag och mänskliga rättigheter: påtagliga brister och luckor i svensk lag’ (Enact 2018)

Utrikesdepartementet, *Handlingsplan för företagande och mänskliga*

Rättigheter (Regeringskansliet 2015)

Statskontoret, ’FN:s vägledande
principer för företag och mänskliga rättigheter – utmaningar i statens arbete (2018:8)’ (Statskontoret 2018)

Prop. 1972:5, *Med förslag till skadeståndslag m.m.*

Switzerland

Ministry of Development and Cooperation; Swiss Draft Law, *Responsible Business Initiative* (2016), Swiss Coalition for Corporate Justice (Swiss Proposal)

Counterproposal by the Swiss Parliament, *Counterproposal to the Responsible Business Initiative adopted by the Parliament’s Low Chamber* (2018) (Swiss Counterproposal)

Electronic sources

Asia-Europe Meeting (ASEM) ‘14th Informal ASEM Seminar on Human Rights: Human Rights and Businesses Concept Paper’ (2014) <https://www.asef.org/images/docs/ASEM_HumanRightsSeminar_ConceptPaper_ASEM%20logo.pdf> accessed 5th December 2019

Business & Human Rights Resource Centre, ‘German Development Ministry drafts law on mandatory human rights due diligence for German companies’ (2019) <https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies>accessed 9th December 2019

Cossart S and Chatelain L, ‘What lessons does France’s Duty of Vigilance law have for other national initiatives?’ (Business & Human Rights Resource Centre 2019) < https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives> accessed 5th November 2019.

European Coalition for Corporate Justice (ECCJ), ‘Another step towards the adoption of a mandatory HRDD bill in Switzerland’ (ECCJ 2018) <https://corporatejustice.org/news/7046-another-step-towards-the-adoption-of-a-mandatory-hrdd-bill-in-switzerland> accessed 9th December 2019

ECCJ, 'Evidence for mandatory HRDD legislation' (ECCJ 2019) <https://corporatejustice.org/policy-evidence-mhrdd-may-2019-final_1.pdf> accessed 12th October 2019

ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation' (ECCJ 2018) <https://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf> accessed 12th October 2019

H&M Group, 'Sustainability Report 2018' (H&M Group 2018), <https://sustainability.hm.com/content/dam/hm/about/documents/masterlanguage/CSR/2018_sustainability_report/HM_Group_SustainabilityReport_2018_Chapter6_Standards%26Policies.pdf> accessed 18th December 2019

International Finance Corporation (IFC), 'Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets' (IFC 2007) <https://www.scribd.com/document/16903354/Stakeholder-Engagement-A-Good-Practice-Handbook-for-Companies-Doing-Business-in-Emerging-Markets-May-2007#fullscreen> accessed 29th October 2019

IKEA, 'IKEA Sustainability Report FY18' (IKEA 2018) <https://www.ikea.com/se/sv/files/pdf/b7/9c/b79cc907/ikea_sustainability-report_fy18.pdf> accessed 18th of December 2019

International Organisation of Employers (IOE), 'Consensus on Business and Human Rights Is Broken with the Adoption of the Ecuador Initiative' (IOE 2014) <www.ioe-emp.org/index.php?id=1238> accessed 18th December 2019

MVO Platform, Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law (2019) <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> accessed 9th December 2019

Sherpa, 'Le radar du devoir de vigilance: identifier les entreprises soumises à la loi' (Sherpa 2019) <https://plan-vigilance.org/wp-content/uploads/2019/06/2019-06-26-Radar-DDV-16-pages-Web.pdf> accessed on the 21st October 2019

Sherpa, 'Vigilance Plans Reference Guide' (1st edn, Sherpa 2019) <https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-VF-compressed.pdf> accessed 1 November 2019

Simmons & Simmons, ‘Mass tort case alert: Supreme Court hands down judgment in Lungowe and Ors v Vedanta Resource Plc and Konkola Copper Mines Plc’ (Simmons & Simmons 2019) <https://www.simmons-simmons.com/publications/ck0bg637to4bq0b85mehy1du2/170419-mass-torts-case-alert> accessed 26th November 2019

Svenskt näringsliv, ‘Vad innebär lagen om hållbarhetsrapportering?’ <https://www.svenskhandel.se/contentassets/c368b07910fb43e0a2e941efcfbf67a5/faq-lag-om-hallbarhetsrapport.pdf> accessed 17th December 2019

Volvo Group, ‘Års- och hållbarhetsredovisning 2018’ (Volvo Group 2018) <https://www.volvogroup.se/content/dam/volvo/volvo-group/markets/global/en-en/investors/reports-and-presentations/annual-reports/ars-och-hallbarhetsredovisning-2018.pdf> accessed 18th December 2019

Table of Cases

France

Cass civ (2) 20 juin 1985, Bull.civ. 1985.II.125, 84-11.713

Cass civ (2) 4 mars 1970, Bull.civ. 1970.II.76, JCP 1971.II.16585, 68-12.124

United Kingdom

AAA & Ors v Unilever plc. & Anor [2018] EWCA Civ. 1532

AAA & Ors v. Unilever plc. & Anor [2017] EWHC 371

Anns v. Merton London Borough Council, [1978] A.C. 728, UKHL

Caparo Industries plc. v. Dickman, [1990] 2 AC 605, UKHL

Chandler v. Cape plc, [2012] EWCA Civ. 525 (Court of Appeal, 25 April 2012)

Lubbe and Others v. Cape plc. and Related Appeals [2000] UKHL 41.

Lungowe & Ors v. Vedanta Resources plc & Anor, [2016] EWHC TCC 975

Lungowe & Ors v. Vedanta Resources plc & Anor, [2017] EWCA Civ. 1528

Murphy v. Brentwood District Council, [1991] 1 AC 398, UKHL

Okpabi & Ors v. Royal Dutch Shell plc. & Anor (Rev 1) [2018] EWCA Civ 191

Okpabi & Ors v. Royal Dutch Shell plc. & Anor [2017] EWHC TCC 89

Thompson v. the Renwick Group plc. [2014] EWCA Civ. 635

Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents), [2019] UKSC 20

Sweden

NJA 1967 s. 164
NJA 1974 s. 476
NJA 1976 s. 1
NJA 1977 s. 281
NJA 1978 s. 281
NJA 1981 s. 683
NJA 1987 s. 222
NJA 1991 s. 142
NJA 1992 s. 740 I and II
NJA 1993 s. 149
NJA 1998 s. 390
NJA 2004 s. 746 I and II
NJA 2005 s. 462
NJA 2007 s. 295
NJA 2007 s. 584
NJA 2012 s. 597
NJA 2013 s. 145
NJA 2014 s. 272
NJA 2014 s. 323
T 2977-18

The Netherlands

Court of Appeal of the Hague ECLI:NL: GHDHA: 2015:3586