The Swiss Responsible Business Initiative (RBI)

Discussion and legal assessment*

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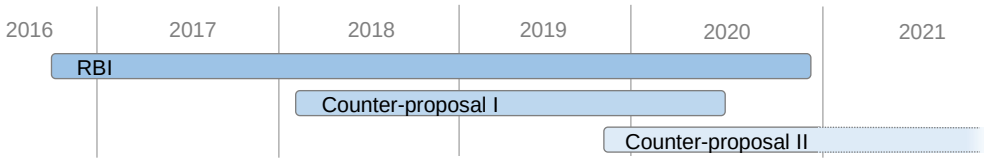
Preface

The article below is the translation of a legal analysis of the Responsible Business Initiative (RBI), first published in German in 2017.[*] The RBI was officially filed by Swiss citizens in 2016 and – as of August 2021 – was the main driver of legal and political discussions on the subject in Switzerland over the last years. In November 2020 the RBI was put to a binding popular referendum and gained a majority of 50.7% of votes. It was only the 24th initiative out of 220 popular initiatives in Swiss history to be approved by a majority. Nevertheless, the RBI was not adopted since it missed double-majority of cantons (see explanation below).

What is the relevance of a popular initiative in Switzerland?

A popular initiative allows Swiss citizens to request an amendment to the Federal Constitution through a binding popular vote. The RBI requested the introduction of an article 101a «Responsibility of business» in the Constitution (legal text in Annex I below). To file an initiative, citizens need to collect 100'000 signatures from the Swiss electorate within 18 months. The initiative is then first submitted to the Federal Council (the Swiss government) and to the Parliament who issue their opinion on the initiative and can – if need for political action is affirmed – craft a counter-proposal. A counter-proposal could convince voters to dismiss an initiative or even initiators themselves to withdraw their initiative. For an initiative to become law, a majority of votes is needed (1) in Switzerland and also (2) in a majority of the Cantons ('double majority'). 10% of popular initiatives succeed. [I]

Overview: the RBI and parliamentary counter-proposals



	RBI	**Counter-proposal I**	**Counter-proposal II**
Author of proposal	Citizens (Swiss Coalition for Corporate Justice)	National Council (Parliament's lower house)	Council of States (Parliament's upper house)
Scope of due diligence obligation	All internationally recognized *human rights* + international *environmental standards*	Same as RBI (but limited to treaties ratified by Switzerland)	Due diligence obligation limited to *child labor* + *conflict minerals*
Sanctions for insufficient due diligence	Civil liability for damages (caused by *own* activities or *controlled* companies)	Same as RBI (but control limited to *legal* control)	None
Final outcome	*Failed* on November 29, 2020, despite gaining a majority of votes, because necessary ‚double majority' was missed	*Failed* in June 2020, despite being adopted four times by the National Council, since the other chamber of Parliament did not agree	*Adopted* by both chambers in June 2020
Selected literature	Our article following below	FRANZ WERRO (2019) [II]	ROLF WEBER (2021) [III]

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[*] This publication is based on the primary publication in German by GREGOR GEISSER, Die Konzernverantwortungsinitiative, Aktuelle Juristische Praxis – AJP 8/2017, 943 et seq.

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[I] See Swissvotes database. For general background on popular initiatives see also ch.ch.

[II] FRANZ WERRO, The Swiss Responsible Business Initiative and the Counter-Proposal, Journal of European Tort Law (JETL) 2019, 10(2), 166-182. Additional materials see also: bhrinlaw.org.

[III] ROLF WEBER, Sorgfaltspflichten in der Lieferkette – Neue gesetzgeberische Herausforderungen für die Schweiz, Jusletter, 29.3.2021. Additional materials see also: bhrinlaw.org.

Abstract

Based on the international framework, the *Responsible Business Initiative* has developed a normative concept which, in the opinion of the authors, is suitable for *strengthening the protection of human rights*, ensuring greater *legal certainty* and also having a *preventive effect* through improved awareness of due care. The legislative proposal is limited to *Swiss companies* whose activities abroad are linked to Switzerland's duty to protect human rights. Moreover, it concerns *internationally recognized* human rights and therefore refrains from exporting domestic values. Finally, as a basic mechanism, the initiative relies on a lean solution under private law. A proportionate implementation of the proposal requires, in our opinion, clear *liability lines*: Civil liability for damages should only extend to Swiss companies' *own actions* as well as their lack of appropriate due diligence in monitoring *controlled companies*, and not to violations within the *value chain* that go beyond that. The further translation work between the relevant areas of law is ultimately incumbent on the *implementing legislation*, the *application of the law* and on *doctrine*. Since transnational companies are already exposed to a widely underestimated, incalculable liability risk on the basis of existent broad general clauses in tort law, this task is pending anyway. The RBI can make a significant contribution to this discussion.

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I. Introduction

An assessment of Switzerland's applicable law regarding binding rules for transnational companies currently falls short. As will be shown, there is a shortness of dependable evaluation criteria based on solid legal basis.[1] In clear contradiction to this initial situation of legal uncertainty stands the growing practical relevance of the issues at hand.[2] Against this

[1] Essential GREGOR GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten – Möglichkeiten und Grenzen der schweizerischen Zivilgerichtsbarkeit im Verhältnis von Völkerrecht und Internationalem Privatrecht, Zürich et al. 2013, passim; CHRISTINE KAUFMANN, Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?, SZW 2016, 45 ff., 53 f.; NICOLAS BUENO, La responsabilité des entreprises de respecter les droits de l'homme – État de la pratique suisse, AJP 8/2017, III.A. und IV.

[2] See also FEDERAL COUNCIL [Swiss government], Comparative Law Report of 2 May 2014 on due diligence with regard to human rights and the environment in connection with foreign activities of Swiss corporations (hereinafter: Report), 2; FEDERAL COUNCIL, Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights of 9 December 2016 (so-called National Action Plan; hereinafter: NAP), 12.

background, a popular initiative that focuses on binding rules for Swiss companies with two main objectives, namely to strengthen human rights and environmental protection in transnational business and to ensure greater legal certainty, is noteworthy. With this assertation the Responsible Business Initiative (RBI) was launched, on which the Swiss electorate will decide in the coming years.[3]

Any regulation of cross-border „situation" must, however, take into account the sensitive balance under *(public) international law*. In balancing the conflict of laws and the substantive justice, binding rules for transnational companies must be based on *legal material as consensual as possible at the international level*. Only on this condition can a regulation provide the community of states with a sense of consideration for fundamental values in order to maintain, at the same time, the conflict of laws interest in economic and legal transactions that are as conflict free and legally reliable as possible.[4] Each legislative proposal must also comply with the *principle of proportionality*. It must be as specific as possible and as open as necessary. In its concreteness, it must, on the one hand, provide greater protection and legal certainty. On the other hand, in its openness, it must leave the necessary leeway for balanced regulations to the legislation and the application of the law in order to avoid over-regulation and undifferentiated standardisation.[5] Pursuant to these criteria, the Responsible Business Initiative must first be outlined and evaluated (III.-IV.). However, the initial legal situation from which the RBI originates must be clarified in advance (II.).

II. Initial legal situation (Legal starting point)

A. Public international law

The UN Guiding Principles on Business and Human Rights (2011), together with the OECD Guidelines for Multinational Enterprises (2011)[6], for the first time provide states and companies with an internationally recognized reference framework for the handling of human rights.[7] The guidelines are based on three pillars:
1) State duty to protect – States are obliged to protect individuals from human rights violations committed by companies.
2) Corporate responsibility to respect – Companies have a responsibility to respect human rights. The core element of this responsibility is adequate due diligence.

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3 See art. 101a para. 1 of the legislative proposal, a translation is provided in Annex I; SWISS COALITION FOR CORPORATE JUSTICE (SCCJ), The initiative text with explanations, 2016; see also KAUFMANN (FN 1), 54.

4 Essential see ALEX MILLS, The Confluence of Public and Private International Law, Cambridge et al. 2009, passim; STEFAN LEIBLE/MATTHIAS RUFFERT, Introduction, in: Leible Stefan/Ruffert Matthias (Hrsg.), *Völkerrecht und IPR*, Gottmadingen 2006, 17 ff., 19 ff.; GEISSER (FN 1), N 178 ff.; GREGOR GEISSER/ALEXANDRE MÜLLER, Transnational Civil Human Rights Litigation against Corporations – Swiss Perspectives in Private International Law, in: Francisco Javier Zamora Cabot et al. (Hrsg.), Implementing the U.N. Guiding Principles on Business and Human Rights – Private International Law Perspectives, Publications of the Swiss Institute of Comparative Law, Geneva et al., 135.

5 See GEORG MÜLLER/FELIX UHLMANN, Elemente einer Rechtssetzungslehre, 3rd edition, Zürich et al. 2013, N 219 ff. (223) und 250 ff.; also GEISSER (FN 1), N 170 f., 243 ff. and 250 ff.

6 See OECD Guidelines for Multinational Enterprises, 2011 Edition, Paris, 2011.

7 See on the whole UNITED NATIONS Guiding Principles on Business and Human Rights (UNGP), New York and Geneva, 2011; FEDERAL COUNCIL, Report (FN 2), 4.

3) Access to legal protection and redress – States shall ensure that persons affected by human rights violations have access to effective remedies. The UN Guiding Principles thus focus equally on prevention and reparation.[8]

The guidelines are based partly on binding international law, partly on international soft law.[9] As such, these guidelines constitute the most recent guideline for the development of national law.[10] By basing the Responsible Business Initiative on these guidelines, it is taking action in the right place.[11]

B. National law

According to the UN Guiding Principles, national measures must be taken in an appropriate and indispensable mix ("smart mix") of voluntariness *and* obligation.[12] The government's effort to put binding rules for Swiss companies up for discussion in a consistent approach have failed at the current stage.[13] This rejection of commitment is subject to criticism both in doctrine and at UN level.[14] For example, the UN Committee on the Rights of the Child is "concerned that [Switzerland] solely relies on voluntary self-regulation and does not provide a regulatory framework which explicitly lays down the obligations of companies acting under [Switzerland's] jurisdiction or control to respect the rights of the child in operations carried out outside of [Switzerland's] territory."[15] But in which areas of law would the legal framework need to be established? Within private law, which must be at the forefront in the relationship between private parties and private operating companies,[16] the political discussion so far has focused on *corporate law*. In a narrow decision in March 2015, the National Council (the lower house of the Swiss parliament) rejected the extension of the duties of the board of directors to include

„Any solution *limited to corporate law* however is subject to an essential systemic flaw: Only the company and its shareholders are entitled to sue for responsibility under corporate law, but not those directly affected by human rights violations."

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8 See UN Guiding Principles (FN 7), Principle 17 (Commentary).

9 For current developments see UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, 10 August 2017.

10 The UN Guiding Principles themselves have an effect that must be qualified as soft law (cf. KAUFMANN [FN 1], 46 with further references). For the description and the role of «soft law» in shaping the law in the present context, see references at GEISSER (FN 1), N 43 ff.

11 See also KAUFMANN (FN 1), 53 f.

12 See on the whole UN Guiding Principles (FN 7), Principles 3, 26-29 (each corresponding commentary); OECD Guidelines (FN 6), Human Rights, para. 46. With additional emphasis on the indispensability of binding measures, see CESCR (FN 9), No. 14 and 39.

13 See FEDERAL COUNCIL, NAP (FN 2), 4, in particular Pi 1, Pi 12 and 13. For the developments under national law to date, see KAUFMANN (FN 1), 46 f.

14 For the doctrine: BUENO (FN 1), IV.; KAUFMANN (FN 1), 45; ROLF H. WEBER, Auf dem Weg zu einem neuen Konzept der Unternehmensverantwortlichkeit?, SJZ 2016, 25 ff., 27; MARK PIETH, Die strafrechtliche Haftung von Managern und Unternehmen für Menschenrechtsverletzungen im Ausland, AJP 8/2017, V.3.

15 See Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Switzerland, UN Doc. CRC/C/CHE/CO/2-4, 26 February 2015, para. 22-23.

16 See, inter alia, CESCR (FN 9), No. 15 and 49-51. Model for a selective administrative and criminal law approach see Federal Act of 27 September 2013 on Private Security Services Provided Abroad (BPS; SR 935.41); for basic information on criminal law see PIETH (FN 14), passim.

a human rights due diligence obligation.[17] As remarkable as this step towards a clarification of corporate responsibility within the company would have been;[18] for an effective protection of human rights (cf. the above-mentioned pillars of the UN Guiding Principles), any solution *limited* to corporate law however is subject to an essential systemic flaw: Only the company and its shareholders are entitled to sue for responsibility under corporate law, but not those directly affected by human rights violations.[19] In parentheses, the question should be raised here as to how, apart from the hard-to-assess reputational risks, shareholders would suffer damage as a result of human rights-relevant activities of their company? The RBI subsequently shifts the focus away from corporate law to tort law.

III. The Responsible Business Initiative (RBI)

An unofficial translation of the legal text of the RBI is provided in Annex I

A. Approach and consideration

Inspired by the UN Guiding Principles, the RBI provides for the main concept of a corporate duty to respect (para. 2. let. a) and a corresponding due diligence obligation (para. 2. let. b). It combines this duty with a liability instrument in the event of infringement (para. 2 let. c.). This approach makes sense in the light of the UN Guiding Principles. In Switzerland, in accordance with the international community, it is *tort law* which, as a basic state mechanism within the meaning of UN Guiding Principle 26, gives an injured party a remedy from any injuring party.[20] This instrument not only has a reparative function but, in particular combined with mandatory due diligence, also has a preventive function.[21] In doctrine, as well as in international committees, tort law accordingly is increasingly becoming the focus of civil

„It is *tort law* which gives an injured party a remedy from any injuring party. This instrument not only has a *reparative* function but, in particular combined with mandatory due diligence, also has a *preventive* function."

[17] Rejection of the motion of the Foreign Affairs Committee-NR 14.3671, Umsetzung des rechtsvergleichenden Berichtes des Bundesrates über die Verantwortung von Unternehmen bezüglich Menschenrechten und Umwelt, 1 September 2014.

[18] It is being debated, whether the observance of human rights and environmental protection is not already part of the due diligence and fiduciary duties of the board of directors in current law (III.C.4.f. below).

[19] See art. 754 para. 2 CO; cf. KARL HOFSTETTER, Sachgerechte Haftungsregeln für multinationale Konzerne – Zur zivilrechtlichen Verantwortlichkeit von Muttergesellschaften im Kontext internationaler Märkte, Tübingen 1995, 80 f., 97 ff. and 239 ff. Cf. also CHRISTINE KAUFMANN et al., Umsetzung der Menschenrechte in der Schweiz – Eine Bestandesaufnahme im Bereich Menschenrechte und Wirtschaft, 2013 (German, French), N 178; SCHWEIZERISCHES INSTITUT FÜR RECHTSVERGLEICHUNG (SIR), Gutachten über gesetzliche Verpflichtungen zur Durchführung einer Sorgfaltsprüfung bezüglich Menschenrechte und Umwelt bei Auslandsaktivitäten von Unternehmen und zur Berichterstattung über getroffene Massnahmen, 2013, 50.

[20] Cf. instead of many comparative legal articles INTERNATIONAL COMMISSION OF JURISTS, Report of the Expert Legal Panel on Corporate Complicity in International Crimes, 2008, Vol. 3, Civil Remedies, 3; for Switzerland see GEISSER (FN 1), N 138 ff. with further reference. For points of reference of the UN Guiding Principles on liability law see in the course of this discussion.

[21] CEES VAN DAM, Tort Law and Human Rights: Brothers in Arms – On the Role of Tort Law in the Area of Business and Human Rights, Journal of European Tort Law 2011, 221 ff., 245; see also HEINZ REY, Ausservertragliches Haftpflichtrecht, 4th ed, Zürich et al. 2008, N 15; with context-related emphasis FEDERAL COUNCIL, Report (FN 2), 12; LIESBETH ENNEKING, Corporate liability for violations of human rights and the environment abroad: a comparative perspective, AJP 8/2017, II.A.; ROLF H. WEBER/RAINER BAISCH, Liability of Parent Companies for Human Rights Violations of Subsidiaries, European Business Law Review 2016, 669 ff., 678.

liability of companies in dealing with human rights.[22] Therefore, the following consideration of the RBI focuses on the relationship between human rights and liability law; at the same time staying aware that the mandate of the legislative proposal (para. 1) also extends to other areas of law and includes environmental standards that go beyond human rights.[23] Since the topic lies at the interface of *public international*, *constitutional*, *private international*, *tort* and *corporate law*, the authors consider themselves to be obliged to focus on a cross-disciplinary approach.[24]

„The topic lies at the interface of (1) *public international*, (2) *constitutional*, (3) *private international*, (4) *tort* and (5) *corporate law*."

B. Territorial scope of application

In the language of private international law, the RBI has a double territorial scope: it contains the jurisdiction of Swiss courts to assess facts with an international dimension (1.) and the application of specific provisions to these facts (2.).

1. Jurisdiction

The RBI relates to Swiss companies, specifically those with "statutory seat", "central administration" or "principal place of business" in Switzerland (para. 2). As such, it complies with international rules of jurisdiction, such as the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[25] (see art. 2 para. 1 in conjunction with art. 60 para. 1 LugC) or the Brussels I regulation.[26] The legislative proposal is therefore based on, internationally well-established grounds of jurisdictions and, in clarifying the determination of domicile, can be based on an interpretation common in commercial transactions.[27] The concerns regarding a new exorbitant Swiss forum in the sense of a universal civil jurisdiction are therefore unfounded.[28]

2. Applicable law

The RBI is primarily aimed at foreign activities of Swiss companies.[29] In order to be effective in these situations, the substantive principles of responsibility should apply "irrespective of the

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[22] See in addition to the last two FNs references in GEORGE P. FLETCHER, Tort Liability for Human Rights Abuses, Oxford/Portland Oregon 2008, passim; cf. CESCR (FN 9), No. 51; Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, 2 March 2016, para. 32 ff.; FEDERAL COUNCIL, NAP (FN 2), 37 f.

[23] This is linked to the reference to GROSZ, according to which there is a pronounced interdependence between human and environmental rights (cf. MIRINA GROSZ, Menschenrechte als Vehikel für ökologische Unternehmensverantwortung – Eine Ergänzung der Diskussion „Wirtschaft und Menschenrechte" um eine grüne Dimension, AJP 8/2017, passim).

[24] See to this fundamental postulate instead of many PEER ZUMBANSEN, Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation, German Law Journal 2004, 1499 ff.; KAUFMANN (FN 1), 54 in fine.

[25] LugC; SR 0.275.12.

[26] See also KAUFMANN (FN 1), 48.

[27] Cf. https://www.swisslex.ch (accessed 18.08.2021) with corresponding keyword search (paid access).

[28] For example, contrary DAVIDE SCRUZZI, Konzernverantwortungsinitiative – Klagen aus aller Welt, Neue Zürcher Zeitung NZZ of 21.4.2015 (paywall), 11; in particular, no emergency court of jurisdiction is envisaged pursuant to art. 3 CPIL; for para. 2 let. c of the initiative, see also III.C.3.d.

[29] See on the one hand the wording in para. 2 let. a: "Companies must […] also abroad"; on the other hand, the systematic of art. 101a Swiss Federal Constitution (legislative proposal) directly behind foreign economic policy.

law applicable under private international law" (para. 2 let. d). How should this regulation be assessed in the context of Switzerland's private international law and the fundamental principles of international law?

a. Assessment in the light of the Swiss private international law (PIL)

The RBI focuses on the classic constellation in which a company operates abroad from Switzerland and causes or contributes to a human rights violation as a result of a *domestic act* or omission in the context of its *activities abroad*.[30] Switzerland's current private international law generally leads to the application of foreign law of State X in which the injury *occurred* for the assessment of such cases.[31] This result is then objectionable for the injured parties if the law of State X does not guarantee adequate legal protection for human rights violations or does not provide for effective reparation; as practical examples show.[32] If deemed appropriate, *de lege lata* does indeed consider the public policy clause: according to this, the application of foreign law is excluded if it leads to a result which Switzerland considers contrary to basic values (see art. 17 CPIL[33]). However, this general clause largely leaves it to the discretion of the courts to decide when and according to what standards foreign law is to be corrected. In the consideration of civil human rights lawsuits in an international context, the courts are aware of the *lack of assessment criteria*.[34] The valuable function of the public policy clause is not to be questioned as an emergency valve. Nevertheless, such a general exception shaped by judicial law, can hardly do justice on its own[35] to a topic so fundamental and relevant to practice such as the present one.[36] The lack of legal landmarks ("topoi") weakens international human rights protection and eventually leads to legal uncertainty.[37]

In response to this problem the RBI sets the following guideline: Swiss companies need to be judged according to certain standards of responsibility for their activities abroad – regardless of the law referred to in private international law. The RBI therefore invokes the concept of an overriding mandatory provision (cf. art. 18 CPIL). This refers to norms that are of such fundamental importance for Switzerland for human rights reasons that they should also apply unconditionally to situations with an international dimension.[38] As a result, the assessment of Swiss companies in their handling of human rights for certain particularly fundamental facts and sufficient domestic relevance no longer remains at the sole discretion of

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[30] For the qualification as «international liability cases» see text of the legislative proposal (Annex I); and also SWISS COALITION FOR CORPORATE JUSTICE (SCCJ) 2016 (FN 3), 3.

[31] Cf. e.g. art. 133 CPIL; see GEISSER (FN 1) N 437 ff. (446 ff.).

[32] See evidence from practice GEISSER (FN 1) N 462 ff. (frequently there is also uncertainty about the standards applicable in State X); ENNEKING (FN 21), II.A.

[33] Switzerland's Federal Code on Private International Law; SR 291.

[34] Decision of the Swiss Federal Supreme Court, 4C.379/2006 of 22 May 2007, E. 3.4 *in fine* : «[…] la jurisprudence et la doctrine n'apportent guère d'enseignement pour ce qui est d'une action en responsabilité civile pour la réparation des dommages consécutifs à de crimes contre l'humanité, la vie et l'intégrité corporelle, commis à l'étranger […].» (Although related to art. 3 CPIL it can also be applied mutatis mutandis to art. 17 CPIL as a counterpart to the public policy clause). Characteristic in this respect is e.g. Swiss Federal Supreme Court's decision published in BGE 139 III 411 E. 2.6 (possible application of art. 17 CPIL left unexamined); BGE 79 II 193 ff., E. 7 and 8 (Ius-cogens character not taken into account accordingly; for a critical appraisal, inter alia, FRANK VISCHER, Das nationalsozialistische Recht im Spiegel einiger Entscheidungen schweizerischer Gerichte, in: Jürgen Basedow et al. [ed.] Festschrift Ulrich Drobnig, Tübingen 1998, 455 ff.).

[35] The application of art. 17 CPIL for areas not regulated by the initiative would remain unaffected.

[36] See GEISSER (FN 1), N 462 ff., for further information on the challenges associated with an interpretation in conformity with human rights on the basis of existing law.

[37] In a balancing of individual case justice and legal certainty, see fundamentally ERNST KRAMER, Juristische Methodenlehre, 3. A., Bern et al. 2010, 74, 266 and 287 f.; GEISSER (FN 1), N 180 ff. and 248 in fine.

[38] See message of 10 November 1982 on the CPIL, BBl 1983 I 263 ff., 314; BSK IPRG-MÄCHLER/WOLF-METTIER, Art. 18 N 16a, in: Heinrich Honsell et al. (ed.); VAN DAM (FN 21), 232.

the courts to decide on a case-by-case basis whether the foreign law of State X is contrary to human rights and should be corrected. Caution is nevertheless required in the concrete design of such a mandatory rule: Principles of corporate responsibility can only keep themselves free from the accusation of imperialism of values if they are based on international legal material.[39] An internationally shaped, sufficiently concrete but open enough rule (above I.) has its justification according to what has been said and as such fits into the existing PIL-instruments.

b. Assessment in the light of the international coordination framework

This leaves the question of the extent to which the legislative proposal also complies with *international law*; i.e. the fundamental concerns of the international coordination framework. From a supranational perspective of private international law, a balance needs to be found between conflict of laws and substantive justice (I. above). In order to strike a balance between these two concepts of justice, the connecting factors of the cases, as well as that of the scope of application of the legal values at stake, are decisive:[40]

i. Connecting factors of the cases to Switzerland

Indeed, the RBI is aimed at situations with a certain international dimension, such as compliance with human rights standards to prevent violations *abroad*. At the same time however, it is limited to the actions originating in Switzerland of companies domiciled here, in other words to the behaviour of actors with a strong domestic connection. Within this scope, Switzerland has the responsibility of preventing economic activities from being carried out from its territory that cause or contribute to human rights violations abroad. Based on increasingly strong international law, the validity of this task is progressively moving towards an actual duty to protect.[41] Since the RBI does not regulate the conduct of foreign actors, but only that of Swiss companies, it only has *direct* effect within national borders. Therefore, it does not directly interfere with foreign sovereignty. It is only a domestic measure with a reach to foreign activities of local companies – such as propagated inter alia by the FEDERAL COUNCIL.[42]

ii. Scope of application of the legal values

If the intended regulation is based on universal standards, conflict of laws concerns will fade further. Within this framework, Switzerland on one hand does not expose itself to accusations of value imperialism. On the other hand, transnationally active companies do not have, in the light of the OECD Guidelines and the UN Guiding Principles, a justifiable right to claim that they were surprised by this standard of conduct in absence of appropriate local regulations ("unfair surprise").[43] Even in the international coordination framework of conflict-free, legally secure economic and legal transactions, the RBI appears appropriate, *provided it is as*

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[39] In the light of the so-called public policy clause relating to human right articles 17 and 18 CPIL approach each other in such a way that the differences essentially exist only in the mechanism and no longer in the content. In further development to KAUFMANN (FN 1), 49 f., cf. for the further interconnection of art. 17 and 18 CPIL GEISSER (FN 1), N 518 ff.; also the FEDERAL COUNCIL, NAP (FN 2), 38, names the two CPIL provisions in this respect in the same breath.

[40] In detail GEISSER (FN 1), N 506 ff.

[41] See CESCR (FN 9), No. 30 ff. for the recent status; also essential UN Guiding Principles (FN 7), Principle 2/Commentary. Further reading EVELYNE SCHMID, L'obligation internationale d'adopter des mesures législatives – La Suisse a-t-elle une obligation de légiférer dans le domaine des „entreprises et des droits humains"?, AJP 8/2017, in particular IV.B.; FEDERAL COUNCIL, NAP (FN 2), 8; Message of 23 January 2013 on the Federal Act on Private Security Services Provided Abroad (PSSA), BBl 2013 1745 ff., 1797.

[42] See CESCR (FN 9), No. 33; FEDERAL COUNCIL, NAP (FN 2), 14; also CHRISTINE KAUFMANN et al., Extraterritorialität im Bereich der Menschenrechte – Zusammenfassung der Studie, 15. August 2016, 4; in detail and on the qualification of the Responsible Business Initiative as such KAUFMANN et al. in their full study (available in German), esp. N 231.

[43] See OECD Guidelines (FN 6), Human Rights, No. 38 ff.; UN Guiding Principles (FN 7), Principle 23 (Commentary); PETER FORSTMOSER, Schutz der Menschenrechte – eine Pflicht für multinationale Unternehmen?, in: Angela Cavallo et al. (ed.), Liber amicorum for Andreas Donatsch, Zürich et al., 2012, 712 f.

internationally based as possible. The individual principles of responsibility must then be measured against this.

C. The principles of responsibility

1. Basic concept

In order to effectively enforce the principles of responsibility stipulated in para. 2 of the legislative proposal, the RBI recognizes, as outlined above, the largest potential in tort law. Accordingly, the principles of responsibility must be set in relation to the liability requirements, which Switzerland's tort law foresees in accordance with other states:[44] The *duty to respect* according to para. 2 let. a of the legislative proposal finds its liability counterpart in the *unlawfulness* of a harmful act. The *mandatory due diligence*, as outlined in para. 2 let. b of the bill results in a translation into tort law in *fault*.[45] The legislative proposal primarily focuses on the responsibility for *own* actions within the meaning of the basic norm of Swiss tort law in art. 41 Swiss Code of Obligations (CO; SR 220). Provided that it also establishes a responsibility for the damaging actions of *other* companies on a selective basis, a special provision is required. Such a norm is anchored in para. 2 let. a. Accordingly, Swiss companies are liable for damages caused by (foreign) companies *controlled* by them due to the violation of human rights, based on the principal's liability under art. 55 CO.[46] The basic concept of the RBI therefore has the following structure:

Responsibility Principles	Translation into tort law
a. Duty to Respect	Unlawfulness
b. Due diligence obligation	Fault
c. Specific Case Constellation: Responsibility for controlled companies	Special liability norm based on the model of art. 55 CO

The following analysis follows this basic structure.

2. Duty to Respect – Unlawfulness

Par. 2 let. a of the imitative provides that "companies must respect internationally recognized human rights […]". This requirement raises two central questions with regard to tort law: (a) What are internationally recognized human rights and (b.) what is a liability-relevant duty to respect?

a. Internationally recognized human rights

Human rights serve to protect central aspects of human person and dignity. Internationally recognized human rights are a subset of these. They are characterized by a special value and a

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[44] For Switzerland cf. instead of many REY (FN 21), *passim*; for a comparative law perspective cf. e.g. INTERNATIONAL COMMISSION OF JURISTS (FN 20), 7.

[45] The initiative leaves the other liability requirements, such as the determination of the damage or immaterial negligence and the causal connection, to the current private international law.

[46] See text of the legislative proposal (Annex I); and also SWISS COALITION FOR CORPORATE JUSTICE (SCCJ) 2016 (FN 3), 2.

correspondingly large scope of application.[47] As a canon of internationally recognized human rights, the UN Guiding Principles (Principle 12) and the OECD Guidelines (Human Rights, No. 39) refer in a non-exhaustive list to the Universal Declaration of Human Rights (UDHR), together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR); in addition, the eight core conventions of the International Labour Organization (ILO) are referred to. This universal treaty law binds Switzerland like most other countries in the world. The RBI *rightly draws the decisive line among the internationally recognised human rights* mentioned above, in accordance with the international legal coordination framework and the UN Guiding Principles.[48] The categorical application of purely regional or even national values in international situations led to a non-reflective export of values.[49] In this respect, following a specific Federal Court case, e.g. (health) regulations of the Swiss Labour Code, which lie above the ILO guarantees, are to be mentioned.[50] The task of exporting such standards on a case-by-case basis in individual cases must continue to be left to the existing national law, i.e. the public policy clause exception (cf. art. 17 CPIL), and cannot be subject of a comprehensive mandatory rule provision (cf. art. 18 CPIL).[51]

b. Duty to respect

The maxim is solid international and constitutional law: Human rights are not only effective between private individuals and the state, but – if suitable – via the state duty to protect indirectly also between private individuals (see UN Guiding Principles 11; for Switzerland analogous to art. 35 para. 3 Federal Constitution of the Swiss Confederation [BV; SR 101]; so-called indirect horizontal effect).[52] However, doctrine and jurisprudence have not yet conclusively clarified which human rights can be affected by private individuals (i.e. corporations) and to what extent. What is clear is, that certain rights are generally more suitable than others. These include, first of all, the right of freedom and physical integrity for individuals to *defend* themselves. In this regard the "duty to respect", as provided by the RBI and the UN Guiding Principles, is primarily to be understood to prevent negative effects on the human rights of private individuals.[53] In private law, such an obligation is particularly tailored to *tort law*. Accordingly, a company acts *unlawful* if it violates the absolutely protected rights of others, such as *body* (Art. 11 Swiss Civil Code [CC; SR 210]), *life* (Art. 11 CC), *personality* (Art. 28 CC) or *property* (Art. 641 CC).[54] With its human rights reference and its orientation towards liability law, the *RBI's primary function* is to help these absolutely protected rights, insofar as they have an international echo, to achieve a breakthrough in legally secure application across borders.

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47 On the whole instead of many WALTER KÄLIN/JÖRG KÜNZLI, Universeller Menschenrechtsschutz, 3. A., Basel 2013, 33 ff. and 103 ff.

48 Also welcomed by KAUFMANN (FN 1), 50.

49 See above III.B.2.b.ii.

50 From the point of view of the initiative, the result of the Swiss Federal Court's decision BGE 139 III 411 is in this respect arguably correct.

51 Cf. above III.B.2.a.

52 With reference to the foundation in international law instead of many JOHN RUGGIE, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts […], UN Doc. A/HRC/4/035, 9 February 2007, No. 10 ff.

53 See inter alia OECD Guidelines (FN 6), Human Rights, No. 41. The responsibility does not extend in principle to positive obligations such as a duty to protect, as they apply in full to states (see, for example, guarantees in the area of social security). Summarising the discussion and with differentiations GEISSER (FN 1), N 106 ff. and 115 ff.

54 From the international discussion VAN DAM (FN 21), 243; INTERNATIONAL COMMISSION OF JURISTS (FN 20), 4. For Switzerland inter alia JÖRG PAUL MÜLLER, Elemente einer schweizerischen Grundrechtstheorie, Bern 1982, 49.

3. Due diligence obligation – Fault

a. Principles

Para. 2 let. b of the RBI obliges companies to carry out an "appropriate due diligence". The introduction of a *mandatory* due diligence, which is based on unequivocal UN requirements,[55] is at the heart of the RBI.[56] The proposal follows the three-step approach set out in the UN Guiding Principles and OECD Guidelines: (1) identifying risks of human rights implications, (2) taking measures (3) and to report.[57]

This risk-based approach has marked parallels with the due diligence standards known from tort law for *fault*. The universal understanding also in Switzerland is, that the standard of care relevant to liability is violated under two conditions: that (1) the risk of the conduct was foreseeable for the tortfeaser and (2) it did not take the necessary measures to prevent the damage. In addition, according to the unanimous understanding of current Swiss and international law, fault can be measured by means of standards that do not have to reach the level of *hard*, legally binding norms, but *can also determine the necessary care in the sense of "soft law"*.[58] Accordingly, the due diligence of the UN Guiding Principles, as enshrined in the RBI, also constitutes the first comprehensive international guideline for the liability fault of companies in dealing with human rights.[59] This is illustrated by an example:

b. Concrete application

Those affected hold a company based in Switzerland with a branch in State X responsible for having driven residents in State X off their land in the context of planned economic activities; for emitting harmful emissions for residents and workers in the course of their activities; for having used violence by security forces with severe bodily harm against demonstrators. For this example, diligence under tort law can be substantiated on the basis of the risk triad of the RBI as follows:

1st Step: Identify actual and potential impacts on internationally recognized human rights (Art. 101a para. 2 let. b. legislative proposal)

The risk-based assessment is founded, inter alia, on an assessment of the specific human rights situation in which a company operates; with an emphasis on vulnerable and marginalized groups. The requirement for comprehensive information must also include independent expert knowledge (cf. selected elements from the UN Guiding Principle 18/Commentary). According to the current standings of the state of science and with the inclusion of expert opinions, the company could have foreseen, that the extraction of raw materials would – in view of the massive exceeding of internationally recognised emission limit values (e.g. those of the WHO) – lead to considerable health risks for workers and residents. If the company had examined the specific human rights setting sufficiently, it could have been aware that its operations deprived

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55 See very explicitly CESCR (FN 9), No. 16 and 33.

56 See text of the legislative proposal (Annex I); and also SWISS COALITION FOR CORPORATE JUSTICE (SCCJ) 2016 (FN 3), 2.

57 UN Guiding Principles (FN 7), Principle 17; for this understanding by the initiative also KAUFMANN (FN 1), 52.

58 See in-depth VAN DAM (FN 21), 238 ff. (245) (also with a view to the UN Guiding Principles); CEES VAN DAM/FILIP GREGOR, Corporate responsibility to respect human rights vis-à-vis legal duty of care, in: Juan José Alvarez Rubio et al. (ed.), Human Rights in Business: Removal of Barriers to Access to Justice in the European Union, New York 2017, 131; with a view to Switzerland GEISSER (FN 1), N 563 f.

59 VAN DAM (FN 21), 245 ff; UN Guiding Principles (FN 7), Principle 17/Commentary in fine.

the indigenous population of their livelihood and that the company did not provide any reasonable compensation.[60]

2nd Step: Take appropriate measures to prevent and cease existing violations (Art. 101a para. 2 let. b. legislative proposal)

The appropriate due diligence measures then take different forms with regard to the concrete case, depending on whether a company itself causes an infringement or contributes to it (UN Guiding Principle 19 b). If a company *causes* direct human rights violations through its own activities, it must take the necessary measures to cease or prevent them (UN Guiding Principle 19/Commentary). For example, the above-mentioned commodity company, knowing that the emissions were harmful would have had the option to immediately cease operations, until the necessary technical measures to comply with the limit values had been taken. To the extent to which a company contributes to a human rights violation by another actor, it must at least take the necessary measures to cease or prevent its own contribution and use its leverage to mitigate as far as possible any remaining effects (UN Guiding Principle 19/Commentary). In the example, the company is to be accused of culpable conduct if it armed the commissioned security company indicating that it can take actions against demonstrators with armed force at its own discretion (for information on the action required instead, see UN Guiding Principle 19/Commentary).[61]

3rd Step: Account for actions taken (Art. 101a para. 2 let. b. legislative proposal)

Accordingly, the companies must, among other things, report externally, regularly and sufficiently on the measures taken (see UN Guiding Principle 21). The more substantiated such a report on human rights concerns is, the better it can prove that the necessary measures have been taken.

c. Interim conclusion

The example illustrates how the extensive nature of the liability fault in the present context can be concretized by the risk triad as anchored in the RBI. Implementing the RBI through legal orientation points can therefore make a significant contribution to making the application of the law more predictable and legally secure in international relations. It must be considered, however, that even an objectified standard of care under liability law is ultimately risk-based und thus strongly influenced by a given situation.[62] The aforementioned risk triad can therefore only be the first guideline for a careful corporate approach to human rights.[63] The concrete benchmark remains to be refined, for example, on the basis of sector-specific standards that are evolving, and must remain accessible to an assessment of the concrete circumstances. Legislation could take account of this tension between legal certainty and justice in individual cases by two means: Firstly, prescribing the methodology and principles of consideration of a risk-based approach in terms of initial problem-solving aspects (so-called "topoi"),[64] secondly

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60 See Principle 18/Commentary of the UN Guiding Principles (FN 7) and CESCR (FN 9), No. 12, both with reference to the UN Declaration on the Rights of Indigenous People, UN Doc. A/Res/61/295, 13 September 2007.

61 In exemplary concretisation with the Voluntary Principles on Security and Human Rights VPSHR (Multi-Stakeholder-Initiative, in which Switzerland also participates).

62 Cf. REY (FN 21), N 843 f.; see also text of the legislative proposal (Annex I); and also SWISS COALITION FOR CORPORATE JUSTICE (SCCJ) 2016 (FN 3), 2.

63 See UN Guiding Principles (FN 7), Principle 17/Commentary in fine.

64 See in general KRAMER (FN 37), 266 and 269 ff.; on this topic GEISSER (FN 1), N 180 ff. (248) in fine.

for situation related refinements it could refer, for instance, to applicable sector-specific standards and the scope for judicial judgement.[65]

d. Lines of liability

Finally, for a balanced understanding of the RBI, lines of liability need to be drawn. There are two basic types of corporate involvement in human rights violations to be distinguished: (1) involvement through their own actions and (2) involvement through a business relationship with another actor as the injuring party.[66]

(1) Own action of the Swiss company

Damage caused by own action is relevant to liability in accordance with the UN Guiding Principles and the general norm of art. 41 CO.[67] The company may have caused damage through its own activity as the principal offender ("cause") or contribute to the damage ("contribute to") – be it as aider or abettor of an unlawful act by another actor (see the above model case for an illustration of these variants).[68] A Swiss company may, for example, therefore abet an unlawful act within a supply chain if it increases the production requirements at the last minute without adjusting the delivery deadline; thereby it would compel the supplier to oblige its personnel to work contrarily to ILO-compliant overtime with health damage.[69]

(2) Business relationship with another actor as the injuring party

This title covers, in contrast, the case in which a Swiss customer orders clothes from a foreign manufacturer which have been produced under ILO-incompatible working conditions without the above-mentioned instructions (aiding and abetting).[70] In this case, the Swiss company indeed has a business relationship with the producer that is related to the violation. In contrast to the above constellation, however, no further causal and negligent contribution by the Swiss company is apparent in the sense of a cause for infringement. It is at this point where the limit for fault-based liability must be drawn. To deduce from para. 2 let. b of the RBI text a fault-based liability across "all business relationships" would lead to an overstretched understanding of liability, which neither corresponds to the international framework nor art. 41 CO.[71] However, the RBI *does not* provide for such an extension of liability in a literal and systematic interpretation: The expression "all business relationships" is neither to be found in the basic norm of legal responsibility (para. 2 let. a) nor in the special norm of liability (para. 2 let. c).[72] To the extent that the due diligence obligation of the RBI extends to violations that are "directly

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65 In particular, with the UN Guiding Principles are mentioned references to current international standards in the National Action Plan of the FEDERAL COUNCIL (FN 2), 18 ff. and 35 ff.; on criteria for suitability as liability law due diligence standards see VAN DAM (FN 21), 238 ff.; GEISSER (FN 1), N 564.

66 UN Guiding Principles (FN 7), Principle 13 let. a and b; REY (FN 21), N 69 and 72 f.

67 On the whole UN Guiding Principle (FN 7), Principle 17/Commentary, Principle 22 (Reparation), Principle 26 (Context); REY (FN 21), N 516 ff., in particular in the sense of a natural and causally adequate, culpable act, also ROLAND BREHM, Berner Kommentar zum schweizerischen Privatrecht, Die Entstehung durch unerlaubte Handlung, Art. 41-61 OR, 4.A., Bern 2013, Art. 50 N 24 ff.; on this topic ANDREW CLAPHAM/SCOTT JERBI, Categories of Corporate Complicity in Human Rights Abuses, Hastings International and Comparative Law Journal 2001, 339 ff.; FLETCHER (FN 22), 161 ff.; STEVEN R. RATNER, Corporations and Human Rights: A Theory of Legal Responsibility, Yale Law Journal 2001, 443 ff., 522 ff.

68 Cf. in the case of aiding and abetting, but only dealt with within the framework of the question of jurisdiction, from practice Swiss Federal Court's decision BGE 131 III 153 E. 6.4.

69 Inspired by UNITED NATIONS, The Corporate Responsibility to Respect Human Rights - An Interpretive Guide, 2012, 17.

70 Case also inspired by UNITED NATIONS (FN 69), 17.

71 See UN Guiding Principles (FN 7), Principle 17/Commentary (Questions of Complicity) as well as Principle 22 (Reparation) and Principle 26; see REY (FN 21), N 591 ff. (602), according to which a causality by omission in the absence of a liability-relevant duty to act cannot lead to fault-based liability, in this case GEISSER (FN 1), N 558, with further reference.

72 Cf. the basic concept above III.C.1.

linked to" business relationships,[73] this requirement, based on current UN Guiding Principles, may still have the force of a due diligence and reporting obligation *under company law*.[74] But it has to remain without the consequences of *fault-based liability*.[75]

These considerations lead to an understanding of the RBI that sets clear limits to *fault-based* liability: This includes one's own damaging act or a contribution to it, but not a pure business relationship. Compared to the current law, the due diligence obligation pursuant to para. 2 let. b of the RBI therefore serves to clarify the standard of care in context at hand and does not lead to an extension of fault-based liability. With this result, one special fact remains reserved to the subject of the last responsibility principle of the RBI: liability for lack of care in the control relationship.

4. Liability for lack of care in the control relationship

a. Initial position

„ The present topic concerns the *external* and not the *internal* liability of the group, i.e. primarily tort law and not company law."

The continuing globalisation is also characterized by economic interdependence via groups of companies, in particular multinational corporations. SAVIGNY's view of individual companies as isolated legal entities is in a clearly discernible tension with this reality. This is especially the case in view of the limits of liability for serious offences such as human rights violations.[76] Based on the third pillar (access to remedy) together with other international legal material, the UN Guiding Principles advise states to set the legal framework to distribute legal responsibility *appropriately among the members of a corporate group;* all this in accordance with their respective responsibilities in order to prevent individual companies from evading human rights responsibility to the detriment of effective redress for the injured parties. International law, however, for now leaves it to the states to decide *how* the concept of liability is to be structured.[77] Although the FEDERAL COUNCIL of Switzerland has recognised the problem, there is currently no substantial proposal in sight.[78] Consequently, in the absence of statutory group law, the issues are left to the broad field of judicial discretion for the selective breach of limits of liability. The courts have thus developed the practice in the tension between *plurality* and *unity*. The present topic concerns the *external* and not the *internal* liability of the group, i.e. primarily tort law and not company law. On this aspect, the otherwise very rich doctrine is much thinner.[79] In this case, even more specifically it is about the question to which extent the

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[73] For a restrictive understanding of the formulation of «all business relationships» as «directly linked» see SWISS COALITION FOR CORPORATE JUSTICE (SCCJ) 2016 (FN 3), 2.

[74] CESCR (FN 9), No. 33 in view of UN Guiding Principle 21, the proposal of a mandatory due diligence under corporate law already discussed in Switzerland, above II.B.

[75] In the systematic interpretation of para. 1 let. a-c of the initiative mentioned above, this rule could therefore not have the force of a liability-relevant duty to act in the sense of REY (FN 21), N 591 ff. (602).

[76] Instead of many WEBER (FN 14), 25 f., with references.

[77] Cf. in an overall view: UN Guiding Principles (FN 7), 26/Commentary (finding grievance); CESCR (FN 9), No. 44 ("This requires State Parties to remove […] barriers to remedies, including by establishing *parent company or group liability* regimes […]."); Committee on the Rights of the Child (FN 15), No. 22-23 (with a view to Switzerland); OECD Guidelines (FN 6), I. No. 4 (division of tasks); UNITED NATIONS (FN 69), 22; INTERNATIONAL LAW ASSOCIATION, Final Conference Report Sofia – International Civil Litigation for Human Rights Violations, 2012, Princ. 3.2 (commentary); WEBER/BAISCH (FN 21), 676 f.

[78] See FEDERAL COUNCIL, Report (FN 2), 9; WEBER (FN 14), 27.

[79] Still the comprehensive fundamental guide KARL HOFSTETTER, Sachgerechte Haftungsregeln für Multinationale Konzerne – Zur zivilrechtlichen Verantwortlichkeit von Muttergesellschaften im Kontext internationaler Märkte, Tübingen 1995 (distinguishing between internal and external group liability, 201 and 205 ff.); in the sense of PETER V. KUNZ, Grundlagen

domestic parent company is co-liable vis-à-vis third parties injured under human rights law by its foreign subsidiary. In this respect, in international comparison the domestic doctrine remains remarkably quiet.[80] To close this gap would be beyond the scope of the present analysis. This contribution is limited to classifying the RBI in the light of international developments into national law in order to understand the approach and to submit it to an initial assessment.

b. Basic concept of the RBI

i. Decision in favour of liability for lack of due care

In Switzerland, as in other countries, there are basically two options for the selective breaching of liability barriers within the corporate group vis-à-vis non-contractually injured third parties – "piercing the corporate veil" and "liability for lack of due care".[81]

Piercing the corporate veil: This concept developed from art. 2 CC [Swiss Civil Code; SR 210] does not appear to be suitable for an effective regulation of the present facts: It breaks up the separation principle and treats a corporate group as a unit in cases of abuse. For this reason, piercing the corporate veil must remain the exception. An excessive application of the principle places companies under general suspicion and impedes international commercial transactions. Furthermore, it has too far-reaching effects in international legal transactions. Since the exceptions provided for – namely undercapitalisation, hidden distribution of profits and mixing of assets – are not tailored to an external group liability with regard to human rights, they are unlikely to apply *de lege lata* in such a case.[82]

Liability for lack of due care: In accordance with WEBER/BAISCH and international voices, the Responsible Business Initiative rightly ties in with this liability variant. On one hand, a liability for lack of due care of any kind permits an in-depth analysis of the duty of care of corporate management bodies with regard to monitoring foreign subsidiary activities, in order to simultaneously show its limits. In doing so it has the potential to further clarify the human rights implications of the duty of group supervision.[83] On the other hand, a liability for lack of due care understood in this way does not override the separation principle. Therefore, it does not have the negative consequences that determine piercing the corporate veil. The RBI is limited to anchoring a specific *monitoring obligation of the parent company with regard to activities of subsidiaries relevant to human rights*. The subsidiary will, however, continue to be regarded as an independent legal entity. It will remain *a priori* responsible in its own country *and* in accordance with the relevant local provisions.[84] The liability of the parent company for a directly damaging act of its subsidiary is a liability from omissions and presupposes a special

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zum Konzernrecht der Schweiz, Bern 2016, N 298, the subject matter is, in our opinion, strictly speaking outside group law.

80 With further references on the rich international doctrine and practice and with a view to Switzerland WEBER/BAISCH (FN 21), passim.

81 WEBER/BAISCH (FN 21), 685; VAN DAM (FN 21), 248.

82 On the whole WEBER/BAISCH (FN 21), 688 ff. (691); KAUFMANN (FN 1), 51; VAN DAM (FN 21), 247 f.; GEISSER (FN 1), N 569; PIETH (FN 14), V.E. At a glance ROLAND VON BÜREN, Schweizerisches Privatrecht Bd. VIII/6, Der Konzern, 2nd ed., Basel et al. 2005, 181 ff.; in this case FORSTMOSER (FN 41), 720 f. (in some cases, undercapitalization or the creation of trust in a group in the sense of Swiss Federal Court's decision BGE 120 II 331 could be considered; the latter, however, is controversial in academia as an independent legal figure for liability; cf. with references PETER BÖCKLI, Schweizer Aktienrecht. 4th ed., Zürich et al. 2009, § 11 N 475 ff.).

83 On the whole WEBER/BAISCH (FN 21), 685 ff. (687); VAN DAM (FN 21), 248; WEBER (FN 14), 26 ff.; ENNEKING (FN 21), III.B and IV.; CESCR (FN 9), No. 44 („establishing parent company or group liability regimes").

84 For an exception de lege lata according to the emergency competence of art. 3 CPIL (GEISSER [FN 1], N 354 ff. [385]).

duty to act. Hence a special liability provision is required in Switzerland.[85] This leads us to the second basic decision of the RBI.

ii. Decision in favour of principal's liability

„ Anyone who controls a company should also exercise this control with due care to prevent human rights violations; anyone who benefits from the activities of another company should also bear the corresponding risks."

Let us consider a practical basic constellation. A parent company based in Switzerland controls a subsidiary based abroad, while the subsidiary extracts a raw material that is harmful to the health of local residents. The relevant responsibility principles of the RBI are as follows: Anyone who controls a company should also exercise this control with due care to prevent human rights violations;[86] anyone who benefits from the activities of another company should also bear the corresponding risks. These liability principles are consistent with those of the principal's liability under art. 55 CO.[87] The legislative proposal is therefore modelled on this provision. In Switzerland, as in similar form abroad,[88] the principal's liability is the basic norm for non-contractual business risks. As such, it has led the way for product liability, principal's liability under criminal law and also points the way for developments towards a corporate organisational liability.[89] Given that art. 55 CO is such a versatile basic norm, it is not surprising that it should be applicable – regarding corporate groups – according to the prevailing doctrine even when companies, rather than natural persons, are principals and auxiliaries.[90] HOFSTETTER sums up meaning and purpose of such a transfer as follows:

„ In Switzerland, as in similar form abroad, the principal's liability is the basic norm for non-contractual business risks."

> „The group-adequate extension of the principal's liability is about the protection of the non-contractual subsidiary creditors who are particularly endangered by the liability privilege under stock corporation law. The functional cause of this protection is the fact that non-contractual creditors do not tend to be compensated for the risk transferred to them."[91]

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85 REY (FN 21), N 72 f. and 591 ff. (602); KUNZ (FN 79), N 757; LUKAS HANDSCHIN, Der Konzern im geltenden schweizerischen Privatrecht, Zürich 1994, 110 f. (Art. 55 CO as facts of a damage-causing omission of the parent company). Nota bene: Die UN Guiding Principles (FN 7), Principle 13/Commentary understand the «activities» of a company as «both actions and omissions».

86 SWISS COALITION FOR CORPORATE JUSTICE (SCCJ) 2016 (FN 3).

87 REY (FN 21), N 84 and 897 ff.; in-depth also MARTIN PETRIN, Fortentwicklung der Geschäftsherrenhaftung in der Schweiz, Zürich et al., 2004, 21 and 22 f.; HANDSCHIN (FN 85), 347.

88 Cf. BGB [Germany] 831; CCfr [France] 1242 V; Ccit [Italy] 2049; ABGB [Austria] 1315; at supranational level see EUROPEAN GROUP ON TORT LAW (EGTL), Principles of European Tort Law – Text and Commentary, Wien et al. 2005, Art. 6:102; cf. CEES VAN DAM, European Tort Law, Oxford 2013, 502 ff.

89 Cf. first the leading case in Swiss Federal Court's decision BGE 110 II 456 („Schachtrahmenfall"). For the organisational liability for typical business risks envisaged for Switzerland, although not yet ready for presentation cf. VITO ROBERTO, Haftpflichtrecht, Bern 2013, N 8.62; in detail GERT BRÜGGEMEIER, Prinzipien des Haftungsrechts, Baden-Baden 1999, 126 ff.; OLIVER WAESPI, Organisationshaftung, Bern 2005, passim; see with regard to criminal law PIETH (FN 14), IV.

90 HOFSTETTER (FN 19), 239 ff.; HANDSCHIN (FN 85), 344 ff.; VON BÜREN (FN 82), 202 f.; NINA SAUERWEIN, La responsabilité de la société mère, Bern 2006, 89 f.; KARIN BEYELER, Konzernleitung im schweizerischen Privatrecht, Zürich 2004, 272 f.; JEAN NICOLAS DRUEY/ALEXANDER VOGEL, Das Schweizer Konzernrecht in der Praxis der Gerichte, Zürich 1999, 101; MAX ALBERS-SCHÖNBERG, Haftungsverhältnisse im Konzern, Zürich 1980, 174 ff.; GEISSER (FN 1), N 568 (S. 494 ff.); FRANÇOIS MEMBREZ, Etude juridique – Les remèdes juridiques face aux violations des droits humains et aux atteintes à l'environnement commises par les filiales des entreprises suisses, 2012, 32 ff.; only voice with reference to the lack of practical relevance MARC AMSTUTZ, Musique plurielle: Überlegungen zu einem konzernorganisatorischen Haftungsrecht, in: M.A. Niggli/Marc Amstutz (Hrsg.), Verantwortlichkeit im Unternehmen, Basel 2007, 146. Categorically rejective voices are, as far as can be seen, no longer present in the more recent literature.

91 HOFSTETTER (FN 19), 239 (translation by authors).

The Federal Supreme Court of Switzerland seems to be in favour of a transfer, but has not clarified this question conclusively.[92] In view of the practical potential of art. 55 CO, particularly in the context of human rights abroad,[93] it seems only a matter of time before it will be answered in court. The legislative proposal anticipates this legal development and makes a double stipulation for the facts at hand: On the one hand, companies (i.e. legal entities) are also regarded as *auxiliaries*. On the other hand, the principal's liability also applies regarding *foreign* companies as their auxiliaries.

c. Overview of liability requirements

In accordance with art. 55 CO, the legislative proposal reads as follows: "Companies are also liable for damage caused by companies under their control where they have, in the course of business, committed violations of internationally recognized human rights […]. They are not liable under this provision, however, if they can prove that they took all due care per paragraph b to avoid a loss or damage, or that the damage would have occurred even if all due care had been taken." The following liability requirements can be read from this:

1) Company A controls company B (control relationship);

2) Company B causes damage causally and unlawfully;

3) in the course of business (functional connection);

4) the proof of due diligence of company A as the controlling company fails.

A closer look at the *control* and the *due diligence* is required.

d. Control

Para. 2 let. a of the legislative proposal states: "Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship." The following cumulative prerequisites for a liability-relevant control are to be concluded from this.

(1) Business relationship related to human rights violations: First of all, a business relationship must exist – any control presupposes a business relationship. According to para. 2 let. c, the controlled company must have caused the human rights violation "in the course of [its] business [activities]" and not on occasion or in the course of its activities on behalf of a person other than the parent company.[94] The liability requirement of a functional connection also corresponds to the limits of the UN Guiding Principles. As mentioned above, these do not provide for corporate responsibility outside a business relationship that is connected with a human rights violation (III.C.3.d. above).

(2) Hierarchical element – control relationship: Art. 55 CO requires a subordination, i.e. control relationship. The decisive factor is therefore not the legal designation of the business relationship, but the existence of an *actual*, i.e. economic-organisational, control relationship between the companies.[95] In a group, a control relationship usually arises through a

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92 The reason is probably that the liability of the directly damaging company is in the foreground in purely domestic cases. See as first approach the unofficially published decision of the Federal Supreme Court of 11 June 1992, in: Semaine Judiciaire 1992, 627 f.

93 Regarding international relations, no regular place of jurisdiction is available in Switzerland for the assessment of foreign subsidiaries (see below V.A.1.). For potential practical relevance, see BUENO (FN 1), passim (esp. III.A.).

94 REY (FN 21), N 912 ff.; HANDSCHIN (FN 83), 350 f.; KAUFMANN (FN 1), 51, illustrates an example which, according to its clear wording (para. 2 let. c), is therefore not covered by the bill.

95 REY (FN 21), N 903 f. (904); ROBERTO (FN 89), N 8.07; KARL OFTINGER/EMIL W. STARK, Schweizerisches Haftpflichtrecht, Zweiter Bd.: Besonderer Teil, Erster Teilband, 4. A., Zürich 1987, 303 ff. (305); PETRIN (FN 87), 67 ff.; Swiss Federal Court's decision BGE 61 II 342 E. 2.

shareholding under company law (e.g. when a company has a majority of the votes in the highest management body or the right to appoint a majority of the members of the supreme management or administrative body, see art. 963 CO in anchoring the control principle). [96] A group-relevant control is imaginable, however, in a broader sense also by contract or – as the RBI alternatively envisages – by special economic dependence, i.e. de facto "exercise of power in a business relationship". VON BÜREN refers in this respect to the example of exclusive purchasing agreements: One company produces virtually exclusively goods for another company; the discontinuation of purchases threatens the existence of that company. In this sense, the relevant control parameters could also be the mutual market position of the companies concerned as well as the concrete contractual agreements between them or similar.[97] In addition to these criteria, it is also necessary with regard to the principal's liability that a *group management* is in place or that – based on the control principle – the management mechanisms exist but have not been exercised. [98] Such an understanding of control can be based on art. 55 CO, can be found in group law and corresponds to the approach of the OECD Guidelines.[99]

With the chosen wording, the Responsible Business Initiative opts for a group concept that goes beyond the consolidation obligation pursuant to art. 963 CO. In this respect it pays the price for a somewhat less legally secure solution. The opening for a case-by-case consideration of the actual control seems, however, consistent for a responsibility based on art. 55 CO and economic realities. On the one hand, in the case of a holding company (without established group management mechanisms),[100] a priori confirming a liability-relevant control, and on the other hand always denying such a control in the case of a close-knit purchasing system, would not do justice to the actual circumstances. In our opinion, however, the liability line of the Responsible Business Initiative must be drawn at the limits of the group in the broad understanding mentioned above. There are narrow limits to the ability of the companies to influence the behaviour of other companies in the value chain beyond the established control relationship of the group.[101] Accepting a liability-relevant "exercise of power" that extends further than the group, goes beyond the scope of a balanced regulation.[102] In our opinion, the wording should be interpreted restrictively in this sense.

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96 Adopted from art. 5 para. 1 BPS (FN 16).

97 VON BÜREN (FN 82), 78 ff. (81); for a differentiated approach depending on the field of law see KUNZ (FN 79), N 17 ff.; HANDSCHIN (FN 85), 349 (corresponding to art. 55 CO); in this case, with a view to case practice, comparative law, e.g. NICOLAS BUENO, Corporate Liability for Violations of the Human Right to Just Conditions of Work in Extraterritorial Operations, The International Journal of Human Rights 2017, 565 ff., 575 ff.; VAN DAM (FN 21), 247 ff.

98 HANDSCHIN (FN 85), 353 (and 111); VON BÜREN (FN 82), 203, with a view to art. 55 CO operating somewhat more restrictively with the threshold of an effective possibility of influence. In the concrete application mediating and for the understanding of the management mechanisms see below II.C.4.e.i.

99 Cf. HOFSTETTER (FN 19), 4, aptly describes the Multinational Corporations, based on the terminology of the OECD Guidelines (FN 6), Chapter I No. 4, as „Aufteilung eines Unternehmens in mehrere Einheiten, welche in verschiedenen Ländern lokalisiert, aber durch gemeinsame Kontrolle verzahnt sind" [division of a company into several units which are localised in different countries but interlocked through joint control].

100 BEYELER (FN 90), 18 f. (group management, for example, remains with the parent company).

101 OECD Guidelines (FN 6), Explanations of the General Principles, No. 21 ff.

102 This is also the result of KAUFMANN (FN 1), 53; however, it should not go unmentioned that there are already additional expanding tendencies in liability law, such as VAN DAM (FN 21), 251 ff. and VAN DAM/GREGOR (FN 58), 132, 134 ff., both in a comparison of the Responsible Business Initiative (RBI) to the «Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre» adopted in France on 21 February 2017 and further regulatory efforts in Europe.

e. Due diligence

i. Principles

In the interplay between national and international law, the following step-by-step approximation can be outlined in the context of due diligence in group relations. The proof of due diligence in accordance with art. 55 CO is based in practice on the four following curae: (1) diligence in the selection, (2) instruction and (3) supervision of the auxiliary, as well as (4) an appropriate organisation of the company.[103] HOFSTETTER has condensed the due diligence criteria for multinational corporations to the following denominator:

> „Also in connection with the principal's liability, the parent company's proof of due diligence should be based on the concept of proper group management. This should be specifically targeted at the (functionally deduced) protection interests of non-contractual subsidiary creditors. In doing so, account must be taken of the concrete form of parent control over subsidiary activities and the predictability of risks that have arisen. However, proof of the three classical curae […] is in principle not sufficient. Rather, what is required is proof that all organizational possibilities within the group have been exhausted in order to ensure optimum security of the subsidiary activities (group organizational liability)."[104]

From this, together with additional doctrine[105] and in the understanding of the legislative proposal, one principle and two parameters can be derived: It is above all a question of an *appropriate group organisation*; the requirements for this are in particular dependent on the *control* of the subsidiary activities as such (i.e. whether or not a tightly managed group exists with regard to the concrete management mechanisms) and on the *risk* of the subsidiary activity in question with regard to possible non-contractual damages.

These due diligence criteria fall on fertile soil in the human rights reference framework. The UN Guiding Principles are also risk based (III.C.a. above). The risk triad postulated there extends to the broad field of *all business relationships* related to human rights violations. This includes qualified business relations in the form of a control relationship (this said, "control" is not an additional qualifying concept of the UN Guiding Principles).[106] The OECD Guidelines, in particular, allow further concretisation of the due diligence parameter of *control*. These include the following guiding principles:

- "*According* to the actual *distribution of responsibilities* among them, the different entities [of the company] are expected to co-operate and to assist one another to facilitate observance of the Guidelines." [107]
- "*Compliance* and *control systems* should extend where possible to these *subsidiaries*. Furthermore, the board's monitoring of governance includes continuous *review* of internal *structures* to ensure clear lines of management *accountability* throughout the group." [108]

Such a standard of care, which according to the above can also be relevant in terms of liability law,[109] can be illustrated as follows in a group-related adaptation of our model case:

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[103] Instead of many REY (FN 21), N 927 ff. (940), with references.

[104] HOFSTETTER (FN 19), 243 with further references (translation by authors).

[105] Cf. also HANDSCHIN (FN 85), 111, 343 f. and 351 ff.; VON BÜREN (FN 82), 203.

[106] Above III.C.4.d. and UNITED NATIONS (FN 69), 22 (for corporate groups also with reference to „with varying degrees of control exercised by the parent company and correspondingly varied levels of devolved authority to the subsidiaries") and 49; VAN DAM/GREGOR (FN 58), 130 f.

[107] Ibid, Terms and principles, No. 4; emphasis added.

[108] Ibid, Explanations of the General Principles, No. 9; emphasis added.

[109] The national legal framework is provided by art. 55 CO; regarding the unanimous opinion on the use of soft law as a liability-relevant standard of due diligence above III.C.3.a.; with regard to corporations additionally VAN DAM/GREGOR (FN 58), 130 ff.; with regard to the OECD Guidelines already HANS W. BAADE, The Legal Effects of Codes of Conduct for

ii. Concrete application

A parent company is domiciled in Switzerland. The facilities of the *subsidiary*, which is based in State X, emit harmful emissions for workers and local residents as part of the extraction of raw materials; the subsidiary uses its security personnel against demonstrations by local residents in connection with the activity, which leads to killings and serious bodily injuries among demonstrators. For this example, a liability-relevant standard of care can be specified as follows based on the risk triad of the RBI and the principles mentioned.

Multinational Enterprises, German Yearbook of International Law 1979, 11 ff., 29 ff.; for concrete cases see references at GEISSER (FN 1), N 503.

1st Step: Identify risks

Human rights due diligence should be initiated as early as possible in the development of a new relationship, particularly prior to the acquisition of a company (UN Guiding principle 17/Commentary). Due diligence should include all internationally recognised human rights as a reference point (UN Guiding Principle 18/Commentary). The obligation to assess risks at an early stage undoubtedly has an impact on the *group as a whole*.[110] If the controlling company fails to assess the human rights risks associated with the activities of the acquired company prior to or after the takeover, it violates its due diligence obligation.[111] The parent company could have violated this duty in the aforementioned circumstances for example in failing to prioritize the most salient issues, e.g. if it confines itself to certain human rights issues (e.g. the prohibition of child labour), but as part of its group-wide risk management system fails to identify those areas in which the risk of human rights impacts is much more obvious in the specific corporate context. This could be the potentially health-threatening mining of raw materials in a sensitive operational environment with the emerging resistance of local residents.[112]

„ The aim is to achieve an *appropriate division of competences* within the corporate group corresponding to the relationship between control, risks and resources, which aims to *avoid any gaps* in *human rights supervision*."

In accordance with due diligence parameters of *risk* and *control*, it remains to be differentiated how closely human rights monitoring (*"cura in custodiendo"*) must be structured in order to approve of a carefully planned group organisation. HANDSCHIN, together with other voices, has formulated a plausible rule of thumb for art. 55 CO: The more decentralised a group is organised, the more important it is for the group management to carefully monitor the group-wide *overall* structure. This combined with sufficient financial, personnel and technical resources of the controlled company and less by monitoring each individual risk. The situation is different in a centrally managed group, in which the parent company instructs the subsidiary in detail and is therefore in a position to check that the business is conducted in accordance with the instructions.[113] FORSTMOSER although points out an important *barrier* to group freedom in the division of responsibilities: It may be forbidden to leave certain tasks with a group subsidiary, if the latter lacks the necessary financial, human or technical resources to handle the specific risks.[114] In a nutshell, in accordance with the above-mentioned OECD Guidelines, the UN Guiding Principles and the standard of care in liability and company law, the following

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[110] With reference to the UN Guiding Principles, this even extends to business relationships that go beyond there: e.g. Lok Shakti Abhiyan (India), KTNC Watch (South Korea), Fair Green and Global Alliance (Netherlands) and Forum for environment and development (Norway) vs. South Korean Pohang Iron and Steel Enterprise (POSCO), the Dutch Pension Fund ABP and its pension administrator APG, and the Norwegian Bank Investment Management (NBIM) of the Government Pension Fund Global, Norwegian National Contact Point, Final Statement of 27 May 2013, 29 ff. (30 and 33); HANDSCHIN (FN 85), 343, which could constitute a violation of the „cura in eligendo" with regard to art. 55 CO in this respect; generally REY (FN 21), N 929.

[111] In addition to the last FN, UN Guiding Principles (FN 7), Principle 17 (in particular let. c; risk assessment also as a continuous task).

[112] See UN Guiding Principles (FN 7), Principle 17 and 18 and each commentary; e.g. Norwegian National Contact Point, Final Statement (FN 110), 37.

[113] Cf. in an overall view: HANDSCHIN (FN 85), 111, 352 f. (across all *curae*); as a minimum, OECD Guidelines (FN 6), Explanations of the General Principles, No. 9 (overall monitoring in the sense of reviewing internal structures); FORSTMOSER (FN 43), 715 (organisational obligation to the extent that the controlling company has to enable its subsidiary to fulfil the remaining or assigned tasks), 720 (in the concrete case of liability for undercapitalisation); PETER FORSTMOSER, Corporate Social Responsibility, eine (neue) Rechtspflicht für Publikumsgesellschaften?, in: Robert Waldburger et al. (eds.), Festschrift für Peter Nobel zum 70. Geburtstag, Bern 2015, 157 ff., 175; VON BÜREN (FN 82), 203, who in art. 55 CO with further information, recognises a supervisory duty of the parent company adapted to the specific circumstances of the group; cf. again the formula of HOFSTETTER (FN 19), 243 (above III.C.4.e.i. quoted).

[114] FORSTMOSER (FN 43), 713 f.; HANDSCHIN (FN 85), 111, 352 f. (with a specification of the risk/means ratio).

formula can be derived: The aim is to achieve *an appropriate division of competences within the corporate group corresponding to the relationship between control, risks and resources, which aims to avoid any gaps in human rights supervision*.[115]

In our example, given the parents company's actual control over production issues, the risk potential of specific raw material extraction and the subsidiary's lack of technical expertise, it should be the parent company's responsibility to identify risks at an early stage. The parent company could have violated such an obligation to identify, if it had not recognised early enough that the output of the subsidiary's factory would massively exceed the WHO limits because of technical inadequacy.

2nd Step: Take appropriate measures

The companies should integrate the findings of their due diligence into all relevant internal business areas and processes and take appropriate measures. Such measures take various forms depending on the company's ability to mitigate the adverse effect. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm (see UN Guiding Principles 19/Commentary). As mentioned above, *group relationships* are characterised by the parent company's *control* over the subsidiary (III.C.4.d. above). By controlling the subsidiary, the parent has *significant leverage* over its business activities as well as the associated human rights violations.[116] Thus, in mutual convergence of art. 55 CO, the OECD Guidelines and the UN Guiding Principles, the basic requirement applies *that it must also use* this leverage to prevent or seize the harm caused by the subsidiary in the course of its business activities.[117] The question remains as to *how* it must use this influence, in particular at which corporate level which measures are to be taken. Here too, the degree of control and the resulting division of competencies within the group play a key role.[118] Based on the model case, the following two scenarios are imaginable:

a) The highest management bodies of the parent company of the subsidiary set operational targets for sales and earnings or for production, as is typical in a tightly managed group, i.e. the schedule for the launch of a new facility.[119] At the same time, however, there is no monitoring body that could have advised the board of directors to adjust the earning and production targets in such a way that the subsidiary can wait with a launch until the necessary filter system has been installed. If there is a lack of such a central control body as the establishment of a corporate

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[115] So in our own summary of the above principles and notes; also with a view to art. 55 CO inspired by REY (FN 21), N 940, with further information.

[116] Although, as mentioned above, control is not an additionally qualifying concept of the UN Guiding Principles, the interpretive Guide to the UN Guiding Principles (UNITED NATIONS [FN 69]), 22 and 49, leaves no doubt as to the fact that, in terms of the control relationship, we are moving in the broad notion of "leverage" in the sense of *influence* (cf. the criteria determining "leverage", 49, above all "degree of direct control by the enterprise over the entity" with the understanding of control of the initiative above III.C.4.d.; cf. also the criteria in the UN Guiding principles themselves, Principle 19/Commentary). In addition, the OECD Guidelines (FN 6), Concepts and Principles No. 4, which multinational companies understand in the direction of control as meaning that one or more of these parts of a company must be in a position to "exercise a *significant influence* over the activities of others". In this sense, there is also a liability-relevant influence pursuant to art. 55 CO, according to VON BÜREN (FN 82), 203, with further information if [the parent company] has a possibility comparable to that of a principal to avoid damage to third parties by influencing the dependent company; in an additional clarification, according to which the application of art. 55 CO is subject to a liability-relevant influence, not only the control over the direct injuring party must exist, but indirectly also over the tortious risk, cf. ROBERTO (FN 89), N 8.09; ALBERS-SCHÖNBERG (FN 88), 178 (this condition is fulfilled by the initiative by the fact that the violation has to be committed "in the course of business"; cf. III.C.4.d above).

[117] See UN Guiding Principles (FN 7) 19/Commentary; with a view to art. 55 CO, formulated in terms of liability law: ALBERS-SCHÖNBERG (FN 90), 178; HANDSCHIN (FN 85), 353.

[118] Above III.C.4.e.i.; UNITED NATIONS (FN 69), 22; KAUFMANN (FN 1), 51, with reference to a case study on the OECD Guidelines (responsibility according to the possibilities of control and influence).

[119] As examples of such management tasks see VON BÜREN (FN 82), 57; HANDSCHIN (FN 85), 352 (on art. 55 CO); in the present context also case analysis at BUENO (FN 97), 575 ff.

department "Health and Sustainability" *with* reporting duties to the highest corporate management body, the parent company suffers from a serious *lack of corporate organisation*. The responsibility to carry out risk assessments and to integrate the findings into relevant business areas and processes in order to prevent human rights impacts is therefore, in the language of the UN Guiding Principles, not assigned to the appropriate *level* and *function*;[120] since this risk management is not installed at the top management level under the given circumstances, there is no appropriate *balance* between control over budget/production and over the harmful effects.[121] In the understanding of the RBI, such a lack of group organisation – as a result of *inadequate internal group structures* –[122] leads to the parent company being liable for the associated damage to health.

b) In the second scenario, group management has a "Health and Sustainability" department or similar, which reports to the board of directors on the health risks of the existing facility and on the growing resistance from residents. However, for reasons of profitability, the board of directors is committed to adhering to the budget and timetable without considering human rights reporting. As a result, in the language of the UN Guiding Principles, the board could have omitted to consider the following risks and initiate measures based on a consistent triple-bottom-line approach:

- „Any situations that are recognized as often raising tensions or dilemmas in relation to a salient issue (e.g. […] approvals to proceed with projects affecting local communities, entry into high-risk, high-opportunity markets, the provision of security for personnel in conflict-affected areas);"
- "Any formal processes for supporting decisions where these tensions arise (e.g., gateway decision-making […]);"
- "Any involvement of external experts in the assessment of dilemmas on a standing or ad hoc basis (e.g., an independent advisory board or council, academic or other experts)."[123]

If the parent company adheres to the budget and production targets which do not allow a postponement by the subsidiary through the prior installation of a filter system, without dealing with the associated health risks and the danger of escalating violence, it behaves in the understanding of the RBI[124] in a liability-relevant and careless manner.

3rd Step: Report about it

Formal reporting is evolving from traditional annual reports and corporate responsibility/sustainability reports to online updates and the integration of financial and non-financial reporting (UN Guiding Principle 21/Commentary). Appropriate reporting has a *group-wide dimension*.[125] In our example of a tightly managed group, this requirement could be violated if the top management of the group failed to provide any public reporting on the alleged handling of the damage caused by the subsidiary activities; this in particular regarding fatalities and bodily injuries in the course of the launch of the facility. In the language of the UN Guiding Principles, group management would therefore have omitted to use the aforementioned information resources to cover topics and indicators concerning how the group identifies and

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120 UN Guiding Principles (FN 7), Principle 19/Commentary.

121 UN Guiding Principles (FN 7), Principles 19 and 20 Commentaries (integrate due diligence checks into relevant business areas and effectiveness reviews into relevant internal reporting procedures).

122 See principles above III.C.4.e.i.

123 SHIFT, UN Guiding Principles – Reporting Framework with implementation guidance, 2015, 77.

124 See with regard to art. 55 CO also HANDSCHIN (FN 85), 353 f.

125 OECD Guidelines (cited above III.C.4.e.i); Norwegian National Contact Point, Final Statement (FN 110), 38 (even beyond groups in the narrower sense); WEBER/BAISCH (FN 21), 685; FORSTMOSER (FN 43), 716 (in the sense of a minimum requirement).

addresses adverse impacts on human rights (see UN Guiding Principle 21/Commentary). In the view of the RBI, such an omission would at least have liability consequences, if the top management were unable to provide either external or internal evidence (e.g. from internal reporting procedures),[126] that it had exercised due diligence or that the damage would have occurred even if such diligence had been exercised.[127]

f. Conclusion in five theses

A comprehensive expert assessment of the initiated due diligence liability in the control relationship goes beyond the scope of this contribution. Nevertheless, the comments have made it clear that the RBI shows a promising way in its concrete application to make a significant step forward in matters of human rights protection and legal certainty. On the basis of this positive initial assessment, the following theses are put forward for further discussion of the proposal:

(1) The basic decisions of the RBI are correct: The *first* decision in favour for liability for lack of due care and against piercing the corporate veil avoids the categorical abolition of the separation principle. Instead, it opens the view to an urgent clarification of the monitoring duties of the parent company with regard to subsidiary activities, insofar as these are potentially harmful to human rights (above III.C.4.b.i). The *second* decision for a principal's liability then paves the way for a *kind of human rights-related "group organizational liability"* (*menschenrechtliche "Konzernorganisationshaftung"*[128]) – a concept which the domestic and foreign doctrine rightly regards as an approach with potential (above III.C.4.b.ii.):[129] In a nutshell, the proposal is about an *appropriate division of competences within the corporate group, corresponding to the relationship between control, risks and resources, which aims to avoid any gaps in human rights supervision* (above III.C.e.ii.).

(2) The concrete design of a balanced regulation remains in the hands of the implementing legislation: *Firstly*, the regulation appears to be balanced if the legislation takes the Responsible Business Initiative at its word. It only refers to a liability for lack of due care within a *corporate group* and not for business relationships that go beyond this (III.C.4.d. above). *Secondly*, the regulation is appropriate if the legislation, by analogy with art. 55 CO, leaves the *burden of proof* for the diligence applied with the parent company, but leaves the proof of an actual controlling relationship, an unlawfully damaging action of the subsidiary and the causal connection between the action of the subsidiary and the damage with the injured party.[130] Understood in this way, the regulation corresponds to the UN requirements, which expressly call for the lowering of barriers to proof that lies in the hands of the companies. In case at hand, the *intra-group information* is beyond the reach of the victims as evidence of the care taken.[131] In this respect, the problem of collecting evidence from abroad is also eliminated, especially since these documents are (or would have to be) located with the group management in Switzerland. *Thirdly*, for a balanced rule that lives up to the international requirements of an

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[126] UN Guiding Principles (FN 7), Principle 20/Commentary (as a result of effectiveness reviews).

[127] See para. 2 let. c of the RBI; also REY (FN 21), N 943 ff.

[128] Term inspired by HOFSTETTER (FN 19), 244 with references.

[129] Furthermore ENNEKING (FN 21), III.B. and C. as well as IV; CEES VAN DAM/FILIP GREGOR/PAIGE MORROW, Corporate Responsibility vis-à-vis Duty of Care, 2016, Recommendation III; HOFSTETTER (FN 19), 239 f. (also for preventive effect).

[130] REY (FN 21), N 901 f.; also as a counterpart under company law, e.g. art. 753 para. 2 CO (FORSTMOSER [FN 43], 716); to speak of a break of the presumption of innocence in this respect (so FELIX EHRAT, „Die Initiative ist eine Mogelpackung", NZZ of 8.11.2016 (paywall), is borrowed from criminal law and has nothing to do with private law.

[131] See CESCR (FN 9), No. 45 (42/44); UN Guiding Principles (FN 7), Principle 19/Commentary; HOFSTETTER (FN 19), 205 and 241; GWYNNE SKINNER/ROBERT MCCORQUODALE/OLIVIER DE SCHUTTER, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (ICAR, ECCJ, 2013), 43 ff.; GEISSER (FN 1), N 424 (with further information) and N 568 (S. 493).

appropriate distribution of responsibility between the members of the corporate group (III.C.4.a above), the legislation could consider a *proportionate accountability*. It could do so by a quota regulation already in the external liability or recourse regulation vis-à-vis the co-responsible together with the introduction of an international jurisdiction on the basis of a closely connected claim.[132]

(3) The proposal does not lead to an extension of the corporate supervisory duty of the group management, but seeks to be in line with it: A primarily liability provision such as the present could initially take the view that the company law is not a subject of consideration. Such a view, however, shortens the subject in a way that does not seem appropriate. A reference to company law could accordingly open with the statement that the parent company, as a result of a *group management obligation*, in the existing law already has a non-delegable *duty of overall supervision over the subsidiary activity*. This first requires an adequate group *organisation*, which in the case of companies listed on the stock exchange results in a duty for consolidated reporting. From a *material* point of view, this obligation also aims at compliance with legal norms. In the current interpretation of the relevant general clauses (e.g. art. 716a para. 1 no. 2 and 5 as well as art. 717 CO), a *tendency* is also recognisable in the Swiss doctrine to extend this duty – true to the triple bottom line approach – by analogy to subsidiary activities and norms which serve to protect human rights. With particular comprehensibility are to mention the rights protected under liability law such as life, body, personality and property. The *scope* of such a due diligence obligation also depends on how tightly the group is managed, in line with the liability clause as foreseen by the RBI: If a parents company's control over its subsidiary goes so far that it interferes in the subsidiary's individual business activities and achieves the degree of actual management, it leads to the known consequences of the parent company's responsibility under *company law* as the de facto organ of its subsidiary. But this is the result of a general trend towards ever closer management of the controlled companies. A human rights-related group organizational liability, as anchored by the RBI, is neutral in relation to this development. This provision does not lead to a tightly managed group, but simply determines the scope of human rights due diligence in accordance with the specific circumstances, including the degree of concrete control. This initiated group organizational liability provides the *absolutely protected rights* with an *external effect* in the consistent enforcement of their *protective purpose*. At the same it remains, as explained above (III.C.4.e.) in matters of scope of consideration, within the framework which also characterises the due diligence under company law. The human rights due diligence under company and liability law are therefore closely related to each other. The RBI invites a coordinated development of these two topics.[133]

(4) On the basis of Swiss law, there is no serious alternative in the non-contractual sphere to the proposed human rights-related group liability: All responsibilities aimed at *internal* group liability – such as the responsibility of the parent company as a de facto organ – do not guarantee effective remedy for non-contractual injured parties due to the lack of legal

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[132] Also art. 55 para. 2 CO; HOFSTETTER (FN 19), 244; INTERNATIONAL LAW ASSOCIATION, Final Conference Report Sofia – International Civil Litigation for Human Rights Violations, 2012, p. 12 ff.

[133] As basis for discussion on the whole: cf. FORSTMOSER (FN 113), in particular 174 f.; FORSTMOSER, (FN 41), 708 ff.; WEBER/BAISCH (FN 21), 687 f.; more in-depth and in the result thus more restrained see SIR (FN 19), 27 f. and 40 ff. (46, 49); comparative law with interesting reference to the UN Guiding Principles and to liability law also VAN DAM/GREGOR (FN 58), 131 ff.; in this respect further thoughts on the theory of protective purposes, introducing REY (FN 21), N 698 ff., are most valuable; for group law principles see HANDSCHIN (FN 85), 109 ff., 111 and 346 ff. (353) (in connection with group management duty and principal liability); JEAN NICOLAS DRUEY, Leitungsrecht und -pflicht im Konzern, in: Charlotte M. Baer (ed.), Vom Gesellschafts- zum Konzernrecht, Bern 2000, 24 ff. Also Swiss Federal Court's decision BGE 128 III 92 E. 3 specifically to the capacity as de facto organ; the present thesis as the first answer to WEBER (FN 14), 27 f. (with regard to PIL questions and a possible liability of organs see HOFSTETTER [FN 19], 246 f.; there also on exceptions to the foreign subsidiary statute).

standing. The principle of piercing the corporate veil as the remaining means of *external* group liability does not represent a viable option (III.C.4.b.i above). On the basis of theses, the only option that remains to be discussed is liability for unlawful acts arising from *dual corporate bodies*. An in-depth analysis would, however, show that their scope of application (a natural person is both, organ of the parent company and the subsidiary) is too limited and their liability hurdles (in particular the burden of proof) too high to represent a genuine alternative to a liability modelled on the principal's liability. The RBI has thus likely made the right choice on the basis of Swiss law in order to bring about an effective strengthening of the protection of human rights in the sense of international guidelines.[134]

(5) The further assessment of the proposal lies in the core business of tort law: Since we are in the field of *external* group liability, primarily the circle of tort lawyers is addressed for further discussion. Based on the approach of a *human rights-related group organizational liability*, they could contribute to a balanced implementation in an overall consideration of possible accountability instruments and principles, which also takes into account the references to company law and the equilibrium under international law. The core concerns of the proposal are clear: In the light of the UN requirements, it is a matter of effective remedy (including the possibility for injured parties to bring an action), an appropriate distribution of responsibility within the corporate group and an adequate reduction of evidentiary hurdles for injured parties.[135]

IV. Overall assessment

The Responsible Business Initiative is entering a complex, current and controversial legal field. Binding rules for transnational companies in dealing with human rights must, according to what has been said, seek a balanced solution:

- the fundamental principle of the law is to distinguish between *legal certainty* and *justice in individual cases*;
- in international law between *universalism* and *pluralism*;
- in private international law, between *conflict of laws* and *substantive justice*;
- in the group relationship between *plurality* and *unity*.

Opportunities: In our opinion, the RBI has developed a concept for a set of laws in this multifaceted tense relationship, which is suitable for strengthening international human rights protection, creating more legal certainty and also having pronounced preventive effect through improved risk awareness on part of the companies.[136] For the complex findings that lead to this overall result, please refer to the individual chapters. The RBI has also found a viable way in the *international coordination framework*: It is limited to Swiss actors whose activities abroad lead our country to a designated responsibility (if not a duty) to protect. It restricts itself to international human rights and does not export any values beyond this. Finally, as a basic mechanism, the RBI relies on a proportionate solution under private law based on the procedural maxim that the private parties themselves must provide the evidence. It neither creates administrative authorities, nor leads to an additional caseload for prosecuting

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[134] As a basis for discussion for the search for alternative, cf. guidelines in the CESCR (FN 9), No. 42-45 and UN Guiding Principles (FN 7), Principle 26/Commentary; then HOFSTETTER (FN 19), passim (esp. 201 ff., 204, 225, 232 and 239 ff.); VON BÜREN (FN 82), 174 ff.; KUNZ (FN 79), N 820 (at least with reference to a necessary reversal of the burden of proof because of the existing proximity to the evidence); furthermore above III.C.4.b. (respective FN); GEISSER (FN 1), N 568.

[135] In this sense shown among others VAN DAM (FN 21), passim.

[136] Cf. also PIETH (FN 14), ENNEKING (FN 21) and BUENO (FN 1), each passim.

authorities. The limits of accountability are clear: In accordance with the UN Guiding Principles and Swiss liability maxims, liability extends only to the actions of Swiss companies and their lack of diligence in monitoring controlled companies, and not to further violations in the value chain.

Challenges: In parts, the RBI is progressive. This is most evident in the introduction of a mandatory due diligence with group-wide scope and liability consequences. However, the approach chosen is based on a line that is becoming increasingly apparent internationally and which has a domestic legal basis in the form of principal's liability. As a constitutional amendment, the regulation will inevitably remain in need of concretisation through the implementing legislation. In the next step, the translation work to be carried out between the relevant fields of law is primarily on the legislation and application of law. Multinational companies – based on general clauses (e.g. art. 3 and 17 CPIL as well as art. 41 and 55 CO) – are already today exposed to a liability risk that is widely underestimated and difficult to calculate. This task is already on the agenda – with or without the RBI.[137] The latter is the main regulatory driving force behind the discussion. It sets the first constitutional boundaries to the broad discretion of the courts.

V. Final remarks

„ The authors take the view that the RBI is legally sound and can be implemented."

The authors take the view that the RBI is legally sound and can be implemented. The core concerns have been identified and the challenges of implementation seem to be solvable. The article restricts itself to a legal assessment and emphatically invites further legal discussion in a cross-disciplinary perspective. It leaves the field of legal-political controversies to politics. To conclude, one can end with a quote from JOHN RUGGIE, whose universally recognised work as the former UN Special Representative on Business and Human Rights on the UN Guiding Principles has shaped developments in recent years:

> "Achieving significant progress [...] would require moving beyond the mandatory-vs.-voluntary dichotomy to devise a smart mix of reinforcing policy measures that are capable over time of generating cumulative change and achieving large-scale success – including in the law."[138]

The handling of human rights by companies is not about an *either-or*, but about an *as-well as*, which can exist between the following pairs: voluntary and mandatory – national and international law – prevention and reparation – substantive and procedural law.

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[137] Detailed GEISSER (FN 1), passim.

[138] JOHN RUGGIE, Just Business – Multinational Corporations and Human Rights, New York 2013, xxiii.

Annex I – Text of the RBI[139]

The Federal Constitution will be amended as follows:

Art. 101a Responsibility of business

[1] The Confederation shall take measures to strengthen respect for human rights and the environment through business.

[2] The law shall regulate the obligations of companies that have their registered office, central administration, or principal place of business in Switzerland according to the following principles:

a. Companies must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control. Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.

b. Companies are required to carry out appropriate due diligence. This means in particular that they must: identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken. These duties apply to controlled companies as well as to all business relationships. The scope of the due diligence to be carried out depends on the risks to the environment and human rights. In the process of regulating mandatory due diligence, the legislator is to take into account the needs of small and medium-sized companies that have limited risks of this kind.

c. Companies are also liable for damage caused by companies under their control where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards. They are not liable under this provision, however, if they can prove that they took all due care per paragraph b to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.

d. The provisions based on the principles of paragraphs a-c apply irrespective of the law applicable under private international law.

[139] Unofficial translation by the authors, the official text is available in German, French and Italian.