Liability of Parent Companies for Human Rights Violations of Subsidiaries

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Abstract

The infringement of human rights by subsidiaries of multinational enterprises has become a thoroughly discussed topic. It is obvious that potential corporate liability under any regime gives incentives to group companies for structuring themselves in a way that, if ever agents who do not respect human right will be held responsible, the liability risks remain within the sphere of a foreign subsidiary. Looking from the perspective of the injured person, this strategy motivates to invoke veil-piercing, direct liability or forum-doctrines to tap the financial capability of the parent company. Following the UNGP the question arises what can be done to establish fair jurisdiction, suitable to hold negligent parent companies liable e.g. based on mandatory due diligence obligations in respect of the adherence to human rights.

I. Introduction

A. Starting Point

The infringement of human rights by subsidiaries or contracting partners of multinational enterprises has become a thoroughly discussed topic.[1] The respective violations often concern either the ownership of land associated with the relocation of locals or labour law standards: in the first situation for instance a mining corporation is operating through a subsidiary, in the latter situation a subcontractor is engaged.[2] This

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[1] The question regarding roots and causes or a satisfactory account of the obligations of corporations in the respect of global justice is not in the focus of this paper. Political as well as ethical conceptions of Corporate Social Responsibility (CSR) are calling for "*an appropriately modest set of duties tied to relationships with stakeholders in the organization*"; Denis G Arnold, *Global Justice and International Business* 23 Business Ethics Quarterly 125 (2013). For a good collection of essays see Andre Clapham (ed.), *Human Rights and Non-state-actors* (Elgar 2013); for an analysis of the legal quality of CSR-rules see Rolf H Weber, *Corporate Social Responsibility As a Gap-Filling Instrument?* in Andrew P Newell (ed), *Corporate Social Responsibility,* 87 (Nova 2014).

[2] Corporative structures are usually given in raw materials mining ownership matters, whereas in the area of textile production contractual relationships are prevailing.

contribution will address operations with a corporative structure rather than just a contractual relationship[3] and was inspired by a typical example applying this approach, namely the decision of a Canadian court[4] not to strike a claim against a Canadian company regarding possible violations of human rights related to its former subsidiary in Guatemala.[5]

The discussions about the liability of parent companies have put major emphasis on jurisdictional issues.[6] This contribution rather argues that more attention should be paid to behavioural rules on a high corporate level, particularly to the duty of care in corporate matters.[7] Thereby, the focus is laid on civil not criminal law and issues

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[3] However, a contractual supply chain does not prevent from claims against the legal entity in its home state. Survivors and relatives of victims of the fatal fire at a textile factory in Karachi (Pakistan), where 260 people were killed in 2012, filed compensation claims at the Regional Court in Dortmund against a German discount clothing retailer who was by its own admission the factory's main customer. The Italian company that had issued the social audit certificate to the Pakistani company has also been sued by 15 heirs of the victims in a court of Milan, Italy.

[4] *Choc v. Hudbay Minerals* ONSC 1414 (Can. 2013), http://www.osler.com/uploadedFiles/Judgment-July-22-2013-Hudbays-motion-to-strike.pdf (accessed 23 June 2016). The facts are as follows: Until August 2011, the Canadian mining company Hudbay was holding the major stake of the Fenix mining project in Guatemala through a wholly controlled Guatemalan subsidiary. The plaintiffs, indigenous Mayan, brought three related cases alleging that Fenix mining´s project security personnel, who were under the control and supervision of Hudbay, committed human rights abuses, including murder and gang rape. *Hudbay* in February 2013 withdrew its motion to dismiss the case based on *forum non conveniens* just before the Ontario court was to rule on it. This was done probably due to a lack of prospect of success based on the law and the facts associated with the *forum non conveniens* factors established in *Club Resorts v. Van Breda*, 1 SCR. 572 (Can. 2012). *Hudbay* stated that it will not appeal the decision; however, the beginning of the trial was delayed. On June 29 2015 the Superior Court of Justice, Ontario, decided that *Hudbay* has to disclose internal corporate documents being relevant for the assessment of a potenttial direct negligence and for the issue of piercing the corporate veil. For a good coverage of relevant case law see Stanley W Elkind and Ryan Tevel, *Piercing the Corporate Veil: New Perspectives on an Age-Old Concept* in Dennis Campbell, *The Comparative Law Yearbook of International Business,* 73 (vol. 36, Kluwer, 2014).

[5] Shin Imai et al, *Accountability Across Borders: Mining in Guatemala and the Canadian Justice System*, Osgoode CLPE Research Paper No. 26/2012, http://dx.doi.org/10.2139/ssrn.2143679 (accessed 23 June 2016). See also John Terry Sarah Shody, *Could Canada Become a New Forum for Cases Involving Human Rights Violations Committed Abroad* 1 Commercial Litigations and Arbitration Review 63 (2012), discussing that the Canadian Supreme Court will have to address how the principles established in *Club Resorts v. Van Breda* apply to cases involving human rights abuses by businesses committed abroad.

[6] After finishing this article the Parent Company Accountability Project (PCAP) exploring next to other activities the opportunities in United States law for holding parent corporations liable for actions for their subsidiaries and/or even business partners released a project report in November 2015 which offers recommendations and ways forward to address the barrier that limited liability of a parent corporation raises for victims of the subsidiary's human rights violations; see Gwynne Skinner, *Parent Company Accountability: Ensuring Justice for Human Rights Violations* (icar.ngo/wp-content/uploads/2015/06/ICAR-Parent-Company-Accountability-Project-Report.pdf, accessed 23 June 2016); Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law* 72 Washington & Lee Law Review 1769–1864 (2015).

[7] Radu Mares, *Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights*, 169, 192 (The UN guiding principles on business and human rights: founda-

regarding the applicable law and the possible procedural plea denying plaintiff's right of action will not be dealt with in depth.[8] At the beginning, multinational companies are characterised, followed by some remarks in respect to the general normative framework regarding accountability. Based on this assessment the various approaches developed by the jurisprudence to grant victims access to justice are discussed. Due to the protective effect of the corporate veil manifold aspects became relevant in recent years; therefore, legal principles as well as relevant exceptions to those principles will be looked at; furthermore, the influence of the UN Guiding Principles and the OECD Guidelines are also analysed.

B. Particularities of Multinational Companies

Multinational companies are normally structured in parent-subsidiary relationships for a variety of managerial, regulatory, and tax reasons.[9] It is obvious that potential corporate liability under any regime incentivises multinational operations to organise themselves in a way that whenever agents who do not respect human rights will be held responsible, the liability risks remain within the sphere of a subsidiary not subject to jurisdiction where the parent company is domiciled, preferably in the sphere of an impecunious foreign subsidiary. Looking from the perspective of the damaged person, this strategy motivates to invoke veil-piercing, direct liability or similar doctrines in order to tap the financial capability of as well as to jeopardise the credibility of the parent company.[10] At the very beginning, a central barrier for the victims is to convince a court in the state where the parent company is incorporated to declare itself competent. For practical motives a plaintiff usually prefers to address his claim against the parent company in its home country not only because of financial stability reasons, but also because of stricter laws and more reliable enforcement procedures. However, based on international private law the applicable law is in most cases

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tions and implementation, 2012), draws "*on concepts employed in jurisprudence – vulnerability, risk, culpable conduct*" and characterises "*familiar relationships between core companies and affiliates in a way that does not relieve the core company of all responsibility for human rights abuses*". Based on that concept it must be assumed a "*core company's responsibility to act and to do so with reasonable care, which is completely in tune with Ruggie's precepts of due diligence*".

[8] See for example Veerle van den Eeckhout, *Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor?* (July 2011, http://ssrn.com/abstract=1895690, accessed 23 June 2016).

[9] Alan O Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis* 100 *The Georgetown Law Journal* 2161, 2177 et seq. (2012); for a general overview see also Lisbeth FH Enneking, *Foreign Direct Liability and Beyond*, 13 et seq. (Eleven 2012).

[10] See Douglas M Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation* 9 Santa Clara Journal of International Law 227, 245 (2011): "*Many courts use principal-agent analogies to uphold veil piercing allegations. When a court finds that a subsidiary corporation exists solely to carry out the owner's agenda, having no independent reason for its own existence, then the corporation is found to have been the mere agent or instrumentality of the owner*."

derived from the occurrence that gave rise to the litigation (*lex loci actus*) and, therefore, the law at the domicile of the subsidiary will often be the applicable law. Consequently, if jurisdiction is assumed by a court, in principle, such a claim must then be assessed under the foreign local laws of the country where the subsidiary is domiciled and operating.[11]

II. Human Rights and Corporate Accountability

Before looking into the specific legal details of parent companies' liability for human rights violations of subsidiaries the general normative framework in this context needs to be shortly sketched. In particular, the cross-border regulations developed by the United Nations (UN) and the OECD merit attention. These efforts attempt to overcome the obstacles for access to judicial remedy. Further general approaches improving the legal position of victims can consist in the acknowledgement of a third party effect of human rights and in the establishment of accountability concepts.

A. Multinational Companies and International Law

The major global source being relevant for multinational companies is the UN framework, *United Nations Guiding Principles on Business and Human Rights* (UNGP), being composed of three pillars, namely the duty to *protect*, *respect,* and *remedy*, as developed by *John Ruggie*. The UNGP is encompassing obligations for governments and private businesses, amongst others a state's duty to *protect* civil society against human rights abuses by third parties and to guarantee the injured persons an appropriate access to redress and compensation.[12] The pillar *respect* is addressed to the companies. Based on the *Ruggie* framework all companies should respect human rights

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[11] In Europe this is true also for claims under the Rome II Regulation relating to events after January 2009. But then, for the analysis of liability risks, the application of the national laws of the jurisdictions where the subsidiary is located must be taken into account. The Rome II Regulation (EC 864/2007) is addressing the conflict of laws in case of non-contractual obligations and the choice of the governing law in civil and commercial matters concerning non-contractual obligations. Analogous rules were already established for contractual obligations by the Rome Convention in 1980, meanwhile replaced by the Rome I Regulation on the law applicable to contractual obligations (EC 593/2008).

[12] The *United Nations Guiding Principles on Business and Human Rights* (UNGP) as a global standard addresses the compliance of business activities with human rights (United Nations 2011, HR/PUB/11/04). In June 2008, the UN Special Representative on Human Rights and Business, Professor John Ruggie, presented his report to the Human Rights Council which then was adopted by the Human Rights Council in a resolution welcoming this report. Ruggie developed a framework for addressing business and human rights that comprises three pillars: pillar I: states have a duty to protect against human rights abuses by third parties, including business; pillar II: companies have a responsibility to respect human rights: corresponding to the 'do no harm' principle; pillar III: victims should have access to effective remedies. Within a renewed mandate Professor Ruggie operationalised this framework presented in his report and published the Guiding Principles for implementing the framework in March 2010; thereafter, the Human Rights Council adopted the framework in June 2011.

in the world.[13] However, without a legally binding duty of care obliging the parent company to assume a responsibility for infringements perpetrated by a subsidiary a plaintiff can only sue the subsidiary.[14] Therefore, it depends on to the implementation of provisions regarding the pillar *remedy* to allow for fair access to justice.

In general, the Guiding Principles state that corporate responsibilities to respect human rights are voluntary and, therefore, not necessarily a legal enforcement as demands on business entities is to be expected.[15] Because the obligations within the Guiding Principles can be seen more like social expectations rather than moral obligations, it would be necessary to guarantee such principles by national law. However, the voluntarism of responsibilities implies that such kind of social expectations or normative claims would imply that "*corporations, like individuals, are moral agents who can be responsible*".[16] Instead of trying to foster the enforceability of the rights elaborated within the UNGP, in 2014 an Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council (HRC).[17] According to its mandate and after conducting deliberations on the content, scope, nature and form of a future international instrument in July 2015 a draft report was submitted to the HRC.[18] The further development remains to be seen.

Multinational companies are only partially linked to international law and cannot be regarded as direct subjects of international law.[19] On the one hand, businesses are not members of multilateral agreements and, therefore, can only be indirectly touched by their substantive principles (for example by the national treatment principle of international trade law); on the other hand, the question must be analysed to what

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[13] For further details see Christine Kaufmann, *Wirtschaft und Menschenrechte – Anatomie einer Beziehung*, Aktuelle Juristische Praxis 744 (2013).

[14] Ruggie emphasised the importance of judicial mechanisms and also highlighted the legal and practical barriers that plaintiff s face (Guiding Principle 26), and called upon home states to keep their courts open to plaintiff s from abroad. Ruggie recommended (Protect, Respect and Remedy, para. 91) that "*States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access to justice, including for foreign plaintiffs – especially where alleged abuses reach the level of widespread and systematic human rights violations*." See also Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, 1, 20 (The UN Guiding Principles on Business and Human Rights: Foundations And Implementation, 2012).

[15] See Patricia H Werhane, *Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations Have Moral Rights?* 1 Business and Human Rights Journal 5 (2016).

[16] *Ibid*. at 6.

[17] Resolution A/HRC/RES/26/9 on 26 June 2014 (<www.ihrb.org/pdf/G1408252.pdf>, accessed 12 June 2016). The proposal was highly divisive and opposed by the US as well as the EU member states.

[18] www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Draftreport.pdf; (accessed 26 June 2016).

[19] However, it could be argued that states which remain the primary subjects of international law are able to transform non-state actors to subjects of international law. See for further details Eric De Brabandere, *Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility* 4 Human Rights and International Legal Discourse 66, 80 (2010).

extent directors and officers of companies could be addressed by internationally acknowledged fundamental rights. So far reality has shown that in extreme cases only directors are at risk to be prosecuted, for example in case of committing international crimes (genocide, crimes against humanity, war crimes). In most other cases of human rights violations, neither companies nor their directors are directly bound by international conventions, resulting in the fact that they cannot be held accountable by international or regional human rights courts.

Another approach to overcome the potential lack of applicable international rules consists in the development of generally accepted guidelines having more than only a voluntary impact on businesses. The most well know example is the *OECD Guidelines for Multinational Enterprises*,[20] a comprehensive set of government-backed recommendations on responsible business conduct. The Guidelines address multinational enterprises operating in or from adhering countries and provide principles and standards for responsible business conduct.

To support the effective functioning of these Guidelines, governments adhering to them have specific obligations. They are obliged to set up *National Contact Points* (NCPs) which then have to promote the effectiveness of the Guidelines by handling enquiries and contributing to the resolution of issues that arise from the possible non-observance of the Guidelines.[21] NCPs report to and meet regularly with the OECD Investment Committee and its Working Party on Responsible Business Conduct; the efforts attempt to reach a minimum level of harmonisation in the application of the Guidelines. In addition to the work of NCPs and the specific instance mechanism (built-in grievance mechanism), sector-specific initiatives based on the Guidelines are being developed and used to promote responsible business conduct in five specific sectors.[22]

In the field of mineral supply chains, the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* was published in order to provide detailed recommendations to assist companies in their efforts to respect human rights. In August 2012, the US Securities and Exchange

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[20] The *OECD Guidelines for Multinational Enterprises* (updated in 2011 for the fifth time since they were first adopted in 1976) are far reaching recommendations for responsible business conduct that 44 adhering governments – representing all regions of the world and accounting for 85% of foreign direct investment – encourage their enterprises to observe wherever they operate; covered are areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.

[21] A recent example was a spyware-company (Gamma International) having been the subject of a complaint filed with the OECD UK NCP alleging that the company's malware was sold to Bahrain in 2009 and then used to violate the rights of citizens critical to the government (see for further details: https://www.gov.uk/government/publications/uk-ncp-final-statement-privacy-international-and-gamma-international-uk-ltd, accessed 23 June 2016); for a general assessment see Kaufmann (n 11), at 750–752.

[22] (i) Agricultural supply chains (increase of demand for food may lead to ethical dilemmas), (ii) financial due diligence (multi-stakeholder project to develop guidance), (iii) textile and garment supply chains (strengthen regulation of global supply chains), (iv) extractive sector stakeholder engagement (user guide on how to undertake due diligence in engaging with stakeholders for mining, oil and gas enterprises), (v) mineral supply chains.

Commission (SEC) recognised this OECD Guidance as an international framework for due diligence measures undertaken by companies that are required to file a conflict minerals report under the final rule implementing sec 1502 of the Dodd-Frank Act.[23]

In the past, experience has shown that manifold initiatives for social corporate governance (corporate social responsibility, CSR) were not sufficiently suitable to become a basis for legal success in such cases. Nevertheless, a change seems to appear at the horizon: During the next few years the most recent EU initiatives in the CSR field[24] might reach the same level of influence as the mentioned OECD Guidelines[25] since the European Commission is likely to insist on national regulators to implement at least the most basic CSR-principles into national law; consequently, the EU-domiciled parent companies of multinational enterprises will have to comply with the respective principles.

B. Third Party Effects of Human Rights

As mentioned, human rights contained in multilateral agreements cannot be invoked by individuals against (private) companies. This fact has been acknowledged as conceptual weakness already some decades ago. The *German Constitutional Court* appears to have been the first court overcoming the traditional understanding of human rights and implementing a theory called "Drittwirkung" (third party effect).[26] Based on this theory, human rights can have an impact on purely private relations. Consequently, in case of violation of human rights by a subsidiary of a corporate group, on the one hand the question arises whether human rights contained in the EU Treaty, in the European Convention on Human Rights or in national constitutions are self-executing; on the other hand it must be assessed whether human rights are directly

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[23] SEC 17 CFR PARTS 240 and 249b (August 2012), http://www.sec.gov/rules/final/2012/34-67716.pdf. Several complaints have been lodged against the Dodd-Frank Act, amongst others related to the disclosure in connection with raw materials (see http://fas.org/sgp/crs/misc/R43639.pdf and decision by Court of Appeals, https://www.sec.gov/rules/other/2014/34-72079.pdf, accessed 23 June 2016; furthermore, public Statement of SEC, http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994). In general, the obligation exists to file reports under Securities Exchange Act of 1934, as amended, particularly Section 1502 (conflict minerals) and Section 1504 (disclosure of payments by resource extraction issuers); see also http://www.sec.gov/News/Article/Detail/Article/1365171562058#.VRfvMeExDYs (all websites accessed 23 June 2016).

[24] See for details: ec.europa.eu/growth/industry/corporate-social-responsibility/ (accessed 23 June 2016); for a detailed discussion of the legal quality of CSR-rules see Weber, n 1, at 89–91.

[25] See also for further information, https://friendsoftheoecdguidelines.files.wordpress.com/2014/11/eu-proposal-conflict-minerals-tradoc_152227.pdf (accessed 23 June 2016). The proposal is not very strict; e.g. Art. 7 No. 4 proposes *Disclosure obligations* based on that importers of minerals or metals would have to "*publicly report as widely as possible, including on the internet and on an annual basis on its supply chain due diligence policies and practices for responsible sourcing*."

[26] The legal doctrine called "Drittwirkung" (third party effect) in the tradition of German law applies public law provisions such as fundamental rights to private law relations such as contracts and is rather complex coming with equally complex interpretations. See Eric Engle, *Third Party Effect of Fundamental Rights (Drittwirkung)* 5 Hanse Law Review 165 (2009).

applicable in private relations or whether these rights are at least indirectly relevant for the concretisation of civil law obligations.[27]

An affirmative assessment is likely to be prevailing if legal obligations in private law interactions of private persons require compliance with human rights guaranteed by the applicable constitutional law (direct effect) or if human rights are acknowledged by the judge as interpretative guides when assessing the private rights and duties of individuals (indirect effect). By way of example in a group companies' context, the parent company would be obliged to see to it that the exercise of the freedom of expression by the employees of a subsidiary is respected (direct effect) or the fiduciary duty in an employment agreement must be interpreted on the light of the human rights (indirect effect).

A good example for such an approach exists in Switzerland: Even if the Constitution does not know a specific provision that would require a legal entity or its management to respect human rights in their activities abroad, and, therefore, no constitutional norm is visible to directly hold parent companies accountable if their subsidiaries violate human rights, the mentioned third party effect could be invoked based on the following (appropriate) legal "bridge": Art. 35 (3) of the Federal Constitution reflects the principle that fundamental rights also have an indirect impact on private enterprises. This provision has not yet been applied in the context of violation of fundamental rights by subsidiaries of Swiss enterprises but its basic message could eventually be made fruitful.

C. Obstacles for Access to Judicial Remedy

Apart from the problems related to the application of human rights in the context of private relations, access to judicial remedy is the second important discussion topic in the liability debates. A recent report summarises the main obstacles for access to judicial remedy in a comprehensive way.[28] Due to the complex corporate structures used to organise business conglomerates within the transnational context the access to justice for victims is often exceptionally difficult and sometimes even impossible.

Broadly discussed legal barriers – originating from traditional legitimate rooting like the separate legal personality and the limitations on extraterritorial jurisdiction

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[27] The application of fundamental rights to contractual or non-contractual relationships between private parties can be based on constitutional law and/or further determined by other legislation to allow for horizontal application. Court practice and the application of fundamental rights by judges substitute and complement the enforcement in case of absence of direct textual requirements of horizontality within the applicable tort or contract law. In principle, the idea of fundamental rights as private liberties involves not directly the state since those rights protect partially also individual privacy in relation to public authorities. However, the notion of third-party effects requires an active role of the state to create a guarantee of individual rights.

[28] See Gwynne Skinner et al, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, International Corporate Accountability Roundtable, 68 et seq. http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf (December 2013, accessed 23 June 2016).

– hamper plaintiff´s access to justice; in addition those challenges are escalated in combination with evidentiary complicacies and the burden of proof. As a result victims encounter difficulties because there is no clarifying legislation for parent company liability. In consequence, it becomes difficult to construe that the parent company of a multinational enterprise domiciled in its forum state bears responsibility for the harm carried out by its subsidiary in the host state. Additionally, inadequate legislation and enforcement procedures facilitate that the subsidiary remains outside of the reach of its home state courts´ jurisdiction.

Since the international human rights conventions are addressed to sovereign states, a binding commitment to comply with human rights does not exist for companies or individuals. However, recent approaches from international legal doctrine and partly also from court practice may lead to other perspectives. In addition, general public statements by companies regarding their commitment to respect human rights could also change the situation, namely justify the assumption that it would not be unjust or unfair to impose a duty of care on multinational companies for the activities of group entities, since such a commitment could evoke expectations by potentially affected employees.

D. Accountability Concepts

In view of the complex and often not transparent organisational structures of multinational enterprises making it difficult for victims of human rights violations to start legal actions, more attention should be paid to the accountability mechanisms. The request to act in a comprehensible and accountable manner can also be seen as a concretisation of the third pillar (*remedy*) of the *Ruggie* Framework.[29]

From a general perspective, accountability is the acknowledgment and assumption of responsibility for policies, actions, decisions, and products within the scope of the designated role. Therefore, accountability must be understood as a pervasive concept, encompassing political, legal, philosophical, and other aspects; each context can cause a different shade on the meaning of accountability. In view of the broad understanding of accountability, a differentiation into various types appears to adequate, namely moral, political, administrative, managerial, economic, legal, consequences-related and professional accountability.[30] Notwithstanding these facets the basic elements of accountability centre around the obligation of a person (the accountable) to another person (the accountee) according to which the former must give the account of, explain and justify actions or decisions taken against criteria of the same kind.

Generally, any form of accountability is based on the assumption that objectives and standards are available against which an action or a decision may be assessed. For the enhancement of accountability, the following three elements have been developed in the literature:[31] (i) Standards need to be introduced which hold executives and

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[29] See Skinner et al, n 28.

[30] Rolf H Weber, *Realizing a New Global Cyberspace Framework*, 78 (Springer 2015).

[31] Allen Buchanan and Robert O Keohane, *The Legitimacy of Global Governance Institutions* in

governing bodies accountable at least on the organisational level. (ii) Information should be more easily attainable to accountability-holders and information flows should become rather active than passive. (iii) Accountability-holders must be able to impose some sort of sanction, thus, attaching cost do the failure of meeting the standards; such kind of "sanctioning" can have a preventive effect inducing the addressees to comply with the standards.

In the meantime, the UNGP have further refined the accountability principle which reads in GP 21 as follows:[32]

"In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality."

The concept of accountability is a commonly used one within companies. All kinds of reporting standards and organisational provisions recognise the importance of internal accountability for achieving the defined objectives. Whenever a company is publicly listed and their shares are traded at any kind of public exchange certain duties come into play to allow for the control of their compliance which would be impossible without proper chains of command and responsibility. In practice, in respect of potential conflicts with human rights the enterprises tend to move the responsibility always from the centre of the group; but internal information-gathering and accountability systems are vital to ensure that businesses meet their responsibility to respect human rights in practice and enable an externally enforceable accountability if allegations of human rights abuse become viable.

In connection with GP 21 the 'Interpretative Guide' (2012) lists the following questions to ask:

– *Do we have the necessary internal communications and reporting systems to gather all relevant information on how we address our adverse human rights impact? If not, what additional systems do we need?*

Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law,* 25, 51 (Springer 2008); Rolf H Weber, *Shaping Internet Governance: Regulatory Challenges*, 147 (Springer 2009).

[32] In 2012, the *United Nations Human Rights Commission* published its *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (accessed 23 June 2016), which was designed to support the process of effective implementation of the UNGP while focusing on the corporate responsibility to respect human rights.

- *What different groups can we envisage we may need to communicate to and about what types of issues?*
- *What means of communication do we need for those different groups, taking account of how they can access information, and what will be the most effective? Should those communications be driven by a set timetable, be in response to particular events or both?*
- *What processes do we have in place to make reasoned and defensible judgements on when we should communicate publicly?*
- *If our operations or operational contexts pose significant risk to human rights, how do we provide formal public reporting on how we address that risk?*
- *If we are not in a context of heightened human rights risk and are not required to report publicly on our human rights performance, would there nevertheless be other benefits to formal public reporting?*
- *How will we ensure that our communications do not pose a risk to individuals inside or outside the enterprise?*
- *How might we solicit feedback on our public communication to test how it is viewed and see whether there are ways to improve it?*

Another example addressing accountability can be derived from GP 29: an effective and reliable grievance mechanism depends on senior-level oversight and accountability within the company and must avoid any conflicts of interest. Apart from sound internal procedures and senior management´s attention and accountability for human rights risks, management staff training at all levels and performance indicators related to human rights policies and procedures within the assessments of staff will deliver an important contribution to an optimised level of compliance with the GP.

III. Legal Approaches Based on the Extraterritoriality Concept

The previous discussions in respect of the parent companies' liability usually concentrated on questions related to the extraterritoriality concept. As shown hereinafter, this approach is not the most convincing concept.

A. Alien Tort Statute

From a procedural perspective the most important (but also the most contested) legal instrument for foreign direct liability actions is the well-known Alien Tort Statute (ATS) in the United States (U.S.). The main principles of the Alien Tort Statute, not having clear equivalents in civil law countries, can be described as follows: the *Alien Tort Statute* (ATS) refers to 28 U.S.C. § 1350 which grants jurisdiction to Federal District Courts "*of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States"*. An ATS-lawsuit against a natural or legal person could be based on any harm resulting from a violation of international

law, no matter where the harm originally occurred or who is actually responsible, as long as the plaintiff serves process in U.S. territory.

The U.S. jurisprudence to the Alien Tort Statute is already extensively described in the legal literature. In the past, however, court practice to corporate ATS cases has not been very coherent, for example due to the fact that many cases have been settled at an early stage. Recently, some corporate ATS cases have proceeded to trial, partly resulting in a verdict for plaintiffs on ATS grounds. Possibly, the newest developments in the field of corporate litigation seem to paint a bleaker picture for future ATS-based foreign direct liability cases since an overall tendency for courts closing the door for plaintiffs to use the ATS to police the activities of non-state actors occurring outside of the United States can be diagnosed.[33] Reasons are the narrowing of the scope of corporate ATS cases or the requirement of exhaustion of local remedies.

In the United States, most lawsuits based on harms as a result of violations of human rights protected by international law against companies have proceeded in U.S. Federal Courts under the ATS for violations of customary international law or under State tort law.[34] In 2013 the U.S. Supreme Court in the controversially debated case *Kiobel v. Royal Dutch Petroleum*[35] held[36] that the presumption against the extraterritorial application of U.S. law applies to the ATS, which can only be overcome if the claim "*touches and concerns*" the U.S. "*with sufficient force*". The Supreme Court asked whether and under what circumstances the ATS allows courts to recognise a cause of action for violations of the law of nations occurring within the territory of a sovereign state other than the U.S. *Kiobel* applied a presumption against extraterritoriality to claims arising under the ATS arguing that the claims at issue in the case were not actionable because they were brought by foreigners against foreigners for conduct abroad.[37]

Furthermore, the Supreme Court held that the ATS is subject to a "*presumption against extraterritoriality*" and that a foreign corporation with a "*mere presence*" in the U.S. cannot be sued under the ATS for allegedly aiding and abetting violations of customary international law that take place overseas. Because the ATS enables U.S. Federal Courts to establish jurisdiction over business entities, its flexible inter-

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[33] For further details see Enneking, n 9, at 121.

[34] Skinner et al, n 28, at 5.

[35] *Kiobel v. Royal Dutch Petroleum*, 133 S Ct 1659 (2013). In *Kiobel*, Nigerian nationals (expatriates) who had been granted political asylum in the United States filed a claim in the Federal Court against a Dutch company for aiding and abetting the Nigerian government in committing a number of egregious human rights violations including torture and crimes against humanity.

[36] For a detailed discussion of the *Kiobel* case see for example Sarah H Cleveland, *After Kiobel* 12 Journal of International Criminal Justice 551 (2014); Gwynne Skinner, *Beyond* Kiobel: *Providing Access to Judicial Remedies for Corporate Accountability for Violations of International Human Rights Norms by Transnational Corporations in a New (Post-Kiobel) World* 46 Columbia Human Rights Law Review 158 (2014): Ernest A Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After* Kiobel 64 Duke Law Journal 1023 (2015); Ross J Corbett, *Kiobel, Bauman, and the Presumption Against the Extraterritorial Application of the Alien Tort Statute* 13 Northwestern Journal of International Human Rights 50 (2014).

[37] *Kiobel v. Royal Dutch Petroleum*, 133 S Ct 1659 (2013), 1669.

pretation would facilitate the application of the UN Guiding Principles and, therefore, promote corporate responsibility. Some voices see ATS as an effective way that allows States to implement the UN Guiding Principles' protect, respect and remedy framework.[38] Even if this approach is worth to be deepened, a clear legal foundation is not yet available.

B. Forum Non Conveniens

Referring to the doctrine of *forum non conveniens* courts can prevent a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is the more eligible venue for the case.[39] This situation can occur because of the location of the parties or witnesses, as well as evidence; additionally, a local court knows the local law better which often has to be applied.[40] To raise this objection is quite common in cases against companies while trying to dismiss a case under the theory that it should be filed in the other state.

Mostly in common law countries, the *forum non conveniens* doctrine extends the discretion to a court to accept proceedings notwithstanding a close connection to another forum that could be more suitable for the interests of all the parties.[41] In reality courts often prefer to avoid additional workload; the basic idea is that the case is actually filed in a more convenient court. However, statistics suggest that almost all cases dismissed on *forum non conveniens* grounds in the U.S. are never refiled in the alternate forum, leaving the victims without any remedy.[42]

States could enact laws that allow hearing complaints and enforcing remedies against all corporations operating or based in their territory; however, barriers must be in place to protect companies against frivolous claims.[43] *Forum non conveniens*

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[38] See also Mirela V Hristova, *The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility* 47 University of San Francisco Law Review 89 (2012).

[39] This section is based on the more detailed analysis of Christine Kaufmann, *Holding Multinational Corporations Accountable for Human Rights Violations: Litigation outside the United States*, in Justine Nolan & Dorothée Baumann-Pauly (eds), *Business and Human Rights – Challenges and Opportunities,* at 253 seq. (Routledge 2016); see also Erin F Smith, *Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses* 44 Columbia Journal of Law & Social Problems 145 (2010).

[40] Skinner et al, n 28, at 6.

[41] Judgment of Lord Kinnear in *Sim v. Robinow* 19 R 665, 668 (1892): " *... the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice*". *Spiliada Maritime v. Cansulex* 3 WLR 972, 985 (1986), A.C. 460 (1987).

[42] Skinner et al, n 28, at 6. John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (2008) United Nations Human Rights Council, A/HRC/8/5, para. 89.

[43] The European Court of Justice has confirmed that national courts in an EU member state may not dismiss actions against companies domiciled in that state on *forum non conveniens* grounds; *Owusu v. Jackson* ECR-I-1283 (2005). However, the latest revision of the Brussels I Regulation reintroduces some discretion for member state courts to stay proceedings in the interest of "proper administration of justice", Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December

constitutes always a potential barrier to victims seeking judicial remedy in the parent company´s home country. A possible solution could be a duty for the plaintiff who wants to defeat a *forum non conveniens* motion, forcing him to demonstrate that it would be difficult to obtain adequate remedies in another state.[44]

Recently, the *forum non conveniens* doctrine was applied in Canada: in 2012 the Supreme Court of Canada identified several factors allowing to determine the place of jurisdiction and concluded that the court may assume jurisdiction if it takes into consideration the impact of a transfer on the conduct of the litigation, the possibility of conflicting judgments and the principle of "*comity and attitude of respect for the courts and legal systems of other countries*".[45] The U.S. Supreme Court declined to discuss this doctrine in the already mentioned ATS case, *Kiobel v. Dutch Petroleum*.[46] In the United Kingdom, deviating from the previous classic interpretation,[47] the House of Lords deferred the application of the *forum non conveniens* doctrine to the European Court of Justice; thereafter, this court, based on the Brussels Convention,[48] stated that national courts would have jurisdiction over all persons who are domiciled in their jurisdiction.[49] However, the latest revision of the Brussels I Regulation now provides member state courts with discretion to stay proceedings in the interest of

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2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 No. L351, 1 (in force since 10 January 2015, Art. 33 and 34). In Australia, defendants must prove that the forum is "clearly inappropriate". *Voth v. Manildra Flour Mills* 171 C.L.R. 538 (1990 H.C.A.). See also Ruggie, n 42, para. 91.

[44] Relevant UK case law: (i) *Lubbe v. Cape* UKHL 41 (2000) as a conflict of laws case is also significant for the question of lifting the corporate veil in relation to tort victims. It was assumed that it is unlikely that legal representation for the claimants would be available despite the fact that South Africa was the more appropriate forum for hearing the claim. The expert evidence suggested that a denial of justice would occur due to the lack of procedures in South Africa to accommodate multi-party actions. This meant that lifting the stay was appropriate and the action continued in the English courts. In this case it was alleged, and postulated by the House of Lords, that in principle it is possible to show that a parent company owes a direct duty of care in tort to anybody injured by a subsidiary company in a group. (ii) *Chandler v. Cape* EWCA Civ 525 (2012) addresses the availability of damages for a tort victim from a parent company in circumstances where the victim suffered industrial injury during employment by a subsidiary company because the parent company had had actual knowledge of the subsidiary employees' working conditions.

[45] In *Van Breda v. Village Resorts (*two Ontario residents killed at a resort in Cuba) the Ontario Court of Appeals confirmed that the court was permitted to exercise jurisdiction under *forum necessitatis* because "the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity"; *Van Breda v. Village Resorts* 98 O R 3d 721 Can Ont C A (2010). The Supreme Court of Canada concluded that because the contract was entered into in Ontario, there was presumptive jurisdiction and the defendant was unable to show that Cuba was a more appropriate forum; *Club Resorts v. Van Breda* 1 S.C.R. 572 (2012 Can.).

[46] *Kiobel* 133 S Ct, 1672.

[47] The leading case is *Lubbe v. Cape* CLC 1559 (CA 1998), 1 WLR 1545 (HL 2000).

[48] Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments of Civil and Commercial Matters, now replaced by Council Regulation (EC) No. 44/2001 of 22 December 2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12/1.

[49] *Owusu v. Jackson* ECR 1383 (2005).

"proper administration of justice".[50] Finally, Australia still applies quite strict requirements; denial of jurisdiction can only take place if the Australian forum is "*clearly inappropriate*".[51]

C. Forum Necessitatis

The *forum necessitatis* doctrine[52] is better known in civil law jurisdictions, allowing a court to assert jurisdiction even if the usual conditions are not fully met as long as no other forum providing a fair trial is reasonably available.[53] Cases in which a plaintiff can successfully evoke that he is a candidate for *forum necessitatis* might prevent a denial of justice.[54] *Forum necessitatis* stands for a legal doctrine "*which allows proceedings to be brought when there would otherwise be no access to justice*".[55] Basically, whenever a court could refuse jurisdiction because another forum is more appropriate this should not lead to a situation in which there is in consequence no other competent forum that might hear the case. Consequently, courts should accept jurisdiction to prevent a denial of justice, provided that (i) some connection with the forum state and (ii) unsurmountable obstacles preventing the plaintiff from bringing proceedings abroad are given; there might also be circumstances in which the foreign court would not guarantee a fair trial.

The European Commission considered adding a *forum necessitatis* provision in Article 26 of the Proposal for a *Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Brussels I Regulation).[56] However, the Commission appar-

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[50] Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 No. L351, 1 (in force since 10 January 2015), Art. 33 and 34.

[51] *Voth v. Manildra Flour Mills* 171 C.L.R. 538 (1990); see also *Duffy v. Broken Hill Proprietary* 1 VR 428 (1997).

[52] Chilenye Nwapi, *A Necessary Look at Necessity Jurisdiction* 47 University of British Columbia Law Review 211 (2014).

[53] Kaufmann, n 39 at 254–258.

[54] Stephanie Redfield, *Searching for Justice: The Use of Forum Necessitatis* 45 Georgetown Journal of International Law 893 (2014). On 18 December 2015 the Dutch Court of Appeal at the Hague decided against companies of the Shell group that a case for disclosure of documents can be submitted at the domicile of the parent company (*Eric Barizaa Dook/Vereniging Milieudefensie v. Royal Dutch Shell et al.*, cases no. 200.126.843 and 200.126.848).

[55] Commission Green Paper on the Review of the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM 2009 175 final, 4 (April 2009).

[56] The Commission Proposal (COM(2010) 748/3) on the review of Brussels I proposed to establish two additional fora: suing a non-EU defendant under certain conditions at the place where moveable assets belonging to him are located, or where no other forum is available and the dispute has a sufficient connection with the Member State concerned; Commission Proposal (COM(2010) 748/3) for a regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2010/0383 (COD), December 2010 (amendments to Brussel I-Regulation 44/2001), http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf (accessed 23 June 2016).

ently acknowledged that international courtesy is of greater significance than justice for applicants with barriers of access.[57] Switzerland adopted the doctrine in Article 3 of its Federal Code on Private International Law which provides for the following: "*If this Code does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial or administrative authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction*".

D. Interim Conclusion

As outlined, the future developments in U.S.-based foreign direct liability claims is uncertain in the light of the current controversies existing over the feasibility of corporate liability under the ATS. A tendency towards narrowing the window of opportunity for ATS-based claims against non-state actors cannot be overlooked.[58] However, this trend does not coincide with the end of transnational litigation against multinational corporations since alternative legal avenues are available. If civil law claims against multinational corporations revolve around alleged violations of domestic legal norms rather than around alleged violations of international norms, the applicable regulatory framework would become more foreseeable and predictable.

Obviously, in such a perception the present domestic legal norms would have to encompass those liability provisions which are adequate in the context of human rights violations of group companies. In particular, based on an appropriate accountability understanding the duties of the mother companies should enshrine behavioural rules that also extend to subsidiaries. Starting foreign direct liability cases on this legal basis could constitute certain comparative advantages,[59] particularly if the legal environment for an appropriate liability regime is favourable; this approach must now be assessed in more detail.

IV. Legal Approaches Based on Corporation Law

Is it possible to sue the parent company if a subsidiary being a separate legal entity infringes human rights somewhere in the world? In contrast to common law countries,[60]

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[57] Redfield, n 54, at 910 et seq.

[58] Enneking, n 9, at 267 seq.

[59] Enneking, n 9, at 272; idem, *The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case* 10 Utrecht Law Review 44 (2014); idem, *Multinationals and Transparency in Foreign Direct Liability Cases – The Prospects for Obtaining Evidence under the Dutch Civil Procedural Regime on the Production of Exhibits* 3 Dovenschmidt Quarterly 134 (2013); see also Radu Mares, *A Gap in the Corporate Responsibility to Respect Human Rights* 36 Monash University Law Review 33 (2010).

[60] For further details see Sykes, n 9, 2161 et seq. and Bethany J Spielman, *The Alien Tort Statute as Access to Justice, Post Kiobel: When the International Norm Prohibiting Nonconsensual Human Experimentation is Violated* in Charles Sampford et al (eds), *Rethinking International Law and Justice,* 179 (Ashgate 2015).

many obstacles for a successful liability claim exist in civil law countries. In principle, two different approaches can be distinguished: (i) direct liability doctrines are asking whether there is a duty of care owed by the management of the parent company, and (ii) as an alternative the question arises whether the corporate veil can be pierced.[61] Thereby, the fundamental question must be answered "*whether and to what extent the use of the tort system to promote socially responsible behaviour in internationally operating business enterprises is both desirable and legally and practically feasible*".[62]

A. Duty of Care: Negligence and Vicarious Liability?

1. Concept of Duty of Care

In a situation, in which the parent company's business decisions do not contribute to a direct violation of human rights or in which no proper evidence for a violation is available, a *duty of care* can be invoked if the parent company has not sufficiently supervised the subsidiary.[63] The *duty of care* binding directors and officers of a company can be defined as mandatory task to apply the amount of care that people of ordinary prudence would use in the decision-making process under similar circumstances; furthermore, all material information that is reasonably available must be considered.

The *duty of care* defines the necessary standard of conduct in the fulfilment of the respective corporate roles; the requirements are to be interpreted on the basis of an objective business rationale but not in an attempt to achieve extraordinary high standards. Therefore, depending on the given circumstances, the *duty of care* can encompass manifold elements taking into account standards for aiding and abetting liability. Assessing the notion from a general perspective it can be said that the responsibility to act according to the local laws and respect the human rights remains at the level of the subsidiary; the parent company has to organise adequate reporting procedures and to monitor the compliance based on those reports.

The *duty of care* also includes an obligation to implement and maintain principles of corporate governance with an appropriate reporting system.[64] In this context, the question arises whether a responsibility to act can be construed in such a situation. This might be possible based on negligence law recognising a number of exceptions

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[61] Skinner, n 6, additionally distinguishes three other approaches: (i) agency theory, (ii) enterprise liability, and (iii) due diligence. In our opinion due diligence is a corollary when a parent company takes its duty of care seriously and the outcome could be its direct liability; therefore, due diligence does not need to be treated as a separate approach.

[62] Enneking, n 9, at 56.

[63] See also Nora Mardirossian, *Direct Parental Negligence Liability: An Expanding Means to Hold Parent Companies Accountable for the Human Rights Impacts of Their Foreign Subsidiaries* (SSRN: <http://ssrn.com/abstract=2607592>, accessed 23 June 2016) arguing that parent companies with high levels of control or supervision of their subsidiaries owe a direct duty of care to those whose risk of injury is foreseeable.

[64] See Christoph B Bühler, *Regulating Corporate Governance following the "Swiss Muesli" Recipe*, Schweizerische Zeitschrift für Wirtschafts- und Finanzrecht 141, 142 (2013).

to the principle of no responsibility for third party abuses.[65] To invoke a *duty of care* of the parent company implies assuming an act or omission by this company constituting a violation of the obligation to perform due diligence in the execution of control of the subsidiary; therefore, based on the relevant national liability law the conduct of the parent company must to be assessed.[66]

2. Scope of Duty of Care

An important aspect of the liability discussions concerns the scope of duty of care. Thereby, it should not be underestimated that the assumption asserting the parent company as responsible entity just based on vicarious liability goes quite far.[67] In addition, this type of *duty of care* is not identically applied in civil law as in common law jurisdictions where it is more likely perceived as a general statutory duty,[68] i.e. this instrument might be less powerful in a civil law environment. Depending on the final outcome of the Canadian court proceedings outlined in the introduction,[69] however, the notion of a reasonably foreseeable damage could eventually be widened justifying the imposition of a liability based on the principles of fairness and reasonableness.[70]

Furthermore, the so-called Business Judgment Rule as applied in many Continental-European countries shields managers if they are able to prove that everything necessary was done to avoid potential harm; in the meantime court practice and legal doctrine have developed basic yardsticks for the interpretation of the Business Judgment Rule. In particular, the principle of due diligence can be fruitful in assessing the scope of the duty of care.

In the common law environment the *duty of care* might be established when (i) the human right violation was "*reasonably foreseeable*" (proper conduct assumed) and (ii) a certain degree of "*proximity*" exists between the company and the plaintiff.[71] Nevertheless, the *duty of care* might be limited to the subsidiary and, therefore, stays within its place of jurisdiction, while profits could be transferred around the world; however, it is not unlikely that local activities infringing human rights are taking place within a multinational company even if good governance standards are correctly established and fulfilled. Generally, the facts are to be analysed from case to case; any kind of *automatic* liability or a shift of the burden of proof appears not to be reasonable.

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[65] See also Mares, n 59.

[66] See *Chandler v. Cape* EWCA Civ 525 (2012).

[67] Based on the doctrine of vicarious liability companies may be held liable for the acts of their employees, agents or subsidiaries or any person for whom the organisation is found to be responsible.

[68] For an overview of foreign direct liability cases during the last twenty years (*Bhopal* litigation, *Unocal* case, *Cape* case, *Apartheid* litigation, *Trafigura* case, *Shell* cases) see Enneking, n 9, at 93 et seq.

[69] See *Choc v. Hudbay Minerals* ONSC 1414 (Can. 2013).

[70] See also Kaufmann, n 39, at 260.

[71] *Donoghue v. Stevenson* UKHL 100 (1932); a dead snail in the bottle created the modern concept of negligence by establishing general principles it which case one person would owe another person a duty of care.

As just seen, a major legal issue concerns the *duty of care* which parent companies must exercise in supervising the affairs of their subsidiaries. In the Netherlands[72] the District Court of The Hague has taken a relatively restrictive approach to the scope of a parent company's *duty of care* if the parent fails to oversee the implementation of standards set for the subsidiary.[73] Nevertheless, the Dutch Court left the door slightly open for adopting similar cases by taking into account that people affected by human rights violations often face difficulties in bringing a complaint in the country of the abuse.[74] The UK courts also seem to be more open to accept jurisdiction and to judge on the merits of a potentially negligent behaviour if a certain relation between the human rights violation and the activities of the parent company is proven.[75]

Summarising the above considerations, the conclusion can be drawn that the concept of the *duty of care* appears to be a suitable legal instrument to tackle to problems of human rights' violations committed by subsidiaries of group companies that allow holding the parent company liable. Thereby, the above developed elements of an appropriate accountability framework should be taken into consideration. Such kind of concept, if applied in view of the given circumstances, opens the possibility to design an appropriate governance mechanism of surveillance to be complied with by the parent company without extending the liability risk too far.

3. Case Study: Duty of Care in Swiss Civil Law

Civil law regulates the relations between parties and allows an injured party to obtain redress for damages caused by natural or legal persons. Additionally, civil law encompasses various regulations, which could prevent the attribution of liability of companies for human rights violations. The Swiss statutory duty of care for directors (Article 717 para. 1 CO) solely relates to the protection of the company's interests.

A company is liable for wrongful acts caused or committed by its senior management (Article 722 CO) or its employees (Article 55 CO) as part of its business activities in Switzerland or abroad. Wherever the legal separation between parent company and subsidiary (corporate veil) applies, the separate legal entity has a limited liability,

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[72] See for the Netherlands Nicola Jägers and Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands* 33 Brooklyn Journal of International Law 833 (2009).

[73] *A F Akpan v. Royal Dutch Shell* HAZA 09-1580 (The Hague 2013). But the Dutch Court assumed jurisdiction to hear the claim against both the Dutch parent company and the foreign subsidiary (see also the comparable decision of the Dutch Court of Appeal, cited in n 54). The Court ruled under English/ Nigerian law, that there is no general duty of care for a parent company to prevent harm caused by a local subsidiary. Such a duty could only be assumed, if it would be it is foreseeable for a parent company that the victims could suffer harm. Additionally, the legal test of 'proximity' between the parent company and the plaintiff must be met, which was not given in this case. However, the Court ruled that Shell Nigeria was liable.

[74] See also Kaufmann, n 39, at 253, arguing without the word "*slightly*".

[75] See *Bodo Community v. Shell Petroleum Company of Nigeria* EWHC 1973 (TCC 2014). This case did not proceed to trial on the merits since the parties agreed on a settlement after the court indicated that the case could be heard (see Enneking, n 7, at 125/26).

even if the parent company owns 100 percent of the shares of a subsidiary.[76] Therefore, the parent company cannot be held liable for the illegal activities of its subsidiary; in analogy to the legal consequences due to a breach of contract only the indented legal entity can be held responsible by the other party. The exceptions to this rule, like the abuse of trust liability, are interpreted very restrictively by the Swiss Federal Court.[77] Swiss law provides victims of human rights violations no easy way to make the parent company of a group of companies liable for violations of its subsidiary.

In Swiss law, the general guiding principles for governance are established in Article 717 para. 1 CO at a relatively high level of abstraction; reference is made to the *duty of care* to be complied with by the board of directors and the management board. The interpretation of this notion leaves ample room for an inclusion of the requirement to have suitable subsidiaries' governance and surveillance mechanisms implemented on the level of the parent company. This interpretative direction can also be underlined by the fact that the Swiss Code of Best Practice, being a self-regulatory framework that is to be compulsorily observed by companies having their shares quoted at the stock exchange and that has at least a strong moral impact on other companies, contains a clause which requires compliance with sustainability criteria since its last revision.[78]

Therefore, it seems to be quite unlikely that a Swiss court would assume a liability of a Swiss parent company based on a duty of care. However, if there are corporate policies in place promoting human right standards and asserting the compliance to those, a different appreciation could prevail. In combination with the proof that Swiss directors have been involved in delicate issues of the subsidiary and that a certain degree of proximity is given, direct liability could possibly be established.

B. Piercing the Corporate Veil

1. Rationale and Concept

One of the significant or the most basic rationales of corporate law is the separation of the company's legal personality from the legal personality of the controlling or owning persons. Therefore, courts are quite reluctant to lift the veil and some good arguments as well as extraordinary circumstances must be given in order to overcome this principle. Besides fraudulent purposes and abuses any deviation needs solid ground. Especially when operating in foreign jurisdictions with an unstable political

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[76] For an overview see Institut suisse de droit comparé, *Gutachten über gesetzliche Verpflichtungen zur Durchführung einer Sorgfaltspflichtsprüfung bezüglich Menschenrechte und Umwelt bei Auslandaktivitäten von Unternehmen*, 40–60 (Lausanne 2013), available at http://www.ejpd.admin.ch/content/dam/data/bj/aktuell/news/2014/2014-05-28/gutachten-sir-d.pdf (accessed 23 June 2016).

[77] This view has also been confirmed by the Swiss Federal Tribunal, amongst other, in BGE 110 Ib 127. For further details see Rolf H Weber, *Schweizerisches Privatrecht II/4, Juristische Personen*, 188 (Helbing & Lichtenhahn 1998).

[78] See Economiesuisse, Swiss Code of Best Practice for Corporate Governance, September 2014, www.economiesuisse.ch/sites/default/files/downloads/economiesuisse_swisscode_e_web.pdf (accessed 23 June 2016).

and judicial environment it corresponds to good business practices to establish separate and legally distinct entities. In consequence, court decisions will always be very case-specific to balance the reasonableness of incorporating a separate entity while clamping down abuses.[79]

An assessment of the corporate relationship between parent and subsidiary validates the degree of control executed by the parent influencing the activities of its subsidiary. Criterion and indication are the percentage of ownership,[80] directors serving on two boards or the chain of command.[81] Often things are even more complicated with various company layers in more than two different countries. If only a contractual relationship is in place it becomes even more difficult to hold the parent company liable for a possible careless selection of the contracting party (e.g. in case that a subcontracted security company has violated human rights).

To pierce the corporate veil means verifying that the parent company is liable for acts or omissions actually conducted by its subsidiary. Following a potential disregard of the basic principle of legal separation, because the real business conduct does not reflect that principle or even abuses the corporate form, the separation might be challenged. Whether a court will accept to pierce the corporate veil in a human rights case, where a foreign subsidiary has violated human rights, is hard to anticipate. Only based on the poof of a large financial involvement of the parent company and, in addition, its recognition of the human rights violation a decision by a court to ignore the corporate veil may be justified.

Obviously, each case regarding the infringement of human rights is different. Therefore, the application of certain criteria must be in relation to the specific setting. As a disadvantage the fact cannot be overlooked, that the parent might be stimulated to avoid too much control thereby reducing the knowledge that can be attributed to it about the business conduct of its subsidiary in order to strengthen the corporate veil. Possibly, in this connection parallel concepts could be developed as applied in relation the sanctioning of money laundering activities.

A potential liability of the parent company could also be based on good faith. An abuse of legal independence and exclusive liability of the subsidiary might lead to an accountability of the parent company itself or its executives if the behaviour corresponds to bad faith. Therefore, a parent company should take care in a meticulous way that the legal independence of the subsidiary is consistently guaranteed by equip-

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[79] Elkind and Tevel, n 4, at 90; for an analysis of proceedings for *piercing the corporate veil* in different legislations, see Karen Vandekerckhove, *Piercing the Corporate Veil: A Transnational Approach* (Kluwer 2007); idem, *Piercing the Corporate Veil* 4 European Company Law, 191 (2007).

[80] In para. 49 of *AEG v. Commission* (Case 107/82 [1983] ECR 3151) it is stated: "*As the court has already emphasised, particularly in its judgment of 14 July 1972 International Chemical Industries, Case 48/69 ([1972] ECR 619), the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company... in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.*"

[81] Olivier de Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law* in Philip Alston, *Non-State Actors and Human Rights,* 227, 277 (Oxford University Press 2005).

ping it materially and organisationally in a sufficient way in order to allow a proper performance of its duties at arm's length.

2. Case Study: Piercing the Corporate Veil in Swiss Civil Law

Even if the separation of legal entities is strict like in Switzerland (or in Germany)[82] it might be feasible to pierce the corporate veil when the local law at the domicile of the subsidiary has to be applied. But to let this happen, the jurisdiction at the domicile of the parent company must be given. The principle of separation between legal entities is – derived from Article 2 para. 2 of the Swiss Civil Code – infringed by a number of exceptions which can lead to a direct liability of the parent company and even the responsible director in the following cases:[83]

(i) In case of lack of business separation, whenever the independence of the subsidiary is disregarded by the parent company or generally within a group, meaning that the subsidiary and their interests are treated within the group similar to just a dependent branch then a third party might have the right to challenge the sole responsibility of such a subsidiary; as a result, obligations and liabilities of the subsidiary could be treated like being those of the parent company itself.[84] (ii) A very common situation is that directors of the parent company or other de facto (not formally appointed) executives are managing the subsidiary.[85] In those situations when the parent company is doing much more than just exercising its shareholder rights, it may be held responsible because of the direct or indirect interference in the administration and management of the subsidiary. (iii) Insufficient capitalisation leading to a subsidiary which is not independently viable may lead to a situation in which a third party may assume that the parent company will assist its subsidiary in a crisis and therefore will avouch obligations of the subsidiary as its own. (iv) Whenever confidence is inspired based on the behaviour and appearance of the parent company or the entire group a legitimate expectation of third parties can accrue that the parent company will step into the obligations of the subsidiary.[86] (v) Publicly expressed commitments of the group or its parent company with regard to the protection of human rights could be legally significant.[87]

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[82] "*The question of whether a German company has human rights due diligence obligations in relation to infringements of the legal interests of third parties abroad at all has to date not been answered in German law*." See Robert Grabosch & Christian Scheper, *Corporate Obligations with Regard to Human Rights Due Diligence – Policy and Legal Approaches* (December 2015) 59, (library.fes.de/pdf-files/iez/12167.pdf, accessed 23 June 2016).

[83] See Peter Forstmoser, *Schutz der Menschenrechte – eine Pflicht für multinationale Unternehmen*? in Angela Cavallo et al, *Liber amicorum für Andreas Donatsch*, 703 (Schulthess 2012).

[84] Mixing of the spheres of the parent and subsidiary means that the appearance of the unit may be awakened by external signs, such as identical or very similar or identical location, employees or phone numbers; BGE 137 III 550, E. 2.4, in which a mixing of spheres allowed the plaintiff to sue both the parent and the subsidiary.

[85] The Swiss Federal Tribunal held three representatives of a bank liable as *de facto* directors because they attended the board meetings regularly together; additionally, there was a financing and share purchase contract with the company in place (BGE 107 I 349).

[86] See BGE 120 II 331.

[87] Ruggie Principle 16 states that as the basis for embedding their responsibility to respect human

The outlined principles show that piercing the corporate veil is a difficult concept. Moreover, it appears to be a doubtful way to loosen the mentioned requirements since such an approach could incentivise the mother company to cut the personal ties to the subsidiary. Insofar, the more promising approach remains the application of the duty of care principle.

C. Challenges of Possible Developments

Whenever certain corporate agents do not respect human rights it is not unlikely that directors or management members based in the company's home country have been negligent in not taking measures to prevent this behaviour. But if the parent company has to pay for mistakes of a separate legal entity without clear evidence of an infringement of its human rights governance vicarious liability is given. Thereby, a potentially wide variety of shareholders owning a public corporation (without personal involvement) will finally have to bear the debt even if the responsibility principle would not call for blaming them or even making them the target of punishment.[88]

From a general perspective it must also be taken into account that the social utility of liability should have the capacity of influencing behaviour of those who act. Therefore, appropriate incentives to avoid harmful acts are to be set with the purpose to calibrate the activities within and around the subsidiaries. This idea corresponds to Ruggie's third pillar concept. The cost of good governance can be reflected in product prices when a company depends on the perception of the consumer market. This is less true for commodities and raw material; therefore, it should not be relied on market forces to influence behaviour based on buying patterns.

Accepting direct liability doctrines or making it easier to pierce the corporate veil may influence international activities. But with alternative strategies like using subcontractors as already implemented by many multinational companies the related risks can be reduced. Therefore, it appears to be much better to improve the jurisdictional situation locally in order to give injured persons access to court as well as rights to claim damages from those companies and people who factually operate and execute the business. However, given the political reality in many of the states in question a quick improvement of the situation cannot be expected. Anyhow, a reliable legal environment would not only grant access to justice but would have preventative effects.

Despite the commitment of the EU and its Member States in assuring their full support to the UNGP[89] and, therefore, in accepting the need for effective remedy in

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rights, companies should express their commitment to meet this responsibility through a statement of policy.

[88] Sykes, n 9, at 2182.

[89] See Council of the European Union, Joint Communication to the European Parliament and the Council: Action Plan on Human Rights and Democracy (2015–2019) 'Keeping human rights at the heart of the EU agenda', 29 April 2015, JOIN(2015) 16 final. Until June 2015, the UK, the Netherlands, Denmark, Italy, Finland, Spain and Lithuania have published National Action Plans to implement UN Guiding Principles. France, Germany, Greece Ireland, Latvia, Lithuania, and Slovenia have committed to developing a National Action Plan or were in the process of doing so. A more official resource is

favour of victims of human rights violations by appropriate judicial mechanisms, there are still many deficiencies. For example, the lawyers of the NGO 'Access to Justice' identified multiple obstacles which make it difficult for victims to access justice; the major categories of existing barriers to justice are classified as follows:[90]

- financial and procedural burdens are associated with pursuing remedies;
- implications of the corporate veil, combined with the absence of effective evidential disclosure requirements, may prevent the attribution of liability to individual companies within a multinational enterprise;
- insufficient clarity regarding the application of EU rules on private international law can contribute to legal uncertainty for victims.

Based on this analysis the NGO submits four recommendations for further development (areas of action),[91] namely (1) to tackle financial and procedural burdens,[92] to put in practice and clarify standards of human rights due diligence in civil justice systems across the EU;[93] to clarify EU rules regarding private international law (particularly Rome II Regulation),[94] and to have the EU exercising its powers to support the implementation by EU Member States of the third pillar of the UN Guiding Principles, which addresses access to remedy.[95]

Even if the elements of such kind of action plan seems to go quite far and do not internalise the described *duty of care* principle it should become possible to improve the legal status of persons who have suffered from human rights violations committed

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the respective website of the OHCHR: http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed 23 June 2016).

[90] Access to Justice Report, *EU's Business: Recommended Actions for the EU and its Member States to Ensure Access to Judicial Remedy for Business-Related Human Rights Impacts*, 5 December 2014, http://www.accessjustice.eu/downloads/eu_business.pdf, accessed 23 June 2016).

[91] Access to Justice Report, n 90, at 5 seq.

[92] The European Commission adopted in 2013 a Recommendation addressed to Member States regarding a European framework for collective redress to alleviate certain hurdles: European Commission, *Towards a European Horizontal Framework for Collective Redress* (Communication) COM(2013)401; European Commission, *Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights Granted under Union Law*, 2013/396/EU.

[93] The UNGP and the concept of human rights due diligence achieved global recognition: the European Commission's 2011 Communication on corporate social responsibility; the Organization of American States' 2014 Endorsement of the UN Guiding Principles; the International Organization for Standardization's ISO26000 social responsibility standard; the OECD's Guidelines for Multinational Enterprises; the African Union's 'Africa Mining Vision'; as well as the work of the ASEAN Intergovernmental Commission on Human Rights. However, a study found that in many cases existing due diligence regimes do not address human rights sufficiently and also are less common then due diligence regimes that address issues such as environmental protection, product safety and money laundering; Olivier de Schutter et al, *Human Rights Due Diligence: The Role of States*, 8 (International Corporate Accountability Roundtable et al. 2012).

[94] See for details Access to Justice Report, n 90, at 17 seq.

[95] *Ibid*. at 19.

by subsidiaries of big multinational groups. Nevertheless, the main approach must remain the concretisation of the responsibilities under a duty of care approach.

V. Outlook

Not only general frameworks such as the OECD Guidelines for Multinational Enterprises but also specific lawsuits attempting to hold a multinational parent company liable could have the objective to create a greater degree of awareness in corporate boardrooms and to make it likely that persons who have suffered real harm obtain a recovery.[96] Often the complaints based on human rights violations are addressing the rules for a socially and environmentally responsible behaviour, which multinational companies have committed to. However, due to the vague, not binding and not enforceable voluntariness of the international guidelines those efforts have difficulties to reach an adequate level of legal accountability.[97] In balancing what is politically feasible and what would represent a true improvement for victims, Olivier de Schutter[98] examines four suggestions: (i) to clarify the scope of the states' duty to protect human rights, (ii) to oblige states to present national action plans on business and human rights, the first and second options explored respectively, (iii) to establish a new mechanism to monitor compliance of corporate actors with human rights obligations, and (iv) to impose on states duties of mutual legal assistance in order to ensure adequate access to effective remedies for victims. Focusing on the aspect that states must be obliged to care for a fair access to justice is not really revolutionary but addresses the heart of the problem.

In this connection a further important question merits to be addressed: which level (or quality) of potential impact should be required to hold the parent company liable? Looking at a subsidiary based on the concept of companies' *sphere of control* a responsibility regarding wrongdoings could easily be established. Therefore, the concept of companies' *sphere of control* is useful when assessing companies' ethical responsibility. However, the concept of *sphere of influence* (e.g. within a supply chain) is often not suitable and also not workable for binding obligations.[99]

Another interesting conclusion could possibly be drawn from a comparative approach looking at another area of law. For example, despite the fact that there is no general EU rule on the piercing of the corporate veil, in competition law the situation seems to be different from company, insolvency or tort law since, if a subsidiary is not acting autonomously regarding its conduct on the market and just applies instruc-

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[96] Branson, n 10, at 249.

[97] See the pessimistic assessment recently published by the Business & Human Rights Resource Centre, Annual Briefing: Corporate Legal Accountability (January 2015, http://www.business-human-rights.org., accessed 12 Nov. 2015).

[98] Olivier de Schutter, *Towards a New Treaty on Business and Human Rights* 1 Business and Human Rights Journal 41 (2016).

[99] Ola Mestad, *Attribution of Responsibility to Listed Companies* in Ola Mestad et. al., *Human Rights, Corporate Complicity and Disinvestment,* 79, 105 (Cambridge University Press 2011).

tions given by the parent company the conduct of a subsidiary may be imputed to the parent company.[100] Nevertheless, a widening of this approach to another field of law might be a slippery slope.[101]

In Switzerland, an initiative for legally binding rules concerning the group-wide observance of human rights in combination with a primary liability of the parent company for violations of such rules through subsidiaries was initiated.[102] It aims at ensuring that companies domiciled in Switzerland respect human rights and environmental standards in their activities worldwide. In particular, Swiss companies must ensure that human rights are "also respected by companies under their control. […] Control may result through the exercise of power in a business relationship".[103] Based on mandatory due diligence obligations anchored in the Swiss constitution the extent of corporate responsibility and liability would be enhanced. However, the initiative leaves some legal questions open and could lead to more uncertainty because of the vagueness regarding liability criteria.[104]

In the United Kingdom a court approved a liability claim in favour of the plaintiffs based on the parent company responsibility argument.[105] Based on the principles established by the court in the *Chandler* decision the notion of the corporate veil shields a parent company from liability at stake. The court stated that it would not lift the corporate veil in this case but found that the parent company had assumed a direct duty towards the employees of its subsidiary. Thus, the question whether the corporate veil should be lifted becomes irrelevant in situations in which the parent company owes a duty of care directly to its subsidiaries' employees.[106] However, the problem

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[100] See Bernardo Cortese, *Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability*, in Cortese (ed.), *EU Competition Law: Between Public and Private Enforcement*, 73 seq (2014); Geert van Calster, *Piercing the Corporate Veil in Competition Cases – The ECJ in Eni*, GAVC Law (updated June 2016), (https://gavclaw.com/2013/06/11/piercing-thecorporate- veil-in-competition-cases-the-ecj-in-eni/, accessed 23 June 2016).

[101] "*Considering the consequences and the position of the creditors, it is obvious that the law should differentiate between veil piercing by voluntary creditors and by involuntary creditors. National laws should follow the example and differentiate between liability of a mother company towards contractual creditors in insolvency proceedings and liability towards employees and the local population of the host country of a subsidiary*." See Siel Demeyere, *Liability of a Mother Company for Its Subsidiary in French, Belgian and English Law* 23 European Review of Private Law 385, 413 (2015).

[102] 50 civil society organisations decided together to launch an initiative "for responsible business – for the protection of people and the environment (the responsible business initiative)", particularly since the Swiss parliament dismissed a similar motion in March 2015; an important objective of the initiative is the mandatory due diligence mechanism in respect of compliance with human rights (http://konzern-initiative.ch/wp-content/uploads/2015/11/150421_sccj_factsheet_5_-_responsible_business_initiative.pdf, accessed 23 June 2016).

[103] Art. 101a para 2. lit a. of the proposed constitutional text.

[104] For further details see Rolf H Weber, *Auf dem Weg zu einem neuen Konzept der Unternehmensverantwortlichkeit?*, SJZ 112 (2016), 121; Christine Kaufmann, *Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?*, SZW (2016), 45.

[105] According to the Court of Appeal in England and Wales a parent company issuing group guidelines must adequately oversee the implementation of these standards otherwise they are responsible towards victims; *Chandler v. Cape* EWCA Civ 525 (2012).

[106] Access to Justice Report, n 90, 14 seq.

remains to get access to documents and evidence within the sphere of the parent company.

In addition, it should be added that eight European Parliaments support a so called «Green Card Initiative» to ensure corporate accountability for human rights abuses; a «Green Card Initiative» is a political instrument to propose that the European Commission should take action in the form of a legislative initiative or a non-legislative action.[107]

Nevertheless, with the intention to foster the assertiveness of claims regarding the violation human rights, the concept of human rights due diligence should be combined with existing standards of *duty of care* in civil and tort law. Thereby, the duty of care principle needs to be embedded into an appropriate accountability framework. Sound and transparent procedures must be developed in order to clarify the application of these standards especially in the context of complex corporate structures and of value chains with various subcontracting parties that are common in the logistical supply chain of globalised business.[108] In addition, the Interpretative Guide to UNGP 21 could be refined in the given context by concretising the relevant responsibility elements in specific questions. Often companies are committing themselves to adhere to certain standards or a specific code of conduct within their policy statements; therefore, the relevant case law could be influenced by respective developments in this field.

Finally, a note of caution should be sounded in connection with a broader duty of care liability: The pervasive and ubiquitous risk that corporate liability for extraterritorial torts may impose great costs on firms while accomplishing little to improve human rights somewhere in the world cannot be overlooked.[109] Therefore, an open door to corporate liability requires careful attention to the standards for aiding and abetting liability, the premises for vicarious liability, and the measures regarding the amount of damages.

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[107] See press release, 18 May 2016: (http://konzern-initiative.ch/wp-content/uploads/2016/05/EU-Duty-of-Care-Green-Card-Media-Alert-18-May-002.pdf, accessed 23 June 2016).

[108] See UNGP 15b, 18, and 19 providing further guidance.

[109] Sykes, n 9, at 2209.