

The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability

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1 Introduction

Unless the Swiss Parliament adopts a new law on corporate due diligence, Swiss citizens will decide in 2020 whether to adopt or reject a partial revision of the Constitution of Switzerland that aims to introduce a specific provision on responsible business.¹ According to the proposal, companies that are based in Switzerland are required to carry out appropriate human rights and environmental due diligence in Switzerland and abroad. Furthermore, those companies shall be liable for human rights and environmental-related harm caused by (foreign) companies under their control unless they can prove that they took all due care to avoid the harm.

This contribution first presents the international corporate human rights due diligence framework, as defined by the UNGPs² and the OECD Guidelines for Multinational Enterprises (‘OECD Guidelines’).³ In order to clarify the link between corporate due diligence and corporate liability, the first section focuses on the appropriate action that companies should take within this due diligence framework to prevent potential adverse impacts or to cease those that have occurred. The second section outlines the political background of the Swiss Popular Initiative on Responsible Business in light of the UNGPs and the OECD Guidelines, and then assesses this initiative.

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¹ The official text of the initiative can be found in French, German, and Italian at www.bk.admin.ch/ch/f/pore/vi/vis462t.html accessed 14 November 2018. The English translation presented below is available on the website of the Swiss Coalition for Corporate Justice at <https://corporatejustice.ch> accessed 18 February 2018.

² Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy”, Annex to UNHRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (21 March 2011) UN Doc A/HRC/17/31.

³ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2000).

The last section compares the Swiss popular initiative with other legislative developments that have occurred after the adoption of the UNGPs. It distinguishes between mandatory disclosure laws, mandatory due diligence laws, and laws clarifying the legal consequences of failing to comply with due diligence duties. In that third category, this contribution compares the Swiss popular initiative with the recently adopted French *loi relative au devoir de vigilance*. Both legislative initiatives clarify the corporate civil liability for human rights and environmental harm committed abroad, which should reduce, to some extent, the uncertainty related to outcomes of transnational litigation for corporate human rights and environment abuses.

2 Corporate human rights and environmental due diligence

The UNGPs and the OECD Guidelines are soft-law instruments and do not impose binding legal obligations upon states or companies. However, they have given rise to binding obligations regarding corporate human rights and environmental due diligence – for instance, in the French *loi relative au devoir de vigilance*. In any event, they provide a relatively clear standard of conduct for business enterprises.

With respect to other elements, both Guidelines define the due diligence that companies should apply regarding human rights.⁴ Due diligence is the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts.⁵ The OECD Guidelines define human rights due diligence in the same way.⁶

On the contrary, environmental issues are not specifically addressed in the UNGPs, which cover only human rights. Corporations are nevertheless expected to respect and conduct due diligence with regard to all internationally recognized human rights, including those that necessarily entail environmental aspects, such as the rights to health, water, or food, or the rights of indigenous peoples.⁷ Additionally, Chapter VI of the OECD Guidelines defines the conduct that multinational

⁴ UNGPs (n 2) Guiding Principles 17–21.

⁵ *ibid* Guiding Principle 17.

⁶ OECD Guidelines (n 3) ch II, commentary para 14 and ch IV, commentary para 15.

⁷ See for further comments, Mirina Grosz, ‘Menschenrechte als Vehikel für ökologische Unternehmensverantwortung’ (2017) *Pratique Juridique Actuelle* 982.

enterprises should adopt to take due account of the need to protect the environment. This section focuses mainly on human rights and human rights-related environmental due diligence, as they are covered by both the UNGPs and the OECD Guidelines. Section 12.3 will present how the Swiss Popular Initiative defines human rights and environmental due diligence.

Both the UNGPs and the OECD Guidelines specify what is expected from business enterprises for each step of the due diligence process.⁸ With a view to linking due diligence and corporate liability, this contribution focuses on the appropriate action that business enterprises should take to prevent potential adverse human rights impacts or cease actual ones (section 12.2.1). Actual adverse impacts – those that have already occurred⁹ – could also be subject to remediation. This section then discusses compensation through civil liability as one form of remedy (section 12.2.2). Presenting this international standard of corporate conduct will aid assessment of the Swiss Popular Initiative on Responsible Business.

2.1 *Corporate due diligence: taking appropriate action*

Regarding the appropriate action that companies should take to prevent or cease adverse impact, Guiding Principle 19(b) of the UNGPs distinguishes between three scenarios. Each scenario has different implications for the nature of a business enterprise's responsibility.¹⁰

First, where a business enterprise *causes* or may cause an adverse impact, it should take the necessary steps to cease or prevent the impact.¹¹ This would apply, for example, in the case of a business enterprise being the main source of pollution in a community's drinking water supply due to chemical effluents from its production processes.¹² Second, where a business enterprise *contributes* or may contribute to an adverse impact, it should take the necessary steps to cease or

⁸ Nicolas Bueno, 'Corporate Liability for Violations of the Human Right to Just Conditions of Work in Extraterritorial Operations' (2017) 21 *The International Journal of Human Rights* 565, 571–73; Olga Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2014) 32 *Netherlands Quarterly of Human Rights* 44, 55–57; Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or not Law?', in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 156-57.

⁹ UNGPs (n 2) Guiding Principle 19, commentary.

¹⁰ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (UN 2012) 15.

¹¹ UNGPs (n 2) Guiding Principle 19, commentary.

¹² OHCHR (n 10) 17.

prevent its contribution. According to the OECD Guidelines, contributing to an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates, or incentivizes another entity to cause an adverse impact.¹³ The OHCHR gives the example of an enterprise changing product requirements for suppliers without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver.¹⁴ Although highly relevant in practice, it is not clear from the international framework to what extent failures to supervise or intervene in the harmful conduct of a business entity – such as a subsidiary or a supplier – enter into the notion of contribution. However, in any event, the enterprise should use its leverage to mitigate impacts, in addition to ceasing or preventing its contribution.¹⁵ Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that is causing or contributing to an adverse impact.¹⁶

In the two first scenarios, the business enterprise causes or contributes to adverse impacts through its own activities,¹⁷ including its own activities in the supply chain.¹⁸ An enterprise can finally be involved in an adverse impact when the impact is caused by an entity with which it has a business relationship and when the company is *directly linked* to that company's own operations, products, or services.¹⁹ The OHCHR gives the example of a supplier acting contrary to the terms of its contract and using child or bonded labour to manufacture a product for the enterprise, without any intended or unintended pressure from the enterprise to do so.²⁰ Indeed, if the enterprise had pressured the supplier, it would have contributed to the adverse impact. The legal literature has provided other examples in which the notions of 'contribution' and 'directly linked' are sometimes understood in different ways.²¹ In the third scenario, the appropriate measure to be taken depends

¹³ OECD Guidelines (n 3) ch II, commentary para 14.

¹⁴ OHCHR (n 10) 19.

¹⁵ UNGPs (n 2) Guiding Principle 19, commentary.

¹⁶ *ibid*; OECD Guidelines (n 3) ch II, commentary para 19; OHCHR (n 10) 7.

¹⁷ UNGPs (n 2) Guiding Principle 13(a).

¹⁸ OECD Guidelines (n 3) ch II, commentary para 17.

¹⁹ UNGPs (n 2) Guiding Principle 19, commentary; OECD Guidelines (n 3) ch II, A 12.

²⁰ OHCHR (n 10) 56. See also for other examples, Christine Kaufmann, 'Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?' (2016) *Swiss Review of Business and Financial Market Law* 45, 51; Nicolas Bueno, 'La responsabilité des entreprises de respecter les droits de l'Homme: État de la pratique suisse' (2017) *Pratique Juridique Actuelle* 1015, 1016.

²¹ cf Olivier de Schutter, 'Corporations and Economic, Social, and Cultural Rights', in Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 212-16; Martin-Ortega (n 8) 56; Christine Kaufmann et al., *Extraterritorialität im Bereich Wirtschaft und Menschenrechte* (Swiss Center of Expertise in Human Rights 2016).

on the leverage the enterprise has on the entity causing or contributing to the adverse impact. If the business enterprise has leverage to mitigate the adverse impact it should exercise this, as in the contribution scenario. If it lacks leverage, it should try to increase its leverage. Finally, when increasing leverage is impossible, it should consider terminating the relationship.²²

In the two last scenarios, another entity is always involved. Thus, in both situations the appropriate actions to be taken vary according to the extent of an enterprise's leverage in addressing the impact.²³ The extent of leverage over another business entity is a factual question. Some factors help identify the extent of leverage, such as the degree of direct control by the enterprise over the entity; the terms of contract between the enterprise and the entity; the proportion of business the enterprise represents for the entity; or the ability of the enterprise to incentivize the other entity to improve human rights.²⁴

2.2 *Human rights due diligence and corporate liability*

While the UNGPs recommend that states implement and enforce laws that are aimed at, or have the effect of requiring, business enterprises to respect human rights,²⁵ they do not entail specific recommendations about legal sanctions or corporate liability in the event that a business enterprise does not carry out human rights due diligence. However, they do provide guidance regarding remediation after an actual adverse impact has occurred, both to companies and to states.

Whenever enterprises identify that they have caused or contributed to adverse impacts – the first two scenarios – they are expected to provide for remediation through grievance mechanisms, which should conform to the effectiveness criteria of Guiding Principle 31 of the UNGPs.²⁶ As such, remediation is part of the corporate responsibility to respect human rights. States, on the other hand, are expected, among other elements, to take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including

²² UNGPs (n 2) Guiding Principle 19, commentary; OECD Guidelines (n 3) ch II, commentary para 22, for the steps to be taken before termination.

²³ UNGPs (n 2) Guiding Principle 19(b)(ii).

²⁴ OHCHR (n 10) 49, among other factors.

²⁵ UNGPs (n 2) Guiding Principle 3(a).

²⁶ OHCHR (n 10) 71, 75–80.

considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.²⁷ Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions, as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.²⁸

Among legal barriers that could lead to a denial of access to remedy, the UNGPs mention the way in which legal responsibility is attributed among members of a corporate group under domestic laws. This should not facilitate the avoidance of appropriate accountability.²⁹ In this respect, the OHCHR adds that the corporate group structure does not make any difference regarding whether entities within the group have to respect human rights – it simply affects how they go about ensuring that rights are respected in practice. If human rights abuses do occur, it will be the national law in the relevant jurisdiction that determines where liability rests.³⁰ Other legal barriers also arise where claimants face a denial of justice in a host state and cannot access home state courts regardless of the merits of the claim.³¹ The UNGPs finally note that many legal and practical barriers result from imbalances between the parties to business-related human rights claims, such as their financial resources, access to information, and expertise.³²

The UNGPs are an important framework regarding corporate civil liability for human rights and human rights-related environmental abuses. However, they do not entail specific recommendations to states on how they should regulate issues of jurisdiction, applicable law, or the material conditions of parent or contracting company liability. These elements remain a matter of domestic law. They have given rise to much uncertainty in the emerging relevant transnational civil litigation, as is the case for material conditions of parent-company liability.

²⁷ UNGPs (n 2) Guiding Principle 26, commentary.

²⁸ *ibid* Guiding Principle 25, commentary.

²⁹ *ibid*. See also for a comparative approach on the question of liability and the structure of the corporate group, Gwynne Skinner, Robert McCorquodale, and Olivier de Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (ICAR, CORE, ECCJ, 2013) 61.

³⁰ OHCHR (n 10) 22.

³¹ UNGPs (n 2) Guiding Principle 26, commentary. The Council of Europe clarified the question of jurisdiction in Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, 2 March 2016, paras 34–35.

³² UNGPs (n 2) Guiding Principle 26, commentary

In the English case of *Chandler v Cape* of 2012, for example, the Court of Appeal developed four criteria to establish when law may impose on a parent company responsibility for the health and safety of its subsidiary's employees.³³ Concretely, it found the parent company Cape liable for asbestos-related injuries caused to an employee of a subsidiary. However, in *Thompson v The Renwick Group* of 2014, it found that the criteria were not met for a holding parent company carrying out any business at all apart from that of holding shares in other companies.³⁴ Similar questions of parent liability for the harm caused to employees of a subsidiary have been addressed in France in the cases of *Areva* and *Comilog*.³⁵ Finally, the *Dutch Shell Nigeria* case, which is, at the time of writing, pending, should shed light on the question of the duty of care owed by a parent company to third parties.³⁶

So far, there has also been no court verdict on the merits of addressing the liability of a company for damage caused by a foreign supplier. The ongoing case of *Jabir et al. v KiK* is expected to clarify this question in Germany. In September 2012, over 250 workers died in a fire at a factory in Pakistan that supplied the German textile corporation KiK. The plaintiffs filed a compensation claim against KiK alleging that it shared responsibility for the fire-safety deficiencies in the Pakistani factory.³⁷ Despite emerging case law, one lesson is the uncertainty for both plaintiffs and defendants about criteria to be used to determine a company's civil liability for the harm caused by a subsidiary or a supplier. The next section presents and assesses the Swiss Popular Initiative on Responsible Business in light of the UNGPs and the OECD Guidelines, and discusses the extent to which it will clarify the conditions of parent and contracting liability in transnational civil litigation.

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³³ *Chandler v Cape plc* (2012) EWCA Civ 525, para 80.

³⁴ *Thompson v The Renwick Group plc* (2014) EWCA Civ 635, para 37. For details, see Bueno (n 8) 576.

³⁵ Cour d'Appel de Paris, Arrêt du 24 octobre 2013, no 12/05650 (*Areva*); Cour d'Appel de Paris, Arrêt du 10 septembre 2015, nos 11/05955 and 11/0596 (*Comilog*). For more detail on the case of *Comilog*, see Liesbeth Enneking, 'Paying the Price for Socially Irresponsible Business Practices?' (2017) *Pratique Juridique Actuelle* 991 and on the case of *Areva*, see Bueno (n 8) 576–77.

³⁶ Court of Appeal The Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3586-7-8 (*Oguru-Efanga/Shell*), (*Dooh/Shell*), (*Shell/Akpan*). For more details, see Enneking (n 35) 992.

³⁷ See Bueno (n 8) 579.

3.1 *Political background*

The Position Paper on CSR and the National Action Plan

Three years after the endorsement of the UNGPs by the UNHRC in 2011, the Swiss government released a report in comparative law on the legal obligations of corporate directors to conduct due diligence with regard to business activities abroad.³⁸ In this comparative law report, the government identified potential measures that could be adopted in company law to increase the corporate responsibility to respect human rights. The proposed measures included the introduction of a specific duty for corporate directors to exercise human rights due diligence.³⁹ A failure to comply with their due diligence duties would trigger their liability.⁴⁰ In March 2015, however, the lower chamber of the Parliament rejected, with a narrow majority,⁴¹ a motion requiring the government to take further steps with a view to implementing the measures identified in the comparative law report.⁴²

In April 2015, the Swiss government also adopted the Position Paper on CSR (Position Paper 2015).⁴³ In this document, it presented four strategies for the period 2015–2019 regarding CSR. It set out plans to develop the definition of CSR within international fora, such as the UN and the OECD; support companies implementing their CSR; promote CSR in developing countries; and work for the improvement of corporate transparency.⁴⁴ Position Paper 2015 raised some criticism for not addressing the issue of corporate civil liability.⁴⁵ Indeed, the paper was not intended to

³⁸ Swiss Federal Council, ‘Rapport de droit comparé : Mécanismes de diligence en matière de droits humains et d’environnement en rapport avec les activités d’entreprises suisses à l’étranger’ (2 May 2014) <www.ejpd.admin.ch/dam/data/bj/aktuell/news/2014/2014-05-28/ber-apk-nr-f.pdf> accessed 14 November 2018. See Annex I for the report of the Swiss Institute of Comparative Law.

³⁹ *ibid* 9.

⁴⁰ *ibid* 11.

⁴¹ The motion was first accepted by 91:90 before it was again submitted to vote and rejected by 95:86.

⁴² Swiss Parliament, ‘Motion 14.3671: Mise en œuvre du rapport de droit comparé du Conseil fédéral sur la responsabilité des entreprises en matière de droits humains et d’environnement’ (1 September 2014) <www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20143671> accessed 14 November 2018.

⁴³ Swiss Federal Council, ‘La responsabilité sociétale des entreprises: Position et plan d’action du Conseil fédéral concernant la responsabilité des entreprises à l’égard de la société et de l’environnement’ (1 April 2015) <www.news.admin.ch/NSBSubscriber/message/attachments/38882.pdf> accessed 14 November 2018.

⁴⁴ *ibid* 13–17.

⁴⁵ Rolf H Weber, ‘Auf dem Weg zu einem neuen Konzept der Unternehmensverantwortlichkeit?’ (2016) 112 *Revue suisse de jurisprudence* 121, 123.

introduce mandatory human rights due diligence provisions or clarify the conditions upon which corporations based in Switzerland could be held liable for human rights abuses committed abroad.

Finally, on 9 December 2016, the Swiss government released its National Action Plan (NAP) on implementation of the UNGPs, which should be read as a complement of equivalent value to Position Paper 2015.⁴⁶ In the NAP, the Swiss government set out the expectation that corporations that are domiciled or active in Switzerland respect human rights in their activities in Switzerland and abroad.⁴⁷ However, like Position Paper 2015, the NAP did not introduce any mandatory human rights due diligence provisions in Swiss law, nor did it provide any clarification as to the conditions of liability of Switzerland-based companies for human rights or environmentally adverse impact abroad resulting from the operations of foreign subsidiaries, subcontractors, or suppliers.

Regarding mandatory due diligence, the NAP acknowledged that there is currently no legally binding provision in Swiss law requiring that corporations conduct human rights due diligence in their operations abroad.⁴⁸ In December 2016, when the NAP was released, the Swiss government outlined that no other country had adopted such legally binding provisions.⁴⁹ It concluded that any regulation that Switzerland would introduce in that regard should be broadly adopted internationally in order to avoid the Swiss economy being penalized.⁵⁰ Regarding access to remedy in Switzerland for victims of corporate abuses, the NAP focuses exclusively on private international law questions. It broadly states that for transnational tort claims there is always a forum in Switzerland when the defendant is a corporation domiciled in Switzerland, and that fundamental norms in Switzerland, such as human rights, are applicable regardless of the applicable law.⁵¹ In September 2018, Switzerland released a specific report on Access to Remedy.

⁴⁶ Swiss Federal Council, ‘Rapport sur la stratégie de la Suisse visant à mettre en œuvre les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l’homme’ (9 December 2016) 12 <https://www.ohchr.org/Documents/Issues/Business/NationalPlans/Switzerland_NAP_FR.pdf> accessed 14 November 2018. The NAP follows the report.

⁴⁷ *ibid* 7–8 and 12.

⁴⁸ *ibid* 15.

⁴⁹ *ibid*.

⁵⁰ *ibid*.

⁵¹ *ibid* 39; Kaufmann et al. (n 21) 61–63; Christine Kaufmann et al., *Mise en oeuvre des droits humains en Suisse: Un état des lieux dans le domaine droits de l’homme et économie* (Swiss Center of Expertise in Human Rights 2013) 54–56, for private international law questions in Switzerland.

Despite identified international developments, it did not recommend the adoption of regulatory measures introducing a mandatory due diligence provision in Swiss law.⁵²

Human rights due diligence and liability in specific sectors

Beyond the political developments set out here, which cover companies in all economic sectors, the Swiss government has taken some measures in relation to specific sectors. A key example is the recently entered into force Swiss Federal Act on Private Security Services Provided Abroad 2013. The Act expressly prohibits the provision, from Switzerland, of private security services for the purpose of direct participation in hostilities abroad, or of those that may be assumed to be utilized by the recipient or recipients in the commission of serious human rights violations.⁵³ These prohibitions apply expressly to parent and contracting companies based in Switzerland.⁵⁴

Regarding liability, criminal sanctions are in place for individuals who infringe the prohibitions.⁵⁵ The Act does not cover corporate civil liability. However, it should be noted that article 6 of the Act sets out that where a company contracts out the provision of a security service to another company, it has to ensure that the subcontractor performs that service in keeping with the constraints to which the contracting company is itself subject. Interestingly, the civil liability of the contracting company for harm caused by the (foreign) subcontractor should be determined in accordance with the Swiss Code of Obligations.⁵⁶ The Act does not mention whether the Swiss Code of Obligations would also apply to determine the civil liability of a parent company for the harm caused by a foreign subsidiary. In any event, the Swiss Code of Obligations does not entail any specific provision on extracontractual liability of contracting companies for the harm caused to third parties by their subcontractors or subsidiaries, and no relevant case law currently exists in that regard.⁵⁷ Future case law will thus have to show how Swiss courts will solve the question of civil liability of Swiss-based providers of private security services abroad.

⁵² Swiss Federal Council, *Entreprises et droits de l'homme: analyse comparée des mesures judiciaires et non judiciaires offrant un accès à la réparation*, 14 September 2018.

⁵³ Private Security Services Provided Abroad Act 2013 (CH), arts 8 and 9. Companies can also be subject to administrative sanctions defined in arts 25 and 26.

⁵⁴ *ibid* arts 5 and 6.

⁵⁵ *ibid* arts 21–24.

⁵⁶ *ibid* art 6.

⁵⁷ Nicolas Bueno and Sophie Scheidt, *Die Sorgfaltspflichten von Unternehmen im Hinblick auf die Einhaltung von Menschenrechten bei Auslandsaktivitäten* (Netzwerk Soziale Verantwortung 2015) 10.

Finally, the Swiss government has set out two recommendations on the corporate responsibility to respect human rights for the commodities sector.⁵⁸ The first deals with the redaction of a guide on implementation of the UNGPs in the commodity sector; the second with mandatory due diligence provisions for corporations in that sector.⁵⁹ Regarding mandatory due diligence, the government is following international legislative developments on reporting and on mandatory due diligence in conflict minerals industries. It is following developments taking place in the EU⁶⁰ and has expressed the possibility of adopting similar provisions that are adapted to the Swiss context.⁶¹ However, there is no recommendation to clarify the conditions of corporate liability of parent, subcontracting, or contracting companies in the commodity sector for human rights abuses.

3.2 *The initiative text and its content*

In parallel to the abovementioned political and legislative developments in Switzerland, the Swiss Coalition for Corporate Justice, representing over eighty NGOs in Switzerland, launched the popular constitutional initiative ‘Responsible Business: Protecting Human Rights and the Environment’. The initiative collected the requisite threshold of 100,000 signatures and Swiss citizens will have to decide whether to adopt or reject this partial revision of the Swiss Constitution unless the Parliament adopts a satisfactory counter-proposal, which is in discussion.⁶² In that case, the committee that launched the popular initiative could consider withdrawing the initiative.

Popular initiatives in Switzerland aim at revising the constitution; for example, that on responsible business aims to add article 101a, ‘Responsibility of Business’, to the Swiss Constitution.

⁵⁸ Swiss Federal Council, ‘3^e rapport concernant l’état d’avancement de la mise en œuvre des recommandations’ (2 December 2016) 13–14 <www.news.admin.ch/news/message/attachments/46473.pdf> accessed 14 November 2018.

⁵⁹ *ibid* 13.

⁶⁰ *ibid* 14. In particular Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130/1.

⁶¹ NAP (n 46) 29.

⁶² See Swiss National Council, Rapport complémentaire de la Commission des affaires juridiques du 18 mai 2018 sur les propositions de la commission en vue du dépôt d’un contre-projet indirect à l’initiative populaire «Entreprises responsables – pour protéger l’être humain et l’environnement» (18 May 2018) <https://www.parlament.ch/centers/kb/Documents/2016/Rapport_de_la_commission_CAJ-N_16.077_2018-05-18.pdf> accessed 14 November 2018.

Statistically, since the introduction of the popular initiative in 1891, 209 popular initiatives have led to a vote, 22 of which have been accepted. From 1848 to 2010, however, 47% of all popular initiatives triggered some kind of modification of the legislation.⁶³ Technically, if the constitutional initiative is adopted the constitutional rule will have to be implemented through a more detailed piece of sub-constitutional legislation, which would probably be included in the Swiss Code of Obligations.

The text of the initiative

The text of the proposed article 101a Constitution reads as follows:

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

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

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

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

⁶³ Gabriela Rohner, *Die Wirksamkeit von Volksinitiativen im Bund 1848–2010* (Schulthess 2012) 115.

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

d. The provisions based on the principles of paragraphs a-c apply irrespective of the law applicable under private international law.⁶⁴

Mandatory due diligence, liability, and applicable law

After setting the general goal of the initiative in Paragraph 1, the initiative text entails three elements to implement this goal in Paragraph 2. First, Article 101a(2)(b) introduces and defines the scope of a mandatory due diligence provision in the Swiss Constitution. Article 101a(2)(c) then addresses the liability of companies based in Switzerland, including their liability for harm caused by companies under their control. Finally, Article 101a(2)(c) aims to ensure that the introduced mandatory due diligence and liability provisions will apply even though the human rights or environmental-related harm typically occurs abroad. These three elements of mandatory due diligence, liability and applicable law are discussed in turn.

First, the initiative requires that companies identify human rights and environmental impacts, take measures to prevent or cease adverse impacts, and account for how they address these impacts. In other terms, section (2)(b) introduces a mandatory due diligence provision. The scope of this due diligence covers human rights, as well as the environment. Regarding the environment, which the UNGPs do not cover explicitly,⁶⁵ the explanatory note of the initiative text expressly refers to the OECD Guidelines, which entails specific recommendations for multinational enterprises.⁶⁶

Concretely, the introduction of a mandatory due diligence provision objectifies the expected conduct that Switzerland-based companies must apply with a view to preventing adverse human

⁶⁴ Swiss Coalition for Corporate Justice, 'The Initiative Text with Explanations' <https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf> accessed 18 February 2018.

⁶⁵ See section 12.2.

⁶⁶ Swiss Coalition for Corporate Justice (n 644).

rights and environmental impacts in Switzerland and abroad. In this regard, the text of the initiative does not distinguish between the three scenarios presented above: causing an adverse impact, contributing to an adverse impact through the enterprise's own activities, and adverse impacts directly linked to the enterprise's operations by a business relationship.⁶⁷ It broadly states that due diligence 'duties apply to controlled companies as well as to all business relationships'.⁶⁸ However, according to the explanation of the initiative text, section (2)(b) introduces a mandatory due diligence provision based on the UNGPs and the OECD Guidelines.⁶⁹ Therefore, the international framework may provide guidance on how to interpret the text of the initiative. Although not expressly referenced in the text, this standard of conduct should help to identify whether a company has committed a fault and should be held liable *for its own actions and omissions* on the basis of the general tort of negligence.⁷⁰

Second, section (2)(c) brings about a specific liability for the harm *caused by others*. 'Others' means exclusively controlled companies, and thus not all business relationships to which due diligence duties apply. This liability for others has been modelled on the existing employer's liability in the Swiss Code of Obligations.⁷¹ Accordingly, when a controlled company causes harm, the controlling company is liable unless it can prove that it took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken. This liability provision addresses the practical difficulty that plaintiffs may face in bringing evidence about the conduct of controlling companies located abroad. As a result, it is not up to the plaintiff to prove that the controlling company acted negligently, but up to the company to prove that it took the required due care. For the rest, section (2)(c) does not reverse the burden of proof. It remains the plaintiff's responsibility to prove the harm, the causality, and the control relationship between the business entities.

⁶⁷ See section 12.2.1.

⁶⁸ Swiss Popular Initiative on Responsible Business, art 101a(2)(b).

⁶⁹ Swiss Coalition for Corporate Justice (n 64).

⁷⁰ In Switzerland, under art 41 Code des obligations. For more detail, see Gregor Geisser, 'Die Konzernverantwortungsinitiative: Darstellung, rechtliche Würdigung und mögliche Umsetzung' (2017) *Pratique Juridique Actuelle* 943, 948–49. Article 101a(2)(c) states that companies are *also* liable for damage caused by companies under their control, which means in addition to the liability for their own conduct.

⁷¹ Geisser (n 70) 954.

The notion of ‘control’ in section (2)(c) is not a UNGPs concept.⁷² It is also not precisely defined in the initiative text, which states that control is to be determined according to the factual circumstances, and that control may also result through the exercise of power in a business relationship.⁷³ Thus, it is up to the legislative and the judiciary to clarify it in practice. However, according to the explanations of the initiative text, controlled companies are generally subsidiaries of parent companies. Nevertheless, in certain cases a multinational company could also *de facto* control another company outside its strict legal structure through the exercise of economic control. For example, a relationship of control may exist if a Swiss company is the only purchaser from a supplier, even if the latter is not a direct subsidiary.⁷⁴ Therefore, control is narrower than the concept of leverage presented above, as companies may have leverage over other entities without controlling them, according to the Swiss initiative.⁷⁵

Finally, section (2)(d) ensures that the new standard of conduct for corporations and the conditions of liability for torts will apply in practice before Swiss courts. Under Swiss private international law, as in other countries, transnational claims in tort are generally governed by the law of the country in which the result occurred.⁷⁶ Thus, foreign tort law would generally apply to cases in which the result materializes abroad, which would render useless the mandatory due diligence and liability provisions Article 101a(2)(b) and (c) intend to introduce in Swiss law. Expressly making these provisions overriding mandatory provisions of Swiss law would ensure their application before Swiss courts in an international matter dealing with human rights or environmental due diligence.

4 The Swiss popular initiative in international comparison

4.1 Mandatory disclosure laws

⁷² However, control is used in the OHCHR *Interpretative Guide* in relation to parent companies. OHCHR (n 10) 22, and in relation to leverage 48–49.

⁷³ Swiss Initiative on Responsible Business, art 101a(2)(a).

⁷⁴ Swiss Coalition for Corporate Justice (n 64).

⁷⁵ See Swiss Initiative on Responsible Business and section 12.2.1.

⁷⁶ Art 133(2) Swiss Private International Law Act.

An increasing number of laws require that companies disclose information regarding human rights. For example, the California Transparency in Supply Chains Act 2010 requires every retail seller and manufacturer doing business in California and having worldwide gross receipts that exceed US\$100 million to disclose their efforts to eradicate slavery and human trafficking from their supply chains.⁷⁷ The Modern Slavery Act 2015 in the UK has a similar scope. It requires that commercial organizations prepare a slavery and human trafficking statement. Among other information, the statement must include information about parts of the organization's business and supply chains where a risk of slavery and human trafficking exists, and the steps it has taken to address that risk.⁷⁸

The EU Directive 2014/95 on Disclosure of Non-Financial Information also enters into the category of mandatory disclosure laws. Large enterprises must include a non-financial statement containing information about the development, performance, position, and impact of their activity relating to environmental, social, and employee matters; respect for human rights; anti-corruption; and bribery matters.⁷⁹ Interestingly, the enterprise has to report the risks of adverse impact stemming not only from its own activities, but also from those linked to its operations, products, services and business relationships, including its supply and subcontracting chains.⁸⁰ However, the company is not required to pursue policies in relation to those matters; in that case, it must only provide a clear and reasoned explanation for not doing so.⁸¹

The California Act, the Modern Slavery Act, and the EU Directive 2014/95 do not introduce a due diligence standard. They also do not clarify the conditions of liability for parent or contracting companies. Some suggest that even if information that companies must disclose does not lead to any legal sanctions, companies may still seek to change their behaviour if they believe that such

⁷⁷ California Transparency in Supply Chains Act 2010 (US), s 1714.43(a)(1). See for an overview, Benjamin T Greer and Jeffrey Purvis, 'Corporate Supply Chain Transparency: California's Seminal Attempt to Discourage Forced Labour' (2016) 20 *The International Journal of Human Rights* 55.

⁷⁸ Modern Slavery Act 2015 (UK), s 54(4)(a).

⁷⁹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1, art 19a(1).

⁸⁰ *ibid* art 19a(1)(d) and preamble, para 8.

⁸¹ *ibid* art 19a(1).

information would lead to non-legal sanctions, such as reputational harm.⁸² Although mandatory disclosure provisions have a preventive rather than remediation purpose, they may facilitate the establishment of corporate liability after harm has occurred. Indeed, mandatory disclosure requirements make it more difficult for a company to argue that it did not know, or could not have known, about adverse impacts. Therefore, these regulations may be an important step towards more accountability. However, in the end, since they do not clarify any due diligence standard and conditions of liability, they do not significantly reduce the uncertainty related to outcomes of transnational litigation for corporate abuses.⁸³

4.2 *Mandatory due diligence laws*

With respect to specific issues, such as conflict minerals, some laws have introduced mandatory due diligence standards beyond disclosure requirements. For example, section 1502 of the Dodd–Frank Act on conflict minerals requires that some companies submit a report on the measures taken to exercise due diligence regarding the supply chain of conflict minerals.⁸⁴ In addition, the Final Rule for its implementation⁸⁵ does specify the standard for due diligence that must be exercised once a company has determined that it uses conflict minerals.⁸⁶ Accordingly, companies must follow a nationally or internationally recognized due diligence framework.⁸⁷ The Final Rule specifically states that the OECD’s Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas may be used as such a framework.⁸⁸ The EU has recently taken a similar approach by defining the due diligence that importers of some specific minerals originating from conflict-affected and high-risk areas must adopt beyond disclosure requirements.⁸⁹

⁸² Stephen Park, ‘Human Rights Reporting as Self-Interest: The Integrative and Expressive Dimensions of Corporate Disclosure’, in Robert C Bird, Daniel R Cahoy, and Jamie D. Prekert (eds), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar Publishing 2014) 53.

⁸³ Bueno (n 8) 580.

⁸⁴ Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US), s 1502(b)(p)(1)(a). See for reporting requirements, Park (n 82) 63.

⁸⁵ Securities and Exchange Commission, 17 CFR pts 240 and 249b, Conflict Minerals, Final Rule, August 2012 (Sec 1502 Final Rule).

⁸⁶ Martin-Ortega (n 8) 66.

⁸⁷ Sec 1502 Final Rule (n 85) 205.

⁸⁸ *ibid* 206; Martin-Ortega (n 8) 66.

⁸⁹ Directive 2014/95/EU (n 79).

The introduction of a standard of conduct that companies should adopt would certainly help to assess corporate liability once harm occurs. The company's failure to meet the expected standard can be considered unlawful and result in the obligation to compensate the harm. However, like mandatory disclosure laws, mandatory due diligence laws do not mention or elaborate on corporate liability.

4.3 *Human rights due diligence and liability provisions*

A third category of laws includes those defining the standard of corporate due diligence and, in addition, specifying the legal consequences of failing to carry it out. Legal consequences can take the form of criminal liability or civil liability depending on who must enforce the due diligence standard – the public prosecutor or the victim. The Swiss popular initiative enters into that last category. Indeed, the text of the initiative entails a mandatory due diligence provision in section (2)(b) and clarifies the corporate liability for the harm, at least for the harm caused by controlled companies in section (2)(c). There are other examples of human rights due diligence laws accompanied by liability provisions.

The abovementioned Swiss Federal Act on Private Security Services Provided Abroad 2013,⁹⁰ for example, requires that companies that are based in Switzerland and provide private security services abroad become signatories to the International Code of Conduct for Private Security Providers.⁹¹ This code of conduct clarifies the due diligence that security service providers should carry out. Beyond defining the standard of due diligence, criminal liability provisions are in place to ensure that individuals within companies meet their due diligence obligations.⁹² Another example is the Dutch Child Labour Due Diligence Proposal. The proposal entails a mandatory due diligence provision. In that regard, companies based in the Netherlands should act in accordance with the International Labour Organization Child Labour Guidance Tool for Business.⁹³ In addition, the proposal entails administrative and criminal fines for companies that do not submit a declaration that they have conducted due diligence, or that fail to conduct due diligence when

⁹⁰ See n 53.

⁹¹ Private Security Services Provided Abroad Act 2013 (CH) (n 53) art 21–24.

⁹² Child Labour Due Diligence Law Proposal (NL), art 5(3).

⁹³ *ibid* art 7(1).

required.⁹⁴ The legislative proposal was passed by the Dutch House of Representatives in February 2017 and is currently pending before the Dutch Senate.⁹⁵

The French *loi relative au devoir de vigilance* also establishes a link between due diligence and civil corporate liability⁹⁶ – at least, both elements of due diligence and liability are mentioned in one single document. It requires that large companies based in France establish and implement a vigilance plan. In addition, it states that companies are liable and obliged to compensate for harm that due diligence would have permitted to avoid. After several back-and-forth exchanges between the two parliamentary chambers,⁹⁷ it reads as follows:

Art. L. 225-102-4. Any company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan. [...]

The plan shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls [...] as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.

⁹⁴ *ibid* art 7(2). See also Christine Kaufmann, ‘Menschen-und umweltrechtliche Sorgfaltsprüfung im internationalen Vergleich’ (2017) *Pratique Juridique Actuelle* 974.

⁹⁵ See Eerste Kamer der State-Generaal, ‘Initiatiefvoorstel-Kuiken Wet zorgplicht kinderarbeid’ <www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken> accessed 14 November 2018 and Eerste Kamer der State-Generaal, ‘Debat Wet zorgplicht kinderarbeid aangehouden’ <www.eerstekamer.nl/nieuws/20171219/debat_wet_zorgplicht_kinderarbeid> accessed 14 November 2018.

⁹⁶ Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (FR).

⁹⁷ See Sénat, ‘Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre’, <www.senat.fr/dossier-legislatif/pp114-376.html> accessed 14 November 2018, for the travaux préparatoires.

The plan shall be drafted in association with the company stakeholders involved, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level. It shall include the following measures: 1. A mapping that identifies, analyses and ranks risks; 2. Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship; 3. Appropriate action to mitigate risks or prevent serious violations; 4. An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned; 5. A monitoring scheme to follow up on the measures implemented and assess their efficiency.

The vigilance plan and its effective implementation report shall be publicly disclosed [...]

Art. 225-102-5. – According to the conditions laid down in Articles 1240 and 1241 of the Civil Code, the author of any failure to comply with the duties specified in Article L. 225-102-4 of this code shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid [...]⁹⁸

The French Law presents many similarities with the Swiss popular initiative. First, article L.225-102-4 introduces a mandatory human rights and environmental due diligence obligation. The law covers, more precisely than the Swiss initiative, severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage, and health risks. It lists five reasonable vigilance measures to adequately identify and prevent risks related to those matters.⁹⁹ As for the Swiss popular initiative, this due diligence process is based on the international human rights due diligence framework. Companies must identify risks, take appropriate actions to mitigate them, and account for the measures taken.

⁹⁸ Non-official translation provided by the European Coalition for Corporate Justice and published on 14 December 2016 available at <<https://business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation>> accessed 14 November 2018.

⁹⁹ Sandra Cossart, Jérôme Chaplier, and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 Business and Human Rights Journal 317, 320.

The French law also makes clear that these due diligence duties extend beyond the company's own operations. They additionally apply to operations of the companies it controls, and those of the subcontractors or suppliers with whom the company maintains an established commercial relationship. In comparison, due diligence duties in the Swiss initiative apply to 'controlled companies and all business relationships'.¹⁰⁰ It must be noted that the French law limits the scope of due diligence to the operations of subcontractors and suppliers 'with whom the company maintains an established commercial relationship'. In French law, an established commercial relationship is defined as a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last.¹⁰¹ Whether this precision makes the scope of the due diligence narrower than the one in the Swiss initiative depends greatly on how 'business relationships' will be translated and interpreted in the law implementing the Swiss initiative, if it is accepted.

However, there are at least four differences with the Swiss popular initiative. First, the French Law applies only to very large companies,¹⁰² while the Swiss initiative only requires taking into account the needs of small and medium-sized companies. The second and third difference pertain to liability. Article L.225-102-5 expressly establishes a fault liability for the company's own actions and omissions on the basis of the general tort of negligence. It states that the author of any failure to comply with its due diligence duties shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid. This fault liability for the company's own conduct is only intended in the Swiss initiative.¹⁰³ In practice, however, fault liability should apply in a similar manner.

The third difference is that the French Law does not introduce specific *liability for others*, whilst the Swiss initiative introduces liability for the harm caused by controlled companies. This does not mean that French parent or contracting companies cannot be liable for harm resulting from the operations of subsidiaries or suppliers at all, as presented in the previous paragraph. However, without specific liability for others, it remains for the plaintiff to prove that a French company

¹⁰⁰ See Swiss Initiative on Responsible Business and section 12.3.2.

¹⁰¹ Cossart, Chaplier, and Beau de Lomenie (n 999) 320.

¹⁰² Code of Commerce (FR), art L. 225-102-4, I, para 1.

¹⁰³ See Swiss Initiative on Responsible Business and section 12.3.2, in particular n 70.

failed to comply with its due diligence duties regarding the operations of these (foreign) companies,¹⁰⁴ which has implications for the plaintiffs. According to the Swiss initiative, it is instead up to the controlling company to prove that it conducted due diligence regarding its controlled companies.

Finally, the French law does not expressly make article L.225-102-4 and 5 mandatory overriding provisions of French law. Under EU Regulation 864/2007, the law applicable to non-contractual obligation arising out of a tort will generally be the law of the country in which the damage occurred.¹⁰⁵ Thus, it is questionable whether they will apply in practice in international matters concerning torts at all. A judge would first need to establish their mandatory character – however, regarding the *travaux préparatoires* and the purpose of article 225-102-4 and 5, this should be the case. It seems indeed unthinkable to adopt provisions aimed explicitly at ensuring that French companies respect human rights and the environment in France and abroad and not apply them when the situation requires it. Table 12.1 summarizes the findings of section 12.4. It compares domestic legal instruments on business and human rights adopted and currently in discussion.

Table 1: Comparative overview legislative initiatives

Title (chronological order)	Disclosure provisions	Due diligence provisions	Liability provisions (criminal/civil)	
California Transparency in Supply Chains Act 2010 (US)	X			
Dodd–Frank Act, sec 1502, 2010 (US)	X	X		
Federal Act on Private Security Services Provided Abroad 2013 (CH)		X	X	
Directive 2014/95 on Disclosure of Non-Financial Information 2014 (EU)	X			
Modern Slavery Act 2015 (UK)	X			
<i>Loi relative au devoir de vigilance</i> 2017 (FR)	X	X		X
Regulation 2017/821 on Supply Chain Due Diligence Obligations for Importers of [Minerals]	X	X		

¹⁰⁴ Cossart, Chaplier, and Beau de Lomenie (n 99) 321.

¹⁰⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, art 4.

from Conflict-Affected and High-Risk Areas 2017 (EU)				
Child Labour Due Diligence Proposal, currently in discussion (NL)	X	X	X	
Popular Initiative on Responsible Business, currently in discussion (CH)	X	X		X

5 Conclusion

The Swiss Popular Initiative on Responsible Business aims to ensure that companies based in Switzerland respect human rights and the environment in Switzerland and abroad. It introduces mandatory due diligence and clarifies the legal consequence of a failure to conduct it. In particular, it introduces a specific liability provision for controlling companies. By clarifying the conditions under which companies may be held liable, the Swiss initiative goes beyond mandatory disclosure and due diligence laws.

Clarifying the conditions of liability for multinational enterprises could reduce the uncertainty related to outcomes of transnational civil litigation for corporate human rights and environmental abuses.¹⁰⁶ This is a smart move. What happens in jurisdictions hosting transnational corporations but having no such laws? The judiciary must rule on parent or contracting company liability based on unclear conditions of liability. This volume exemplifies this in the English cases of *Chandler v Cape* and *Thompson v The Renwick*, and the French ones *Areva* and *Comilog*. This will happen again in the German case of *Jabir et al. v KiK* and the cases against Shell in the Netherlands. Why not simply clarify the conditions of liability?

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