Switzerland: The Underuse of Civil Remedies for Corporate and State Human Rights Violations

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I. Introduction

Switzerland has a long humanitarian tradition. It has attached great importance to advancing and promoting respect for human rights, at least from a legal perspective. It has ratified eight out of the nine core international human rights instruments adopted within the United Nations framework,[1] all eight fundamental conventions of the International Labour Organization, and most European human rights treaties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but not the European Social Charter.[2] Switzerland endorses a monist approach, which means that international law does not have to be transposed into domestic law to be valid within the national legal order.[3] Once approved according to domestic proceedings, treaties become part of Swiss law directly and without any need for a transformation act.

However, the ranking of treaties, including international human rights treaties, within the domestic hierarchy of norms remains disputed.[4] Over the years, the Swiss Federal Tribunal has asserted that federal law cannot be applied if it violates a binding international human rights instrument, such as the ECHR.[5] More recently, it seemed to have endorsed the principle of the supremacy of international law,[6] provided that the international norm has a self-executing character. Whether an international provision is self-executing depends on several

[1] Switzerland has ratified the following instruments: International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965); International Covenant on Economic, Social and Cultural Rights (ICESCR) (16 December 1966); International Covenant on Civil and Political Rights (16 December 1966); Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984); Convention on the Rights of the Child (20 November 1989); Convention on the Rights of Persons with Disabilities (13 December 2006); International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006). Switzerland has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990). All online resources cited in this chapter were accessed on 31 May 2021.

[2] European Social Charter (Turin, 18 October 1961) and European Social Charter (revised) (Strasbourg, 3 May 1996).

[3] Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill Nijhoff, 2020) 70.

[4] Raffaela Kunz and Anne Peters, 'Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law National Reports* (TMC Asser, 2019) 1505.

[5] Swiss Federal Tribunal, ATF 125 II 147.

[6] Ammann (n 3) 76.

considerations, in particular the intention of the parties in the treaty and the degree of precision of the rule. In this respect, Switzerland has always been reluctant to recognise the self-executing character of social human rights and therefore their direct justiciability. The jurisprudence persists in defining these provisions as mere programmatic objectives.[7]

In addition to being bound by human rights in international treaties, the Swiss Constitution also entails a list of fundamental rights. These must be upheld throughout the legal system, and whoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation.[8] With regard to the scope of this edited volume, this list includes, among other rights, the right to life and to personal freedom and collective workers' rights. However, there is no specific fundamental right to just and favourable conditions of work or that are directly related to the environment.

Although fundamental rights are primarily addressed to the state, authorities must nonetheless ensure that they apply to relationships among private persons, where appropriate.[9] However, the Swiss Constitution does not recognise any 'direct' horizontal effect between private persons.[10] This means that private persons whose rights have been negatively affected by non-state actors, including business enterprises, cannot hold them directly accountable for not complying with fundamental rights. The Swiss Constitution is also vague regarding remedies. It does not specifically indicate the conduct that the state must adopt to remedy a human rights infringement in a particular case.[11] It also does not provide for an individual right to obtain civil remedies or compensation.[12]

This chapter addresses why civil remedies have generally not been used so far as a mechanism to hold the state and non-state actors accountable for human rights violations. It also discusses the potential use of civil remedies to redress human rights violations in the future. It is structured in two sections as follows. The first section emphasises legal challenges and the potential of civil remedies for corporate human rights violations, particularly harmful labour conditions and environmental pollution, taking place domestically and abroad in complex corporate structures. With respect to complex corporate structures, it explains specific legal challenges, shows the case law and reports the debate that took place in recent years in Switzerland around the Swiss constitutional initiative on responsible business, also called the Swiss Responsible Business Initiative (RBI).[13] The chapter then turns to the civil liability of the state and addresses the lacunary system of civil remedies and compensation for victims of human rights violations committed by the state in Switzerland. This section discusses more particularly civil remedies for the unlawful arrest and detention of persons.

[7] See Swiss Federal Tribunal, ATF 139 I 257, in relation with rights of the ICESCR.
[8] Swiss Constitution, Art 35, paras 1 and 2.
[9] *ibid*, Art 35, para 3.
[10] But see explicit exceptions in Art 8, para 3 *in fine* (right to equal pay for work of equal value) and Art 28 (right to form professional associations and to strike).
[11] Hardy Landolt, 'Die Grundrechtshaftung: Haftung für grundrechtswidriges Verhalten unter besonderer Berücksichtigung der Rechtsgleichheitsgarantie (art 8 BV)' (2005) *Aktuelle Juristische Praxis* 379, 381–82 and 386.
[12] But see Swiss Constitution, Art 26, para 2 (guarantee of ownership) providing for an explicit right to compensation in case of expropriation.
[13] Swiss Federal Chancellery, 'Initiative populaire fédérale 'Entreprises responsables – pour protéger l'être humain et l'environnement'', bk.admin.ch/ch/f/pore/vi/vis462t.html and unofficial English translation by the Swiss Coalition for Corporate Justice, 'About the Initiative', https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf.

II. Civil Remedies for Corporate Human Rights Violations

A. Extra-Contractual Civil Liability

Until recently, Swiss private law and human rights law operated in isolation. The fact that damage in private law caused by a corporate actor can also qualify as a human rights violation did not raise much attention. Recent discussions in Switzerland, particularly since the RBI, bridged this gap by addressing specific civil liability regimes for human rights violations committed by corporate actors.[14] Before addressing the specific question of the civil liability of multinational enterprises for human rights violations in transnational settings, such as environmental pollution caused by a foreign subsidiary or harmful labour conditions at a foreign supplier, this section explains how corporate actors can be held civilly liable for human rights violations in Switzerland.

With respect to civil remedy, a first general remark deals with the compensation-oriented nature of civil liability in Swiss law. Apart from specific types of remedies to protect personality rights, such as requesting the court to prohibit an imminent violation, to put an end to an ongoing violation or to establish the unlawful character of a violation,[15] Swiss tort law focuses on compensation as the main mechanism of redress. Specific provisions govern the extent of compensation in the specific cases of homicide[16] and personal injury.[17] In both situations, the court may award, in addition, an appropriate sum by way of satisfaction.[18]

Another general distinction must be made between contractual and extra-contractual liability. In the case of environmental pollution, for example, the parties will probably not be bound by a contract, and therefore extra-contractual liability will apply. In the case of harmful labour conditions, a contract may exist between the parties. In this case, the worker who suffered damage will have to prove that the employer breached its legal obligation resulting from the employment contract to protect the health of the worker.[19] The case *Howald Moor and others v Switzerland* dealt with the civil liability of the employer for the death of a worker due to the inhalation of asbestos at the workplace in Switzerland.[20] The European Court of Human Rights (ECtHR) found that Switzerland violated the right of victims of asbestos-related diseases to assert their rights to be compensated, not because of the absence of a cause of action through contractual liability, but due to the strict rules on limitation periods in Swiss law.[21]

That being said, no contract will exist between the parties in most situations of corporate human rights violations and particularly in transnational settings. This section focuses, therefore, on extra-contractual liability. It explains how corporate actors can be held extra-contractually liable for the damage they cause under the general rule of direct liability of Article

[14] See n 13 for the text and section II.B.iii below for the discussion.
[15] Swiss Civil Code, Art 28a.
[16] Swiss Code of Obligations (CO), Art 45.
[17] *ibid*, Art 46.
[18] *ibid*, Art 47.
[19] *ibid*, Art 328.
[20] *Howald Moor and Others v Switzerland* App nos 52067/10 and 41072/11 (ECtHR, 11 March 2014).
[21] *ibid* [79].

41 of the Swiss Code of Obligations (CO) and, under the conditions of Article 55 CO, for the acts of a subordinated person. It then addresses specific challenges to establish the civil liability of multinational enterprises registered in Switzerland involved in human rights violations abroad, such as environmental pollution and harmful labour conditions in their foreign subsidiaries or supply chain.

i. Direct Liability

Article 41 CO is the general rule of direct fault liability that applies in the absence of any more specific liability provision. Pursuant to this provision: 'Any person who unlawfully causes damage to another, whether willfully or negligently, is obliged to provide compensation.' There are four conditions to establish direct liability under Article 41 CO: a damage, causation between the harmful event and the damage, a wrongful act[22] and a fault.[23] This is the reason why this type of liability is also called fault liability. The claimant must prove each element. Once these four conditions are fulfilled, the plaintiff is entitled to receive compensation for the damage suffered. Causation and fault raise specific questions regardless of whether damage amounts to a human rights violation.

Regarding causation, only causes that are in 'adequate' relation to the damage can trigger liability. In order to establish whether causation is adequate, a judge must assess whether the kind of event at stake can be considered as being the cause of the kind of damage that occurred 'in view of the ordinary course of things and the experience of life'.[24] Causation is more complex when it comes to establishing when an omission to act is reproached to the individual or corporate actor. The claimant first has to prove that the omission constituted a breach of a duty to act. A duty to act generally arises from the fact of creating or maintaining a situation of risk.[25] In some specific situations, the law expressly stipulates a duty to act. In the environmental context, for example, any person who operates installations which could seriously damage people or their natural environment must expressly choose suitable sites, observe the required safety distances, take technical safety measures and ensure the monitoring of the installation.[26] To establish causation, the claimant will then have to prove that the damage would not have occurred if the company had acted in conformity with that duty.[27]

Where several entities are involved in one damage, only acts and omissions that are so important to be considered as the only cause of the damage can exclude causation.[28] In contrast with criminal law, Swiss tort law does not distinguish between primary and accessory liability.[29] Where two or more persons have together caused a damage, whether as instigator, perpetrator

[22] The condition of a wrongful act plays a more predominant role for the state's civil liability and is explained in section III.A.ii below.
[23] Martin Kessler, 'Art 41 OR' in Heinrich Honsell et al (eds), *Obligationenrecht* (Helbing Lichtenhahn, 2015) 360; Franz Werro, 'Art 41 CO' in Luc Thévenoz and Franz Werro (eds), *Code des obligations*, 2nd edn (Helbing Lichtenhahn, 2012) 364.
[24] Kessler, *ibid*, 364; Werro, *ibid* 376.
[25] Kessler (n 23) 367.
[26] Art 10 (Disaster Prevention) of the Federal Act on the Protection of the Environment.
[27] Kessler (n 23) 366; Werro (n 23) 375.
[28] Kessler (n 23) 331.
[29] Benoît Chappuis, 'La notion d'illicéité civile à la lumière de l'illicéité pénale: réflexions sur la responsabilité civile du blanchisseur d'argent par négligence' (2000) *Semaine Judiciaire* 304, 307.

or accomplice, they are jointly liable to the person suffering damage.[30] The only consequence regards the repartition of the responsibilities among the tortfeasors, based on the degree of their fault.[31]

Regarding fault, conduct is reproachable, and therefore faulty, when a person willfully or negligently fails to meet an expected standard of conduct. A person fails to meet this standard by negligence when they do not want the result but fail to meet the diligence that can be objectively expected from a person of the category of the tortfeasor in a similar situation.[32] In most situations, the judiciary will not have any guidance in this respect. In specific situations, however, the due diligence standard is expressly defined in the law.[33] These legal due diligence norms sometimes refer to private standards and help the judiciary determine the existence of a fault. For example, companies providing security services abroad have the obligation to adhere to the International Code of Conduct for Private Security Service Providers that defines the due diligence conduct that they must adopt to prevent human rights violations.[34] Another example explained below is the due diligence obligation that companies in Switzerland have to carry out in order to prevent the use of child labour in Switzerland and in their supply chain.[35]

ii. Liability for the Acts of a Subordinated Entity

In addition to direct liability for own acts or omissions, corporate actors can also be liable for the acts of another person, which corresponds to a form of vicarious liability in other countries. In this respect, Article 55 CO is a specific type of liability of an entity for the damage caused by a subordinated entity. Historically, this provision was introduced in 1911 for reasons of fairness: by choosing to let subordinated persons conduct the work, an entity increases risks on third parties and economically benefits from that choice.[36] It was therefore considered fair to make that entity liable for the damage caused by the subordinated persons.

Pursuant to Article 55 CO, a person is liable for the damage caused by a subordinated entity in the performance of its work unless it proves that it took all due care to avoid damage of this type or that the damage would have occurred even if all due care had been taken. Case law has identified several conditions that must be met to hold a person liable for the damage caused by a subordinated person. In addition to a tortious act by the subordinated person in the performance of the work,[37] two of them are of particular interest when addressing the liability of parent companies or lead companies in the supply chain, as discussed in the following section. The first relates to the existence of a relationship of subordination. The second deals

[30] Art 50(1) CO. See Franz Werro, 'Art 50 CO' in Thévenoz and Werro (n 23) 471–72.
[31] Werro (n 23) 484.
[32] Werro (n 23) 381.
[33] Kessler (n 23) 380; Pierre Widmer and Frédéric Krauskopf, 'Privatrechtliche Haftung' in Stephan Weber and Peter Münch (eds), *Haftung und Versicherung: Beraten und Prozessieren im Haftpflicht- und Versicherungsrecht*, 2nd edn (Helbing Lichtenhahn Verlag, 2015) 60.
[34] Art 7 Federal Act on Private Security Services provided abroad. See Hector Entenza, *Les obligations et la responsabilité de l'État face aux activités des entreprises militaires et de sécurité privées: Étude de droit international des droits de l'homme et de droit suisse* (Helbing Lichtenhahn, 2016) 142.
[35] See section II.B.iii below.
[36] Werro (n 23) 510.
[37] *ibid* 511; Kessler (n 23) 463, for all the conditions.

with the absence of proof that the employer took all due care in selecting, instructing and supervising the subordinated person.

First, a relationship of subordination does not require an employment contract or any other contract.[38] In order to determine whether an entity is subordinated, a judge must instead assess whether the company can instruct and supervise the subordinated person.[39] An element that is taken into account is the margin of decision that this person retains when performing the work.[40] Although it is acknowledged that subordinated entities can be legal persons, subcontracting companies are generally not considered as subordinated.[41] In one old decision in the labour context, the Swiss Federal Tribunal excluded the liability of a contracting company for a work accident caused to the employee of a subcontractor during renovation work on a building.[42] In the circumstances of that case, the Tribunal found no relationship of subordination between the two companies that worked as independent entities from each other. As a result, it found that the contracting company was not liable for the acts of the subcontractors that caused the damage to the employee.[43]

Second, if a tortious act by the subordinated entity has been committed and the conditions of the employer are met, case law has established a presumption that the controlling entity failed to carry out due diligence. It is also presumed that this lack of due diligence caused the damage.[44] This is an important difference from the direct fault liability outlined above because the claimant does not have to prove the fault of the controlling entity. This entity nevertheless has the possibility to reverse this presumption by proving that it took all due care when selecting, instructing and supervising the subordinated entity to avoid a damage of this type. Legal persons are also increasingly required to prove that they were well organised. Organisational duties encompass, for example, the duty to clearly define internal competences and responsibilities within the company.[45]

B. Civil Remedies for Human Rights Violations by Multinational Enterprises

In Switzerland, the debate has not focused on how to ensure that Article 41 CO and Article 55 CO remedy human rights violations by corporate actors in the domestic context. It addressed the practical relevance of both provisions in a transnational context.[46] Theoretically, Article 41 CO and Article 55 CO could already apply to hold a multinational enterprise in Switzerland liable for the damage caused by harmful labour practices at a foreign subsidiary or at a foreign supplier or by environmental pollution abroad.[47] With respect to environmental pollution, the

[38] Werro (n 23) 512; Kessler (n 23) 463.
[39] Kessler (n 23) 463.
[40] Franz Werro, *La responsabilité civile*, 3rd edn (Stämpfli, 2017) 153.
[41] Werro (n 23) 512.
[42] Swiss Federal Tribunal, ATF 42 II 615.
[43] *ibid*.
[44] Werro (n 23) 514.
[45] *ibid* 516; Kessler (n 23) 463.
[46] Gregor Geisser, *Ausservertragliche Haftung privat tätiger Unternehmen für "Menschenrechtsverletzungen" bei internationalen Sachverhalten* (Schulthess Juristiche Medien, 2013); Christine Kaufmann and Lukas Heckendorn, *Access to Remedy* (Swiss Centre of Expertise in Human Right, 2017); Nicolas Bueno, 'La responsabilité des entreprises de respecter les droits de l'homme: État de la pratique suisse' (2017) *Aktuelle juristische Praxis* 1015.
[47] Provided they would apply in transnational matters according to Swiss private international law.

damage must also injure a legal interest of individuals and not only the environment per se.[48] In practice, however, the application of Article 41 CO and Article 55 CO in complex corporate structures raises particular legal challenges.

i. Specific Legal Challenges

The application of direct fault liability of Article 41 CO, as presented above in the domestic context, raises at least two specific legal challenges to remedy environmental pollution or harmful labour conditions by multinational enterprises. First, the acts of another entity interrupt adequate causation only when it appears as the only cause of the damage.[49] The acts of a foreign subsidiary or a supplier should generally not interrupt causation between the harmful event of the parent or contracting company. However, problems may arise when the reproachable conduct of the parent or contracting company located in Switzerland is an omission.[50] In case of an omission, the claimant first has to prove that the parent or contracting company had a duty to act before proving that the damage would not have occurred if the company had acted in conformity with that duty.[51] This can prove challenging in the absence of a statutory duty to act for the parent or contracting companies.

Second, a claimant has to establish the fault by a company in Switzerland for environmental pollution or harmful labour conditions abroad. This also proves challenging in the absence of a legal standard of conduct for companies with respect to core labour standards and the environment. The question is whether a judge can deduce human rights due diligence duties for multinational enterprises directly from internationally recognised standards, in particular the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, when assessing the fault under Article 41 CO. Although nothing speaks against it and some scholars recommend it,[52] there is no case law addressing the question, which is a source of great uncertainty.

The legal doctrine also debates whether Article 55 CO could be a better avenue to hold a company registered in Switzerland accountable for the damage caused by a ‘controlled’ and therefore ‘subordinated’ subsidiary, supplier or subcontractor.[53] A first legal uncertainty in this respect is to prove the existence of a relationship of subordination between the parent or contracting company and the foreign company causing the harm. Some argue that in a corporate group when controlling companies extend their acting capacity by using a subsidiary as agents,

[48] Swiss Federal Tribunal, 4C_317/2002. In this case, the Tribunal dismissed the compensation claim filed by an ecological foundation dealing with the abatement of endangered bird species because of the lack of legal standing under Art 41 CO.
[49] Werro (n 23) 378; Widmer and Krauskopf (n 33) 48.
[50] Bueno (n 46) 1020.
[51] Kessler (n 23) 366; Werro (n 23) 375.
[52] Mirina Grosz, ‘Umweltschutz als Aspekt gesellschaftlicher Unternehmensverantwortung im internationalen Kontext’ (2017) *Umweltrecht in der Praxis* 641, 658; Geisser (n 46) 487–88.
[53] Franz Werro, ‘The Swiss Responsible Business Initiative and the Counter-Proposal’ (2019) 10(2) *Journal of European Tort Law* 172. For a detailed overview of the debate see also (in German) Franz Werro, ‘Indirekter Gegenentwurf zur Konzernverantwortungsinitiative: Haftungsnorm im Einklang mit der schweizerischen Tradition’ (2018) *Sui Generis* 428, 434 and all references in n 23.

they should accordingly be jointly responsible for the actions taken by these agents.[54] Other authors do not exclude that this should also be the case for subordinated suppliers in the supply chain.[55]

In this respect, the recently adopted Federal Act on Private Security Services Provided Abroad (PSSA) contains an interesting provision on the civil liability of contracting companies for the human rights violations caused by their subcontractor abroad. This Act aims at ensuring that companies do not provide security and military services abroad that are in violation of human rights.[56] Regarding civil liability, Article 6(1) PSSA provides that 'when a company subcontracts the provision of a security service abroad to another company, it shall ensure that its subcontractor performs that service in keeping with the constraints to which it is itself subject'. Article 6(2) adds that 'the liability of the contracting company for the harm caused by the subcontractor is determined in accordance with the Code of Obligations'. We suggest that the contracting company should be held liable for the damage caused by a subcontractor under the conditions of Article 55 CO. As a result, the contracting company should be liable for the action(s) of its subcontractor, unless it proves that it took all due care to avoid the damage caused in the performance of providing the security service.

Finally, even if a relationship of subordination exists, it remains unclear how the controlling parent or contracting company registered in Switzerland must argue that it took all due care when selecting, instructing and supervising the subordinated entity or prove that it was well organised to escape liability.

These legal uncertainties may explain why there has not been much case law addressing the liability of companies in Switzerland for human rights violations. Nevertheless, some proceedings have shed light on the liability of multinational enterprises involved in human rights violations, in particular with regard to environmental pollution and harmful labour conditions abroad.

ii. The Case Law

Chronologically, the *IBM* case was the first to address civil remedies for human rights violations by a corporate actor abroad. The claimants were Gypsies detained in concentration camps during the Second World War.[57] They reproached the American company IBM for supplying technology to the Nazi regime from its European headquarters based in Geneva and claimed civil compensation for the harm they had suffered based on Article 41 CO.

Ruling on the question of territorial jurisdiction, and not on the merits, the Swiss Federal Tribunal found that the allegation of the claimants that IBM had supplied its Nazi clients with technology from its European branch in Geneva was plausible.[58] Since it could not be excluded

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[54] Werro 2019, *ibid*, 172; Ronald von Büren, *Schweizerisches Privatrecht Bd. VIII/6, Der Konzern*, 2nd edn (Helbing Lichtenhahn, 2005) 203; Nina Sauerwein, *La responsabilité de la société mère* (Staempfli, 2006) 89–90.
[55] Gregor Geisser, 'Die Konzernverantwortungsinitiative: Darstellung, rechtliche Würdigung und mögliche Umsetzung' (2017) *Aktuelle Juristische Praxis* 943, 953; Nicolas Kuonen, *La responsabilité précontractuelle: Analyse historique. Etude de la phase précontractuelle et des instruments précontractuels. Théorie général en droit suisse* (Schulthess, 2007) 500.
[56] Entenza (n 34) for the detail.
[57] Swiss Federal Tribunal, ATF 131 III 153.
[58] *ibid* cons 6.4; see Bueno (n 46) 1018.

that IBM was responsible for acts of complicity in genocide and that such acts had been committed in Geneva, this was sufficient for establishing the jurisdiction of the Geneva Court.[59] The parties also agreed to apply Swiss law to the civil proceedings. If it had ruled on the merits, the Court would have had to address the four conditions of direct liability on Article 41 CO presented above. It would therefore have had to establish whether IBM in Switzerland wrongfully committed acts or omissions and, whether wilfully or negligently, caused damage to the claimants. Although this case shows that, theoretically, furnishing a technology used by others, including by a state, to violate human rights abroad can constitute a tortious act under Article 41 CO, it was dismissed on the grounds the claim was statute-barred.[60]

The *FIFA* case dealt with harmful labour conditions. In this case, a Bangladeshi worker alleged that the Fédération Internationale de Football Association (FIFA), which is registered in Zurich, attributed the 2022 World Cup to Qatar despite well-documented abuses on core labour standards due to the kafala sponsorship system. The kafala system prohibited migrant workers, including the claimant, to quit, change work or leave Qatar without the consent of a sponsor-employer, which retains travel documents.[61] FIFA was also reproached for having omitted to require legal reforms from Qatar after it attributed the World Cup.[62] Regarding compensation based on Article 41 CO, the Commercial Court of Zurich found that the claim did not demonstrate precisely enough what acts by or omissions of FIFA violated the claimant's rights. It found further that FIFA did not have a direct possibility to influence Qatari law and that it was not directly active in the construction of infrastructure projects.[63] The Court dismissed the case without assessing the conduct of FIFA and without mentioning the international human rights due diligence standards, such as the UNGPs or the OECD Guidelines for Multinational Enterprises, as was required of the claimant.

Finally, victims of pesticide poisoning in the central Indian region of Yavatmal have recently submitted a product liability claim in Switzerland against Syngenta. This case deals with environmental pollution as well as harmful labour conditions. In parallel to an OECD complaint submitted to the Swiss National Contact Point,[64] three claimants among hundreds of poisoning cases argue that Syngenta produced and sold a pesticide prohibited in Switzerland without taking the necessary measures to prevent farmers from being poisoned that allegedly led to homicides and physical injuries.[65] The ongoing proceedings will test a new cause of action under the Federal Act on Product Liability.

Apart from this ongoing case, the other cases show the limited success of using civil remedies for human rights violations in complex corporate structures. None of them has led to civil remedies or has even discussed conditions of civil liability on the merits. This reality also contributed to an intense debate on the RBI, as will be presented in the following section.

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[59] Geisser (n 46) 224.
[60] Swiss Federal Tribunal, ATF 132 III 661.
[61] *Handelsgericht des Kantons Zurich*, HG160261-O [unpublished] 3 January 2017, 13.
[62] *ibid* 14.
[63] *ibid* 15; Bueno (n 46) 1018.
[64] Swiss National Contact Point, 'Report on the Initial Assessment Syngenta' (Berne, 15 December 2020)
[65] European Center for Constitutional and Human Rights, 'Poisoning in Yavatmal: Those Affected Take on Pesticide Conglomerate Syngenta', www.ecchr.eu/en/case/vergiftungswelle-yavatmal-pestizid-konzern-syngenta/.

iii. The Legislative Debate Around Corporate Liability for Human Rights Violations

Since 2016, an intense legislative debate has taken place to clarify the conditions of civil liability for corporate human rights violations. This debate was triggered by the RBI, which aimed at including a new provision on the responsibility of business enterprises in the Swiss Constitution.[66] The constitutional initiative was submitted to a popular vote in 2020. A majority of 50.7 per cent of Swiss citizens accepted it. However, the revision of the Constitution also required a majority from the population in the majority of the 26 cantons. This was not the case, and the revision was therefore rejected.[67] Despite this rejection, the RBI triggered several drafts of civil liability provisions for corporate human rights abuses.[68]

According to a proposed provision in the Swiss Constitution in the RBI, companies based in Switzerland would be required to carry out appropriate human rights and environmental due diligence.[69] Such due diligence would be based on the UNGPs and the OECD Guidelines for Multinational Enterprises. Regarding liability, companies would be liable for human rights and environmental-related harm caused by companies under their control unless they could prove that they took all due care to avoid the harm.[70] This proposed provision aimed to ensure that the controlling company, including parent companies and contracting companies, could be held liable for damage caused by the companies it controls. This liability regime, in short, aimed to clarify the scope of liability for damage caused by a subordinated entity in complex corporate structures in Article 55 CO.

Before the popular vote, one chamber of the Swiss Parliament adopted a counterproposal directly modifying Article 55 CO with a view to leading to the withdrawal of the constitutional initiative.[71] The counterproposal limited the human rights and environmental due diligence obligation to big companies and excluded that a contracting company could be liable for damage caused by a supplier. Nonetheless, it maintained a parent company liability regime in which a parent company could be liable for damage caused by a controlled subsidiary in breach of international human rights and environmental standards by which Switzerland is bound. The parent company would not be liable if it could prove that it carried out its due diligence to protect human rights and the environment or that it could not influence the controlled company.[72] This proposal was not adopted by the second chamber.

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[66] Nicolas Bueno, 'The Swiss Federal Initiative on Responsible Business: From Responsibility to Liability' in Liesbeth Enneking et al (eds), *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Routledge, 2020) 239, for an overview.

[67] Christine Kaufmann and Res Schuerch, 'Nouvelles règles pour les entreprises suisses : obligation de rendre compte et devoir de diligence limité, Swiss Center for Expertise in Human Rights' (*Newsletter*, 17 December 2020), www.skmr.ch/frz/domaines/economie/nouvelles/imr-contre-projet.html.

[68] Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69(4) *International and Comparative Law Quarterly* 789, 804–806, for an overview.

[69] Proposed Art 100, para 2, lett b of the Swiss Constitution.

[70] Proposed Art 100, para 2, lett c of the Swiss Constitution. Bueno (n 66) 247, for a comment.

[71] For the text of the counterproposal, see Swiss Parliament, 'National Council and Council of States, 16.077 CO. Droit de la société anonyme, Session d'été 2020', www.parlament.ch/centers/eparl/curia/2016/20160077/NS2-9%20F.pdf.

[72] Nicolas Bueno, 'Diligence en matière de droits de l'homme et responsabilité de l'entreprise: Le point en droit suisse' (2019) 29 *Swiss Review of International and European Law* 345, 360; Werro (n 53); Isabelle Chabloz and Julie Perriard, 'Responsabilité sociale des entreprises: responsabilité de la société mère ou de son conseil d'administration?' in Rita Trigo Trindade, Rashid Bahar and Giulia Neri-Castracane (eds), *Vers les sommets du droit: "Liber amicorum" pour Henry Peter* (Schulthess, 2019) 310, 318; Nicolas Bueno, 'The Swiss Initiative on Responsible Business and its Counter-Proposal: Texts and Current Developments' (*Business and Human Rights*

A few months before the popular vote, the two chambers of Parliament agreed on a weaker counterproposal that did not contain any corporate liability provision.[73] It was agreed that it would be automatically adopted if the RBI was rejected, which is what happened. This counterproposal, which modifies the CO, will therefore be the human rights due diligence legislation for the years to come. This new legislation contains a due diligence obligation for certain big companies based in Switzerland in two areas: conflict minerals and child labour.[74] Although it does not include any legal liability, introducing due diligence obligations in Swiss law in these two areas will nonetheless help the judiciary when it assesses whether the acts or omissions of companies based in Switzerland were reproachable and therefore faulty in a specific case.[75] This will have an impact on claims based on the direct liability of Article 41 CO but also potentially when assessing the organisational duties of a company under Article 55 CO. The case law will explain how this will apply in the future.

III. State Civil Liability for Human Rights Violations

It is not only private actors who can be civilly liable in Swiss law. So can the state. This section first explains the conditions of state civil liability that could lead to a duty to compensate damage by the state. It then illustrates additional hurdles in respect of compensation for breaches of human rights in particular. It shows that compensation by the state is rarely considered as a tool against violations of human rights, but it exists namely in the case of unlawful arrests.

A. State Civil Liability

Historically, the concept of public compensation has met stiff resistance in Switzerland. It was only by the mid-twentieth century that a system of exclusive and objective state civil liability was established, which abolished the victim's need to sue the public agent personally.[76] Such a system arose out of the rule of law's requirement encompassing the fulfilment of human rights, equal treatment, as well as an equitable spread of the risks associated with the expansion of public activities.[77]

Journal Blog, 7 December 2018), www.cambridge.org/core/blog/2018/12/07/the-swiss-responsible-business-initiative-and-its-counter-proposal-texts-and-current-developments/.

[73] Swiss Parliament, Contre-projet indirect à l'initiative populaire «Entreprises responsables –pour protéger l'être humain et l'environnement of 19 June 2020, www.parlament.ch/centers/eparl/curia/2016/20160077/Texte%20pour%20le%20vote%20final%202%20NS%20F.pdf.

[74] Art 964j CO.

[75] This could be the case after a judge recognises that they apply according to private international law.

[76] Anne-Christine Favre, 'Le droit de la responsabilité de l'État: les enjeux' in Anne-Christine Favre, Vincent Martenet and Etienne Poltier (eds), *La responsabilité de l'État* (Schulthess, 2012) 9, 12ff; Jacques Dubey and Jean-Baptiste Zufferey, *Droit administratif général* (Helbing Lichtenhahn, 2014) 567.

[77] Pierre Moor and Etienne Poltier, *Droit administratif: Volume II* (Stämpfli, 2011) 834.

Today, the law of state liability remains highly fragmented, hardly uniform[78] and largely based on administrative law. At the constitutional level, Article 146 of the Swiss Constitution provides that 'The Confederation shall be liable for damage or loss unlawfully caused by its organs in the exercise of official activities'. At the federal law level, this provision is implemented through the Federal Act on the Liability of the Confederation, its Authorities' Members and its Public Federal Officials (LCA).[79] This Act is complemented by provisions establishing special regimes, concerning, for example, compensation for the damage suffered by an accused person who has been acquitted[80] or caused to a third party by (members of) the armed forces.[81] Finally, private civil law liability provisions, including Articles 41 and 55 CO outlined above, remain applicable to the state and its entities when state relations fall under private law or when certain issues are not regulated in the state liability legislation.[82]

Additionally, each of the 26 cantons is allowed to enact provisions that deviate from the conditions of private civil liability in the Code of Obligations with respect to the liability of civil servants and public officials for any damage they cause in the exercise of their duties.[83] In practice, 26 cantonal regimes on the public cantonal and local entities liability, which is particularly relevant in the field of damage caused by the police (a competence of the cantons),[84] complement the federal system of state civil liability.[85]

Despite this normative fragmentation, Article 3 LCA provides for the underlying principle of the civil liability of the state. Accordingly, the state is 'liable for the damage caused to a third party by a wrongful act of a public official in the performance of its functions, regardless of the official's fault'. The injured party is called to provide evidence of the damage of a wrongful act imputable to a person who holds a public and official function and of the causal relationship between the two.[86] In contrast to the fault liability of Article 41 CO, the injured party need not prove that the public official committed a fault.[87] Since the issue of damage and causation is similar to the regime of liability in private law,[88] this section focuses on the wrongful act imputable to a person who holds a public and official function, which is also the central and most limitative condition of liability.[89]

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[78] Dubey and Zufferey (n 76) 575; Reto Patrick Müller and Lea Bachmann, 'Treu und Glauben als grundrechtliche Vermögensschutznorm?: Mögliche Konsequenzen des Urteils A-793/2011 des Bundesverwaltungsgerichts vom 20. Februar 2012 für das System der Staatshaftung bei reinen Vermögensschäden' (2020) 8 *Schweizerische Juristen-Zeitung* 259, 270.

[79] Loi fédérale sur la responsabilité de la Confédération, des membres de ses autorités et de ses fonctionnaires du 14 mars 1958 (RS 170.32).

[80] Art 429 ff Swiss Criminal Procedure Code (RS 312.0); Etienne Poltier, 'La responsabilité de l'Etat pour acte illicite: l'exigence de l'illicéité' in Favre, Martenet and Poltier (n 76) 45, 69–70.

[81] Chapter 5 (Art 135 ff) of the Federal Act on the Armed Forces and Military Administration (RS 510.10).

[82] Tobias Jaag, 'Le système général du droit de la responsabilité de l'Etat' in Favre, Martenet and Poltier (n 76) 23 ff.

[83] Art 61, para 1 Code of Obligations.

[84] See section III.B.ii below.

[85] Swiss Federal Tribunal, ATF 133 III 462 cons 4, for the application of the private civil law regime (Art 41 ff CO) in this context.

[86] Federal Administrative Court, 2009/57, 29 September 2009, cons 2.1, with references.

[87] However, the official will be held liable under the internal recourse procedure if he or she has committed serious misconduct: Moor and Poltier (n 77) 850.

[88] Jaag (n 82) 27. Swiss Federal Tribunal, ATF 133 III 462 cons 4.4.2. See section II.A.i below for some specific questions regarding these conditions.

[89] Florence Aubry-Girardin, 'Responsabilité de l'Etat: un aperçu de la jurisprudence du Tribunal fédéral' in Favre, Martenet and Poltier (n 76) 143.

First, the applicability of the public liability regime depends on the fact that the damaging wrongful act or omission is imputable to a person who holds a public and official function. At the federal level, all individuals entrusted with a public function, such as the members or employees of the administrative or judicial federal authorities[90] as well as all other corporations or individuals 'insofar as they are directly entrusted with tasks under public law by the Confederation',[91] can trigger the liability of the state. Second, a functional relation between the damage and the official task must exist. In other words, it is required that the damage is caused *in* the exercise of their functions and not purely *on the occasion* of the exercise of their functions.

Third, Article 3(1) LCA requires a wrongful act. Generally speaking, as in the private civil law regime, an act is wrongful when it violates an absolute legal interest of the injured party. Absolute legal interests are legal interests absolutely protected by the legal order. They include personal integrity, life, personal liberty as well as property.[92] An act by a public official that violates them is considered wrongful as such because the *outcome* of the act is wrongful. If instead the injuring act does not infringe an absolute legal interest,[93] the act is wrongful only if the perpetrator has violated a standard of behaviour whose specific purpose was to safeguard the legal interest at stake. In this case, the *behaviour* is wrongful, which reflects a wrongfulness of behaviour. Such a standard of behaviour can result from legal norms,[94] general principles of law[95] or from the guarantee of a fundamental right.[96]

B. State Civil Liability and Compensation for Human Rights Violations

i. The Subsidiarity of Compensation and the Requirement of a Legal Basis

One might assume that, in principle, when the state breaches a fundamental right, this will amount to a wrongful act and therefore automatically trigger the duty of the state to provide compensation. In practice, however, civil remedies in the form of compensation for damage resulting from an act committed by a person who holds public and official function consisting in the violation of a fundamental right are subsidiary to other mechanisms of protection and require an explicit legal basis.

First, compensation for a human rights violation by the state is subsidiary to the possibility of judicial redress. A potential violation has to be primarily assessed before a judge through a complaint procedure against the act that caused it. The judge must redress a breach by bringing the situation in conformity with the constitutional order through the annulment or

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[90] Art 1, para 1 LCA.
[91] Art 1, para 1, lett f LCA.
[92] Swiss Federal Tribunal, ATF 123 II 577, 581–82; Jaag (n 82) 32; Poltier (n 80) 48.
[93] With regard to fundamental rights, this might be the case of the right to freely form and express an opinion or the right to organise meetings or to belong to an association: these are, indeed, mere rights of participation or opportunities which do not guarantee any absolute legal rights.
[94] As, eg, from the legislation on animal diseases, which also aims at protecting individuals from financial losses: Swiss Federal Tribunal, ATF 126 II 63, 68.
[95] In particular, the principle of good faith. See Federal Administrative Court, A-793/2012, 12 February 2012, commented by Müller and Bachmann (n 78) 259.
[96] Jaag (n 82) 32; Poltier (n 80) 48 ff; Aubry-Girardin (n 89) 133; Moor and Poltier (n 77) 858 f; see also Swiss Federal Tribunal, ATF 132 III 122, 130 and ATF 133 III 323. This distinction is still disputed.

the amendment of the challenged decision. Thus, the sanction provided for human rights infringement is one of a *restorative* nature,[97] not of a *compensatory* nature.

Second, when the restorative sanction of a human rights violation cannot be granted, for example when the consequences of infringing a human right are irreversible,[98] the protection might be achieved through a state liability action to oblige the state to compensate the damage.[99] Even in that situation, compensation by the state for the violation of a human right presupposes the existence of an explicit legal basis stating the duty to compensate, according to the general principle of '*Entschädigungspositivismus*'.[100]

As outlined in the introduction, the problem is that the Swiss Constitution does not specifically indicate the conduct that the state must adopt to remedy a human rights infringement and does not provide for a legal basis for compensation.[101] The jurisprudence states, for example, that the guarantee of personal freedom in the Constitution cannot by itself provide for such a legal basis.[102] An argument for this conclusion is that fundamental rights have a negative nature. A general duty to compensate fundamental or human rights violations would amount to a positive obligation that would contrast with their negative nature.[103]

A part of the doctrine considers instead that such a stiff attachment to the need for an explicit legal basis for compensation is not justifiable, especially in light of the positive dimension of human rights.[104] It emphasises that the compensation reflect a form of reparation for the breach caused by a public authority to legitimate individuals' interests.[105] For example, the Swiss Federal Tribunal has shown a certain openness concerning a right to be compensated directly from the duty of the state to act in good faith, as guaranteed in Article 5 of the Swiss Constitution, in the presence of an overwhelming sacrifice for the individual.[106]

Some authors consider that the duty to compensate for a human right infringement represents a constitutional principle and should therefore apply to the infringement of all fundamental rights. They argue that the duty to compensate arises directly from the state's duty to protect fundamental rights.[107] As a result, as long as the other liability conditions are fulfilled, the breach of this duty is wrongful and should trigger the liability of the state and its obligation

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[97] Bernhard Rütsche, *Rechtsfolgen von Grundrechtsverletzungen: Mit Studien zur Normstruktur von Grundrechten, zu den funktionellen Grenzen der Verfassungsgerichtsbarkeit und zum Verhältnis von materiellem Recht und Verfahrensrecht* (Helbing Lichtenhahn, 2002) 107 ff.
[98] *ibid* 102f; Landolt (n 11) 385–86.
[99] Jost Gross, 'Staatshaftung und Grundrechtsschutz' (2002) *Aktuelle Juristische Praxis* 1429, 1430.
[100] Landolt (n 11) 386.
[101] Except for the guarantee of ownership in Art 26 of the Swiss Constitution and the explicit right to compensation in case of an expropriation.
[102] Moor and Poltier (n 77) 880f.
[103] Landolt (n 11) 386 ff, with references to case law.
[104] Markus Müller, 'Staatshaftungsverfahren und Grundrechtsschutz: Zum Grundrechtsschutz im Staatshaftungsverfahren am Beispiel ärztlicher Behandlung in öffentlichen Spitälern; gleichzeitig eine Besprechung von BGE 2P.373/1994 vom 12 Februar 1996' (1996) 14(6) *Recht* 259, 267; Landolt (n 11) 386 ff.
[105] Moor and Poltier (n 77) 884.
[106] Swiss Federal Tribunal, ATF 101 Ia 328, 330–31; 117 Ib 497, 500-501; 122 I 328, 340–42; Landolt (n 11) 392; Dubey and Zufferey (n 76) 636, 640; Lukas Schaub, 'Art 146' in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds), *Bundesverfassung (BV) Basler Kommentar* (Helbing Lichtenhahn, 2015) 2275.
[107] Rütsche (n 97) 375–76; Evelyne Sturm, *Untersuchung von polizeilicher Gewaltanwendung: Menschenrechtliche Vorgaben und ihre Umsetzung in der Schweiz* (Dike, 2019) 286f; Nadine Mayhall, *Aufsicht und Staatshaftung* (Schulthess, 2008) 240 ff.

to compensate without an express legal basis. This should apply even if the breach of the fundamental right does not infringe an absolute legal interest, such as life or personal integrity.

These limitations explain the few cases brought to a court that discuss the duty of the state to compensate for a human rights infringement. The next three sections discuss specific situations that can give rise to compensation from the state, in particular for a damage caused by the police, for unlawful detention, and for unlawful conditions of stay for asylum seekers in federal registration centres.

ii. Civil Compensation for the Use of Police Force

In Switzerland, the cantons have competency over the activities of the police. The question of compensation is therefore governed by cantonal legislation. Some cantonal legislation has enacted liability provisions for police actions.[108] However, in general, there is no comprehensive cantonal police-specific liability legislation: similar conditions of state civil liability as in Article 3 LCA are usually applicable.[109] Therefore, the canton will usually be liable, not the public agent, if the victim can prove the damage, wrongful act by a police officer in the exercise of his or her function and the causal relationship between these two. However, this may prove to be complex.

In one case, for example, a claimant required compensation of CHF 161.058 from the canton of Basel for serious injury to his shoulder allegedly caused by a joint lock, a grappling technique, from a police officer. After the cantonal court dismissed the claim at the procedural stage, the Swiss Federal Tribunal required that the cantonal court judge on the matter and establish whether the act of the police caused the damage and whether it was wrongful.[110] Based on medical reports and testimonies, the cantonal court confirmed that the claimant did not prove that the act of the police officer was the adequate cause of the serious injury to his shoulder. As a result, it rejected the claim.[111]

Even if causation had been established, proving a wrongful act by a public agent can also turn out to be complex in practice. When the use of force by the police infringes an absolute legal interest, such as physical integrity in this case, the act is wrongful.[112] The wrongful nature of the act, however, may still be excluded through the existence of a justification, particularly when the use of force is authorised. In this respect, police measures, even coercive ones undertaken in the framework of a criminal proceeding, are not wrongful as long as they have a legal basis, when they satisfy a public interest, when they are proportionate and when they respect the essence of fundamental rights.[113] For example, in the case mentioned above, it was not contested that the police officer used the grappling technique, and the Swiss Federal

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[108] These provisions typically provide a basis to compensate individuals suffering from serious harm following a police measure taken in a state of necessity, and this on the basis of principles such as equity or fair treatment. In this respect see, for instance, Art 9 of the Law on Civil Liability of Public Entities and Public Agents of the Ticino Canton, www.lexfind.ch/fe/it/tol/20435/versions/108424/it.

[109] Jürg Marcel Tiefental, *Kantonales Polizeirecht der Schweiz* (Schulthess, 2018) 624; Pierre-Louis Manfrini, 'La responsabilité de l'État pour les actes de la police' in Favre, Martenet and Poltier (n 76) 209.

[110] Swiss Federal Tribunal, Decision 2C_194/2013.

[111] Canton of Basel-Stadt, Appellationsgericht, ZB.2016.8 (2016) cons 3.3.3.

[112] See section III.A above.

[113] Tiefental (n 109) 627.

Tribunal raised some concerns about the necessity and proportionality of this act.[114] However, the cantonal court found that the question could be left unanswered as there was no adequate causation between the act and the damage.[115]

Finally, it may happen that as a result of an unintentional consequence of an agent performing a legal duty, a third (non-interfering) party could suffer damage (eg a passer-by wounded by police gunfire during a violent demonstration). Except for a striking abuse of force, such an act will also be considered as justified and therefore lawful. This aims at avoiding stigmatising the agent and denaturalising the objective character of the liability.[116] That being said, the question of compensation is disputed in such a situation.[117] Some authors call for the establishment of a legal liability regime for lawful acts. To clarify the situation, some cantonal legislation provides for compensation by the state for third (non-interfering) parties.[118] As a result, the state is required to compensate a victim who is affected by a damaging act with a distinguished intensity with respect to other individuals.[119]

iii. Civil Compensation for Unlawful Detention

As shown above, there is no constitutional provision that directly associates the right to be compensated with the breach of a fundamental right.[120] For unlawful detention, however, Article 431 of the Swiss Criminal Procedure Code (SCPC) provides for a compensation scheme in case of unlawfully applied compulsory measures. Moreover, the Swiss Federal Tribunal has recognised that Article 5(5) ECHR, to which Switzerland is bound and which guarantees the right to compensation for unlawful detention, constitutes a *lex specialis* that has to be applied in domestic proceedings.[121] Nevertheless, this provision does not grant more extensive guarantees to individuals than those pursuant to Article 431 SCPC.[122]

This said, even if Article 431 SCPC endorses the principle of compensation, it does not regulate its modalities, which leaves a certain amount of latitude to judicial authorities. In this respect, the Swiss Supreme Court recognised that it is possible to take inspiration from the general rules of Article 41 CO.[123] Thus, for example, the cantonal court of Vaud canton denied any compensation for moral damage in two cases of irregular detention. Indeed, while admitting that detention exceeding the maximal duration in a police station cell (48 h) by ten and seven days, respectively, did not comply with Article 3 ECHR (prohibition of torture and inhuman and degrading treatment), the judges ruled that the mere existence of a decision that found

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[114] Swiss Federal Tribunal, Decision 2C_194/2013, cons 3.3.
[115] Canton of Basel-Stadt (n 111).
[116] Manfrini (n 109) 209; Poltier (n 80) 55, for the case concerning the liability of the state for police acts, and the difficulty with establishing a duty to compensate.
[117] Bernhard Rütsche, 'Staatshaftung für bewilligte Sicherheitsrisiken: warum die objektive Widerrechtlichkeitstheorie nicht funktioniert' (Jusletter, 4 April 2011).
[118] eg Art 8 Loi sur la responsabilité civile des collectivités publiques et de leurs agents (Canton of Fribourg), Art 6 Haftungsgesetz (Canton of Shaffhouse). See Jörg Künzli, Evelyne Sturm and Vijitha Veerakatty, *La protection juridique contre les abus de la part de la police: Présentation des mécanismes de plainte possibles en Suisse* (Berne, Centre Suisse de compétence sur les droits humains (CSDH, SKMR, CSDU and SCHR, 2014)) 70.
[119] Manfrini (n 109) 224 ff.
[120] Rütsche (n 977) 370. Except for Art 26, para 2 of the Swiss Constitution that guarantees property.
[121] Swiss Federal Tribunal, ATF 129 I 139, 141.
[122] Swiss Federal Tribunal, ATF 142 V 245, 249.
[123] Swiss Federal Tribunal, ATF 140 I 246, 251.

irregularity was a sufficient form of reparation. By contrast, the threshold of seriousness that could justify financial compensation was not reached.[124]

On the other hand, the Swiss Federal Tribunal has clarified that the fact that a judicial authority can revoke a detention order pronounced by an administrative authority does not necessarily mean that the detention was unlawful and therefore that the state has an obligation to compensate the claimant.[125] In this specific case, the claimant arrived in Switzerland and requested asylum. After a few days, his request was rejected. The administrative migration authorities detained the claimant given his expulsion, detention that was revoked twice by the judicial authority. The claimant required compensation of CHF 12,000 (approximately USD 13,031) for his alleged unlawful detention of six days.[126] The Swiss Federal Tribunal dismissed the compensation claim. Although the judicial authority revoked the detention twice, the Swiss Federal Court found that, in the case at hand, the restriction of personal freedom represented legitimised interference under Article 5(1)(f) ECHR, which covers the lawful detention of a person against whom action is being taken with a view to deportation.[127]

iv. Civil Compensation for Conditions of Stay in Asylum Centres

Other cases that are relevant in the Swiss context have dealt with compensation not for unlawful detention but for a breach of the right to private and family life due to conditions of an extended stay in federal asylum centres in Switzerland upon arrival. Asylum applicants frequently claim that these centres do not guarantee any private space and that security staff monitor the residents, perform daily raids and inflict penalties.[128]

The Federal Administrative Court has pointed out the problem of the subsidiarity of liability action to judicial redress in this situation.[129] With regard to the correct way to address these claims, the courts found that the protection offered by state civil liability should only be indirect and *a posteriori*. This protection alone was considered not sufficient and not in the public interest. In this case, judicial redress was deemed more appropriate, since it allowed the applicant alleging that his or her fundamental rights had been breached to request that the authority refrains from, discontinues or revokes unlawful acts and decides by way of an appealable ruling.[130] It should therefore be primarily used.[131] This argument helps to reflect on the purpose and timing of compensation as a type of civil remedy for human rights violations. It shows that compensation is not always sufficient and that it should be understood as one possible remedy among others.

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[124] Théo Meylan, ’L’indemnisation des détentions irrégulières: un nouveau défi pour la justice pénale’ (2014) 1 *Quid? Fribourg Law Review* 10 ff.
[125] Swiss Federal Tribunal, ATF 129 I 139.
[126] *ibid* 140.
[127] Swiss Federal Tribunal, ATF 129 I 139, commented by Mayhall (n 1077) 237 ff.
[128] Swiss Federal Tribunal, ATF 128 II 156.
[129] Federal Administrative Court, F-4036/2016, 9 March 2017.
[130] Art 25a of the Federal Act on Administrative Procedure.
[131] Federal Administrative Court (n 129).

IV. Conclusion

Civil remedies have not, or at least not yet, been considered as an important mechanism to redress human rights violations in Swiss law. This chapter has highlighted some legal uncertainties but also the legal obstacles that a claimant would have to overcome before establishing the civil liability of corporate actors and the state for human rights violations.

Regarding the liability of corporate actors, legal uncertainties mostly concern the liability of multinational enterprises registered in Switzerland for damage, such as environmental pollution or harmful labour conditions, caused abroad through their foreign subsidiaries or suppliers. These legal uncertainties mainly result from the absence of norms in Swiss law that clarify the due diligence conduct that is expected from a multinational enterprise with regard to these issues. In this regard, the chapter has also shown the legislative debate that took place in Switzerland around the RBI to design mandatory human rights due diligence obligations for corporations. The chapter has also explained the outcome of these political discussions, which has been to introduce obligations for companies in the areas of child labour and conflict minerals without addressing the issue of civil liability.

With respect to the state's civil liability for fundamental right breaches, a *compensatory* sanction cannot (and should not) substitute a *restorative* sanction that has to be as wide as possible. Nevertheless, the strict condition of a wrongful act, the subsidiarity of compensation to judicial protection, and the principle according to which an express legal basis for compensation must exist greatly reduce the scope of application of the state's civil liability for human rights infringements. Examples were limited to compensation for damage caused by the police force or unlawful detention, which, incidentally, are explicitly foreseen by a specific legal provision. This chapter has also provided the opportunity to encourage developments to the civil liability of the state as a complementary tool for securing the effective protection of human rights, at least when it is no longer possible to restore legality through the mechanism of judicial protection.[132] Some authors argue that, in these circumstances, the right of access to court[133] associated with Article 146 of the Swiss Constitution on state liability should trigger a duty of the state to compensate the damage as *ultima ratio*.[134] This view deserves support, especially since the ECHR equally compels states that breach a fundamental right to bring the victim back to the situation he or she would have been if he or she had not undergone this infringement and to remove as far as possible its implications using any suitable measures, among which is the payment of an amount as a form of satisfaction.[135]

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[132] Rütsche (n 97) 103.
[133] Art 29a of the Swiss Constitution.
[134] Schaub (n 106) 2271 f.
[135] eg *VGT v Switzerland* App no 32772/02 (ECtHR, 4 October 2007) paras 46–47; Swiss Federal Tribunal, Decision 2F_11/2008, con. 3.2.

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