

# Human Rights Implementation in Switzerland

A Baseline Study on the Business and Human Rights Situation in Switzerland

SKMR / CSDH / CSDU / SCHR I.6

Schweizerisches Kompetenzzentrum für Menschenrechte (SKMR)

Centre suisse de compétence pour les droits humains (CSDH)

Centro svizzero di competenza per i diritti umani (CSDU)

Swiss Centre of Expertise in Human Rights (SCHR)

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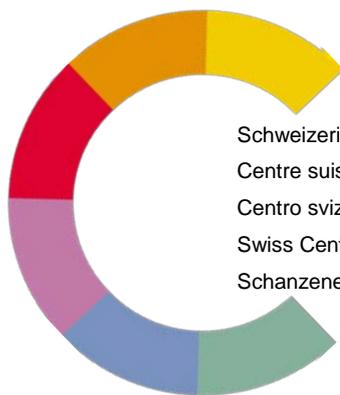
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The views expressed in this study are those of the authors and only the Swiss Centre of Expertise in Human Rights can be held responsible.



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## Preliminary Remarks

The Study on Human Rights Implementation in Switzerland is a baseline study in six sub-volumes released by the Swiss Centre of Expertise in Human Rights (SCHR) that analyses the implementation of recommendations and decisions by international human rights bodies in Switzerland. The sub-volumes refer to the areas Migration, Imprisonment, Police and Justice, Gender Policy, Child and Youth Policy, Institutional Issues, as well as Business and Human Rights.

The study analyses the commitments arising from the United Nations and Council of Europe human rights treaties ratified by Switzerland, the recommendations of the supervisory bodies and the UN Human Rights Council that are based on these agreements and issued in the course of the Universal Periodic Review (UPR), as well as the decisions against Switzerland in individual cases made under these treaties. In drafting the sub-studies, the recommendations and decisions were collected and substantially evaluated, and specific focal points were defined for every subject area. Except in the sub-study on Business and Human Rights, the evaluation was limited to the topics addressed by international human rights bodies – other problem areas in the human rights implementation were not further analysed. On the basis of the information gathered, the study evaluates the current state of the implementation of obligations and recommendations in Switzerland, demonstrates the difficulties in the implementation, and defines the current need for action. Moreover, the results from previous consultations with selected authorities, non-governmental organisations (NGO), and other relevant actors were also incorporated into this study.

The Study on Human Rights Implementation in Switzerland represents a snapshot of the current situation. The present sub-study on Business and Human Rights takes decisions and developments up to July 2013 into account. The SCHR studies and all information on its further activities are available on the SCHR website, <http://www.scehr.ch>.

The SCHR is a network consisting of the universities Berne, Fribourg, Neuchâtel and Zurich as well as the Institut Universitaire Kurt Bösch (IUKB), the Center of Human Rights Education (ZMRB) at the University of Teacher Education Central Switzerland – Lucerne (PHZ Lucerne), and the association <http://www.humanrights.ch/MERS>. The SCHR is a pilot project limited to five years and mandated by the Federal Council to strengthen and support capacities with regard to the implementation of international human rights obligations in Switzerland on all levels of the political system, the civil society, and the corporate sector, as well as to advance the public debate on human rights. To this end, the Centre will mainly author studies and expert reports, hold conferences, provide information, and offer continued education and trainings. It does not, however, offer any consultation services for individual cases. In the scope of its yearly performance mandate, the SCHR is financed with a basic contribution by the Federal Department of Foreign Affairs (FDFA) and the Federal Department of justice (FDJP). Moreover, the SCHR is supported by mandates from public authorities, NGOs and private businesses, as well as the resources of the network institutions. This Study on Human Rights Implementation in Switzerland is based on the SCHR's own initiative, and the network partners financed its publication. At the end of the pilot phase in 2015, the Swiss Federal Council will decide on the future of the SCHR, and consider whether the Centre should be converted into an independent human rights institution.

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## Abbreviations

APA	Federal Act of 20 December 1968 on Administrative Procedure, Administrative Procedure Act, SR 172.021
Art.	Article
ATS	Alien Tort Claims Statute (1789)
AVIG	Bundesgesetz vom 25. Juni 1982 über die obligatorische Arbeitslosenversicherung und die Insolvenzentschädigung (Federal Act of 25 June 1982 on the Mandatory Unemployment Insurance and Insolvency Compensation, SR 837.0)
Banking Law	Federal Act of 8 November 1934 on Banks and Savings Banks (Banking Law), SR 952.0
BBl	Bundesblatt (Federal Gazette)
BEHG	Bundesgesetz vom 24. März 1995 über die Börsen und den Effektenhandel (Federal Act of 24 March 1995 on Stock Exchange and Securities Trading), SR 954.1
BGE	Bundesgerichtsentscheid (Federal Supreme Court decision)
BSK	Basler Kommentar (Basel Commentary)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court) (Germany)
BVGE	Bundesverwaltungsgerichtsentscheid (decision of the Federal Administrative Court)
C.	Consideration
CAT	Convention against Torture
CartA	Federal Act of 6 October 1995 on Cartels and other Restraints of Competition, SR 251
CC	Swiss Civil Code of 10 December 1907, SR 210
CDDH	Steering Committee for Human Rights (European Council)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
chapt.	chapter
CHR	Commission on Human Rights
CPC	Swiss Civil Procedure Code of 19 December 2008
CRC	Committee on the Rights of the Child
CrimPC	Swiss Criminal Procedure Code of 5 October 2007, SR 312.0

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CRPD	Convention concerning the Rights of People with Disabilities
CSR	Corporate Social Responsibility
DAH	Directive on Ad Hoc Publicity of 29 October 2008
Diss.	Dissertation
DWA	Decent Work Agenda of the Internationa Labour Organisation
EA	Federal Act of 13 March 1964 on Work in Industry, Trade and Commerce (Employment Act), SR 822.112
ECCHR	European Center for Constitutional and Human Rights
ECHR	European Convention on Human Rights (Convention of 4. November 1950 for the Protection of Human Rights and Fundamental Freedoms), SR 0.101
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
ECRI	European Commission against Racism and Intolerance
ed.	edition
eds.	editors
EFTA	European Free Trade Association
e.g.	for example
ESC rights	Economic, social and cultural (human) rights
et al.	et alii
etc.	et cetera
EU	European Union
f./ff.	following/subsequent
FA	Federal Act
FAPP	Federal Act of 16 December 1994 on Public Procurement, SR 172.056.1
FC	Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101
FCF	Federal Commission for Foreigners
FCM	Federal Commission on Migration
FCR	Federal Commission against Racism
FDF	Federal Department of Finance
FDFA	Federal Department of Foreign Affairs
FDJP	Federal Office of Justice
FINMA	Financial Market Supervisory Authority
FLA	Fair Labour Association
Fn.	Footnote

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FNA	Federal Act of 16 December 2005 on Foreign Nationals, SR 142.20
FOM	Federal Office for Migration
FPO	Federal Personnel Office
FS	Festschrift (Commemorative Publication)
FSC	Federal Supreme Court
FSCA	Federal Act of 17 June 2005 on the Federal Supreme Court, SR 173.110
FSCR	Federal Service for Combating Racism
FSIO	Federal Social Insurance Office
GA	General Assembly (General Assembly of the United Nations)
GEA	Federal Act of 24 March 1995 on Gender Equality (Gender Equality Act), SR 151.1
GesKR	Zeitschrift für Gesellschafts- und Kapitalmarktrecht (Swiss Journal on Corporate and Capital Market Law)
GRUR	Zeitschrift Gewerblicher Rechtsschutz und Urheberrecht (Swiss Journal on Intellectual Property and Copyright)
Habil.	Habilitation
HRC	Human Rights Council
i.a.	inter alia
ICCPR	International Covenant of 16 December 1966 on Civil and Political Rights, SR 0.103.2
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination, SR 0.104
ICESCR	International Covenant of 16 December 1966 on Economic, Social and Cultural Rights, SR 0.103.1
ICJ	International Court of Justice
ICoC	International Code of Conduct for Private Security Providers
IFC	International Finance Corporation
ILC	International Law Commission
ILO	International Labour Organisation
incl.	including
LR	Listing Rules of SIX Swiss Exchange
Lugano Convention	Convention on the Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention) of 30 October 2007, SR 0.275.12
MNE	Multinational enterprise
NCP	National Contact Point

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NGO	Non-Governmental Organisation
NKPV-OECD	Verordnung über die Organisation des Nationalen Kontaktpunktes für die OECD-Leitsätze für multinationale Unternehmen und über seinen Beirat (Ordinance on the Organisation of the National Contact Point for the OECD Guidelines for multinational enterprises and on its Advisory Committee of 1 May 2013), SR 946.15 126
No.	Number
OECD	Organisation for Economic Co-operation and Development
OPP	Ordinance on Public Procurement of 11 December 1995 (SR 172.056.11).
p.	page
PA	Postal Act of 30 April 1997, SR 783.0
para.	paragraph
PHV	Verordnung über die privaten Hausangestellten (Private Household Employees Ordinance), SR. 192.126
PIL Statute	Federal Act of 18 December 1987 on Private International Law, SR 291
PrHG	Bundesgesetz vom 18. Juni 1993 über die Produkthaftpflicht (Federal Act of 18 June 1993 on Product Liability (Product Liability Act)), SR 221.112.944
pt.	point
resp.	respectively
RVOG	Regierungs- und Verwaltungsorganisationsgesetz vom 21. März 1997 (Government and Administration Organization Act of 21 March 1997), SR 172.010
SBB	Schweizerische Bundesbahnen (Swiss Federal Railways)
SCC	Swiss Criminal Code of 21 December 1937, SR 311.0
SCHR	Swiss Centre of Expertise in Human Rights
SCO	Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), SR 220
SCPC	Swiss Code of Civil Procedure of 19 December 2008, SR 272
SECO	State Secretariat for Economic Affairs
SFM	Swiss Forum for Migration and Population Studies
SGB	Schweizerischer Gewerkschaftsbund (Swiss Federation of Trade Unions)
SIX	Swiss Exchange
SME	Small and Medium Enterprises
SR	Systematische Sammlung des Bundesrechts (Systematic Collection of Federal Law)
SRSG	Special Representative of the Secretary-General

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SZW	Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht (Swiss Review of Business and Financial Market Law)
Trademark Law	Federal Law of 28 August 1992 on the Protection of Trademarks and Indications of Source (Trademark Law), SR 232.11
UCA	Federal Act of 19 December 1986 against Unfair Competition, SR 241
UN/UNO	United Nations Organisation
UPR	Universal Periodic Review
VG	Bundesgesetz vom 14. März 1958 über die Verantwortlichkeit des Bundes sowie seiner Behördenmitglieder und Beamten (Federal Act of 14 March 1958 on the on the Liability of the Federal Government, the Members of its Authorities and its Public Officials (Government Liability Act)), SR 170.32
VGG	Bundesgesetz vom 17. Juni 2005 über das Bundesverwaltungsgericht (Federal Administrative Court Act of 17 June 2005), SR 173.32
VgT	Verein gegen Tierfabriken (Association against Animal Factories – animal welfare organisation)
VPETA	Vocational and Professional Education and Training Act of 13 December 2002, SR 412.10
VZAE	Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit vom 24. Oktober 2007 (Ordinance on Admission, Stay and Employment of 24 October 2007), SR 142.201
w.f.r.	with further references
ZSR	Zeitschrift für Schweizerisches Recht (Journal of Swiss Law)

# INTRODUCTION

## I. BACKGROUND AND OBJECTIVE OF THE STUDY

[1] The Study analyses the legal foundations of the implementation of human rights standards in business activities. It is part of a series of baseline studies prepared by the Swiss Centre of Expertise in Human Rights for each of its clusters.<sup>1</sup>

[2] The Study focuses on the *State's* duties relating to Business and Human Rights. In particular, it illuminates the currently applicable state duty to protect (Chapt. State Duty to Protect in connection with Business and Human Rights), the corresponding remedies in case of human rights abuses (Chapt. Grievance Mechanisms for Human Rights Abuses), and in light of their practical relevance, the sensitive areas of the labour market with regard to human rights (Chapt. Human Rights-sensitive Areas in the Labour Market) as well. Overall, the Study shall serve as a mapping of the current legal status quo, and thus contribute to a more in-depth discussion of this complex subject area.<sup>2</sup> In doing so, it emulates the approach chosen by the UN Working Group on Business and Human Rights<sup>3</sup>.

## II. SPECIAL CHARACTERISTICS OF THE BUSINESS AND HUMAN RIGHTS NEXUS

### 1. Structural Particularities

[3] The topic Business and Human Rights is characterized by three important special factors in terms of the actors, territoriality, and complexity of the applicable rules:

- Generally, enterprises are *private* actors, whereas human rights are typically characterized as the concern of states. However, the influence that enterprises exert on society and the living conditions of individuals has grown steadily, in particular, due to globalization and the increased international interconnectedness of business. Applicable international law does not adequately reflect this situation, since private enterprises are generally not recognized as subjects of international law.
- International markets are not defined based on national borders. Today, trade liberalization and new technologies facilitate *cross-border* production of goods and delivery of services. The individual parts of a product can be manufactured in the place that offers the best conditions. This may lead to long production and supply chains, which cannot easily be assigned to the domestic regulations of only one state.
- Despite the significant influence of private actors (enterprises and civil society), there is only a comparatively small number of binding regulations in the area of Business and

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<sup>1</sup> The present study was initiated in 2011 and is not connected to the „Corporate Justice“ campaign. For further information referring to the initiative at <http://www.rechtohnegrenzen.ch/en/campaign/> (visited on 4 April 2014).

<sup>2</sup> See also: CHRISTINE KAUFMANN, Introduction: Situating the Debate, in: Kaufmann/Cohen/Tan/Lim, p. 1-7.

<sup>3</sup> Additional information on the UN Working Group on the issue of human rights and transnational corporations and other business enterprises at <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx> (4 April 2014).

Human Rights; on the other hand, there is a *multitude of non-binding regulations* compiled by the corporations themselves, civil society organizations or international organizations. In addition to these non-binding regulations, there are *national binding norms*, which may differ greatly from one country to the other. Every corporation, NGO or state institution that addresses Business and Human Rights issues is thus confronted with an extremely complex, almost impenetrable structure of norms with different liability provisions and varying scopes.

## 2. Coherence as Challenge

[4] Coherence plays a key role in many aspects in the field of Business and Human Rights. Since Art. 5, FC decrees that all activities of the state are based on and limited by law, it can be concluded that state authorities must coherently apply all legal standards applicable to Switzerland. A similar obligation for coherence with regard to foreign relations is found in Art. 54, FC. While this principle of coherence seems appealingly simple, it is not so easy to implement in the context of Business and Human Rights. On the one hand, different offices and departments deal with Business and Human Rights (horizontal coherence), and on the other, the federal structure of Switzerland requires coordination among the different community levels, for example, in public procurement processes (vertical coherence).

[5] Enterprises are confronted with similar challenges. Often human rights issues are assigned to a specific (administrative) department, such as the Corporate Social Responsibility department, whereas the actual operational (economic) activities are executed by the front line. A company-wide implementation (horizontal coherence) of the adopted human rights principles is therefore often challenging. Moreover, due to international networks and increased specialization, sub-contractors that are involved would have to apply the same standards (vertical coherence).

## III. INTERNATIONAL LAW FRAMEWORK

[6] The outlined particularities are also reflected in the legal framework. It would by far exceed the scope of this Study to discuss all standards dealing with Business and Human Rights issues. We thus limit our analysis to the provisions that are particularly important for Switzerland. In addition to the standards issued by the Council of Europe that will further be discussed in paragraph nos. 55ff, the obligations that Switzerland entered into within the UN framework will be particularly relevant. As they will be discussed in all chapters of the Study, below is a short overview of the country's various commitments.

### 1. The Scope of Switzerland's Human Rights Obligations

[7] Since companies are generally not recognized as subjects of international law, and are thus not bearers of human rights responsibilities under this legal regime, every "search" for international norms concerning Business and Human Rights begins with the state. Like many

other states, Switzerland has entered into several human rights obligations in particular within the UN, the International Labour Organization and the Council of Europe frameworks.<sup>4</sup>

[8] These human rights obligations encompass three levels<sup>5</sup>:

- (1) The duty to respect human rights<sup>6</sup>: This obligation does not allow the state to restrict guaranteed rights; it requires a “non-doing” or non-interference by the state, and is thus also referred to as negative obligation. Various human rights may, however, be limited if the law allows it, if the restriction serves public interest or protects the rights of third parties, and is proportionate.
- (2) The second level, the state’s duty to protect, obliges the state to actively take measures to protect human rights.<sup>7</sup> In this context, the obligation to ensure that third parties do not violate the citizens’ human rights is particularly important. Thus, it is not enough, for example, that the state prevents misconduct of the government’s prison personnel against prisoners, but it also has to ensure that fellow inmates do not hurt each other.<sup>8</sup> In addition to private individuals, these “third parties” may also be corporations. Thus, for instance, the UN Committee on the Rights of the Child (CRC) declared that the Australian government would have to take effective measures to prevent the violation of children’s rights by Australian mining companies.<sup>9</sup>
- (3) Finally, the states are obliged to guarantee the fulfillment of human rights within the scope of the obligations they have undertaken (duty to fulfill).<sup>10</sup> In concrete terms, this means that states must create the legal, institutional and procedural conditions that are needed for the realization of human rights.

[9] The classical human rights treaties of the UN and the Council of Europe do not contain any specific provision relating to corporate human rights responsibility. This issue was first debated at an international level in the 1970s. The discussions were triggered by the participation of American corporations in the overthrow of the Allende regime in Chile.<sup>11</sup>

## 2. Developments until 2005

[10] The realization that corporations, in particular, international enterprises, may possess strong political influence which in contrast to the states’ influence, is not bound to any corresponding obligations, initiated a series of regulatory efforts. For almost 30 years, the UN tried to craft a legally binding code of conduct for transnational enterprises. However, the idea of corporations becoming subjects of rights and obligations under international law could not reach the required consensus.

[11] In order to ensure that the subject of the human rights responsibility of corporations was not lost to another international organization, then UN Secretary-General Kofi Annan initiated the

<sup>4</sup> A current list of the contracts ratified by Switzerland is found at <http://treaties.un.org/Pages/UNTSONline.aspx?id=3> (visited on 4 April 2014).

<sup>5</sup> Human Rights Committee, General Comment No. 31 (2004).

<sup>6</sup> KÄLIN/KÜNZLI, p. 113-118.

<sup>7</sup> KÄLIN/KÜNZLI, p. 118-127.

<sup>8</sup> ECtHR, Paul and Audrey Edwards v. United Kingdom, 46477/99 (2002).

<sup>9</sup> CRC, Observation Australia 2012, pt. 27.

<sup>10</sup> KÄLIN/KÜNZLI, p. 127-128.

<sup>11</sup> KAUFMANN, p. 747.

*Global Compact*<sup>12</sup> in 1999. In a very short period of time, this exclusively voluntary instrument managed to motivate numerous companies to sign on to the *Global Compact*. However, many NGOs criticized that this initiative was not sufficiently effective for not including a monitoring mechanism. Not least due to this criticism, in 2003, the UN made another attempt that channeled the existing accepted principles of international law: from an international law perspective, the states are responsible for ensuring compliance with human rights standards. As such, binding responsibilities of corporations have to be regulated at the domestic level.

[12] The results of these considerations were published in 2003 in the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*<sup>13</sup> drafted by the Sub-Commission of the then Human Rights Commission. These norms were intended as the foundation for a subsequent binding regulation, which would stipulate mandatory requirements on obligations states would have to impose on corporations at a national regulatory level. Thus, the basic idea was to oblige states on an international law level to ensure through binding domestic regulations that corporations comply with human rights obligations. The scope of the *Draft Norms* proposed by the Sub-Commission was very wide: all corporations are obliged to comply with practically all human rights obligations in their *sphere of influence*.<sup>14</sup> While this concept was greatly supported by NGOs, it was decisively rejected by industry, especially by large international business organizations, and was eventually not adopted by the Human Rights Commission.<sup>15</sup>

[13] This stalemate led to the appointment of a Special Representative for Business and Human Rights by the UN Secretary-General in 2005.<sup>16</sup> Harvard professor John Ruggie, who, in his prior role as Assistant Secretary-General for Strategic Planning, had been involved in the development of the *Global Compact*, received the mandate. Right from the beginning of his term, Ruggie clarified that he would not produce a new edition of the *Draft Norms*, since he thought that striving for a legally binding instrument was excessive and not feasible. Instead, he chose an approach that he called “principled pragmatism”.<sup>17</sup> He wanted to build on the states’ obligations, and at the same time, acknowledge the fact that many corporations already considered human rights in their activities or at least did not have anything against doing so. Ruggie thought his approach pragmatic, because it was not oriented towards the binding force of obligations, but towards the intended result of obtaining better human rights protection in economic activities. This result-oriented approach also included accessible remedies for victims, be it through judicial or non-judicial proceedings.

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<sup>12</sup> For more information on the creation of the *Global Compact* see <<http://www.unglobalcompact.org/AboutTheGC/>> (visited on 4 April 2014).

<sup>13</sup> CHR, *Draft Norms on Responsibilities* 2003.

<sup>14</sup> CHR, *Draft Norms on Responsibilities* 2003, pt. 1: „Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law.”

<sup>15</sup> The Human Rights Commission stated “that [the draft norms have] not been requested by the Commission and, as a draft proposal, [have] no legal standing.” CHR, *Report* 2004, p. 346.

<sup>16</sup> CHR, *SRSG mandate* 2005, see KAUFMANN, p. 747-750.

<sup>17</sup> See CHR, *SRSG Interim Report* 2006, No. 81.

### 3. Protect, Respect and Remedy Framework

[14] The work of the Special Representative resulted in the unanimous adoption of the *Protect, Respect and Remedy Framework* by the Human Rights Council in 2008.<sup>18</sup> The Framework featured three pillars:

[15] The first pillar – the *state duty to protect* – is addressed to the state. It is based on the already defined and accepted obligation of the states under international law to protect human rights and prevent them from being violated by third parties, including corporations. This comprises states promoting a corporate culture, which makes the respect of human rights an integral part of the business activity.<sup>19</sup> In their own area of responsibility, states, among other things, are obliged to ensure coherence among its various policies,<sup>20</sup> both vertically and horizontally, on a national and international level.<sup>21</sup>

[16] The second pillar – the *corporate responsibility to respect* – is intended for corporations. Corporations are obliged to respect human rights in their activities. This requires three conditions: a careful management that incorporates human rights (*due diligence*)<sup>22</sup>, a corporate human rights policy<sup>23</sup> and an assessment of whether, and in what way business activities may impact human rights (*impact assessment*).<sup>24</sup> The goal of these measures is to ensure that human rights become an integral part of all corporate activities, and that the corporation's respect of human rights, as well as its compliance with all other internal corporate guidelines, is monitored.<sup>25</sup>

[17] The third pillar – *access to remedy* – refers to access to dispute settlement and remediation mechanisms. Providing victims of human rights violations with effective and efficient avenues for remedy or appeal is the joint responsibility of states and corporations. Similarly, it is not the legal enforceability of the mechanism that serves as a guideline under this pillar, but providing assistance to victims, be it in the form of judicial or non-judicial proceedings.<sup>26</sup>

[18] With the adoption of the *Framework*, the Human Rights Council extended the mandate of John Ruggie, and at the same time asked him to further substantiate the Framework.<sup>27</sup>

### 4. UN Guiding Principles on Business and Human Rights

[19] Three years after the approval of the *Framework*, the UN Human Rights Council adopted the *Guiding Principles on Business and Human Rights* (UN Guiding Principles).<sup>28</sup> The 31 principles, which are grounded on the three pillars of the framework, substantiate them. Every guiding principle is supplemented with a commentary. The UN Guiding Principles, as such, are not binding, but they refer to existing applicable law, particularly with regard to the duty of states to

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<sup>18</sup> HRC, Ruggie-Framework 2008.

<sup>19</sup> Ibid., No. 29-32.

<sup>20</sup> The Framework speaks of *policy alignment*, ibid., No. 33-42.

<sup>21</sup> Ibid., No. 43-47.

<sup>22</sup> Ibid., No. 56-59.

<sup>23</sup> Ibid., No. 60.

<sup>24</sup> Ibid., No. 61.

<sup>25</sup> Ibid., No. 62-63.

<sup>26</sup> Ibid., No. 82-103.

<sup>27</sup> HRC, Ruggie Mandate 2008.

<sup>28</sup> HRC, UN Guiding Principles 2011.

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protect human rights. Some of the more central and often discussed aspects of each pillar are briefly summarized in the following.

#### 4.1. State Duty to Protect

[20] The UN Guiding Principles 1 to 10 substantiate the obligation of states resulting from their existing duty to protect human rights, and ensure that business enterprises respect human rights. The following principles deserve a special mention:

##### 4.1.1. Extraterritoriality (Guiding Principle 2)

[21] The commentary to Guiding Principle 2 summarizes the controversial debate regarding the states' duty to ensure that enterprises within their territories also respect human rights in their activities abroad. Under this Principle, states should, at the very least, clearly *communicate* the *expectation* that all business enterprises domiciled in their territory must respect human rights throughout their operations. In the debate the duty of the states as such is less controversial than the means by which it would be implemented, as the UN Guiding Principles leave it up to the respective states to adopt more stringent obligations covering corporate responsibilities that extend beyond defining minimum expectations.

##### 4.1.2. Business operations in conflict-affected areas (Guiding Principle 7)

[22] Business operations in conflict-affected areas face particular challenges. Guiding Principle 7 reminds the States of their special responsibility in these situations and requires them to assist business enterprises operating in conflict-affected areas to identify and assess human rights-related risks at the earliest stage possible. Thus, on the one hand, states shall have the duty to inform business enterprises of how they can address risks and provide support. If a company is involved with gross human rights abuses and refuses to take any action to address the situation, however, it should be denied access to public support and services. On the other hand, states must ensure that their regulations are effective in addressing the risk of business involvement in gross human rights abuses in conflict-affected areas.

##### 4.1.3. Coherence (Guiding Principles 8 to 10)

[23] Coherence is one of the main topics of the Framework. Consequently, states should ensure that internally, governmental departments and agencies on all levels contribute to the implementation of human rights obligations in economic affairs (Guiding Principle 8). Additionally, states should maintain adequate domestic policy space to meet their human rights obligations when they engage in economic cooperation with other states, such as when they enter into treaties protecting investments (Guiding Principle 9). Finally, states acting as members of international institutions that deal with business-related issues are to incorporate human rights in their policies and operations, and in particular, ensure that the activities of these organizations do

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not restrain the implementation of human rights (Guiding Principle 10). In essence, the objective is mainstreaming the UN Guiding Principles in the activities of business organisations<sup>29</sup>.

#### 4.2. The Corporate Responsibility to Respect Human Rights

[24] The Guiding Principles 11 to 24 substantiate the corporate responsibility to respect human rights. These principles give particular attention to the need for business enterprises to adopt carefully designed corporate governance instruments (*due diligence*) that articulate the business enterprise's responsibility to avoid infringing on the human rights of others, and operationalising this policy commitment. However, since the focus of this Study is on the states' duties, we will refrain from further elaborating on these aspects.

#### 4.3. Access to Grievance and Remediation Mechanisms

[25] The Guiding Principles 25 to 31 differentiate between governmental (Guiding Principles 26 to 27) and non-governmental (Guiding Principles 28 to 30) mechanisms, as well as between judicial and non-judicial proceedings. Guiding Principle 31, for example, lists the criteria for effective non-judicial mechanisms. Moreover, placing non-judicial mechanisms on an equal level as judicial proceedings is a novel concept for states. Once more, the decisive factor is the perspective of the victim, who may, under certain circumstances, consider presenting grievances before non-judicial processes to be as valuable as participating in judicial proceedings.

### 5. Importance of the Framework and the Guiding Principles

[26] Although both the Framework and the related UN Guiding Principles are resolutions of the Human Rights Council and are as such, formally not binding, they are, to a large extent, grounded on existing binding human rights obligations of states. Moreover, they are given special weight by the unanimous endorsement of the Human Rights Council, and the positive reception they found with international business organizations such as the OECD and the International Finance Corporation.<sup>30</sup> Not only are the Framework and the UN Guiding Principles the sole instruments adopted by the UN on the subject of Business and Human Rights to date, but they also represent the result of a six-year-long process that involved a multitude of stakeholders – states and non-state actors, from the International Chamber of Commerce to civil society organizations, employers' associations and trade unions to business enterprises – contributed their experiences and approaches in addressing relevant issues. This hitherto unique legitimization of the Framework and the UN Guiding Principles is the reason why the present Study builds upon them.

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<sup>29</sup> Contribution of the United Nations system as a whole to the advancement of the Business and Human Rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human rights, Resolution adopted by the Human Rights Council, A/HRC/RES/21/5, 16 October 2012, paras. 8, 12.

<sup>30</sup> Both the OECD as well as the IFC incorporated the Guiding Principles in their instruments; see OECD, Guidelines 2011 and IFC, Sustainability Framework 2012.

## IV. DOMESTIC LAW

[27] Domestic law complements international regulations. While constitutional foundations create a clear general framework for government actions that are in conformity with human rights principles, so far, no overview on the legal norms concerning the implementation of human rights standards in business activities exists. One of the main interests of this Study is to therefore identify these norms – in the sense of taking a legal inventory – and thus contribute to establishing an overview of the human rights framework shaping the business activities of the state and business enterprises in Switzerland.

## V. APPROACH

### 1. The Study as a First of Three Steps

[28] As previously mentioned, this Study is based on the Guiding Principles on Business and Human Rights that are being implemented in the UN framework, as well as the human rights obligations undertaken by Switzerland. Considering the dearth of fundamental principles on the subject of Business and Human Rights in Switzerland to date, however, a multistage approach was necessary to determine the course of action:

- (1) As a first step, it was essential to gather data on the current state of legal affairs, *i.e.* the existing norms and instruments (mapping).
- (2) Only when the status quo has been ascertained could possible gaps be identified (gap analysis).
- (3) The gap analysis serves as the basis for defining further measures, and is communicated in the form of an action plan (action plan).

[29] The main focus of this Study is the first step: the collection of data on the legal status quo. Its goal is to establish an objective basis for discussion that provides different stakeholders with a comprehensive overview of the existing legal rubric relevant to the field of Business and Human Rights. In light of the National Council's approval of the postulate issued by Swiss National Councillor, Alex von Graffenried, commissioning the Federal Government to prepare a strategy to implement the UN Guiding Principles<sup>31</sup>, this Study seeks to contribute to the discourse by identifying possible discrepancies between the status quo and stakeholders' expectations (Step 2). It will then be incumbent on policy makers to develop a strategy in the form of an action plan to fill the gaps that Switzerland considers to be unacceptable.

### 2. Methodology

[30] We prepared the first draft of this Study on the basis of the existing literature and accessible sources, and by drawing on our respective fields of expertise. We consulted with experienced colleagues with different areas of specialization to clarify questions that were technical in nature.

[31] The resulting text generated by our research and consultations was subsequently discussed with representatives of the State, business enterprises and the civil society. Consultations with

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<sup>31</sup> See National Council, Postulate 12.3503 (Graffenried); Federal Council, Reply to Postulate 12.3503 (2012), Approval by National Council on 14.12.2012.

the respective stakeholders were held separately in order for us to gather very detailed feedback. We conducted a total of seven discussions with an average duration of two hours. The participants supplemented these discussions with written feedback.

<b>Authorities</b>	State Secretariat for Economic Affairs, SECO (SECO)
	Federal Office of Justice (FDJP)
	Human Security Division (FDFA)
<b>Non-governmental Organizations</b>	Amnesty International
	Alliance Sud
	Fastenopfer (Swiss Catholic Lenten Fund)
	Berne Declaration
<b>Associations</b>	Employers' Association
	Economiesuisse
	Swissholding
	Swiss Federation of Trade Unions
	Travail.Suisse
<b>Business Enterprises</b>	Credit Suisse
	Nestlé
	UBS

[32] The numerous and detailed feedback from the representatives of various stakeholders substantially contributed to the review of the first draft of the Study. In addition to the aforementioned consultations, we likewise discussed the Study's methodology with some members of the UN Working Group for Business and Human Rights.

The consulted organizations and institutions are neither responsible for the present Study nor is their participation in the consultations to be interpreted as approval of the findings.

# STATE DUTY TO PROTECT IN CONNECTION WITH BUSINESS AND HUMAN RIGHTS

## I. CONCEPT AND MEANING OF THE STATE DUTY TO PROTECT

[33] Human rights are no longer regarded only as an individual's rights of defense against state interference. Rather, as outlined at the start, they are also comprised of the duty of the state to provide protection from infringement of these rights by private parties. In light of the fact that the state continues to be the primary holder of human rights obligations, the extent to which the state can and must oblige private actors to respect human rights in the performance of their business activities at home and abroad is a question that inevitably arises in the context of Business and Human Rights. The *existence* of this state duty to protect, by taking the necessary precautions within the scope of its existing human rights obligations in order to protect against human rights abuse by private parties, is widely undisputed.<sup>32</sup>

[34] Nevertheless, it has not yet been definitively clarified to *which* human rights this state duty to protect applies and *how extensive* the resulting statutory duties requiring action from the state are. Although the state duty to protect is indisputably of great importance for the full implementation of all human rights that may also be jeopardized by private parties (e.g., the right to life), other rights seems less likely or even impossible for private individuals to violate (e.g., general procedural guarantees). Thus, it is necessary to substantiate this area further through jurisdiction, commentaries of relevant treaty bodies and scientific research. Notably, in the case *X. and Y. v. The Netherlands*<sup>33</sup>, the European Court of Human Rights ruled that, while the human rights under the ECHR<sup>34</sup> do not apply directly between private parties (no horizontal direct effect), they may still generate a positive duty to protect for the state (horizontal indirect effect).<sup>35</sup> In its later judgments, however, the Court qualified that the horizontal indirect effect could only be unfolded for *suitable* human rights.<sup>36</sup>

[35] The current regulatory environment is fragmented: both on an international and on a national level, states, international organizations, business enterprises, and non-governmental organizations have increasingly started addressing the question of corporate responsibility in

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<sup>32</sup> See KÄLIN/KÜNZLI, p. 118 ff.

<sup>33</sup> ECtHR, *X. and Y. v. The Netherlands*, 8978/80 (1985), pt. 23. In scientific circles the state duty to protect against human rights abuses is justified with the horizontal indirect effect of fundamental and human rights. The horizontal indirect effect means that the state does not only have to ensure human rights standards in its own relationships with private individuals, but should also guarantee compliance with human rights among individuals, both within the scope of its legislation (legislative power), in its administration (executive power) as well as in its jurisdiction (judiciary power). In contrast to the horizontal indirect effect, the horizontal direct effect means that individuals have the right to directly invoke human rights not only before the state, but also in relation to other private individuals and are at the same time obliged to comply with human rights in relation to other private actors. See more w.f.r. (with further references) in SCHWEIZER, p. 721 ff.; MÜLLER, p. 74 ff.

<sup>34</sup> Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (SR 0.101).

<sup>35</sup> See e.g. ECtHR, *von Hannover v. Germany*, 59320/00 (2004), pt. 57 (to Art. 8 ECHR, right to respect for private and family life). In more detail regarding the question of positive obligations with regard to environmental matters (e.g. pursuant to Art. 2 ECHR) see European Council, *Manuel* 2012, p. 18 ff.

<sup>36</sup> E.g. ECtHR, *Moldovan and others v. Romania*, 41138/98 (2005), pt. 98

relation to human rights issues. The multitude of actors is complemented by the diversity of regulatory approaches, which range from very few legally binding standards to political recommendations and codes of conduct to self-regulatory instruments. The goal of this chapter is to show against this background and on the basis of the state duty to protect, what the current legal situation relating to the protection of human rights in the business environment is in Switzerland.

[36] The first part (hereafter para. 37ff) starts with the substantiation of the state duty to protect within the scope of the three-pillar *Protect, Respect and Remedy* framework adopted by the UN Human Rights Council, with particular focus on the first pillar. Under this framework, the duty to protect is defined and embedded in the context of the existing international law obligations. This is important because the UN Guiding Principles do not consider the state duty to protect in economic activities as a new creation, but rather a substantiation of already applicable international law.<sup>37</sup> The following section (hereafter para. 59ff) establishes the link to Switzerland by elaborating on the implementation of the state duty to protect in Swiss law. The chapter concludes with a summary of the legal *status quo*. It shows potential fields of action for a further substantiation and implementation of the state duty to protect in economic activities in Switzerland. Thus, it creates a foundation for relevant actors to subsequently identify whether there is a need to take action, and develop options for further steps involving all key stakeholders.

## II. INTERNATIONAL INCORPORATION OF THE STATE DUTY TO PROTECT

### 1. Particular International Law Aspects and Relevance to the Actors

[37] In contrast to national law, there are several special aspects in international law that are of crucial importance to the Business and Human Rights field. For example, since states are the primary subjects of international law, they are obliged to implement binding provisions under this legal regime, such as human rights law on a national level. For states, binding regulations are usually enacted in the form of treaties, since, in international law, there is no hierarchy in laws that is comparable to the Constitution-Statute-Ordinance gradation as it is known in Switzerland's legal system. These two particular aspects – focus on states and the lack of binding written instruments under the treaties – are the reasons why one finds a multitude of formally non-binding instruments in the field of Business and Human Rights. A number are in the form of resolutions adopted by international organizations, codes of conduct, and other similar initiatives.

[38] Since non-binding norms can still formally produce legal effects, for instance, by being transposed into a national law in the future, international law scholars have introduced another category of instruments: “soft law”. While soft law – *i.e.* the compromise between inter-governmental sovereignty and the necessity to regulate international relationships – is generally enacted by subjects of international law such as states or international organizations, even standards developed by private actors may exhibit a quasi-regulatory quality and decisively influence the creation and development of binding international law regulations.<sup>38</sup> Furthermore, guidelines developed by companies, associations, and civil society organizations may become

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<sup>37</sup> HRC, UN Guiding Principles 2011, p. 5 no. 14.

<sup>38</sup> DANIEL THÜRER, Soft Law, in: Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX, Oxford 2012, p. 269-278, p. 270 point 6, p. 277 point 35.

legally effective, if they are transposed into national law or accepted as the standard by the state. Nevertheless, the enforcement and interpretation of soft law pose particular challenges.

## 2. International Law Foundations for the State Duty to Protect

[39] International and regional human rights treaties substantiate the state duty to protect on an international law level. For example, Art. 1 of the European Convention on Human Rights obliges the contracting states to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. Similarly, Art. 1 para. 2 of the UN ICCPR<sup>39</sup> provides that each state Party undertakes “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant (...)”. Art. 2 para. 1 of the UN ICESCR<sup>40</sup> seeks the full realization of rights on all state levels. Thus a State Party “...undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” It can be observed that, as a rule, most human rights covenants provide for this positive realization obligation of the state notwithstanding the differences in their wording.<sup>41</sup>

[40] Moreover, other intergovernmental agreements concerning specific human rights-sensitive areas are also relevant. For instance, the eight ILO Core Conventions<sup>42</sup> exhort the contracting states to apply and implement the fundamental labour rights contained in the Conventions. One of the most recent examples of norms relating to another field under international law that are also relevant to human rights is the Oslo Convention on Cluster Munitions. Switzerland ratified the Oslo Convention on 17 July 2012, and it entered into force on 1 January 2013.<sup>43</sup> The Convention, which prohibits both the production and the financing of cluster munitions, required a corresponding amendment of Switzerland’s War Material Act. Presently, the revised Act not only prohibits the direct financing of the development, manufacture or acquisition of cluster munitions, but also the indirect financing thereof (Art.8c), which even exceeds the requirements of the Convention. While indirect financing includes participation in companies that manufacture cluster munitions, the Act does not proffer a clear definition of what constitutes “indirect financing”.<sup>44</sup> The Swiss financial industry is confronted with difficult implementation issues on account of this gap in

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<sup>39</sup> International Covenant of 16 December 1966 on Civil and Political Rights (SR 0.103.2).

<sup>40</sup> International Covenant of 16 December 1966 on Economic, Social and Cultural Rights (SR 0.103.1).

<sup>41</sup> As for example art. 2 of the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979 (SR 0.108) and art. 2 of the Convention on the Rights of the Child of 20 November 1989 (SR 0.107).

<sup>42</sup> The following agreements are considered the ILO core-conventions: Convention No. 29 of 28 June 1930 concerning Forced or Compulsory Labour (SR 0.822.713.9), Convention No. 87 of 9 July 1948 concerning Freedom of Association and Protection of the Right to Organise (SR 0.822.719.7), Convention No. 98 of 1 July 1949 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (SR 0.822.719.9), Convention No. 100 of 29 June 1951 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (SR 0.822.720.0), Convention No. 105 of 25 June 1957 concerning the Abolition of Forced Labour (SR 0.822.720.5), Convention No. 111 of 25 June 1958 concerning Discrimination in Respect of Employment and Occupation (SR 0.822.721.1), Convention No. 138 of 26 June 1973 concerning Minimum Age for Admission to Employment (SR 0.822.723.8) and Convention No. 182 of 17 June 1999 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (SR 0.822.728.2).

<sup>43</sup> Convention on Cluster Munitions of 30 May 2008 (SR 0.515.093).

<sup>44</sup> Federal Council, Message on Cluster Munitions and the War Material Act 2011, p. 5943 ff.

the law.<sup>45</sup> In any case, however, one of the leading stock index providers, MSCI, already offers several indices that exclude manufacturers of cluster munitions.<sup>46</sup> The ratification of the Oslo Convention is significant to the state duty to protect since with the revision and implementation of the War Material Act, Switzerland can ensure that companies within its borders do not jeopardize human rights by supporting the production of weapons that mostly claim civil casualties worldwide.

[41] In addition to the broad language, presently, there are few concrete binding state obligations in international law that apply to human rights abuses of corporations apart from the broad and general duty of states to protect individuals within their jurisdiction from human rights abuses by third parties.

### 3. Substantiating Guidelines and Frameworks

[42] At the international level, guidelines, recommendations and frameworks are of crucial importance for the determination of the state duty to protect with regard to Business and Human Rights. Instruments that have been adopted under the auspices of the UN, OECD, EU and European Council will be discussed in more detail, and we will see how the effect of such instruments vary, depending on the context in which they were adopted.

#### 3.1. UN Guiding Principles on Business and Human Rights

[43] Since all the efforts undertaken by the UN to come up with binding instruments that would oblige companies to comply with human rights standards failed (see para. 10ff), the adoption of the Guiding Principles on Business and Human Rights by the UN Human Rights Council developed by the UN Special Representative, John Ruggie, represents a major milestone.<sup>47</sup> While the question of the extraterritorial effect of the state duty to protect remains unanswered in the Guiding Principles, they nevertheless include the obligation of the state to influence corporations domiciled in their jurisdiction to ensure that they are not involved in human rights abuses in the scope of their activities abroad.

[44] Despite their formally non-binding nature, the UN Guiding Principles evolved into a standard in a very short time – in part, even before their adoption – for regulatory plans in the area of Business and Human Rights of other international organizations and institutions. Although one could argue that the non-binding UN Guiding Principles do not become binding just because they are reflected in other non-binding instruments, this argument no longer holds water in light of their broad factual reception.

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<sup>45</sup> NILS MELZER/JONATAN NIEDRIG, Ratification of the Convention on Cluster Munitions as well as Financing Prohibition, contribution in the SCHR Newsletter of 26 October 2011, accessible at <<http://www.skmr.ch/de/themenbereiche/wirtschaft/artikel/streumunion.html?zur=94>> (in German, last visited on 4 April 2014). Therefore UBS decided that they „will not provide credit facilities, capital market transactions as well as buying and holding equity and/or bonds (including derivatives) of companies that are involved in the development, production or purchase of these controversial weapons.“ press release of 8.1.2013; <[http://www.ubs.com/global/en/about\\_ubs/corporate\\_responsibility/news\\_display\\_page\\_corporate\\_responsibility.html/en/2013/01/07/20130107b.html](http://www.ubs.com/global/en/about_ubs/corporate_responsibility/news_display_page_corporate_responsibility.html/en/2013/01/07/20130107b.html)> (visited on 4 April 2014).

<sup>46</sup> see: <[http://www.msci.com/products/indices/esg/ex\\_controversial\\_weapons/](http://www.msci.com/products/indices/esg/ex_controversial_weapons/)> (visited on 4 April 2014).

<sup>47</sup> HRC, UN Guiding Principles 2011. See in more detail para. 19ff

### 3.2. The Revised OECD Guidelines for Multinational Enterprises

[45] On 25 May 2011, the OECD Council adopted the updated text of the Guidelines for Multinational Enterprises.<sup>48</sup> The updated text of the Guidelines includes a separate chapter on human rights, which reflects and substantiates the UN Guiding Principles adopted by the Human Rights Council. While the OECD Guidelines are binding for governments, they only become binding for corporations when they are transposed into national or international law. The Chair of the responsible OECD Investment Committee summarized the situation as follows: “government backed, binding for governments, non-binding for MNEs”.<sup>49</sup>

[46] The Guidelines apply to state-owned and private multinational enterprises and, as far as meaningful, also to national enterprises facing the same expectations in terms of their operations, and within the limits of their capabilities. The enterprises are expected to respect internationally accepted human rights standards in their activities. They have to institute a procedure (due diligence) to identify, prevent and minimize both the actual, as well as the potential adverse human rights impacts arising from their activities. Furthermore, enterprises must be able to explain how they confront these consequences effectively. The Guidelines provide for an obligation for disclosure by enterprises of several aspects of their corporate governance strategies, as well as in areas in which companies have committed to specific guidelines or corporate codes of conduct. These codes of conduct mostly refer to sensitive areas, such as the environment, human rights, labour standards, consumer protection or taxation.

[47] In the newly included chapter on human rights, enterprises are encouraged to respect human rights and prevent negative impacts on human rights in the context of their activities. This comprises not only their own conduct, but also all activities within the scope of their business relationships and their production chain. Should any adverse effects nevertheless arise, enterprises shall have to address them, in particular, by promoting legitimate proceedings. Enterprises shall participate in the remediation of negative impacts if it transpires that they caused or contributed to the situation.

[48] In contrast to the UN, enterprises consider the OECD as an organization with a core competency in economic issues. In many areas of economic activities, such as money laundering or taxation, the OECD has already set the standard internationally, and generally, economic actors accept these standards for purposes of competitiveness, regardless of whether or not the language is legally binding.

[49] Even after the update, the enforcement of the OECD Guidelines still lies with the participating states, and thus represents a further element of the state duty to protect. The member states are encouraged to set up National Contact Points (NCP), which are responsible for dealing with complaints concerning breaches of the Guidelines, and mediate in conflict situations. Due to the decentralized implementation the form of the NCPs varies among the OECD states. The importance attributed to the new human rights chapter becomes clear when analyzing the first decision made by a NCP based on the updated Guidelines. In this decision, the Norwegian NCP concluded that a Norwegian company displayed behavior that violated human rights in Indonesia, on the basis of, among others, the updated Guidelines, the ILO Convention No. 169 and the Concluding Observation of the UN Committee on the Elimination of Racial Discrimination

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<sup>48</sup> OECD, Guidelines 2011.

<sup>49</sup> See <[http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc\\_150012.pdf](http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150012.pdf)> (visited on 4 April 2014).

(CERD).<sup>50</sup> Even though Switzerland has not ratified the ILO Convention No. 169 applied in this case, and that the form of the Norwegian NCP is not comparable to the Swiss NCP, the argumentation of the Norwegian NCP shows how the corporate responsibility to respect human rights can be interpreted and substantiated on the basis of other existing instruments.<sup>51</sup>

[50] In Switzerland, the NCP is established within the State Secretariate for Economic Affairs (SECO).<sup>52</sup> Its tasks are listed in detail in para. 183 ff.

[51] Regardless of institutional implementation issues, the adoption of the updated OECD Guidelines is undoubtedly an important contribution towards the protection from direct or indirect human rights abuses by corporations. Even if the OECD Guidelines are not directly binding for companies, they, together with the UN Guiding Principles adopted by the Human Rights Council, will develop into an international standard that will be highly relevant for the interpretation and application of domestic law. This is already clearly demonstrated in the Shared Principles for International Investment of the US and EU adopted in April 2012.<sup>53</sup> In Principle 6, entitled *Responsible Business Conduct*, they stipulate:

*Governments should urge that multinational enterprises operate in a socially responsible manner. To this end, the European Union and the United States intend to promote responsible business conduct, in general, and adherence by third countries to the OECD Guidelines for Multinational Enterprises, in particular.*

[52] If both global actors follow this principle and strongly urge the enterprises in their sphere of influence to comply with the OECD Guidelines, as well as encourage third parties that have not yet adhered to the OECD Guidelines to comply with them, the OECD Guidelines will develop into a standard for enterprises in the medium term. It is also interesting in this context that China, one of the most important investors and non-members of the OECD, has shown great interest in the updated OECD Guidelines.<sup>54</sup>

### 3.3. New Strategies in the EU

[53] The strategy on Corporate Social Responsibility (CSR) presented by the European Commission in October 2011 is strongly aligned with the approach of the UN Guiding Principles. In addition to the fundamental message that enterprises are responsible for the impacts of their business activities on society<sup>55</sup>, the new EU strategy stipulates that CSR issues primarily fall under the area of responsibility of enterprises. Due to the state duty to protect, however, public authorities should nonetheless play a supporting role and create market incentives for responsible business conduct with a “smart mix of voluntary policy measures and, where

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<sup>50</sup> CERD, General Recommendation 1993.

<sup>51</sup> NCP Norway, *FIOH v. Intex*, Final Report (2011), p. 21 ff. see also Norwegian Ministry of Foreign Affairs, CSR Report 2009.

<sup>52</sup> See: <<http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en>> (visited on 4 April 2014).

<sup>53</sup> European Commission, Press Release 2012. See also on the topic CHRISTINE KAUFMANN, The EU and USA adopted Shared Principles on International Investment, article in the SCHR-Newsletter of 27 June 2012, accessible at <<http://www.skmr.ch/de/themenbereiche/wirtschaft/artikel/investitionsgrundsaeetze-eu-usa.html?zur=94>> (visited on 4 April 2014).

<sup>54</sup> Information on the current status of the dialogue between China and the OECD is accessible under <<http://www.oecd.org/china/china-oecdcorporategovernancepolicydialogue.htm>> (visited on 4 April 2014).

<sup>55</sup> European Commission, Message 2011, pt. 3.1, p. 6.

necessary, complementary regulation".<sup>56</sup> The commission has set an ambitious roadmap for the implementation of the strategy that requires EU member states to present concrete implementation mechanisms, including legislative measures.<sup>57</sup> The adoption of uniform European laws, for example, with regard to the reporting obligations of financial institutions, is under discussion. Additionally, stricter public procurement requirements have already partly been put into practice.<sup>58</sup> Prospectively, an enterprise participating in a EU call for tenders will have to show that it adheres to the UN Guiding Principles. The proof of compliance with these requirements is currently the subject of intense discussions. In fine, these developments clearly demonstrate the importance of planned and already implemented EU measures for Swiss companies.

[54] A second important development within the EU that has received little attention to date, are the aforementioned Shared Principles on Investment<sup>59</sup> agreed with the USA.

### 3.4. Council of Europe

[55] Reference has already been made to the ECtHR's interpretation of the state duty to protect that encompasses several human rights standards.<sup>60</sup> Additionally, the ECtHR has likewise addressed questions on the extraterritoriality of the rights laid down in the covenants in several of its decisions.<sup>61</sup> The political bodies of the Council of Europe also deal with the subject, and are thus exerting influence on the substantiation of Switzerland's state duty to protect as member state. Moreover, in 2010, the Parliamentary Assembly of the Council of Europe adopted a Resolution<sup>62</sup> and Recommendations<sup>63</sup> on the issue of Business and Human Rights. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly further confirmed the need for action in its corresponding report.<sup>64</sup>

[56] Recently, the Steering Committee for Human Rights (CDDH) of the Council of Europe published a Feasibility Study – also based on the UN Guiding Principles – on Corporate Social

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<sup>56</sup> European Commission, Message 2011, pt. 3.4, p. 7.

<sup>57</sup> See also: [http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm) (visited on 4 April 2014). In his speech held on 4 December 2012 at the 1<sup>st</sup> UN-Forum on Business and Human Rights in Geneva Stavros Lambrinidis (EU-Special Representative for Human Rights) pointed out that at the end of 2012 around two thirds of the EU member states had already complied with this obligation or were at least in the process of creating a national action plan; see: [http://www.ohchr.org/Documents/Issues/Business/ForumSession1/SubmissionsStatements/StavrosLambrini\\_dis.pdf](http://www.ohchr.org/Documents/Issues/Business/ForumSession1/SubmissionsStatements/StavrosLambrini_dis.pdf) (visited on 4 April 2014).

<sup>58</sup> European Commission, Buying Social 2011, p. 10.

<sup>59</sup> European Commission, Press Release 2012. In more detailed on the „Shared Principles“ see additional information in fn. 53.

<sup>60</sup> In more detail with regard to the state duty to protect based on the ECHR see THOMAS KOENEN, Staatliche Schutzpflichten auf der Basis regionaler und internationaler Menschenrechtsverträge, Berlin 2012, p. 54 ff. In view of the role of enterprises see ECHR, Factsheet Companies 2012.

<sup>61</sup> ECtHR, Factsheet Companies 2012.

<sup>62</sup> Council of Europe, Resolution 1757 (2010). Concrete content in view of the state duty to protect is particularly sub-point 7.1 in which Member States are required „(to) foster accountability for corporate human rights conduct, in particular by: (7.1.1.) adopting guidelines on public procurement and investment of public funds aimed at excluding companies associated with human rights abuses; (7.1.2.) establishing bodies to advise governments on ethical issues and investment; (7.1.3.) including, in public procurement and investment contracts, clauses recalling the obligation to protect human rights.“

<sup>63</sup> Council of Europe, Recommendation 1936 (2010).

<sup>64</sup> Council of Europe, Report Doc. 12361 (2010).

Responsibility in the field of human rights.<sup>65</sup> Building on the existing network of international standardization initiatives, the Council of Europe investigated the added value and the most suitable instruments (e.g., a new convention/additional protocol/soft law mechanisms) for supplementary standardization measures. In doing so, particular attention was given to the possible implementation gaps within the UN Guiding Principles. One of the recommended measures was the issuance by the Committee of Ministers on Corporate Social Responsibility and Human Rights of a declaration on concrete implementation guidance in the field of Business and Human Rights. Furthermore, the Council recommended intensified thematic cooperation with the EU (within the scope of the existing Memorandum of Understanding), and with National Human Rights Institutes.<sup>66</sup>

### 3.5. Results and Assessment

[57] This short summary shows that despite their non-binding nature, the UN Guiding Principles have created considerable momentum on an international level, the effects of which are currently difficult to predict. In any case, this development demonstrates that many states are willing to deal with the subject and participate in the discussion on a shared understanding and common standards, thus, possibly paving the way for the harmonization of these standards. Another advantage of soft law instruments is that they facilitate the involvement of enterprises and civil society in the debate.

[58] It is apparent from the Swiss perspective that, in general, the traditional definition of CSR as a voluntary contribution to society (*i.e.* taking into account the interests of the stakeholders)<sup>67</sup> is decreasing in importance and is being replaced by a holistic approach as expressed in the UN Guiding Principles and the new EU strategy on CSR.<sup>68</sup> Even if the concept of the *state duty to protect* is nothing new, its consequent application to the economic sphere and the activities of enterprises poses several questions that need to be clarified. Regardless of the question of whether or not it is formally covered by these initiatives, Switzerland, a small open economy with a strong international network, cannot *de facto* avoid the developments in other states, and in particular the EU. This is confirmed by the international coordination of efforts between the Council of Europe and the EU, most recently in the field of CSR. Moreover, in implementing the state duty to protect it must be remembered that approximately 80% of Swiss companies are small and middle-sized businesses. These enterprises quickly reach the limits of their resources

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<sup>65</sup> Council of Europe, Feasibility Study 2012.

<sup>66</sup> *Ibid.*, p. 20 f. For the concrete cooperation with the EU in the area of *Corporate Social Responsibility* in particular the expertise of the Council of Europe in the areas of „Clothing and textile“, „Internet governance“, „Child labour“ and „Social rights“ are identified; *ibid.* p. 7 ff.

<sup>67</sup> See also SECO, CSR Concept 2009.

<sup>68</sup> Two current examples from the business world illustrate this development: The Statement of Commitment on Human Rights adopted in 2012 by Kuoni ([http://www.kuoni.com/docs/gl\\_12\\_020\\_statement\\_of\\_commitment\\_0.pdf](http://www.kuoni.com/docs/gl_12_020_statement_of_commitment_0.pdf)) (visited on 4 April 2014)) and the Kenya Pilot Project executed based on this statement ([http://www.kuoni.com/docs/assessing\\_human\\_rights\\_impacts\\_0.pdf](http://www.kuoni.com/docs/assessing_human_rights_impacts_0.pdf)) (visited on 27 May 2013)). In 2011 Nestlé mandated the Fair Labor Association, a non-governmental organization specialized in labour law, with a comprehensive review of the cocoa manufacturing chain in the Ivory Coast. The report published in 2012 by the FLA is the first study that identifies the complex value and production chain of the cocoa industry and the different stakeholders involved: <http://www.fairlabor.org/report/assessment-nestle-cocoa-supply-chain-ivory-coast> (visited on 4 April 2014).

when following international developments and forward planning for possible necessary adjustments in their activities. Consequently, the State's obligation to provide information and promote awareness pursuant to its duty to protect is of crucial importance.

### III. IMPLEMENTATION OF THE STATE DUTY TO PROTECT IN SWITZERLAND

#### 1. Constitutional Framework

##### 1.1. Principle

[59] Switzerland fulfills its state duty to protect by, *inter alia*, transposing its international law obligations into its constitution and domestic legislation. The Federal Constitution (FC) sets certain guidelines in Art. 5 para. 4, and in particular, Art. 35 para. 3. Thus, on the constitutional level, the legislator has a basis for substantiating the state duty to protect in the area of corporate human rights responsibility.

[60] Moreover, Art. 54 para. 2 FC lays down the duty of the federal government to contribute to the respect of human rights in the context of its foreign affairs, as one of the five goals of Swiss foreign policy. Nevertheless, the question of whether there is a direct duty to protect that can be derived from this provision remains difficult to answer. Legal authors see this provision as a guide for the authorities' actions, and as such, it may have little normative power, but at the same time is not only programmatic.<sup>69</sup> In the mentioned norms, the Federal Constitution takes a holistic policy decision for the protection of human rights that has to be taken into consideration in the application of the law, and in particular, the interpretation of Swiss law.

##### 1.2. The State Duty to Protect in Art. 35 para. 3 FC

[61] Art. 35 para. 3 FC stipulates that, the authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons. Both the rights contained in the agreements ratified by Switzerland, as well as the other guarantees provided for by national legislation, are included among the fundamental rights.<sup>70</sup> Thus, the issue of the third party effect, *i.e.*, the applicability of fundamental rights among private persons, is closely linked to the state duty to protect. In general, the prevailing doctrine in Switzerland does not work on the assumption of a direct third party effect of human rights.<sup>71</sup> So far, the only acknowledged exceptions – those that emerge from the catalogue of internationally guaranteed human rights – are equal pay for men and women,<sup>72</sup> the ban on torture,<sup>73</sup> and in some areas, religious freedom.<sup>74</sup> With regard to

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<sup>69</sup> See AUBERT/MAHON, p. 464 pt. 10; ROLAND KLEY/ MARTIN LUTZ, art. 54 para. 2, p. 994 pt. 25, in: Bernhard Ehrenzeller et. al. (eds.), *Die schweizerische Bundesverfassung: Kommentar*, Zurich et. al. 2008, p. 991 ff.; BIAGGINI, p. 356 Pt. 17 ff.

<sup>70</sup> With regard to the relationship between the fundamental rights contained in the Federal Constitution and the treaty-based guarantees, see for example REGINA KIENER/WALTER KÄLIN, *Grundrechte*, 2<sup>nd</sup> ed., Bern 2013, p. 17 ff.

<sup>71</sup> BIAGGINI, p. 255 Pt. 18.

<sup>72</sup> BGE 131 I 105, E. 3.6, p. 109.

<sup>73</sup> SCHWEIZER, p. 724 f. pt. 39.

the horizontal direct effect of human rights, the doctrine identifies problems, primarily in connection with legal certainty, since often the wording of human rights obligations is not sufficiently precise in order to derive concrete rights and obligations for relationships between private persons.<sup>75</sup> As already explained in previous sections, parallels can nevertheless be found at the international level, since the ECHR also stipulates that generally, the convention guarantees do not have a direct third party effect.<sup>76</sup> Consequently, the applicability of fundamental rights among private persons requires legislative action. Art. 35 para. 3 FC substantiates this principle, and specifies that the required realization of human rights in the whole legal order under Art. 35 para. 1 FC is generally also applicable between private persons.

### 1.3. Economic Freedom

[62] Economic freedom pursuant to Art. 27 and Art. 94 FC is vital for entrepreneurial activities. Government activities that seek to implement the state duty to protect in accordance with the UN Guiding Principles may under certain circumstances result in the restriction of economic freedom. An example of this is when contractual freedom is limited through human rights requirements, such as compliance with labour standards. Without specific authorization in the Constitution, these measures have to conform to the principles and comply with the requirements of Art. 36 FC, *i.e.*, they must have a legal basis, be justified in the public interest and be proportionate. While the UN Guiding Principles are not suitable to serve as legal basis, they may play an important role for the justification of public interest.

## 2. Implementation of the State Duty to Protect at the Legislative Level

### 2.1. Preliminary Remarks

[63] Swiss law does not provide for the direct, comprehensive human rights responsibility of enterprises. However, certain statutory connection points exist in the area of business management accountability, especially of the board of directors, as derived from the Swiss Code of Obligations (SCO)<sup>77</sup>. Furthermore, several provisions in civil and criminal law provide for direct corporate liability. Finally, enterprises may be subject to various reporting obligations that may include social and environmental elements.

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<sup>74</sup> BGE 4, p. 434 ff. of the year 1878: „As little as the state pursuant to art. 49 of the Federal Constitution and art. 17 of the Thurgau Cantonal Constitution may prescribe or prohibit a certain religious belief to its nationals or may prevent them from entirely or partially exercising any of their civil rights due to their beliefs, as little the husband has the right to control the religious belief of his wife and exert pressure on her freedom of belief and conscience. The latter is on the contrary an individual right preserved by the constitution for all citizens without discrimination on the grounds of sex.“ (p. 435) [translation provided by the authors].

<sup>75</sup> AUBERT/MAHON, p. 315 pt. 11.

<sup>76</sup> See above para. 34.

<sup>77</sup> Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 [Part Five: The Code of Obligations] (SR 220).

## 2.2. General Civil Law Provisions

### 2.2.1. Obligations of the companies themselves

[64] Under Swiss law, human rights compliance is not a requirement for the incorporation of a company that has a legal identity separate from its stockholders. Nevertheless, it is of course forbidden for an enterprise to pursue an unlawful purpose.<sup>78</sup> As a rule, Swiss law only provides for a few direct obligations of companies to comply with human rights standards. Specific obligations may be found in labour law, which contains provisions on, *inter alia*, working hours and conditions<sup>79</sup> in general, as well as in the context of gender equality.<sup>80</sup>

[65] Currently, there is no overarching obligation for companies to report on their compliance with human rights standards in Switzerland. While these domestic reporting requirements are still rather rare compared with binding international reporting obligations, the trend is pointing towards the merger of financial and social reporting. For example, since 2009, Denmark has been requiring large companies to include a section on CSR in their annual report, which should specifically list all the efforts they have undertaken to promote human rights.<sup>81</sup> However, in Denmark, it is enough for the company to state that it has done nothing, in order to fulfill the reporting requirements. The Netherlands, in turn, has adopted a new approach. It requires listed companies to present a written policy on the CSR aspects that are relevant to the company. The company must then account for the implementation of the policy in its annual report.<sup>82</sup> The new CSR strategy of the EU reflects similar considerations.<sup>83</sup> The EU Commission is considering the introduction of an obligation for financial institutions to report on their compliance with the human rights commitments they have undertaken. Overall, a certain international trend towards stronger reporting requirements, in particular, for stock exchange listings, can be identified, the most recent examples of which are the stock exchanges of Malaysia,<sup>84</sup> Mumbai, and Hong Kong.<sup>85</sup>

### 2.2.2. Management responsibility

[66] The legal basis for the management responsibility in a limited company, specifically of the members of the board of directors, is regulated in Art. 754 SCO. In general terms, this provision refers to the accountability of board members before their company, the shareholders and the creditors. The duty to protect the corporate interests is given priority. According to Art. 717 SCO, this means that members of the management have to fulfill their tasks with the appropriate diligence (due diligence) and set the interests of the company above other interests and protect them (fiduciary duty). According to the prevailing doctrine and legislation, the board of directors may only engage in transactions that it believes in good faith to be of long-term benefit for the

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<sup>78</sup> As comparative study see HRC, Ruggie Addendum 2011, pt. 39.

<sup>79</sup> In particular, Federal Act on Work in Industry, Trade and Commerce (Employment Act) of 13 March 1964 (SR 822.112), and in art. 319 ff. SCO.

<sup>80</sup> Federal Act on Gender Equality of 24 March 1995 (SR 151.1).

<sup>81</sup> See: <<http://csrgov.dk/legislation>> (visited on 4 April 2014).

<sup>82</sup> See HRC, Ruggie Addendum 2011, pt. 130.

<sup>83</sup> See CSR Strategy of the EU above para. 53

<sup>84</sup> LONG SEH LI, Malaysia, in: Kaufmann/Cohen/Tan/Lim, p. 222 f.

<sup>85</sup> *Sustainable Stock Exchanges Initiatives* see <<http://www.sseinitiative.org/>> (visited on 4 April 2014).

company's value.<sup>86</sup> A prerequisite for the accountability of the board of directors pursuant to Art. 717 SCO is the violation of a corresponding due diligence obligation. This, in any case, includes the violation of legally binding provisions, but not necessarily the violation of quasi-judicial standards, such as the provisions of the UN Global Compact.<sup>87</sup> Under Swiss Company Law, there are no specific provisions that expressly deal with the accountability of the management before the company in connection with human rights abuses caused by corporate activities. Nevertheless, there are certain constellations – as presented below – in which a human rights accountability of the board of directors is conceivable.

### 2.2.3. General human rights guidelines within a company

[67] The responsibility of a company before society in general, and the prevention of human rights abuses in particular, may be part of the internal guidelines of a company. Depending on the form of these guidelines, they could be an integral part of a binding corporate strategy, and as such, may be binding to the company's management, pursuant to Art. 716a, para. 2 pt. 5 SCO, making the board of directors responsible for their implementation.<sup>88</sup> If the board of directors does not comply with these internally binding standards, this may – to the extent the other requirements are fulfilled – trigger accountability under company law. Even if no binding human rights or CSR strategy exists, the due diligence obligation of the board of directors may nonetheless require it to follow international industry standards and best practices.<sup>89</sup> These international standards develop in different forms and industries. An example is the OECD Guidance Document on Mining in Conflict-affected Areas.<sup>90</sup> This document contains concrete approaches for determining the risks of a company mining mineral resources in conflict-affected areas. Since its adoption in 2011, the document has been supplemented with specific annexes on the mining of tin, tantalum and wolfram. A further supplement on gold mining was adopted in 2012.<sup>91</sup> In view of the serious risks that activities in conflict-affected areas entail, and the positive echo generated by this guidance in the industries concerned, it cannot be excluded that the OECD Guidance Document will develop into a standard for the reliable risk assessment, as it is required in the scope of due diligence under company law.

### 2.2.4. Reporting obligations

[68] Though the recently updated accounting law that is shaped irrespective of the legal form of the company does not contain any obligations that go beyond the financial reporting, pursuant to Art. 957 ff. SCO, information on the performance of a risk assessment in the annex to the annual report has been required for limited companies since 2008.<sup>92</sup> With the revision of 1 January 2013, the risk assessment has become part of the management report (Art. 961c SCO), and all

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<sup>86</sup> Instead of many see WATTER/SPILLMANN, p. 105.

<sup>87</sup> Regarding the *UN Global Compact* see <[http://www.unglobalcompact.org/Issues/human\\_rights/](http://www.unglobalcompact.org/Issues/human_rights/)> (visited on 4 April 2014).

<sup>88</sup> WATTER/SPILLMANN, p. 105.

<sup>89</sup> *Ibid.*, p. 110.

<sup>90</sup> OECD, Due Diligence Guidance 2011; see also OECD, Recommendation of the Council 2011.

<sup>91</sup> With regard to the meaning of a regulation see SCHNEIDER/SIEGENTHALER, *passim*. Regarding the addition for the raw material gold added in 2012 see OECD, Supplement on Gold 2012.

<sup>92</sup> Old art. 663b pt. 12 SCO.

companies, irrespective of their legal form, that are subject to ordinary audits pursuant to Art. 727 SCO, are obliged to provide a report (Art. 961 SCO). This means that under certain circumstances, the company has to report on human rights issues that may represent a risk for the company, such as ongoing (legal) proceedings. Relevant questions arise with regard to the verification of the reporting particularly for multinational enterprises, since the format and the published content of the report may result in concrete liability issues under certain circumstances.<sup>93</sup> Moreover, as in the EU, the Swiss are debating the extent to which listed companies may be subject to an obligation to disclose non-financial impacts of their business activities. In Switzerland, not the legislator, but SIX Swiss Exchange issues the listing and disclosure regulations.<sup>94</sup> At present, these regulations do not contain any disclosure requirements concerning human rights and CSR issues. Nonetheless, human rights abuses may become relevant in connection with Art. 53 of the Listing Rules (LR),<sup>95</sup> if they have an effect on share price.<sup>96</sup> In particular, Art. 53 LR obliges companies to disclose all listing- and price-sensitive facts. However, the violation of Art. 53 LR can only trigger accountability pursuant to Art. 754 SCO, if the rule is considered a standard of protection. This has been challenged in legal writing.<sup>97</sup> For a long time the opinion prevailed that the SIX Listing Rules were self-regulatory provisions, and therefore, not a standard of protection. However, since the Listing Rules have to be approved by the Financial Market Supervisory Authority (FINMA) to enter into force,<sup>98</sup> it is increasingly argued that they have taken the character of a sovereign decree, which may contain provisions that have standard of protection features.<sup>99</sup> So far, the Swiss Federal Supreme Court has only issued one decision with regard to this question. Accordingly, the regulations of the stock exchange have a normative function, even though they are based on contract law.<sup>100</sup> In view of the foregoing, human rights abuses that have an impact on the share price and are not disclosed, may establish responsibility in accordance with Art. 754 SCO, if all other requirements are also fulfilled.

#### 2.2.5. Possible liability principles

[69] If a company threatens to infringe on human rights, or is involved – even if unintentionally – in human rights abuses, this may also result in negative consequences for the company itself, including damages to its reputation, fall in market prices, or even liability claims.<sup>101</sup> For instance, triggers may be campaigns by non-governmental organizations<sup>102</sup> or claims for damages.<sup>103</sup> If

<sup>93</sup> See FORSTMOSER, p. 712.

<sup>94</sup> Art. 3 para. 2 lit.a FA on Stock Exchange and Securities Trading of 24 March 1995 (SR 954.1).

<sup>95</sup> „The issuer must inform the market on any price-sensitive facts which have arisen in its sphere of activity. Price-sensitive facts are facts which are capable of triggering a significant change in market prices “, art. 53 para. 1 SIX Listing Rules, Obligation to disclose potentially price-sensitive facts (Ad hoc publicity). See also the Directive on Ad Hoc Publicity issued by SIX, (DAH).

<sup>96</sup> URS VON ARX/ANDREAS ZIEGLER, The Effect of CSR on Stock Performance: New Evidence for the USA and Europe, CCRS Working Paper Series, Working Paper No. 04/08, Zurich 2008.

<sup>97</sup> ROBERTO/RICKENBACH, p. 192.

<sup>98</sup> Art. 4 para. 2 SESTA.

<sup>99</sup> Very persuasive: MATTHIAS MAURER/HANS CASPAR VON DER CRONE: Rechtsschutz bei Dekotierungen von der Börse SIX Swiss Exchange, in: SZW 4/2011, p. 400-415, p. 403 ff.; ROBERTO/RICKENBACH, p. 192.

<sup>100</sup> BGE 133 III 221, E. 5.2.3, p. 226.

<sup>101</sup> See FORSTMOSER, p. 718 ff.

<sup>102</sup> Thus for example the NGO campaign against the textile company Triumph due to their production activities in Burma, which was considered an indirect assistance of the Burmese military junta and the human rights abuses resulting from the situation, in particular of labour standards in the production. Triumph was forced to close the production in Burma, which however did not improve the situation of the workers concerned: Clean

damages arise against a company as a result of such cases, and it can be proven that the board of directors negligently or intentionally violated its duties in preventing such risks and damages, Art. 754 SCO applies. An example of how seriously these kinds of legal risks can affect a company is demonstrated by the fact that, when the new risk regulations for banks were introduced with the *Basel II*<sup>104</sup> set of rules, banks were explicitly obliged to evaluate possible legal risks, include them in their risk management and, if necessary, protect against them. This includes litigation risks arising from actions on the grounds of human rights abuses and requiring adequate provisions.

[70] Finally, an interesting development has emerged from the discussions on updating the Federal Act and amending Accompanying Measures for the Free Movement of Persons.<sup>105</sup> The discussion on the secondary joint and several liability of companies in the construction industry relative to the compliance with Swiss labour law minimum standards of their subcontractors,<sup>106</sup> was reopened and approved in the fall session of the Federal Parliament 2012.<sup>107</sup> On 15 July 2013, the Federal Council put the strengthened joint and several liability clause into force, on the same day as the revised and substantiated regulation on posted workers came into effect. Under these regulations, the effective date for the validity of the joint and several liability provisions is the date of completion between the first contractor and the first subcontractor.<sup>108</sup>

### 2.3. Draft for the Federal Act on Private Security Services Provided Abroad

[71] The draft of the Federal Act on Private Security Services Provided Abroad<sup>109</sup> is breaking new ground. It obliges private security firms to directly comply with the *International Code of Conduct* (ICoC),<sup>110</sup> and thus, to comply indirectly with the human rights provision therein. The ICoC

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Clothes Campaign, Newsletter No. 15, June 2002, accessible at <http://archive.cleanclothes.org/newslist/289-triumph-closes-factory-in-burma> (visited on 4 April 2014).

<sup>103</sup> Such as the actions initiated against companies due to their support of the apartheid policies in South Africa based on the American Alien Tort Claims Act. In this context see also, CHRISTINE BREINING-KAUFMANN, *Banken vor Gericht. Die Apartheidklagen gegen Schweizer Banken*, in: Hans Caspar von der Crone et al. (eds.), *Aktuelle Fragen des Bank- und Finanzmarktrechts* (FS Zobl), 2004 Zurich.

<sup>104</sup> Basel II: Revised international capital framework (capital requirements of the Basel Committee), Bank for International Settlements, Basel 2004.

<sup>105</sup> See Federal Council, *Message on the Accompanying Measures to the Free Movement of Persons 2012*.

<sup>106</sup> See GABRIELA SCHWARZ, *Joint and Several Liability of Swiss enterprises for non-compliance with minimum salary and working conditions of foreign subcontractors*, contribution in the SCHR-Newsletter of 27 June 2012, accessible at <http://www.skmr.ch/de/themenbereiche/wirtschaft/artikel/solidarhaftung-lohndumping.html> (in German, visited on 4 April 2014).

<sup>107</sup> BBI 2012 9725. Since the referendum deadline expired unused, the new regulations entered into force on 15 July 2013.

<sup>108</sup> See Press Release Federal Council on 26 June 2013, accessible at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=49422> (in German, visited on 4 April 2014).

<sup>109</sup> The preliminary draft is accessible at <http://www.bfm.admin.ch/content/dam/data/sicherheit/gesetzgebung/sicherheitsfirmen/vorentw-d.pdf> (in German, visited on 4 April 2014), and the Message of the Federal Council of 23 January 2013 is accessible at <http://www.admin.ch/opc/de/federal-gazette/2013/1745.pdf> (in German, visited on 4 April 2014). On 6 June 2013 the national Council approved the adoption of the Draft by a great majority; see [http://www.parlament.ch/ab/frameset/d/s/4909/407151/d\\_s\\_4909\\_407151\\_407328.htm](http://www.parlament.ch/ab/frameset/d/s/4909/407151/d_s_4909_407151_407328.htm) (in German, visited on 4 April 2014).

<sup>110</sup> See in this context the ICoC website: <http://www.icoc-psp.org/> (visited on 27 May 2013). For an overview of the current developments see NILS MELZER/JONATAN NIEDRIG, *Private Security and Military Companies – An overview of the international regulatory approaches*, contribution in the SCHR-Newsletter of 1 February 2012,

prescribes compliance with human rights standards by these companies, regardless of national laws or the legal system of the countries in which they operate.<sup>111</sup> At the same time, the federal authorities are implementing Switzerland's state duty to protect contained in the *Montreux Document*.<sup>112</sup> Furthermore, private companies situated in Switzerland are not permitted to provide security services abroad that can be linked to human rights abuses. With the implementation of the ICoC dated 9 November 2010, the "hardening" of soft law into binding law can once again be observed.

[72] The Fässler postulate entitled "The role of Switzerland as host state of commodity trading companies"<sup>113</sup> that the Federal Council recommended for adoption, but the National Council rejected on 16 March 2012, projected a similar regulatory direction.

#### 2.4. Public Procurement

[73] The state's duty to protect is especially apparent in the field of public procurement, and the applicable provisions depend on the community level responsible for the procurement. Switzerland ratified the Government Procurement Agreement of the World Trade Organization<sup>114</sup>, which stipulates that the offer shall be awarded to the tenderer whose tender is either the lowest or most advantageous in terms of the criteria set forth in the tender documentation (Art. XIII:4 b). The "advantageous" criterion may also include non-economic factors such as human rights aspects, as long as these are not used to discriminate against foreign suppliers.

[74] The determining factor for defining the actual scope of protection is mainly the location where the service will be provided.<sup>115</sup> Thus, on a federal level, when services are provided in Switzerland in accordance with Art. 8 FAPP (Federal Act on Public Procurement),<sup>116</sup> the following principles must be observed in the award procedure: (1) Compliance with occupational safety regulations and the work conditions of employees (Art. 8 para. 1 lit. b FAPP); and (2) Equality of treatment between women and men with regard to equal pay (Art. 8 para. 1 lit. c FAPP). Similar regulations can also be found at an inter-cantonal and cantonal level.<sup>117</sup> If the services are provided abroad, the supplier has to at least comply with the ILO Core Conventions, in accordance with Annex 2a of the Ordinance on Public Procurement (Art. 7 par. 2 OPP)<sup>118</sup>. Moreover, important subcontractors and suppliers have to be considered in the decision-making

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accessible at <<http://www.skmr.ch/de/themenbereiche/wirtschaft/artikel/pmsc-regulierung.html?zur=94>> (in German, visited on 4 April 2014).

<sup>111</sup> See <<http://www.eda.admin.ch/eda/de/home/recent/media/single.html?id=36144>> (visited on 4 April 2014). In addition, the correlated ICoC charter for the governance and oversight mechanism was adopted on 22 February 2013 and shall institutionally be based in Geneva. The purpose of the charter is the certification and monitoring of private security providers, as well as the adoption of a third-party complaint procedure; see <<http://www.eda.admin.ch/eda/de/home/recent/media/single.html?id=47889>> (visited on 4 April 2014).

<sup>112</sup> UN GA, Montreux Document 2008.

<sup>113</sup> National Council, Postulate 11.3803 (Fässler).

<sup>114</sup> Agreement of 15 April 1994 on Public Procurement (SR 0.632.231.422).

<sup>115</sup> For concrete examples to determine the place of performance see Federal Procurement Commission, Guideline 2012, p. 9 f.

<sup>116</sup> Federal Act on Public Procurement of 16 December 1994 (SR 172.056.1).

<sup>117</sup> Thus for example on an inter-cantonal level in art. 11 lit. e and f of the Intercantonal Agreement of 25 November 1994/15 March 2001 on Public Procurement (SR 172.056.5).

<sup>118</sup> Ordinance on Public Procurement of 11 December 1995 (SR 172.056.11).

process, and as a general rule, the tenderer is liable for fulfilling the criteria.<sup>119</sup> In practice, this provision sometimes causes difficulties, since on the one hand, the important subcontractors and suppliers are not always easily identified, and on the other hand, it is often unclear how compliance with the required human rights standards can be proven. For instance, which certificates from which authorities are meaningful? A clarification of this issue would be very helpful, particularly for SMEs.

## 2.5. Competition Laws

### 2.5.1. Federal Act against Unfair Competition (UCA)

[75] The Federal Act against Unfair Competition (UCA)<sup>120</sup> stipulates a punishment under competition law for so-called “social dumping.” Art. 7 UCA prohibits non-compliance with the provisions on working conditions that by law or contract, are also imposed on competitors, or are customary in the profession or location. This is a special case of unfair competition due to violation of law, which is generally included in the blanket clause under Art. 2 UCA. Social dumping occurs when a company gains a competitive advantage by saving in workforce costs. These costs may be connected to different factors, such as security, hygiene and protection of the workers, work and rest periods, as well as remuneration. The purpose of the provision does not lie in the protection of the workers’ rights, but in the prevention of a competitive distortion. As a consequence only the non-compliance with working conditions, to which also competitors are bound, e.g. through laws, ordinances or regulations, but also collective work agreements or general professional or local customs, is established.<sup>121</sup> The non-compliance with working conditions must further serve an economic purpose and have a noticeable effect on market conditions.<sup>122</sup> However, if the company pursues different objectives, or if all competitors violate the regulations in the same manner, thus removing the competitive advantage connected to the violation, the respective behavior of each company does not represent an infringement of Art. 7 UCA. Non-compliance with individual work agreements is also not covered by Art. 7 UCA.

[76] Thus, under certain circumstances, the behavior of a company may be qualified as unfair under the UCA, if it takes advantage of “human rights-related gaps” and benefits from working conditions that violate human rights.<sup>123</sup> In Switzerland, no decisions on this subject have been made yet. In view of the new joint and several liability in connection with the accompanying measures,<sup>124</sup> the options of the UCA for the protection of human rights should be analyzed in more detail.

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<sup>119</sup> Federal Procurement Commission, Guideline 2012, p. 10.

<sup>120</sup> FA of 19 December 1986 against Unfair Competition (SR 241).

<sup>121</sup> JUNG, art. 7 UCA, p. 629 ff.

<sup>122</sup> See JUNG, art. 2 UCA, p. 170 pt. 17.

<sup>123</sup> ROLF H. WEBER/ROMANA WEBER, Unlauteres Marktverhalten des Importeurs bei Nichteinhaltung von Arbeitsbedingungen durch ausländische Lieferanten?, in: GRUR Int 2008, München 2008, p. 899-907, p. 907.

<sup>124</sup> Revised Law on Posted Workers, see above text in Fn. 107.

## 2.5.2. Antitrust provisions

[77] The purpose of the Antitrust Law is to ensure free competition in the market. Art. 5 para. 1 of the Cartel Act (CartA)<sup>125</sup> provides that companies may not enter into agreements that significantly influence competition in a market. For restrictions in competition that are significant (Art.5 para. 1 CartA), but do not eliminate competition altogether (Art. 5 para. 3 and 4), Art. 5 para. 2 CartA includes a catalogue of possible justifications on grounds of economic efficiency that allow anti-competitive agreements, if, for example, they are necessary for a better allocation of resources. However, it excludes the possibility of justifying actions on human rights grounds and according to prevailing opinion neither could this be subsumed under the heading of increasing economic efficiency.<sup>126</sup>

[78] Possible unwanted collisions with provisions under the Cartel Act may be caused by collusion between companies not to conclude contracts with suppliers that infringe human rights. For this type of collusion, one must first verify whether they eliminate competition altogether and are thus unlawful pursuant to Art. 5 para. 3 and 4 CartA. If the agreements do not go that far because they do not eliminate competition entirely, Art. 5 para. 2 CartA is applicable, which stipulates that agreements affecting competition are deemed justified on grounds of economic efficiency. According to Art. 5 para. 2 lit. a CartA for example, measures that are necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally, may be justified by economic efficiency. Invoking factors that lie outside the economic process, even if they are public interests that may produce positive economic consequences, cannot be subsumed under the exception catalogue of Art. 5 para. 2 CartA.<sup>127</sup> The exclusion of suppliers for human rights infringements may not be incorporated under this provision, at least according to the currently prevailing opinion.

[79] The failure to include human rights matters in the Cartel Act may lead to a situation where companies starting from a certain size or market power can only utilize a limited range of measures in their corporate responsibility strategies for the protection of human rights. Thus, a justification for measures restricting competition due to human rights considerations would have to be based on the express authorization of the Federal Council, which may grant it at the request of the undertakings involved for compelling reasons of public interests, and for a limited time period (Art. 8 CartA). However, for companies to be able to apply for authorization, their behavior has to be declared unlawful by the responsible authority, the Competition Commission<sup>128</sup>. The pronouncement of this decision is deemed a formal request requirement.<sup>129</sup> Moreover, if a group

<sup>125</sup> FA on Cartels and other Restraints of Competition of 6 October 1995 (SR 251, status of 1 January 2011). Particularly instructive on the current revision of the Cartel Act: ROGER ZÄCH/ROLF WEBER/ANDREAS HEINEMANN (eds.), Revision des Kartellgesetzes. Kritische Würdigung der Botschaft 2012 durch Zürcher Kartellrechtler, Zurich et al. 2012.

<sup>126</sup> REINERT, art. 5 CartA, p. 63 f. pt. 11-13. This point will probably also not change after the proposed Cartel Act Revision. See Federal Council, Message on Cartel Act 2012, p. 3941.

<sup>127</sup> See JÜRIG BORER, pt. 45 to Art. 5 CartA, in: Jürg Borer (ed.): Wettbewerbsrecht I, 3. ed., Bern 2011.

<sup>128</sup> In the planned revision this monitoring function would be placed with the Federal Administrative Court that would act as a first instance competition court in future; see <<http://www.news.admin.ch/message/index.html?lang=de&msg-id=43503>> (visited on 4 April 2014). The competent Committee for Economic Affairs and Taxation of the Council of States recently clearly rejected this proposal and with a majority of 10 to 2 pronounced itself in favor of a revision, in which the Competition Commission will stay the authority of first instance; see <<http://www.parlament.ch/d/mm/2013/Seiten/mm-wak-s-2013-01-15.aspx>> (visited on 4 April 2014).

<sup>129</sup> REINERT, art. 8 KG, p. 102 para. 5.

of companies wants to obtain authorization for an exclusion or “boycott” list, it has to submit to civil or administrative law proceedings, in the course of which, the Competition Commission declares the action as unlawful (see Art. 15 para. 2 and 31 CartA). As a concrete example, the Competition Commission would have to declare that an agreement with the purpose of excluding companies that do not comply with the ILO Core Conventions as business partners or suppliers is unlawful. Based on Art. 8 CartA, the Federal Council could enforce the ILO Core Conventions for reasons of public interests, and thus permit this type of agreement. This possibility had been discussed in connection with the fixing of book and sheet music prices; however, as we know, the enterprises concerned did not make use of it.<sup>130</sup>

[80] If a company that wants to avoid using raw materials and products mined or produced through means that are problematic to human rights is in a dominant position, its refusal to enter into a business relationship with certain suppliers should also be evaluated in terms of Art. 7 para. 2 lit. a CartA. This provision stipulates that, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder or disadvantage other undertakings. Even if Art. 7 CartA does not explicitly provide for possible justifications, exculpation is similarly possible on the grounds of legitimate business purposes, which again may include economic reasons. In contrast to the interpretation of Art. 5 CartA, the extent to which efficiency considerations or human welfare benefits<sup>131</sup> may be taken into account, in addition to business-related or economic reasons, is still the subject of dispute among practitioners and the scholars.

[81] If the Competition Commission would consider the relevant behavior of a dominant undertaking unlawful, theoretically, it would also be possible to submit an application to the Federal Council for admission under these circumstances. However, the application of Art. 8 CartA for the protection of human rights in this regard has not yet been discussed in legal literature.

## 2.6. Criminal Provisions

[82] Since 2006, the Seventh Title of the Swiss Criminal Code (SCC) has stipulated general provisions on corporate criminal liability (Art. 102 and 102a). Art. 102 para. 1 SCC articulates the principle that, in the exercise of commercial activities, first and foremost, the natural person who committed the act is responsible for the felony or misdemeanour.<sup>132</sup> If, however, the perpetrator cannot be determined, the felony or misdemeanour is attributed to the undertaking in the second degree.<sup>133</sup> The primary criminal liability of undertakings is provided for in Art. 102 para. 2 SCC, and the exhaustive list of offences is defined therein.<sup>134</sup> Interestingly, the discussion on corporate criminal liability that finally led to the inclusion of Art. 102 in the SCC was sparked by a human

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<sup>130</sup> See REINERT, art. 8 KG, p. 101 para. 3.

<sup>131</sup> For more details on the issue of *legitimate business reasons* see BSK-KG, MARC AMSTUTZ/BLAISE CARRON, pt. 63 ff. on art. 7, Basel, 2010. Regarding the refusal of dominant undertakings to enter into a business relationship see *ibid.*, pt. 72 ff. on art. 7.

<sup>132</sup> In-depth considerations regarding Art. 102 SCC: FORSTER, *passim*.

<sup>133</sup> GÜNTER STRATENWERTH/WOLFGANG WOHLERS, Schweizerisches Strafgesetzbuch – Handkommentar, 2nd ed. Bern 2009, p. 236 pt. 3.

<sup>134</sup> Mentioned are offences pursuant to 260ter, 260quinquies, 305bis, 322ter, 322quinquies or 322septies para. 1 SCC and art. 4a para. 1 lit. a CartA.

rights-related area: Swiss companies had violated an export embargo or even the War Materials Act with their exports.<sup>135</sup>

[83] In addition to Art. 102, the SCC also contains various specific offences that justify corporate accountability for human rights infringements. Art. 182 SCC, for example, stipulates that trafficking in human beings is an intrinsically punishable offence both for companies as well as individuals. Thus, the punishability of a company for this criminal offence subsists directly and not only in the secondary degree to individual culpability. Also, the offense of contaminating drinking water under Art. 234 SCC covers both individuals and companies. However, in contrast to the scope of Art.182 SCC, this offence under Art. 234 SCC applies only to crimes committed in Switzerland.

#### IV. FURTHER OPTIONS FOR THE IMPLEMENTATION OF THE STATE DUTY TO PROTECT IN SWITZERLAND

[84] Increasing global interdependencies on an economic and informational level have an influence on the conceptualization of the state duty to protect in connection with the human rights-related actions of companies. In this context, a strengthening of the efforts to implement the state duty to protect can be observed on a regional and international level.

[85] The presented development trends of the state duty to protect in the field of Business and Human Rights are also important for Switzerland as the domicile of multi-national enterprises. As the previous statements show, Switzerland has undertaken selective efforts to implement the state duty to protect in various fields of the economic sphere. In addition to legislative measures, the SECO has adopted the information on the National Contact Point and the updated OECD Guidelines.<sup>136</sup> Nevertheless, an integrated strategy for the implementation of the UN Guiding Principle has not yet been addressed.<sup>137</sup> With the recent decision of the National Council to respond to the Graffenried postulate – which calls for a report of the Federal Council on the implementation strategy for the *Protect, Respect, Remedy* framework in Switzerland – there is now a specific need for action.<sup>138</sup> One of the tools for the Federal Council to define the content is its multi-stakeholder dialogue with representatives from business, civil society and science.<sup>139</sup>

[86] In summary, we have identified the following focal points for the continued discussion of the implementation of the state duty to protect in Switzerland :

- In connection with the raw material industry, the Federal Council correctly determined that human rights abuses by commodity trading companies domiciled in Switzerland could lead

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<sup>135</sup> BGE 96 IV 155, E. 2.4.a, p. 174, 122 IV 103, E. 6.2.a, p. 126. In more detail HEINIGER, pt. 167-181.

<sup>136</sup> The information is accessible on the homepage of the SECO. There the updated procedural directive can also be found, accessible at <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en> (visited on 4 April 2014).

<sup>137</sup> Various parliamentary requests have suggested the drafting of this strategy: National Council, Postulate 12.3503 (Graffenried) and National Council, Interpellation 12.3520 (Moser); National Council, Interpellation 12.3456 (Haller); National Council, Interpellation 12.3449 (Ingold).

<sup>138</sup> Approved on 14 December 2012; accessible at [http://www.parlament.ch/D/Suche/Seiten/geschaefte.aspx?gesch\\_id=20123503](http://www.parlament.ch/D/Suche/Seiten/geschaefte.aspx?gesch_id=20123503) (visited on 4 April 2014). At present with the Postulate Comte a similar request is pending in the Council of States; Council of States, Postulate 12.4100 (Comte).

<sup>139</sup> Federal Council, Response to Postulate 12.3503 (2012).

to a reputational damage for Switzerland abroad.<sup>140</sup> In light of the economic importance of this industry for Switzerland, question arises as to whether and how Switzerland can ensure that Swiss companies assume their responsibility for human rights when operating abroad, without interfering with the sovereignty of other states, and without assigning tasks that are incumbent upon the host state to the company.<sup>141</sup> For example, the application of the home country control principle, as known from the capital markets regulations, would have to be considered<sup>142</sup>.

- John Ruggie’s framework proposes a smart mix of voluntary and regulatory policy instruments. Transparent binding regulations contribute to a predictable framework and competitive conditions applicable to all economic actors in the same manner. On the other hand, non-binding, voluntary instruments leave room for taking into account industry-specific characteristics or new developments that could not have been foreseen by the legislator. It is particularly important for SMEs that the expectations set on them with regard to the respect of human rights are transparent and clear. In view of the developments in the EU, it is essential for Switzerland to define its own position, and thus prevent possible competitive disadvantages for Swiss undertakings, which may arise from regulatory gaps between Switzerland and the EU in the field of CSR. The dynamics of the debate in Switzerland are also characterized by civil society initiatives such as the “Corporate Justice” campaign, which, in any case, should not be (mis)understood as an implementation strategy for the UN Guiding Principles.<sup>143</sup>
- This Study shows that the legal discussion on the human rights responsibility of corporations must integrate different legal fields and relationships that so far have received little attention. In light of the complexity of the topic and the developments in the environments most relevant for the Swiss economy, in particular the EU, a detailed inventory exceeding the parameters of this Study, which would also include soft law and industry specific instruments, would be useful as a basis for decision-making relative to a possible strategy for the implementation of the UN Guiding Principles. Such an approach would also be in line with the approach of the UN Working Group on Business and Human Rights that is presently compiling pilot mapping surveys in three countries (United Kingdom, Germany and Denmark)<sup>144</sup>, which based on a common methodology are setting out the legal situation with regard to the implementation of the UN Guiding Principles. These studies will enable states to identify specific needs and develop action plans.
- In view of the mainstreaming of the UN Guiding Principles, it could be useful to analyse the current amendments of laws relative to the *state duty to protect* in economic activities.
- Finally, the role of Switzerland regarding the normative substantiation of the UN Guiding Principles in the international framework must be defined. Switzerland has substantially supported the preparation of the UN Guiding Principles, and as a small open economy and

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<sup>140</sup> Federal Council, Response to Postulate 11.3803 (2011).

<sup>141</sup> In this regard FORSTMOSER, P. 712 f., seems to express a different view, according to which companies must take responsibility for upholding human rights themselves in countries with weak governments.

<sup>142</sup> See PETER NOBEL, Schweizerisches Finanzmarktrecht – Einführung und Überblick, 2. ed., Bern 2004, § 5 pt. 6.

<sup>143</sup> The campaign inter alia explicitly demands the introduction of more controls for companies on a national and international level, accessible at <<http://www.rechtohnegrenzen.ch/en/campaign/demands/>> (visited on 4 April 2014), in more detail in MEMBREZ, Study 2012.

<sup>144</sup> The publication of these Pilot Mapping Surveys is planned in the course of 2013; see <<http://www.ohchr.org/EN/Issues/Business/Pages/ImplementationGp.aspx>> (visited on 4 April 2014).

host country of numerous multinational enterprises, it could make a significant contribution to their continued development.

## GRIEVANCE MECHANISMS FOR HUMAN RIGHTS ABUSES (ACCESS TO REMEDY)

### I. HUMAN RIGHTS AND REMEDIATION

[87] The procedural side of the state's obligations to protect and respect human rights consists in offering effective grievance mechanisms to private parties who feel that their rights under international and constitutional law have been infringed. This remedy option is the indispensable corollary to the state duty to protect, since without it, enforcement of protected rights is practically impossible. A remedy is effective if it presents the possibility of having a claim verified in a fair and independent proceeding, and of seeking redress, if needed.

[88] It may be difficult for individuals to seek remediation for human rights violations, especially in connection with corporate economic activities. Private parties who want to defend themselves against the infringement of their rights are confronted with various practical and legislative obstacles, which will be analyzed in more detail below.

[89] In principle, there are different ways to seek remedy. Whereas, traditional guarantees under international law for individual legal protection partly set out requirements to the establishment and design of a judicial complaint system, extrajudicial mechanisms are increasingly becoming the focus of current discussions. The structure of both systems in Switzerland shall be further explored in this chapter.

[90] With regard to the judicial remedy system in Switzerland, the implementation of the international law requirements on a constitutional and legislative level is evaluated and the individual complaint mechanisms are presented. In this context, the question arises as to the extent an enterprise can be prosecuted under civil or criminal law, if the wrongdoing cannot be traced back to an individual, or if it is exactly the structure and organization of the company that promotes human rights abuses. In civil actions in particular, it is important to broach the issue of the major obstacles that could discourage the parties concerned from pursuing judicial remedies. Finally, questions that arise in connection with the activities of transnational enterprises abroad, specifically in conflict-affected areas, where often the level of legal protection is not comparable to the one in Switzerland, will be addressed.

[91] If judicial systems reach their conceptional and concrete limitations, the meaning and necessity of alternative complaint mechanisms, which could complement the judicial remedy options, becomes clear. While alternative complaint mechanisms present several advantages, these cannot, however, replace a working and efficient judicial system. In this chapter, we will primarily explain the dispute resolution instruments that are based on the OECD Guidelines, as well as the main features of the non-state mechanisms.

## II. INTERNATIONAL REQUIREMENTS

### 1. International Law Obligations

[92] The obligation of the state to create effective remediation instruments is a key element of the international law obligation of the states to ensure the protection of human rights. It is primarily based on Art. 2 para. 3 UN ICCPR and Art. 13 ECHR, which include the right to an effective remedy for violations of the guarantees contained in the covenant or the convention. Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Art. 2 para. 1, Art. 4 and Art. 5 of the Convention against Torture (CAT), as well as Art. 2 of the Convention on the Elimination of Discrimination against Women (CEDAW), oblige the authorities to provide effective legal remedies for the guarantees under the respective covenants. The direct applicability of these guarantees and the possibility of their legal enforcement are considered key factors for the effective implementation of the conventions.<sup>145</sup>

[93] Moreover, Art. 14 of the ICCPR and Art. 6 ECHR on the procedural safeguards in civil and criminal law proceedings, presuppose a functioning judicial system.<sup>146</sup> Art. 2 of the Additional Protocol No. 7 to the ECHR, dated 22 November 1984, which entered into force in Switzerland on 24 February 1988, provides for a right of appeal in criminal matters, and grants the corresponding right to have the conviction or sentence reviewed by a higher tribunal.

### 2. Access to Remedy according to the UN Guiding Principles

[94] The framework on corporate human rights responsibility adopted by the UN Human Rights Council<sup>147</sup>, in addition to the *state duty to protect*, and the call to companies to respect human rights as an integral part of their corporate culture in their economic activities (*corporate responsibility to respect*), stipulate access to grievance mechanisms in case of human rights violations or infringements (*access to remedy*) as a third pillar. This third pillar reflects the view of victims of human rights abuses. For them, an effective remedy is a fundamental aspect of a functioning human rights system.

[95] The UN Guiding Principles for the implementation of the framework<sup>148</sup> explain the obligations of the states to take steps to ensure, through judicial, administrative, legislative or other appropriate means, protection against business-related human rights abuses (Guiding Principle 25). The creation of such grievance mechanisms is seen as part of the general state duty to protect. The mechanism may be a judicial or non-judicial, state-based or non-state-based process. The reduction of legal and practical barriers helps ensure access to judicial mechanisms (Guiding Principle 26). State-based non-judicial mechanisms are there to complement the judicial mechanisms and form part of a comprehensive and integrated system. Just like state-based grievance mechanisms, these can be mediation-based or adjudicative, and may result in agreements or decisions. To ensure that grievances can be addressed early and remediated directly, business enterprises should establish effective operational-level grievance mechanisms

<sup>145</sup> With regard to the issue of justiciability see [“Human Rights Implementation in Switzerland”, sub-study “Eine Bestandesaufnahme im Bereich Freiheitsentzug, Polizei und Justiz”].

<sup>146</sup> KÄLIN/KÜNZLI, p. 127.

<sup>147</sup> HRC, Ruggie Framework 2008.

<sup>148</sup> HRC, UN Guiding Principles 2011.

for individuals and communities who may be adversely impacted by their operations (Guiding Principle 29). In this context, reference is made to existing or developing codes of conduct, performance standards or global framework agreements (Guiding Principle 30). Finally, the UN Guiding Principles contain a catalogue of effectiveness criteria for non-judicial grievance mechanisms (Guiding Principle 31).<sup>149</sup>

### 3. OECD Guidelines for Multinational Enterprises

[96] The Organisation for Economic Co-operation and Development (OECD) adopted Guidelines containing recommendations addressed by governments to multinational enterprises operating in or from adhering countries.<sup>150</sup> The Guidelines themselves provide non-binding principles and standards for responsible business conduct. However, adhering countries are required to ensure the implementation of the Guidelines in accordance with the OECD Council Decision. The Guidelines were updated in 2011 and now contain a new chapter on human rights, which is in line with the UN Guiding Principles.<sup>151</sup> The implementation mechanism created to support the Guidelines is characterized in particular by its conciliation and mediation function, and the strengthened role of the National Contact Points (NCPs).<sup>152</sup>

[97] In the newly-included chapter on human rights, companies are required to respect human rights and prevent adverse human rights impacts in the context of their own activities and activities they are linked to by business relationships, including the production chain. The companies must address such adverse impacts when they occur, especially by promoting legal processes. Companies shall also participate in remediating adverse human rights impacts, if it transpires that they caused or contributed to them.

[98] While the OECD Guidelines are more specific than the UN Guiding Principles, the Guidelines nevertheless leave implementation to the discretion of each adhering country, including Switzerland.

## III. THE IMPLEMENTATION ON A NATIONAL LEVEL

### 1. Judicial Grievance Mechanisms

#### 1.1. Constitutional Requirements

[99] The judicial assessment of possible human rights violations or infringements through an independent and fair process, in addition to a whole range of possible preventive and reactive measures, is a crucial element of the state duty to protect. It is a fundamental aspect of the rule of law and has different legal bases. Art. 29a of the Federal Constitution contains a guarantee of access to justice, which grants every person the right to legal disputes determined by a judicial

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<sup>149</sup> See below para. 182.

<sup>150</sup> OECD, Guidelines 2011.

<sup>151</sup> Further chapters of the Guidelines refer to Transparency, Employment Relations, Environment, Corruption, Consumer Interests, Technology transfer, Competition and Taxation.

<sup>152</sup> More detail on the national contact points in para. 183 ff.

authority. The right to an effective access to the courts is complemented by general procedural guarantees. The proceedings must be fair, and the case must be decided within a reasonable time (Art. 29 para. 1 FC). Each party to the case has the right to be heard (para. 2) and any person who does not have sufficient means, has the right to free legal advice and assistance, and, if necessary, free legal representation in court (para. 3). Courts must be legally constituted, competent in the matters before them, as well as lead independent and impartial proceedings (Art. 30 para. 1 FC). As a rule, court hearings and the delivery of judgments shall be in public (para. 3). The resulting decision must be binding and enforceable.<sup>153</sup> In case of a criminal sentence, the convicted person has the right to have the conviction reviewed by a higher court, with the exception of cases in which the Federal Supreme Court sits at first instance.

[100] To meet its duty to protect, the state must prevent, investigate, punish, eliminate and remediate human rights violations and infringements, by creating the relevant legal bases, and a suitable infrastructure of judicial bodies.<sup>154</sup> The constitutional provisions incorporate these requirements, which were further substantiated by the jurisdiction of the European Court of Human Rights<sup>155</sup> into Swiss law. Administrative, criminal and civil law grievance steps are defined and the corresponding proceedings and legal remedies substantiated in their statutory framework. Their structure will be further analyzed in the following sections. In general, it can be said that the Swiss judicial system largely satisfies the international standards. However, the prerequisite is that, Swiss courts are competent to hear concrete cases that are brought before them. This, in turn, is questionable in cases that take place abroad, in part or in full.<sup>156</sup>

## 1.2. Administrative Grievance Mechanisms

[101] The initiation of public proceedings for human rights abuses caused by enterprises is conceivable in various constellations. On the one hand, a company that – with a varying degree of influence by the state – was mandated by the authorities to perform public services may violate fundamental rights. This would be the case, for example, if postal or railway operations in the scope of their governmental tasks<sup>157</sup> would discriminate between customers without justification. On the other hand, the question arises as to the extent the state can be held responsible by the people involved, if it failed to fulfill its positive duty to protect with regard to corporate violations of fundamental rights. This may be the case in situations where the state omitted to create legal bases to protect individuals, or when the laws present relevant gaps or are in conflict with international law and the Constitution.<sup>158</sup> Notably, the neglect of the state duty to protect can be

<sup>153</sup> ANDREAS KLEY, *Der richterliche Rechtsschutz gegen die öffentliche Verwaltung*, Habil., Zurich 1995, p. 3.

<sup>154</sup> See HRC, UN Guiding Principles, Guiding Principle 1.

<sup>155</sup> See e.g. ECtHR, *Vo v. France*, 53924/00 (2004), pt. 81 ff., in particular pt. 89 with further references regarding the positive duty to protect pursuant to art. 2 ECHR in legislation and jurisdiction; ECtHR, *McCann and others v. United Kingdom*, 18984/91 (1995), pt. 161 with the note that the right to life (art. 2 ECHR) would be ineffective without the inherent obligation of having *inter alia* killings ordered by state actors effectively investigated *ex officio*; ECtHR, *Gül c. Suisse*, 23218/94 (1996), pt. 38 regarding the positive state duty to protect in connection with the right to respect for private and family life (art. 8 ECHR).

<sup>156</sup> See also below para. 133 ff.

<sup>157</sup> Art. 13 and 14 Swiss Postal Act of 17 December 2010 (SR 783.0), art. 1 para. 2, art. 5-6 Railways Act of 20 December 1957 (SR 742.101).

<sup>158</sup> In the ECtHR case, *Rantsev v. Cyprus and Russia*, 25965/04 (2010) the ECtHR established that a Cypriot provision stipulating that it is the nightclub owners that have to apply i.a. for the entrance visas of their foreign artists, only increased the dependency of the women involved and thus possibly favored human trafficking (pt. 291). This provision thus violates art. 3 ECHR. In the ECtHR case, *Von Hannover v. Germany*, 59320/00

identified and, if possible, corrected, if a case brought before a supranational body, the competence of which is to prosecute authorities for violations against international law responsibilities to protect. The ECtHR is of particular importance in this context.

#### 1.2.1. Public service companies

[102] The government can entrust private parties, in particular, companies, with the fulfillment of public services [Art. 178 para. 3 FC; Art. 2 para. 4 RVOG (Government and Administration Organization Act)]. Thus, private actors may perform supervisory functions on behalf of the community or act as sole provider for certain services upon appointment by the state.<sup>159</sup> As a rule, private administrative bodies are subject to the requirements of fundamental rights in the performance of their administrative tasks (Art. 35 para. 2 FC). Consequently, the state cannot circumvent the binding nature of fundamental rights by delegating the performance of its duties to private parties.<sup>160</sup> Rather, it has to supervise the civil law administrative bodies and has subsidiary liability for damage unlawfully caused to third parties [Art. 19 para. 1 litt. a VG (Government Liability Act)].

#### 1.2.2. Procedure

[103] A private company charged by the state with a public task is authorized to issue rulings within the scope of its responsibilities (see Art. 1 para. 2 lit. e in connection with Art. 5 APA (Administrative Procedure Act)). If a person's fundamental rights are violated by one of these rulings, he/she can appeal it through a recourse or complaint before the bodies specified by law.<sup>161</sup> If it refers to a company mandated by a cantonal agency, there is often a higher authority such as an administration internal appeals body, before the case can be submitted to a court. The cantons may appoint an authority other than a court only for decisions that are mainly political in character as instance below the Federal Supreme Court (Art. 86 para. 3 FSCA). The decisions can be appealed with the Federal Supreme Court with certain exceptions (Art. 83 FSCA), and considering the threshold (Art. 85 FSCA), if necessary with a complaint for public services matters (Art. 82 ff. FSCA) or under certain circumstances as subsidiary constitutional complaint (Art. 113 ff. FSCA). The Federal Administrative Court is responsible for appeals against rulings of federal authorities [Art. 31 VGG (Administrative Court Act)], and its rulings can generally

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(2004) Germany was sentenced due to a violation of art. 8 ECHR, since the highest court's interpretation of the relevant legislation did not offer enough protection to the plaintiff against interferences in her private life (pt. 72 ff.) Similarly, the decision in the ECtHR case *VgT v. Switzerland*, 24699/94 (2001) determined: Switzerland had violated the freedom of expression of the plaintiff with the Federal Supreme Court's interpretation of the relevant legislation in the case. Further details regarding the case see below at para. 107.

<sup>159</sup> TSCHANNEN, § 7, pt. 47.

<sup>160</sup> See ANDREAS AUER/GIORGIO MALINVERNI/MICHEL HOTTELIER, *Droit constitutionnel suisse*, Vol.II, *Les droits fondamentaux*, 2<sup>nd</sup> ed., Bern 2006, pt. 121 ff.

<sup>161</sup> If the violation constitutes a real act, however, generally an injunction can be obtained by for example requesting from the competent authority that it establishes the unlawfulness of the actions with an ordinance (art. 25a VwVG). Also companies entrusted by the federal government with public service functions have to issue an order for disputed claims due to personal, financial or material damages pursuant to public liability law (art. 19 para. 3 VG). If it is not possible to obtain a contestable ordinance, an action can be brought in court. In this case a court decides at first instance (at the federal level the Federal Administrative Court pursuant to art. 35 VGG or the Federal Supreme Court pursuant to art. 120 FSCA).

be taken to the Federal Supreme Court with a complaint in public services matters (exceptions are listed in Art. 83 FSCA).<sup>162</sup>

[104] After exhausting these domestic remedies and compliance with other additional conditions, this legal protection is complemented by recourse to the European Court of Human Rights as regional human rights body (Art. 34 sentence 1 ECHR). If the court establishes that there was a violation of the Convention, domestically, this constitutes a ground for cassation, particularly when indemnification will not offset the consequences of the violation and revision is necessary to remedy the violation (Art. 122 FSCA). Access to the Human Rights Committee for a violation of the ICCPR, however, is precluded, since Switzerland has not ratified the corresponding Optional Protocol.

### 1.2.3. Binding effect of the fundamental rights for companies

[105] In a dispute between the Verein gegen Tierfabriken (VgT, animal welfare association) and the Swiss Post, the issue at stake was whether the Post could refuse to dispatch two VgT publications. The Federal Supreme Court determined that the behavior of the Post had been unlawful, since refusing to dispatch a shipment contravenes public decency principles. In its considerations, the Federal Supreme Court analysed the extent to which the Post was bound to uphold fundamental rights, taking into account that the Post was, at that time, an independent establishment in the field of competitive services under public law. The Federal Supreme Court concluded that the Post was not bound by fundamental rights principles pursuant to Art. 35 para. 2 FC, since the Post did not perform any state functions when dispatching bulk mail; it provided services that any other entity could also provide.<sup>163</sup> The Tribunal also denied the binding effect of fundamental rights principles, on the basis of Art. 35 para. 1 FC, since the Federal legislator had stipulated in the Postal Act (PA)<sup>164</sup> that the Post should abide by the same rules as private undertakings (with the exception of the so-called “universal services”) to ensure that it would be able to compete on a level playing field.<sup>165</sup> Some legal scholars, who assume a full binding effect of the fundamental rights for public companies, strongly criticized the decision.<sup>166</sup>

[106] In March 2011, the Federal Administrative Court issued a decision on the binding effect of the fundamental rights to the Swiss Federal Railways (SBB AG) with regard to the use of station walls as advertising space.<sup>167</sup> The complaint was lodged against the ordinance of SBB AG, which prohibited the complainant from displaying at the Zürich train station, a poster criticizing the Israeli government’s settlement policy. The complainant argued that there had been an infringement of the freedom of expression. In its decision, the Federal Administrative Court determined that the SBB AG was bound to uphold fundamental rights when it performed state functions. This was not only the case with regard to transporting passengers, but also when operating the railway infrastructure. The public facilities – which include the walls of the train stations – constitute facilities in public use, which pursue a specific purpose. While the commercial use of the train

<sup>162</sup> See ALAIN GRIFFEL, *Rechtsschutz, insbesondere Verfassungsgerichtsbarkeit*, in: Giovanni Biaggini/Thomas Gächter/Regina Kiener (eds.), *Staatsrecht*, Zurich et al. 2011, §27., pt. 54 ff.

<sup>163</sup> BGE 129 III 35, E. 5.2, p. 40.

<sup>164</sup> Postal Act of 30 April 1997, repealed by art. 39 Postal Act of 17 December 2010 (SR 783.0).

<sup>165</sup> BGE 129 III 35, E. 5.3, p. 41.

<sup>166</sup> See e.g. ULRICH HÄFELIN/GEORG MÜLLER/FELIX UHLMANN, *Allgemeines Verwaltungsrecht*, 6. ed., Zurich et al. 2010, Pt. 1239; MÜLLER, p. 59 ff, pt. 14 ff.

<sup>167</sup> BVGE A-7454/2009 of 29 March 2011.

station wall is not excluded, it may not, however, hinder rail traffic, since the state's interest prevails over any financial interests.<sup>168</sup> Moreover, the Court established that, in regulating the use of train station walls, fundamental rights claims based on freedom of expression might arise, such as a contingent claim for enhanced public use. The refusal to authorise the display of the poster, which constitutes a restriction of the freedom of expression, was therefore inappropriate, since it would not withstand the test of proportionality.<sup>169</sup> The SBB AG took the case to the Federal Supreme Court, which confirmed the Federal Administrative Court's decision with its judgment of 3 July 2012.<sup>170</sup>

[107] In the *VgT* case against Switzerland<sup>171</sup>, the ECtHR established that a state violates its duty to protect if it approves, through the verdict by its highest court, the restriction of a conventional right that goes far beyond what is necessary in a democratic society. In this case, the Commercial Television Company (*AG für das Werbefernsehen*; today *Publisuisse*) refused to broadcast *VgT*'s short commercial that supported a reduced meat consumption broadcast by the Swiss Radio and TV Company, in reaction to various commercials of the meat industry in 1994, because of the "overtly political nature" of the spot. When the Federal Supreme Court, Switzerland's highest judicial authority, rejected *VgT*'s appeal,<sup>172</sup> the latter brought the case before the ECtHR, and argued that there had been a violation of the freedom of expression pursuant to Art. 10 ECHR. In the proceedings at the European Court, the Government asserted that Switzerland was not responsible for a possible violation of Art. 10 ECHR by the Commercial Television Company, since it was a company established under private law, and as such, the authorities did not hold any supervisory function over it.<sup>173</sup> The Swiss Radio and TV Company did not perform any state function when it broadcasted commercials, and could thus invoke the freedom of contract. The questions that emerged are, whether Switzerland had the positive obligation to ensure the full effect of freedom of expression between private parties, and whether the law that allows *AG* for Commercial TV to refuse to broadcast commercials with a political character is reconcilable with Art. 10 ECHR.<sup>174</sup> In resolving these issues, the European Court referred to the existence of a positive state duty to protect;<sup>175</sup> however, it did not see the need to express an opinion on the effect that the rights defined in covenants have in relations between private individuals.<sup>176</sup> It merely established that according to the Federal Supreme Court's interpretation of domestic law it was admissible to prohibit the political expression of the complainant. Thus, a possible violation of the freedom of expression pursuant to Art. 10 ECHR falls within the responsibility of the state.<sup>177</sup> Having determined that the prohibition was disproportionate, the ECtHR concluded that Art. 10 ECHR had been violated.<sup>178</sup>

<sup>168</sup> BVGE A-7454/2009 of 29 March, E. 8.6.5, p. 15.

<sup>169</sup> BVGE A-7454/2009 of 29 March 2011, E. 9.6, p. 20 and E. 10.4.3 ff., p. 23 ff.

<sup>170</sup> Sentence of the Federal Supreme Court 2C\_415/2011 of 3 July 2012.

<sup>171</sup> ECtHR, *VgT v. Switzerland*, 24699/94 (2001).

<sup>172</sup> BGE 123 II 402.

<sup>173</sup> ECtHR, *VgT v. Switzerland*, 24699/94 (2001), pt. 40.

<sup>174</sup> *Ibid.*, pt. 41.

<sup>175</sup> *Ibid.*, pt. 45.

<sup>176</sup> *Ibid.*, pt. 46.

<sup>177</sup> *Ibid.*, pt. 47.

<sup>178</sup> *Ibid.*, pt. 79.

### 1.3. Grievance Mechanisms under Criminal Law

#### 1.3.1. Corporate liability in criminal law

[108] The liability of companies and organizations is relatively new in Swiss criminal law. Traditionally, it is the individual person who acts independently, and whose individual guilt is the basis of culpability for the violation of legal interests. Naturally, a legal person lacks the necessary physical and psychological characteristics for criminal liability.<sup>179</sup> If human rights are unlawfully violated on account of a company's economic activities, primarily the members of its executive body are personally responsible under criminal law, to the extent that they acted as the company's employees with independent decision-making authority in their field of activity (Art. 29 SCC). This form of liability of the legal representative, however, is only applicable, as long as the individual members of the body participated in the offence themselves, but it does not represent "a criminal liability of the bodies of the legal person that is independent from the concrete participation in the offence, which was committed in their organization by others."<sup>180</sup>

[109] If no active involvement of the relevant bodies can be established, the management of the company may be sued and become liable for damages pursuant to the principal's liability for the failure to comply with the duty to act under criminal law (Art. 11 SCC).<sup>181</sup> Thus, the principal must make all the necessary organizational arrangements to ensure the prevention of criminal offences in the company by correctly selecting, monitoring and instructing his employees and ancillary staff.<sup>182</sup>

[110] Since multinational enterprises are increasingly organized in a decentralized manner, and have internal structures that are becoming more complex, it is often very difficult to assign the wrongfulness of a corporate action entirely to a single person.<sup>183</sup> The provisions on corporate criminal liability included in the Swiss Criminal Code of 2003 take these recent developments into account, insofar as they provide for a primary and secondary liability of the company (Art.102 SCC).<sup>184</sup>

[111] If a felony or misdemeanour is committed in a company in the exercise of commercial activities in accordance with the objects of the company, and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the company, then the felony or misdemeanour is attributed to the company. If the offence committed is characterized as one of criminal organization, financing of terrorism, money laundering, bribing of government officials or active private bribery (so-called catalogue offences), the company is primarily liable, regardless of the liability of natural persons. In both cases, companies may be liable to a fine not exceeding 5 million francs. The provisions aim at an improved organizational transparency and an increased diligence in the performance of its typical operating risks. They require the

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<sup>179</sup> In this context e.g. BGE 85 IV 95, E. 2, p. 100; 97 IV 202, E. 1, p. 203; 105 IV 172, E. 3, p. 175.

<sup>180</sup> BGE 105 IV 172, E. 3, p. 175 f. [translation provided by the authors].

<sup>181</sup> Acknowledged for the first time in the so-called Bührle decision, BGE 96 IV 155, E. II.4, p. 174 f.

<sup>182</sup> Von Roll decision, BGE 122 IV 103, E. VI.2d, p. 128 f.

<sup>183</sup> See HEINE, p. 98 f.

<sup>184</sup> See generally regarding art. 102 SCC: FORSTER, *passim*.

companies to detect these risks and take organizational measures to collectively prevent cataloged crimes (Art. 309 CrimPC).<sup>185</sup>

### 1.3.2. Procedure

[112] A person whose human rights have been infringed by an unlawful, punishable behavior of a company can report an offence to a criminal justice authority (Art. 15 and 301 CrimPC). An investigation is opened if there is reasonable suspicion that an offence has been committed (see Art. 306, 309 CrimPC).<sup>186</sup>

[113] The Swiss Criminal Procedure Code and the Federal Supreme Court Act are applicable to criminal law disputes. The place of jurisdiction for criminal proceedings is normally the domicile of the company (Art. 36 CrimPC). The cantonal criminal justice authorities prosecute and judge offences under federal law, subject to statutory exceptions (Art. 22 CrimPC). The Criminal Procedure Code, which reflects relevant provisions in the ECHR and the Federal Constitution, stipulates a mandatory objections authority and a court of appeal; the powers of the objections authority may be assigned to the court of appeal (Art. 20 f. CrimPC). The decisions of the last cantonal court and the federal criminal court may be brought to the Federal Supreme Court with an appeal on criminal matters (Art. 78 ff., Art. 80 FSCA). If constitutional rights are violated, including cantonal constitutional rights, there is the additional possibility of lodging a subsidiary constitutional appeal at the Federal Supreme Court (Art. 113 ff. FSCA). The Federal Supreme Court decides as the last instance of appeal.

## 1.4. Civil Law Grievance Mechanisms

### 1.4.1. Corporate liability under civil law

[114] Like natural persons, legal persons may also be held liable under Swiss Civil Law. Thus, the behavior of the bodies of the company, which can be attributed to the business operations of the legal person, makes the legal person accountable as a whole. In particular, the legal person is liable for damages caused by the unlawful behavior of its governing officers (Art. 55 para. 2 CC in connection with Art. 41 SCO). The term “governing officer” is interpreted very broadly and includes persons, who, in fact, make decisions reserved to governing officers, or who are actually responsible for the management and decisively influence the formation of the corporate will (so-called *de facto* corporate bodies).<sup>187</sup>

[115] A company is also liable as a principal for damages to third parties caused by the unlawful behavior of its employees and ancillary staff, who may be linked to the company by a subordination relationship such as an employment contract (Art. 55 SCO). In contrast to the governing body liability where exculpatory evidence is excluded from the outset,<sup>188</sup> the principal

<sup>185</sup> See HEINE, p. 104.

<sup>186</sup> One difficulty in opening criminal proceedings against companies for possible human rights abuses may lie in finding a suitable offence, which the company meets with reasonable suspicion, since the offences in the Swiss Criminal Code are not aimed at companies, but at individual persons.

<sup>187</sup> BGE 114 V 218, E. 4e; See BGE 117 II 570, 571 E. 3; 81 II 223, 226 f., E. 1b.

<sup>188</sup> HEINZ HAUSHEER /REGINA AEBI-MÜLLER, Das Personenrecht des Schweizerischen Zivilgesetzbuches, 2. ed., Bern 2008, p. 318.

can be relieved of its liability, if it proves that due diligence was applied or that the damage would also have occurred, if due care had been exercised.<sup>189</sup>

[116] In corporate law, there is one concrete application for the governing body liability: a joint stock corporation is liable for the unauthorized acts of the board of directors (Art. 722 SCO). The members of the board of directors and all persons engaged in the business management or liquidation of the company are liable, both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties (Art. 754 Abs. 1 SCO).

[117] More liability provisions that cover corporate responsibility are found in special laws. If, for example, a faulty product leads to the death or injury of a person or to material damage, the liability of the manufacturer for the corresponding damage may result from the Product Liability Directive (see Art. 1 PrHG).<sup>190</sup> Even cases that fall under the Law Against Unfair Competition,<sup>191</sup> are subject to the civil procedural law.

[118] Thus, under civil law, if the human rights infringement consists of an unlawful action of a governing officer or an ancillary staff member, the person affected can directly proceed against the corporation. Possible examples are the invasion of the affected person's privacy due to the unlawful use or disclosure of private data, gender specific wage discrimination by the employer, or the wrongful termination of a working relationship by the company that can be attributed to the employee's exercise of a constitutional right, such as freedom of religion, expression or association.

#### 1.4.2. Procedure

[119] At the cantonal level, civil law disputes are subject to the Swiss Civil Procedure Code; at the federal level, the Swiss Federal Supreme Court Act applies. The determination of operational competence is mostly laid down at cantonal level. In many cantons, there are specialized tribunals, such as the labour, trade and commercial courts, in addition to the ordinary civil chambers.

[120] With few exceptions, any civil litigation is preceded by an attempt at conciliation (Art. 197 CPC), to the extent that the parties are allowed to determine the object of the litigation (principle of party disposition). A conciliation proceeding is a partly statutory, legally formalized reconciliation hearing, in which the parties try to reach a settlement (Art. 201 CPC) with the help of the conciliation authority. The cantonal organization of the courts decides whether the attempt to reconcile is handled by the court of first instance or a justice of the peace authority (Art. 3 CPC). Upon joint request of the parties, mediation may replace the normal conciliation proceeding. Mediation is a discussion between the parties that is conducted by a moderator. In contrast to the conciliation process, the moderator does not propose a solution to the dispute (Art. 213 ff. CPC).

[121] An appeal against the decision of the court of first instance can normally be lodged at the high court of the canton, which can reassess the case with full cognition (Art. 308 ff. CPC).

<sup>189</sup> ROLAND BREHM, *Berner Kommentar*, Vol. VI/1/3/1, *Allgemeine Bestimmungen, Die Entstehung durch unerlaubte Handlungen*, art. 41-61 SCO, 3rd ed., Bern 2006, Pt. 33.

<sup>190</sup> Federal Act on Product Liability of 18 June 1993 (SR 221.112.944, as per update of 1 July 2010).

<sup>191</sup> See below at pt. 132.

Decisions that are not subject to appeal can be contested with the extraordinary remedy of objection (Art. 319 ff. CPC). With few exceptions, federal law requires this two-step procedure at the cantonal level before a decision on a civil complaint may be appealed to the Federal Supreme Court (Art. 75 FSCA). Proprietary rights disputes can only be taken to the Federal Supreme Court if the amount in dispute exceeds 30'000 francs or 15'000 francs for labour and tenancy law cases, provided that there is no so-called "legal issue of fundamental importance" at the center of the dispute. For violations of constitutional rights, it is possible to lodge a subsidiary constitutional appeal at the Federal Supreme Court (Art. 113 ff. FSCA), which, in this case, similarly serves as the final instance of appeal.

#### 1.4.3. Costs

[122] The court may demand that the plaintiff make an advance payment of up to the amount of the expected court costs (Art. 98 CPC). At the request of the defendant, the plaintiff may also be required to provide security for party costs under certain circumstances (Art. 99 CPC). The payment of the advance and security for costs is a procedural requirement (Art. 59 para. 2 lit. f CPC). At the end of the proceedings, the procedural costs *i.e.*, the court and party costs are charged to the unsuccessful party. If no party is entirely successful, the costs are allocated in accordance with the outcome of the case (Art.106 para. 2 CPC).

[123] The amount of the required advance payment of costs and security, as well as the risk of having to bear all procedural costs if the case is lost, may become an obstacle for the effective access to judicial grievance mechanisms. Art. 29 para. 3 of the Federal Constitution grants every person who does not have sufficient means the right to free legal advice and assistance, as well as the right to free legal representation, unless their case appears to have no prospect of success. To obtain this, however, the applicant has to show, *inter alia*, that he/she cannot make the required payments for the procedural and party costs without using funds needed to cover his/her and his/her family's basic needs.<sup>192</sup> If a party is unsuccessful in a dispute, the party concerned is not relieved from paying the party costs of the opposing party (Art.118 para. 3 and 122 para. 1 lit. d CPC).

#### 1.4.4. Evidence

[124] Pursuant to the principle of party presentation, the framing of issues and the scope of the argumentation is solely the parties' responsibility. They have to prove their statements with evidence. Under Art. 8 SCC, the burden of proving the existence of an alleged fact shall rest on the party who derives rights from that fact. Regardless of this subjective burden of proof, however, the parties still have a duty to cooperate in the taking of evidence, pursuant to Art. 160 CPC. Consequently, they have the duty to make a truthful deposition (para. 1 lit. a) and produce the physical records in their possession (so-called procedural obligation to disclose, para. 1 lit. b), to the extent that the requesting party can sufficiently describe and substantiate the content of the documents.<sup>193</sup>

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<sup>192</sup> BGE 125 IV 161, E. 4, p. 164.

<sup>193</sup> See MARKUS BERNI, art. 160, p. 648 f., in: Baker & McKenzie (eds.), Swiss Civil Procedure Code (CPC), Bern 2010, p. 645-651 (art. 160 CPC).

[125] Individuals who lodge a civil complaint against a company may sometimes face difficulties in obtaining evidence, since their access to relevant corporate documents and archives is often limited. The parties' obligation to disclose documents can partly help in this scenario. Often, however, other circumstances aggravate the situation. For instance, there is regularly a certain asymmetry between the parties, in terms of their financial resources, access to information or their knowledge of the subject and the law. Significantly, if the plaintiff is still employed by the defendant company, the plaintiff/employee may come under additional pressure. One possibility of addressing this difficult evidentiary situation may be the reduction of the standard of evidence for the plaintiff and a subsequent reversal of the burden of proof to the disadvantage of the company.<sup>194</sup> To take the unequal situation of the parties into account, the Gender Equality Act (GEA)<sup>195</sup> stipulates a reduced burden of proof for the persons concerned in various cases: discrimination is presumed if the person concerned can substantiate the same by *prima facie* evidence (Art. 6 GEA).

#### 1.4.5. Representative action and class action

[126] As a rule, the plaintiff must assert his/her own right in order to pursue a lawsuit or authorize a contractually-appointed representative to participate in proceedings. Third parties are generally not authorized to pursue a lawsuit. A legal system can, however, provide for civil procedure code instruments, which facilitate collective legal protection. On the one hand, these instruments serve to counteract a structural deficit with regard to legal protection, and mitigate the procedural risks in so-called "dispersed damages cases," where only a relatively low number of victims take legal action despite the involvement of a large number of persons concerned because procedural risks are considered too high.<sup>196</sup> This is often the case when the defendant is a large corporation. On the other hand, these instruments can nevertheless play a procedural role, since they consolidate proceedings, and thus relieve the burden on courts.<sup>197</sup>

[127] In particular, the Swiss Civil Procedure Code stipulates representative action pursuant to Art. 89 CPC in this context: it allows associations or organizations of regional or national importance, the bylaws of which authorise them to safeguard the interests of certain groups of individuals, to assert a claim in its own name for the violation of the personality of this group of individuals. Representative action is also included in Art. 7 GEA, as well as other special laws.<sup>198</sup> If the articles of incorporation of an association define the promotion of gender equality or safeguarding other interests of employees as its object, the association can lodge a representative action. This applies if the violation of the corresponding rights by a company does not only affect individuals, but a whole group of individuals. A representative action may consist of an action for an injunction, an action for elimination or a declaratory action; it cannot, however, be an action for performance. Correspondingly, while the court may determine systematic wage

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<sup>194</sup> See ICJ, *Home State Duty* 2010, p. 35.

<sup>195</sup> Federal Act of 24 March 1995 on Gender Equality (Gender Equality Act), SR 151.1.

<sup>196</sup> *DOMÉJ*, p. 421 f.

<sup>197</sup> *Ibid.*, p. 421 f.

<sup>198</sup> E.g. art. 56 Law on Trade Mark Protection (Trademark Law) as well as art. 10 para. 2 lit. a and b UCA for Professional and Economic Associations or consumer protection organizations of national and regional importance.

discrimination in its decision, it cannot sentence the company to pay back the legitimate wages.<sup>199</sup> The back payment has to be claimed through individual lawsuits.

[128] Representative action should not be mistaken for class action, as it is especially known in US Law. In a class action, the legal and factual issues are clarified uniformly and are binding for all parties that are potentially affected, even if they are not directly involved in the lawsuit, unless they explicitly left the group by opting out. Having been personally impacted and a possible damage that has a causal link to the behavior of the company do not have to be fully established; it is sufficient if the court can be convinced of the affiliation with the damaged group. This significantly reduces the burden of proof of the plaintiff. Due to the possibility of sharing the procedural costs, the individuals concerned are more willing to file a lawsuit, since they carry a smaller personal risk. The new Civil Procedure Code rejected the introduction of a class action in accordance with American law because *inter alia*, it is allegedly foreign to the European legal system that someone may exercise binding rights for a large number of people, when those entitled to take action do not participate as parties to the lawsuit.<sup>200</sup> Moreover, in big class action lawsuits, the parties involved may be limited in their right to a hearing. At the time of the revision of the Civil Procedure Code, the Federal Council also justified the refusal to include class actions by citing problems that might arise in connection with the distribution of the proceeds from the lawsuit when the action proves successful and the costs of lawsuits that often ensue subsequent to the main action, as well as the possible abuse of class actions to force companies to yield.<sup>201</sup>

[129] To allow several aggrieved parties to jointly file a lawsuit for a positive performance, such as compensation for damages, they have to resort to a joinder of parties or the objective combination of actions. In a simple joinder of parties, several parties can jointly file a lawsuit against a third party (Art. 71 CPC). This can be worthwhile, if synergies are used in obtaining evidence or when there are advantages relative to calculating the amount in dispute.<sup>202</sup> Since the independence of the joint plaintiffs' procedural actions is preserved,<sup>203</sup> lawsuits with many procedural parties quickly become very costly and complex. As a result, this process is not suitable for the merger of actions filed by a large number of aggrieved persons. The objective combination of actions (Art. 90 CPC) refers to the consolidation of several claims against the same party in one action. If the rights of several persons were adversely affected by a company, it would theoretically be possible for them to assign their individual legal claims to an association that would be able to assert these rights as a group on their behalf.<sup>204</sup>

[130] While a representative action under Swiss law, the joinder of parties, and the objective combination of actions, may be suitable to *expand* legal protection in favor of individuals, neither these instruments, nor the class actions based on the US law model can replace an individual's access to a fair and independent trial. Finally, effective access to a grievance mechanism means that a person affected should have the possibility of asserting his or her claim on his or her own right. A system in which an individual would only be able to obtain legal protection through an association is inadequate.

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<sup>199</sup> See BGE 86 II 18 E.2 p. 21 ff.; BGE 114 II 345 E.3b p. 347.

<sup>200</sup> Federal Council, Message Civil Procedure Code 2006, p. 7290.

<sup>201</sup> *Ibid.*, p. 7290.

<sup>202</sup> DOMEJ, p. 428 f.

<sup>203</sup> ERNST STAEHELIN/SILVIA SCHWEIZER, art. 71, p. 531, in: Thomas Sutter-Somm/Franz Hasenböhler/Christoph Leuenberger (eds.), *Swiss Civil Procedure Code (CPC)*, Zurich 2010, p. 527 ff. (art. 71 CPC).

<sup>204</sup> In Switzerland, however, this practice is not followed; see DOMEJ, p. 429 f.

[131] A recent report by the Federal Council, which presented feasible courses of action to improve the insufficient instruments for the effective enforcement of mass and dispersed damages, brought some movement to the question of collective legal protection in Switzerland.<sup>205</sup> It is paramount to uncover possible improvements on the existing instruments,<sup>206</sup> as well as to promote the introduction of general instruments of collective law enforcement<sup>207</sup>. The extent to which these measures will result in the concrete revision plans remains to be seen.

### 1.5. Competition Law

[132] Violating labour conditions, which are common in certain professions and are often imposed by an enterprise on its competitors by law or contract, constitutes unfair behavior under Art.7 UCA, if such imposition affects the relationship between competitors or between suppliers and buyers in the course of a tender. This provision seeks to prevent social dumping. Thus, if a person's economic interests are threatened or violated by behavior that is qualified as unfair by law, this person may file an action asserting the prohibition, elimination or detection of the violation, as well as compensation for damages, satisfaction or surrender of any profits made from such unfair behavior (Art. 9 UCA). Under certain circumstances, customers (Art. 10 para. 1 UCA), professional and trade associations, consumer protection organizations (para. 2) or the Confederation (para. 3) may file a lawsuit. Significantly, the aggrieved employees themselves are not entitled to invoke this provision.<sup>208</sup> Even a deliberate infringement of Art. 7 UCA does not constitute a criminal act under Art. 23 UCA. Consequently, this type of behavior is not punishable unless it constitutes a criminal offence.

### 1.6. Circumstances with International Aspects

#### 1.6.1. Range of the state duty to protect

[133] While grievance mechanisms concerning fundamental rights infringements are widely regulated at a national level, a comparably clear regulation for case constellations with international aspects is still lacking. This raises questions in light of the rapidly growing number of transnational corporations: many companies have production sites and branches abroad, frequently in developing countries with lower social and environmental standards. Especially in those countries, where the protection of the population is insufficiently anchored in laws that are hardly enforced, there is a risk that human rights abuses, regardless of who committed them, are not sanctioned. Often, these host countries are dependent on the investments of the foreign corporation, and are thus interested in preserving production conditions that are favourable to

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<sup>205</sup> Federal Council, *Collective Legal Protection in Switzerland* (2013), p. 55 ff.

<sup>206</sup> In this case according to the Federal Council in particular improvements on the actual provision on the procedural costs, the extension of the scope of application of the representative action (extension of the factual scope beyond the violation of personal rights / possibility of asserting reparatory claims) as well as the introduction of a right to prior claim for applicant shareholders when filing a liability claim for indirect damages under the corporation law is conceivable; see *ibid.*, p. 56 f.

<sup>207</sup> On the one hand the possibility of introducing sample or test proceedings to assert mass claims and forms of group actions (group actions based on a pure opt-in-concept or group settlement proceedings); see *ibid.*, p. 57.

<sup>208</sup> JUNG, art. 7 UCA, p. 629 pt. 1.

foreign investors. If these production conditions go hand in hand with the infringement of human rights, such as non-compliance with the ILO core labour rights, persons who are adversely affected are often lacking means of lodging an effective complaint in their own country.

[134] In light of these circumstances, there is a need to determine the extent to which corporations' domicile or home countries are responsible for punishing these corporations for serious human rights abuses on foreign territories, if the host countries do not want to or cannot fulfill their duty to protect for economic or political reasons. States enjoy some flexibility with regard to their regulatory efforts under international law: while they are allowed to issue provisions for the protection from human rights abuses by corporations domiciled in their territory, so far, there is no general obligation to do so. The latter is only discussed in exceptional cases, such as if the state is considered a *failed state* or *failing state*, i.e., a country where the authority of the state has failed.

[135] The possibilities of Switzerland to open their courts up „voluntarily“ for actions against human rights abuses caused by Swiss corporations abroad would go beyond Switzerland's obligations under international law.<sup>209</sup> Significantly, without any (international) legal obligation, there is no legal basis for a state liability action against Switzerland for unsanctioned human rights abuses of Swiss corporations abroad. Lawsuits would therefore have to be filed against the company itself. Whether this is possible in Switzerland, depends on various factors:

[136] There is a need to clarify the extent to which a company domiciled in Switzerland contributes directly or indirectly to the human rights abuses or through a subsidiary abroad. In any case, however, even if the contribution of a company domiciled in Switzerland or for one of its subsidiaries without its own legal personality is confirmed, the question still arises whether Switzerland has jurisdiction over these matters. If foreign subsidiaries that were incorporated as independent legal personalities are involved, recourse to the Swiss parent company is not necessarily easy, even if close economic ties are established. In the course of economic globalization, it has become difficult to determine the reach of the state duty to protect. Economic processes, such as production chains, do not respect national borders. Nevertheless, the legal structure and responsibility of a company as a legal person are still largely determined on the basis of national legislation.

#### 1.6.2. International requirements

[137] The term “extraterritoriality” is often used in a different and ambiguous manner in national and international debates. In the present context, the issue is not whether Switzerland, as the home country of international enterprises, could intervene in the affairs of other states, and thus disregard their sovereignty that is protected under international law. Rather, the question is whether Switzerland can or must sanction the negative impact of Swiss companies on human rights abroad by taking appropriate measures in Switzerland.

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<sup>209</sup> At any rate Switzerland could declare itself responsible in all those cases, in which there is a national link, even if it did not have any duty to protect the victim. This would for example be the case, if the parties agreed to a place of jurisdiction in Switzerland, as well as for the prosecution of criminal offences committed abroad (art. 4-7 SCC). Sometimes Switzerland provides arbitration courts for cases without any link to Switzerland (see art. 176 ff. PIL Statute), see STEFANIE PFISTERER/ANTON SCHNYDER, *Internationale Schiedsgerichtsbarkeit in a nutshell*, Zurich a.o. 2010, p. 16.

[138] The threshold for the application of most international human rights agreements is tied to the jurisdiction of a state.<sup>210</sup> This is seen as a prerequisite for the applicability of guarantees, as well as the corresponding human rights obligations of the state with respect to a person, or a situation contemplated in the treaties; it is understood as a relationship whereby the contracting state exerts its factual authority over the affected individual persons.<sup>211</sup> In this respect, a functional understanding underlies the sovereign power, which in turn, is based on an effective, general and normative control.<sup>212</sup> In principle, jurisdiction may be equally exercised on a territorial, as well as on an extraterritorial level. Due to territorial sovereignty, however, it is assumed to concern the own territory of the state, while outside the state's territory, it is only assumed in exceptional cases. Consequently, guarantees are generally only applied within the limits of the state; cases of extraterritorial application are the exception and require certain circumstances.<sup>213</sup> If a state does not exercise its sovereignty, the crucial relationship between the state and the individual is missing, and the human rights standards are not applied.

[139] In several cases, the ECtHR established the territorial scope of application of the ECHR, and indicated that the sovereignty of a state primarily refers to its national territory.<sup>214</sup> Thus, Member States' obligations under the ECHR focus primarily on the respective national territory of the states; impacts outside this area would be restricted by the territorial sovereignty of other states and therefore, would generally need their authorization. Art. 1 ECHR, which defines the scope of application of the Convention, is ostensibly interpreted with this in mind.<sup>215</sup> Nevertheless, a number of exceptional cases affirm the extraterritorial effect of the Convention: thus, the ECHR was applied to the Turkish occupation of Northern Cyprus,<sup>216</sup> to British prisons in Iraq,<sup>217</sup> the British engagement in Iraq,<sup>218</sup> French coercive measures on a Columbian ship at sea,<sup>219</sup> as well as the control of Somali and Eritrean immigrants in the Mediterranean sea by the Italian coast guard.<sup>220</sup> Notably, On the other hand, however, it was not applied to the NATO's bombing of Belgrade,<sup>221</sup> since a constitutive element was lacking for sovereignty, namely, general control over the area in question, which comprises a large number of situations.<sup>222</sup>

[140] With regard to the territorial scope of the ICCPR, the Covenant's supervisory body, the UN Human Rights Committee, established in its General Comment No. 31 that the Covenant rights

<sup>210</sup> BESSON, *passim*; ECtHR, *Al-Skeini and others v. United Kingdom*, 55721/07 (2011), pt. 130.

<sup>211</sup> BESSON, p. 863 f.

<sup>212</sup> Whether this control complies with international law, does not play a role, since the functional understanding of sovereignty is based on a factual authority. See *ibid.*, p. 865 and 874 f.

<sup>213</sup> E.g. Nationality, display of banners, diplomatic and consular relationships, active or passive personality or universality principle, see ECtHR, *Banković and others v. Belgium and others*, 52207/99 (2001), pt. 59; the occupation of a territory, see: BESSON, p. 862 and 876 f.

<sup>214</sup> ECtHR, *Al-Skeini and others v. United Kingdom*, 55721/07 (2011), pt. 131 ff; *Banković and others v. Belgium and others*, 52207/99 (2001), pt. 59 ff.; *Soering v. United Kingdom*, 14038/88 (1989), pt. 89.

<sup>215</sup> ECtHR, *Banković and others v. Belgium and others*, 52207/99 (2001), pt. 59 f.

<sup>216</sup> ECtHR, *Loizidou v. Turkey*, 15318/89 (1996).

<sup>217</sup> ECtHR, *Al-Saadoon v. United Kingdom*, 61498/08 (2010).

<sup>218</sup> ECtHR, *Al-Skeini and others v. United Kingdom*, 55721/07 (2011).

<sup>219</sup> ECtHR, *Medvedyev v. France*, 3394/03 (2010).

<sup>220</sup> ECtHR, *Hirsi Jamaa and others v. Italy*, 27765/09 (2012).

<sup>221</sup> ECtHR, *Banković and others v. Belgium and others*, 52207/99 (2001).

<sup>222</sup> See BESSON, p. 873; ECtHR, *Banković and others v. Belgium and others*, 52207/99 (2001), pt. 71. For a list of the most important ECtHR cases relating to extraterritoriality, see: ECtHR, Factsheet Extraterritorial Jurisdiction 2012.

and the resulting obligations of the States Parties do not only refer to all persons residing within the territory of the States Parties, but also include all persons subject to their jurisdiction, even if not situated within the territory.<sup>223</sup> In its Concluding Observations on the most recent country report Germany, the Committee urged Germany to clearly communicate to all corporations domiciled in its territory or jurisdiction, the expectation that the human rights standards defined in the Covenant must be respected in all their business activities.<sup>224</sup> Furthermore, Germany was invited to reinforce existing grievance mechanisms for the protection of persons, whose rights are affected by these companies abroad. Nevertheless, there are no examples of regulation of corporate actions abroad in the concluding observations of the Committee.

[141] In contrast, the UN Committee on Economic, Social and Cultural Rights confirmed the enterprise-related obligations of home states concerning the protection of foreign citizens in its General Comment No. 14, regarding the right to health, as well as General Comment No. 15, regarding the right to water with recourse to the obligation of states to participate in international cooperation. The States Parties would thus have to prevent companies from infringing on the right to health<sup>225</sup> or the right to water<sup>226</sup> of individuals (and communities) in other states. The *General Comments* of the Committee should be viewed as guide to the interpretation of the Covenant; in this respect, they do not have a legally binding status.<sup>227</sup> Apart from the obligation to participate in international cooperation, the ICESCR does not contain any other reference to regulatory obligations for private conduct abroad.<sup>228</sup> Similarly to the ECtHR, the Committee and the International Court of Justice confirmed that the Covenant applies when a state exercises effective control or sovereign power over a foreign territory.<sup>229</sup>

[142] While jurisdiction over the extraterritorial applicability of international law agreements, specifically in the context of transnational private corporate structures has not taken hold yet, other sources of general international law may play a role in addressing gaps. For instance, the principle of active personality allows a state to exercise comprehensive authority over legal persons constituted under its law.<sup>230</sup> According to the incorporation theory, a company incorporated under Swiss law in Switzerland would be subject to Swiss jurisdiction. On the other hand, the proscription on extraterritorial intervention under international law reserves the regulation of economic activities within its territory in favor of the host country. Thus, it would be the obligation of the host country, when assuming their duty to protect, to prevent third parties – including foreign corporations – from infringing on the rights of persons living within its jurisdiction. The home country can support the host country in the fight against human rights abuses. Finally, the home country is not allowed to provide aid to host countries that participate in human rights abuses. The aid ban, as stipulated in Art. 16 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, is recognized in legal practice, and covers cases where

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<sup>223</sup> See Human Rights Committee, General Comment No. 31 (2004), pt. 10.

<sup>224</sup> Human Rights Committee, Concluding Observations Germany 2012, pt. 16.

<sup>225</sup> CESCR, General Comment No. 14 (2000), pt. 39.

<sup>226</sup> CESCR, General Comment No. 15 (2002) pt. 31 and 33.

<sup>227</sup> See BERNSTORFF, p. 20 f.

<sup>228</sup> *Ibid.*, p. 22.

<sup>229</sup> See CESCR, Concluding Observations Israel 2003, pt. 31; IGH, Advisory Opinion 2004, pt. 112.

<sup>230</sup> BERNSTORFF, p. 25; see KARL DOEHRING, *Völkerrecht*, 2. Ed., Heidelberg 2004, p. 356.

the home state intentionally assists the host state's violation of its duty to protect with a significant contribution.<sup>231</sup>

[143] In resource-rich developing countries that suffer from internal conflicts and weak state governance, human rights abuses are often tolerated or even supported by the host state; for example, by providing military troupes to assist private security forces that are frequently involved in the human rights abuses. Though the ban on intervention under international law applies to cases in which the home state supports human rights abuses against the will of the host state by for example financing them.<sup>232</sup> There are, however, no effective mechanisms in place in the event of state governance failure in the host state.

[144] In the discourse on the extraterritorial obligations of states in favor of individuals, there are other instruments that promote developments in grievance mechanisms apart from international law agreements.

[145] The UN Guiding Principles urge states to clearly set out the expectation that all business enterprises subject to their jurisdiction respect human rights throughout their operations (Guiding Principle 2). Further, the UN Guiding Principles appeal to the role that the companies' home states can take in sanctioning human rights abuses, when the legal system of the host country fails to do so. This is particularly important in conflict-affected areas where the situation is often disastrous from a human rights perspective (Guiding Principle 7). Under the UN Guiding Principles, business enterprises are also called on to prevent adverse human rights impacts that they did not directly contribute to, but are directly linked to their operations, products or services by their business relationships within the scope of their corporate responsibility (Guiding Principle 13). In each individual case, business enterprises should comply with all applicable laws, as well as internationally recognized human rights wherever they operate (Guiding Principle 23).

[146] Additionally, according to the OECD Guidelines, participating states should encourage the business enterprises operating in their jurisdiction to comply with the Guidelines in all the places where they exercise their business activities.<sup>233</sup> This comprises, as far as reasonable, activities in their supply chain as well, especially since enterprises may be able to influence suppliers through their negotiating power.<sup>234</sup> Adverse human rights impacts linked to the business activities of the companies, their products or services, should accordingly be prevented, even if the company itself did not contribute to these impacts.<sup>235</sup> Business enterprises have to respect the Universal Declaration of Human Rights, the ICCPR and the ICESCR, as well as the Declaration of the ILO on the Fundamental Principles and the Rights at Work of 1998,<sup>236</sup> regardless of where they conduct their business activities.

[147] With regard to disputes on the subject of extraterritoriality, in September 2011, the University of Maastricht, together with the International Commission of Jurists (ICJ) published the "Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social

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<sup>231</sup> With regard to the exact prerequisites see BERNSTORFF, p. 26 f.

<sup>232</sup> Accordingly the International Court of Justice ICJ in its decision of 1986 determined that the USA's financial support to rebel groups in Nicaragua was not a violation of the ban on the use of force, but rather a violation of the ban on intervention. ICJ, Nicaragua 1986, p. 119, pt. 228.

<sup>233</sup> OECD, Guidelines 2011, p. 19, pt. 3.

<sup>234</sup> Ibid., p. 24 f., pt. 21.

<sup>235</sup> Ibid., p. 36, pt. 3.

<sup>236</sup> Ibid., p. 37, pt. 39.

and Cultural Rights”.<sup>237</sup> Though these Principles are partly based on declarations of the community of states,<sup>238</sup> they have no legally binding force. According to the Principles, states would have to respect, protect and guarantee human rights within and beyond their territory and contribute to their global implementation through international cooperation.<sup>239</sup> In the scope of its duty to protect, a state should, *inter alia*, take necessary measures to ensure that neither state actors nor non-state actors (such as business enterprises or transnational corporations) impair the enjoyment of economic, social and cultural rights.<sup>240</sup> Furthermore, a state is obliged to assist other states or to ask for assistance from other states to ensure the realization of economic, cultural and social rights in the best possible way.<sup>241</sup> Should a state violate one of these provisions, it should be considered a breach of their international human rights obligations, and the state’s responsibility would be invoked as a consequence.<sup>242</sup>

[148] Without a binding international set of rules relating to the human rights responsibility of transnational enterprises, one has to resort to national (or regional) law. In various instruments and bodies, the states are advised to avoid having conflicting requirements for multinational enterprises issued by the governments of different countries.<sup>243</sup>

### 1.6.3. Legal situation regarding corporate activities abroad

[149] If a company operates subsidiaries abroad – *i.e.*, local branches, which are generally managed from the corporate headquarters as production sites – the headquarters and the subsidiaries abroad constitute one legal entity. Thus, the company is in principle also liable for the offences committed by the subsidiaries abroad.

[150] The competence of Swiss Courts in civil law matters is determined in accordance with possible treaties in this area, or if there are no treaties that can be applied to a specific situation, in accordance with the Federal Act on Private International Law (PIL Statute).<sup>244</sup> The Lugano Convention is particularly relevant,<sup>245</sup> as it is applicable to civil and commercial matters (Art. 1), provided that the domicile of the defendant is in one of the contracting states and a further

<sup>237</sup> Experts from all regions of the world developed the Maastricht Principles, among others present and former members of the international treaty bodies, regional human rights agencies and former and present special rapporteurs of the United Nations Human Rights Council.

<sup>238</sup> Particularly on the Declaration and the Action Program, which were adopted by the UN Human Rights Conference 1993 in Vienna and have been signed by 171 states, as well as on other documents, in which the communities of states re-committed to the economic, social and cultural rights.

<sup>239</sup> Maastricht Principles, pt. 3, 4, 8 and 9.

<sup>240</sup> Maastricht Principles, pt. 24. Such measures must be taken, when a corresponding damage is caused on one’s own territory, if the parent or controlling company of a corporation has its center of activity, is registered or domiciled in the state concerned or if there is any other reasonable link, as well as when the conduct of a non-state actor is subject to the universal jurisdiction (pt. 25).

<sup>241</sup> Maastricht Principles, pt. 33 and 34.

<sup>242</sup> Maastricht Principles, pt. 11 and 13.

<sup>243</sup> As for example Annex 2 of the OECD Declaration on International Investment and Multinational Enterprises of 1976 deals with *conflicting requirements*. The Annex is accessible in English in a succinct format at: <http://www.oecd.org/daf/inv/investment-policy/conflictingrequirementsimposedonmultinationalenterprises.htm> (visited on 4 April 2014).

<sup>244</sup> See Federal Act on International Private Law of 18 December 1987 (SR 291, situation on 1 July 2013).

<sup>245</sup> Convention on the Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention), signed in Lugano on 30 October 2007, entered into force for Switzerland on 1 January 2011 (SR 0.275.12). Contracting States of the Lugano Convention are Switzerland, the EU Member States as well as Iceland and Norway.

international element is met, such as for example that the domicile of the plaintiff is in a different country.<sup>246</sup> Notably, Article 16 of the Lugano Convention provides for exceptions to its applicability. For corporations or legal persons, the registered office, the principal place of business or head office is regarded as its domicile (Art. 60). Since its applicability is determined in accordance with the domicile of the defendant, the Lugano Convention is regularly applied in cases where Swiss companies are sued.

[151] In general, the courts of the state where the defendant is domiciled are competent to exercise jurisdiction if the Lugano Convention is applicable (Art. 2). When an alternative place of jurisdiction is located in a different state bound by the Convention, the defendant may be sued for the performance of a contractual obligation in the courts of the place of performance (Art. 5, para. 1 lit. a); matters relating to unlawful conduct, on the other hand, should be brought before the courts of the place where the harmful event occurred or may possibly occur (Art. 5 para. 3). In matters relating to disputes arising out of operations and individual contracts of employment with an employer who is not domiciled in a state bound by the Convention, but has a branch, agency or other establishment in one of the states bound by the Convention, the employer is deemed to be domiciled in the jurisdiction of the latter state (Art. 18; see Art.5 para. 5). An employee may be sued in the courts of the state where he or she is domiciled, or in the place where the employee habitually carries out his or her work (Art. 19). Additionally, a consumer may bring proceedings against the other party to a contract, either in the courts of the domicile of the consumer or the other party. (Art.16). The applicable law is determined in accordance with the national law of the competent state, which in the case of Switzerland is the PIL Statute.<sup>247</sup>

[152] The PIL Statute determines jurisdiction if a case does not fall under the objective, locational, personal or chronological areas of application of the Lugano Convention or any other treaty. Under the PIL Statute, if the defendant is not domiciled in Switzerland, the case must have a “reasonable link” to a place in Switzerland for it to fall under the jurisdiction of a Swiss court.<sup>248</sup> For disputes arising out of unlawful acts, jurisdiction may lie with the place where the act was committed or had its effect, in addition to the domicile or place of residence of the defendant (Art. 129 PIL Statute). As regards disputes arising out of employment contracts, apart from the domicile of the defendant, the place where the employee habitually carries out his or her work, could determine jurisdiction (Art. 115 para. 1 PIL Statute).<sup>249</sup>

[153] With the exception of a derogation of the choice of law (Art. 132 PIL Statute), the governing law for unlawful acts is determined by the habitual domicile of both parties, or if they are domiciled in different places, in the place where the act was committed (Art. 133 PIL Statute).<sup>250</sup> If an existing legal relationship such as an employment contract is violated due to the unlawful act, the law governing this legal relationship will be applied (Art. 133 para. 3 PIL Statute). The law of the state where the employee carries out his work normally governs an employment contract

<sup>246</sup> This additional international element is considered a given, even if the plaintiff is domiciled in a state that is not bound by the Lugano Convention; see BGE 135 III 185, E. 3.3, p. 189 f. with further references

<sup>247</sup> Even the jurisdiction within Switzerland is determined by the PIL Statute and not the CPC. PORTMANN/STÖCKLI, p. 276.

<sup>248</sup> Art. 2 PIL Statute (General Jurisdiction) and art. 3 PIL Statute (Forum Necessitatis).

<sup>249</sup> Additional places of jurisdiction are stipulated i.a. in art. 5 PIL Statute (Agreement on Place of Jurisdiction), art. 8 (counter-claim), art. 8a (joinder of parties or combination of actions), and art. 112 para. 2 (Lawsuit against the owner of a branch office at its location). See PORTMANN/STÖCKLI, p. 276.

<sup>250</sup> If the place where the unlawful act was committed and where it had its effect are in the same country or if the infringing party did not have to reckon with the effect taking place in a different state, the place where the act was committed and not where it had its effect is relevant for the determination of applicable law.

(Art. 121 para. 1 PIL Statute).<sup>251</sup> However, foreign law will not be applied if its application will produce a result that is irreconcilable with the Swiss *ordre public* (Art. 17 PIL Statute). Since the Swiss *ordre public* necessarily encompasses international fundamental principles, it also covers fundamental human rights.<sup>252</sup> Moreover, the precedence of the application of certain Swiss laws or provisions thereof remain reserved, which due to their specific purpose, have to necessarily be applied (Art. 18 PIL Statute).<sup>253</sup>

[154] Consequently, both the Lugano Convention and the PIL Statute confer jurisdiction over to Swiss courts for civil law actions against corporations domiciled in Switzerland for human rights abuses committed abroad.<sup>254</sup> According to the PIL Statute, the law of the host country, and as such, foreign law, applies in cases involving unlawful acts, where the place of commission of the alleged human rights infringement and violations of labour law, where the place of the habitual performance of the aggrieved employee are located in the host country. As an exception, foreign law will not apply if its application is irreconcilable with Swiss *ordre public* or if it is subordinate to provisions of Swiss laws that are of mandatory application.

[155] Art. 3 ff. of the Swiss Criminal Code determines the jurisdiction of Swiss courts in criminal cases with links abroad. Thus, the territorial applicability of the SCC generally covers crimes and offences committed in Switzerland (territoriality principle, Art. 3 SCC). Since pursuant to Art. 8 SCC, the place of the offence is either the place where the offender acted or remained passive, as well as the place where the result, of the offence, as defined in the statute, occurred (Art. 8 SCC), the territoriality principle will only justify the jurisdiction of Swiss courts in exceptional cases of human rights violations of subsidiaries abroad.<sup>255</sup> It is difficult to assess whether Switzerland may be considered as the place of commission when decisions that were made at the headquarters of the corporation lead to human rights abuses abroad.

[156] The Swiss Criminal Code stipulates exceptions to the territoriality principle, which could become important in the prosecution of human rights abuses committed by corporations abroad. Thus, criminal offences, which Switzerland prosecutes in accordance with international treaties, are subject to the territorial applicability of the SCC, provided that the offence is also punishable at the place where the act was committed, and that the offender is staying in Switzerland

<sup>251</sup> The parties may also subject the employment contract to the law of the state, in which the employee habitually resides or in which the employer operates his branch office, his domicile or habitual place of residence (art. 121 para. 3 PIL Statute). Both the residence as well as the branch office of a company are defined by their domicile (art. 21 para. 1 and 4 PIL Statute).

<sup>252</sup> See Message regarding the Contract between Switzerland and Chile on Mutual Assistance in Criminal Matters of 28 November 2007, BBI 2008 105, p. 113; BGE 130 II 217 E.8.8 and 131 II 228 E.3.3 regarding the refusal to comply with request for mutual legal assistance due to the risk of death penalty in Taiwan; FRANK VISCHER, ART. 17, in: Daniel Girsberger et al. (eds.), Zürcher Kommentar zum IPRG, 2<sup>nd</sup> ed., Zurich i.a. 2004, p. 253-270, p. 260, pt. 19 f.

<sup>253</sup> Further exceptions: When a choice of legal system has taken place; when the foreign law refers back to Swiss law or to any other law (art. 14 PIL Statute); when the situation is obviously closely linked to a different legal system (art. 15 IPR); when the content of the applicable law cannot be determined (art. 16 para. 2 PIL Statute).

<sup>254</sup> The competence of Swiss courts pursuant to the Lugano Convention goes further in defining that the domicile of a company or legal person (as opposed to the corresponding definition in the PIL Statute) in addition to the registered office of a company also includes the main administrative office or headquarter, and that in cases of claims from individual employment contracts under certain circumstances branch offices, agencies or other affiliates are enough to establish jurisdiction.

<sup>255</sup> In more detail TRECHSEL, art. 8.

(principle of vicarious criminal justice, Art. 6 SCC).<sup>256</sup> Under Art. 7 para. 1 SCC, Swiss criminal law applies to offences committed by or against a Swiss citizen (principle of active and passive personality), provided that, the offence is also punishable in the place where it was committed but is unlikely to be prosecuted there, and the offender is staying in Switzerland (or is extradited to Switzerland because of the offence), as well as in cases in which there is no extradition from Switzerland to the foreign country.<sup>257</sup> Moreover, Art. 7 para. 2 lit. a SCC establishes Swiss criminal jurisdiction if neither the victim nor the offender is Swiss, but the offender is staying in Switzerland and extradition was refused. Art. 7 para. 2 lit. b SCC is also relevant for the prosecution of human rights infringements arising from corporate actions. As an expression of universal jurisdiction, it justifies the competence of Switzerland to prosecute particularly serious offences outlawed in the international community, even if neither the offender nor the victim is a Swiss citizen.<sup>258</sup>

[157] In fine, this means that, if a company domiciled in Switzerland commits or participates in human rights abuses that are punishable under Swiss criminal law, the responsible officers would be prosecuted in Switzerland under the conditions discussed in the previous sections.<sup>259</sup> If the persons responsible cannot be established, the company itself may be sued in accordance with Art. 102 SCC. For criminal proceedings against a corporate undertaking in terms of Art. 102 SCC, the authorities at the registered office of the undertaking have jurisdiction (Art. 36 para. 2 CrimPC) over the case. Nevertheless, the interpretation and interaction of Art. 3 ff. and Art. 102 SCC for criminal offences with links abroad need additional substantiation in jurisprudence and legal theory in order for us to take the particular features of corporate liability into account.<sup>260</sup>

[158] A first initiative was undertaken on 5 March 2012 with the criminal complaint submitted by the *European Center for Constitutional and Human Rights* (ECCHR) and the Columbian trade union, *Sinaltrainal*, against several executive officers of Nestlé AG (and in the second degree against the company itself) to the Public Prosecutor's Office of the Canton of Zug. The defendants were accused of ignoring the threats issued against a Columbian trade unionist and former employee of a Columbian subsidiary of Nestlé, and because of this omission, of sharing responsibility for this person's murder by paramilitaries.<sup>261</sup> Nestlé rejected the allegations in the indictment.<sup>262</sup> The Public Prosecutor of the Canton of Zug assigned the case to the justice of the

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<sup>256</sup> Under certain conditions the jurisdiction is also given for criminal acts committed abroad, which are specifically directed against the State (so-called state protection principle, art. 4 SCC) or against minors (art. 5 SCC).

<sup>257</sup> Jurisdiction in terms of the principle of active and passive personality pursuant to art. 7 para. 1 SCC is however subsidiary to the one of art. 4, 5 and 6 SCC, see art. 7 para. 1 SCC.

<sup>258</sup> More on this subject: see TRECHSEL, art. 7.

<sup>259</sup> More detail on this subject: HEINIGER, p. 339 ff.

<sup>260</sup> In this context i.a. the question arises to what extent corporations enjoy judicial rights of defence as they were first conceived for individuals to take account of their particular need for protection and the power gap between the state and the individual; or if these rights should be adapted to reflect the nature of corporations.

<sup>261</sup> The shared responsibility of the parent company is justified inter alia with the close economic ties of the companies and the allegedly defective risk management for the whole group, in particular in light of the limited statehood of the region concerned; See FORSTMOSER, p. 706. The plaintiffs are considering both the principal's liability in terms of art. 11 para. 2 lit. d SCC in the sense of a failure to comply with the duty to act as well as the subsidiary's corporate criminal liability pursuant to art. 102 para. 1 SCC as basis for the liability.

<sup>262</sup> See „Letter to Colombian trade union“, Press Release of Nestlé Group, accessible at <<http://www.nestle.com/media/statements/pages/Letter-to-Colombian-trade-union.aspx>> (visited on 4 April 2014).

Canton of Vaud, which on 1 May 2013, decided that it would not hear the charges due to the statute of limitation.<sup>263</sup> The plaintiffs want to appeal this decision.<sup>264</sup>

#### 1.6.4. Legal situation regarding a company's foreign subsidiaries

[159] The situation where Swiss undertakings operate and control a foreign subsidiary through a majority interest is far more complex. In this case, the foreign company has its own legal personality, but is nevertheless economically dependent on the Swiss parent company. In this type of corporate structure, several independent undertakings are combined into a network of companies under one management.<sup>265</sup>

[160] As a rule, the juridical independence of the subsidiary (with an independent domicile in a foreign territory) is not subject to regulations under Swiss law. In any case, a home country may indirectly influence the subsidiary with regulations that are addressed to the parent company. Swiss civil law contemplates different constructions that allow a parent company to be legally challenged in connection with the misconduct of a subsidiary. However, these are applied with caution and interpreted in a restrictive manner.

[161] On the one hand, the mother corporation is liable due to the trust created as a group if its conduct may be construed as taking responsibility for its subsidiary. Jurisprudence in this field particularly refers to cases where trust in the subsidiaries' creditworthiness was created through the parent company.<sup>266</sup> Nevertheless, cases with human rights elements are definitely also conceivable, particularly if the parent company publicly affirms the human rights compliant behaviour of its subsidiaries, while in truth having knowledge of and condoning violations.

[162] Another means of increasing the accountability of parent companies is possible if the latter unlawfully incorporates or establishes the subsidiary for the purpose of gaining unfair advantage, and as such, merely uses the subsidiary as a pretext so that they cannot be prosecuted. In such a case, piercing the corporate veil of the parent company is possible, and may result in the attribution of the subsidiary's actions to the parent company. In one of its 2005 decisions, the Federal Supreme Court developed criteria that would allow the attribution of the business relationships of a subsidiary established in the Bahamas to its parent company, a Swiss bank. The subsidiary's activities in question were legal under Bahamian law, but violated the Swiss

<sup>263</sup> The plaintiffs appealed against the transfer of the case to the Public Prosecutor of the Canton of Vaud. The Federal Criminal Court rejected the appeal, since the company is domiciled both in Zug and in Vevey (VD), which made both cantons responsible based on art. 36 para. 2 CrimPC: Decision of the Federal Criminal Court of 14 Nov. 2012, BG.2012.25, E 2.2.2.

<sup>264</sup> See <<http://www.ecchr.de/index.php/nestle.html>> (visited on 4 April 2014).

<sup>265</sup> The term group of companies is not defined in Swiss law (see art. 663e para. 1 a SCO (status at 1 March 2012), which however is not in force anymore since 1 Jan. 2013). In Switzerland at least half of all stock corporations are part of a network of companies, see IMHOF, p. 4.

<sup>266</sup> See e.g. BGE 120 II 331, E. 5, p. 335 ff; FORSTMOSER, p. 720 f. For questions regarding the applicable law for cases of corporate liability of the parent company see e.g. BGE 128 III 346, E. 3.1.3 ff., p. 349 f.: In connection with art. 154 para. 1 PIL Statute the Federal Supreme Court refers to the law of the state, according to whose provisions the company concerned was organized. If therefore foreign law is applicable, the principle prohibiting the abuse of rights in accordance with Swiss law can only be applied through the ordre public provisions of the PIL Statute; See FELIX DASSER, Der Durchgriff im Internationalen Privatrecht, Ein Beitrag zur Diskussion über den positiven und den negativen Ordre public, p. 41, in: Peter Breitschmid et al. (ed.), Grundfragen der juristischen Person, Festschrift für Hans Michael Riemer zum 65. Geburtstag, Bern 2007, p. 35 ff.

Anti-Money Laundering Act. These violations could be prosecuted by piercing the corporate veil of the parent company in Switzerland.<sup>267</sup>

[163] The existence of a *de-facto* executive body could also make attribution possible. Under this model, persons who are not formally members of the management or were not duly authorized but who, in fact, take on management tasks, are accountable as “de-facto directors” under Swiss corporate law.<sup>268</sup> If the governing company in a group exerts significant influence on the decision-making process of the dependent company, just like a typical executive body would, it is attributed with a de-facto executive body position in this company.<sup>269</sup> The group’s governing company will thus be seen as a “person concerned with management,” and is thus responsible under Swiss corporation law, in accordance with Art. 754 SCO.<sup>270</sup> Correspondingly, it is liable to the company, the shareholders and creditors for every direct or indirect interference in the administration or management of the dependent company or subsidiary, if such interference goes beyond the ordinary exercise of their shareholder rights.<sup>271</sup>

[164] A similar attribution model likewise arises if the executive bodies of the parent company also hold a formal executive body position in a subsidiary. This is referred to as “double affiliation,” which allows recourse to the parent company for liability under certain circumstances.

[165] If recourse to the parent company has not been provided for under substantive law and legal actions due to human rights infringements abroad cannot be directed at the parent, but have to be addressed to the subsidiary, the territorial jurisdiction of Swiss courts is already not given, since both the seat of the defendant (namely the subsidiary) as well as the place where the offence was committed or had its effect, or the place, where the employee habitually carries out his work, are abroad and thus as per the PIL Statute a reasonable connection with a place in Switzerland cannot be established.<sup>272</sup> These limitations may result in the failure of properly reflecting the economic unity of the group in procedural regulations. This failure may not only occur in the protection of human rights, but also in the general supervision of multinational enterprises. In the financial industry, the situation is diffused on some level by the fact that financial groups can be subjected to a consolidated supervision, which means that the group is considered as a whole.<sup>273</sup> This model could also be adopted for other industries should the legislator desire it.

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<sup>267</sup> Decision of the II. Public Law Department of the Federal Supreme Courts of 09.02.2006 (2A.91/2005), Published in the SFBC-Bulletin 49/2006, p. 36 ff.

<sup>268</sup> IMHOF, p. 31 f.; FORSTMOSER, p. 720.

<sup>269</sup> IMHOF, p. 42 f. This type of influence may take the form of internal regulations or may for example arise, if the group’s parent company holds the majority of shares of the dependent company and thus has the majority of votes at the general meeting. This means it can exert the desired influence on decisions and for example staff the supervisory bodies with persons they trust. See also *ibid.*, p. 45.

<sup>270</sup> See in this context: BGE 117 II 570, E. 4a, p. 573; IMHOF, p. 60 ff.; FORSTMOSER, p. 720.

<sup>271</sup> FORSTMOSER, p. 720. A similar result can be expected, even if the liability of legal persons pursuant to art. 754 SCO is generally excluded: In this case the focus is placed on the individual persons in the group’s management, who exert significant influence on the decision-making process of the dependent company. Their management measures within the dependent company may then be directly attributed to the controlling company in terms of art. 722 SCO, art. 55 para. 2 SCC (executive officers’ liability) or art. 55 SCO (principals’ liability). See IMHOF, p. 43 f.

<sup>272</sup> If the seat of the subsidiary accused of human rights infringements is in a state that is not party to the Lugano Convention this is not applicable.

<sup>273</sup> Art. 3a-3g Federal Act of 8 November 1934 on Banks and Savings Banks (SR 952.0).

[166] Even the criminal prosecution before a Swiss court of a foreign subsidiary registered in a developing country and not in Switzerland seems problematic in light of the provisions regarding the territorial application of Swiss jurisdiction under criminal law, particularly Art. 3-8 SCC. To the extent that the infringement was carried out abroad (or the failure to act when under an obligation to do so), and the effect thereof did not manifest in Switzerland, the principle of territoriality does not apply to subsidiaries without Swiss branch office.<sup>274</sup> At most, one could consider attribution to the parent company, pursuant to Art. 4-7 SCC. It is possible for the parent company to be held liable, if it can be shown that it failed to act in accordance with Art. 102 SCC. In this case the place where the infringement was committed (i.e. the failure to act) would be in Switzerland, which would mean that the situation would not constitute an extraterritorial fact in the proper sense and that the jurisdiction of Swiss courts would arise from the principle of territoriality. In practice, it will nevertheless be difficult to prove and legally justify the parent company's corresponding obligation to act.<sup>275</sup>

#### 1.6.5. International and national developments

[167] With regard to the handling of civil lawsuits against corporations based on international circumstances, it is argued that in different countries – the Netherlands, the United States, the United Kingdom and Australia – an increasing tendency to seek redress from the parent company for human rights violations committed by the subsidiary can be observed. However, a review of jurisprudence shows that while courts in these countries are dealing with the question of recourse for human rights infringements, it would be premature to speak of a clearly identifiable trend. Some developments are also interesting for Switzerland:

[168] Subsequent to the redress lawsuit of workers exposed to asbestos against the James Hardie group in Australia in 2004, amendments to Australian corporate laws have been discussed and requested. So far, however, these proposed amendments have yet to be implemented. The James Hardie Group had transferred funds internally to reduce its liability substrate for damage compensations.<sup>276</sup>

[169] In 2009, a Dutch court declared its jurisdiction over three cases filed by Nigerian farmers and fishermen, together with environmental organizations against the Royal Dutch Shell Company domiciled in the Netherlands, and against its Nigerian subsidiary, requesting the clean-up of oil-related pollution and compensation for damages. The plaintiffs, among other things, claimed that Shell and its Nigerian subsidiary had failed to close leaks in their oil pipelines and clean up the ensuing oil-spills between 2004 and 2007. As a result, the local farmers and fishermen suffered damage to their health (*inter alia*, due to the polluted drinking water), and partly lost their livelihoods. Though the court's 30 January 2013 decision rejected all the complaints against the Dutch parent company, it confirmed its jurisdiction over the lawsuits against the Nigerian subsidiary.<sup>277</sup> The court applied Nigerian law and established that the subsidiary had failed to take appropriate precautionary measures under the given circumstances and effectively counteract the risk of the wells being sabotaged, contrary to its obligation to

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<sup>274</sup> MARK PIETH, *Schweizerisches Strafprozessrecht, Grundriss für Studium und Praxis*, Basel 2009, p. 202.

<sup>275</sup> See remarks on the so-called Nestlé case above in para. 158.

<sup>276</sup> HELEN ANDERSON, *Challenging the Limited Liability of Parent Companies: A Reform Agenda for Piercing the Corporate Veil*, *Australian Accounting Review* 61/22 (2012), p. 129-141, p. 130.

<sup>277</sup> District Court (The Hague, Netherlands), *Milieudefensie et al. v. Shell et al.*, Decision of 30 January 2013, case number C/09/337050, docket number HA ZA 09-1580, E.4.34 and E. 4.6.

exercise due care. The court ordered Shell's Nigerian subsidiary to pay damages, the amount of which has not yet been quantified, but rejected all the other causes of action.<sup>278</sup> The plaintiffs appealed the decision.

[170] In March 2012, a group of 11,000 Nigerians filed a similar lawsuit against Shell on behalf of their community, Bodo, at the High Court in London, United Kingdom.<sup>279</sup> These proceedings are still pending at the time of writing.

[171] Various lawsuits seeking better access to remedies were also filed in American courts under the *Alien Tort Statute* (ATS).<sup>280</sup> A law dating back to 1789, the ATS allows foreigners to invoke jurisdiction in the US, if they assert claims for damages arising from tort due to a violation of the "law of nations". Using the ATS as basis, victims of human rights violations in Nigeria, or their survivors, filed lawsuits in different but inter-related cases against the parent companies, the Royal Dutch Petroleum Company domiciled in the Netherlands, and Shell Transport and Trading Company domiciled in the United Kingdom, which they believe were both responsible for the actions of the Nigerian subsidiary. In 2002, the plaintiffs in the *Kiobel* case – one of the proceedings filed in the United States – accused Shell of aiding and abetting serious crimes contemplated by the ATS. In June 2010, the District Court refused to exercise jurisdiction over the case since the plaintiffs could not establish a reasonably close link between the Nigerian Shell subsidiary and the United States. The Court of Appeals confirmed this decision in September 2010, but justified it by stating that corporations cannot be sued under the ATS.<sup>281</sup>

[172] The plaintiffs brought the case before the US Supreme Court. The Court proceeded from a general presumption against the extraterritorial application of the ATS, and ruled that nothing in the law's text, history or purpose rebuts this presumption. According to the Court, the presumption against the extraterritorial application of statutes such as the ATS, serves to avoid conflicts between American and foreign law.<sup>282</sup> For these reasons, the Supreme Court affirmed the challenged decision but did not rule on the extent claims for damages against multinational enterprises may be possible under the ATS. Moreover, the decision does not address the question of how close the link to the US has to be in order for the ATS to apply in a specific case. Nevertheless, four of the nine justices supported an alternative justification of the judgment and argued that the ATS has extraterritorial application if a case relates to the United States' interest of preventing itself from becoming a "safe haven" for torturers or other enemies of mankind.<sup>283</sup> In *Kiobel*, however, the necessary factors that connected the case to the US were missing; consequently, the ATS did not apply under the alternative interpretation of the four justices.<sup>284</sup>

[173] The questions of jurisdiction that courts in the Netherlands, the United Kingdom and the United States are facing are embedded in the wider discussions on the extraterritorial responsibility of states in the field of human rights. They are thus also relevant to Swiss corporations, since precedents abroad may not only influence the behavior of the companies

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<sup>278</sup> Ibid., E.4.43 and E. 5.1.

<sup>279</sup> High Court (UK), *Bodo v. Shell*, Particulars of Claim, Claim NO. HQ11X01280.

<sup>280</sup> Alien Tort Claims Statute (1789), 28 U.S.C. § 1350.

<sup>281</sup> *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 621 F. 3d 111 (2010) (2nd Court of Appeals)

<sup>282</sup> *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 569 U.S. (2013), Opinion of the Court, p. 4.

<sup>283</sup> Ibid, Breyer, J., concurring in judgement, p. 1 ff.

<sup>284</sup> The negation of the applicability of the ATS due to a lack of reasonable connecting factors is reminiscent of the line of reasoning of European courts.

concerned, but also the regulatory developments in Switzerland, both on the legislative and the judiciary level.

[174] The call of civil society and that of other voices advocating stricter liability obligations for parent companies with regard to their activities abroad are growing louder.<sup>285</sup> To prevent companies from creating a regulatory grey area outside the jurisdiction of the individual states, and thus escape control under the guise of rule of law, some 50 organizations' "Corporate Justice" campaign requested the Federal Council and the parliament to amend regulatory provisions, to ensure that the duty of care of Swiss companies with regard to human rights and the environment is clearly mandatory and extended to subsidiaries and suppliers abroad. Furthermore, victims of related violations should be able to seek redress in Swiss courts and under Swiss law. On 14 December 2012, the National Council decided not to respond to the Corporate Justice Campaign's petition,<sup>286</sup> various parliamentary motions, which address some of the requests of the petition, are still pending.<sup>287</sup>

[175] The legal study<sup>288</sup> commissioned by the Campaign suggested obliging board members to take all necessary steps to ensure that human rights and the environment are respected by the company, including its subsidiaries, subcontractors and suppliers in their business activities through a new inclusion in the law: Art. 717 para. 3 SCO. Moreover, an amended 722 para. 2 SCO will provide for the joint and several liability of the parent company for the unlawful activities of all its subsidiaries and suppliers. By adapting the PIL Statute, Swiss law (Art.155 para. j PIL Statute, as amended) should become applicable and Swiss courts should have jurisdiction (Art. 129 para. 2 PIL Statute, as amended) over complaints against erring companies. Further, the domicile of a legal person shall no longer only be defined by the place of incorporation, but also by the place where its central administration and the principle place of business is located. This definition of domicile will thus be in harmony with the terminology in the Lugano Convention. With regard to procedural law the study advocates a strengthening of the right of associations to assert claims on behalf of their members and a facilitation of the evidentiary burden for the alleged victims of human rights abuses.

[176] Moreover, the study strives for material changes in the criminal law and procedure code: first, it proposes that the maximum fine that may be incurred by a company found to be complicit in criminal conduct should be increased from 5 to 50 million francs; second, the list of offences for which a company may be criminally prosecuted should include genocide, crimes against humanity, war crimes, as well as other serious violations of legal interests, in particular threats to life and limb (revision of Art. 102 SCC). Moreover, associations of national importance should be able to represent victims in criminal proceedings relating to specific offences.

<sup>285</sup> E.g. the request of the European Coalition for Corporate Justice for the introduction of liability for companies domiciled in Europe for their activities abroad: FILIP GREGOR, Principles and Pathways: Legal opportunities to improve Europe's corporate accountability framework, November 2010, p.19 ff., accessible at: <[http://www.corporatejustice.org/IMG/pdf/eccj\\_principles\\_pathways\\_webuseblack.pdf](http://www.corporatejustice.org/IMG/pdf/eccj_principles_pathways_webuseblack.pdf)> (visited on 4 April 2014).

<sup>286</sup> See <[http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch\\_id=20122042](http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20122042)> (visited on 4 April 2014).

<sup>287</sup> See National Council, Interpellation 12.3449 (Ingold); Interpellation 12.3456 (Haller); Postulate 12.3503 (Graffenried); Interpellation 12.3520 (Moser).

<sup>288</sup> MEMBREZ, Study 2012.

## 1.7. Assessment

[177] To be able to fulfill its international law obligations of creating effective grievance mechanisms for human rights violations, Switzerland has incorporated the guarantee of access to the justice system and general procedural guarantees in its Constitution, which are implemented and substantiated in the Swiss administrative, criminal and civil procedural codes. The respective proceedings and rights to appeal are based on established legal foundations, and are therefore predictable and verifiable. They offer legal protection against infringements against the rights of individuals, and grant victims the right to redress. Thanks to the ECtHR as supranational authority, Switzerland's compliance with its duty to protect can partly be monitored, and if necessary, its failures in legislation, jurisprudence or law enforcement, may be disclosed.<sup>289</sup>

[178] Swiss legislation provides for a range of protections and liability provisions with respect to the junction between the rights of individuals and the business activities of corporations. Indubitably, the state cannot circumvent the binding effect of the fundamental rights by delegating the performance of its duties to private parties. However, private parties are nevertheless bound to respect fundamental rights in the fulfillment of their administrative tasks.<sup>290</sup> Thus, under certain conditions, private undertakings that unlawfully violate human rights, are liable under criminal law, be it by holding members of their governing bodies personally accountable<sup>291</sup> for payment of damages for their involvement in the commission of the offence or their role as principals for criminal omissions,<sup>292</sup> or by holding the company as a whole, liable.<sup>293</sup> Finally, the law also stipulates the responsibility of legal persons under civil law and makes them liable for damages caused by their governing bodies or auxiliary persons.<sup>294</sup> If human rights abuses by companies lead to damages to the company itself, Swiss corporate law further provides the possibility for not only the direct victims of human rights abuses but also the company's shareholders, creditors or possibly partners to file a lawsuit.<sup>295</sup>

[179] The Swiss legal framework that regulates its internal relations largely satisfies Switzerland's international law obligations. Moreover, the dynamic development in the language and interpretation of the law allows addressing possible limitations and gaps in the best possible manner and finding timely solutions. Such developments also take place in the discussion on foreign-related cases: the emergence of multinational enterprises, which operate in countries with different standards, raises the question on the extent to which the home state can or must adopt regulations that concern the multinational company's business activities in host countries. Legislation in this area is still very limited both at the national and the international level. On the state level in particular, while some initial proceedings are ongoing in various countries, they have yet to be assessed. While non-binding instruments in this field may represent possible trends, it is still unclear how the community of states will want to deal with questions on this subject.

[180] According to the Swiss conflict of law rules in civil law cases, Swiss courts have jurisdiction over human rights infringements committed by Swiss enterprises abroad. As a rule, foreign law is applied, unless it contradicts fundamental principles of Swiss law. However, if it is the subsidiary

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<sup>289</sup> E.g. ECtHR, *VgT v. Switzerland*, 24699/94 (2001), pt. 47.

<sup>290</sup> Art. 35 para. 2 FC.

<sup>291</sup> Art. 29 SCC.

<sup>292</sup> Art. 11 SCC.

<sup>293</sup> Art. 102 SCC.

<sup>294</sup> Art. 55 SCC or 55 SCO.

<sup>295</sup> Art. 754 para. 1 SCO.

and not the Swiss corporation that exhibited oppressive behavior, the separation of the legal personalities of the two companies for recourse against the parent company in Switzerland is only allowed under few exceptional constellations. In all other cases, the jurisdiction of Swiss courts is not assumed.

[181] In criminal law, corporate undertakings may be sued for human rights violations committed abroad, first, if the action is connected to a failure to act in Switzerland that is contrary to their duties; second, if the Swiss jurisdiction can be justified based on a representative criminal justice measure;<sup>296</sup> third, through the principle of active or passive personality;<sup>297</sup> fourth, on the basis of the principle of universalism;<sup>298</sup> or finally, if the perpetrator is in Switzerland and will not be extradited.<sup>299</sup>

## 2. Extra-judicial Grievance Mechanisms

### 2.1. Criteria

[182] Extra-judicial mechanisms are not meant to replace or circumvent judicial proceedings. The UN Guiding Principles have identified the following criteria for the effectiveness of extra-judicial grievance mechanisms: legitimacy; accessibility for all parties concerned, including marginalized groups; predictability of the proceedings; equitability; transparency; human rights compatibility; and openness to continuous learning. In addition, the design and implementation of enterprise-based grievance mechanisms must be based on the widest possible consultation with the parties concerned or target groups, and must emphasize the importance of dialogue between the parties in cases of dispute.<sup>300</sup>

### 2.2. National Contact Points of the OECD

#### 2.2.1. Guidelines

[183] The OECD Guidelines oblige the governments of participating states to create a body for the promotion and implementation of the Guidelines. These bodies, called National Contact Points (NCP), are tasked with promoting compliance with the Guidelines and serve as a forum for discussing questions regarding the Guidelines.<sup>301</sup> As dispute settlement bodies, the NCPs contribute in an impartial, predictable and fair manner to the solution of problems that may arise from the implementation of the Guidelines in specific cases. For this purpose they will collaborate with other NCPs, meet regularly to exchange experiences and present an annual report to the OECD Investment Committee.<sup>302</sup> While the proper organization of the NCP is mostly left to the responsibility of the participating states, the active support of social partners, namely, businesses

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<sup>296</sup> Art. 6 SCC.

<sup>297</sup> Art. 7 para. 1 SCC.

<sup>298</sup> Art. 7 para. 2 lit. b SCC.

<sup>299</sup> Art. 7 para. 2 lit. a SCC.

<sup>300</sup> See HRC, UN Guiding Principles, Guiding Principle 31.

<sup>301</sup> OECD, Guidelines 2011, p. 21, pt. 11.

<sup>302</sup> *Ibid.*, p. 78, pt. 3 ff.

and workers' organizations, non-governmental organizations, as well as other interested parties, is nonetheless to be ensured.<sup>303</sup> Moreover, the bodies must comply with the four key criteria of visibility, accessibility, transparency and accountability. As extra-judicial grievance mechanisms, NCPs should not compete with judicial grievance mechanisms.

[184] If problems arise in the application of the Guidelines to specific cases – if for example, it is reported that a certain corporation violated the principles or standards incorporated in the Guidelines – the NCP of the country in which the problems arose, ordinarily handles the case. However, the NCP of the host country should consult with the home state of the company concerned, and may request assistance from the latter. If the host country is not a member of the OECD and thus does not have a contact point, the NCP of the home state will handle the case. Should several countries be responsible for the case, the respective NCPs will have to coordinate with each other and determine a body that will take the lead.<sup>304</sup>

### 2.2.2. NCP in Switzerland

[185] In Switzerland, the NCP is located at the State Secretariat for Economic Affairs (SECO) at the International Investment and Multinational Enterprises unit. It neither sees itself as a “quasi-judicial instance” nor as “investigation authority”; rather, its main purpose is the promotion of dialogue between the parties and not the establishment of a possible violation against the OECD Guidelines.<sup>305</sup> In May 2013, the organization and mode of operation of the NCP was adapted to the needs of Switzerland, and a corresponding regulation was adopted.<sup>306</sup> In this new approach, an advisory committee consisting of representatives of the federal administration, employers' associations, unions, trade associations, NGOs and the scientific community assists the NCP in its strategic alignment and the application of the OECD Guidelines.<sup>307</sup>

[186] An individual or interest group can report a company's violation of the OECD Guidelines to the NCP.<sup>308</sup> In order for the Swiss NCP to exercise its jurisdiction, the company must be Swiss or the alleged violation against the Guidelines must have occurred in Switzerland. After receipt of a violation report, the NCP acts in accordance with the procedural guidance adopted by the SECO: it sends a written confirmation of its receipt of the report to the company concerned within 10 working days. The company is given the opportunity to comment on the submission. If the NCP considers the submission credible, it convenes an administrative working group that will assist it with the investigation.<sup>309</sup> In its initial assessment, the NCP summarily determines whether the request is admissible and whether the NCP will provide its services. For this purpose, the NCP ascertains the following: the identity and interest of the complainant, whether it has jurisdiction over the submission, whether the matter falls under the Guidelines' scope of application, and whether a violation of the Guidelines is sufficiently substantiated. Furthermore, it has to ensure that an admission of the case would not have any adverse consequences to the parties of

<sup>303</sup> Ibid., p. 81, lit. A.

<sup>304</sup> Ibid., p. 93, pt. 24.

<sup>305</sup> See SECO, Procedural Rules NCP 2011, p. 2.

<sup>306</sup> Ordinance on the Organisation of the National Contact Point for the OECD Guidelines for multinational enterprises and on its Advisory Committee (NKPV-OECD) of 1 May 2013, SR 946.15.

<sup>307</sup> Art. 6 f. NKPV-OECD.

<sup>308</sup> Art. 3 NKPV-OECD.

<sup>309</sup> Art. 4 para. 2 NKPV-OECD.

possible parallel procedures. Finally, it prepares a written report indicating whether it will admit the case, and explaining the bases of its decision.<sup>310</sup>

[187] If the NCP decided that the inquiry does not justify a closer examination, and the result is thus, negative, it has to publish a corresponding statement that presents the questions raised, and substantiates its decision to dismiss the case.<sup>311</sup> However, if the NCP admits the submission, it assists the parties in resolving the questions raised. With the consent of the parties, the NCP may initiate a dispute resolution procedure which it can manage itself, or if the procedure is mediation, engage a mediator. The purpose of the procedure is to offer a neutral discussion platform to clarify the various interests of the parties, find common methods of resolution, and reach an agreement between them. The discussions are voluntary, confidential, and are not recorded.<sup>312</sup>

[188] The result of the dispute resolution procedure is published in the annual report and on the homepage of the NCP Switzerland,<sup>313</sup> as well as on the homepage of the OECD.<sup>314</sup> A final declaration is also published if the parties reached an agreement through the dispute resolution procedure. In doing so, the parties involved may decide which information on the discussions and the agreement would be included in the declaration.<sup>315</sup> In the event that no agreement is reached, or a party is not willing to participate in the proceedings, such circumstances will also be published in a final declaration. This final declaration should present the questions raised, the grounds for a more detailed examination of the submission, and the procedures initiated by the NCP. Moreover, it can include recommendations on the implementation of the Guidelines and the reasons that prevented the parties from reaching an agreement.<sup>316</sup>

[189] One case in which the Swiss NCP had to address human rights infringements was the grievance submitted by NGOs against companies that were trading cotton produced in Uzbekistan. According to the complaint, in Uzbekistan, children were forced to work during the cotton harvest against their will and under very hard conditions, but the companies had not reacted to this in any way. The NCP mediated between the parties; however, the concrete recommendations were not published.<sup>317</sup>

### 2.2.3. International comparison

[190] The NCPs can play an important role in the implementation of the Guidelines. To what extent they appropriately fulfill this role depends on, among other factors, their organization and composition. In this regard, the member states are left with considerable discretion. The establishment of the NCP can vary greatly from country to country. Consequently, there are significant differences in the manner in which each NCP handles specific cases.

<sup>310</sup> SECO, Procedural Rules NCP 2011, p. 2 ff.

<sup>311</sup> OECD, Guidelines 2011, p. 83, pt. 3, lit. c.

<sup>312</sup> SECO, Procedural Rules NCP 2011, p. 4; see OECD, Guidelines 2011, p. 84, pt. 4.

<sup>313</sup> <<http://www.seco.admin.ch/themen/00513/00527/02584/02586/index.html?lang=de>> (visited on 3 June 2013).

<sup>314</sup> <<http://www.oecd.org/daf/inv/mne/ncpstatements.htm>> (visited on 3 June 2013).

<sup>315</sup> SECO, Procedural Rules NCP 2011, p. 4. See OECD, Guidelines 2011, p. 83, pt. 3, lit. b.

<sup>316</sup> SECO, Procedural Rules NCP 2011, p. 4. See OECD, Guidelines 2011, p. 83, pt. 3, lit. c.

<sup>317</sup> Final Remarks of 22 Dec. 2011 (ECOM), 29 Feb. 2012 (Louis Dreyfuss Commodities Suisse S.A.) and 9 March 2012 (Paul Reinhart AG), <<http://www.seco.admin.ch/themen/00513/00527/02584/02586/index.html?lang=de>> (visited on 4 April 2014).

[191] The question of the composition of the NCP concerns its independence, on the one hand, and the scope of interests represented particularly by social partners, on the other. A majority of the 44 NCPs – among them the Swiss NCP – opted for an administrative model. Notably, a majority of the NCPs that have adopted this model operates through a single department, while nine NCPs feature inter-departmental structures.<sup>318</sup> In almost a sixth of the contact points, social partners are also included in the structure, in addition to the various administrative entities.

[192] Recently, Nordic states in particular, tend to open the composition of their NCPs further to foster independence, such as the Finnish NCP, which involves NGOs. The Swedish NCP operates with a three-party structure, consisting of union representatives, business representatives, and different administrative entities, including the Labor Ministry. The Danish NCP features a similar system.<sup>319</sup> In March 2011, Norway redesigned its NCP to consist of four independent experts who are elected by the Foreign and the Trade Ministry based on recommendations of trade associations, unions, and a group of environmental and development organizations.<sup>320</sup> The Netherlands is pursuing a similar direction: since 2007, the Dutch NCP is composed of four independent corporate responsibility experts, and four consultants from the administration, all of who, are from different ministries. While the body is formally affiliated with the Ministry of Economy, it nevertheless operates independently. This system was chosen to strengthen the legitimacy and independence of the NCP, and to avoid internal conflicts of interest in the administration.<sup>321</sup>

[193] The British NCP was also restructured in 2007. Currently, instead of only one, two departments manage it: the Department for International Development, and the Department of Business, Innovation and Skills. In addition, a Steering Committee that consists of representatives of various interest groups was created to monitor the effectiveness of the NCP and its compliance with the procedural rules, and to support the implementation and promotion of the Guidelines. If a party wants to assert procedural violations, it can file a complaint to the Steering Committee. Notably, the Steering Committee meets at least four times a year, and the meeting minutes are normally published.<sup>322</sup>

[194] The manner by which NCPs assess specific cases is as different and varied as their structures and composition. While many states, including Switzerland, focus on mediation and communicate sparingly regarding possible violations, and instead, publish recommendations for the future,<sup>323</sup> various contact points initiate investigations in cases where attempts at mediation failed, in order to establish whether the company concerned did, in fact, violate the guidelines.<sup>324</sup>

<sup>318</sup> The numbers are based on the data obtained from the *Trade Union Advisory Committee* of the OECD and a comparison between the various NCP websites, as far as they are available. See: <<http://www.tuacoecdmguidelines.org/contact-points.asp>> (visited on 4 April 2014).

<sup>319</sup> Ibid. (visited on 4 April 2014).

<sup>320</sup> For more information see the official website of the Norwegian NCP: <[http://www.regjeringen.no/en/sub/styrrer-rad-utvalg/ncp\\_norway/ncp\\_norway.html?id=669910](http://www.regjeringen.no/en/sub/styrrer-rad-utvalg/ncp_norway/ncp_norway.html?id=669910)> (visited on 4 April 2014).

<sup>321</sup> For more information see: <<http://www.tuacoecdmguidelines.org/companydetails3.asp?organisationID=22902>> (visited on 4 April 2014); <<http://www.oecdguidelines.nl/ncp/organisation/>> (visited on 4 April 2014).

<sup>322</sup> The new structure, in particular the newly introduced possibility to file a complaint to the Steering Committee, is welcomed by the NGOs; See e.g. OECD Watch, Complaint Procedure, p. 7.

<sup>323</sup> See SCHNEIDER/SIEGENTHALER, p. 66.

<sup>324</sup> The states, where the NCP investigates whether a violation of the guidelines occurred, in addition to the Nordic countries and the United Kingdom include Belgium, Brazil, Germany, France, Italy, Austria and Mexico.

A published report may have an impact similar to a ruling if the report contains a statement on whether and to what extent the Guidelines were violated.<sup>325</sup>

[195] The various NCPs also gather information on the allegations in a submission through different means. For instance, not all contact points allow for visits to the host country, should it be necessary and the state concerned authorizes it. The circumstances of the alleged violations or additional relevant facts that occurred in other states may also be established through cooperation with embassies or other entities on site. The possibility of gathering sufficient information on the facts for a legitimate and fair procedure depends on whether the NCP is sufficiently equipped with financial and human resources.

[196] Finally, the way NCPs manage the difficult balancing act between requests for more transparency and the legitimate interests of the parties in keeping sensitive data and business information confidential is different from entity to entity. For example, while the initial assessment is published in the United Kingdom, it is kept confidential in Switzerland.

#### 2.2.4. Challenges and potentials of the NCP

[197] States are faced with different challenges in the creation and operation of the NCP, and must in part take difficult policy decisions. One of the greatest difficulties lies in the fact that the interpretation of the Guidelines is not always clear, and that neither the parties nor the contact point assessing the case know how to determine the degree of compliance that must be set for the corresponding standards. Furthermore, the flexibility in the composition of the NCP leaves the participating states with a wide room for manoeuvre. The criteria on the effectiveness of extra-judicial grievance mechanisms in the UN Guiding Principles may help in finding a suitable form and structure for the entity.

[198] In Switzerland, the NGOs are mostly advocating a stronger role for the NCP. However, this requires an analysis of the available legal remedies and their relation to the NCP. It is not surprising that no uniform answer has yet been found on the institutional composition and investigative powers of the NCP within the OECD framework. Nevertheless, it can be expected that the recent increase of complaints filed with the NCP will continue, and that a more in-depth discussion on the role of the NCP will become inevitable. Moreover, there is an ongoing discussion and a voluntary peer review system among NCPs taking place. The results of this process could lead to the assimilation of the national models in the medium term.

### 2.3. Non-governmental Grievance Mechanisms

[199] As articulated in the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises, it is in the responsibility of the corporations to respect human rights and fight against possible adverse impacts.<sup>326</sup> Corporations need procedural facilities and processes that allow them to become aware of possible problem areas, determine the extent to which unintended human rights infringements can be prevented, ensure the necessary transparency with regard to the conformity of their business activities and relationships in their entire value chain to human rights, avert existing and prevent latent infringements. In this context, the UN Guiding Principles

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<sup>325</sup> See e.g. NCP Norway, Final Report FIOH v. Intex 2011.

<sup>326</sup> HRC, UN Guiding Principles, Guiding Principles 11 and 13.

and the OECD Guidelines endorse the concept of due diligence. To comply with their obligation of exercising due care, corporations have to install procedures for identifying and managing problem areas. These procedures should serve to determine, prevent or mitigate actual and potential adverse impacts arising from the company's activities. Moreover, they set out the duties of the corporations to report on the measures they have taken to address relevant impacts.<sup>327</sup> Companies are encouraged to engage with human rights experts and consult with affected groups.<sup>328</sup>

[200] Additionally, companies have to install procedures that allow for reparation of human rights violations.<sup>329</sup> States are encouraged to support the creation of extra-judicial grievance mechanisms for corporate human rights infringements.<sup>330</sup> These extra-judicial grievance mechanisms should comply with the criteria defined in Guiding Principle 31. The development of corporate grievance mechanisms is also recommended for practical reasons because they may help prevent judicial actions or aggressive campaigns against the corporation. Thus, the risk of costs is not only decreased for the plaintiffs, but also for the company. Problems can be identified and eliminated in this manner before they escalate. An effective grievance mechanism is therefore an important element of the corporate responsibility to respect human rights.<sup>331</sup>

[201] These mechanisms may include a hotline, information services, or mediation; they may be operated in collaboration with other enterprises or entirely outsourced. The important part is that – regardless of the form of the mechanisms – it satisfies the criteria defined in Guiding Principle 31. This includes the requirement that the grievance mechanisms are presented and explained to the concerned groups in a manner that they understand.<sup>332</sup> If corporations directly operate the grievance procedures, it is important that they are based on dialogue and mediation, and that they involve representatives of the groups concerned. Significantly, these extra-judicial grievance mechanisms must not compromise aggrieved persons' option to file a case in court.<sup>333</sup> If corporate behavior is punishable under criminal law or if the state is involved, the corporate recourse is insufficient and a judicial process is necessary.

[202] Examples of internal grievance mechanisms for companies are found particularly in areas such as sexual harassment and other forms of abuse of power. Various Swiss companies are trying to enforce the protection of their employees from infringements by establishing corporate codes of conduct, creating helplines for victims and internal grievance mechanisms.<sup>334</sup>

[203] In addition to the actual grievance procedure, the subsequent analysis relating to the compliance with conventions and decisions, the so-called *follow-up*, is important. This analysis may be performed by a committee specifically established for this purpose or a similar monitoring body that reports to the management, the human resources department, and other authorities involved.

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<sup>327</sup> Ibid., Guiding Principles 15 lit. b and 17; OECD, Guidelines 2011, p. 27, pt. 14.

<sup>328</sup> HRC, UN Guiding Principles, Guiding Principle 18.

<sup>329</sup> Ibid., Guiding Principles 15 lit. c and 22.

<sup>330</sup> Ibid., Guiding Principle 28.

<sup>331</sup> See HRC, Ruggie Framework 2008, para. 93.

<sup>332</sup> This also, if the persons concerned are restricted by their reading or writing abilities for example.

<sup>333</sup> See HRC, Ruggie Framework 2008, para. 95.

<sup>334</sup> See e.g. the regulation on the "Protection of Sexual Integrity in the Workplace" (ABB Switzerland); brochure Sexual Harassment and Abuse of Authority in the Workplace (Novartis); Regulation on Mobbing and Sexual Harassment in the Workplace (SRG SSR idée suisse); all documents can be downloaded at: <<http://www.ebg.admin.ch/themen/00008/00074/00209/00211/index.html?lang=de>> (visited on 4 April 2014).

#### 2.4. Assessment

[204] National Contact Points can play an important role as extra-judicial grievance mechanisms for the implementation of human rights in economic areas. Through its own NCP, Switzerland provides a dispute resolution platform that contributes to the solution of problems arising from the implementation of the OECD Guidelines. In doing so, it places the interests of the parties involved, instead of the legal positions, in the centre of the process. The model that Switzerland has adopted for its NCP mostly corresponds to the ones chosen by the other 43 participating states under the OECD Guidelines. With the revision of the NCP and the creation of an advisory committee in which representatives of civil society are also members, it has now improved the active involvement of the stakeholders concerned.

# HUMAN RIGHTS-SENSITIVE AREAS IN THE LABOUR MARKET

## I. INTRODUCTION

### 1. Human Rights and Labour Market

[205] This chapter addresses the human rights-sensitive areas of the labour market. The labour market, which is understood here in a broad sense, is of great practical importance for most people of working age, be it in their role as employees, employers, as job or apprenticeship seekers. In addition to private parties, the state in its role as employer is also an actor on the labour market; at the same time, it is responsible for ensuring that labour law requirements are respected and enforced.

[206] One of the special aspects of the labour market lies in the mostly asymmetric power relations between employers and employees. This constellation may lead to the accentuation of human rights-relevant issues in the labour market.

[207] As a small open economy, Switzerland relies on foreign workers.<sup>335</sup> Working conditions and questions relating to human rights concern both citizens and foreign workers employed in Switzerland. Due to the importance of the labour market and the unequal distribution of roles of the parties involved, there exists a large body of rules and regulations on both the national and international level, and Switzerland has entered into a number of these commitments.

[208] Overall, Swiss labour law largely succeeds in finding satisfactory answers to legal questions in human rights-sensitive areas of the labour market. Nevertheless, a number of cases relevant to human rights have repeatedly come to light, to which labour law provisions provides only unsatisfactory answers, if they have answers at all. More information on this can be found in a series of social science investigations on the subject that were carried out in recent years.<sup>336</sup>

[209] Various human rights have a direct link to the labour market. Thus, in addition to SEC rights such as the right to paid employment, equal pay for work of equal value, children's rights<sup>337</sup> to education (training) and safe working conditions, the prohibition against discrimination is of central significance. Types of discrimination in the legal sense – understood as a qualified type of unequal treatment on the basis of a characteristic shunned by law – may arise in various areas of the labour market. An overview of where and what type of discriminations can arise in the labour market, shows the following tri-section:<sup>338</sup>

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<sup>335</sup> See ILO Working Paper 1991, p. 31-36.

<sup>336</sup> See e.g. EGGER/BAUER/KÜNZI, *passim*; FCF, Integration and Work 2003; URS HAEBERLIN/CHRISTIAN IMDORF/WINFRIED KRONIG, Inequality of Opportunites in the Search for an Apprenticeship. The influence of schooling, origin and gender, Bern among others 2004; ROSITA FIBBI/BÜLENT KAYA/ÉTIENNE FIGUET, Le passeport ou le diplôme? Etude des discriminations à l'embauche des jeunes issus de la migration, Neuchâtel 2003.

<sup>337</sup> See UNICEF et al., Children's Rights and Business Principles 2012.

<sup>338</sup> See with regard to this trisection, instead of many others EGGER/BAUER/KÜNZI, p. 14 ff.

- (1) “Before the market”, *i.e.*, before employment, for example, prerequisites for employment relating to school education, language skills, diploma recognition or, for foreign job seekers, residence status;
- (2) at the “threshold to the labour market”, such as finding an apprenticeship position, as well as the transition from education to employment in general;
- (3) “in the labour market” itself, that is, when employers hire and employ job seekers, as well as protecting employees and securing their remuneration.

[210] There is a direct link – at least in the assessment of the Federal Council – between human rights risk areas in the labour market and Switzerland’s integration efforts. Apart from integration requirements stipulated in the Foreigners’ Act (respect for the federal constitution and public safety and order, willingness to be educated and employed, knowledge of one of the national languages), the national integration policy is based on diversified development policies. The latter primarily connects existing regulatory structures such as schools, professional education, and labour market structures, which are areas that are significant from an integration policy perspective.<sup>339</sup>

[211] In this chapter, we will first analyse the extent to which human rights-sensitive areas of the labour market can be attributed tangible – thus codifiable – human rights relevance. This will be demonstrated through a presentation of existing relevant international obligations, as well as their realization in Switzerland (in the following para. 215ff. International Requirements and their Normative Implementation in Switzerland).

[212] As a second step, human rights problem areas specific to the labour market in Switzerland will be analysed in more detail based on the relevant recommendations of the UN supervisory bodies. These recommendations focus on discrimination, as well as its associated additional human rights implications (in the following para. 242 Recommendations of International Supervisory Bodies and the Situation in Switzerland).

[213] Thereafter, existing problem areas are analysed through a presentation of possible options for action and corresponding remedies (in the following para. 265ff. Existing Problem Areas and Options for Action). The coherence of the recommendations will be briefly examined (in the following para. 282ff. Coherence in the Recommendations of the International Supervisory Bodies) and the chapter Conclusion and Outlook (in the following pt. 285ff.) will close with the summary of the findings.

## 2. Integration into the Framework of the UN Special Representative for Business and Human Rights

[214] Through very close links to private actors, the present topic presents many points of contact with the work of the UN Special Representative for Business and Human Rights. As already mentioned in the Introduction, the concept of the protection of human rights in the economic field – protect, respect and remedy – that was developed by the UN Special Representative and adopted by the Human Rights Council, is based on the traditional obligations of states to respect, protect and fulfill human rights. The Framework<sup>340</sup> and the UN Guiding Principles<sup>341</sup> are relevant

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<sup>339</sup> Federal Council, Report Integration Policies 2010, p. 21 ff.

<sup>340</sup> HRC, Ruggie Framework 2008.

<sup>341</sup> HRC, UN Guiding Principles 2011.

to the recommendations on human rights-sensitive areas in the labour market, since they target the protection of human rights in an economic context, such as the workplace. They substantiate, among other things, the government's responsibility to protect human rights from infringements by private parties (duty to protect).

## II. INTERNATIONAL REQUIREMENTS AND THEIR NORMATIVE IMPLEMENTATION IN SWITZERLAND

### 1. International and Regional Level

[215] The following universal (in the case of the ECHR, regional) provisions are of particular significance to Switzerland and its labour market. On an international level, the provisions of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, as well as the instruments that Switzerland ratified under the auspices of the ILO are especially relevant. On a regional level, the ECHR plays an important role.

#### 1.1. International Covenant on Economic Social and Cultural Rights (ICESCR)

[216] Art. 6 ICESCR is primarily applicable to the regulation of the labour market. It stipulates the right to work, and in its second paragraph, instructs the State Parties to take all necessary measures to achieve the full realization of this right. Apart from the other provisions of the ICESCR, recommendations by the Committee on ESC Rights also discuss the right to education under Art. 14 ICESCR.<sup>342</sup> The Federal Supreme Court's opinion<sup>343</sup> that with a few exceptions, the provisions in Art. 6-15 ICESCR are not directly applicable, has been met with criticism.<sup>344</sup> The Committee on ESC Rights criticised this restrictive approach in its 2010 report on Switzerland, and stated that in particular, Art. 7 lit. a (i) (equal remuneration and non-discrimination in the employment relationship) could be brought to justice.<sup>345</sup> Furthermore, it must be remembered that the lack of justiciability, specifically with regard to Art. 6 ICESCR, does not mean that it is not legally binding. Switzerland entered into a commitment under international law to realize the rights contained in the ICESCR when it ratified the Covenant. While these rights are not enforceable before the courts, they nevertheless have to be realized through the legislative process or through administrative measures. The Federal Council, however, holds the view that social rights only have a programmatic character in Switzerland.<sup>346</sup>

<sup>342</sup> See more on the recommendations of the Committee on ESC Rights below pt. 242 ff.

<sup>343</sup> BGE 121 V 229, E. 3a, p. 232.

<sup>344</sup> CHRISTINE KAUFMANN, Soziale Grundrechte, in: Giovanni Biaggini/Thomas Gächter/Regina Kiener (eds.), Staatsrecht, Zurich 2011, § 41, pt. 18; KÄLIN/KÜNZLI, p. 119; DANIEL THÜRER, Verfassungsrechtlicher und völkerrechtlicher Status der Grundrechte, in: Detlef Merten/Hans-Jürgen Papier (eds.), Jörg Paul Müller/Daniel Thürer (Koord.), Handbuch der Grundrechte in Deutschland und Europa, Band VII/2: Grundrechte in der Schweiz und in Liechtenstein, Zurich et.al. 2007, p. 31 ff., pt. 43.

<sup>345</sup> CESCR, Concluding Observations Switzerland 2010, pt. 5.

<sup>346</sup> Federal Council, Statement on Motion 09.3279 (2009).

[217] Art. 8 ICESCR, which stipulates the rights involving participation in trade unions, is also relevant in the present context.<sup>347</sup>

## 1.2. International Covenant on Civil and Political Rights (ICCPR)

[218] While Art. 26 ICCPR stipulates a universal prohibition of discrimination, Switzerland's reservation to this provision limits its effect from a comprehensive prohibition to only the safeguards specified in the Covenant. Consequently, Switzerland's obligations under the ICCPR do not include a universal, independent obligation to promote equal opportunity and prevent discrimination.

## 1.3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

[219] Art. 5 lit. e (i) of the ICERD provides for the right to work or the free choice of employment. Art. 2 para. 1 lit. a ICERD prohibits any kind of behavior that is racially discriminating. Moreover, Art. 2 para. 1 lit. b ICERD obliges states to take measures to prevent racially discriminatory behaviour of private actors. The practical application by the Committee on the Elimination of Racial Discrimination (CERD) of these provisions, as well as some of its statements, indicate the extension of this obligation to corporations. Thus, for instance, the CERD invited the Canadian government in 2007 and again in 2012, to take appropriate legislative and administrative steps to protect indigenous people from negative impacts on their human rights caused by corporations, and to find possibilities for holding corporations liable for human rights infringements.<sup>348</sup> Switzerland made a reservation to Art. 2 para. 1 lit. a ICERD as it ratified the Convention on the ground that Switzerland wants to regulate the access of foreign nationals to its labour market.<sup>349</sup> Moreover, when the ICERD was ratified, the Federal Council was of the opinion that no active measures against racially discriminatory behavior of private persons was necessary, since Swiss private laws (namely Art.28 SCC, Art.328 CO, Art.2 SCC) were sufficient.<sup>350</sup>

## 1.4. Convention on the Elimination of Discrimination against Women (CEDAW)

[220] The CEDAW stipulates a universal prohibition of discrimination against women. Apart from the corresponding legislative measures referred to in Art. 2 lit. b, Art. 2 lit. e CEDAW also explicitly obliges Switzerland to take all appropriate legislative measures to eliminate discrimination against women by any person, organization or enterprise in all areas.

## 1.5. International Labour Organisation (ILO)

[221] Switzerland has ratified numerous International Labour Organisation (ILO) conventions, including its eight Core Conventions. These contain four labour rights that, due to their human rights content, are defined as fundamental labour rights, and were laid down in the universally

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<sup>347</sup> See also below para. 269.

<sup>348</sup> CERD, Concluding Observations Canada 2007, pt. 17, CERD, Concluding Observations Canada 2012, pt. 14.

<sup>349</sup> With regard to Switzerland's reservations see: <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec)> (visited on 4 April 2014).

<sup>350</sup> Federal Council, Message Accession CERD 1992, p. 291.

applicable Declaration on Fundamental Principles and Rights at Work that was adopted in 1998. The Declaration protects from forced labour, exploitative child labour and discrimination in the work place and guarantees the freedom of association and the related right to collective bargaining.<sup>351</sup>

[222] Convention No. 111 on Discrimination in Respect of Employment and Occupation is one of the core conventions. It was ratified by Switzerland on 13 July 1961, and contains a legislative mandate for the realization of equal opportunity in employment and occupation.<sup>352</sup> Convention No. 111 covers both gender specific and racial discrimination made.<sup>353</sup> It is important that the Convention comprises not only direct, but also indirect discrimination of immigrants, which means that *intent* to discriminate is unnecessary. A survey on apprenticeship positions carried out by the Swiss Association of Commercial Employees revealed the following example of indirect discrimination: it showed that in an application process for apprenticeships where the name of the applicant has to be specified from the beginning, apprenticeship seekers whose names may be associated with a Balkan state are *de facto* disadvantaged.<sup>354</sup>

[223] The ILO strengthened its efforts to ensure the enforcement of core labour rights with the launch of the *Decent Work Agenda* (DWA) in 1999. The DWA set four objectives: create jobs, guarantee labour rights, improve social protection, and promote social dialogue. The second objective, guaranteeing of labour rights, includes the obligation of the 185 Member States to ensure the realization of working conditions that are free of discrimination.<sup>355</sup>

[224] For a long time Switzerland has been advocating a coherent implementation of human rights on different levels, most recently with a draft resolution on the coherence of multilateral systems, which it submitted at the International Labour Conference in June 2011.<sup>356</sup> Although the draft was unsuccessful, Switzerland was still able to initiate a discussion on this important subject.

## 1.6. European Human Rights Convention (ECHR)

[225] Art. 14 ECHR stipulates a ban on discrimination. Notably, however, this prohibition only relates to the rights guaranteed by the ECHR, as is the case for Switzerland with regard to the ICESCR. While the ECHR does not provide for a universal proscription on discrimination, Protocol No. 12 to the ECHR does provide for such a universal ban. However, Switzerland has not ratified this protocol.

## 1.7. Soft Law

[226] Switzerland has participated in elaborating soft law instruments in various bodies. Its active support of both the Ruggie Framework adopted in 2008 as well as the UN Guiding Principles on

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<sup>351</sup> See also above fn. 42.

<sup>352</sup> Art. 2 Convention No. 111 ILO (1958).

<sup>353</sup> Art. 1 para. 1 lit. a Convention No. 111; STEFAN BRUPBACHER, *Fundamentale Arbeitsnormen der Internationalen Arbeitsorganisation*, Diss. Bern 2002, p. 16.

<sup>354</sup> See also below para. 257.

<sup>355</sup> GARY P. FIELDS, *Decent Work and Development Policies*, in: *International Labour Review*, 142:2, p. 239-262, June 2003, p. 242.

<sup>356</sup> ILO, *Draft Resolution 2011*.

Business and Human Rights adopted by the Human Rights Council in June 2011 is particularly noteworthy.<sup>357</sup> Moreover, Switzerland collaborated in the revision of the OECD Guidelines for Multinational Enterprises.

## 2. Overview of Domestic Regulations

### 2.1. General Conditions for Human Rights Actors on the Labour Market (*state duty to protect*)

[227] Switzerland's obligations under international law are primarily implemented through the Federal Constitution. The requirement for universal equal treatment and the prohibition against discrimination defined in Art. 8 FC, contain elements of the duty under international law to protect equal treatment and opportunity in the workplace in Swiss constitutional law. Art. 8 para. 3 FC is particularly significant for being the only provision in the Federal Constitution with direct third-party effect.<sup>358</sup> Thus, a general requirement for equal treatment and the proscription of discrimination based on Art. 8 FC is applicable for actions of the state.

[228] Private parties are bound only in certain cases by the requirement for equal treatment and the ban on discrimination. In Switzerland, there is neither a universal right to equal treatment by private parties nor a comprehensive constitutional protection against discrimination in the private sector.<sup>359</sup> Parliament established the legal basis for the protection against discrimination based on gender with the Gender Equality Act of 1996,<sup>360</sup> which not only covers acts of the state, but also those of individual private parties. However, there is still a lack of comparable provisions for private actors on the labour market for violations of the discrimination ban on the basis of other sensitive criteria.

[229] Art. 35 para. 3 FC stipulates that fundamental rights – where appropriate – also apply to relationships among private persons. The realization of the rights to equality, equal opportunity, and protection from discrimination in the workplace among private persons certainly seems appropriate. In any case, there is a need to clarify the resulting state of tension between these rights, and the right to contractual autonomy, which is also protected under the constitution.<sup>361</sup>

[230] The prohibition against discrimination under international and constitutional law, and the realization of equal opportunity are directly applicable in administrative law. The Federal Commission against Racism (FCR) criticized the near absence of explicit anti-discrimination clauses in administrative laws.<sup>362</sup> In this context, one must distinguish between legal obligations and the promotion of awareness by the administrative authorities concerned: from a legal standpoint, the constitutional ban on discrimination is applicable to all activities of the state, regardless of whether or not it is explicitly mentioned in an administrative decree. It is not part of

<sup>357</sup> See above para. 38 for a detailed description of soft law.

<sup>358</sup> Art. 8 para. 3 sentence 3: „Men and women have the right to equal pay for work of equal value.“; see also para. 61 above on art. 35 FC.

<sup>359</sup> In more detail CHRISTINA HAUSAMMANN, *Instrumente gegen Diskriminierung im schweizerischen Recht - ein Überblick*, Bern 2008.

<sup>360</sup> Federal Act of 24 March 1995 on Gender Equality (SR 151.1).

<sup>361</sup> See ANNE PETERS, *Diskriminierungsverbote*, in: Detlef Merten/Hans-Jürgen Papier (eds.), JÖRG PAUL MÜLLER/DANIEL THÜRER (Koord.), *Handbuch der Grundrechte in Deutschland und Europa*, Band VII/2: *Grundrechte in der Schweiz und in Liechtenstein*, Zurich et al. 2007, p. 255 ff. pt. 91.

<sup>362</sup> NAGUIB, p. 38.

the Swiss legislative procedure to integrate all fundamental and human rights in every administrative decree. The explicit reference to the discrimination ban in selected decrees may therefore even be problematic, since it may create the impression that without this reference the discrimination ban does *e contrario* not apply. However, this legal issue should be distinguished from the need to promote awareness in the administration with regard to addressing discrimination issues; awareness promotion can be supported more efficiently with internal and external education and trainings, or the substantiation of measures for the prevention of discrimination in functional specifications, staff handbooks, and other means.

[231] As regards the state's supervision over private entities – for instance, the Federal Office of Private Insurance, which analyzed whether nationality is an improper criterion for calculating insurance premiums – Art. 35 para. 3 FC provides that, the state has the duty to ensure the full effect of the prohibition against discrimination among private parties. Just like in private law, the lack of explicit incorporation of the ban on discrimination in administrative laws leads to varying interpretations.<sup>363</sup>

[232] In June 2012, the Federal Department of Finance issued internal recommendations aligned with the ILO Conventions for public procurement procedures. According to recommendations, the public authorities responsible would have to request compliance with ILO Conventions from their suppliers.<sup>364</sup>

[233] Finally, the personnel policy of the Federal Personnel Office (FPO) pursues the objectives of *Diversity Management* and the realization of equal opportunity.<sup>365</sup>

## 2.2. General Conditions for Employers in the Private Sector (*corporate responsibility to respect*)

[234] Specific duties for private parties in Switzerland arise from civil and criminal law provisions regarding the protection of employees and job seekers to ensure the realization of equal opportunity and the fight against discrimination.

[235] To a certain extent private law provisions (e.g., Art. 2 para. 2 SCC – Protection of Good Faith) afford protection from discrimination. Courts can interpret contractual law provisions in such a manner that they may also apply to the pre-contractual relationship (e.g., Art. 328 SCO).<sup>366</sup> According to a decision of the Tribunal de Prud'hommes de l'arrondissement de Lausanne, Art. 328 SCO obliges an employer to protect the privacy of individuals even in the application process. As such, the employer must respect the privacy of the job seeker during the application process. It would be unfair if a violation of this obligation could not be brought before a court due to the absence of a written employment contract.<sup>367</sup> Victims of discrimination have concrete legal means of protection under the GEA, particularly under Art. 7 GEA (associations' right of appeal) and Art. 6 (alleviation of the burden of proof). Specific legal claims are included in Arts. 5 and 8 ff.

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<sup>363</sup> Ibid., p. 39.

<sup>364</sup> FDF, Recommendations 2012, p. 10 ff. See above para. 199 ff.

<sup>365</sup> Accessible at <<http://www.epa.admin.ch/themen/personalpolitik/00264/index.html?lang=de>> (visited on 4 April 2014).

<sup>366</sup> With regard to the duties to protect arising from public law provisions: BGE 132 III 257.

<sup>367</sup> Tribunal de Prud'homme de l'arrondissement de Lausanne, Arrêt du 10 Octobre 2005 (T304.021563), as well as labour court Zurich, 2nd division, matter no. AN 050401/U 1 of 13 January 2006. In the first case the plaintiff was not employed due to the colour of her skin, in the second due to her origin.

[236] Art. 336c para. 1 lit. c SCO forbids the termination of employment during pregnancy, and 16 weeks after the date of confinement; it does not matter whether or not the mother is fit to work.<sup>368</sup> Moreover, according to Art. 336c para. 2 SCO, the termination of employment during the freeze period is null and void, while terminations issued before the period will be extended by the freeze period.<sup>369</sup> Under these provisions, the SCO offers some measure of protection against discrimination against pregnant women.

[237] A comparable protection is contained in Art. 10 para. 1 GEA, which declares the termination of employment null and void if it is issued after an equal treatment complaint. In this context, Art. 335 para. 2 SCO stipulates that a termination has to be justified upon request, and both the employee and the employer have the right to a justification.<sup>370</sup> Such justification is indispensable in determining whether a termination is abusive.<sup>371</sup>

### 2.3. Importance of Private Initiatives

[238] In addition to legal protection mechanisms, the corporate responsibility to respect human rights is also accompanied by private initiatives. Various initiatives launched, or supported by corporations in Switzerland are aimed at ensuring protection against human rights infringements in the workplace by private actors. Switzerland directly supports a number of such initiatives, and it participates in the implementation of the corporate responsibility to respect (Section II UN Guiding Principles), which stipulates that corporations must ensure comprehensive due diligence with regard to human rights in all business activities. The protection against discrimination and the guarantee of equal opportunity when accessing the labour market is not only in the interest of potential employees, but also of companies. Employment that is free of discrimination promotes the optimal deployment of competencies and creates a pleasant working atmosphere.<sup>372</sup>

[239] The United Nations Global Compact and the International Code of Conduct for Private Security Service Providers (ICoC) contain provisions for corporations that are specifically relevant for Switzerland. In its Principle 6, the Global Compact stipulates the elimination of discrimination in respect of employment and occupation.<sup>373</sup> Almost 70 Swiss corporations are committed to uphold the provisions of the Global Compact.<sup>374</sup> A fundamental non-discrimination clause is also incorporated in Art. 42 of the ICoC, which seven Swiss corporations have joined to date.<sup>375</sup> Switzerland played a special role in the creation of the ICoC, since its text was drafted in cooperation between the FDFA and a number of private security service providers.<sup>376</sup>

<sup>368</sup> STREIFF/VON KAENEL, art. 336c, p. 726 pt. 9.

<sup>369</sup> Ibid., art. 336c, p. 727 pt. 10.

<sup>370</sup> Ibid., art. 335, p. 605 pt. 13.

<sup>371</sup> BGE 121 III 60, p. 61. See in particular deliberation 3b.

<sup>372</sup> CAPLAZI/NAGUIB, pt. 69.

<sup>373</sup> See: <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle6.html>> (visited on 4 April 2014).

<sup>374</sup> Business Participants from Switzerland: <[http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&country\[\]=34&joined\\_after=&joined\\_before=&business\\_type=2&sector\\_id=all&listing\\_status\\_id=all&cop\\_status=all&organization\\_type\\_id=&commit=Search](http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&country[]=34&joined_after=&joined_before=&business_type=2&sector_id=all&listing_status_id=all&cop_status=all&organization_type_id=&commit=Search)> (visited on 4 April 2014).

<sup>375</sup> A current list of signatory companies is regularly published at: <<http://www.icoc-psp.org/ICoCSignatoryCompanies.html>> (visited on 4 April 2014).

<sup>376</sup> FDFA, Fact Sheet ICoC 2011.

[240] Several steps have also been taken to improve knowledge of the legal bases relating to protection against discrimination: with the creation of the first national internet platform, “Reconciliation of Work and Family Life: Measures Adopted by Cantons and Municipalities”, the SECO and the Federal Social Insurance Office (FSIO) have created an important tool for practitioners for the realization of equal opportunity in the workplace, particularly for mothers.<sup>377</sup> Additionally, the Federal Commission for Women's Issues drafted a Guide to CEDAW to facilitate access to information on the CEDAW for legal practitioners.<sup>378</sup>

[241] The Federal Supreme Court does not *a priori* rule out the application of soft law (for example, corporate or associations' internal regulations), particularly not in cases where soft law substantiates the existing rights of employees.<sup>379</sup> In this context, it is worth mentioning that in 2009<sup>380</sup>, UBS, in collaboration with AIDS-AID Switzerland, implemented a workplace regulation in the form of two policy statements regarding protection against discrimination in case of disabilities or chronic illness<sup>381</sup>, and protection against discrimination in case of HIV/AIDS<sup>382</sup>. There are also other Swiss companies actively engaging in the issue of HIV/AIDS in the workplace<sup>383</sup> apart from UBS. Presently, five Swiss enterprises have signed the Women's Empowerment Principles supported by the Federal Administration, according to which, corporations must align their continued efforts to obtain a corporate culture that promotes equality.<sup>384</sup>

### 3. Recommendations of International Supervisory Bodies

#### 3.1. Recommendations by the Committee for Economic, Social and Cultural Rights

[242] The recommendation of the Committee for ESC rights relevant to this chapter is as follows:

*Le Comité recommande à l'État partie de prendre des mesures concrètes pour lutter contre le chômage parmi les groupes vulnérables de la population, promouvoir leur intégration dans le marché du travail et chercher à développer la formation professionnelle et l'apprentissage parmi les jeunes d'origine étrangère.*<sup>385</sup>

<sup>377</sup> See: <<http://www.berufundfamilie.admin.ch>> (visited on 3 June 2013). Another less extensive “Platform Family Policy” was already launched by the Swiss Employers Association in 2001.

<sup>378</sup> Accessible at <<http://www.ekf.admin.ch/dokumentation/00596/index.html?lang=de>> (visited on 4 April 2014).

<sup>379</sup> BGE 136 IV 97, p. 112. In the concrete case the Federal Supreme Court referred to medical-ethical guidelines when practicing medicine on incarcerated persons, published by the Swiss Academy of Medical Sciences.

<sup>380</sup> Annual Report AIDS-AID Switzerland, 2009, p. 13.

<sup>381</sup> Accessible at <[http://www.workpositive.ch/images/stories/74659DP\\_Grundsatzzerklrung\\_Krankheit.pdf](http://www.workpositive.ch/images/stories/74659DP_Grundsatzzerklrung_Krankheit.pdf)> (visited on 4 April 2014)

<sup>382</sup> Accessible at <[http://www.workpositive.ch/images/stories/74660DP\\_Grundsatzzerklrung\\_HIV\\_AIDS.pdf](http://www.workpositive.ch/images/stories/74660DP_Grundsatzzerklrung_HIV_AIDS.pdf)> (visited on 4 April 2014).

<sup>383</sup> See for more information the overview on <<http://www.workpositive.ch/de/engagierte-firmen.html>> (visited on 4 April 2014).

<sup>384</sup> See List of Company Signatories to the CEO Statement of Support for the Women's Empowerment Principles, status at 17 April 2012, accessible at: <[http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/WEPS\\_CEO\\_Statement\\_of\\_Support\\_Signatories.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/WEPS_CEO_Statement_of_Support_Signatories.pdf)> (visited on 4 April 2014).

<sup>385</sup> CESCR, Concluding Observations Switzerland 2010, pt. 9.

[243] Essentially, the recommendation contains three elements, which are considered together due to their close thematic ties. These are:

- Combating unemployment for groups of people who are particularly vulnerable in this respect;
- The promotion of their integration in the labour market;
- The further development of professional training opportunities and apprenticeship offers for young people of foreign origin.

[244] The term “particularly vulnerable group of people” is substantiated succinctly in the accompanying text: According to the Committee, it particularly refers to immigrants, women and young people of foreign origin.

[245] This recommendation of the Committee for ESC Rights issued in November 2010 is based on Art. 6 of the ICESCR:

*(1) The States Parties recognize the right to work, which includes the right of everyone to the opportunity to gain his/her living by work which he/she freely chooses or accepts, and will take appropriate steps to safeguard this right.*

*(2) The steps to be taken by a State Party to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

[246] In its concluding observations, the Committee was “concerned about the high unemployment rates among particular groups such as migrants, women, and young people, especially those of foreign origin.” Moreover, it determined that the measures Switzerland had taken in this context have “apparently been inadequate”.<sup>386</sup>

[247] In the hearings on Switzerland’s State Party Report held in November 2010, the Committee expressed some criticisms with regard to the issue of implementation, such as the finding that young people of foreign origin – in light of the fact that they are also frequently disadvantaged when trying to find an apprenticeship position – are often excluded from access to higher education. Questions with regard to the availability of the relevant statistical data were also raised.<sup>387</sup> Other queries related to the implementation of the measures to fight youth unemployment<sup>388</sup> that Switzerland announced in the State Report it submitted to the Committee on ESC Rights (E/C.12/CHE/2-3)<sup>389</sup>. The Committee requested Switzerland to submit detailed information on its implementation measures as early as 2009.<sup>390</sup>

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<sup>386</sup> Ibid., pt. 9.

<sup>387</sup> CESCR, Summary Record 39th Meeting 2010, pt. 29.

<sup>388</sup> CESCR, Summary Record 38th Meeting 2010, pt. 4.

<sup>389</sup> CESCR, State Party Report Switzerland 2008, pt. 121 f.

<sup>390</sup> CESCR, List of Issues 2009, pt. 11, 31.

### 3.2. Recommendation of the Human Rights Council in the Scope of the Universal Periodic Review (UPR)

[248] The relevant recommendation of the Human Rights Council from the first review cycle states as follows:

*Renforcer les actions menées pour garantir l'égalité des chances sur le marché du travail, en particulier aux femmes des groupes minoritaires.*<sup>391</sup>

[249] This recommendation exhorts Switzerland to increase its efforts to realize equal opportunities of access to the labour market, where both the state and private actors are active. It gives special focus to the situation of women who belong to minorities.

[250] While the Human Rights Council's recommendation went into the same direction as the one issued by the Committee for ESC Rights, it went further by defining the target group, namely, "women who belong to minorities" in narrower terms than in the Committee's recommendations.

[251] In the course of the second review round, which took place on 29 October 2012 for Switzerland, the Human Rights Council issued a series of recommendations that may be thematically attributed to the labour market. Moreover, during this cycle, six states reiterated some recommendations that were made in 2008, including taking measures against gender inequalities in professional life, particularly in terms of wage inequality and representation in leadership positions.<sup>392</sup> Switzerland accepted these recommendations outright.

[252] Slovakia made other relevant recommendations: adopting measures to reduce gender inequality in the labour market, including the provision of sufficient places for childcare.<sup>393</sup> The Federal Council accepted a recommendation by the Philippines concerning the ratification by Switzerland of the ILO Convention No. 189 on decent work for domestic workers.<sup>394</sup> The ILO adopted this Convention in 2011, and so far, it has been ratified by Uruguay, the Philippines and Mauritius. In its statement regarding the Rytz Motion, the Federal Council pointed out that according to the ILO Constitution, this Convention must be submitted to Parliament, regardless of the findings of the ongoing verification on whether Swiss Law is consistent with this Convention.<sup>395</sup> Finally, Russia recommended that Switzerland take measures to decrease the level of unemployment of migrants; Switzerland accepted this recommendation with an explanatory comment.<sup>396</sup>

<sup>391</sup> HRC, UPR Switzerland 2008, Recommendation 57.19, p. 16.

<sup>392</sup> HRC, UPR Switzerland 2012, Recommendations 122.21-26, p. 16,

<sup>393</sup> Ibid., Recommendation 123.75, p. 22. The Federal Council wanted to await the result of the referendum regarding the Federal Decision on Family Politics of 3 March 2013. The bill was rejected by the majority of cantons.

<sup>394</sup> Ibid., Recommendation 123.6, p. 18.

<sup>395</sup> National Council, Motion 12.3928 (Rytz); Federal Council, Statement on the Motion 12.3928 (2012).

<sup>396</sup> HRC, UPR Switzerland 2012, Recommendation 123.55, p. 21. With the acceptance the Federal Council declared: „Active measures to decrease the level of unemployment of foreign citizens, namely women and young people, have already been taken, for example in the scope of the cantonal integration programs, the poverty reduction strategy and the strategic realignment of the public employment services.“

[253] Just like in 2008, Switzerland once again rejected recommendation 124.1 – ratifying the UN Convention on the Protection of the Rights of All Migrant Workers and Their Families – immediately after the review.<sup>397</sup>

### 3.3. Further Recommendations

[254] A number of partly generally-worded recommendations relates to the area of discrimination, but cannot specifically be attributed to the labour market.<sup>398</sup> Additional criteria targeting a similar direction as the recommendations proffered during the UPR can be derived from at least two more State Party Reports by Switzerland. In the most recent State Party Report it submitted to the Committee for the Elimination of Racial Discrimination, Switzerland gave an account of the situation on education, particularly the discrimination suffered by young people of foreign origin, and announced that it will take measures to address these issues.<sup>399</sup>

[255] Notably, in the State Report relating to the Convention for the Elimination of All Forms of Discrimination against Women, Switzerland affirmed its awareness of the issues concerning the difficult integration of foreign women, also into the working environment.<sup>400</sup>

## 4. Measures Taken in Switzerland with regard to the Recommendations

### 4.1. Measures Already Implemented

[256] In recent years, Switzerland has taken various measures to ensure better protection against discrimination and to improve the opportunities for gender equality in the labour market.

[257] In 2008, the Swiss Association of Commercial Employees carried out a pilot project entitled *Smart Selection*.<sup>401</sup> This project was particularly directed at the issue of discriminating characteristics that may affect apprenticeship placements, such as last names that may indicate that the person is of Balkan origin. The project showed that an application process for apprenticeships where the name of the applicant had to be disclosed from the beginning, in fact disadvantaged apprenticeship seekers with names indicating that the person originates from the Balkan states. In 2007, the Federal Administration did not see any need for legislative action in this regard.<sup>402</sup> This attitude may have to be reconsidered in light of the recommendations for implementation discussed in the previous sections, the UN Guiding Principles and the required government measures for the protection of human rights by private parties therein. In particular, one would have to verify whether there are other means of improving the situation apart from the adoption of legislative measures. A study by the Swiss Forum for Migration and Population Studies (SFM) published in 2011 – commissioned by the Federal Service for Combating Racism

<sup>397</sup> Ibid., Recommendation 124.1, p. 23. Switzerland's rejection must be seen in light of the fact that the convention has so far not been ratified by any industrial or immigration state.

<sup>398</sup> For example recommendation 123.27-29 (Adoption of a comprehensive anti-discrimination legislation, in particular aimed at preventing racial discrimination) and 123.31,38 (Comprehensive strategy or take additional measures to combat discrimination).

<sup>399</sup> CERD, Periodic Reports Switzerland 2005, pt. 331 ff.

<sup>400</sup> CEDAW, Summary Record 894th meeting 2009, pt. 5 and 57.

<sup>401</sup> Final Report accessible at <<http://www.nahtstelle-transition.ch/files/nst8931b.pdf>> (visited on 4 April 2014)

<sup>402</sup> Council of States, Interpellation 07.3265 (Fetz).

and the Office for the Equality of People with Disabilities – analysed the measures for combating unequal treatment in the work environment, particularly in terms of access to job positions.<sup>403</sup> It was found that the most important measures that have been taken so far were in the area of gender equality. In the fight against discrimination based on ethnic origin, only scant empirical findings on Switzerland existed, and hardly any efforts have been undertaken to ensure that the recruitment of persons of foreign origin was not overshadowed by discrimination. The study also determined that employers seemed only marginally aware of this issue.<sup>404</sup>

[258] Also in 2011, the ILO adopted the Convention concerning decent work for domestic workers.<sup>405</sup> It will enter into force in September 2013, a year after a second state, the Philippines, ratified the Convention, thus satisfying the necessary condition for its entry into force. The assessment of the Convention has yet to be finalized in Switzerland, on account of the numerous areas of law affected by this Convention, the necessary consultations with the Cantons, as well as delicate migration and host country policy aspects that need to be considered.<sup>406</sup> In August of the same year, the Federal Council adopted a corresponding Private Household Employees Ordinance (PHV).<sup>407</sup> This Ordinance sets out the conditions that apply to entry into Switzerland, and the residence and working standards for private domestics employed by members of the staff of diplomatic missions, permanent missions, consular posts and international organisations. It takes into account the special need for protection of household employees who are mostly of foreign origin.

#### 4.2. Announced Measures

[259] In November 2011, the Federal Council declared that it was in favor of changes in the legal integration provisions relating to the recommendations of the Committee for ESC Rights and the Human Rights Council. The integration plan that had been elaborated by the Federal Government and the Cantons includes a partial revision of the Foreign Nationals Act (FNA).<sup>408</sup>

[260] The Federal Council adopted the Message on the Revision of the Foreign Nationals Act in March 2013.<sup>409</sup> The planned amendments are an integral part of the integration plan adopted by the Federal Council. The financial resources shall be increased by up to 40 million Swiss Francs and the integration dialogue with all the important partners shall be intensified. Integration agreements shall serve not only as an incentive, but also as obligation for migrants to take steps such as acquiring language skills (Art. 58b Draft-FNA). Moreover, it is planned that employers also contribute to the integration of their foreign employees and their relatives, primarily by

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<sup>403</sup> FSCR, Study Combating Discrimination 2011.

<sup>404</sup> Ibid., p. 54.

<sup>405</sup> Wording of the ILO Domestic Workers Convention: <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_157836.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_157836.pdf)> (visited on 4 April 2014).

<sup>406</sup> See Federal Council, Statement on the Motion 12.3928 (2012).

<sup>407</sup> Ordinance of 6 June 2011 on the conditions of entry, of residence and of working conditions for private domestics employed by persons with privileges, immunity and facilities (SR 192.126).

<sup>408</sup> Press Release of the Federal Department of Justice and Police of 23 November 2011, accessible at <<http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2011/2011-11-232.html>> (visited on 4 April 2014).

<sup>409</sup> Message on the Revision of the Foreign Nationals Act (Integration) of 8 March 2013, BBI 2013 2397.

promoting integration to them.<sup>410</sup> In this context, the Message states that, the integration of employees, as well as their relatives, is to be promoted with targeted measures, and possible discrimination is to be eliminated in the scope of the existing division of powers between the Federal Government and the Cantons.<sup>411</sup>

[261] The integration plan is also incorporated into the Vocational and Professional Education and Training Act (VPETA).<sup>412</sup> It will be complemented with provisions on the promotion of equal opportunity for foreign nationals, in order to emphasize the importance of equal opportunity and integration.<sup>413</sup>

[262] The Unemployment Insurance Act (UIA) will also be amended based on the same template.<sup>414</sup> The amendments will focus on provisions that will improve the collaboration between the implementing authorities of the Asylum and Alien Law and the UIA. These provisions shall be embedded in the principles of measures relating to the labour market (Art. 59 para. 5 Draft-UIA), as well as in clauses on inter-institutional cooperation (Art. 85f para. 1 lit. Draft-UIA). Moreover, unemployed persons will be enabled to improve their capacity to access the labour market through education allowances for completing vocational training, if the vocational training they completed abroad is not recognized in Switzerland (Art. 66a para. 1 lit.c Draft-UIA).

[263] Furthermore, in May 2013, the Federal Council adopted the Message on the Law on Further Education.<sup>415</sup> One of the goals of this law is to grant access to further education to as many people as possible. Moreover, where necessary, equal opportunity shall be improved, for example, for migrants or persons with disabilities.<sup>416</sup> The promotion of core competencies of adults for better integration (reading, writing, mathematical literacy, application of information and communication technologies, and basic knowledge of the most important rights and obligations) shall also be embedded in the Law on Further Education.<sup>417</sup>

[264] In 2008, the Federal Assembly accepted the Barthassat Motion, which had the goal of allowing young *sans-papiers* to complete their apprenticeship.<sup>418</sup> With this, motion the Federal Council was mandated to enable young people without legal status who completed their school education in Switzerland to have access to vocational training. On 1 February 2013, the

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<sup>410</sup> Art. 58c Draft-FNA: „The employers will contribute to the integration of their employees and the family members that followed. They inform them on suitable offers fostering integration and support them in participating in these offers.“

<sup>411</sup> Federal Council, Message Integration (2013), p. 2406.

<sup>412</sup> Vocational and Professional Education and Training Act of 13 December 2002 (SR 412.10).

<sup>413</sup> Federal Council, Message Integration (2013), p. 2403.

<sup>414</sup> FA of 25 June 1982 on the Mandatory Unemployment Insurance and Insolvency Compensation (SR 837). Federal Council, Message Integration (2013), p. 2438 ff.

<sup>415</sup> Message concerning the Federal Act on Further Education of 15 May 2013, BBI 2013 3729.

<sup>416</sup> Art. 8 Draft of the Federal Act on Further Education: With the further education controlled and supported by them, the Federal Government and Cantons strive to in particular:

- a. realize the actual equal treatment of women and men;
- b. take into account the special needs of persons with disabilities;
- c. facilitate the integration of foreign nationals;
- d. improve the capacity to enter the labour market of persons with fewer qualifications.

In this context Federal Council, Message Integration 2013, p. 3756.

<sup>417</sup> Art. 13-16 Draft Law on Further Education; Federal Council, Message Further Education 2013, p. 3757 ff.

<sup>418</sup> See National Council, Motion 08.3616 (Barthassat).

Ordinance on Admission, Stay and Employment (VZAE)<sup>419</sup> was amended to include that young people without legal documents, who are well integrated (*i.e.*, speak one Swiss national language, comply with the Swiss legal order and attended at least five mandatory school years in Switzerland) may complete an apprenticeship. The young individuals must provide proof of their identity for a successful application, which is similarly required under the hardship clause.<sup>420</sup>

### III. EXISTING PROBLEM AREAS AND OPTIONS FOR ACTION

#### 1. Existing Problem Areas

##### 1.1. Problem Areas in the Fostering of Integration

[265] A recently published OECD study on the topic of integration of migrants in the Swiss labour market found generally positive results.<sup>421</sup> At the same time, however, it identified several shortcomings in Swiss labour market integration for specific groups of immigrants. For example, there is no special program for the integration of humanitarian immigrants. Moreover, women with small children are often disadvantaged since they could not access all the benefits of an active labour-market policy. The study saw a further issue in the fact that diplomas or academic degrees of well-qualified migrants from non-OECD states are inadequately recognized. Finally, the study pointed out that children of immigrants do not have the opportunity of enrolling in school early because their aptitude is considered below the standard set by the Cantons; this contributes to their poor performance in the future.

##### 1.2. Problem Areas in Connection with Discrimination

[266] Since the Committee for ESC Rights recommends the improvement of the fight against unemployment of certain groups of persons and their integration in the labour market, it also refers indirectly to certain shortcomings in the protection against discrimination. Switzerland does not have a universal legal protection against discrimination in access to the labour market. In contrast, EU member states have adapted their legislation to reflect EU-Guideline 2000/43, and introduced comprehensive protection against discrimination.<sup>422</sup> For instance, the Netherlands established a National Equal Treatment Commission, which receives complaints from victims and takes on the role of mediator.<sup>423</sup>

[267] Even though the recommendations of the Committee for ESC Rights and the Human Rights Council do not call for universal legal protection from discrimination in the access to the labour market, the lack of universal anti-discrimination legislation in Switzerland remains obvious. While

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<sup>419</sup> Ordinance on the Admission, Stay and Employment of 24 October 2007 (SR 142.201).

<sup>420</sup> New art. 30a VZAE.

<sup>421</sup> OECD, Working Paper 2012.

<sup>422</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Regarding racial discrimination on the labour market according to European Law, see also OLIVIA LE FORT/MAYA HERTIG, La discrimination raciale sur le marché de l'emploi en droit européen, in: Tangram no. 29 of the FCR of June 2012, p. 80 ff.

<sup>423</sup> CAPLAZI/NAGUIB, pt. 97a.

women and people with disabilities enjoy special legal protection, it is missing for other vulnerable groups, such as young people of foreign origin mentioned in the recommendations of the Committee for ESC Rights. As previously discussed, some general private law clauses nevertheless offer possibilities for realizing equal opportunity and combating discrimination in contract law.<sup>424</sup> However, since a comprehensive legal framework is missing, contract partners are often unaware of how to behave in the labour market, and do not know which rights they have or how far their contractual freedom is restricted. Persons of foreign origin, for example, hardly ever know about the so-called “racism provision” (Art. 261bis SCC).

[268] The fact that under the current legal regime, citizens of EU and EFTA states are enjoying better protection from discrimination in comparison with citizens of other states, including Swiss citizens, seems problematic.<sup>425</sup> The reason for this is that the agreements on free movement concluded with the EU and EFTA contain general bans on discriminating on the basis of citizenship. This discrimination ban, which is relevant under labour law, is directly applicable to private law employment relationships; consequently, citizens of EU and EFTA states can invoke the protective clauses of agreements on free movement.<sup>426</sup>

### 1.3. Problem Areas in Connection with Dismissal for Trade Union Activity

[269] Although not directly connected to the recommendations of an international supervisory body, but repeatedly mentioned by the ILO, is the opinion that the sanctions under the Code of Obligations, which are imposed in case of wrongful dismissal for trade union activities, are inadequate. In 2004, the Committee on Freedom of Association approved a complaint filed by the Swiss Federation of Trade Unions (SGB), and asked Switzerland to adopt its proposed legislation.<sup>427</sup> In 2006, a further appeal was launched, demanding the realization of the relevant legal modifications.<sup>428</sup> Since several attempts to revise the Code of Obligations have not yielded any results, the SGB reactivated its complaint before the Committee on Freedom of Association of the ILO with a submission dated 19 September 2012.<sup>429</sup> In this context, it should be noted that,

<sup>424</sup> See also para. 234 above.

<sup>425</sup> Decision of the Federal Supreme Courts 2C 354/2011 of 13 July 2012: The discrimination of nationals is incorporated in the Agreement of the Free Movement and would have to be changed by the legislator. In this context see also SIMONETTA SOMMARGUA, *Rechtsentwicklung im Wechselspiel von Gerichten und Gesetzgeber*, in: *Justice – Justiz – Giustizia* 2012/4, Rz 15-17.

<sup>426</sup> KATHRIN BUCHMANN, *Schutz vor rassistischer Diskriminierung – eine Frage der Staatsangehörigkeit*, in: *Tangram* No. 29 of the Federal Commission against Racism of June 2012, p. 85.

<sup>427</sup> Case No. 2265 of 14 May 2003, accessible at [http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO::P50001\\_COMPLAINT\\_FILE\\_ID:2897410](http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO::P50001_COMPLAINT_FILE_ID:2897410) (visited on 4 April 2014), where several SGB cases are also listed. At the time the Federal Council rejected the arguments of the SGB; See Press Release of 31 March 2004, accessible at <http://www.wbf.admin.ch/aktuell/00120/index.html?lang=de&msg-id=9329> (visited on 4 April 2014).

<sup>428</sup> The Federal Council thereafter presented an additional report, according to which the current Swiss law offered adequate protection to employees and imposes a reasonable balance between sanction and flexibility of the labour market; See Press Release of 16 June 2006, accessible at <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=de&msg-id=5664> (visited on 4 April 2014).

<sup>429</sup> The report on the results of the official review process is available since October 2012 (accessible at [http://www.admin.ch/ch/d/gg/pc/documents/1933/Ergebnisbericht\\_Sanktionen-bei-missbraeuchlicher-oder-ungerechtfertigter-Kuendigung\\_de.pdf](http://www.admin.ch/ch/d/gg/pc/documents/1933/Ergebnisbericht_Sanktionen-bei-missbraeuchlicher-oder-ungerechtfertigter-Kuendigung_de.pdf)); visited on 4 April 2014). In the following the Federal Council commissioned the Federal Department of Justice and Police to draft a Message on the Partial Revision of the Code of Obligations. The Federal Council will decide later based on a study with regard to the foundations of the protection against dismissal for employee representatives, whether the protection against dismissal should be improved in general; See Press Release of 21 November 2012, accessible at

currently at the ILO, very controversial discussions are taking place between representatives of the employers and the employees with regard to the question of whether ILO Convention No. 87 includes the right to strike.<sup>430</sup>

## 2. Options for Action

[270] To remedy the aforementioned shortcomings, Switzerland could take various steps, both in the legislative process and the application of law. Some of the actions listed here correspond to the ones issued by the Federal Commission against Racism in 2010, as well as those referred to in ILO studies.<sup>431</sup> Further recommendations can be found in the so-called “Shadow Reports” of various non-governmental organisations. The study published by the OECD in February 2012<sup>432</sup> contains a series of additional, often concrete recommendations for action addressed to Switzerland. A selection of these is listed in the following in accordance with their primary focus, either with respect to the area of general promotion of integration or discrimination.

### 2.1. Possibilities for the General Promotion of Integration

[271] The recommendations published by the OECD for possible action steps<sup>433</sup> basically confirm Switzerland’s approach as set out in the integration plan presented in November 2011.

[272] At the same time, a series of recommendations by the OECD points out that Switzerland still has much room for improvement in the general promotion of integration. This can be summarized in four areas: the strengthening of the overall framework; the fostering of the expedient integration of persons who immigrated for humanitarian reasons; a better use of the capacities of migrants; and the reinforcement of efforts for a speedy integration of migrant children.<sup>434</sup>

[273] At the center of many recommendations of the OECD study is the intensification of the collaboration between the Federal Government and the Cantons, as well as the Cantons among each other. This strengthened cooperation must be upheld together with other recommendations, including the recognition of foreign diplomas and the promotion of language skills. Other recommendations worth considering, such as simplifying access to Swiss citizenship or a limited wage subsidy for migrants, would face bigger political blocks and do not appear to be immediately realizable.

[274] The integration plan of Switzerland includes essential elements of these recommendations.

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<[http://www.bj.admin.ch/content/bj/de/home/dokumentation/medieninformationen/2012/ref\\_2012-11-21.html](http://www.bj.admin.ch/content/bj/de/home/dokumentation/medieninformationen/2012/ref_2012-11-21.html)> (visited on 4 April 2014). The statement of the Federal Council after the reactivation of the complaint by the SGB in September 2012 was still being draft at the time of the printing.

<sup>430</sup> INTERNATIONAL LABOUR OFFICE, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A): General Report and observations concerning particular countries, ILC.102/III(1A), Genva 2013, in particular pt. 102 ff.

<sup>431</sup> ILO, Labour Migration 2003; ILO/IOM/UNHCHR, Discussion Paper 2001.

<sup>432</sup> OECD, Working Paper 2012.

<sup>433</sup> Ibid., p. 69 ff.

<sup>434</sup> Ibid., p. 69 ff.

## 2.2. Possibilities for Reducing Discrimination

[275] To ensure the comprehensive ban on discrimination stipulated under international law, Switzerland should withdraw its reservations to Art. 26 ICCPR and Art. 2. para. 1 lit. a CERD, especially since it has repeatedly been asked to do so by the UN Human Rights Committee.<sup>435</sup> A substantial improvement could be achieved with the withdrawal of Switzerland's reservation to Art. 26 ICCPR, since the comprehensive discrimination ban would then immediately become applicable. Furthermore, it would be desirable if Switzerland verifies its ratification of the 12<sup>th</sup> Additional Protocol to the ECHR, since it is one of few remaining European states that has neither signed, nor ratified this protocol.

[276] To facilitate access to existing international grievance mechanisms for victims, Switzerland should verify whether it could ratify the 1<sup>st</sup> Optional Protocol to the ICCPR, as has been done by many other European countries. Ratification of this protocol will allow victims of discrimination to have recourse to the UN Human Rights Committee.

[277] It came as a surprise to many that the Federal Council proposed the approval of the Naef Postulate, which seeks to commission the Federal Council to draft a report concerning the right to protection against discrimination.<sup>436</sup> Previously, the Federal Council had always argued that the current laws on the protection against discrimination were adequate and a universal equal treatment law was unnecessary.<sup>437</sup> In addition to the possibility of creating a comprehensive anti-discrimination law, a few specific legislative measures to improve the protection against racism may also be conceivable. In which case, the current, hierarchy of the sensitive grounds for discrimination that is difficult to justify, could thus be dispensed with, at least partially. In this context, many hold the view that one should follow the direction taken in the GEA, since the tools defined therein that ensured the partial improvement of the position of women in the labour market were certainly applied successfully: low-threshold mediation offices, procedures with easier burden of proof, as well as the right of associations to bring collective action.

[278] The Federal Council has expressed its intent to ratify the UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>438</sup> This Convention prohibits the discrimination against persons with disabilities in all areas of life, including the workplace, and ensures their enjoyment of all civil, political, economic, social and cultural human rights. Art. 27 CRPD recognizes the right of persons with disabilities to work, and incorporates measures that adequately guarantees the enforcement of this right. In Swiss law, Art. 8 para. 2 and 4 FC partly addresses the requirements of the Convention. Moreover, on federal level, a number of legal provisions in various statutes espouse some of the issues that the Convention seeks to address, including those relating to the professional life of persons with disabilities. These provisions are found in the Act on the Elimination of Discrimination against People with Disabilities,<sup>439</sup> the Law on Invalidity Insurance,<sup>440</sup> the Unemployment Insurance Act,<sup>441</sup> the Employment Act,<sup>442</sup> and even in the

<sup>435</sup> See Human Rights Committee, Concluding Observations Switzerland 1996, pt. 11, 21; in the more recent past: Human Rights Committee, Concluding Observations Switzerland 2009, pt. 4.

<sup>436</sup> National Council, Postulate 12.3543 (Naef), Response of the Federal Council of 5 September 2012.

<sup>437</sup> Such as for example the comprehensive response of the Federal Council to an interpellation on the racial discrimination in the workplace; See National Council, Interpellation 03.3372 (Bühlmann); Federal Council, Response to Interpellation 03.3372 (2003).

<sup>438</sup> Message on the Approval of the Convention concerning the Rights of People with Disabilities of 13 December 2012 published on 19 December 2012, BBl 2013 66.

<sup>439</sup> FA on the Elimination of Discrimination against People with Disabilities (SR 151.3).

<sup>440</sup> FA on Law on Invalidity Insurance (SR 831.20).

employment contract law in the Code of Obligations.<sup>443</sup> The National Council, as first council, approved the Convention in June 2013.<sup>444</sup>

[279] In certain areas, persons with disabilities are already protected against discrimination under the current legal order. The existing protective provisions, however, are not as detailed as in Art. 27 CRPD.<sup>445</sup> In particular, in relation to the access to the labour market, the employment contract law in the Code of Obligations does not directly protect from discrimination on the grounds of disability in the hiring process. The Federal Council, however, maintains that the present regulations ensure adequate protection against discrimination.<sup>446</sup>

[280] On 11 February 2013, the Federal Council ratified ILO Convention No. 122 concerning Employment Policy,<sup>447</sup> which supports the creation of adequate basic conditions for the implementation of certain economic and social policies designed to promote full, productive and freely chosen employment. The element of “freely chosen employment” provides that, one of the goals of the Employment Policy should be to ensure equal opportunity, as well as prevent all forms of discrimination in the workplace.<sup>448</sup> According to the Federal Council, the ratification of the Convention concerning Employment Policy does not mean that Switzerland will have to face any new commitments; on the contrary, it unambiguously expressed the intention of eliminating discrimination also by means of measures which are directly or indirectly aimed at the implementation of the employment policies.

[281] In addition to these normative procedures, Switzerland could also establish an authority based on the model of a national human rights institution, which could advise corporations, as central actors in the labour market, on human rights questions in their activities. This type of institution may have a wide mandate and may be established independently from governmental authorities.<sup>449</sup> Furthermore, the Government could support projects like *Smart Selection* and implement their findings within a wider framework.

#### IV. COHERENCE IN THE RECOMMENDATIONS OF THE INTERNATIONAL SUPERVISORY BODIES

[282] As previously mentioned, both recommendations relating to the labour market which were already issued before the last review round go in a very similar direction. There is merely a moderate difference with regard to the groups of people concerned: whereas the recommendations of the Committee for ESC rights primarily subsumes migrants, women and

<sup>441</sup> FA on the Mandatory Unemployment Insurance and Insolvency Compensation (SR 837).

<sup>442</sup> FA on Work in Industry, Trade and Commerce (Employment Act) (SR 822.11).

<sup>443</sup> Even though the employment contract law does not impose an explicit protection from discrimination on the grounds of a disability, there is a mandatory provision in labour law, which comprises the duty of the employer to protect the personality rights of the employee (art. 328 para. 1 SCO).

<sup>444</sup> Decision of the National Council of 21 June 2013.

<sup>445</sup> Art. 27 para. 1 lit. a CRPD stipulates that the discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, *hiring* and employment, continuance of employment, career advancement and safe and healthy working conditions, must be prohibited.

<sup>446</sup> Federal Council, Message CRPD 2012, p. 708.

<sup>447</sup> The parliament approved the ratification on 28 September 2012.

<sup>448</sup> Federal Council, Message ILO Convention No. 122 (2012), p. 4225.

<sup>449</sup> See for more detail UN GA, Paris Principles 1993.

young people from foreign origin under the “particularly vulnerable groups of people”, the recommendation of the Human Rights Council explicitly identify “in particular women that belong to minorities”. Thus, there is no issue with contradictory recommendations in this area.

[283] It may be noteworthy that the phraseology of the terms in both recommendations – at least implicitly – is not limited to one specific group of people, since “in particular” (and thus, *e contrario* not only) denotes that more groups may be included in the enumeration. In addition the other provisions also do not conclusively define the phrase “particularly vulnerable groups of people”.

[284] One may find coherence in the partially more specific recommendations made in the course of the second review round, by attributing them to the same set of thematic issues.<sup>450</sup>

## V. CONCLUSION AND OUTLOOK

[285] In 2012, the President of the Federal Commission against Racism stated that, on the one hand there was a moral obligation to combat racism in the workplace, but on the other hand, there is also an economic interest not to discriminate against the people that contribute to the prosperity of our country.<sup>451</sup> This statement should be qualified and supplemented with the fact that – as explained in this chapter – it is not only a moral, but in principle, also a legal obligation.

[286] These comments indicate that Switzerland has taken many steps to implement the protection against racism in the economic field. More recently, many efforts have been initiated to address the points raised in the recommendations of the UN Treaty Bodies in the legislative process. At present, various draft laws and amendments are in the review process or were recently finalized; how these will finally be reflected in the Swiss legal order remains to be seen.

[287] These efforts, however, should not blind us to the fact that the goal of comprehensive protection against discrimination that also covers the economic field could be better achieved by closing the existing gaps on an international level. Thus, steps should be taken to anticipate and proactively shape those developments, which in the coming years, will mature as a logical consequence of the UN Guiding Principles. Although many of these modern instruments do not have a binding character, and often only concern individual industries, it is already clear today that they, on the one hand, confirm the long-standing state duty to protect, and on the other hand, demonstrate that corporations, in their role as employers, will have to take on new tasks.

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<sup>450</sup> See in this context para. 248ff.

<sup>451</sup> MARTINE BRUNSWIG GRAF, *Combating Racism in the Workplace: in everyone’s interest*, in: *Tangram* No. 29 of the FCR of June 2012, p. 6.

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