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Autor	**Evelyne Schmid**
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The Identification and Role of International Legislative Duties in a Contested Area: Must Switzerland Legislate in Relation to «Business and Human Rights»?

from **Evelyne Schmid**[1]

Does Switzerland have specific legal obligations to adopt legislation related to «Business and Human Rights» as has been argued by some? Must the Swiss domestic legislator compel corporations to take precautionary steps to avoid human rights abuses resulting from corporate activities? Based on a suggested conceptualisation of international legislative duties and their significance in the contemporary international legal system, the article identifies the challenges related to pin down the precise scope of international legislative duties in the particularly contested and loosely defined area of «Business and Human Rights». Despite these challenges, the analysis suggests that the Swiss legislator is indeed obliged to take further steps to implement Switzerland's duties to protect against corporate human rights abuse. At the same time, there remains significant discretion in how exactly Swiss law-makers decide to regulate the behaviour of non-State actors in the field of «Business and Human Rights».

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1 Dr. iur. Evelyne Schmid is a lecturer at the University of Basel and a post-doctoral research fellow of the Max Geldner Foundation. The author thanks the participants of the Vienna ESIL Interest Group Meeting on Business and Human Rights for their constructive comments on an earlier version of this piece.

I. Introduction

States have accepted many international obligations that require them to take certain legislative measures: In many fields of international law, States agree to modify, strengthen or otherwise take legislative measures at the domestic level in order to achieve some common goals. Moreover, international supervision of the implementation of international legal obligations by States has generally increased[2] and international tribunals or other supervisory bodies sometimes condemn states for not adopting legislation required by virtue of international law.[3]

Yet, given the domestic separation of powers and the desire for leaving discretion to democratically legitimised law-makers, international duties to legislate can raise serious challenges. A study of the European Commission for Democracy through Law (Venice Commission) revealed that the identification of legislative duties has so far been weakly rationalised across jurisdictions despite the fact that the implementation of legislative duties is recognised as a widespread challenge in most domestic legal systems.[4] As Robin West pointed out, there is a «relative absence of questions about the positive duties of legislators, not negative duties to restrain from acting (such as a duty not to infringe upon speech) or negative duties to restrain from acting in particular ways (such as a duty not to legislate in discriminatory ways), but positive, affirmative duties to pass laws so as to achieve various … ends».[5] Examining whether the legislator has particular duties to adopt laws would seem particularly relevant in all those areas in which the achievement of a certain goal significantly depends on the State's active engagement. One such area is the currently much discussed field of «Business and Human Rights»: «Business and Human Rights» is a

loose term[6] that has been defined to encompass a wide-range of attempts to address (positive and negative) impacts from business corporations on human rights – whether these impacts occur locally, nationally or in another State.[7]

In this field of contemporary interest, it is a key priority that States strengthen «laws at the national level to hold companies to account for human rights abuses and to better enable access to remedies for those affected by such abuses».[8] But what exactly does

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2 Gleider Hernández, *The Judicialization of International Law: Reflections on the Empirical Turn*, 25 European Journal of International Law (2014), p. 919–934.

3 See, for instance, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v. USA), Judgment of 19 January 2009 (ICJ), para. 44, stating that the Avena judgment obliges the United States to perform an obligation of result – «not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law». For examples of legislative duties in the jurisprudence of the European Court of Human Rights, see, for instance, Cordula Dröge, Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Berlin 2003, 87-100. Or Dimitris Xenos, The Positive Obligations of the State under the European Convention of Human Rights, New York 2012, p. 107–110. See also in this issue Nesa Zimmermann, Legislating for the Vulnerable? Special Duties under the European Convention on Human Rights.

4 European Commission for Democracy through Law (Venice Commission), Special Bulletin: Legislative Omission in Constitutional Jurisprudence, Council of Europe Publishing (2008).

5 Robin West, *Unenumerated Duties*, 9 University of Pennsylvania Journal of Constitutional Law (2006), p. 221–261, 221.

6 For a critical discussion of the term, *see* Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 4 Business Ethics Quarterly (2012), p. 739–770.

7 *See* for instance the definitions provided by OHCHR, Business and Human Rights (OHCH, <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx> accessed 16 September 2015. Or Danish Institute for Human Rights, Business and Human Rights (DIHR, <http://www.humanrights.dk/business-human-rights> accessed 16 September 2015.

8 Amnesty International, Amnesty International Position on the New UN Process to Elaborate a Legally Binding Instrument on Business and Human Rights – IOR 40/005/2014 4 July 2014)

this mean for domestic law-makers? Is it accurate to consider that Switzerland must – by virtue of international law – adopt further legislation to compel corporations to take precautionary measures in order to prevent human rights abuses? Given the expected relevance of the «Business and Human Rights» debate for the coming years in Switzerland, and for the reasons mentioned in further detail below, this article uses the «Business and Human Rights» debate as a case-study to propose and discuss criteria to identify international legislative duties and to illustrate the particular interpretative challenges that arise in attempts to pin down the scope of such international duties to legislate.

Before moving on to the justification for the focus on the «Business and Human Rights» area, let us consider the general reasons why the identification of international legislative duties can be challenging and why criteria are needed to identify such obligations. The identification of legislative duties is significant for the following three reasons:

First, the need to identify legislative duties arises frequently. With the general increase of the influence of international law, the proliferation of human rights instruments and particularly the widespread acceptance of the idea that human rights obligations entail positive obligations, we have witnessed the adoption and judicial or quasi-judicial interpretation of a significant number of treaties containing more or less explicit provisions that arguably oblige States to organise that their domestic legislators do certain things.[9] International law

has always heavily relied on domestic legal systems,[10] and the fact that international law attempts to influence the behaviour of domestic legislators is thus not new.[11] Ever since States could agree that the achievement of certain shared goals requires concerted action, they regularly committed to adopt domestic legislation that would contribute to the achievement of these goals.[12] Hence, if States do not adopt the legislation they agreed would be necessary to reach the objectives of an international agreement, a central mechanism for international law to work is not fully effective.[13] Accordingly, legislative obligations are a key way of how international law intends to shape empirical realities and the need to identify such obligations regularly arises.

<https://www.amnesty.org/download/Documents/8000/ior400052014en.pdf> accessed 14 October 2015.

9 Gerald Staberock, *Human Rights, Domestic Implementation*, in: Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law, Heidelberg 2011, para. 5, 23–27.

10 Pierre-Marie Dupuy, *International Law and Domestic (Municipal) Law*, in: Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law, Heidelberg 2011, particularly para. 138–140.

11 *Ibid.*, para. 45.

12 (Relatively) early examples are, for instance, the Preservation and Protection of Fur Seals Convention, Washington, 7 July 1911, 214 Canada Treaty Series 80 (entered into force 15 December 1911), Art. 6. Or the Treaty between the USA and the Other American Republics on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), 15 April 1935, 167 LNTS 289 (entered into force 26 August 1935), Art 2. For examples of legislative obligations in founding treaties of international organisations, *see* Jörg Polakiewicz, *International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts*, in: Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law, Heidelberg 2011, para. 15.

13 What Cançado Trindade wrote in this regard remains valid today: «Despite the attention devoted in recent years to the relationship between international and domestic legal orders, curiously there remain uncertainties and a lack of conceptual clarity over the extent of the conventional obligations of protection. (...) For example it is regrettable that practical difficulties have arisen over the compliance of States Parties to their legislative obligations ensuring from human rights treaties. (…) Nevertheless, (…) [i]t is always important to bear in mind that the provisions of human rights treaties bind not only governments, as is commonly assumed. They also bind the States themselves – all their powers, organs and agents. Accordingly, the time has come to clarify the extent of the legislative and judicial obligations of the States Parties to human rights treaties.» Antonio Cançado Trindade, *The Interdependence of all Human Rights: Obstacles and Challenges to Their Implementation*, 50 International Social Science Journal (1998), p. 514–523, 519.

Second, the identification of legislative duties can be a particularly difficult exercise. After all, even the identification of purely domestic legislative duties raises a host of challenges.[14] The interpretation of international obligations is not always obvious and it can be challenging to decide with certainty whether

a specific obligation is directed at the legislative or if the obligation can be complied without the adoption of domestic law. For Switzerland, such interpretative challenges can be particularly relevant: Given that it is the domestic division of competences that decides which actor is in charge of implementing which aspects of an international obligation, legislative duties can be relevant for several legislators at once – as this is regularly the case when an international obligation relates to the sphere of competence of the Swiss cantons. The fact that the number of international obligations has increased means that cantonal (and sometimes communal) legislators face challenges that did not exist in the same manner when the Swiss constitutional structure was originally designed. In other words, various domestic legislators often face complex expectations to implement the State's international obligations (spread across a high number of sources that are not easily accessible to the average member of, e.g., a cantonal legislature or administration) as well as to represent domestic constituencies who are not necessarily aware or supportive of the range of international obligations Switzerland has engaged with. Taken together, these are factors that do not inherently facilitate the identification of international legislative duties and consequently their implementation.

Third, the identification of international legislative duties is important as the non-compliance with such duties can entail the responsibility of States for internationally wrongful acts. State responsibility arises whenever a State fails to comply with an international obligation – independent of the State's domestic legal system and independent of which organ of the State causes the breach.[15] The legislature is part of a State's organs and the behaviour of the legislative branch is attributable to the State by virtue of Art. 4(1) of the International Law Commission's Articles on State Responsibility.[16] As the Permanent Court of International Justice noted already in 1926, «[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of the State, in the same manner as do legal decisions or administrative measures».[17] Given that State responsibility can attach to both acts and omissions,[18] the statement not only applies where a municipal law infringes an international duty but also where a municipal law required by international law is lacking. In the commentary on

the articles on State responsibility, Crawford clarifies that «[s]ome classes of treaty obligation will … give rise to responsibility in the absence of legislation, for example where an agreement requires that it be made effective through the adoption of certain

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14 For Switzerland, *see* in particular Stephan Wullschleger, Gesetzgebungsaufträge: Normativer Gehalt und Möglichkeiten richterlicher Intervention, Basel 1999, or the literature on equality between men and women, in particular, Bernhard Waldmann, Das Diskriminierungsverbot von Art. 8 Abs. 2 BV als besonderer Gleichheitssatz: unter besonderer Berücksichtigung der völkerrechtlichen Diskriminierungsverbote einerseits und der Rechtslage in den USA, in Deutschland, Frankreich sowie im europäischen Gemeinschaftsrecht andererseits, Bern 2003. Tobias Jaag, *Unerfüllte Aufträge an den Gesetzgeber*, in: Bernhard Ehrenzeller *et al.* (eds), Festschrift Hangartner, St. Gallen 1998, p. 213–228.

15 ILC Articles on State Responsibility, Annex to GA Res. 56/83, 12 December 2001, Art. 12.

16 *Ibid*., Art. 4(1) states that «the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions».

17 Certain German Interests in Polish Upper Silesia, Judgment of 25 August 1925 (1926 PCIJ Ser. A No. 7) (Permanent Court of International Justice), 19.

18 ILC Articles on State Responsibility, Annex to GA Res. 56/83, 12 December 2001, Commentary to Art. 1.

municipal law standards».[19] From the perspective of international law, the domestic challenges of ensuring the (complete) implementation of international duties to legislate are irrelevant for a finding of State responsibility.[20]

Against this background, it seems warranted to reflect on the criteria that can be used to identify international legislative duties in the (Swiss) domestic legal system and to illustrate the conceptual issues with a case-study in an area in which the adoption of further domestic legislation is vocally demanded by some actors and vehemently opposed by others. The present contribution sets out to provide criteria for the identification of legislative duties and aims to discuss the specific questions of interpretation that arise when international law is arguably directed at domestic law-makers. I propose a tentative conceptualisation of legislative duties and examine whether the Swiss legislator has a legal duty to adopt legislation to protect from corporate human rights abuse (as this is suggested by actors such as Swiss NGOs,[21] the UN Rapporteur on the right to food,[22] and OHCHR, the UN Office of the High Commissioner for Human Rights[23]). The analysis will show that it is widely accepted that a range of existing obligations in binding human rights treaties ratified by Switzerland entail at least some duties to take legislative measures in order to regulate the behaviour of non-State actors in the field of «Business and Human Rights». At the same time, it remains true that pinning down the precise scope of such legislative duties faces sizable obstacles.[24]

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The contribution will first explain the focus on «Business and Human Rights» and outline the current discussion and legal situation in Switzerland (section II). Second, the article will suggest criteria to delineate legislative duties from other problems related to implementation (section III); and third, identify the main difficulties the identification of legislative duties have to overcome (section IV). Section V concludes.

II. «Business and Human Rights» and Switzerland

A. Why «Business and Human Rights» in Switzerland?

The general reasons to study legislative duties in the context of «Business and Human Rights» are the following. The regulation of economic activities and actors is controversial in many jurisdictions. At the same time, the UN Guiding Principles on Business and Human Rights (Guiding Principles) have received support from States. In particular, States have endorsed the view that they have a plethora of pre-existing and legally binding duties to protect the enjoyment of human rights from harm originating from non-State actors such as businesses–[25] and it is at least conceivable that some of

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19 James Crawford, State Responsibility: the General Part, Cambridge 2013, 120f (with examples of legislative duties in the field of transnational criminal law).

20 ILC Articles on State Responsibility, Annex to GA Res. 56/83, 12 December 2001, Art 3.

21 Bern Declaration, Commodities Report of the Swiss Federal Council names problems but fails to provide solutions, Media Release 3 April 2013) stating that «[n]ew legal instruments are (...) urgently needed» and Switzerland must take «appropriate legislative action» <https://www.bernedeclaration.ch/media/press-release/commodities_report_of_the_swiss_federal_council_names_problems_but_fails_to_provide_solutions/> accessed 17 September 2015.

22 Olivier De Schutter, Regulating Transnational Corporations: A Duty under International Human Rights Law, Contribution of the Special Rapporteur on the right to food during the 25th session of the Human Rights Council 2014) <http://www.ohchr.org/Documents/Issues/Food/EcuadorMtgBusinessAndHR.pdf> accessed 16 September 2015.

23 OHCHR, Introductions to the Guiding Principles on Business and Human Rights (OHCH, 2013) 14 <http://www.ohchr.org/Documents/Issues/Business/IntroductionsGuidingPrinciples_en.pdf> accessed 16 September 2015.

24 *See* below, section IV.C for a discussion to what extent future normative developments might alleviate these challenges.

25 Human Rights Council Resolution on Human Rights and Transnational Corporations and other

these duties will require the adoption of domestic legislation. For Howard Mann, duties to legislate are even *the* most crucial aspect of ensuring progress in the realm of «Business and Human Rights»:

«In the context of the state duty to protect and promote human rights, the most critical issue that arises are the duties to legislate in order to implement international human rights obligations into domestic law and to enforce such legislation.»[26]

Indeed, the logic of positive duties to protect human rights hinges upon the adoption of domestic legislation. The centrality of legislative action is recognised in the Guiding Principles that emphasise the pre-existing duties of States to protect people against human rights abuse by business enterprises «through effective policies, legislation, regulations and adjudication».[27] As John Ruggie,

the former UN Secretary-General's Special Representative for Business and Human Rights, emphasised, the State duty to protect «lies at the very core of the international human rights regime».[28] The Guiding Principles also stress States' obligations to provide effective remedies against human rights abuses and urge that States «must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy».[29] Moreover, the Guiding Principles on Extreme Poverty and Human Rights, adopted in 2012 by the Human Rights Council, ask States to legislate in order to «ensure that those affected by business-related abuses have access to a prompt, accessible and effective remedy».[30] As outlined in more detail below, legislative measures at the domestic level are a key component of contemporary human rights law and it is safe to conclude that the adoption of domestic legislation is a particularly important tool for those promoting the «Business and Human Rights» agenda. Yet, the relative lack of specific legislation or other alleged implementation gaps are not always tantamount to a State's failure to implement its international legal obligations and it must be clarified if the State has indeed incurred a legislative duty in the first place.

Selecting the case of Switzerland to illustrate the intricacies of the identification of legislative duties in the realm of «Business and Human Rights» is particularly interesting for three reasons. First, Switzerland is the home State of a high number of internationally active corporations. As the Federal Council confirmed in early 2014, the high number of international corporations based in Switzerland implies that the debate on the implementation of the UN Guiding Principles is of particular relevance.[31] Second, a significant number of corporations based in Switzerland are active in the global commodity trade. The Swiss Federal Department of Foreign Affairs states that «[t]oday, transit trade contributes more to gross domestic product (...) than does

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Business Enterprises A/HRC/17/4 (A/HRC/17/L.17/Rev.1), (15 June 2011) (endorsed without a vote). References to the Guiding Principles are, for instance, also contained in the *OECD Guidelines for Multinational Enterprises, 2011 (multilaterally agreed by 42 governments)*, Chapter IV.

26 Howard Mann & International Institute for Sustainable Development, International Investment Agreements, Business, and Human Rights: Key Issues and Opportunties, Winnipeg 2008, 8 (emphasis added).

27 Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework, John Ruggie, Special Representative of the Secretary-General A/HRC/17/31 (2011), (21 March 2011), Principle 1.

28 *Ibid*., Introduction, para. 6.

29 *Ibid*., Principle 25.

30 Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona A/HRC/21/39, (18 July 2012), para. 102. «The obligation of States to protect against human rights infringements by third parties requires taking steps to prevent, investigate, punish and redress any abuse through effective policies, legislation, regulations and adjudication.» The use of «and» suggests that legislation must be part of the mix.

31 Bundesrat, *infra* note 50, p. 9.

tourism» and that «this segment of the market has also topped the services export table, ahead of the ban-

king sector».[32] Turnover in commodity trade in 2013 was said to be twenty times higher than in 2000 while NGOs estimate that 15–20% of the entire global commodity trade is coordinated from Switzerland, mainly from offices based in Geneva and Zug,[33] approximately half of the global trade in coffee and sugar is done from Geneva, while *Glencore-Xtrata*, a company based in Zug, dominates the global trade in cobalt, coal and zinc.[34] As is well-known, the trade in precious raw materials as well as coffee, cereals or cotton has been in the spotlight of the «Business and Human Rights» debate with allegations ranging from child labour, poor working conditions, threats or violence against trade unionists or the destruction of livelihoods to corruption, environmental damage and tax avoidance in (often fragile) host States.[35] The importance of Switzerland for the global commodity trade thus implies that Switzerland is particularly confronted with the risks and challenges associated with this trade. Third, a coalition of civil society organisations is currently collecting signatures for a popular initiative for «responsible business».[36] The suggested constitutional amendment would require federal legislation to compel corporations to conduct human rights and environmental due diligence assessments and Swiss corporations would be made liable for abuses caused by companies controlled by them unless a company can credibly demonstrate that it carried out sufficient precautionary measures.[37] It is not unlikely that a counter-project to the initiative will be elaborated and the «Business and Human Rights» debate in Switzerland is thus currently evolving in a dynamic manner.

As mentioned, some have argued that adopting further (federal) legislation would not only be desirable but is required by international law.[38] Yet, it would be mistaken to assume that Switzerland currently has no relevant «Business and Human Rights» legislation whatsoever. It is rarely the case that there is a complete absence of steps taken by the domestic legislator. Rather, a range of existing Swiss legislation already touches upon «Business and Human Rights» concerns.

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32 Federal Department of Foreign Affairs, Switzerland and Commodity Trading: The Opportunities and Challenges for Switzerland 2013) <http://www.eda.admin.ch/eda/en/home/recent/dossie/rohsto/fakt.html> accessed 28 August 2015.

33 Erklärung von Bern, Rohstoff: das gefährliche Geschäft der Schweiz, Zürich 2011. Swiss Radio and Television, Die Rohstoff-Drehscheibe Schweiz 2013) <http://www.srf.ch/news/wirtschaft/die-rohstoff-drehscheibe-schweiz> accessed 28 August 2015.

34 Swiss Radio and Television, *supra* note 33.

35 For a documentation of some allegations, *see* Recht ohne Grenzen (Corporate Justice Campaign), Exemples de Cas <http://www.droitsansfrontieres.ch/fr/exemplesdescas/> accessed 18 September 2015. A criminal case was recently dropped by Office of the Attorney General of Switzerland stating that there was no reason to believe that the company had been aware of the criminal origin of gold originating from the Democratic Republic of Congo. Bloomberg, Swiss Dismiss Criminal Case Against Gold Refiner Argor-Heraeus 2 June 2015) <http://www.swissinfo.ch/eng/bloomberg/swiss-dismiss-criminal-case-against-gold-refiner-argor-heraeus/41466032> accessed 17 September 2015.

36 Eidgenössische Volksinitiative «Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt» (popular initiative for «Responsible Business», BBl 2015 3245 <https://www.admin.ch/ch/d/pore/vi/vis462.html> accessed 17 September 2015.

37 Ibid.

38 *See* the references above, notes 21, 22, and 23.

B. The existing legal situation and current proposals for reform

The regulation of corporate behaviour mainly takes place in the federal Code of Obligations, as well as in specialised laws at the federal level, such as the Law on the Protection of the Environment, the Anti-Money Laundering Act or the Federal Act on Public Procurement, but also in some cantonal legislation (e.g. cantonal procurement laws).[39] Recent studies in Switzerland have taken stock of the existing legal situation with regard to the prevention and redress of human rights related harm arising from corporate activities and have tried to match them against the requirements of a plethora of international human rights obligations. The Swiss Centre for Expertise in Human Rights (SCHR/SKMR/CSDH) concluded that it is fair to say that Switzerland has taken targeted steps to implement the duty to protect in the field of «Business and Human Rights» but that a comprehensive strategy to implement the UN Principles has not yet been devised.[40] The report by the SCHR recognises the concern about the possible failures to implement positive duties and calls for addressing situations in which the legislator has not taken measures to protect individuals from corporate abuse.[41] Two previous studies commissioned by NGOs found that the Swiss legal system does not contain specific norms that would oblige enterprises and their leaders to ensure that human rights are respected or norms that would

allow alleged victims to access effective remedies.[42] Provisions directly obliging companies to avoid harm to human rights are limited to the fields of labour law as well as equality between men and women.[43] Exceptions in the Law on the Protection of the Environment aside, Swiss company law does not contain specific rules that would impose an obligation on companies or their directors to consider the company's impacts on non-shareholders (including human rights impacts on the individuals and communities affected by the company's operations), within or outside Switzerland.[44] Nor are there «specific legal requirements on directors to ensure that subsidiaries, suppliers or other business partners take into account human rights considerations».[45]

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39 For reasons of space, reference is made to the extensive overview of the existing legal situation by Christine Kaufmann *et al.*, Umsetzung der Menschenrechte in der Schweiz: Eine Bestandesaufnahme im Bereich Menschenrechte und Wirtschaft, Bern 2013, para. 59 ff.

40 *Ibid.* para. 85. In the meantime, the Federal Council issued a position paper with a suggested action plan. Bundesrat, Gesellschaftliche Verantwortung der Unternehmen: Positionspapier und Aktionsplan des Bundesrates zur Verantwortung der Unternehmen für Gesellschaft und Umwelt, 1 April 2015 <http://www.news.admin.ch/NSBSubscriber/message/attachments/38880.pdf> accessed 16 September 2015.

41 Kaufmann et al., *supra* note 39, para. 101.

42 Carlos Lopez & Simone Heri, Switzerland's Home State Duty to Protect against Corporate Abuse, Bern 2010; François Membrez, Etude juridique – Les remèdes juridiques face aux violations des droits humains et aux atteintes à l'environnement commises par les filiales des entreprises suisses (Recht ohne Grenzen, 2012) <http://www.rechtohnegrenzen.ch/media/medialibrary/2012/03/etude_membrez_def.pdf> accessed 28 August 2015. «La législation suisse ne contient pas de disposition qui oblige les entreprises et leurs dirigeants à faire respecter les droits humains et les normes environnementales dans leurs activités à l'étranger. Elle ne permet pas de rendre une maison mère responsable des atteintes aux droits humains et à l'environnement commises par ses filiales, sous-traitants et fournisseurs. Elle n'offre pas non plus de possibilité pour les victimes d'obtenir efficacement réparation. Des modifications légales sont donc nécessaires afin de remédier à ces manques.»

43 Loi fédérale sur le travail dans l'industrie, l'artisanat et le commerce, 13 mars 1964, RO 1966 57. Loi fédérale sur l'égalité entre femmes et hommes, 24 mars 1995, RO 1996 1498.

44 Some NGOs suggest that company law should be reformed with the introduction of a specific duty of care of parent companies in respect to their subsidiaries and companies under their control. Lopez and Heri, *supra* note 42, p. 7. *See* also Kaufmann et al., *supra* note 39, para. 63, stating that the Swiss legal system does not have a direct, comprehensive responsibility regime for enterprises.

45 Lopez and Heri, *supra* note 42, p. 21.

That said, there are, however, some rules of liability in civil and criminal law that can, at least in principle, be applied to corporations.[46]

Switzerland has been a supporter of the Guiding Principles and ratified most international human rights conventions. But civil society groups and the SCHR have criticised and continue to criticise that there is – in their view – reluctance

to take (further) legislative measures.[47] Until recently, the stated assumption of the Federal Council was that the implementation of the existing human rights treaties as well as the Guiding Principles do not require additional legislative measures but «merely» the good-will of companies.[48] A few years ago, the State Secretariat for Economic Affairs (Seco) issued a corporate social responsibility (CSR) concept (widely criticised by NGOs) in which it emphasised that CSR should be business-driven and in which it did not detail the role of the State with regard to duties to protect stemming from international human rights law.[49]

Signs that this attitude might be undergoing some change appeared in 2014. The Federal Council then stated that it considers that «the Guiding Principles are eminently relevant» for Switzerland given that the country is the home State of a high number of internationally active corporations.[50] This year, the Federal Council issued a report on the implementation of recommendations related to the commodity trade.[51] The Seco CSR concept was removed from the governmental website and replaced with a new and more extensive document that now refers to the term promoted by John Ruggie, i.e. a so-called «smart mix» that combines voluntary measures with legislation that prescribes legally binding measures companies must take. The Seco website and the Federal Council today state that the State plays an important role in setting the legal framework and standards.[52] Yet, other signs indicate that the adoption of further

«Business and Human Rights» legislation will face considerable obstacles. For instance, proposals to include transparency requirements for corporations involved in the extraction of commodities in the revision of the Code of Obligations (Law on Stock

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46 Code pénal suisse, 21 December 1937, RO 54 781, Art. 102. Some have argued that the provision is too complex to be of practical use. *See* Membrez, *supra* note 42, p. 6. For an in-depth analysis of the existing potential of *civil* litigation in Switzerland for corporate abuse abroad, *see* in parti-cular Gregor Geisser, Ausservertragliche Haftung privat tätiger Unternehmen für «Menschenrechtsverletzungen» bei internationalen Sachverhalten: Möglichkeiten und Grenzen der schwei-zerischen Zivilgerichtsbarkeit im Verhältnis von Völkerrecht und Internationalem Privatrecht, Zürich 2013.

47 For the latest reports, *see*, for instance, Sabrina Ghielmini, Christine Kaufmann & Schweizerisches Kompetenzzentrum für Menschenrechte, Corporate Social Responsibility (SCHR, 2015) criticising that Switzerland lags behind other developed nations in the implementation of a «smart-mix» of measures that must include regulatory steps taken by the State to protect rights <http://www.skmr.ch/de/publikationen/wirtschaft/csr-studie.html> accessed 16 September 2015.

48 Federal Council, Response Letter of the Federal Council to the Corporate Justice Campaign 20 February 2013) <www.rechtohnegrenzen.ch/media/medialibrary/2013/03/antwort_bundesrat_februar_2013_inklkorrigendum.pdf> accessed 28 August 2015. «In line with the UN Guiding Principles, the Federal Council expects businesses to do their part to respect human rights and to implement the Guiding Principles relevant to their respective activities» (translated by the author).

49 *See* also State Secretariat for Economic Affairs Seco, CSR-Konzept des Seco, Bern 2009, p. 4–5.

50 Bundesrat, Rechtsvergleichender Bericht: Sorgfaltsprüfung bezüglich Menschenrechten und Umwelt im Zusammenhang mit den Auslandaktivitäten von Schweizer Konzernen: Bericht in Erfüllung des Postulates 12.3980 (Aussenpolitische Kommission Nationalrat, 30. Oktober 2012), 2014, p. 9.

51 Bundesrat, Grundlagenbericht Rohstoffe: 2. Berichterstattung zum Stand der Umsetzung der Empfehlungen 2015) <http://www.news.admin.ch/NSBSubscriber/message/attachments/40641.pdf> accessed 16 September 2015.

52 Bundesrat, *supra* note 40. Seco, Corporate Social Responsibility, <http://www.seco.admin.ch/themen/00645/04008/?lang=en> accessed 16 September 2015.

Companies) have been met with resistance in the consultation process even though they would – at least for now[53] – only apply to the extraction of raw materials and would exclude the significant *trade* in commodities.[54]

It is thus fair to say that Switzerland has some pertinent existing legislation and there are some ongoing developments related to «Business and Human Rights» concerns. Yet, is Switzerland required to take further legislative measures to try to avoid and address corporate human rights abuse? The following section draws a list of suggested criteria in order to identify international legislative duties:

III. Conceptualising International Legislative Duties

Politicians, journalists, NGOs or the general public are often quick to claim that the legislator fails in his job. However, we need to carefully distinguish whether a legislator really incurs a legal duty to legislate or whether we are rather confronted with a situation in which different actors propose a different political weighting of competing interests in the interpretation of a norm, or alternatively, a situation in which adequate existing norms are not fully implemented or, a situation which cannot reasonably be improved by legislation in the first place. International legislative duties can only arise in situations in which there is already an agreement (at least between States Parties to an international treaty) that legislation is compulsory.

To decide whether such is the case, the general rules of interpretation in international (treaty) law are the natural starting point – just as for any other question related to the scope of an international obligation contained in a trea-

ty.[55] Yet, the identification of legislative duties is a distinct and particular exercise as it is not merely a matter of international law whether a State is required to adopt domestic legislation. Rather, the question lays at the intersection between international and domestic (constitutional) law. The latter is in most cases decisive to determine whether a State can only meet a particular international obligation by way of taking domestic legislative action.[56] Taking into account the reports from the 41 European courts participating in the already mentioned study of the Venice Commission and their answers to the question of how their national legal system conceptualises such legislative obligations,[57] I suggest the following considerations to identify legislative duties.

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53 Proposed Revision of the Code of Obligations (Law on Stock Companies) /Änderung des Obli-gationenrechts (Aktienrecht) Vorentwurf, November 2014, Art. 964f. This suggested provision contains a (conditional) delegation norm entrusting the Federal Council to extend the scope of application of the transparency rules to the trade in commodities if there is an «internationally coordinated approach».

54 *Ibid.*, Art. 964a. Explanations are provided in the accompanying report by the Federal Council, Report on the Proposed Revision of the Code of Obligations (Law on Stock Companies)/Erläuternder Bericht zur Änderung des Obligationenrechts (Aktienrecht) 2014, p. 56–57. For answers to the consultation process, *see* the positions taken in the consultation process on the Revision of the Code of Obligations (Law on Stock Companies)/Stellungnahmen des Vernehmlassungsverfahrens zur Aktienrechtsrevision <https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/aktienrechtsrevision14.html> accessed 17 September 2015.

55 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), arts 31-33. For practical reasons, this essay does not address the question of customary international legislative duties.

56 *See*, for instance, the debate in the Avena judgment. *Supra* note 3.

57 Venice Commission, *supra* note 4.

A. Who incurs a legal duty to legislate?

Only certain actors can incur a legislative duty. The definition of the Venice Commission refers to parliaments as the duty-bearer for legislative obligations.[58] Yet, comparative law and nuances in domestic legal systems must be taken into account and, as in Switzerland, it is possible that actors other than parliaments have (limited) legislative functions. All bodies with legislative functions can potentially be tasked to fulfil a legislative duty. Depending on the national legal system, the legislature encompasses various actors, including regional or local legislatives as well as organs otherwise pertaining to the executive but mandated with some limited legislative functions. Where there are several legislative bodies, e.g. because there are several normative levels within a domestic jurisdiction, the domestic division of competences decides who the relevant actor(s) will be. In Switzerland, the first step is to clarify if the international obligation falls within the sphere of competence of the federal level, the cantons or both. In other words, only the organ that is attributed the obligation of fulfilling a specific duty can incur a legislative duty.

B. A legally binding duty to take legislative measures

Second, it must be verified whether there is indeed a binding obligation to take legislative action. Not only must the obligation be of binding force (1), but it must also be a specific duty to legislate, leaving no discretion as to whether

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legislative means are required (2). We will consider the conceptual aspects of these criteria here while the challenges associated with them will be illustrated in the context of the case-study in section IV below.

1. The duty to act is a legally *binding* obligation

The duty to act must be a legally binding obligation applicable to the concrete situation. Recommendations or wording from soft-law instruments do not qualify. Statements in concluding observations of United Nations supervisory organs are also not legally binding and (in the view of the majority of commentators) cannot establish duties to legislate but provide significant interpretative assistance to ascertain whether the provisions contained in a treaty involve specific duties to legislate.[59]

2. The duty to act is a duty to *legislate*

Duties to legislate can only arise if the duty to act denotes a specific duty to legislate. A legislative duty requires that without taking legislative measures, the State could not comply with the obligation. Legislative duties can be explicit or implicit.

Relatively straightforward are situations in which a norm explicitly requires legislative action. While States may still have significant discretion as to the substance of the legislation they adopt, provisions with explicit duties to legislate leave no room for discretion as to the legislative nature of action. Article 2(f) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for instance, contains such an explicit obligation to legislate:

«State parties undertake… to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.»[60]

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58 *Ibid*., p. 1.

59 This has also been the conclusion of the Swiss Federal Tribunal in BGE 137 I 305, 325.

60 Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, 18 December 1979 (entered into force 3 September 1981), SR 0.198, Art. 2(f). Erika Schläppi, Jörg Künzli & Evelyne Sturm, *Art. 2: Allgemein*, in: Erika Schläppi, Silvia Ulrich & Judith

The term «including» means that a portfolio of measures without any legislative steps will not suffice.[61]

Somewhat less unequivocally, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, refers to «all appropriate means, including particularly the adoption of legislative measures» «with a view to achieving progressively the full realization of the rights recognized» in the treaty.[62] Despite the explicit mention of legislation, such wording places considerable discretion in the hands of each State party. However, the provision does not mean that the duties to act are of a less binding nature;[63] rather, it simply means that there are various possible ways in which States can comply with the obligations – and that legislation is a particularly relevant tool to achieve the objectives of the treaty.

Yet, even where legislation is explicitly mentioned in a provision, the provision does not necessarily contain a legislative duty. If, for instance, a provision stipulates that «states shall consider adopting legislation»,[64] there is a legally binding obligation (*shall*) but this obligation can be met by *considering* the adoption of legislation and States may legitimately abstain from adopting legislation. Moreover, even where a legislative duty is explicit, the question of the unavoidability of legislation deserves to be raised. It could be that in a particular jurisdiction, the aim to be achieved by ways of legislation has already been completely fulfilled. In such a scenario, further legislation would arguably not be required despite an explicit duty to legislation in an international convention. This seems at least to have been the position of the Swiss Federal Tribunal in BGE 137 I 305 in which it assessed the existence of a legislative obligation in light of the existing social reality: In order to answer the question whether the cantonal legislator in Zug is obliged to adopt legislative measures related to gender equality by virtue of the CEDAW Convention as well as the Swiss Constitution and the Constitution of the Canton of Zug, the Federal Tribunal took into account statistical and other evidence from various sources before concluding that legislation is (still) required because equality has not yet been reached.

Much more complex is the identification of implicit duties to legislate. In many instances, a provision leaves considerable discretion to the State in relation to the choice of measures. To identify legislative duties, it must be ascertained whether a duty to act can *de facto* only be met by *legislative* action. Depending on the specific wording of a specific provision, a State may have discretion in the type of legislative measure *or* discretion as to whether to legislate in the first place. It is not uncommon that international provisions require States to take measures, but legislation is often only one possible way to meet the obligation. For instance, language referring «all appropriate measures» can *de facto* imply the need to take legislative action, but this will depend on context, the domestic division of competences and on empirical evidence demonstrating the unavoidability of legislative measures in a specific

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Wyttenbach (eds), CEDAW: Kommentar zum Ubereinkommen der Vereinten Nationen zur -Beseitigung jeder Form von Diskriminierung der Frau, Bern 2015, p. 215–243, 229.

61 Similarly, the Federal Tribunal required that the question *whether* to legislate or not must be predetermined in order to show the existence of a legislative duty. *See* BGE 137 I 305, 315.

62 International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 16 December 1966 (entered into force 3 January 1976), Art. 2(1).

63 This statement is nowadays uncontroversial including for opponents of the justiciability of econo-mic, social and cultural rights. *See* Michael Dennis & David Stewart, *Justiciability of Econo-mic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adju-dicate the Rights to Food, Water, Housing, and Health?*, 98 American Journal of International Law (2004), p. 462-515, 466, note 25.

64 For instance, such wording is contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2237 UNTS 319, 15 November 2000 (entered into force 25 December 2003), Art. 7(1). Or the International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, 9 December 1999 (entered into force 10 April 2002).

jurisdiction. A straightforward example of a provision with implicit legislative duties was certainly Art. 11 of the Treaty establishing the European Economic Community. This article required Member States to «take all appropriate measures to enable Governments to carry out, within the timelimits laid down, the obligations with regard to customs duties which are incumbent on them pursuant to this Treaty».[65] Given that customs duties are commonly regulated in domestic legislation, Member States could hardly comply with such an obligation without adapting their national laws.

Unless there are specific requirements contained in provisions of a treaty, the ratification of an instrument entails for the States Parties to it the fulfilment of the obligations expressed in the treaty, whether by legislation, administrative action, common law, custom or otherwise.[66] Given the variety of economic, social and legal systems that exist among States Parties to international human rights treaties, as well as their different levels of development and circumstances, each State's approach to implementing the obligations of a treaty may legitimately vary.[67] While a State has the right to devise its own measures of implementation, according to the circumstances in which it finds itself, this discretion is, however, not unlimited. The UN Committee on Economic, Social

and Cultural Rights has developed a justification requirement, asking States to indicate «not only the measures that have been taken but also the basis on which they are considered to be the most ‹appropriate› under the circumstances» and the supervisory body retains a residual power to assess the appropriateness of the measures taken by States Parties.[68] That said, human rights treaties generally leave considerable discretion for States to decide whether or not to legislate.

There are thus two ways in which it can be shown that a duty to legislate exists. Either, such a duty is explicitly contained in a provision, in which case it is usually straightforward to establish. Or, much more complicated, a duty to legislate can be derived from a provision referring to «all appropriate measures» or «adequate means», or similar terms and it can be demonstrated that legislative action is not only adequate but *essential and unavoidable* in a specific jurisdiction and in light of that jurisdiction's constitutional requirements. In such latter cases, the provision thus contains an implicit duty to legislate. The identification of such implicit legislative duties is obviously no easy exercise. The case-study will demonstrate that it is a particularly difficult exercise in relation to most «Business and Human Rights» concerns.

In sum, legislative duties describe obligations requiring a State to organise that the competent domestic legislative organs legislate. The concept does not cover situations in which it would simply be preferable, for whatever reason, to have additional and/or different legislation. With this in mind, we can proceed to examine whether Switzerland incurs duties to legislate in relation to «Business and Human Rights».

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65 Treaty establishing the European Economic Community (Treaty of Rome), 25 March 1957, 298 UNTS 1958 (entered into force 1 January 1958), Art. 11, see also Art. 5.

66 Yuri Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 Virginia Journal of International Law (1985), p. 627-692, 660. «A domestic implementation clause merely reinforces the customary international rule that a state which has contracted a valid treaty is bound to take every measure necessary to give full effect to the treaty.»

67 This idea is well-known in Switzerland and in European law and resonates with the concept of subsidiarity.

68 «[T]he ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.» Committee on Economic, Social and Cultural Rights, General Comment 3 on the nature of States parties obligations, 14 December 1990, E/1991/23, para. 4. *See* also Malcolm Langford, *Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 27 Nordisk Tidsskrift for Menneskerettigheter (2009), p. 1-28, 25.

IV. Case-Study: Switzerland's Legislative Duties in the Field of «Business and Human Rights»

As mentioned previously, the term «Business and Human Rights» covers a broad range of concerns that pertain to various legal fields. It is unrealistic to ascertain in this article how many of the arguably relevant international norms oblige Swiss law-makers to legislate in the area of «Business and Human

Rights». Rather, the case-study will concentrate on a focal issue that is prominently raised in the current Swiss «Business and Human Rights» debate and that corresponds to one of the two main demands of the ongoing campaign of a coalition of Swiss NGOs: the alleged lack of rules compelling Swiss corporations to take precautionary measures in order to prevent human rights abuses.[69] Is Switzerland legally bound to adopt legislation pursuing this aim and if so, what are the obstacles in attempting to support such an argument?

Does the federal[70] legislator have specific duties to act in order to avoid and address corporate human rights abuse? And if so, are these duties to *legislate*, and more specifically, to take legislative measures that compel companies to take steps with a view to prevent human rights abuses? As is apparent from the theoretical outline above, it is not easy to establish duties to legislate, let alone to establish the specific type of domestic legislation a State should adopt.

At least one legally binding source would need to indicate that aspects of the demand of the Corporate Justice Campaign are not «simply» political demands, but legislative duties. Given that the UN Principles are not legally binding, they are ineligible – in and of themselves – as a source to contain a legally binding obligation to legislate, and international and regional human rights treaties are the most likely candidates:

A. Potential sources of duties to legislate: Positive duties and their implication for the domestic legislator

Switzerland has ratified international and European instruments that contain duties to respect, protect and fulfil human rights. Duties to *protect* human rights entail the positive obligation of the State to take steps with a view to avoid that non-State actors, including corporations, cause harm to the enjoyment of human

69 Inter alia, the «Corporate Justice Campaign» demands that Switzerland adopts legislation ensuring «that Swiss corporations are compelled to take precautionary measures (duty of care) – with respect to their activities, their subsidiaries and subcontractors, in order to prevent human rights violations and ecological crimes, here and elsewhere». The second demand is the call for legislation to ensure «that people who are harmed by the activities of Swiss companies, their subsidiaries and subcontractors can institute proceedings here and seek redress». *See* Corporate Justice Campaign, Demands <http://www.corporatejustice.ch/en/campaign/demands/ (no longer available)> accessed 20 August 2014. For more information on the Campaign's assessment of the current legal situation in Switzerland, *see* Membrez, *supra* note 42.

70 The most relevant actor who should allegedly adopt legislation compelling enterprises to prevent abuses is the federal legislator although there remains some room for cantonal legislation such as in the field of procurement. *See* above, section III.B.

rights.[71] Indeed, supervisory organs have held States responsible not only for situations in which States themselves interfered with the enjoyment of rights, but also for failures to regulate or prevent the behaviour of private actors whose acts and omissions negatively impact upon the enjoyment of human rights.[72] Therefore, OHCHR noted that «[h]uman rights law and jurisprudence points to a duty of the State to take State action in the form of legislation, regulation, monitoring, and enforcement to ensure that company activities do not negatively impact the enjoyment of human rights».[73]

A mapping exercise conducted by OHCHR outlined the scope and content of States Parties' responsibilities to regulate and adjudicate the actions of business enterprises under the existing human rights treaties (and as elaborated by the respective treaty bodies). The study (cautiously) found that there was an «emergence of clear State obligations to prevent and punish corporate abuse» and (more unequivocally) stated that the core international human rights treaties «require States to play a key role in effectively regulating and adjudicating corporate activities with regard to human rights».[74]

The conclusions of the European Court of Human Rights (ECtHR) with regard to duties to protect[75] would seem to support the view that Switzerland has some obligations to adopt legislation with an aim to ensure that non-State

actors do not threaten the enjoyment of human rights and that victims have access to effective remedies. As the study of the SCHR concludes, the conceptualisations of positive obligations to protect human rights and the increasing interlinkages between norms, economies and communities have impacted upon the «Business and Human Rights» debate and these are of particular relevance for Switzerland as a home State of numerous international corporations.[76]

Yet, given that *explicit* duties to legislate against corporate human rights abuse are very limited,[77] an argument based on legislative duties will mostly have to be based on a demonstration of implicit duties to legislate and will have to show that legislation is factually inevitable to comply with the duties to protect human rights and that other steps of encouragement of voluntary initiatives or other measures will not be sufficient.

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71 This is the tripartite typology commonly used to classify the dimensions of human rights obligations. For more on the origins and comparative practice in relation to the typology, *see*, Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5 Human Rights Law Review (2005), p. 81-103. Walter Kälin & Jörg Künzli, The Law of International Human Rights Protection, Oxford 2009, 96-120. Specifically in relation to the regulation of corporate behavior, including by the legislator, *see* Geisser, *supra* note 46, p. 539f.

72 For an overview, see Aoife Nolan, Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the «Obligation to Protect», 9 Human Rights Law Review (2009), p. 225-255. For cases, see for instance COHRE v. Sudan, Communication 296/05, 29 July 2010 (ACommHPR). Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights v. Nigeria, Communication 155/1996, 27 October 2001 (ACommHPR). Lopez Ostra v. Spain, Application No. 16798/90, 9 December 1994 (ECtHR).

73 International Finance Corporation & OHCHR, Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights (OHCHR, 2009), para. 31 <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES> accessed 16 September 2015.

74 OHCHR, State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' Core Human Rights Treaties, Report prepared for the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, Geneva 2007.

75 Dröge, *supra* note 3, p. 87–100. Samantha A. Besson, *Les obligations positives de protection des droits fondamentaux: un essai en dogmatique comparative*, Zeitschrift für Schweizerisches Recht (2003), p. 49-96.

76 Kaufmann et al., *supra* note 39, para. 85. In relation to the ECHR, *see* also para. 100.

77 *See* below, section IV.B for the exceptions relating to discrimination in the sphere of employment.

As mentioned, the Federal Council now seems to accept the idea that some non-voluntary measures should be part of the «mix» of measures to be taken in the future.[78]

It must be shown that measures going beyond the encouragement of voluntary initiatives must involve legislative action. This step is relatively straightforward for Switzerland given that it is not difficult to imagine that measures taken by the State to compel companies to take into account human rights considerations might affect economic freedom.[79] Swiss constitutional law protects economic freedom as a constitutional fundamental right.[80] Restrictions to economic freedom must have a legal basis and, therefore, some sort of legislation is required by virtue of Swiss constitutional law. This means that any restrictions to economic freedom must be able to meet the test established in the Constitution for limiting human rights. In other words, the measures must comply with Art. 36 of the Federal Constitution which requires that the measure does not affect the essence of the relevant right, has a legitimate objective, is proportionate and – importantly – has a legal basis.[81] Significant restrictions must have their basis in a federal act.[82]

To have a legal basis and in order to ensure the foreseeability of the law,[83] measures going beyond the encouragement of voluntary initiatives will therefore require legislation[84] and Switzerland can effectively only comply with its duties to protect from corporate abuse if it adopts the necessary legal bases for restricting economic freedom. This logic applies to many other duties to protect given that the realisation of such duties can restrict other legal interests protected by constitutional fundamental rights and must, therefore, have a solid legal basis.[85] Hence, duties to protect (and fulfil) will hardly ever be realisable without domestic legislation even by virtue of Swiss constitutional law.

That said, it remains to be seen whether such legislation must specifically compel corporations to take precautionary measures in order to prevent human rights abuses. Swiss NGOs argue that legislative measures aiming to comply with the State's duties to protect can only be effective if they compel corporations to take precautionary steps.[86] As an interpretative aid of human rights treaties, the UN Guiding Principles would

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78 Bundesrat, *supra* note 40.

79 This is also argued by Kaufmann et al., *supra* note 39, para. 62. Mentioning, for instance, that freedom of contract could be restricted if businesses are compelled to respect labour standards.

80 Federal Constitution of 18. April 1999 (SR 101), Art. 27. *See*, for instance, Jörg Paul Müller & Markus Schefer, Grundrechte in der Schweiz, Bern 2008, Margin nr. 1042ff. Klaus A. Vallender, St. Galler Kommentar zu Art. 27 BV, 3. Aufl., Zürich/St. Gallen 2014, Margin nr. 57–59.

81 Federal Constitution of 18. April 1999 (SR 101), Art. 36.

82 Federal Constitution of 18. April 1999 (SR 101), Art. 36, para. 1. Furthermore, whenever economic freedom is concerned, the specific elements of Art. 94 of the Federal Constitution must be respected and restrictions even need a basis in the Constitution itself if they amount to a divergence from the principle of economic freedom, i.e. if they are incompatible with the mechanisms of free competition. Federal Constitution of 18. April 1999 (SR 101), Art. 94, para. 4. Müller/Schefer, *supra* note 80, Margin nr. 1044, 1067ff.

83 Rainer J. Schweizer, St. Galler Kommentar zu Art. 36 BV, 3. Aufl., Zürich/St. Gallen 2014, Margin nr. 15.

84 While the Constitution in Art. 35 provides a basis for the federal legislator to implement positive duties (including in the realm of «Business and Human Rights»), this clause alone would not be sufficient for restricting economic freedom. Nor would the international human rights treaties in my view be sufficient as it would be farfetched to argue that businesses should be expected to foresee the measures the legislator could take based on the wording of international treaties alone.

85 For an analysis of the relationship between duties to protect and restrictions in Swiss constitutional law, *see* Patricia Egli, Drittwirkung von Grundrechten: Zugleich ein Beitrag zur Dogmatik der grundrechtlichen Schutzpflichten im Schweizer Recht, Zürich 2002, p. 317.

86 Corporate Justice Campaign, Demands stating that «[v]oluntary corporate social responsibility initiatives by companies are too ineffective to prevent human rights violations and environmental degradation» <http://www.corporatejustice.ch/en/campaign/demands/ (no longer available)> accessed 20 August 2014.

seem to confirm this conclusion.[87] Yet, at least for now, the difficulty is that there is no *explicit* duty to adopt such legislation in the existing human rights treaties and the conclusion hinges upon the interpretation of empirical evidence as well as legal norms.

Moreover, even if one agrees that States have duties to take legislation in order to compel private actors to take precautionary measures to prevent harm to human rights interests, it is another step to argue that the two international covenants or the European Convention on Human Rights (ECHR) or other treaties require that States to tailor their legislation to take into account the human rights impacts occurring outside their own territory.

B. The problem of extraterritoriality

It is trite to mention that extraterritorial aspects of the «Business and Human Rights» debate are crucial but controversial. While there is considerable and evolving jurisprudence and academic interest on extraterritorial aspects of treaties such as the ECHR, the International Covenant on Civil and Political Rights (ICCPR) or the ICESCR and convincing legal arguments that numerous extraterritorial obligations do exist,[88] relatively few States have so far adopted legislation aimed at avoiding harm through business-related activities abroad.[89] Suffice it to say that the ease with which the demonstration of legislative duties in the area of «Business and Human Rights» can be made will increase in parallel with the extent to which States and tribunals accept extraterritorial obligations. At least for now, the scope of States' extraterritorial obligations remains contested although treaty body commentaries show a clear trend towards increasing pressure on States to adopt legislation that addresses extraterritorial abuses by corporations with ties to the territorial jurisdiction of the State. In February 2015, for instance, the UN Committee on the Rights of the Child expressed concern that Switzerland «does not provide a regulatory framework which explicitly lays down the obligations of companies acting under the State party's jurisdiction or control to respect the rights of the child in operations carried out outside the State party's territory».[90]

In light of some remaining uncertainties to establish unequivocal duties to legislate in relation to extraterritorial abuses, it is warranted to point out that there are scenarios in which no extraterritoriality arises. Harm from corporate activities can also arise within one and the same territorial jurisdiction, e.g. in cases of discrimination in the workplace. For such scenarios, Art. 2 of the ICCPR and in particular Art. 27 of the recently ratified Convention on the Rights of Persons with Disabilities (CRPD) in conjunction with articles 8 and 35, para. 3 of the Federal Constitution[91], for instance, would seem to make a compelling case that the federal legislator shall adopt (further) legislation, at the

87 Guiding Principles on Business and Human Rights, *supra* note 27. Principle 1 mentions that duties to protect require legislation to prevent, investigate, punish and redress abuses by businesses.

88 *See* in particular Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, adopted by a group of experts convened by Maastricht University and the International Commission of Jurists, 21 September 2011. For recent literature, *see* also Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy, Oxford 2011. Fons Coomans & Rolf Künnemann, Cases and concepts on extraterritorial obligations in the area of economic, social and cultural rights, Mortsel 2012. Karen DaCosta, The Extraterritorial Application of Selected Human Rights Treaties, Boston 2012.

89 But *see* below, section IV.C for an outlook.

90 Concluding Observations, Switzerland, CRC/C/CHE/CO/2-4, 26 February 2015, para. 22–23.

91 Federal Constitution of 18. April 1999 (SR 101), Art. 35, para. 3 stipulates that «[t]he authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons». Art. 8 deals with equality before the law.

very least in order to protect individuals with a disability from discrimination in the workplace within Switzerland's territorial jurisdiction, including in the labour relationships between private individuals and private corporations.[92] Although disability-related discrimination in the workplace within the domestic territorial jurisdiction of Switzerland only reflects a very small part of the range of «Business and Human Rights» concerns, these obligations show that it is squarely possible to identify at least some binding obligations requiring Switzerland to adopt additional legislation to protect individuals from harm to human rights interests arising from corporate activities. That said, it remains true that the identification of specific duties to legislate remains uneasy – at least for now. In order to briefly consider the future normative evolution of this debate, it is notable that several recent developments may stimulate the debates on domestic legislative measures in relation to «Business and Human Rights»:

C. Outlook

Some influential jurisdictions have begun to introduce or at least debate binding obligations on corporations. An example of the recent adoption of domestic legislation incorporating due diligence regarding human rights along the supply chain is Section 1502 of the US Dodd-Frank Act: This legislation requires companies to report on whether they source certain minerals from conflict areas and the Act references the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals.[93] In addition, European Union institutions are currently contemplating the introduction of a directive along similar lines,[94] and the French Senate is considering a broad proposal already accepted by the French National Assembly.[95] If adopted, the legislation would require large French companies to undertake and publish comprehensive supply chain due dili-

gence.[96] If the law is passed in France, which seems likely according to a commentator,[97] French representatives announced to push the European Commission to develop the proposal for the EU directive along similar lines – in which case spillover effects could be expected across Europe and potentially beyond.[98] A 2014 amendment of the Accounting Directive 2013/34/EU already requires the disclosure of

92 That further legislation is required has also been the conclusion of a legal opinion commissioned by the Swiss government. Walter Kälin *et al.*, Mögliche Konsequenzen einer Ratifizierung der UN-Konvention über die Rechte von Menschen mit Behinderungen durch die Schweiz: Gutachten zuhanden des Generalsekretariats GS-EDI/Eidgenössisches Büro für die Gleichstellung von Menschen mit Behinderungen EBGB, Bern 2008, p. 117. Art. 27(1)(a) of the CRPD requires states to take legislation to prohibit labour discrimination on the basis of disability. For Switzerland, the CRPD entered into force on 15 May 2014.

93 Dodd-Frank Wall Street Reform and Consumer Protection Act, H. R. 4173, 5 January 2010, sec 1502.

94 Parliament of the European Union, *Motion 2015/2589(RSP), 29 April 2015*, demanding the creation of «a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency».

95 Assemblée nationale française, Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, adoptée par l'Assemblée nationale en première lecture, 30 mars 2015 (texte adopté n° 501), Art 1.

96 *Ibid.* Under the proposed law, large French companies would be responsible for developing and publishing due diligence plans for human rights, and environmental and social risks. Failure to do so could result in fines of up to 10 million euros.

97 Arnaud Poitevin, The EU May Move towards Mandatory Business & Human Rights Regulation 2015) <https://www.linkedin.com/pulse/eu-moves-towards-mandatory-business-human-rights-arnaud-poitevin> accessed 18 September 2015.

98 For other examples of domestic legislation, *see* Konzernverantwortungsinitiative, Regulie-rung internationaler Konzernaktivitäten: Der historische und der internationale Kontext, Factsheet II 2015) 2-3 <http://konzern-initiative.ch/wp-content/uploads/2015/04/KVI_Factsheet_2_D.pdf > accessed 16 September 2015.

some human rights relevant information by large corporations and Member States have two years to transpose the directive into their national legislation.[99]

In addition, at the international level, a group of States in July 2015 begun negotiations towards a binding «Business and Human Rights» treaty.[100] The adoption of a treaty promises to be a (potentially very) long and bumpy road at best,[101] and – at worst – an excuse for States for not engaging actively in the implementation of the UN Guiding Principles.[102] While it is too early to speculate about the substance of this potential future treaty, it is certainly conceivable that such an instrument will contain explicit and specific legislative duties to protect against corporate abuse.

V. Conclusion

By considering the elements of a definition of international legislative duties in light of the «Business and Human Rights» debate in Switzerland, the article illustrated that it is still difficult to univocally establish that the relative lack of legislation targeted to implement duties to protect from corporate abuse amounts to a failure to implement international legal obligations. Yet, even if there may not be a specific legislative duty for Switzerland to adopt legislation exactly corresponding to the suggestions made by the coalition of Swiss NGOs, the assessment of the existing legal situation does suggest that the current situation is insufficient from the perspective of ensuring the protection of human rights interests against activities by private actors. At the very least, there are international legislative obligations to address discrimination in all types of employment and States must otherwise be able to explain how their current legal situation enables them to effectively protect human rights against abuses from non-State actors.[103] While it is possible to conclude that Switzerland has some legislative duties in the area of «Business and Human Rights», and has not yet fully implemented all of them, deriving the precise scope of such legislative duties from existing human rights law remains uneasy. In any event, international law «require[s] States to play a key role in effectively regulating and adjudicating corporate activities with regard to human rights».[104] That said, States have considerable leeway in the conduct they

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99 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. L 330/1.

100 Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights A/HRC/26/L.22/Rev.1, (24 June 2014).

101 Carlos Lopez, International Talks on a Treaty on Business & Human Rights: A Good Start to a Bumpy Road (International Commission of Jurists, 24 July 2015) <https://www.escr-net.org/node/366462> accessed 2 September 2015.

102 The worry is that the treaty negotiations could harm the implementation process of the Guiding Principles – in the knowledge that such treaty negotiations will be extraordinarily difficult given past attempts to push for binding international legal obligations related to corporations. *See* John Ruggie, The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty 8 July 2014) <http://www.ihrb.org/commentary/board/past-as-prologue.html> accessed 17 September 2015.

103 This is also the position of the UN Guiding Principles: States shall evaluate the existing legal situation in their jurisdiction in order to identify any potential gaps. Guiding Principles on Business and Human Rights, *supra* note 27, Principle 3A. *See* also, *supra*, section III.B.2 on state discretion and note 68 on the justification requirement applied by UN supervisory bodies. In Switzerland, a former member of parliament requested such a systematic «gap analysis». The National Council agreed with the demand, the result is a paper issued in April 2015. Bundesrat, *supra* note 40. Alec Von Graffenried, Postulat 12.3503, submitted in the Nationalrat, 13.06.2012. *See* also Alec von Graffenried, *Menschenrechte in Unternehmen: Mehr Transparenz über gesetzliche Lücken zum Schutz der Menschenrechte*, Neue Zürcher Zeitung, 21. Januar 2014, p. 16. *See* also Kaufmann et al., *supra* note 39, para. 86, recommending a detailed mapping evaluation similar to the pilot mapping report exercises conducted in the UK, Germany and Denmark.

104 OHCHR, *supra* note 74.

pursue to achieve the realisation of their international obligations and the Swiss legislator therefore continues to enjoy significant discretion as to how it endeavours to implement the State's duties to protect individuals from harm arising from corporate activities.

Against this background, the relationship between international law and domestic legislators deserves more attention from international lawyers in general and in the context of «Business and Human Rights» in particular. Legislative measures taken by States to implement their international legal obligations

are at the core of the interaction between international law and domestic legal systems because the reality of international law «in action» still largely depends on domestic legislators in implementing and shaping norms originating at the international level. If the basic assumptions of George *Scelle*'s theory of the role splitting (*dédoublement fonctionel*) are plausible (which they are in my view),[105] the problem of the identification and implementation of legislative duties almost necessarily becomes more acute the more interdependent the international community is and the more international law attempts to address globalised phenomena such as corporate human rights abuses.[106]

Just as international lawyers have studied the relationships between international law and domestic courts,[107] this article showed that the conceptual exploration of the relationship between international law and domestic legislators can illustrate some of the practical problems related to the decentralised nature of international law. In particular, the recent research on international law in domestic courts has emphasised the need to consider how the division of labour between the international and the domestic levels has (or has not) evolved over time and the very real consequences resulting for individuals affected by human rights abuses. In the realm of «Business and Human Rights», domestic legislators undoubtedly remain crucial «engineers» of the empirical reality of international law and are tasked to play a central role in fulfilling the promise of States' duties to protect individuals from abuses resulting from non-State actors.

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105 Georges Scelle, Précis de droit des gens: Principes et systématique, Paris 1932. Antonio Cassese, *Remarks on Scelle's Theory of Role Splitting (Dédoublement fonctionnnel) in International Law*, 1 European Journal of International Law (1990), p. 210-231. A State sets its internal order and simultaneously participates in the international community, whose right the State helps to shape and implement.

106 Similarly, *see* Daniel Thürer, *Internationales «Rule of Law» – innerstaatliche Demokratie*, in: Daniel Thürer (ed), Völkerrecht als Fortschritt und Chance, Zürich 2009, p. 197-222, 198ff.

107 The research on international law in domestic courts is based on the underlying assumption that international jurisdiction and enforcement remain limited and national organs keep a crucial role in shaping the reality of international law. *See*, for instance, the wording of the International Law Association, Mandate of the Study Group on Principles on the Application of International Law by Domestic Courts 2011) <www.ila-hq.org/download.cfm/docid/2F922184-52A1-4610-98BEB165E7217134> accessed 28 August 2015. Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 Loyola International and Comparative Law Review (2011), p. 133-168. Yuval Shany, *Bolstering the Implementation of International Rules in Domestic Systems*, in: Antonio Cassese (ed), Realizing Utopia: The Future of International Law, 2012, p. 200-209. Antonios Tzanakopoulos & Christian J Tams, *Introduction: Domestic Courts as Agents of Development of International Law*, 26 Leiden Journal of International Law (2013), p. 531-540.