

**CORPORATE ACCOUNTABILITY IN SUPPLY CHAINS OF
SWISS MULTINATIONAL ENTERPRISES:
AN IMPOSSIBLE CASE?**

DISSERTATION

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ABSTRACT

There is an increasing awareness concerning responsibility and potential liability of multinational enterprises for potential human rights violations committed predominantly in the Global South. On an international level, there is a growing research focusing on business and human rights issues. Although being the country with the highest density of international corporations compared to its population, this research has been widely absent in Switzerland. This paper attempts to fill this gap. It uses two hypothetical scenarios to examine whether potential civil claims could be established. The findings suggest that jurisdiction could likely be upheld in Swiss courts. However, at the time of writing there has not yet been a case in Switzerland where the court considered the merits. It remains doubtful that the legal provisions in place are sufficient to address these challenges and provide an effective remedy for victims of corporate human rights abuses.

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with love

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ABBREVIATIONS

Art./Arts.	Article/Articles
ATS	Alien Tort Statute
BD	The Berne Declaration
BSCI	Business Social Compliance Initiative
Cape	Cape Industries Plc.
CCC	Clean Cloth Campaign
CoC	Code of Conduct
CSR	Corporate Social Responsibility
CVP	Christian Democratic People's Party of Switzerland
Draft Norms	Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights
DRC	Democratic Republic of Congo
ECCHR	European Centre for Constitutional and Human Rights
ECCJ	European Coalition for Corporate Justice
ed.	Edition
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FDI	Foreign Direct Investment
FLA	Fair Labor Association
GCP	Glencore Corporate Practice
GDP	Gross National Product
GRI	Global Reporting Initiative
HRC	Human Rights Committee
Ibid	Ibidem
IBM	International Business Machines Corporation
ICRC	International Committee of the Red Cross
ILO	International Labor Organization
MNE / MNEs	Multinational Enterprise / Enterprises

NAP	National Action Plan
No.	Number
OECD	Organization for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
OAGS	Office of the Attorney General of Switzerland
Para./ Paras.	Paragraph/Paragraphs
Rev	Review
SA	South Africa
SCCJ	Swiss Coalition for Corporate Justice
SECO	Swiss State Secretariat for Economic Affairs
SZIER	Schweizerische Zeitschrift für internationals und europäisches Recht
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN Guiding Principles	UN Guiding Principles on Business and Human Rights
US	United States of America
UWG	Unfair Competition Act, in German: Bundesgesetz gegen den unlauteren Wettbewerb
v.	Versus
vol	Volume
VZ	Customer Protection Agency, in German: Verbraucherzentrale
WBCSD	World Business Council for Sustainable Development

Introduction

«It is extremely difficult to hold to account European companies for their impact outside Europe, and even more so in their supply chains. The most tragic consequence of this situation is that workers pay the price with their lives, and victims are left without compensation.»

(European Coalition for Corporate Justice)

Hardly a month passes by without the media reporting on corporations being involved in scandals related to human rights or the environment. The *Agror case*², or the FIFA scandal³, both related to Switzerland, are just two of the most recent examples. Legal scholars, practitioners, politicians and civil society increasingly grow aware of the issue of responsibility and potential liability of multinational enterprises (hereinafter MNE) for potential human rights violations. Most of these violations occur in the Global South. At the same time there are increasing expectations from different stakeholders for those companies to respect and at the same time enforce human rights standards. In this context tort cases for damages can play a crucial role. Not only due to the potential compensation for victims, but also as a tool to prevent future violations.⁴

MNEs are often intentionally structured in a way that the parent company cannot be held liable for corporate action of its subsidiaries, affiliates or suppliers. In today's global economy MNEs organize their production and supply chain geographically dispersed through highly fragmented production networks. These supply chain

¹ ECCJ, "European Coalition for Corporate Justice Supports French Bill Establishing Due Diligence Duty for Parent Companies," accessed June 7, 2015, <http://business-humanrights.org/en/european-coalition-for-corporate-justice-supports-french-bill-establishing-due-diligence-duty-for-parent-companies>.

² See Sub-Chapter 1.4.2.2

³ See for instance: Elmar Wagner, "Fifa-Skandal: Der Sport Im Korruptionssumpf," *Neue Zürcher Zeitung*, accessed June 14, 2015, <http://www.nzz.ch/meinung/kommentare/der-sport-im-korruptionssumpf-1.18556754>; Owen Gibson, "Sepp Blatter and the Qatar 2022 World Cup: Too Little, Too Late," *The Guardian*, accessed April 10, 2015, <http://www.theguardian.com/football/2014/dec/23/sepp-blatter-qatar-2022-world-cup-too-little-too-late>.

⁴ Ingeborg Schwenzer and Alain F. Hosang, "Menschenrechtsverletzungen - Schadenersatz vor Schweizer Gerichten" 2 (2011).

production networks impact the labor situation and often affect minimum guarantees that are protected as human rights norms. There is a growing movement of human rights advocates devoting themselves to these issues and working on the challenges posed to hold to account European companies for their impact outside Europe, as the introductory quote by the European Coalition for Corporate Justice (ECCJ) shows.

For this reason, the following paper will analyze the developments and challenges in legal corporate responsibility cases particularly concerning supply chains. The focus will be set on the example of Switzerland, the country with the highest density of international corporations compared to its population.

The first chapter will focus on the evolving international agenda in this area. It will then go on to look at the example of Switzerland as well as the most recent developments in terms of law and politics within the country. Chapter two will analyze the challenges of supply chain mechanisms. In this context, corporate social responsibility instruments and legal gaps will be pointed out. At the same time some of the most important socio-economic issues will be raised. In order to assess whether there is a potential for civil cases in the field of corporate accountability, the last chapter will look at two hypothetical scenarios of Swiss based MNEs in this area.

This paper is intended to contribute to a growing literature in the area of business and human rights focusing on the pertinent case of Switzerland. At the same time it may also be helpful for human rights advocates who are intending to bring a tort claim in this field before a Swiss court. Since this has not yet happened it would be of relevance for the legal development in this field to see how Swiss courts would decide in such matters, and whether there are adequate bases for claims against MNEs at this point in time.

I. Business and Human Rights: an Evolving International Agenda

A key concern in the field of corporate accountability is access to remedies for victims of human rights violations committed by MNEs. The issues that are created can be categorized in terms of three challenges. The first of these concerns the discussion of whether human rights are only addressed to states, or whether non-state actors, such as corporations have their own human rights obligations. The second challenge concerns jurisdiction over legal disputes in this field. The challenge is the fact that each sovereign state is in general regarded as having jurisdiction over its own internal affairs.⁵ The third one is the issue of corporate structure of multinational enterprises (MNEs)⁶. In general MNEs are treated as separate legal entities with only limited liability.⁷ While economically speaking MNEs are perceived as one entity, from a legal perspective they are almost multiple separate corporations in different countries.⁸ The first of these challenges will be addressed in the following, the latter two to a certain degree in chapter III of this paper.⁹

1.1 Human Rights and Non State Actors

There is increasing recognition that challenges posed by non-state actors have to be addressed through human rights law.¹⁰ Corporations are one of these non-state actors. This area does however, remain rather controversial and many scholars still reject the notion that human rights obligations as a whole apply to corporations as well.¹¹ Andrew Clapham, one of the most important advocates for obligations of

⁵ David Bilchitz, "The Necessity for a Business and Human Rights Treaty," *Available at SSRN* 2562760, 2014.

⁶ In the following paper I chose to refer to multinational enterprises (MNEs) rather than transnational corporations (TNCs), in line with the OECD. The activities of such MNEs can also be of a transnational nature. The focus is on the fact that these companies are effectively spread over several countries. While TNC implies that a corporation is active on an international level, however still rather centrally organized out of one state.

⁷ Peter Muchlinski, "Limited Liability and Multinational Enterprises: A Case for Reform?," *Cambridge Journal of Economics*, 2010, beq023.

⁸ Bilchitz, "The Necessity for a Business and Human Rights Treaty."

⁹ See Chapter III

¹⁰ See for instance: Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); Surya Deva and David Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013).

¹¹ See for instance: Carlos Manuel Vazquez, "Direct vs. Indirect Obligations of Corporations Under International Law," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2005).

non-state actors, concludes that concerning corporations and human rights, we can not yet say that human rights law has met the challenges of both preventing and punishing violations committed by corporations. It is currently the challenge to fully translate obligations of corporations as non-state actors and also to develop and strengthen accountability mechanisms.¹²

Recalling the obligation of states to ensure that those within their jurisdiction are protected from abuses committed by non-state actors especially certain human rights obligations are getting more widely acknowledged.¹³ One of the main challenges concerning non-state actors in relation to the power of ever-growing corporations and their limited liability has been strengthened through the globalization of the world economy. Companies increasingly outsource different links in their supply chains, which results in the rise of complex global subcontracting relationships and retailer buying practices. Precarious labor standards and human rights violations very often occur in these complex supply chains.¹⁴ International human rights law is the emerging framework that has the potential to guarantee and ensure more responsibility in this area. Since both the state's duty to protect individuals in its jurisdiction from such human rights violations of non-state actors, as well as national tort and contract laws have proven to be inadequate to address these challenges there is a need to fill the legal gaps. Governments are competing for investment and tax revenues of transnational corporations. Therefore incentives are not in line with the development of solid legal accountability for MNEs. This makes national law alone inadequate to address these issues.¹⁵

Many corporations now increasingly express their commitment to abide to human rights to reduce risks such as reputational damage or protests and also to be more attractive for their employees.¹⁶ At the same time no major company any longer

¹² Andrew Clapham, "Non-State Actors," in *International Human Rights Law*, ed. Daniel Moeckli et al. (Oxford University Press, 2013), 17.

¹³ See for instance: Daniel Augenstein and David Kinley, "When Human Rights 'responsibilities' Become 'duties': The Extra-Territorial Obligations of States That Bind Corporations," *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, 2013; Myfanwy Badge, "Transboundary Accountability for Transnational Corporations: Using Private Civil Claims" (Chatham House, Working Paper, March 2006) at http://www.chathamhouse.org.uk/pdf/research/il/ILP_TNC.pdf; Andrew Clapham, "Non-State Actors," in *International Human Rights Law*, ed. Daniel Moeckli et al. (Oxford University Press, 2013).

¹⁴ See also Sub-Chapter 2.5

¹⁵ Clapham, "Non-State Actors," 2013, 4 – 5.

¹⁶ Ibid., 14.

claims that human rights are none of their business. Nike for instance claimed that supply chain issues were none of their business back in the 1990s, but then radically changed its strategy and adopted human rights policies.¹⁷

1.2 Human Rights as Corporate Mandate

The richness of documentation on both positive and negative impacts on human rights of MNEs has triggered debates on business and human rights on the international and national level. Before focusing on the discussions on the domestic level in Switzerland, this sub-chapter will give a brief overview of some of the recent developments and debates on the international level.

At the UN a series of different phases within the UN has led to the adoption of the Guiding Principles in the Human Rights Council in 2011.¹⁸ To begin with, in 2003 a Sub-Commission of the Human Rights Committee (hereinafter HRC) proposed «Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights» (hereinafter Draft Norms)¹⁹. These were drafted in a treaty-like language and provided that virtually every human right would impose a duty on corporations. The HRC rejected their adoption in 2004. One of the main issues was that the Draft Norms assumed that the entire body of human rights law applies to corporations just as it applies to states, imposing virtually the same range of duties to corporations as to states. When Ruggie was appointed as Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business entities in 2005, this was one of his main critiques and an important reason why he distanced himself from the approach of the Draft Norms.²⁰ A further critique, in his view, was that no distinction was made between primary and secondary duties. The fact that corporations were supposed to step in where states were unable or unwilling to

¹⁷ Simon Zadek, «The Path to Corporate Responsibility», in *Corporate Ethics and Corporate Governance* (Springer, 2007), 159–72

¹⁸ John Ruggie, «Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises», 2011, http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/nethqur44§ion=14.

¹⁹ «Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights» (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, August 26, 2003), <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2003.12.Rev.2.En>.

²⁰ Augenstein and Kinley, «When Human Rights ‘responsibilities’ Become ‘duties.’»

respect HRL was furthermore troubling him.²¹ Based on that critique, together with an assumption that many states would by no means support such binding norms, Ruggie chose a different approach. He distanced himself from a utopian approach with striving aspiration, as it was for instance the case when the Universal Declaration of Human Rights (hereinafter UDHR) was adopted.²² Instead, the Guiding Principles aim to make non-legal standards more effective. They do not impose legal obligations on anyone, their «normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and Businesses»²³.

On June 25, 2014 the Human Rights Council passed a resolution called «Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights»²⁴. The resolution is sponsored by Ecuador and South Africa and establishes «an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights»²⁵.²⁶ The major economic powers, such as the US, the EU and China all opposed the resolution and refuse to participate in the ongoing negotiations of the working group.

1.3 Soft law Mechanisms in Place

Concerning business and human rights there is an increasing number of soft law instruments. These have to be distinguished from non-binding decisions of a mere

²¹ John Gerard Ruggie, «Business and Human Rights: The Evolving International Agenda,” *The American Journal of International Law* 101, no. 4 (October 1, 2007): 825 – 827.

²² John H Knox, «The Ruggie Rules: Applying Human Rights Law to Corporations,” *The UN Guiding Principles on Business and Human Rights* (Radu Mares Ed., 2012), 2011, 62.

²³ Ruggie, «Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,” para. 14.

²⁴ «Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights” (Human Rights Council, June 25, 2014).

²⁵ *Ibid.*, para. 1.

²⁶ For more information and arguments in favor of a binding treaty see for instance: Larry Cata Backer, «Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All,” *Fordham Int’l LJ* 38 (2015): 457; Bilchitz, «The Necessity for a Business and Human Rights Treaty”; Jens Martens, «Corporate Influence on the Business and Human Rights Agenda of the United Nations” (Misereor, Global Policy Forum, Brot für die Welt, June 2014); Cindy S Woods, «It Isn’t a State Problem: The Minas Conga Mine Controversy and the Need for Binding International Obligations on Corporate Actors,” *Geo. J. Int’l L.* 46 (2014): 629; for arguments against a binding treaty see for instance John G. Ruggie, «The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty,” *IHBR Commentary* 8 (2014), http://www.ksg.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf.

political character but cannot be put on the same level with treaty and international customary law either. In general soft law norms have to meet the following characteristics in order to be categorized as such: (1) unanimous adoption or at least adoption with a clear majority, (2) sufficiently clear and precise rules of conduct and a (3) certain degree of actual compliance in state practice.²⁷ Soft law has been applied in Swiss courts for the interpretation of international law as well as *mutatis mutandis* as guidance for the interpretation or concretization of domestic law.²⁸ The following texts are examples of instruments with such a soft law character: UN Guiding Principles, ILO Conventions and OECD Guidelines for Multinational Enterprise.

1.3.1 UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights²⁹ (hereinafter Guiding Principles) were drafted by Special Rapporteur Professor John Ruggie and unanimously endorsed by the UN Human Rights Council in June 2011. The Guiding Principles build on a three-fold «protect, respect and remedy» framework, which is comprised of three pillars:

- I. States have a duty to protect against human rights abuses committed by third parties, including business enterprises;
 - II. Business enterprises have a responsibility to respect human rights; and
 - III. Victims of business-related human rights abuses need access to effective remedies.
 - IV. The Guiding Principles are intended to provide practical guidance on how states and business enterprises can enhance «standards and practices ... so as to achieve tangible results for affected individuals and communities».³⁰
- The Guiding Principles do not impose legal obligations on anyone, their «normative contribution lies not in the creation of new international law

²⁷ Gregor Geisser, *Ausservertragliche Haftung Privat Tätiger Unternehmen für «Menschenrechtsverletzungen» bei Internationalen Sachverhalten: Möglichkeiten und Grenzen der Schweizerischen Zivilgerichtsbarkeit im Verhältnis von Völkerrecht und Internationalem Privatrecht* (Schulthess, 2013), para. 44 – 45.

²⁸ Ibid., para. 43 – 47.

²⁹ Ruggie, “Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.”

³⁰ Ibid.

obligations but in elaborating the implications of existing standards and practices for States and Businesses».³¹

There are a total of 31 Guiding Principles, each accompanied by a short commentary. A number of earlier international instruments and standards have been revised in order to align with the Guiding Principles. The Organization for Economic Co-Operation and Development (hereinafter OECD) Guidelines for Multinational Enterprises for instances, were revised in 2011 to include a chapter on human rights, which is now consistent with the Guiding Principles.

Due to the unanimous adoption of the Guiding Principles, they potentially could have universal application. While at this point they can be characterized as soft law there is a possibility for the principles to develop into customary law over time³². In addition, many multinational corporations have incorporated the Guiding Principles as a whole or partly into their code of conducts.

Further more, many states have since the endorsement of the Guiding Principles adopted so called National Action Plans on Business and Human Rights on how to best implement the Guiding Principles. Among these are several European countries such as the UK, the Netherlands and Italy.³³ Switzerland has not done so yet, but there is currently a pending petition in the Federal Council and a strategy is in the drafting process. The Swiss Federal Council furthermore published a comparative legal analysis concerning the due-diligence assessment of extraterritorial activities of Swiss corporations.³⁴ The Federal Council made many references to the Guiding Principles.³⁵ Among the suggested measures are mandatory reporting on human rights law and environmental protection, and an extension of the due diligence obligation of the Board of Directors which has to take human rights into consideration.³⁶

³¹ Ibid., para. 14.

³² Geisser, *Ausservertragliche Haftung Privat Tätiger Unternehmen für «Menschenrechtsverletzungen» bei Internationalen Sachverhalten*, 66.

³³ European Commission, “Business and Human Rights,” *Enterprise and Industry*, n.d., http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm.

³⁴ Federal Department of Justice and Police FDJP, “Rapport de droit compare: Mécanismes de diligence en matière de droits de l’homme et d’environnement en rapport avec les activités d’entreprises suisses à l’étranger,” May 2, 2014, <http://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2014/2014-05-28/ber-apk-nr-f.pdf>.

³⁵ Ibid., 9, 17, 18.

³⁶ Ibid., 10 – 11.

1.3.2 ILO Declarations

The ILO is the primary body within the UN System dealing with labor related issues. It is structured in a tripartite governing structure, which consists of national governments, employers' as well as workers' organizations. The organization has only very limited capability to deal with non-compliance of its standards and the sanctioning power is basically limited to «shaming and blaming» the non-compliant states. The focus of the ILO is more on providing guidance and information for its constituencies.

The ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy of 1977 (MNE Declaration)³⁷ provides guidance to MNEs, governments and social partners concerning relevant labor and social standards. The MNE Declaration is voluntary and aims to promote good corporate practice. It makes recommendations for «good corporate conduct» in the area of employment (promotion of employment, equality of opportunity and treatment, employment security, training opportunities and skill enhancement), working as well as living conditions (wages, benefits, occupational health and safety) and industrial relations (freedom of association, collective bargaining, dispute settlement). In the appendix there is a list of conventions and recommendations, which are relevant for the MNE Declaration.³⁸

The MNE Declaration is directed both to governments and MNEs. It focuses mainly on ethical and moral obligations as well as an enhanced reporting system. However, the MNE Declaration is often criticized to be too complex and hard to implement which is why it is an unpopular instrument.³⁹

The Core Labor Standards of the ILO include: (1) no forced or bonded labor, (2) no child labor, (3) no discrimination in employment and (4) freedom of association and right to collective bargaining.

³⁷ *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 2006.

³⁸ *Ibid.*

³⁹ «International Labor Organization ILO: Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,” *Informationsplattform Humanrights.ch*, accessed June 9, 2015, <http://www.humanrights.ch/de/menschenrechte-themen/tnc/regulierungen/ilo/>.

1.3.3 OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises⁴⁰ (hereinafter OECD Guidelines) constitute recommendations for the MNEs that are based within their jurisdiction for action overseas. The OECD Guidelines were last revised in 2011 and now include a chapter on human rights, which is consistent with the UN Guiding Principles. Human rights shall be taken into account by both parent companies and subsidiaries in all their operations and business relations, including the supply chain. In addition, they also demand in this respect due diligence.

Similar to the instruments described above, non-compliance can only be countered with «naming and shaming» by the OECD Contact Point⁴¹ or OECD Watch. A particular strength of these guidelines is the inclusion of NGOs in the process, also concerning remedies.⁴²

1.4 Why Switzerland?

«Switzerland has a great responsibility both as the country of headquarters for humanitarian organizations as well as the home of many multinational companies. In the interests of the reputation of our country, we have to make our companies responsible too.» Cornelio Sommaruga, former president of the International Committee of the Red Cross (ICRC)⁴³

With a Gross Domestic Product (hereinafter GDP) per capita of 78,539 CHF in 2013, Switzerland is one of the wealthiest countries in the world.⁴⁴ A majority of workers are employed in the tertiary sector i.e. in the service sector, such as in banking and

⁴⁰ *OECD Guidelines for Multinational Enterprises, 2011 Edition* (OECD Publishing, 2011), http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en.

⁴¹ For more information on the National Contact Point of Switzerland see: “SECO - National Contact Point of Switzerland,” accessed June 12, 2015, <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en>.

⁴² “OECD-Leitsätze für Transnationale Unternehmen,” *Informationsplattform Humanrights.ch*, accessed June 9, 2015, <http://www.humanrights.ch/de/menschenrechte-themen/tnc/regulierungen/oecd/>.

⁴³ Cornelio Sommaruga: cited in Swiss Coalition for Corporate Justice, “SCCJ Press Release, Launch of Responsible Business Initiative - 150421,” April 21, 2015, http://www.corporatejustice.ch/media/medialibrary/2015/04/150421_sccj_press_release_-_launch_of_responsible_business_initiative.pdf.

⁴⁴ Federal Statistical Office FSO, “Switzerland GDP per Inhabitant,” September 30, 2014, http://www.bfs.admin.ch/bfs/portal/en/index/themen/04/02/01/key/bip_einw.html.

insurance. Importing and trading raw materials or turning them into high value goods generates most of Switzerland's GDP.⁴⁵

No less than 20% of the global raw material is traded through corporations that are based in Switzerland. Critics such as the most important Swiss-oriented, business-critical, non-governmental organizations: «the Berne Declaration» (hereinafter BD) as well as the «Swiss Alliance of Development Organizations» have asserted that these raw material corporations have long been exploiting gray areas within the law and are most active in very fragile countries. This results in a range of challenges and critical issues from potential human rights abuses over precarious working conditions to environmental pollution.⁴⁶ In addition to the extractive industry, the second area with a huge potential for human rights abuses are supply chains in the garment and food and beverage industry.

1.4.1 The Strong Presence of MNEs in Switzerland

Switzerland has the highest density of international corporations compared to its population. At the same time Switzerland ranks second in foreign direct investment. The country has therefore a high potential of human rights violations by corporate action abroad, but is also exposed to scrutiny.⁴⁷ A combination of Swiss stock corporation law and significant tax advantages, as well as very good infrastructure and security make the country an exceptionally attractive domicile. No less than 269 foreign corporations moved their European or global headquarters to Switzerland between 2003 and 2009.⁴⁸ These MNEs are typically structured in such a way that they have numerous branches, subsidiaries and joint ventures abroad. And while the management, innovation and marketing branches are often located in Switzerland, the actual production takes place in developing and emerging countries for the most

⁴⁵ Katharina Hetze and Herbert Winistörfer, "Insights into the CSR Approach of Switzerland and CSR Practices of Swiss Companies," in *Corporate Social Responsibility in Europe*, ed. Samuel O. Idowu, René Schmidpeter, and Matthias S. Fifka (Cham: Springer International Publishing, 2015), 154.

⁴⁶ See for instance: Thomas Braunschweig et al., *Commodities: Switzerland's Most Dangerous Business*, ed. Erklärung von Bern, 2. Aufl (Zürich: Salis-Verl, 2012); Hetze and Winistörfer, "Insights into the CSR Approach of Switzerland and CSR Practices of Swiss Companies," 158.

⁴⁷ "L'initiative Pour Des Multinationales Responsables – Evolution Politique En Suisse," accessed June 11, 2015, http://konzern-initiative.ch/wp-content/uploads/2015/04/KVI_Factsheet_1_F.pdf.

⁴⁸ Arthur D. Little, "Headquarters on the Move – Benchmarking of Global and Regional Headquarters in Switzerland," Trends in Headquarters Relocations and Headquarters Redesign, (November 2009), http://www.adlittle.ch/uploads/tx_extthoughtleadership/ADL_Headquarters_on_the_Move.pdf.

part.⁴⁹ This is where there is a large potential for human rights abuses and environmental pollution.⁵⁰

Because of its importance as a domicile of many small as well as well known large MNEs such as Glencore, Nestlé, Novartis, Roche, Syngenta, Holcim and Triumph, Switzerland serves as a good example of the challenges and issues that are faced in the area of corporate accountability⁵¹.⁵² The coalition supporting the «Responsible Business Initiative»⁵³ claims that adopting the suggested amendments would be a clear signal that Switzerland is only domicile to MNEs that are responsible. In addition, an image loss could potentially be prevented and Switzerland as a domicile would be strengthened and made more sustainable for the future.⁵⁴

1.4.2 New Legal Territory: the Lack of Legal Cases

In light of the above-mentioned facts of potential of human rights abuses by Swiss based corporations, it is rather surprising that there has been only one attempt of a civil case in this area in Switzerland with the IBM cases⁵⁵. The case never got to the merits, because the Court held that the issues at hand were time barred.⁵⁶ There is a general perception among the legal professionals that there is not much leeway for creative cases under the Swiss legal system, as such corporate accountability are for instance brought under the Alien Tort Statute (hereinafter ATS)⁵⁷ in the United States (hereinafter US). The ATS of 1789 is a domestic US legislation that potentially allows international victims to sue in US district courts for international human rights law violations (violations of the law of nations).⁵⁸ In order to assess, whether the legal

⁴⁹ See also Sub-Chapter 2.3

⁵⁰ Swiss Coalition for Corporate Justice, “La Suisse, Repaire des Multinationales,” accessed May 26, 2015, <http://www.droitsansfrontieres.ch/fr/>.

⁵¹ The expression «corporate accountability» is used in this paper as general term to describe the field of corporate legal responsibility or corporate legal accountability.

⁵² Swiss Coalition for Corporate Justice, “La Suisse, Repaire des Multinationales.”

⁵³ See Sub-Chapter 1.5.2

⁵⁴ “L’initiative pour des Multinationales Responsables – De Quoi s’agit-il,” accessed May 26, 2015, <http://konzern-initiative.ch/de-quoi-il-s-agit/?lang=fr>.

⁵⁵ BGE 131 III 153 (Federal Supreme Court of Switzerland 2004); BGE 132 III 661 (Federal Supreme Court of Switzerland 2006).

⁵⁶ BGE 132 III 661 (Federal Supreme Court of Switzerland 2006).

⁵⁷ *Alien Tort Statute*, 28 U.S.C. § 1350, 1789. «The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.»

⁵⁸ For more information see for instance: Richard Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States,” *City UHKL Rev.* 3 (2011): 1; Lisa Lambert, “At the Crossroads of Environmental and Human Rights

provisions itself are less favorable than in, to a certain degree comparable, legal systems such as that of Germany, Section IV of this paper will analyze two potential scenarios in more details. There have been two attempts of criminal cases only just recently. Since criminal cases and their connection to business and human rights are a whole different topics with similar but also many specific challenges the cases will only be reported on briefly at this point. As they are the first cases in Switzerland related to alleged criminal actions of a MNE it is nevertheless important to bear them in mind when one is analyzing the potential of civil cases in this area.

1.4.2.1 A Pilot Case in Criminal Law: Romero v. Nestlé

Lawyers from the European Centre for Constitutional and Human Rights (hereinafter ECCHR) attempted to use the case of Romero as a pilot case in corporate criminal law in Switzerland. The case of the unionist Luciano Romero who was murdered on September 10, 2006 in Valledupar, Columbia, served as a typical and well-investigated case for that matter.⁵⁹ As a result of this murder, ECCHR together with the Colombian union Sinaltrainal Sindiato Nacional de Trabajados del Sistema Agroalimentario (hereinafter Sinaltrainal) represented by two lawyers from Zurich, Bosonnet and Wick filed a criminal claim against Nestlé AG as well as some of its top managers with the states attorney's office in Zug, Switzerland in March 2012.⁶⁰ On July 21, 2014 the Federal Supreme Court of Switzerland upheld the ruling of the lower courts, stating that the issues in question were statute-barred.⁶¹

Romero, a former employee of the Nestlé factory Cicolac, was working for the workers union Sinaltrainal at the time he was tortured and then murdered. The murder took place in the context of an on-going conflict at Cicolac. During that conflict both paramilitary groups and state actors systematically persecute

Standards: Aguinda v. Texaco, Inc.-Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in US Courts," *J. Transnat'l L. & Pol'y* 10 (2000): 109.

⁵⁹ Constantin Seibt, "Mord in Kolumbien: Anzeige gegen Nestlé-Manger Brabeck und Gut," *Tagesanzeiger*, March 6, 2012, Print Edition, sec. Economics, http://www.multiwatch.ch/cm_data/Tagi_Nestl_120306.pdf.

⁶⁰ ECCHR, "Juristischer Hintergrundbericht: Strafrechtliche Verfolgung von Menschenrechtsverletzungen durch Wirtschaftsunternehmen in der Schweiz: Der Fall Nestlé," March 2012, http://www.ecchr.de/nestle.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/Nestle%2C%20Juristischer%20Hintergrundbericht.pdf.

⁶¹ 6B_7/2014 (Federal Supreme Court of Switzerland 2014).

members of unions and other social groups.⁶² In order to put this in context it is important to analyze what happened in 2002. After a spontaneous strike in due to falling milk prices as well as threats to close the factory, nine leaders of the union Romero among them lost their jobs at Cicolac. Romero and his colleagues received death threats over years before his murder. They tried to reach out both to the local factory, as well as to the Nestlé headquarters without much success. While the murder of unionists by paramilitaries in Columbia is nothing exceptional, there was something different about this one. The interesting issue was that during the investigations the murderers of Romero were caught and convicted in 2007. Three years later a paramilitary commander in charge of his murder was also found guilty. The judge of the case got a lot of attention, when his recommendations for the states attorney were to investigate not only the police and the secrete service, but also in the direction of Nestlé's management. The reason for this was the fact that in the weeks before Romero was killed he was preparing to participate in a Congress in Bern, Switzerland to publicly speak out against Nestlé.⁶³

ECCHR names several reasons for brining this suit in Switzerland. Among these are attempts to bring an end to the numerous similar kinds of murders in Colombia, to bring attention to this issue as well as to test how far the criminal liability of a multinational, yet centrally organized corporation may go. Nestlé is alleged to have committed the following two crimes: First they have neglected their responsibility to protect their (former) employees and unionist from a series of murders against such unionists. Their negligence has allegedly contributed to the death of Romero. This allegation is based on Art. 11 Para. 2 (d) of the Swiss Criminal Code⁶⁴ regulating commission by omission through the creation of a risk. Secondly, they may have made the overall situation even worse by wrongfully accusing Romero and others to be guerrilla fighters and of committing an attempted murder at the Cirolac factory in 1999. As mentioned above the murder of Romero was committed in the context of an armed conflict in which unions and other social groups are systematically

⁶² “Der Fall Nestlé Kolumbien: Beschwerde gegen die Schweiz in Strassburg,” *Informationsplattform Humanrights.ch*, December 30, 2014, <http://www.humanrights.ch/de/menschenrechte-schweiz/aussenpolitik/aussenwirtschaftspolitik/tnc/praezedenzfall-klage-nestle-schweiz>.

⁶³ Seibt, “Mord in Kolumbien: Anzeige gegen Nestlé-Manger Brabeck und Gut.”

⁶⁴ «A person fails to comply with a duty to act if he does not prevent a legal interest protected under criminal law from being exposed to danger or from being harmed even though, due to his legal position, he has a duty to do so, in particular on the basis of: (d) the creation of a risk» Art. 11 Para. 2 (d) *Swiss Criminal Code* 311.0, 1937, <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>.

prosecuted. In addition to this, Nestlé has been accused of being involved with the paramilitary on different levels, and of paying them off for reasons of protection. Nestlé has vehemently rejected the latter.⁶⁵ The second ground is based on Art. 102 Para. 1 of the Swiss Criminal Code⁶⁶, under corporate criminal liability in case the act cannot be attributed to an individual.

After the Swiss Federal Supreme Court held in July of 2014 that the merits of the case would not be analyzed, the European Court of Human Rights (hereinafter ECtHR) has also dismissed a complaint in Spring 2015. The highest legal authority of Switzerland held that the crimes were by now statute-barred. ECCHR's General Secretary Wolfgang Kaleck reacted disappointed: *«the lapse of the statute of limitations, a lack of jurisdiction, investigatory difficulties – it's always the same arguments. European corporations are almost never held accountable in their home states for human rights violations committed abroad. Europe badly needs a catalogue of human rights due diligence obligations for corporations!»*⁶⁷ With the rejection of the ECtHR complaint all legal avenues in Europe are now exhausted.⁶⁸ As a result the legal situation remains unclear, and it has yet to be tested how far reaching corporate liability⁶⁹ extends under Swiss criminal law.

⁶⁵ See: Franziska Kohler, "Ermordung eines Gewerkschafters – Strafanzeige gegen Nestlé," *tagesanzeiger.ch*/, March 6, 2012, Online Edition, sec. Economics, <http://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/Ermordung-eines-Gewerkschafters--Strafanzeige-gegen-Nestle/story/11106507>; ECCHR, "Der Fall Nestlé Und Luciano Romero: Fallbeschreibung," accessed May 30, 2015, http://www.ecchr.de/nestle.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/Nestle_Romero_Fallbeschreibung_2014_12_18.pdf; ECCHR, "Juristischer Hintergrundbericht: Strafrechtliche Verfolgung von Menschenrechtsverletzungen durch Wirtschaftsunternehmen in der Schweiz: der Fall Nestlé"; "Pressemitteilung Fall Nestle: Schweizer Justiz verweigert Gerechtigkeit," August 1, 2014.

⁶⁶ *« If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organization of the undertaking, then the felony or misdemeanour is attributed to the undertaking. In such cases, the undertaking is liable to a fine not exceeding 5 million francs.»* Art. 102 Para. 1 Swiss Criminal Code 311.0.

⁶⁷ ECCHR, "Nestlé Precedent Case: Murder of Trade Unionist Romero in Colombia," accessed June 7, 2015, <http://www.ecchr.de/nestle-518.html>.

⁶⁸ "Nestlé Lawsuit (re Colombia) | Business & Human Rights Resource Centre," accessed June 7, 2015, <http://business-humanrights.org/en/nestl%C3%A9-lawsuit-re-colombia>.

⁶⁹ For more information of corporate criminal liability in Switzerland see for instance: Günter Heine, "Organisationsverschulden aus Strafrechtlicher Sicht: Zum Spannungsfeld von Zivilrechtlicher Haftung, Strafrechtlicher Geschäftsherrenhaftung und der Strafbarkeit von Unternehmen," *Verantwortlichkeit Im Unternehmen: Zivil-Und Strafrechtliche Perspektiven*. Basel: Helbing & Lichtenhahn, 2007, 93–125; Marcel Alexander Niggli and Marc Amstutz, eds., *Verantwortlichkeit im Unternehmen: zivil- und strafrechtliche Perspektiven* (Basel: Helbing & Lichtenhahn, 2007); for

1.4.2.2 The Argor Case: Closed after a 16-month Investigation

In an even more recent case the Office of the Attorney General of Switzerland (hereinafter OAGS) decided on March 10, 2015 to not prosecute the claim against the Swiss gold company Argor-Heraeus SA (hereinafter Argor) any further. The investigations followed a complaint filed by three NGOs, namely TRIAL (Track Impunity Always), Conflict Awareness Project and Open Society Justice Initiative, in November 2013 concerning the alleged illegal processing of three tons of gold which were pillaged from the Democratic Republic of Congo (hereinafter DRC). The OAGS acknowledged that looted gold from DRC was refined and that Argor was in violation of its duty of diligence. However, the case was closed after 18 months on the basis that there was not enough reason to believe the company was aware of where the pillaged gold came from.⁷⁰ According to the CEO of Argor, circumstances were such that the company was not able to honor due diligence and supply chains were not understood well enough at the time in question. The BD counters this, stating that this is evidence for the inefficiency of voluntary measures and that there is a clear need for a legal obligation of due diligence for such MNEs.⁷¹ Again this case sheds light on issues concerning activities of Swiss domiciled MNEs, but there are no clear legal answers as the investigations were closed.

1.5 Momentum: Developments in Swiss Law and Politics

This brief analysis of the situation in Switzerland as well as the issues and rapid developments on the international level point to the fact that at the moment there is great momentum to act in this area. So far the window of opportunity has been seized rather well by Organizations and coalitions such as Swiss Coalition for Corporate Justice (hereinafter SCCJ). In the last few years there have also been quite a few developments that took place in the legal and political realm of Switzerland. A short overview over these and what can be expected in the near future will be given in the following.

further information about criminal liability in the present case see ECCHR, “Juristischer Hintergrundbericht: Strafrechtliche Verfolgung von Menschenrechtsverletzungen durch Wirtschaftsunternehmen in der Schweiz: Der Fall Nestlé.”

⁷⁰ Trial, Open Society Justice Initiative, and Conflict Awareness Project, “Swiss Decision to Close Argor Case Encourages «head in the Sand» Attitude,” June 2, 2015, http://trial-ch.org/fileadmin/user_upload/documents/Informing/Media_Releases/Argor/StopPillage_CP_march2015_Final3_EN.pdf.

⁷¹ David Scruzzi, “Umstrittener Rohstoffhandel: Goldraffinerie steht auch ohne Straftaten in der Kritik,” *Neue Zürcher Zeitung NZZ*, June 2, 2015, <http://www.nzz.ch/schweiz/goldraffinerie-steht-auch-ohne-straftaten-in-der-kritik-1.18554184>.

In Switzerland a clear-cut strategy on how to tackle these issues is still missing. As this paper will assert, it is almost impossible from a legal perspective to succeed in a Swiss court against a MNE for violations committed by their subsidiaries or subcontractors overseas. The topic is however gaining increasing attention and importance. As a result there have been quite a few initiatives in this regard, especially so within the last three years. Arguably the most important development was the launch of a popular initiative «Responsible Business Initiative» that would amend the Swiss Federal Constitution to include an article on due diligence and corporate accountability. The scope and content of this initiative will be discussed later in this chapter. It is however important for context to analyze subsequent developments since 2012 before doing so.

A coalition of 50 NGOs created the Swiss Coalition for Corporate Justice (SCCJ), a coalition that calls for binding rules for Swiss companies. Their first major political success was the adoption of Postulate 12.3980 on the 30th of October 2012 and a subsequent report by the Federal Council. In a comparative analysis this report sheds light on a preventive approach due to due diligence mechanisms, in line with Ruggie's recommendations.⁷² This development followed the submission to the Federal Council of a «Corporate Justice» petition with 135'285 signatures collected within a short period of time. The petition urges the Swiss government to compel corporations headquartered in Switzerland to respect human rights and protect the environment worldwide, as well as to ensure that potential victims have access to a remedy within Switzerland.⁷³ In addition to the postulate mentioned above, more than 25 initiatives concerning the complexity of business, human rights and the environment were introduced. Motion 14.3671 was from 1st of September 2014 was among them. The motion was introduced to implement the comparative report of the Federal Council through the introduction of a required due diligence analysis.⁷⁴ The vote in March this year was extremely close and led to some controversy. After an initial adoption with 91 to 90 votes, the vote was repeated one and a half hour later resulting in a rejection by a majority of 95 votes. The reason for this sudden

⁷² Ruggie, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises."

⁷³ "Press Release: «Corporate Justice» Petition Submitted. 135'285 Demand Clear Rules for Swiss Corporations. Worldwide." (Swiss Coalition for Corporate Justice, June 13, 2012), http://www.rechtohnegrenzen.ch/media/medialibrary/2012/06/pr_submission_petition_120613_en.pdf.

⁷⁴ Commission de Politique Extérieure, "14.3671 – Motion: Mise en Oeuvre du Rapport de Droit Comparé du Conseil Fédéral sur la Responsabilité des Entreprises en Matière de Droits Humains et d'environnement," *Curia Vista*, April 25, 2015,.

change was due to strong lobbying and pushing from the side of the Swiss Business Federation «Economiesuisse» and two right wing parties after the first vote. It is possible to demand the reconsideration of an issue. The justification by the CVP (Christian Democratic People's Party of Switzerland) politician who moved for this, reconsideration was that some of her colleagues (as the president of her party) have pushed the wrong button.⁷⁵

1.5.1 National Action Plan Concerning the Implementation of the UN Guiding Principles

As mentioned above, unlike many other European states, Switzerland has not yet developed a so called national action plan (hereinafter NAP) concerning the implementation of the UN Guiding Principles, which could serve as a reference for all the different public institutions having to deal with the private sector on these issues. Postulate 12.3505 adopted by the National Council in December 2012 calls on the Federal Council to draft such a NAP by the end of 2014.⁷⁶ The report has been delayed and is now expected by June this year. The Council of States further adopted a Postulate 14.3663 on the 26th of November 2014.⁷⁷ It tackled the second point of the «Corporate Justice» petition, access to remedy and demanded another report on this topic. The Federal Council however, decided to integrate this analysis into the NAP.

1.5.2 Responsible Business Initiative

On April 21, 2105 a broad coalition of no less than 66 Swiss organizations⁷⁸ launched the so-called «Responsible Business Initiative» in Berne. They are convinced that Swiss companies, which abuse human rights and the environment through their economic activities abroad must be help responsible for such action. The initiative therefore seeks to ensure that these companies that are based in Switzerland are compelled to integrate the compliance as well as protection of

⁷⁵ «Kurioses Politkarussell um mehr soziale Verantwortung,” *Handelszeitung*, March 20, 2015, sec. Politik, <http://www.handelszeitung.ch/politik/kurioses-politkarussell-um-mehr-soziale-verantwortung-756982>.

⁷⁶ Alec von Graffenried, “12.3503 - Une Stratégie Ruggie pour la Suisse - Curia Vista - Objets Parlementaires - The Federal Assembly - The Swiss Parliament,” *Curia Vista*, accessed April 22, 2015, http://www.parlament.ch/e/suche/Pages/geschaefte.aspx?gesch_id=20123503.

⁷⁷ Commission de politique extérieure, “14.3663 – Postulat: Accès à la Réparation,” *Curia Vista*, accessed April 25, 2015, http://www.parlament.ch/f/suche/Pages/geschaefte.aspx?gesch_id=20143663.

⁷⁸ As of 26.5.2015 the number of supporting organizations from the areas of human rights, gender equality, environmental protection as well as others had already increased to 70.

human rights and the environment into their business practices and supply chain mechanisms.⁷⁹ Within 18 months 100'000 signatures have to be collected in order to go to the next step of a popular vote on the constitutional amendment. After the Federal Chancellery validates the at least 100,000 signatures, the popular initiative will be put to the popular vote. This does however not happen immediately, but can take up to several years after it was submitted. In order to enter into force a so-called double majority is necessary, that is a majority of the electorate and the cantons at the same time.⁸⁰

1.5.2.1 The Wording of the Proposed Constitutional Amendment.

The popular initiative seeks to amend the Swiss constitution by adding a new article 101a. This article is constituted of two paragraphs, the second one with 4 subparagraphs.⁸¹ Art. 101a para. 1 establishes the general principle that further steps to

⁷⁹ “L’initiative pour des Multinationales Responsables – De quoi s’agit-il”; Swiss Coalition for Corporate Justice, “SCCJ Press Release, Launch of Responsible Business Initiative - 150421.”

⁸⁰ For more information on how Popular Initiatives work in Switzerland and how they can be launched see for instance: “Popular Initiatives,” *Ch.ch*, accessed June 10, 2015, <https://www.ch.ch/en/popular-initiatives/>.

⁸¹ The text of the initiative would amend the Swiss Constitution as follows. This translation by the BD is for information purpose only.

«Art. 101a Responsibility of business

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

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

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

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

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

strengthen the respect of human and environmental rights through the economy need to be taken.⁸² According to Art. 101a para. 2 this law shall regulate the duty of corporations that either have their statutory seat, central administration, or principle place of business in Switzerland in the way that is specified in lit a –d. This paragraph aims to enlarge the scope of application. It would therefore not be enough for a corporation to simply transfer the statutory seat to another country and thereby avoid regulation of their business conduct. Glencore as an example with its statutory seat in Saint Helier, Jersey would nevertheless fall within the scope, as their central administration is located in Baar, Switzerland.⁸³ Article 60 of the Lugano Convention and the Brussels Regulation respectively define the company's domicile for the purpose of establishing jurisdiction according to the same three criteria.⁸⁴

Based on pillar II of the UN Guiding Principles⁸⁵, Art. 101a (2)(a) establishes the duty for corporations to respect human rights.⁸⁶ However, it does so not only for the parent company itself but also for other controlled companies. Controlled in this sense is defined in a way to include de-facto power as well.⁸⁷

Sub-paragraphs b) and c) constitute the core provisions of the initiative. The former defines the due diligence obligation, the latter the implementing mechanisms. The due diligence paragraph incorporates the obligation of companies to analyze, act and report. In order to abide to the standard they need to analyze both actual and potential human rights violations, act to prevent them and report on the steps taken. This obligation extends to subsidiaries and other controlled entities as well as all other business relations, including the entire supply chain of a company. The exact content and extend of the obligations itself depends on the risks in the different human rights and environmental areas. Furthermore while small and medium-sized enterprises are not excluded from the obligation they may have the possibility of a

(d) The provisions based on the principles of paragraphs a-c apply irrespective of the law applicable under private international law»

⁸² “L’initiative pour des Multinationales Responsables – Texte d’initiative,” accessed April 22, 2015, <http://konzern-initiative.ch/de-quoi-il-s-agit/texte-initiative/?lang=fr>.

⁸³ “Glencore: Ab nach Jersey,” *Handelszeitung*, May 18, 2011, sec. Unternehmen, <http://www.handelszeitung.ch/unternehmen/glencore-ab-nach-jersey>.

⁸⁴ *Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 2000, <http://curia.europa.eu/common/recdoc/convention/en/c-textes/2001R0044.htm>.

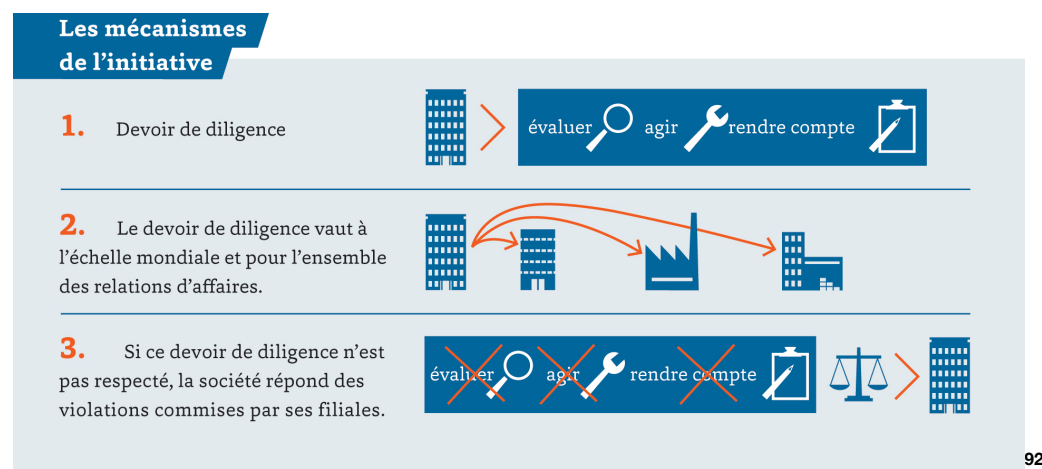
⁸⁵ See also Sub-Chapter 1.2. and 1.3

⁸⁶ Ruggie, “Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.”

⁸⁷ “L’initiative pour des Multinationales Responsables – Texte d’initiative.”

facilitated process if their operations are less risky.⁸⁸ Access to an effective remedy for victims of violations is addressed in Para 2 (c). As a general rule companies are liable for human rights violations abroad committed by themselves and their subsidiary. However, if the company can prove that it has complied with the due diligence obligation it will not be held liable. As a result it would no longer be the applicants burden to prove a violation, but the defendants to prove compliance with due diligence. This is particularly important in a country like Switzerland, where in civil law there is no discovery phase that allows the claimants to seize relevant documents from the defendant, as this is the case in other jurisdiction such as in the United States of America. In light of this subparagraph (c) therefore results in a reversal of the burden of proof.⁸⁹ Swiss newspapers underlined this element of reversing the burden of proof. This should result in more legal certainty even from an economic perspective, since as long as due-diligence is upheld MNEs have nothing to fear and cannot be held liable.⁹⁰ Finally, Art. 101a (2)(d) defines the entire clause as a mandatory overriding one.⁹¹

In sum, the mechanisms that the constitutional amendments foresees are well summarized in the following info graphic:



⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Marcel Gyr, "Konzernverantwortung: Unternehmen sollen Menschenrechtsverletzungen bekämpfen," *Neue Zürcher Zeitung*, April 21, 2015, sec. Newsticker, <http://www.nzz.ch/wirtschaft/newsticker/konzernverantwortung-unternehmen-sollen-menschenrechtsverletzungen-bekaempfen-1.18526894>.

⁹¹ "L'initiative pour des Multinationales Responsables – Texte d'initiative."

⁹² "KVI_Factsheet_5_F_.pdf," accessed April 22, 2015, http://konzern-initiative.ch/wp-content/uploads/2015/04/KVI_Factsheet_5_F_.pdf.

1.5.2.2 Aim of the Constitutional Amendment

The main goal of the initiative is to extend civil liability for corporations. While the initiative committee sees the necessity to legally pursue some of these cases in the future, their hope is that the strongest effect will be that of prevention. The risk of being held legally liable for these kinds of issues will make sustainability an important goal not only within the specific and often rather weak sustainability department but in an overarching manner. The legal department for instance will also have to constantly bear this in mind. If companies actually committed to thorough due-diligence, activists claim that numerous violations would not happen in the first place. An additional reason why no one is hoping for a flood of law suits, is that legal action in Switzerland is extremely expensive. While there is some kind of institution of legal aid, it is again in no way comparable to that of common law countries for instance.⁹³ Another important aspect is that of due diligence in the supply chain. MNE often don't know where all their resources and products actually come from. If the initiative were accepted, they would have to make a thorough assessment and therefore get to know their supply chain.

An adoption of the initiative would at this point in time it would indeed be a landmark decision in a worldwide comparison and with far reaching implications. Currently there are no obligations in place in any state that are as extensive. However, the political process in Switzerland as inherent to a referenda system takes quite sometime. The Swiss will only have a possibility to vote on this in three years from now, probably in 2018. By that time it is rather likely that some in this context more progressive states will have adopted similar provisions. Some have already started the process. In France for instance, the National Assembly has passed a bill on March 31, 2015 that would establish a mandatory duty of vigilance by parent companies. Similar to the «Responsible Business Initiative», large companies would have to publish reports in the form of so-called «vigilance plans». In these they would have to lay out their due diligence before conducting their business abroad and within France. Regardless if the business conduct takes place with one of their subsidiaries or with an entity further down the supply chain such as suppliers and subcontractors. Similar legislation already exists in the area of preventing money laundering. The Bill also foresees measures of transparency, through which a judge could demand the publication of these reports and in some

⁹³ See for instance: Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights.”

cases impose a civil fine. Unlike the Swiss initiative, the French bill does not include a reversal of the burden of proof and victims would still have to prove that the corporation has committed a fault. The historic bill now has to be approved by the Senate before it will enter into force.⁹⁴

⁹⁴ ECCJ, “European Coalition for Corporate Justice Supports French Bill Establishing Due Diligence Duty for Parent Companies.”

II. CSR and Corporate Accountability in Supply Chain Mechanisms

In the last few decades Western-based fashion retailers had to turn to global sourcing in order to be able to better achieve their goals of supply chain efficiency and effectiveness in a marketplace dominated by so-called «Fast Fashion».⁹⁵ This resulted in a rise of complex global subcontracting relationships and retailer buying practices, which also exist in other areas such as food and beverages. One of the goals of these complex structures is to minimize buying risk, reduce cost as well as to increase frequency of shipments. All of this resulted in ever growing concerns over ethical issues such as precarious working conditions in the supply chains.⁹⁶ There are numerous challenges and issues in relation to CSR and its implementation in supply chains as a consequence of this globally dispersed supply chain networks. The following chapter will shed lights on some of these issues.

2.1 CSR in the Supply Chain

Corporate Social Responsibility (hereinafter CSR) is a model of self-regulation adopted by transnational corporations that is based on voluntarism. CSR has gained an enormous amount of attention in recent years. In general CSR has its roots in the wider concept of sustainable development. The definition most cited in this regard is that of a report by the Brundtland Commission in 1987: «Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs».⁹⁷ The definition of CSR itself is much more controversial and contested.⁹⁸ The scope was understood to be rather narrow in the beginning. When CSR first gained importance it was solely referring to voluntary measures. The literature on CSR has only recently started to enlarge the scope as to include non-voluntary government regulations. While the notion of CSR used to refer to voluntary actions only, it is now seen as referring to the general way of how businesses manage their impact upon society. In

⁹⁵ See also Chapter 2.4

⁹⁶ Patricia Susan Perry, «Garments without Guilt?: An Exploration of Corporate Social Responsibility within the Context of the Fashion Supply Chain: Case Study of Sri Lanka» (Heriot-Watt University, 2012), 119.

⁹⁷ Brundtland Commission) WCED (World Commission on Environment and Development), «Our Common Future», Aka. «*The Brundtland Report*,» 1987.

⁹⁸ For a historic overview and extensive discussion of CSR definitions see for instance: Marcel Van Marrewijk, «Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion», *Journal of Business Ethics* 44, no. 2–3 (2003): 95–105.

line with this enlarged scope, the EU for instance altered its definition to a more extensive one of «the responsibility of enterprises for their impact on society».⁹⁹ This definition is no longer limited to voluntarism, but also encompasses government policies. In a similar way scholars have argued that CSR can be defined as a complex interaction between business, communities and the government. Law is therefore seen as playing an important role in putting pressures on companies to act socially responsible and in a sustainable way.¹⁰⁰ In Switzerland a definition of corporate responsibility includes: «every effect of its decisions and activities on society and the environment, the integration of the entire organization and supply chain, adherence to laws and international standards, as well as the active integration of interest groups».¹⁰¹ Swiss corporations employ terms like «sustainability» and «sustainability management» more frequently than «CSR» and are traditionally more concerned with ecological rather than with social issues.¹⁰² The Swiss Federal Council furthermore adopted a position paper on CSR on April 1, 2015.¹⁰³

In general CSR continues to gain importance and evolve, now often extending its reach to include supply chain partners such as suppliers, logistic providers and even customers. This enlargement of the scope of CSR however, only took place during the last two decades despite the general research on CSR dating back 50 years. The importance of extending CSR to supply chain mechanisms was highlighted in the early 2000s.¹⁰⁴ What drives MNE to accept responsibilities and to extend CSR

⁹⁹EU, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A renewed EU strategy 2011-2014 for Corporate Social Responsibility. COM(2011)681 final. Brussels, 25.10.2011, 6.

¹⁰⁰ See for instance: McBarnet, Doreen J, Aurora Voiculescu, and Tom Campbell. *The New Corporate Accountability: Corporate Social Responsibility and the Law*. Cambridge University Press, 2009.

¹⁰¹ Schweizerische Normen-Vereinigung [SNV]. (2011). SNR ISO 26000 Leitfaden zur gesellschaftlichen Verantwortung, Ausgabe 2011-01. Winterthur, Switzerland: Schweizerische Normen-Vereinigung. Cited in: Hetze and Winistörfer, “Insights into the CSR Approach of Switzerland and CSR Practices of Swiss Companies,” 160.

¹⁰² Ibid.

¹⁰³ Bundesrat, “Gesellschaftliche Verantwortung der Unternehmen: Positionspapier und Aktionsplan des Bundesrates zur Verantwortung der Unternehmen für Gesellschaft und Umwelt” (Bern, April 1, 2015), <http://www.news.admin.ch/NSBSubscriber/message/attachments/38880.pdf>.

¹⁰⁴ See for instance: Craig R Carter and Marianne M Jennings, “Social Responsibility and Supply Chain Relationships,” *Transportation Research Part E: Logistics and Transportation Review* 38, no. 1 (January 2002): 37–52 ; Craig R. Carter and Marianne M. Jennings, “The Role of Purchasing in Corporate Social Responsibility: A Structural Equation Analysis,” *Journal of Business Logistics* 25, no. 1 (March 1, 2004): 145–86. ; Paul R. Murphy and Richard F. Poist, “Socially Responsible Logistics: An Exploratory Study,” *Transportation Journal* 41, no. 4 (July 1, 2002): 23–35.

management to the supply chain are among other reasons customer pressure, as well as other stakeholder's expectations and the threat of potential legal liability.¹⁰⁵

When the concept of CSR became increasingly important the various critics became louder as well. Ballinger for instance criticizes CSR for legitimizing power relations that undermine workers rights. He asserts that CSR threatens trade union rights already by working within the ideological project of neo-liberalism. The global worker self help movement can be seen as a hopeful development in a different direction.¹⁰⁶ ECCHR challenges the voluntary side of CSR, stating that it is hard to justify it in the reality of today's globalized economy. Too many human rights violations occur as a result of corporate actions of parent companies or their subsidiaries and suppliers. These violations can be a result of deliberate cooperation with regimes suppressing the population, of policies solely focusing on increasing profits, or simply as a result of the lack of due diligence. Victims of such violations most often have no access to adequate legal remedies, neither in the host countries where the violations occur, nor in the home countries of these MNEs.¹⁰⁷

It is furthermore interesting to assess how the goals and initiatives of CSR are actually implemented, as this is where the critique is strongest. Multinationals primarily use four instruments to implement voluntary initiatives for promoting labor standards and social responsibility among their subcontractors: social labels, ethical investment and sourcing, internal codes of conducts and certified external codes of conduct.¹⁰⁸ Social labeling is based on a system whereby a service or good is certified with a specific label informing consumers about its compliance with certain social or environmental standards. Codes of conducts on the other hand apply to management practice and standards that corporations define in a written document. They undertake to both observe and enforce these standards among their employees and increasingly also among subcontractors. In a similar way as social labels, external codes of conduct are drafted and verified by organizations that claim to be independent. In the context of textile industries the Clean Cloth

¹⁰⁵ D. Eric Boyd et al., "Corporate Social Responsibility in Global Supply Chains: A Procedural Justice Perspective," *Long Range Planning* 40, no. 3 (June 2007): 343.

¹⁰⁶ Kate Macdonald and Shelley Marshall, *Fair Trade, Corporate Accountability and beyond: Experiments in Globalizing Justice* (Ashgate Publishing, Ltd., 2013), 223 – 240.

¹⁰⁷ ECCHR, "Enforcing Human Rights Law by New Means: Annual Report 2014," accessed June 7, 2015,

http://www.ecchr.de/?file=tl_files/Dokumente/Publikationen/ECCHR_Annual%20Report_2014.pdf.

¹⁰⁸ Olivier Boiral, "The Certification of Corporate Conduct: Issues and Prospects," *International Labour Review* 142, no. 3 (September 1, 2003): 325.

Campaign serves as an example for this category. The Campaign offers a code of conduct, which is coupled with a certification procedure by independent inspection.¹⁰⁹ The following sub chapters will elaborate in a bit more detail on Code of Conducts and sustainability reporting.

2.2 The Potential of Green Washing: the Limits of Code of Conducts and Sustainability Reports

Corporate codes of conducts, audits and sustainability reports are among the most prominent practices of voluntary CSR commitment. They can raise awareness on addressed challenges both within a company internally and towards other stakeholders. However, in reality, as I will assert in this part of the paper, they are very often used as PR instruments reporting only very selectively.

The problem with audits is particularly important in terms of socio economic challenges, as Duncan Pollard Head of Stakeholders Engagement Sustainability, Nestlé S.A. points out.¹¹⁰ These audits have been used over quite some time now for environmental issues, where they did indeed have some positive impact. Companies now want to apply the same instrument to monitor issues such as labor rights violations. This approach does however have numerous shortcomings. While environmental impacts can often be detected relatively easy through audits this is a lot more challenging for social issues. Among the difficulties are the facts that auditors are usually planned in advance and that it is nearly impossible for them to ask tough questions if they want to get invited again. Even if they do ask, it is highly unlikely that workers would speak up, out of fear to lose their job.¹¹¹ Even NGOs find that research on such tasks poses a great challenge. The Fair Labor Association (FLA) for instance undertook a study on labor issues such as child labor in the Ivory Coast. During their official visit of two weeks they found nothing. It was only when they returned for another month that they detected hundreds of children working for Nestlé suppliers.¹¹² Nestlé claims to be determined to tackle the problem, but they like all other companies sourcing in Côte d'Ivoire at this point cannot

¹⁰⁹ Ibid., 325 – 327.

¹¹⁰ Duncan Pollard, Corporate Responsibility in Nestlé's Supply Chain. Interview with the AVP Stakeholders Engagement in Sustainability Nestlé, June 5, 2015.

¹¹¹ Ibid.

¹¹² FLA, "Sustainable Management of Nestle's Cocoa Supply Chain in the Ivory Coast—Focus on Labor Standards," 2012, <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2740&context=globaldocs>.

guarantee that this risk has been removed entirely.¹¹³ The company committed to an action plan that was compiled together with the FLA, and builds on the recommendations of their investigative report.¹¹⁴ In light of the above, human rights activists are currently searching for alternative means on how socio- economic challenges can be detected and tackled more efficiently.

2.2.1 Supplier Code of Conducts

Corporate codes of conducts (hereinafter CoC) are among the most prominent practices of voluntary regulations in apparel as well as in other industries. They are documents in which companies pledge to uphold certain social, ethical and environmental standards and principles.¹¹⁵ The CoC can also be seen as some sort of contract between the involved company and society.¹¹⁶ These codes however, have been strongly criticized by social scientists, human rights defenders and other critical observers for their effect of displacing or crowding out public regulations and legal accountability. This so-called displacement hypothesis has been raised both in the 1990s as well as by more recent publications.¹¹⁷ Bartley asserts that this shift reshaped the discussion and fight for legal accountability rather than displacing it. Labor and human rights activists soon discovered how to creatively turn companies' arguments around by asserting that these code of conducts and the monitoring increased the knowledge and liability of companies for labor conditions further down in the supply chains. So companies thought that it would be enough to make commitments to sustainability and statements in this direction. Human rights advocates however made those voluntary commitments and statements binding to some degree. Later court cases at least partially indorsed such an argumentation.¹¹⁸

¹¹³ "Does Nestlé Have Child Labour in Its Cocoa Supply Chain?," *Http://www.nestle.com*, accessed June 7, 2015, <http://www.nestle.com/aboutus/ask-nestle/answers/nestle-child-labour-supply-chains>.

¹¹⁴ Nestlé and others, "Nestlé Action Plan on the Responsible Sourcing of Cocoa from Cote d'Ivoire," 2012, <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2741&context=globaldocs>.

¹¹⁵ Tim Bartley, "Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry," *Research in Political Sociology* 14, no. 2005 (2005): 218.

¹¹⁶ Esben Rahbek Pedersen and Mette Andersen, "Safeguarding Corporate Social Responsibility (CSR) in Global Supply Chains: How Codes of Conduct Are Managed in Buyer-Supplier Relationships," *Journal of Public Affairs* 6, no. 3–4 (August 1, 2006): 237.

¹¹⁷ Bartley, "Corporate Accountability and the Privatization of Labor Standards," 212.

¹¹⁸ *Ibid.*, 213.

2.2.1.1 Code of Conducts in Legal Cases

An early case in this was the *Saipan case*¹¹⁹, where anti-sweatshop groups filed three separate lawsuits in US state and federal courts against over 25 major retail and apparel companies including Gap and Tommy Hilfiger that were sourcing within the US territory of Saipan. The cloth were produced by mostly Chinese and Filipino workers but labeled as «made in the U.S.A». The argument of the complaint was that retailers and manufacturers were indeed substantially controlling those factories in Saipan, partly because of the monitoring of their codes of conducts.¹²⁰ Through that monitoring they can reasonably be expected to have knowledge of the working conditions further down in the supply chain. Global Exchange, Sweatshop Watch, the Asian Law Caucus, and the garment workers' union UNITE filed a class action lawsuit on behalf of these workers for the sweatshop conditions they had to work under. The class action lawsuit was allowed to go forward. After consumer pressured the case was finally settled as most cases in this area are.¹²¹ None of the lawsuits were fully resolved, however most of the companies involved contributed to a settlement over 20 million US\$. This settlement closed all three cases in 2004. In addition the parties agreed upon a code of conduct as well as independent monitoring, compensation and reparation as part of this settlement. San Francisco's Levi Strauss & Co. opposed the settlement as the sole defendant, stating that the claims made were untrue. The plaintiffs voluntarily dismissed the claims against Levis Strauss so that the settlement could take effect.¹²²

These CoCs furthermore have very limited impact on improving working standards in reality. This is due to a mismatch between the CoC and the actual codes of practice. A study of the Indian garment industry for instance, showed that the codes are inapplicable to non-factory realms of production and are only designed to target the permanent workforce. In India however, homeworkers and part time workers constitute a significant part of the employees in this sector. The latter is due to the reinforcement of patriarchy and structures of power and the process of feminization of the factory workforce, in line with the intention to minimize the responsibility

¹¹⁹ Business & Human Rights Resource Centre, "U.S. Apparel Cos. Lawsuit (re Saipan)," accessed June 7, 2015, <http://business-humanrights.org/en/us-apparel-cos-lawsuit-re-saipan-0>; Global Exchange, "The Saipan Victory," n.d., <http://www.globalexchange.org/sweatfree/saipan>.

¹²⁰ Bartley, "Corporate Accountability and the Privatization of Labor Standards," 229–230.

¹²¹ Global Exchange, "The Saipan Victory."

¹²² Business & Human Rights Resource Centre, "U.S. Apparel Cos. Lawsuit (re Saipan)."

towards fair labor standards.¹²³

Supply chain codes of conduct in the apparel industry most likely include labor conditions, contractors, and sub contractors within the supply chain. Nestlé will serve as an example of an interesting supplier code of conduct in the beverage and food industry.¹²⁴

There are further challenges in managing, as well as controlling these CoCs in the context of supply chain mechanisms. One of the issues is that even if the supply chain codes are applicable for all the actors in the chain, the incentive to comply might not extend to all of them. Enforcement of these codes is particularly challenging as the companies involved are separated in many aspects such as geographical, economical, legal, cultural and political separation.¹²⁵ Even just making the codes visible and controlling their implementation can pose many challenges, as the following example of Nestlé's Supplier Code and the coca supply chain in the Ivory Coast demonstrates.

2.2.1.2 Nestlé and the Struggle for Visibility

A good example of a supplier code is the Nestlé Supplier Code of 2013 (hereinafter Supplier Code). In general, while many challenges remain, Nestlé is often seen as a good example of CSR efforts. With 54% Nestlé had the highest score among the 10 largest brand according to a ranking made by Oxfam International.¹²⁶ By March of 2015 their score has been increased to 69%.¹²⁷

The Supplier Code defines non-negotiable minimum standards for the business conduct between Nestlé and its suppliers as well as their sub-tier suppliers¹²⁸. According to Nestlé it is further proof of their continuous commitment and

¹²³ Alessandra Mezzadri, "Reflections on Globalisation and Labour Standards in the Indian Garment Industry: Codes of Conduct Versus Codes of Practice Imposed by the Firm," *Global Labour Journal* 3, no. 1 (2012), <https://escarpmentpress.org/globallabour/article/download/1112/1168>.

¹²⁴ Bartley, "Corporate Accountability and the Privatization of Labor Standards."

¹²⁵ Pedersen and Andersen, "Safeguarding Corporate Social Responsibility (CSR) in Global Supply Chains."

¹²⁶ Beth Hoffman, "Behind the Brands: Food Justice and the «Big 10» food and Beverage Companies" (Oxfam, February 2013), 26.

¹²⁷ "Behind the Brands: Change the Way the Food Companies That Make Your Favorite Brands Do Business.," *Behind the Brands*, accessed June 7, 2015, <http://www.behindthebrands.org>.

¹²⁸ The scope of the Nestlé Supplier Code covers not only the suppliers but also their „parent, subsidiary or affiliated entities, as well as all others with whom they do business including all employees (including permanent, temporary, contract agency and migrant workers), upstream suppliers and other third parties.“ "The Nestlé Supplier Code," December 2013, <http://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf>.

implementation of international standards such as those defined in the UN Guiding Principles and the OECD Guidelines.¹²⁹ The suppliers are bound by all the applicable laws and regulations as well as by the standards on human rights, health and environmental protection detailed within the code. Nestlé furthermore reserves the right to verify compliance with the Code's norms through both external and internal assessment mechanisms. The Code is however seen as an instrument of a dynamic process. Before suppliers enter into a contract with Nestlé the Supplier Code must first be acknowledged.¹³⁰

The Supplier Code is structured in the four pillars of: human rights, health and safety, environmental sustainability and business integrity. In the context of this paper the first one is the most relevant. In it the Code first reiterates Nestlé's support of the UN Guiding principles, then lists the minimum standards of human and included labor rights. The first one is freedom of association and collective bargaining.¹³¹ Forced labor as a second category is prohibited in line with ILO Conventions No. 29 and 105. Employment practices and the minimum age of employment shall also be in line with ILO standards. Concerning fair and equal treatment discrimination in any way is prohibited; this is particularly relevant for all the women that are employed in the garment sector.¹³² Working hours are defined to not exceed 60 hours a week and at least one day of rest must be granted after 6 days of work. The Code furthermore specifies that wages must at a minimum comply with national laws or industry standards. Additionally, wages must also be in line with what is often called living wages, which means that they should always be high enough to cover basic needs for employees and their dependents.¹³³ At the very end the Supplier Code indicates that as a next step suppliers shall report any suspected violations of both regulations and laws as well as of the Code to the Nestlé contact person. This can also be done through confidential channels on their website.¹³⁴

While this code and the fact that it must be acknowledged before Nestlé enters any business relations is certainly a development that is welcome by many human rights defenders, it is not enough to just write everything down, but the code must also be

¹²⁹ See also Chapter 1.3

¹³⁰ "The Nestlé Supplier Code."

¹³¹ This played a role in the criminal case against Nestlé see Chapter 1.4.2.1

¹³² See also Chapter 2.5.3

¹³³ "The Nestlé Supplier Code," 2 – 3.

¹³⁴ "Nestlé: Report Your Concerns of Corporate Non-Compliance," [Http://www.nestle.com](http://www.nestle.com), accessed June 7, 2015, <http://www.nestle.com/aboutus/businessprinciples/report-your-concerns>.

visible and implemented. In this context in 2012 the Fair Labor Association (hereinafter FLA) assessed the sustainable management of Nestlé's coca supply chain in the Ivory Coast. A team of 20 local as well as international experts conducted an assessment of the supply chain focusing on labor rights. The report seeks to evaluate root causes and available means for robust monitoring. It furthermore outlines specific recommendations to both Nestlé itself as well as the government and international buyers on how the risks can be mitigated.¹³⁵

Nestlé's Supplier Code does indeed form part of the companies' contracts at the first tier, that is to say with the most important members of the supply chain that supply components directly. However, one of the challenges is that the suppliers often also have their own Code of Conducts which led to the fact that subsidiaries in the Ivory Coast were not clear on which code they had to follow. Most of the suppliers that were interviewed by the FLA were not informed about Nestlé's Supplier code. Only two of them could show it, others stated that they have their own or that the Code should be available online. In general the study found that both visibility and awareness of the Supplier code decrease moving further up the supply chain.¹³⁶ The recommendations for Nestlé are among others: the strengthening of the Supplier Code especially where there are legal gaps; increasing the awareness of the Code amongst upstream suppliers; defining clear roles and responsibilities that go along with this among the staff, suppliers and the farmers; strengthening the monitoring and developing remediation systems.¹³⁷ The FLA stresses that enhanced monitoring and increased accountability at various stages in the supply chain are crucial to make it more sustainable. At the same time however, it is clear that the company alone cannot solve the challenges and problems with labor standards that are still prevailing in the Ivory Coast. Child labor and other issues are deeply rooted within the country due to a combination of reasons among which are: the socio economic situations of the farmers, cultural perceptions and the issues of migration.¹³⁸

As a result of this study Nestlé committed to collaborate with the FLA in order to tackle these problems. The company adopted an action plan building on the FLA

¹³⁵ Fair Labor Association, "Sustainable Management of Nestlé's Cocoa Supply Chain in the Ivory Coast—Focus on Labor Standards," 2012, <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2740&context=globaldocs>.

¹³⁶ Ibid., 34–35.

¹³⁷ Ibid., 4; 57.

¹³⁸ Ibid., 55.

recommendations.¹³⁹

The Supplier Code of Conduct is only one part of Nestlé's strategy towards creating shared value. There are also Policy Commitments and Responsible Sourcing Guidelines among other instruments that were adopted in this regard. Furthermore assessment checklists have been introduced recently. Nestlé works with an outside partner, mostly NGOs on each of the issues such as child labor. Explaining this strategy, Duncan Pollard, Head of Stakeholders Engagement Sustainability, Nestlé S.A. also admitted that if one looks very closely there is probably an issue with every single one of Nestlé's suppliers.¹⁴⁰ The fact that there is now an open dialogue on these issues and that there is close collaboration with NGOs and other stakeholders is a development that is certainly welcomed by human rights activists.

2.2.2 Sustainability Reports and What They Aim For

In line with these commitments to CSR, MNEs routinely publish glowing reports on sustainability on their activities. One of the main challenge however, is that the veracity of their claims is very difficult to be verified, due to a lack of transparency and reliable information or data from the companies themselves, as well as from regulatory agencies in the countries of corporate business. In recent decades there was an exponential increase in these non-financial or extra-financial reports. The largest database of such reports, «Corporateregister.com» for instance shows that there were less than a dozen reports in 1992, while today there are well over 60'000 from a variety of different industries and sectors.¹⁴¹ In addition to that, the scope of the reports has also been enlarged. The reports used to only report on environmental performances. Today they cover a broad range of issues in the area of CSR from human rights to labor standards, health and safety issues as well as business ethics.¹⁴² At the same time there is also an increasing number of both sector specific but also general guidance and frameworks on reporting requirements

¹³⁹ Nestlé and others, "Nestle Action Plan on the Responsible Sourcing of Cocoa from Cote d'Ivoire."

¹⁴⁰ Pollard, Corporate Responsibility in Nestlé's Supply Chain. Interview with the AVP Stakeholders Engagement in Sustainability Nestlé.

¹⁴¹ Corporate Register, "Reports," accessed June 10, 2015, <http://www.corporateregister.com/reports/>.

¹⁴² Engobo Emeseh and Ondotimi Songi, "CSR, Human Rights Abuse and Sustainability Report Accountability," ed. Dr Hakeem Yusuf and Dr Ismail Adelopo, *International Journal of Law and Management* 56, no. 2 (March 4, 2014): 138 – 139.

and best practices available.¹⁴³

At this point in time the majority of the reporting is still done on a voluntary basis. There are however tendencies towards either recommended or mandatory reporting, especially within Europe, but also in countries such as South Africa.¹⁴⁴ There is only little proof at this point that only because they are mandatory the reports will automatically also improve in their quality and oversight.¹⁴⁵ Some researchers such as Perrault Crawford and Clark Williams found that corporations in countries with higher levels of mandatory reporting, such as France, not only disclose more but that their reporting is also of a better quality than those in low regulated environments such as the US. In France, government regulations mandate social and environmental reporting, comparable to the case of South Africa. The authors assert that these findings are in a way counter intuitive and do not support their initial assumption that purely normative and cultural pressure would result in a higher quality of reporting. Their findings support a public policy of mandatory regulations rather than voluntary self-regulated reporting.¹⁴⁶ Mandatory reporting furthermore has the advantage that the measures can potentially be standardized and therefore become comparable, which make the emergence of best practices possible.¹⁴⁷

Sustainability reports are intended to inform the stakeholders about the companies' social and environmental performances.¹⁴⁸ While there is no universal definition of what these reports should contain, some definitions have been offered. The World Business Council for Sustainable Development (WBCSD) for instance defines sustainability reports as «public reports by companies to provide internal and external stakeholders with a picture of the corporate position and activities on economic, environmental and social dimensions»¹⁴⁹ For their public commitments

¹⁴³ Christian Herzig and Stefan Schaltegger, "Corporate Sustainability Reporting," in *Sustainability Communication*, ed. Jasmin Godemann and Gerd Michelsen (Dordrecht: Springer Netherlands, 2011), 152, http://www.springerlink.com/index/10.1007/978-94-007-1697-1_14.

¹⁴⁴ Ralph Hamann et al., "Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence," *Journal of Business Ethics* 87, no. S2 (August 2009): 456.

¹⁴⁵ Emeseh and Songi, "CSR, Human Rights Abuse and Sustainability Report Accountability," 140.

¹⁴⁶ Gilbert Lenssen et al., "Should Corporate Social Reporting Be Voluntary or Mandatory? Evidence from the Banking Sector in France and the United States," *Corporate Governance: The International Journal of Business in Society* 10, no. 4 (2010): 523 – 524.

¹⁴⁷ Ibid., 514.

¹⁴⁸ Emeseh and Songi, "CSR, Human Rights Abuse and Sustainability Report Accountability."

¹⁴⁹ Bert Heemskerk, Pasquale Pistorio, and Martin Scicluna, "Sustainable Development Reporting: Striking the Balance" (World Business Council for Sustainable Development, 2002).

MNEs typically develop a strategy on sustainability, an interpretation and definition of it, as well as setting out targets, goals and indicators to measure their performance. The sustainability reports can be seen as the results and updates of these strategies that are made available to the public.¹⁵⁰

It is interesting to consider what motivates these sustainability reports. These include reasons of accountability, reputation and risk management, stakeholder theories, legitimacy and possible competitive advantages.¹⁵¹ The reports are furthermore used internally in many different ways.

2.2.2.1 CSR Reporting of Swiss Companies

Communication of issues related to sustainability plays an important role in MNEs that are based in Switzerland. The Swiss federal parliament rejected a proposal that companies that are listed at Swiss stock exchange would have an obligation to disclose information on non-financial performance in accordance with the Global Reporting Initiative (hereinafter GRI) standards.¹⁵²

Around three quarters of the larger Swiss corporations are engaging in the communication on their activities related to sustainability. The reason for this can be partially explained with the so-called «small country effect», whereby there is a strong public attention and pressure. Especially so in a system of direct democracy as in Switzerland, where citizens play an active role in the political sphere with their power for popular initiatives and referenda.¹⁵³ Within the last decade an increasing number of MNEs published sustainability reports and publish additional information on their websites. The reporting is done in line with the GRI guidelines in the majority of cases. However, reporting is a lot less widespread among SMEs. According to the Swiss State Secretariat for Economic Affairs' (hereinafter SECO) CSR strategy, the Swiss government has the task to promote transparency. This should be done through the promotion of the international harmonization of non-financial reporting as well as by developing tools for such reporting and similar transparency

¹⁵⁰ Cory Searcy and Ruvena Buslovich, "Corporate Perspectives on the Development and Use of Sustainability Reports," *Journal of Business Ethics* 121, no. 2 (May 2014): 149.

¹⁵¹ Herzig and Schaltegger, "Corporate Sustainability Reporting," 152.

¹⁵² Eric Nussbaumer, "10.3401 – Motion: Fixer dans les Règlements des Bourses une Obligation de Présenter un Rapport de Développement Durable Répondant aux Exigences du GRI," *Curia Vista*, accessed June 5, 2015, http://www.parlament.ch/f/suche/Pages/geschaefte.aspx?gesch_id=20103401.

¹⁵³ Hetze and Winistörfer, "Insights into the CSR Approach of Switzerland and CSR Practices of Swiss Companies," 164.

initiatives.¹⁵⁴

2.2.2.2 Inaccurate Information and Incomparable Reports: a Critique

In a similar way as CSR¹⁵⁵ sustainability reports have been criticized for a variety of reasons. First of all there is a wide variation concerning the content of such sustainability reports. This is due to the fact that the term and concept of «sustainability» in itself is already ambiguous and there is no universal definition. As a result these reports can hardly be compared.¹⁵⁶ The strongest critique is probably that the accuracy and credibility of the contained information are typically not subject to rigorous and independent auditing processes resulting in the reports being little more than public relation documents. A study by Ernst and Young in 2009 for instance showed that these reports mainly only report on information that is favorable for the company instead of giving a balanced account.¹⁵⁷ Over 3/4 of the reports in that survey contained only positive data for the most part, while less than half of them even addressed all of the more contagious issues that were in the media for instance.¹⁵⁸

NGOs, such as Oxfam, furthermore criticizes that MNEs still do not know or disclose enough about the injustices in their supply chains. They are accused of cherry picking on what to report and on only joining initiatives, for which they are already fulfilling the criteria.¹⁵⁹

2.2.2.3 Investing into Public Relation Documents: the Case of Glencore

In addition to the above-mentioned criticism, there is also the fact that companies are spending huge sums for these glowing reports. Glencore and its sustainability strategy serve as a good example for this.

Glencore merged with Xstrata in 2011 and became one of the biggest commodity companies. Glencore-Xstrata (hereinafter referred to as Glencore) ranked as the

¹⁵⁴ Ibid., 160.

¹⁵⁵ See Sub-Chapter 2.1

¹⁵⁶ Searcy and Buslovich, “Corporate Perspectives on the Development and Use of Sustainability Reports,” 167.

¹⁵⁷ Ernst & Young, “Keep the Balance Steady: Survey on the Quality of Sustainability Reports 2007,” February 5, 2009, http://www.upj.de/fileadmin/user_upload/MAIN-dateien/Infopool/Forschung/ey_reports_quality09.pdf.

¹⁵⁸ Emeseh and Songi, “CSR, Human Rights Abuse and Sustainability Report Accountability,” 138 – 139.

¹⁵⁹ Hoffman, “Behind the Brands,” 17.

tenth largest company worldwide according to Fortune Global 500 in 2014 with \$232.6 billion revenue.¹⁶⁰ Glencore has developed a very extensive and overarching sustainability strategy.

Glencore's approach to sustainability and values is rather vague. Glencore recognizes the potential impact of their work on both society and the environment and emphasizes its respect for human rights concerning all activities. Glencore's approach to sustainability focuses on the following 4 categories: health and safety, environment, community, and human rights.¹⁶¹ Sustainability is managed through a corporate governance framework program, which is called Glencore Corporate Practice (GCP). GCP is intended to allow a practical application of the corporate values across the business, which is envisaged in the internal Code of Conduct. This is furthermore reflected in the annual sustainability report that is intended to provide oversight.¹⁶²

Glencore's values as published in the statement of values encompass five aspects, which shall serve to uphold good business practice together with the Code of Conduct as well as with the underlying supporting policies. These five values are: safety, entrepreneurialism, simplicity, responsibility and openness.¹⁶³

Since 2010 Glencore has published an annual public Group Sustainability Report. This report consists of external non-financial reporting, in line with the Global Reporting Initiative (hereinafter GRI) guidelines. They include sector-specific supplement for metals and mining.¹⁶⁴ The 2013 Sustainability Report¹⁶⁵ constitutes an extensive report of 104 pages elaborating in detail on Glencore's approach and focus areas. The performance and achievement of the targets set out by Glencore are monitored. In their 2013 Sustainability Report the short-term targets and longer-term objectives for improving the sustainability performance indicators are evaluated according to a traffic light system. The group objectives of 2013 are categorized as: achieved (green light), partially achieved/on track (orange light), not achieved (red light). There are seven different categories containing 19 different

¹⁶⁰ Fortune, "Global 500," 2014, <http://fortune.com/global500/total-11/>.

¹⁶¹ Glencore Xstrata, "Our Approach to Sustainability," accessed June 2, 2015, <http://www.glencore.com/sustainability/our-approach-to-sustainability/>.

¹⁶² Ibid.

¹⁶³ Glencore Xstrata, "Sustainability Report 2013," 2013.

¹⁶⁴ These reports are prominently placed on their website under the following link: Glencore Xstrata, "Sustainability Publications," accessed June 2, 2015, <http://www.glencore.com/sustainability/sustainability-publications/>.

¹⁶⁵ Glencore Xstrata, "Sustainability Report 2013."

objectives. Seven of these were categorized as achieved, eight as partially achieved and only three as not achieved.¹⁶⁶ The 2014 Sustainability Report is even more sophisticated. It is a report of 136 pages of the highest quality, spiked with many photos and info graphics. The report is split in managing sustainability as well as global and regional material issues rather detailed, containing 5 pages dedicated to human rights for instance.¹⁶⁷

Glencore has developed an extensive and overarching sustainability strategy, in which it seems to invest a lot of resources. While part of this extremely well presented strategy might be for PR purposes, there also seems to be substantial progress relating to some of the challenges. In light of the fact that Glencore constitutes one of the largest commodities companies and reflecting the increased awareness as well as pressure from civil society these efforts seem effective in improving the competitiveness of the firm. In order to not only improve the competitiveness, but at the same time to be able to move the society towards sustainability, it is important that Glencore does not only focus on the fact that the communities in developing countries are better off in the future, but that they also take up responsibility for the damages and injuries that occurred in the past.

2.3. Supply Chain Gap

It has been the strategy of MNEs over the last 30 years to outsource actual production of their goods in part or entirely to external supply firms due to cost benefits and often rather lax regulations in developing or so-called transition countries. Additionally MNEs increasingly moved away from forms of control that were more direct such as equity relationships through foreign direct investment (FDI) to subcontracting to other suppliers.¹⁶⁸ In equity relationships there was still an ownership of production sites in host countries, which resulted in some kind of subsidiary relationship with the parent company. While it is already challenging to hold corporations accountable when there is such a headquarters-subsidiary relationship, the outsourcing to subcontractors made the case of corporate accountability a nearly impossible one.

¹⁶⁶ Ibid., 16 – 17.

¹⁶⁷ Glencore Xstrata, “Sustainability Report 2014,” 2014.

¹⁶⁸ Karin Lukas, Leonhard Plank, and Cornelia Staritz, “Securing Labour Rights in Global Production Networks: Legal Instruments and Policy Options,” *Kammer für Arbeiter und Angestellte für Wien*, 2010, 1-2, <http://media.arbeiterkammer.at/wien/PDF/studien/SecuringLabourRightsJune2010.pdf>.

Supply chain mechanisms and global production networks are highly complex as a result of both their cross-border dimension as well as due to the asymmetry in power relations among actors. Regulatory mechanisms to secure labor rights and corporate accountability are therefore very scarce and their development tends to be a lengthy process.¹⁶⁹

As a consequence of this outsourcing process, so-called middlemen now play an increasingly important role. These firms that are located in the production areas choose contractors to manufacture garments for retailers and at the same time guarantee the compliance with quality and delivery schedules as well as cost. Their advantage is that they can leverage their local knowledge. Western MNEs often allow these trade firms to seek the supplies and at the same time source production. They may furthermore shift the supplies from country to country to profit from low labor cost as well as possible fluctuations in exchange rates. As a result the often Western MNEs are more and more separated from operational knowledge and have less and less knowledge of actual work conditions and origins of their product. This leads to what can be called a supply chain gap, where retailers no longer approve the sub contractors directly and are therefore sometimes no longer aware of where exactly their products are produced.¹⁷⁰ This poses a tremendous challenge in terms of accountability.

2.4 Fast Fashion

Until recently most of the analysis of labor related issues in global supply chains as well as the strategies on how to tackle them have focused on the factories as the locus of production. However, even though this focus is reasonable since this is where most of the violations take place it is not sufficient and does not tell the entire story. It is important to zoom out and also focus on the entire system through policies and practices, which are designed and implemented upstream by large retail firms and global buyers. Locke defines this the following way «global brands have responded to a business environment characterized by dynamic consumer demand, shorter product life cycles, and concentrated retail channels by reorganizing their supply chains to optimize efficiencies and minimize financial and

¹⁶⁹ Ibid.

¹⁷⁰ Ian M. Taplin, “Who Is to Blame?: A Re-Examination of Fast Fashion after the 2013 Factory Disaster in Bangladesh,” *Critical Perspectives on International Business* 10, no. 1/2 (February 25, 2014): 77 – 78.

reputational risk».¹⁷¹ This system is often described as «fast fashion». The term fast fashion has its origins in the accelerated speed by which fashion is provided and the demand of consumers to have new and now fashion on a regular basis. Cheap fashionable items are no longer only available during different seasons around four times a year, but the supply has to alternate every other week. In this model reasonably inexpensive items are stocked only in limited quantities and the stock is then replaced every 10 days to two weeks.¹⁷² These modern techniques in the fast fashion industry allow for faster production instructions, a broader variety in products and reduced the general inventory of products, which are not selling well. However, they at the same time result in many different forms of labor problems with the factories and workers downstream.¹⁷³ Additionally, competitive pressure has increased tremendously among sub-contractors due to these changes.¹⁷⁴ The factories have to be able to scale production up and down very rapidly creating a context, which is prone to violations of labor standards.¹⁷⁵ Since labor supply has to be so flexible a lot of cheap labor through migrant workers and young women is used in these productions.

This has been acknowledged by some of the global brands themselves in recent years. Nike's Corporate Responsibility (CSR) report for instance already in 2010 listed a number of upstream practices, which contributed to the fact that the workers had to engage in excessive working hours. Similar facts were reported or admitted by other brands. Among these practices were last minute changes in color or style of products as well as the miscalculation of productive capacity of its respective suppliers resulting in a mismatch of overall orders with total productivity.¹⁷⁶

In summary, the environment and structure of fashion has changed in a radical way recently. While some problems such as large stock of badly sold products have partly been solved this way, many others especially in terms of all kinds of violations

¹⁷¹ Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press, 2013), 126.

¹⁷² M. Taplin, "Who Is to Blame?," 78 – 79.

¹⁷³ Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, 127.

¹⁷⁴ M. Taplin, "Who Is to Blame?," 78 – 79.

¹⁷⁵ Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, 127.

¹⁷⁶ Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, 128.

of labor standards have been created. In addition, as Locke cogently asserts, studies by both scholars, global brands and NGOs show that it is not enough to focus on capacity building and compliance. While these efforts certainly contribute to improving labor conditions in global supply chain factories they are not sufficient by themselves to fully address these issues and can only have a limited impact. There is a pertinent need to focus on the entire structure and reflect on how changes can be made in that regard to improve labor conditions. It is necessary to reexamine these upstream business practices as well as the nature and terms of both relations and power structures among the key actors in these global supply chains.¹⁷⁷

2.5 Socio-economic Challenges

A number of socio-economic challenges result from the issues elaborated in the previous sub-chapters. Among these are involuntarily prolonged overtime work, lack of protection for and discrimination of female workers, discriminatory treatment of labor union activities and an unsafe work environment.¹⁷⁸

2.5.1 Labor Rights

Workers are often treated poorly in different regions of the world. Collective labor rights such as union related activities are violated in 138 nations.¹⁷⁹ Individual labor rights violations related to working hours, payment, health and safety are similarly widespread.¹⁸⁰

Assuming that corporations are bound by human rights at least to a certain degree, it becomes clear that MNEs can violate almost every possible human right in one or another way.¹⁸¹ Nevertheless, it is nevertheless useful for this paper to extract two constellations that can be seen as pertinent, typical and exemplifying the issues at hand. The two areas of concern serve to outline the complexity of such cases in terms of the factual background as well as legal liability.

¹⁷⁷ Ibid., 129; 175 – 176.

¹⁷⁸ “Cambodia: Labour Exploitation in the Garment Industry -Responsibilities of the Cambodian Government and International Brand Companies | Human Rights Now Global Site,” accessed June 11, 2015, <http://hrn.or.jp/eng/news/2015/04/16/cambodia-labour-exploitation-in-the-garment-industry-responsibilities-of-the-cambodian-government-and-international-brand-companies/>.

¹⁷⁹ “International Trade Union Confederation,” accessed June 14, 2015, <http://www.ituc-csi.org/>.

¹⁸⁰ Layna Mosley, *Labor Rights and Multinational Production* (Cambridge University Press, 2010).

¹⁸¹ Miriam Saage-Maaß, “Transnationale Unternehmen im nationalen und internationalen Recht,” in *Menschenrechte und Wirtschaft*, ed. Tanja A Börzel and Tessa Debus (Schwalbach/Ts.: Wochenschau-Verl., 2009), 103.

Contributions to a recent publication on «Protecting Labor Rights in a Multi-Polar Supply Chain and Mobile Global Economy» have shown that the two main challenges with which global labor governance is confronted are the issue of enforcement gaps as well as fragmentation and coordination. The former concerns gaps in the effective protection of such labor rights, and challenges particularly concerning migrant workers. They call for a global and multi-stakeholder approach to better enforcing of international labor regulations. The latter is the issue of actor, policy and norm fragmentation. Various dimensions of coordination, cooperation and coherence within the different international actors such as the ILO, OECD, EU and private initiatives do also play an important role here.¹⁸²

The following sub-chapters will shed light on some of the issues related to workers rights. Both of these are important in the context of discrimination as both union related activities and women are regularly discriminated in supply chains of MNEs.

2.5.2 Right to Organize and to Bargain Collectively

The right to organize and to bargain collectively was codified in the ILO Convention No.98.¹⁸³ The Convention shall ensure adequate protection against anti-union discrimination. The issues regarding labor unions are multifaceted: for instance some countries such as Qatar do not allow migrant workers to unionize, while in others such as Columbia they are actively prosecuted and many are killed.¹⁸⁴ The following example will show a further issue with violations of the right to organize and to bargain collectively.

The example of Palla & Co. in Sri Lanka provides a case in point for the MNE-violations of Labor Rights and the so-called «cut and run» strategy in particular. The shoe factory produced for Bata whose headquarters were in Switzerland until the end of 2013. In August 2012, the factory owners refused to increase the wage after half a year as had been agreed to with the unions. The owners refused increases two more times after another six months had elapsed. At this point the workers decided to go on strike. As a consequence Palla & Co. reacted with dismissals

¹⁸² Roger Blanpain, *Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy* (Wolters Kluwer Law & Business, 2014), 189 – 194.

¹⁸³ International Labor Organization, *C098 - Right to Organize and Collective Bargaining Convention*, vol. No. 98, 1951, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098.

¹⁸⁴ See Chapter 1.4.2.1

instead of seeking a dialogue with the workers or the unionists representing them. A few months later the 179 workers who had been organizing themselves in unions were all laid off in December 2013. Some of them were reemployed shortly after; however only after they agreed to no longer engage in any union activity. The other 92 former employees are still fighting to get their jobs back. Additionally, lists are being circulated with the names of those employees who went on strike, making it virtually impossible for them to find a job in any other factory. According to the Coalition for the Responsible Business Initiative, Bata has been confronted with these violations of labor rights. Palla & Co. replied countering all allegations and stating that all laws had been abided to and that all workers were being paid above minimum salary.¹⁸⁵ After initially claiming that they had nothing to do with these cases, Bata later on stated that Palla & Co. has been violating their own code of conduct. There was however no attempt to find a solution or help the wrongfully dismissed workers in any way. Bata ended its business relations with Palla & Co. by the end of 2013, without any kind of reparations for those who suffered from the violation of their code of conduct. Bata is not the only MNE using this so-called «cut and run» strategy, which is quite frequently employed in this area. The strategy constitutes another way to successfully avoid any kind of liability or responsibility from the side of the MNEs.¹⁸⁶

2.5.3 Discrimination Against and Harassment of Women

Existing gender discrimination and power imbalances are often aggravated in the context of the human rights violations women face through business activities of MNEs. There is currently still a lack of sufficient gendered analysis of business and human rights. While corporate conduct may at first seem gender neutral, it very often has great impact in causing or exacerbating discrimination.¹⁸⁷ Women workers are often placed at the bottom end of the value chain, which is why violations predominantly take place within supplier firms. While the violations of women's rights and discrimination play an important role in this field, they are frequently

¹⁸⁵ “Palla’s Response,” *Business and Human Rights*, accessed June 12, 2015, <http://business-humanrights.org/sites/default/files/documents/Palla-re-ccc-jul-2014.pdf>.

¹⁸⁶ “L’initiative pour des Multinationales Responsables – Exemples de Cas,” accessed May 26, 2015, <http://konzern-initiative.ch/de-quoi-il-s-agit/exemples-de-cas/?lang=fr>.

¹⁸⁷ Bonita Meyersfeld, “Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations,” in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, ed. Surya Deva and David Bilchitz (Cambridge University Press, 2013), 199 – 200.

forgotten or marginalized by states, businesses or even human rights activists themselves.¹⁸⁸ Some even argue that the attempts to deal with the imbalance of power in the field business and human rights through ensuring corporate accountability has at the same time resulted in sidelining the field of gender equality, another well documented power imbalance.¹⁸⁹ In addition to that, even when international labor standards and local laws are generally complied with by the companies, women often work in informal and temporary positions that are not covered by laws or codes of conducts.¹⁹⁰

The key areas in which women are being discriminated against are reproductive rights, rights of migrant and home workers as well as the lack of access to justice.

The Guiding Principles¹⁹¹ address this issue in two different places. First in the commentary to Principle 3 they call on states to guide the businesses on «how to consider effectively issues of gender, vulnerability and marginalization, recognizing the specific challenges that may be faced by indigenous people, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families». They furthermore call on them to provide «adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence» in Principle 7(b).¹⁹²

However, the Guiding Principles fail to look at the topic through what is often called a gender lens. Gender is not integrated as a theme that recognizes that seemingly generic principles may operate differently when it comes to practice concerning men and women. Critics argue that this approach is out of synchronization with the rest of the UN system, the same manifestation where specific standards in respect of gender have been developed in broader international law. Similar attention should be paid to the issue in emerging fields of international law. This is not to say that gender or specific harm to women is more important than to children or racially

¹⁸⁸ Ama Marston, “Women, Business and Human Rights: A Background Paper for the UN Working Group on Discrimination Against Women in Law and Practice” (Marston Consulting, March 7, 2014), 29.

¹⁸⁹ Meyersfeld, “Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations,” 193.

¹⁹⁰ Lauren McCarthy, Liz Kirk, and Kate Grosser, “Gender Equality: It’s Your Business” (Oxfam, March 6, 2012).

¹⁹¹ Ruggie, “Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.” See also Chapter 1.3.1

¹⁹² Ibid.

discrete groups. It only means, that the meaning of gender, as the socially constructed roles based on sex and the specific harm resulting from this occur in addition to and irrespective of other categories such as race or abilities.¹⁹³ Disabled women for instance reported different areas of harm than men, which suffered from similar disabilities.¹⁹⁴ Already in 1988 Leandro Despouy, who was the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities at the time, asserted that «*sex and disability are two separate factors which, when combined in the same person, usually reinforce each other and compound prejudices*».¹⁹⁵

¹⁹³ Meyersfeld, “Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations,” 200 – 202.

¹⁹⁴ Leandro Despouy, “Human Rights and Disabled Persons,” Human Rights Studies Series (Geneva, n.d.).

¹⁹⁵ Ibid., para. 140.

III. A Challenging Case: Hypothetical Case Scenarios in Switzerland

3.1 Relevant Cases in the Area of Business and Human Rights

In the following a few examples from different jurisdictions will be discussed in order to highlight the problem of corporate accountability in court cases before assessing the situation in Switzerland.¹⁹⁶

3.1.1 Cape Asbestos Litigation

The first example is the Cape Asbestos litigation, which took place mostly in UK courts over a period of 15 years, with the first complaint filed in 1997. Initially, Cape agreed to a settlement of £21 million with the by then 7,500 plaintiffs in 2001 that it could however not meet due to financial difficulties in the following year.¹⁹⁷ For this reason the litigation continued until a new out of court settlement agreement was reached in 2003 with Gencor and Cape Plc.¹⁹⁸ The facts of the case concerned the English company Cape Industries Plc. (hereinafter Cape) that was presiding over a group of subsidiaries in South Africa (hereinafter SA), which were involved in the mining as well as marketing of asbestos. The first claim was filed in the English High Court in 1997 by five South African miners suffering from a disease that was caused by asbestos. After Cape moved to dismiss the case on *forum non-conveniens* ground¹⁹⁹, the House of lords held in *Lubbe v. Cape Plc*²⁰⁰ that the case could be heard in the UK, because of the lack of legal aid in SA, which made it very likely that there would be no justice for the victims. Shortly after jurisdiction was upheld Cape agreed to the first settlement.

¹⁹⁶ For a summary of more cases see for instance Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights.”

¹⁹⁷ Business & Human Rights Resource Centre, “Cape/Gencor Lawsuits (re So. Africa),” accessed June 13, 2015, <http://business-humanrights.org/en/capegencor-lawsuits-re-so-africa-0>.

¹⁹⁸ Richard Meeran, “Cape Plc: South African Mineworkers’ Quest for Justice,” *International Journal of Occupational and Environmental Health* 9, no. 3 (2003): 218–29.

¹⁹⁹ Concerning the question of jurisdiction, as a common law country, the UK applies a *forum non conveniens* (FNC) doctrine. The two requirements were developed in *Spiliada Maritime Corporation v. Cansulex Ltd* (1987). First, the defendant must show that there is another forum available which is more appropriate. If this is prima facie established, the claimant must then show that other factors hinder substantial justice to be done if the other forum is chosen.

²⁰⁰ *Lubbe and Others and Cape Plc. and Related Appeals*, House of Lords (2000).

At a later stage in the same litigation the UK Court of Appeal clarified and advanced the applicable law in the UK concerning liability of parent companies in the case of *Chandler v. Cape Plc.*²⁰¹ This was the first case where a UK court recognized a duty of care for a MNE. The Court of Appeal held that in light of Cape's «superior knowledge about the nature and management of asbestos risks», it found that «Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken.»²⁰² Unlike the previous Cape cases however, this case did not concern an overseas subsidiary but operations within the UK. The claimant in *Chandler v. Cape Plc.* was an employee with Cape Products in England, working outside on the same site where asbestos was produced. While it was therefore not a case of accountability of MNE in respect of their activities in developing countries, it could potentially nevertheless serve as precedence. However, the test applied was clearly very fact-specific, which makes it doubtful how strong it will be as precedence for cases with overseas subsidiaries involved.²⁰³

3.1.2 Oil spills in Nigeria

During the last two years, two important judgments in the field of corporate accountability were rendered in two different countries both related to the Anglo-Dutch MNE Shell. In the Netherlands four Nigerian farmers together with the NGO Milieudefensie brought a number of civil liability claims to the Hague District Court²⁰⁴. These claims alleged both the parent Royal Dutch Shell as well as its subsidiary in Nigeria of damages in relation to oil spills in Nigerian villages. At the same time the *Kiobel* case²⁰⁵ that was brought before the New York District Court was also resolved in 2013, after 11 years of litigation. In this class action a number of Nigerians filed civil claims against Shell for its alleged aiding and abetting of the human rights violations committed by the military. In the 1990s the Nigerian military regime brutally suppressed protests that were held against environmental effects of Shell's exploitation in the Niger Delta. These are both highly significant cases

²⁰¹ *Chandler v. Cape Plc.* (Court of Appeal, Royal Court of Justice 2012).

²⁰² *Ibid.*

²⁰³ Meeran, «Tort Litigation against Multinational Corporations for Violation of Human Rights,” 8 – 10.

²⁰⁴ *Friday Alfred Akapan and Vereniging Milieudefensie v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* (District Court of the Hague 2013).

²⁰⁵ *Kiobel v. Royal Dutch Petroleum* (Supreme Court of the United States 2013).

because they had an impact on the development of foreign direct liability in corporate accountability cases.²⁰⁶

The *Dutch Shell Nigeria* case was filed in late 2008 before The Hague District court and the final ruling was rendered in 2013.²⁰⁷ The plaintiffs asserted that the Nigerian subsidiary has failed to exercise due care by not preventing the oil spills that occurred in the area. The allegation made was that Shell Petroleum Development Company of Nigeria has failed to take adequate measures to prevent these oil spills and furthermore has failed to properly mitigate any resulting consequences by not cleaning up the contamination in the aftermath. Shell itself as the parent company has allegedly equally failed to exercise due care and has not used its control and influence over the subsidiary in Nigeria.²⁰⁸ In 2013, the court came to the conclusion that the oil spills were resulting from sabotage and dismissed almost all the claims against both the parent and subsidiary. It did so because under Nigerian law the operator of oil pipelines are generally not liable for the harm and also Nigerian tort law does not put an obligation on a parent company to prevent its subsidiary from causing harm to third parties under the current circumstances. One of the claims against the Nigerian subsidiary however was granted resulting in an order of payment of compensation for the resulting loss. The subsidiary had failed to take sufficient precaution against sabotage resulting in negligence in this particular case.²⁰⁹

The US Supreme Court rendered a final judgment in the case of *Kiobel v Royal Dutch Petroleum*²¹⁰ in 2013, by introducing a presumption against extraterritoriality in applying the ATS. In doing so it avoided the question of whether corporations were subjects of international law in the sense of whether they could be defendants for a violation of the «law of nations».²¹¹ In order to bring a claim under the ATS the claims have to be able to demonstrate a link to the US that goes beyond the mere presence of the company in the US at the time of the lawsuit. The nexus must be

²⁰⁶ Liesbeth FH Enneking, “The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case,” *Utrecht Law Review* 10, no. 1 (2014): 45.

²⁰⁷ *Friday Alfred Akapan and Vereniging Milieudefensie v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* (District Court of the Hague 2013).

²⁰⁸ Ibid.

²⁰⁹ Enneking, “The Future of Foreign Direct Liability?,” 46 – 47.

²¹⁰ *Kiobel v. Royal Dutch Petroleum* (Supreme Court of the United States 2013).

²¹¹ Andrew Clapham, “Non-State Actors,” in *International Human Rights Law*, ed. Daniel Moeckli et al. (Oxford University Press, 2013).

strong enough to displace the presumption of extraterritoriality.²¹² As a result the ATS can still serve as a valuable tool in corporate accountability cases. There are a number of court cases in this area brought under the ATS that are still pending in US courts at the time of writing²¹³, they will have to clarify when such a nexus is sufficient.

These examples from different jurisdictions illustrate that various national courts have addressed the issue of corporate accountability already. In Switzerland however, there has been only one case concerning damages for human rights violations. This case concerns claims by gypsies against International Business Machines Corporation (hereinafter IBM) for their alleged assistance to the Nazis during the Holocaust. The reason for this was that IBM has provided technology and punch card machines, which were used to track and kill gypsies. Even though the Federal Supreme Court of Switzerland decided that jurisdiction could be upheld in the present case²¹⁴, it refused to go into the merits of the case, asserting that the claims were statute-barred.²¹⁵

3.2 Two Possible Scenarios relating to Switzerland

Other than the *IBM* case in 2004 and 2006 there has been no comparable civil case brought before a Swiss court since. In order to better understand why not, it is necessary to have a closer look at Swiss law. This should be done particularly in terms of whether jurisdiction for such corporate accountability cases could be established, and if so, what law the courts would apply. To ensure that such an endeavor yields practical output the analysis will focus on two rather typical case scenarios. This is an attempt to apply the law to corporate legal responsibility cases.

The first hypothetical scenario is built on some of the issues that are predominant in supply chain mechanisms.²¹⁶ It is possible that it will soon be clarified how all these legal norms would be applied to corporate accountability before Swiss courts. However, it has become evident that timing and statute of limitations are crucial in these cases and we should therefore be aware of this additional challenge. The cases against Nestlé and Argor are criminal cases and certainly high profile

²¹² *Kiobel v. Royal Dutch Petroleum*, 14 (Supreme Court of the United States 2013).

²¹³ See for instance: *Re South African Apartheid Litigation* (United States District Court Southern District of New York 2014).

²¹⁴ BGE 131 III 153 (Federal Supreme Court of Switzerland 2004).

²¹⁵ BGE 132 III 661 (Federal Supreme Court of Switzerland 2006).

²¹⁶ See Chapter II

examples. However, they shed some light on how courts apply the rules and when corporations could potentially be liable.

One may argue that there are no civil cases of corporate accountability because there are even more hurdles in place in Switzerland than in most other countries. By using hypothetical cases we see that it is a great challenge to argue such complex international cases. However, there are some creative avenues that have been tried in other jurisdictions and may be applicable in Switzerland. The second hypothetical case, a German case on unfair competition, could be replicated in Switzerland, because the legal and wider circumstances are similar under the two jurisdictions. The first scenario represents a more generalized version of a potential case in the context of supply chains. While it would certainly be interesting to go into the legal merits of such hypothetical cases, within the scope of this paper it will only be possible to analyze if jurisdiction could be established and what law would potentially apply to such cases.

3.3 The advantage of Hypothetical Cases

Concerning parent company liability the presence of a control relationship between the parent and its foreign affiliate is crucial. It is sufficient in order to justify the parent company's liability in a particular case. At first this is the case regardless of how the foreign affiliate is related to the parent. In general there are two options of establishing primary liability of the parent; its familiarity with the risk and its involvement in the potential resulting human rights violations. The other possibility is through secondary theories of liability. There the parent company does not have to be involved directly. Concepts that fall within this category are aiding and abetting, authorization and charges of conspiracy. The challenge in all of this is the principle of separate corporate responsibility. How much weight should be put on this in relation to other factors considering the liability of parent companies? It is evident that this adds an extra layer of complexity to corporate accountability cases. Courts are likely to be very cautious not to create any kind of precedence that could potentially result in unlimited parent company liability through what is often called «the back door». However, at the same time it is also important that in these cases courts are weary of solely basing their argument on corporate structure that is sometimes constructed for the exact purpose of avoiding liability.²¹⁷ This risk that

²¹⁷ Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, vol. 48 (Cambridge University Press, 2006), 234 – 235.

courts focus too much on form rather than substance is indeed a great challenge that claimants who bring these cases are confronted with.²¹⁸

This is also acknowledged by academics. Professor Tyler Giannini, Clinical Professor of Law and Co-Director of the International Human Rights Clinic at Harvard Law School, for instance has lately shifted his strategy regarding business and human rights. He asserted that focusing too much on corporate structure could be diverting attention from the real issue of how justice can be served for victims of corporate human rights abuses. Both the laws in place and academia alike are currently too easily to be distracted by such corporate structures.²¹⁹

3.4 First Scenario – a Typical Case of Corporate Accountability

The first scenario represents a simple and common factual scenario of labor and human rights violations within the context of corporate accountability. There will be a distinction between scenario (a) relating to a case of a subsidiary and (b) relating to a sub-contractor. This will shed light on some additional complexity of supply chain cases.

3.4.1 Factual Scenario «Fresh Food»

«Fresh Food» is a MNE both incorporated as well as headquartered in Switzerland. The corporation's structure is highly dispersed. It is one of the largest food and beverage suppliers in Switzerland.

- a) A fully owned subsidiary «Hand-picked Vegetables» is based in country Y. They directly cultivate land and employ workers. Due to extensive working hours, inadequate protection from pesticides and enormous hot temperatures a number of employees die. The cause of death is stated to be «heart attack» or «unknown». No biopsies are made.*
- b) «Fresh Food» works with a middleman in country Z. This middleman has sub-contracts with local cooperatives. Many of the employees in these cooperatives are migrant workers. These workers are recruited in their home countries. There they have to pay very high recruitment fees leaving them indebted. . The contracts they sign and the promised salary are however very*

²¹⁸ Ibid., 48:136.

²¹⁹ Tyler Giannini, “Business & Human Rights,” *Human Rights @ Harvard Law*, June 10, 2015, <http://hrp.law.harvard.edu/areas-of-focus/business-human-rights/>.

appealing. Once they are in Z their contracts are annulled and replaced by new ones on very harsh terms with much reduced protection. In Z migrant workers have no right to unionize. Due to extensive working hours, inadequate protection from pesticides and enormous hot temperatures a number of employees die. The cause of death is stated to be «heart attack» or «unknown». No biopsies are made.

A labor union in Switzerland together with an international equivalent decides to assess the working conditions in the supply chain of «Fresh Food» both in Y and Z. They approach a law firm in Switzerland and ask for the possibilities to sue the parent company «Fresh Food».

3.4.2 Establishing Jurisdiction in Switzerland

The Swiss Private International Law Act (PILA)²²⁰ governs international jurisdiction in Switzerland. Since the alleged human rights violations are taking place in the context of tortious acts, Art. 129 PILA²²¹ regulates jurisdiction in general. This is the case unless there is a specific treaty on the particular subject. For this reason it must be considered whether the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter Lugano Convention)²²² as a special treaty provides jurisdiction for the facts of the case, otherwise PILA must be consulted. Once jurisdiction in Switzerland can be established, the applicable law will then be determined by PILA. This is the case regardless of whether jurisdiction was established under PILA or the Lugano Convention, since the convention only regulates jurisdiction and does not contain any provision on applicable law.

According to Art. 2 para.1 Lugano Convention²²³, the forum of the defendant is considered to be the place of the defendant's domicile. It can therefore be concluded that provided the defendant is domiciled in Switzerland, the Lugano

²²⁰ *Federal Act on Private International Law (PILA)*, 1987, http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf.

²²¹ “Swiss courts at the domicile or, failing a domicile, at the habitual residence of the defendant have jurisdiction to entertain actions in tort. Swiss courts at the place where the act or the result occurred have also jurisdiction as well as the courts at the place of business to entertain actions pertaining to the operation of the place of business in Switzerland.” Art 129 Ibid.

²²² *Übereinkommen über die Gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen*; *Lugano Übereinkommen*, LugÜ., 2007, <https://www.admin.ch/opc/de/classified-compilation/20082721/201407010000/0.275.12.pdf>.

²²³ Art. 2 para. 1 Lugano Convention *Ibid*.

Convention shall apply. Art. 60 Lugano Convention clarifies that the domicile of a company can be either the (a) statutory seat (derived from the company's statutes); or (b) central administration (decision-making and corporate management – different from the registered offices of domicile companies); or (c) principal place of business (actual business center, staff and facilities).²²⁴ The claimant may in the framework of the defendant's forum choose between these jurisdictions in cases where they are in different places. There is no priority between the various criteria.²²⁵ Suing a parent company based in Switzerland is therefore possible in accordance with both the Lugano Convention and the first sentence Art. 129 Para. 1 PILA.²²⁶

A further question for examination is, whether the parent company, here «Fresh Foods», could potentially raise an objection to a claim in Switzerland on the basis of forum non-conveniens. In cases, which concern the tortious liability of companies for human rights abuses in an international context, it is relatively common for defendants to dispute jurisdiction at the defendant's domicile. This occurs on the basis that the courts of a third country would be better suited, because the alleged violations took place there and/or both the defendant and the witnesses may be located in a third state.²²⁷ This is particularly the case in common law jurisdictions. In the European context, the European Court of Justice (ECJ) clarified this question in *Owusu*²²⁸. The ECJ found that a court in the United Kingdom (UK) could not deny jurisdiction in accordance with Art. 2 Brussels Regulation²²⁹ (which is equivalent to Art. 2 Lugano Convention). It would not be possible to argue that the court of a country not party to the treaty would be more appropriate, even where no connecting factors to the home state other than the defendant's domicile exist. It was therefore held that legal certainty takes precedence over logistical difficulties in establishing the facts of the case.²³⁰ The Swiss jurisprudence in decision BGE 135 III

²²⁴ Art. 60 Lugano Convention (*LugÜ*).

²²⁵ Paul Volken, "Zürcher Kommentar zum IPRG, 2," in *Aufl., Zürich*, ed. Girsberger Daniel et al., 2nd ed., 2004.

²²⁶ Schwenzer and Hosang, "Menschenrechtsverletzungen - Schadenersatz vor Schweizer Gerichten," 277 – 278.

²²⁷ *Lubbe and Others and Cape Plc. and Related Appeals*, House of Lords (2000); *Re, Union Carbide Corporation Gas Plant Disaster at Bhopal* (United States Court of Appeals, Second Circuit 1987).

²²⁸ *Andrew Owusu v N.B. Jackson* (European Court of Justice (ECJ) 2005).

²²⁹ *Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*.

²³⁰ *Andrew Owusu v N.B. Jackson*, 23 – 26 (European Court of Justice (ECJ) 2005).

189²³¹ has aligned itself with the practice established in *Owusu* and accepted jurisdiction in Switzerland under Art. 2 Lugano Convention²³².

In the present hypothetical case, «Fresh Food» has both its statutory seat and central administration in Switzerland. It can therefore be assumed that the Swiss courts would accept jurisdiction in the present case scenario.

A further question would be whether once jurisdiction for the parent company is established it can also be extended to the subsidiary.

In the *Oguru et al v. Royal Dutch Shell and Shell Nigeria* case²³³, the Dutch court came to the conclusion that it could accept jurisdiction for the Nigerian claim against the parent company as well as for the related Nigerian claim against the foreign subsidiary. So long as the claim against the parent was not manifestly unsubstantiated, the jurisdiction of the Dutch court could be justified on the basis of efficiency of decision-making. The Shell subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC), was sentenced to pay compensation to farmers for oil pollution by the Dutch court on the basis that the oil pollution could have been prevented by reasonable means.²³⁴

There is a potential, based on the *Oguru-Shell decision*, that jurisdiction could be granted under passive joinder of parties per Art. 6 para. 1 Lugano Convention²³⁵ or Art. 8a Para. 1 PILA²³⁶ respectively. In the present case in *Scenario A* there could be an attempt for such a joint tortfeasor against «Hand-picked Veggies» together with «Fresh foods». All the more so because the provision being relied upon is the identical one relied upon in the *Oguru-Shell case*. In order to rely on the passive joinder of parties, parallel claims are required against the parent company, as well as against the subsidiary, in order for the two to be considered together for the purposes of decision-making efficiency. So far this hasn't been attempted in Switzerland.

²³¹ BGE 135 III 189 (Federal Supreme Court of Switzerland 2008).

²³² *Übereinkommen über die Gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen*; Lugano Übereinkommen, LugÜ..

²³³ *Oguru et al. v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* (District Court of the Hague 2011).

²³⁴ *Ibid.*

²³⁵ *Übereinkommen über die Gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen*; Lugano Übereinkommen, LugÜ..

²³⁶ *Federal Act on Private International Law (PILA)*.

Concerning Scenario B, while the conditions were the same concerning jurisdiction over the parent company, it will be a lot more challenging to establish jurisdiction in Switzerland against a subcontractor. There may be potential in establishing jurisdiction based on a *forum necessitates* claim in accordance with Art. 3 PILA²³⁷. For this three cumulative conditions have to be met in line with the wording of this article. First, no other ground of jurisdiction according to PILA can be established.²³⁸ Second, a claim in a foreign jurisdiction must be either impossible or unreasonable.²³⁹ And lastly the facts of the case must have a sufficient connection to Switzerland.²⁴⁰ This ground for jurisdiction is however only subsidiary and should therefore be interpreted in a narrow sense. The rationale here lies in preventing the denial of justice and a negative conflict of jurisdiction respectively.²⁴¹ Up to now there has only been one case before the Federal Supreme Court of Switzerland in relation to human rights violations and a *forum necessitates* claim. In this case the court denied jurisdiction on this bases due to a lack of sufficient connection to Switzerland, since the only link was that the claimant lived in Switzerland when he brought the case before a Swiss court.²⁴²

In sum, it can be asserted that jurisdiction against the parent company «Fresh Food» as such seems less problematic. However, once we get to the claims against the subsidiary it will already be more challenging, since it is unclear if a passive joinder of parties would be possible under Swiss law. It gets even more challenging in scenario (B) when we are looking at supply chains and sub contractors. What could potentially be tried in this context is the subsidiary base of jurisdiction, a *forum necessitates* claim.

3.4.3 Applicable Law

The applicable law will now be determined according to the PILA (*lex fori*). The applicable law is determined according to the definition of the claim at issue. Art. 154 PILA²⁴³ clarifies that companies are subject to the law under which they are

²³⁷ Ibid., Art. 3.

²³⁸ Volken, “Zürcher Kommentar zum IPRG, 2,” para. 9.

²³⁹ Ibid., para. 16 – 19.

²⁴⁰ Ibid., para. 35 – 39.

²⁴¹ Schwenzer and Hosang, “Menschenrechtsverletzungen - Schadenersatz vor Schweizer Gerichten,” 286.

²⁴² 4C.379/2006 (Federal Supreme Court of Switzerland 2007).

²⁴³ Art. 154 PILA. *Federal Constitution of the Swiss Confederation 101*, 1999, <https://www.admin.ch/opc/en/classified-compilation/19995395/201405180000/101.pdf>.

incorporated. The relationship between the company statutes and the law on torts is rather controversial in Switzerland. The Federal courts have adopted the new practice of giving the applicability of tort statutes priority on the basis that the complex issue of liability should be subject to the laws of one country only²⁴⁴. Therefore, according to the current practice therefore, questions concerning the tortious liability of a legal person's officers and agents are to be dealt with under the law on torts.²⁴⁵

Concerning the relationship between international law and national law there are three relevant aspects, (1) scope of application, (2) self-executing norms, and (3) the hierarchy within the domestic legal system.²⁴⁶ Switzerland is a so-called monist system, which is comparably favorable to international law. There is no need to incorporate international treaties. Treaties have a direct effect if they are self-executing. According to the Federal Supreme Court of Switzerland an international treaty norm has to be sufficiently precise and clear, so that individual cases can be decided upon this legal standard. In addition the Federal Supreme Court defined that in addition a legal norm has to be sufficient precise, meaning that a norm can only be self-executing if it is justiciable, guaranteeing the rights of individuals, as well as being aimed at authorities that apply the law.²⁴⁷

Art. 5 Para 4 of the Federal Constitution of the Swiss Confederation (hereinafter Swiss Constitution)²⁴⁸ implies that international law generally ranks higher than national law. However, this is no collision norm, and it depends on the rank within the domestic system and the specific circumstances of each case. It should also be highlighted in this context and concerning business and human rights that soft law does not trump domestic law. Soft law has been applied in Swiss courts for the interpretation of international law as well as *mutatis mutandis* as guidance for the interpretation or concretization of domestic law.²⁴⁹

²⁴⁴ See for instance BGE 110 II 188 (Federal Supreme Court of Switzerland 1984).

²⁴⁵ Volken, "Zürcher Kommentar zum IPRG, 2."

²⁴⁶ Geisser, *Ausservertragliche Haftung privat tätiger Unternehmen für «Menschenrechtsverletzungen» bei Internationalen Sachverhalten*, para. 48.

²⁴⁷ See for instance BGE 124 III 90 (Federal Supreme Court of Switzerland 1997), concerning the self executing character of Art 12 of the Convention on the Rights of the Child (CRC)

²⁴⁸ *Federal Constitution of the Swiss Confederation* 101.

²⁴⁹ Geisser, *Ausservertragliche Haftung privat tätiger Unternehmen für «Menschenrechtsverletzungen» bei Internationalen Sachverhalten* para. 49 – 57; BGE 123 I 112 (Federal Supreme Court of Switzerland 1997).

Applicable law concerning wrongful acts is defined in Art. 133 PILA²⁵⁰. According to Art. 133 Para. 1 PILA *lex communis* the law of the place of the common habitual residence is applicable. In cases of human rights violations committed by a subsidiary or sub-contractor overseas the law of the host country will be applied, which is where the victims are based. In cases where there is no common habitual residence *lex loci delicti* in accordance with Art. 133 Para. 2. PILA²⁵¹. This conflict norm leads to the result that again the law of the place where the harm occurred and where the victims are based will be applied most likely. The potential issue with this is that the law of the host state might not have the same kinds of torts or may not provide for compensation for the damages in the same way as Swiss law does.²⁵² This raises the question of the compatibility of the foreign law with Swiss «Ordre public» in accordance with Art. 17 PILA²⁵³. This is the case when the value concepts and legal understandings are virtually incompatible. If the applicable foreign law therefore considers grave human rights violations to be either legal or does not provide for compensation in such cases, this would render it inapplicable according to this exception. Courts should be cautious here to not interpret this too broadly, since this could potentially result in what could be perceived as forcing Swiss value concepts onto the host country, in the sense of what in the extreme could lead to legal colonialism.²⁵⁴

3.5 Second Scenario: Unfair Competition Law

Human rights defenders have started to look outside of tort law in order to hold MNEs accountable through other legal standards. Even if jurisdiction can be established in cases similar to that of the first scenario, it will be very difficult to lift the corporate veil and win such a case at this point in time. Even more so the further one moves upstream in the supply chain.²⁵⁵ For this reason lawyers have started to

²⁵⁰ Art. 133 *Federal Act on Private International Law (PILA)*.

²⁵¹ Art. 133 Para. 2 *Ibid.*

²⁵² Geisser, *Ausservvertragliche Haftung privat tätiger Unternehmen für «Menschenrechtsverletzungen» bei Internationalen Sachverhalten*, para. 462 – 472.

²⁵³ Art. 17 *Federal Act on Private International Law (PILA)*; see also Volken, “Zürcher Kommentar zum IPRG, 2,” Fn. 29.

²⁵⁴ Schwenzer and Hosang, “Menschenrechtsverletzungen - Schadenersatz vor Schweizer Gerichten,” 289.

²⁵⁵ This is where current legislative amendments in France for instance, as well as the Responsible Business Initiative in Switzerland come in (see Chapter 1.5.2). These are intending to clarify when MNE are liable, and also to extend due diligence obligations to all suppliers.

look outward. In cases relating to precarious working conditions in supply chains they have found a possibility to apply competition law to such cases.

A famous example is the Nike case in the US. In *Kasky v. Nike*²⁵⁶ the Supreme Court of California in 2003 confirmed the ruling of lower instances that Nike's advertisement concerning labor conditions of their suppliers could be categorized as «commercial speech». The court held that Nike's statements were not fully protected by the First Amendment, when they concerned facts that are material to commercial transactions, as in the present case the factual claims made about Nike's production conditions.²⁵⁷ The anti-sweatshop and labor rights activist Marc Kasky sued Nike under California's unfair business practices statute, according to which «unfair, deceptive, untrue or misleading advertising» is prohibited.²⁵⁸ It struck him that Nike's Code of Conduct, which mandated certain health, safety and worker's rights as well as environmental standards to which the supplier factories must abide, was marketing their product as false advertisement. The case began on April 20, 1998 as a consumer action and was filed in a San Francisco court. The alleged human rights violations were based on a Vietnam Labor Rights report from 1997 and included among others the charges that Nike mislead the public by: claiming that workers receive health care and free meals, that the average salary of production workers was twice the minimum wage in Southeast Asian countries and that it denied that workers were subject to corporal punishment.²⁵⁹ Nike attempted to take the California Supreme Court case to the U.S. Supreme Court. The U.S. Supreme Court initially granted the writ of certiorari, but after the oral arguments decided that the writ was granted improvidently the merits of the case could not be heard.²⁶⁰

Seven years later another case based on competition law was filed in Germany against Lidl.

²⁵⁶ Mark Kasky v. Nike (Supreme Court of California 2003).

²⁵⁷ Ibid.; Julia Fisher, «Free Speech to Have Sweatshops-How Kasky v. Nike Might Provide a Useful Tool to Improve Sweatshop Conditions», *BC Third World LJ* 26 (2006): 269.

²⁵⁸ *Unfair Competition Law: California Business and Professions Code §§ 17200 - 17210*, 1977.

²⁵⁹ Ronald KL Collins and David M. Skover, «Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story, The», *Case W. Res. L. Rev.* 54 (2003): 971 – 972.

²⁶⁰ Nike, Inc. v. Kasky 539 U.S. 654 (U.S. Supreme Court 2003).

3.5.1 The Creative Case against Lidl (DE)

A coalition between the European Centre for Constitutional and Human Rights (ECCHR), the Customer Protection Agency (VZ) in Hamburg, and the Clean Clothes Campaign (CCC) filed a complaint against the market leading German discounter Lidl in April 2010. Lidl is thereby accused of misleading customers in relation to its own compliance with international labor as well as social standards within the supply chain. The complaint is based on the German laws against unfair competition (hereinafter UWG). Lidl is charged with allegedly violating the law that businesses are bound to comply with voluntary commitments they have referenced in their advertising strategies. By making reference to the Business Social Compliance Initiative (hereinafter BSCI) and their own code of conduct Lidl was advertising clear improvements in working conditions at their supplier firms, which have not yet taken place. Therefore they were in potential violation of this obligation. Through this kind of advertisement Lidl deceived and misled consumers while gaining an unfair competitive advantage.²⁶¹

It was a swift legal victory in the sense that only ten days after the complaint was submitted Lidl conceded. By doing so it retracted the false advertisement making promises to uphold worldwide fair working conditions in its supplying firms in Bangladesh²⁶² and also admitted to the allegations made against them. Lidl was forced to stop advertising in this respect and is no longer allowed to praise its BSCI membership in any advertisements.²⁶³ Another success of the case was the fact that it attracted a lot of media attention.²⁶⁴

²⁶¹ “Swift Legal Victory in the Complaint against Lidl” (ECCHR, September 2010).

²⁶² Lidl may no longer use the following Slogan in their advertisement: „*Wir handeln fair! Jedes Produkt hat eine Geschichte. Uns ist wichtig, wer sie schreibt. Lidl setzt sich weltweit für faire Arbeitsbedingungen ein. Wir bei Lidl vergeben deshalb unsere Non-Food-Aufträge nur an ausgewählte Lieferanten und Produzenten, die bereit sind und nachweisen können, soziale Verantwortung aktiv zu übernehmen. Wir lehnen grundsätzlich jegliche Form von Kinderarbeit oder Menschen- und Arbeitsrechtsverletzungen in den Produktionsstätten unserer Waren ab. Wir sichern diese Standards nachhaltig*“.

²⁶³ “Verbraucherzentrale Hamburg - Lidl dreht bei,” September 10, 2010, <http://www.vzh.de/recht/30345/lidl-dreht-bei.aspx>.

²⁶⁴ See for instance: Miriam Saage-Maaß and Anna von Gall, “Gegenblende – Das Debattenmagazin, Fairer Wettbewerb Weltweit! Am Beispiel ‘Lidl-Klage,’” July 13, 2010, <http://www.gegenblende.de/++co++362c1648-8dc6-11df-7fa7-001ec9b03e44>; “Discounter Täuscht Verbraucher: Menschenrechtler Verklagen Lidl - Wirtschaft,” *Stern.de*, April 8, 2010, <http://www.stern.de/wirtschaft/news/discounter-taesch-t-verbraucher-menschenrechtler-verklagen-lidl-1556980.html>; “Verbraucherzentrale Hamburg Klagt Gegen Lidl,” *TextilWirtschaft.de*, accessed May

3.5.1.1 Prevailing Grave Violations

The case was mainly based on the findings of a study conducted by ECCHR together with CCC on the working conditions in Bangladesh and whether they had actually improved as Lidl claimed. The study focused on some selected employees of Lidl suppliers, focusing on the «model factories» that had taken part in the training programs. The report with the German title «Die Schönfärberei der Discounter»²⁶⁵ found countless labor standards violation that still prevailed in Bangladesh. It built its analysis on a previous report by the CCC that was published in 2008 under the German title «Wer bezahlt unsere Kleidung bei Lidl und KiK? Arbeitskraft zum Discoutpreis – Schnäppchen für alle?».²⁶⁶ This is when Lidl was confronted by the CCC with allegations of labor and human rights law violations in its supply firms in Bangladesh for the first time. In a study in 2007 they found grave labor rights violations by five of the suppliers. Among these was mandatory overtime without guaranteed payments as well as the discrimination of women. Lidl decided to invest in consulting and training on social standards for its suppliers, after increased pressure and public criticism. However, at the same time Lidl wasn't willing to pay higher prices, rather the opposite, pushing prices down by up to one third. With this logic it is difficult to expect the suppliers to adhere to social standards while they are at the same time getting less for their products.²⁶⁷ The company also joined BSCI around that time, which it heavily relied on in its advertisement.

The 2010 study drew a horrible picture once again and found similar violations in all the model factories. These working conditions and labor standard violations were: long working hours, pay deductions as a form of punishment, prohibition of trade unions and grave discrimination of women as well as violations of the minimum standards that are codified in the ILO Conventions, and self imposed regulations of

23, 2015, http://www.textilwirtschaft.de/business/Verbraucherzentrale-Hamburg-klagt-gegen-Lidl_62955.html.

²⁶⁵ Gisela Burckhardt, «Die Schönfärberei der Discounter: Klage gegen Lidl's irreführende Werbung,» April 2010.

²⁶⁶ Korrshed Alam et al., «Wer bezahlt unsere Kleider bei Lidl und Kik? Eine Studie über die Einkaufspraktiken der Discounter Lidl und KiK und ihre Auswirkungen auf die Arbeitsbedingungen bei den Lieferanten in Bangladesch,» January 2008, http://www.saubere-kleidung.de/downloads/publikationen/2008-01_Brosch-Lidl-KiK_de.pdf.

²⁶⁷ Burckhardt, «Die Schönfärberei Der Discounter: Klage Gegen Lidl's Irreführende Werbung,» 3.

Lidl's own code of conduct and the BSCI Code of Conduct (hereinafter referred to as BSCI CoC).²⁶⁸

3.5.1.2 The Lidl Lawsuit

The Lidl complaint was filed by the Customer Protection Agency (VZ) Hamburg in a Heilbronn district court, based on the German UWG. As in other EU countries consumer associations such as the VZ Hamburg are allowed to take legal actions against advertising that results in misleading consumers to purchase a product. As discussed below this is also possible within the Swiss legal system. Materially such a case must analyze all the relevant and important information that leads to purchasing decisions. Focusing on products appealing to the «socially-conscious consumer» are in important case in point, because they tend to make claims about e.g. minimum labor or environmental standards. While there is no legal requirement for vendors to guarantee the adherence to such standards of their suppliers, they may at the same time not make any misleading claims in this regard. This led ECCHR to conclude that consumers can reasonably expect that Lidl will not imply the guarantee or even the potential to guarantee that labor standards are adhered to if that is not the case in reality.²⁶⁹ With advertisements such as the following Lidl is doing exactly. The MNE is whitewashing by promising compliance that cannot be guaranteed: *«Lidl campaigns worldwide for fair working conditions [...] We at Lidl only award non-food contracts to selected producers and suppliers who have already proved they have actively incorporated social responsibility»* or *«Like all BSCI members, LIDL is committed to enforcing uniform minimum social standards in supplier firms, and oversees compliance with these standards through a corresponding system of controls and checks. In order to reach this goal, Lidl has developed its own code of practice that corresponds with BSCI guidelines. Suppliers who work with Lidl are obligated to follow this code. Compliance with these social standards is verified by independent, accredited regulators»*.²⁷⁰

Lidl has allegedly violated BSCI standards as well as ILO conventions. In its complaint VZ Hamburg used the findings of the above-mentioned report «Die Schönfärberei der Discounter»²⁷¹. Para. 3.1.1 lists violations of BSCI standards and

²⁶⁸ Ibid., 24 – 27; “Swift Legal Victory in the Complaint against Lidl,” 2.

²⁶⁹ Miriam Saage-Maaß and Claudia Müller-Hoff, “Fair Competition! Complaint Filed by Consumers in Germany in Defense of Workers’ Rights in South East Asia,” 2010.

²⁷⁰ Ibid., 1–2.

²⁷¹ Burckhardt, “Die Schönfärberei Der Discounter: Klage gegen Lidl’s irreführende Werbung.”

ILO Convention Nr. 1²⁷², which allow no more than 48 hours a week on a regular basis, as well as no more than 12 additional hours a week. Furthermore, these extra working hours have to be voluntary, which was not the case predominantly. The average hours per week resulted in 58.²⁷³ Salaries did not meet the BSCI standards either as discussed in para. 3.1.2. According to BSCI a salary for regular working hours must be at least as high as the minimum salary. Wage deductions as a measure of punishment is prohibited. However, the model firms once again violated both of these provisions. The average gross wage equals 18.00 – 32.00 € a month, which is in line with the Bangladeshi minimum salary but not enough to feed an entire family. This makes wage deductions not just a punishment, but a threat to the livelihood of families and therefore an abuse of economic power.²⁷⁴

Freedom of association and protection of the right to organize, as codified in ILO Convention 87²⁷⁵, as well as in Art. 2 BSCI CoC were also allegedly violated according to para. 3.1.3. The general atmosphere in the factories was found to be one of fearful silence. Many attempts to unionize were nipped in the bud by threats and layoffs.²⁷⁶

In addition, Art. 3 BSCI CoC prohibits any kind of discrimination *«in hiring, remuneration, access to training, promotion, termination or retirement based on gender, age, religion, race, caste, birth, social background, disability, ethnic and national origin, nationality, membership in workers' organizations including unions, political affiliation or opinions, sexual orientation, family responsibilities, marital status, or any other condition that could give rise to discrimination.»*^{277 278} This provision may have already been violated by the treatment of employees that

²⁷² International Labor Organization, *C001 Hours of Work (Industry Convention No.1; Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week*, 1919,

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C001.

²⁷³ Verbraucherzentrale Hamburg e.V. gegen Lidl Dienstleistung GmbH & Co KG, para. 3.1.1 (Landesgericht Heilbronn 2010).

²⁷⁴ Ibid. para 3.1.2

²⁷⁵ See also ILO Convention 98, 135 and 154

²⁷⁶ Verbraucherzentrale Hamburg e.V. gegen Lidl Dienstleistung GmbH & Co KG, para. 3.1.3 (Landesgericht Heilbronn 2010).

²⁷⁷ Inge Biesmans, “Old BSCI Code of Conduct,” 2009, <https://uhdspace.uhasselt.be/dspace/handle/1942/15656>.

²⁷⁸ In accordance with ILO Conventions 100, 111, 143, 158, 159, 169 and 183

attempt to unionize and the harsh treatment of women, especially those that are pregnant.²⁷⁹

The Lidl lawsuit in Germany based on labor rights violations in Bangladesh serves as another even more relevant example of how competition law can be used and has the potential to be replicated to a certain extent in Switzerland should similar circumstances prevail.

3.5.2 A Potential Lawsuit Based on Unfair Competition in Switzerland

In light of the absence of any precedence in Switzerland what follows is a conjecture about how a similar case could be treated under the Swiss legal system. In order to assess whether such a scenario could be repeated in Switzerland it is first and foremost important to look at the legal provisions governing unfair competition in Switzerland, the Swiss UWG.

3.5.2.1 Factual Scenario «Clean Clothes»

The following case will focus on a hypothetical factual scenario that is based on that of Lidl's:

«Clean Clothes» is a MNE that is incorporated and headquartered in Switzerland. As a discounter they want to sell clean clothes that are accessible and affordable for young people. Their CoC is binding for all suppliers and they claim to have an intact system of checks and balances where all their suppliers in State X are independently audited. Clean Clothes MNE has made numerous CSR commitments and is a member of international labor initiatives as well as some certification schemes (labels). In addition they claim to be bound by and abide with international human rights and labor rights as codified in instruments such as the ILO Conventions and the UDHR. An independent group of Swiss and local NGOs from X conducts a study in the supplier firms and find precarious working conditions and numerous grave violations of minimal labor standards. They conduct part of their research undercover, not declaring their visit to the supplier firms. The NGO coalition decides to sue in Switzerland. In order to do so they seek help from the Swiss Consumer Protection Agency.

²⁷⁹ Verbraucherzentrale Hamburg e.V. gegen Lidl Dienstleistung GmbH & Co KG, para. 3.1.4 (Landesgericht Heilbronn 2010).

3.5.2.2 Jurisdiction and Applicable Competition Law

According to Art. 10 Para 2 (b) UWG²⁸⁰ consumer associations in Switzerland have the possibility to take legal actions against firms using advertisement to mislead consumers to purchase a product. Jurisdiction could therefore be established on a very similar basis, as this is the case in Germany. The scope of application is regulated in Art. 2 UWG²⁸¹, according to which such an act can be willing or unwilling and merely has to influence competition in some way. Not only acts of direct competitors are regulated, but also those from actors outside the industry such as media reports, publications of product tests etc. An act is considered unfair according to Art. 3 (b) UWG, if any untrue or misleading information is given or such a declaration is made about either the firm, business relations, products, works and performances, prices or in stock quantities. This article could therefore be applied to the hypothetical scenario as described where MNE Clean Clothes makes declarations and publishes misleading information that leads customers to believe the cloth are produced in an ethical and sustainable way, at least in line with minimum labor standards.

In sum, this brief analysis showed that there are other legal areas outside of tort law where there is a potential for such corporate accountability cases.

3.6 The Potential of a Flood of Cases in Switzerland

The two hypothetical cases have shown that jurisdiction could be established most likely in both cases. However, at this point in time it would be very difficult for victims of human rights abuses to seek justice in the light of the MNE acting in violation of a tort. It is furthermore up to the claimant to prove the strong connection between a parent company and its subsidiary or sub-contractor in order to dissolve the fact that they are two separate legal entities that otherwise prevails. In addition to that there are no strong laws of discovery in place. This finding is in line with all the challenges described by human rights activists.²⁸² It is still incredibly difficult for victims of corporate abuse to sue in either home or host country. These legal gaps

²⁸⁰ Bundesversammlung der Schweizerischen Eidgenossenschaft, *Bundesgesetz Gegen Den Unlauteren Wettbewerb (UWG)*, vol. 241, 1986, <https://www.admin.ch/opc/de/classified-compilation/19860391/201407010000/241.pdf>.

²⁸¹ Ibid.

²⁸² See for instance: Wolfgang Kaleck and Miriam Saage-Maaß, *Transnationale Unternehmen vor Gericht: über die Gefährdung der Menschenrechte durch europäische Firmen in Lateinamerika ; eine Studie* (Berlin: Heinrich-Böll-Stiftung, 2008); Saage-Maaß, “Transnationale Unternehmen im nationalen und internationalen Recht.”

have to be closed if we want to ensure that there is an effective remedy for those victims.

The «Responsible Business Initiative» would certainly be a promising first step in that direction.

Concluding Remarks

The challenges in Switzerland illustrate well the prevailing legal gaps and the current developments in the field of corporate legal accountability. At the same time they also shed light on the fact that there is to a certain degree already a potential to address human rights violations of Swiss based corporations in Swiss courts, provided that there is a sufficient connection to Switzerland. The hypothetical cases demonstrated that jurisdiction could in principal be established for such cases of corporate action infringing human rights abroad. In most cases, the applicable law will be that of the host country, where such violations occur. The «Ordre public» exception could serve as a useful tool to nevertheless apply Swiss law where the applicable foreign law considers grave human rights violations to be either legal or does not provide for compensation in such cases. What is still unclear at the point of writing is how Swiss courts would deal with the merits of corporate accountability cases. The only cases, which were brought before Swiss courts and where jurisdiction was upheld, were finally dismissed because the claims were statute-barred.

This is where current developments in the political and legal spheres, as laid out in chapter I, are of importance. The Responsible Business Initiative for instance would clarify the legal obligations of Swiss based corporations in terms of human rights. There is still a major controversy on an international as well as on a national level concerning what human rights obligations corporations as non-state actors have.

Chapter II highlighted some of the difficulties with the current legal and economic system in place. It is evident that the voluntary standards and soft law mechanisms in place are not sufficient to guarantee access to remedies for victims of human rights violations by corporations and their affiliates. Even more so in relation to supply chain mechanisms resulting in a so-called supply chain gaps.

Examples from different jurisdiction illustrate that various national courts have already addressed the issue of corporate accountability. Building on some of the lessons and drawing from common issues, this paper analyzes two hypothetical cases. The cases analyze whether legal claims could be raised against the hypothetical parent companies that are domiciled in Switzerland. One needs to bear in mind that many hurdles have to be taken even before such a case can be

brought. Among these are issues of finance and legal aid as well as the challenges of discovery and understanding the corporate structure. Nevertheless once a claim is filed, there is a good chance that jurisdiction will be upheld. This was the case in the only civil claim in Switzerland, the *IBM* case as well as in the recent criminal claims against Nestlé and Argor. Even if a new case would not necessarily be won, it could still have an effect by shedding light more clearly on which legal gaps have yet to be filled and where human rights advocates should focus their attention. The scenarios and assessment in this paper can hopefully contribute to showing some possible avenues that could be considered for the future. There are still major challenges regarding torts and corporate liability that have to be addressed in order to win such a case.

There is certainly growing awareness within corporations themselves as well as among the general public concerning the difficulties that remain for corporate accountability. And while many question the entire system of profit-oriented, ever-growing corporations and their potential to meet the needs of all human beings and the environment, increasing the liability of MNE for human rights violations and ensuring accountability would certainly be a valuable contribution in this regard.

References

Books

- Blanpain, Roger. *Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy*. Wolters Kluwer Law & Business, 2014.
- Braunschweig, Thomas, Thomas Chappot, Oliver Classen, Fabian Jucker, Olivier Longchamp, Andreas Missbach, and Urs Rybi. *Commodities: Switzerland's most dangerous business*. Edited by Erklärung von Bern. 2. Aufl. Zürich: Salis-Verl, 2012.
- Clapham, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford University Press, 2006.
- Deva, Surya, and David Bilchitz. *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*. Cambridge University Press, 2013.
- Geisser, Gregor. *Ausservertragliche Haftung Privat Tätiger Unternehmen für «Menschenrechtsverletzungen» Bei Internationalen Sachverhalten: Möglichkeiten und Grenzen Der Schweizerischen Zivilgerichtsbarkeit Im Verhältnis von Völkerrecht und Internationalem Privatrecht*. Schulthess, 2013.
- Locke, Richard M. *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*. Cambridge University Press, 2013.
- Macdonald, Kate, and Shelley Marshall. *Fair Trade, Corporate Accountability and beyond: Experiments in Globalizing Justice*. Ashgate Publishing, Ltd., 2013.
- Mosley, Layna. *Labor Rights and Multinational Production*. Cambridge University Press, 2010.
- Niggli, Marcel Alexander, and Marc Amstutz, eds. *Verantwortlichkeit im Unternehmen: zivil- und strafrechtliche Perspektiven*. Basel: Helbing & Lichtenhahn, 2007.
- Zerk, Jennifer A. *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*. Vol. 48. Cambridge University Press, 2006.

Book Sections

- Heine, Günter. "Organisationsverschulden aus Strafrechtlicher Sicht: Zum Spannungsfeld von Zivilrechtlicher Haftung, Strafrechtlicher Geschäftsherrenhaftung und der Strafbarkeit von Unternehmen." *Verantwortlichkeit Im Unternehmen: Zivil-Und Strafrechtliche Perspektiven*. Basel: Helbing & Lichtenhahn, 2007, 93–125.
- Herzig, Christian, and Stefan Schaltegger. "Corporate Sustainability Reporting." In *Sustainability Communication*, edited by Jasmin Godemann and Gerd Michelsen, 151–69. Dordrecht: Springer Netherlands, 2011.
http://www.springerlink.com/index/10.1007/978-94-007-1697-1_14.

- Hetze, Katharina, and Herbert Winistörfer. "Insights into the CSR Approach of Switzerland and CSR Practices of Swiss Companies." In *Corporate Social Responsibility in Europe*, edited by Samuel O. Idowu, René Schmidpeter, and Matthias S. Fifka, 153–74. Cham: Springer International Publishing, 2015. http://link.springer.com/10.1007/978-3-319-13566-3_9.
- Meyersfeld, Bonita. "Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations." In *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, edited by Surya Deva and David Bilchitz, 193–217. Cambridge University Press, 2013.
- Saage-Maaß, Miriam. "Transnationale Unternehmen im nationalen und internationalen Recht." In *Menschenrechte und Wirtschaft*, edited by Tanja A Börzel and Tessa Debus, 102–22. Schwalbach/Ts.: Wochenschau-Verl., 2009.
- Volken, Paul. "Zürcher Kommentar zum IPRG, 2." In *Aufl., Zürich*, edited by Girsberger Daniel, Heini Anton, Max Keller, Kren Kostkiewicz Jolanta, Kurt Siehr, and Vischer Frank, 2nd ed., 2004.
- Zadek, Simon. "The Path to Corporate Responsibility." In *Corporate Ethics and Corporate Governance*, 159–72. Springer, 2007. http://link.springer.com/content/pdf/10.1007/978-3-540-70818-6_13.pdf.

Academic Articles

- Augenstein, Daniel, and David Kinley. "When Human Rights 'responsibilities' Become 'duties': The Extra-Territorial Obligations of States That Bind Corporations." *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, 2013. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149921.
- Backer, Larry Cata. "Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All." *Fordham Int'l LJ* 38 (2015): 457.
- Bartley, Tim. "Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry." *Research in Political Sociology* 14, no. 2005 (2005): 211–44.
- Bilchitz, David. "The Necessity for a Business and Human Rights Treaty." *Available at SSRN* 2562760, 2014.
- Boiral, Olivier. "The Certification of Corporate Conduct: Issues and Prospects." *International Labour Review* 142, no. 3 (September 1, 2003): 317–40. doi:10.1111/j.1564-913X.2003.tb00265.x.
- Boyd, D. Eric, Robert E. Spekman, John W. Kamauff, and Patricia Werhane. "Corporate Social Responsibility in Global Supply Chains: A Procedural Justice Perspective." *Long Range Planning* 40, no. 3 (June 2007): 341–56. doi:10.1016/j.lrp.2006.12.007.
- Carter, Craig R, and Marianne M Jennings. "Social Responsibility and Supply Chain Relationships." *Transportation Research Part E: Logistics and Transportation Review* 38, no. 1 (January 2002): 37–52.

- Carter, Craig R., and Marianne M. Jennings. "The Role of Purchasing in Corporate Social Responsibility: A Structural Equation Analysis." *Journal of Business Logistics* 25, no. 1 (March 1, 2004): 145–86.
- Clapham, Andrew. "Non-State Actors." In *International Human Rights Law*, edited by Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris. Oxford University Press, 2013.
- Collins, Ronald KL, and David M. Skover. "Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story, The." *Case W. Res. L. Rev.* 54 (2003): 965.
- Emeseh, Engobo, and Ondotimi Songi. "CSR, Human Rights Abuse and Sustainability Report Accountability." Edited by Dr Hakeem Yusuf and Dr Ismail Adelopo. *International Journal of Law and Management* 56, no. 2 (March 4, 2014): 136–51.
- Enneking, Liesbeth FH. "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case." *Utrecht Law Review* 10, no. 1 (2014): 44–54.
- Fisher, Julia. "Free Speech to Have Sweatshops-How Kasky v. Nike Might Provide a Useful Tool to Improve Sweatshop Conditions." *BC Third World LJ* 26 (2006): 267.
- Hamann, Ralph, Paresha Sinha, Farai Kapfudzaruwa, and Christoph Schild. "Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence." *Journal of Business Ethics* 87, no. S2 (August 2009): 453–73.
- Knox, John H. "The Ruggie Rules: Applying Human Rights Law to Corporations." *The UN Guiding Principles on Business and Human Rights (Radu Mares Ed., 2012)*, 2011.
- Lambert, Lisa. "At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc.-Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in US Courts." *J. Transnat'l L. & Pol'y* 10 (2000): 109.
- Lenssen, Gilbert, David Bevan, Joan Fontrodona, Elise Perrault Crawford, and Cynthia Clark Williams. "Should Corporate Social Reporting Be Voluntary or Mandatory? Evidence from the Banking Sector in France and the United States." *Corporate Governance: The International Journal of Business in Society* 10, no. 4 (2010): 512–26.
- Meeran, Richard. "Cape Plc: South African Mineworkers' Quest for Justice." *International Journal of Occupational and Environmental Health* 9, no. 3 (2003): 218–29.
- — —. "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States." *City UHKL Rev.* 3 (2011): 1.
- Mezzadri, Alessandra. "Reflections on Globalisation and Labour Standards in the Indian Garment Industry: Codes of Conduct Versus' Codes of Practice'Imposed by the Firm." *Global Labour Journal* 3, no. 1 (2012). <https://escarpmentpress.org/globallabour/article/download/1112/1168>.
- M. Taplin, Ian. "Who Is to Blame?: A Re-Examination of Fast Fashion after the 2013 Factory Disaster in Bangladesh." *Critical Perspectives on International Business* 10, no. 1/2 (February 25, 2014): 72–83.

- Muchlinski, Peter. "Limited Liability and Multinational Enterprises: A Case for Reform?" *Cambridge Journal of Economics*, 2010, beq023.
- Murphy, Paul R., and Richard F. Poist. "Socially Responsible Logistics: An Exploratory Study." *Transportation Journal* 41, no. 4 (July 1, 2002): 23–35.
- Pedersen, Esben Rahbek, and Mette Andersen. "Safeguarding Corporate Social Responsibility (CSR) in Global Supply Chains: How Codes of Conduct Are Managed in Buyer-Supplier Relationships." *Journal of Public Affairs* 6, no. 3–4 (August 1, 2006): 228–40.
- Perry, Patricia Susan, and others. "Garments without Guilt?: An Exploration of Corporate Social Responsibility within the Context of the Fashion Supply Chain: Case Study of Sri Lanka." Heriot-Watt University, 2012. <http://www.ros.hw.ac.uk/handle/10399/2521>.
- Ruggie, John G. "The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty." *IHBR Commentary* 8 (2014). http://www.ksg.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf.
- — —. "Business and Human Rights: The Evolving International Agenda." *The American Journal of International Law* 101, no. 4 (October 1, 2007): 819–40.
- Searcy, Cory, and Ruvena Buslovich. "Corporate Perspectives on the Development and Use of Sustainability Reports." *Journal of Business Ethics* 121, no. 2 (May 2014): 149–69.
- Schwenzer, Ingeborg, and Alain F. Hosang. "Menschenrechtsverletzungen - Schadenersatz vor Schweizer Gerichten" 2 (2011). https://ius.unibas.ch/uploads/publics/6850/20110913164147_4e6f6bab6f5ca.pdf.
- Van Marrewijk, Marcel. "Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion." *Journal of Business Ethics* 44, no. 2–3 (2003): 95–105.
- Vazquez, Carlos Manuel. "Direct vs. Indirect Obligations of Corporations Under International Law." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2005. <http://papers.ssrn.com/abstract=844367>.
- Woods, Cindy S. "It Isn't a State Problem: The Minas Conga Mine Controversy and the Need for Binding International Obligations on Corporate Actors." *Geo. J. Int'l L.* 46 (2014): 629.

Reports

- Alam, Korshed, Evelyn Bahn, Sarah Bormann, Gisela Burckhardt, Gudrun Giese, Dirk Saam, Christina Schröder, and Uwe Wötzel. "Wer bezahlt unsere Kleider bei Lidl und Kik? Eine Studie über die Einkaufspraktiken der Discounter Lidl und KiK und ihre Auswirkungen auf die Arbeitsbedingungen bei den Lieferanten in Bangladesch," January 2008. http://www.saubere-kleidung.de/downloads/publikationen/2008-01_Brosch-Lidl-KiK_de.pdf.

- Badge, Myfanwy. "Transboundary Accountability for Transnational Corporations: Using Private Civil Claims." Chatham House, Working Paper, March 2006) at http://www.chathamhouse.org.uk/pdf/research/il/ILP_TNC.pdf (accessed 17 August 2006), 2006.
https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/ilp_tnc.pdf.
- "Behind the Brands: Change the Way the Food Companies That Make Your Favorite Brands Do Business." *Behind the Brands*. Accessed June 7, 2015.
<http://www.behindthebrands.org>.
- Bundesrat. "Gesellschaftliche Verantwortung Der Unternehmen: Positionspapier Und Aktionsplan Des Bundesrates Zur Verantwortung Der Unternehmen Für Gesellschaft Und Umwelt." Bern, April 1, 2015.
<http://www.news.admin.ch/NSBSubscriber/message/attachments/38880.pdf>.
- Burckhardt, Gisela. "Die Schönfärberei Der Discounter: Klage Gegen Lidl's Irreführende Werbung," April 2010.
- Despouy, Leandro. "Human Rights and Disabled Persons." Human Rights Studies Series. Geneva, n.d.
- ECCHR. "Enforcing Human Rights Law by New Means: Annual Report 2014." Accessed June 7, 2015.
http://www.ecchr.de/?file=tl_files/Dokumente/Publikationen/ECCHR_Annual%20Report_2014.pdf.
- — —. "Juristischer Hintergrundbericht: Strafrechtliche Verfolgung von Menschenrechtsverletzungen durch Wirtschaftsunternehmen in der Schweiz: Der Fall Nestlé," March 2012.
http://www.ecchr.de/nestle.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/Nestle%2C%20Juristischer%20Hintergrundbericht.pdf.
- Fair Labor Association. "Sustainable Management of Nestle's Cocoa Supply Chain in the Ivory Coast—Focus on Labor Standards," 2012.
<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2740&context=globaldocs>.
- Federal Department of Justice and Police FDJP. "Rapport de droit compare: Mécanismes de diligence en matière de droits de l'homme et d'environnement en rapport avec les activités d'entreprises suisses à l'étranger," May 2, 2014.
<http://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2014/2014-05-28/ber-apk-nr-f.pdf>.
- Glencore Xstrata. "Sustainability Report 2013," 2013.
- — —. "Sustainability Report 2014," 2014.
- Heemskerk, Bert, Pasquale Pistorio, and Martin Scicluna. "Sustainable Development Reporting: Striking the Balance." World Business Council for Sustainable Development, 2002.
- Hoffman, Beth. "Behind the Brands: Food Justice and the 'Big 10' food and Beverage Companies." Oxfam, February 2013.
- Kaleck, Wolfgang, and Miriam Saage-Maaß. *Transnationale Unternehmen vor Gericht: über die Gefährdung der Menschenrechte durch europäische Firmen in Lateinamerika; eine Studie*. Berlin: Heinrich-Böll-Stiftung, 2008.

- Marston, Ama. "Women, Business and Human Rights: A Background Paper for the UN Working Group on Discrimination Against Women in Law and Practice." Marston Consulting, March 7, 2014.
- Martens, Jens. "Corporate Influence on the Business and Human Rights Agenda of the United Nations." Misereor, Global Policy Forum, Brot für die Welt, June 2014.
- McCarthy, Lauren, Liz Kirk, and Kate Grosser. "Gender Equality: It's Your Business." Oxfam, March 6, 2012.
- Ruggie, John G.. "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises," 2011. http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/nethqur44§ion=14.
- Saage-Maaß, Miriam, and Claudia Müller-Hoff. "Fair Competition! Complaint Filed by Consumers in Germany in Defense of Workers' Rights in South East Asia," 2010.
- WCED (World Commission on Environment and Development), Bruntland Commission). "Our Common Future." Aka. "*The Brundtland Report*," 1987.

Legal Instruments

- Alien Tort Statute*. 28 U.S.C. § 1350, 1789.
- Bundesversammlung der Schweizerischen Eidgenossenschaft. *Bundesgesetz gegen den Unlauteren Wettbewerb (UWG)*. Vol. 241, 1986. <https://www.admin.ch/opc/de/classified-compilation/19860391/201407010000/241.pdf>.
- Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 2000. <http://curia.europa.eu/common/recdoc/convention/en/c-textes/2001R0044.htm>.
- Federal Act on Private International Law (PILA)*, 1987. http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf.
- Federal Constitution of the Swiss Confederation 101*, 1999. <https://www.admin.ch/opc/en/classified-compilation/19995395/201405180000/101.pdf>.
- International Labor Organization: Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy." *Informationsplattform Humanrights.ch*. Accessed June 9, 2015. <http://www.humanrights.ch/de/menschenrechte-themen/tnc/regulierungen/ilo/>.
- — —. *C001 Hours of Work (Industry Convention No.1; Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week*, 1919. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C001.

- — —. *C098 - Right to Organize and Collective Bargaining Convention*. Vol. No. 98, 1951.
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098.
- “Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.” Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, August 26, 2003.
<http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2003.12.Rev.2.En>.
- Swiss Criminal Code 311.0*, 1937. <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>.
- Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 2006.
- Übereinkommen Über Die Gerichtliche Zuständigkeit Und Die Anerkennung Und Vollstreckung von Entscheidungen in Zivil- Und Handelssachen, Lugano Übereinkommen, LugÜ*, 2007. <https://www.admin.ch/opc/de/classified-compilation/20082721/201407010000/0.275.12.pdf>.
- Unfair Competition Law: California Business and Professions Code §§ 17200 - 17210*, 1977.

Cases

- 4C.379/2006, (Federal Supreme Court of Switzerland 2007).
- 6B_7/2014, (Federal Supreme Court of Switzerland 2014).
- Andrew Owusu v. N.B. Jackson*, (European Court of Justice (ECJ) 2005).
- BGE 110 II 188, (Federal Supreme Court of Switzerland 1984).
- BGE 123 I 112, (Federal Supreme Court of Switzerland 1997).
- BGE 124 III 90, (Federal Supreme Court of Switzerland 1997).
- BGE 131 III 153, (Federal Supreme Court of Switzerland 2004).
- BGE 132 III 661, (Federal Supreme Court of Switzerland 2006).
- BGE 135 III 189, (Federal Supreme Court of Switzerland 2008).
- Chandler v. Cape Plc.*, (Court of Appeal, Royal Court of Justice 2012).
- Friday Alfred Akapan and Vereiniging Milieudefensie v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.*, (District Court of the Hague 2013).
- Kiobel v. Royal Dutch Petroleum*, (Supreme Court of the United States 2013).
- Lubbe and Others v. Cape Plc. and Related Appeals*, House of Lords (2000).
- Mark Kasky v. Nike*, (Supreme Court of California 2003).
- Nike, Inc. v. Kasky* 539 U.S. 654, (U.S. Supreme Court 2003).
- Oguru et al. v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.*, (District Court of the Hague 2011).

Re South African Apartheid Litigation, (United States District Court Southern District of New York 2014).

Re, Union Carbide Corporation Gas Plant Disaster at Bhopal, (United States Court of Appeals, Second Circuit 1987).

Political Instruments

“L’initiative Pour Des Multinationales Responsables – De Quoi ’agit-Il.” Accessed May 26, 2015. <http://konzern-initiative.ch/de-quoi-il-s-agit/?lang=fr>.

“L’initiative Pour Des Multinationales Responsables – Evolution Politique En Suisse.” Accessed June 11, 2015. http://konzern-initiative.ch/wp-content/uploads/2015/04/KVI_Factsheet_1_F.pdf.

“L’initiative Pour Des Multinationales Responsables – Exemples de Cas.” Accessed May 26, 2015. <http://konzern-initiative.ch/de-quoi-il-s-agit/exemples-de-cas/?lang=fr>.

“L’initiative Pour Des Multinationales Responsables – Texte D’initiative.” Accessed April 22, 2015. <http://konzern-initiative.ch/de-quoi-il-s-agit/texte-initiative/?lang=fr>.

Nussbaumer, Eric. “10.3401 – Motion: Fixer dans les Règlements Des Bourses Une Obligation de Présenter Un Rapport de Développement Durable Répondant Aux Exigences Du GRI.” *Curia Vista*. Accessed June 5, 2015. http://www.parlament.ch/f/suche/Pages/geschaefte.aspx?gesch_id=20103401.

Von Graffenried, Alec. “12.3503 - Une Stratégie Ruggie Pour La Suisse - Curia Vista - Objets Parlementaires - The Federal Assembly - The Swiss Parliament.” *Curia Vista*. Accessed April 22, 2015. http://www.parlament.ch/e/suche/Pages/geschaefte.aspx?gesch_id=20123503.

Newspaper Articles and Press Releases

“Discounter täuscht Verbraucher: Menschenrechtler verklagen Lidl - Wirtschaft.” *Stern.de*, April 8, 2010. <http://www.stern.de/wirtschaft/news/discounter-taeuscht-verbraucher-menschenrechtler-verklagen-lidl-1556980.html>.

Gibson, Owen. “Sepp Blatter and the Qatar 2022 World Cup: Too Little, Too Late.” *The Guardian*. Accessed April 10, 2015. <http://www.theguardian.com/football/2014/dec/23/sepp-blatter-qatar-2022-world-cup-too-little-too-late>.

“Glencore: Ab nach Jersey.” *Handelszeitung*, May 18, 2011, sec. Unternehmen. <http://www.handelszeitung.ch/unternehmen/glencore-ab-nach-jersey>.

Gyr, Marcel. “Konzernverantwortung: Unternehmen sollen Menschenrechtsverletzungen bekämpfen.” *Neue Zürcher Zeitung*, April 21, 2015, sec. Newsticker. <http://www.nzz.ch/wirtschaft/newsticker/konzernverantwortung-unternehmen-sollen-menschenrechtsverletzungen-bekaempfen-1.18526894>.

- Kohler, Franziska. "Ermordung eines Gewerkschafters – Strafanzeige gegen Nestlé." *tagesanzeiger.ch*, March 6, 2012, Online Edition edition, sec. Economics. <http://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/Ermordung-eines-Gewerkschafters--Strafanzeige-gegen-Nestle/story/11106507>.
- "Kurioses Politkarussell um mehr soziale Verantwortung." *Handelszeitung*, March 20, 2015, sec. Politik. <http://www.handelszeitung.ch/politik/kurioses-politkarussell-um-mehr-soziale-verantwortung-756982>.
- "Pressemitteilung Fall Nestle: Schweizer Justiz verweigert Gerechtigkeit," August 1, 2014. http://www.ecchr.de/nestle.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/ECCHR%20-%20PRESSEMITTEILUNG%20-%20Fall%20Nestle%20-%2020140801.pdf.
- "Press Release: «Corporate Justice» Petition Submitted. 135'285 Demand Clear Rules for Swiss Corporations. Worldwide." Swiss Coalition for Corporate Justice, June 13, 2012. http://www.rechtohnegrenzen.ch/media/medialibrary/2012/06/pr_submission_petition_120613_en.pdf.
- Scruzzi, David. "Umstrittener Rohstoffhandel: Goldraffinerie steht auch ohne Straftaten in der Kritik." *Neue Zürcher Zeitung NZZ*, June 2, 2015. <http://www.nzz.ch/schweiz/goldraffinerie-steht-auch-ohne-straftaten-in-der-kritik-1.18554184>.
- Seibt, Constantin. "Mord in Kolumbien: Anzeige gegen Nestlé-Manger Brabeck und Gut." *Tagesanzeiger*, March 6, 2012, Print Edition edition, sec. Economics. http://www.mutiwatch.ch/cm_data/Tagi_Nestl_120306.pdf.
- Swiss Coalition for Corporate Justice. "SCCJ Press Release, Launch of Responsible Business Initiative - 150421," April 21, 2015. http://www.corporatejustice.ch/media/medialibrary/2015/04/150421_sccj_press_release_-_launch_of_responsible_business_initiative.pdf.
- Wagner, Elmar. "Fifa-Skandal: Der Sport im Korruptionssumpf." *Neue Zürcher Zeitung*. Accessed June 14, 2015. <http://www.nzz.ch/meinung/kommentare/der-sport-im-korruptionssumpf-1.18556754>.

Interview

- Pollard, Duncan. Corporate Responsibility in Nestlé's Supply Chain. Interview with the AVP Stakeholders Engagement in Sustainability Nestlé, June 5, 2015.

Webpages

- Biesmans, Inge. "Old BSCI Code of Conduct," 2009. <https://uhdSPACE.uhasselt.be/dSPACE/handle/1942/15656>.
- Business & Human Rights Resource Centre. "Cape/Gencor Lawsuits (re So. Africa)." Accessed June 13, 2015. <http://business-humanrights.org/en/cape-gencor-lawsuits-re-so-africa-0>.

- — —. “U.S. Apparel Cos. Lawsuit (re Saipan).” Accessed June 7, 2015.
<http://business-humanrights.org/en/us-apparel-cos-lawsuit-re-saipan-0>.
- “Cambodia: Labour Exploitation in the Garment Industry -Responsibilities of the Cambodian Government and International Brand Companies | Human Rights Now Global Site.” Accessed June 11, 2015.
<http://hrn.or.jp/eng/news/2015/04/16/cambodia-labour-exploitation-in-the-garment-industry-responsibilities-of-the-cambodian-government-and-international-brand-companies/>.
- Commission de politique extérieure. “14.3663 – Postulat: Accès À La Réparation.” *Curia Vista*. Accessed April 25, 2015.
http://www.parlament.ch/f/suche/Pages/geschaefte.aspx?gesch_id=20143663.
- — —. “14.3671 – Motion: Mise En Oeuvre Du Rapport de Droit Comparé Du Conseil Fédéral Sur La Responsabilité Des Entreprises En Matière de Droits Humains et D’environnement.” *Curia Vista*, April 25, 2015.
http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20143671.
- Corporate Register. “Reports.” Accessed June 10, 2015.
<http://www.corporateregister.com/reports/>.
- “Der Fall Nestlé Kolumbien: Beschwerde Gegen Die Schweiz in Strassburg.” *Informationsplattform Humanrights.ch*, December 30, 2014.
<http://www.humanrights.ch/de/menschenrechte-schweiz/aussenpolitik/aussenwirtschaftspolitik/tnc/praezedenzfall-klage-nestle-schweiz>.
- “Does Nestlé Have Child Labour in Its Cocoa Supply Chain?”
[Http://www.nestle.com](http://www.nestle.com). Accessed June 7, 2015.
<http://www.nestle.com/aboutus/ask-nestle/answers/nestle-child-labour-supply-chains>.
- ECCHR. “Der Fall Nestlé Und Luciano Romero: Fallbeschreibung.” Accessed May 30, 2015.
http://www.ecchr.de/nestle.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/Nestle_Romero_Fallbeschreibung_2014_12_18.pdf.
- — —. “Nestlé Precedent Case: Murder of Trade Unionist Romero in Colombia.” Accessed June 7, 2015. <http://www.ecchr.de/nestle-518.html>.
- ECCJ. “European Coalition for Corporate Justice Supports French Bill Establishing Due Diligence Duty for Parent Companies.” Accessed June 7, 2015.
<http://business-humanrights.org/en/european-coalition-for-corporate-justice-supports-french-bill-establishing-due-diligence-duty-for-parent-companies>.
- “Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.” Human Rights Council, June 25, 2014.
- Ernst & Young. “Keep the Balance Steady: Survey on the Quality of Sustainability Reports 2007,” February 5, 2009.
http://www.upj.de/fileadmin/user_upload/MAIN-dateien/Infopool/Forschung/ey_reports_quality09.pdf.

- European Commission. "Business and Human Rights." *Enterprise and Industry*, n.d.
http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm.
- Federal Statistical Office FSO. "Switzerland GDP per Inhabitant," September 30, 2014.
http://www.bfs.admin.ch/bfs/portal/en/index/themen/04/02/01/key/bip_einw.html.
- Fortune. "Global 500," 2014. <http://fortune.com/global500/total-11/>.
- Giannini, Tyler. "Business & Human Rights." *Human Rights @ Harvard Law*, June 10, 2015. <http://hrp.law.harvard.edu/areas-of-focus/business-human-rights/>.
- Glencore Xstrata. "Our Approach to Sustainability." Accessed June 2, 2015.
<http://www.glencore.com/sustainability/our-approach-to-sustainability/>.
- — —. "Sustainability Publications." Accessed June 2, 2015.
<http://www.glencore.com/sustainability/sustainability-publications/>.
- Global Exchange. "The Saipan Victory," n.d.
<http://www.globalexchange.org/sweatfree/saipan>.
- "International Trade Union Confederation." Accessed June 14, 2015.
<http://www.ituc-csi.org/>.
- "KVI_Factsheet_5_F_.pdf." Accessed April 22, 2015. http://konzern-initiative.ch/wp-content/uploads/2015/04/KVI_Factsheet_5_F_.pdf.
- Little, Arthur D. "Headquarters on the Move – Benchmarking of Global and Regional Headquarters in Switzerland." Trends in Headquarters Relocations and Headquarters Redesign, November 2009.
http://www.adlittle.ch/uploads/tx_extthoughtleadership/ADL_Headquarters_on_the_Move.pdf.
- Lukas, Karin, Leonhard Plank, and Cornelia Staritz. "Securing Labour Rights in Global Production Networks: Legal Instruments and Policy Options." *Kammer Für Arbeiter und Angestellte für Wien*, 2010.
<http://media.arbeiterkammer.at/wien/PDF/studien/SecuringLabourRightsJune2010.pdf>.
- "Nestlé Lawsuit (re Colombia) | Business & Human Rights Resource Centre." Accessed June 7, 2015. <http://business-humanrights.org/en/nestle%C3%A9-lawsuit-re-colombia>.
- Nestlé, and others. "Nestle Action Plan on the Responsible Sourcing of Cocoa from Cote d'Ivoire," 2012.
<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2741&context=globaldocs>.
- "Nestlé: Report Your Concerns of Corporate Non-Compliance."
[Http://www.nestle.com](http://www.nestle.com). Accessed June 7, 2015.
<http://www.nestle.com/aboutus/businessprinciples/report-your-concerns>.
- OECD Guidelines for Multinational Enterprises, 2011 Edition*. OECD Publishing, 2011.
http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en.

- “OECD-Leitsätze für Transnationale Unternehmen.” *Informationsplattform Humanrights.ch*. Accessed June 9, 2015.
<http://www.humanrights.ch/de/menschenrechte-themen/tnc/regulierungen/oecd/>.
- “Palla’s Response.” *Business and Human Rights*. Accessed June 12, 2015.
<http://business-humanrights.org/sites/default/files/documents/Palla-re-ccc-jul-2014.pdf>.
- “Popular Initiatives.” *Ch.ch*. Accessed June 10, 2015.
<https://www.ch.ch/en/popular-initiatives/>.
- Saage-Maaß, Miriam, and Anna von Gall. “Gegenblende – Das Debattenmagazin, Fairer Wettbewerb Weltweit! Am Beispiel ‘Lidl-Klage,’” July 13, 2010.
<http://www.gegenblende.de/++co++362c1648-8dc6-11df-7fa7-001ec9b03e44>.
- “SECO - National Contact Point of Switzerland.” Accessed June 12, 2015.
<http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en>.
- “Swift Legal Victory in the Complaint against Lidl.” ECCHR, September 2010.
- Swiss Coalition for Corporate Justice. “La Suisse, Repaire des Multinationales.” Accessed May 26, 2015. <http://www.droitsansfrontieres.ch/fr/>.
- “The Nestlé Supplier Code,” December 2013. <http://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf>.
- Trial, Open Society Justice Initiative, and Conflict Awareness Project. “Swiss Decision to Close Argor Case Encourages «head in the Sand» Attitude,” June 2, 2015. http://trial-ch.org/fileadmin/user_upload/documents/Informing/Media_Releases/Argor/StoPillage_CP_march2015_Final3_EN.pdf.
- Verbraucherzentrale Hamburg e.V. gegen Lidl Dienstleistung GmbH & Co KG, (Landesgericht Heilbronn 2010).
- “Verbraucherzentrale Hamburg Klagt gegen Lidl.” *TextilWirtschaft.de*. Accessed May 23, 2015. http://www.textilwirtschaft.de/business/Verbraucherzentrale-Hamburg-klagt-gegen-Lidl_62955.html.
- “Verbraucherzentrale Hamburg - Lidl Dreht Bei,” September 10, 2010.
<http://www.vzh.de/recht/30345/lidl-dreht-bei.aspx>.