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Human Rights Impact Assessments

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Table of Contents

Bibliography	III
Human Rights Instruments and other Documents	VII
Case Law	IX
Abbreviations.....	X
I. Introduction.....	1
II. The Right to Food	3
A. International Human Rights Instruments	3
B. Regional Human Rights Instruments	4
C. Human Rights Instruments in Switzerland	5
D. The Normative Content of the Right to Food	6
III. Human Rights Impact Assessments.....	8
A. Brief Introduction.....	8
B. Defining Human Rights Impact Assessments.....	10
1. Impact Assessment	10
2. Human Rights-Based Impact Assessments	11
3. Impacts Specifically Relating to the Right to Food	14
C. Normative Framework of Human Rights Impact Assessments.....	14
IV. The Methodology of Human Rights Impact Assessments.....	19
A. Comparison of Human Rights Impact Assessment Strategies.....	19
1. Health and Human Rights Working Paper Series No 6. Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health.....	19
2. HOM Health Rights of Women Assessment Instrument.....	22
3. The Berne Declaration: Owning Seeds, Accessing Food.....	23
4. The Norwegian Agency for Development Cooperation's Study Handbook in Human Rights Assessment: State Obligations Awareness and Empowerment	26
B. Proposed Guide to Conducting a Human Rights Impact Assessment	30
1. Introduction.....	30
2. Steps.....	30
V. Institutionalisation of Human Rights Impact Assessments in Switzerland.....	40
A. Normative Basis for Human Rights Impact Assessments within Switzerland	40
1. International Human Rights Treaties Ratified by Switzerland	40
2. Federal Constitution	41

3.	Concluding Observations of the CESCR to Switzerland	41
4.	Statement of the Federal Council.....	42
B.	Switzerland’s Obligations Towards the Global South.....	43
C.	Initiatives and Practice of Human Rights Impact Assessments to Date within Switzerland.....	45
D.	Official Governmental Bodies and their Obligation to Conduct Human Rights Impact Assessments	47
E.	State Actions Subjected to Human Rights Impact Assessments	49
1.	Processes Affecting the Right to Food.....	50
2.	Processes Pertaining to the Global South	51
3.	Switzerland’s Actions within Intergovernmental Organisations	53
F.	Recommendation for Legal Institutionalisation of Human Rights Impact Assessments in Switzerland.....	53
VI.	Conclusion.....	54

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Abbreviations

ACHPRCom	African Commission on Human and Peoples' Rights
Art.	Article
BD	The Berne Declaration
BV	Bundesverfassung (Federal Constitution of the Swiss Confederation)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
Cit.	Cited
CRPD	Committee on the Rights of Persons with Disabilities
Doc.	Document
e.g.	Latin: <i>exempli gratia</i> "for example"
EIA	Environmental Impact Assessment
Etc.	Et cetera
ETO	Extraterritorial obligations
EU	European Union
FAO	Food and Agriculture Organization
FOEN	Federal Office for the Environment
HeRWAI	Health Rights of Women Assessment Instrument
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
HOM	Humanist Committee in Human Rights
HRIA	Human Rights Impact Assessment
i.e.	Latin: <i>id est</i> "that is"
IA	Impact Assessment
IAIA	International Association for Impact Assessment
Ibid	Latin: <i>ibidem</i> "in the same place"
ICESCR	The International Covenant on Economic, Social and Cultural Rights
IP	Intellectual Property
NGO	Non-governmental organisation

No.	Number
NORAD	Norwegian Agency for Development Cooperation
OHCHR	UN Office of the High Commissioner for Human Rights
p.	Page
Para.	Paragraph
PVP	Plant Variety Protection
SDC	Swiss Agency for Development and Cooperation
SDGs	Sustainable Development Goals
SECO	State Secretariat for Economic Affairs
SERAC	Social and Economic Rights Action Centre
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPOV	International Union for the Protection of New Varieties of Plants (Union Internationale pour la Protection des Obtentions Végétales)
UVP	Umweltverträglichkeitsprüfung
WIPO	World Intellectual Property Organization

I. Introduction¹

The paper is dedicated to exploring Human Rights Impact Assessments, specifically pertaining to the right to food. The grounds for the study ensued from the growing demand for rights-based impact assessments and the still lacking legal basis for them. The paper interprets a Human Rights Impact Assessment as an effective instrument to protect and implement human rights. In comparison to Environmental Impact Assessments, which have become a well-established element of contemporary policies in many states, the obligation to conduct HRIAs is still not recognised explicitly on international and national levels. This explains why this topic requires urgent and close attention.

This paper represents a project work made in the Human Rights Clinic within the Faculty of Law of the University of Basel in collaboration with FIAN Switzerland. It is aimed to answer the following questions posed by FIAN Switzerland:

1. Which processes and undertakings shall be subject to HRIAs in order to respect and protect the right to food in the Global South?

This question posed by FIAN Switzerland encompasses a broad scope of issues. The focus and goal of this paper is to establish general criteria for Human Rights Impact Assessments that can be a basis for further development of HRIAs regarding the right to food and its realisation in the Global South.

2. Which official bodies may be obliged to undertake HRIAs with regard to the right to food in the Global South?

A general approach is deemed more suitable for tackling this aspect. Rather than specifying official bodies obliged to undertake HRIAs regarding the right to food, a general evaluation is to be made in order to determine which official bodies should be subjected to Human Rights Impact Assessments within Switzerland.

3. Which methodologies are available and which elements of the methodology need to be developed in order to make HRIAs easily applicable, also with participation of civil society?

Within the scope of the paper, a selection of available studies regarding Human Rights

¹ I would like to thank Michael Nanz, Co-President of FIAN Switzerland, for his continued and highly valued support of the Human Rights Clinic research and Alexandra Eberhard for her enthusiastic work on preparing the paper for publication. – Elena Pribytkova.

Impact Assessments as well as their evaluation will be presented. On the basis of the most relevant and useful aspects of the existing approaches to HRIAs, the paper will propose its own methodology with the goal of developing an applicable HRIA mechanism and evaluating civil society's role in this mechanism.

4. How can HRIAs be institutionalised in Switzerland, similarly to the well-established Environmental Impact Assessments?

The paper will appraise the current implementation of Environmental Impact Assessments within Switzerland and their legal basis as well as suggest how EIAs norms and institutions can be applied in the process of developing those of Human Rights Impact Assessments.

Whilst keeping these questions in mind, the paper's main focus is set upon Human Rights Impact Assessments and their further development in Switzerland as well as within a global extraterritorial context. The methodology of HRIAs suggested in this paper focuses on negative impacts that amount to a violation of human rights law. Positive impacts on human rights are not a subject of this paper.

The paper gives consideration to *ex ante* assessments of governmental actions affecting the human rights of the populations in Switzerland or in the Global South. *Ex post* evaluation of existing human rights infractions is not directly encompassed within the scope of the paper. As the proposed methodology of HRIAs was created for the evaluation of governmental actions, those of private sector actors affecting human rights were not encompassed herein.

The paper has the following structure. The first section of the paper explores the right to food and its legal recognition on a national level within Switzerland as well as in international and regional human rights law. Following this, the paper examines the normative content of the right to food. The second section provides an introduction to Human Rights Impact Assessments and attempts to elaborate their definition as well as analyse their normative basis. The third section proceeds to evaluate a selection of existing HRIA approaches with the aim of determining the elements relevant for the creation of the guide to conducting a HRIA pertaining to the right to food. In the final chapter, the focal point is set upon issues surrounding Switzerland's obligations under international human rights law, the institutionalisation of Human Rights Impact Assessments within Switzerland and criteria for their application, as well as the question of whether Switzerland has duties towards the Global South concerning the undertaking of HRIAs.

II. The Right to Food

A. International Human Rights Instruments

The right to food is a basic human right recognised by the core International Human Rights Instruments. The right to food is recognised in the Universal Declaration of Human Rights in art. 25.1 which states: *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.* Despite the right to food's lack of explicit enunciation within the Declaration, its recognition within the guarantees of art. 25 shows the importance of the right as an element of the right to an adequate standard of living.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) includes the right to food in art. 11.1: *The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.*

Art. 11 of the ICESCR includes the right to food as a component of the right to an adequate standard of living, as well as mentioning explicitly the right to be free from hunger. The second paragraph states, *The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.* This emphasises a special relevance of the minimum core of the right to food.

Some other core human rights instruments aimed at protecting specific groups, which are viewed by the global community as being particularly vulnerable, accommodate the right to food. In the Convention on the Rights of the Child (art. 24 and 27) and the Convention on the Rights of Persons with Disabilities (art. 25 and 28), the right to food is also included as an element of the right to an adequate standard of living, as well as of the right to the highest attainable standard of health. The connection between the right to food and the right to health

is also recognised in art. 12 of the ICESCR, as nutrition is crucial to one's wellbeing and leading a healthy life.

In the Convention on the Elimination of All Forms of Discrimination against Women, the right to food is implicit. The only reference to the right to food is found in art. 12 para. 2 in relation to the adequate nutrition during pregnancy and lactation.

Additionally, there are some non-legally binding international soft-law² instruments that could be seen as guidance for the implementation of the right to food. One of these instruments are the Right to Food Guidelines adopted by the FAO that address parties to the ICESCR. They should be used as guiding principles for national strategies and programmes to fight against hunger and malnutrition.³

B. Regional Human Rights Instruments

In the European Social Charter, the right to food is not explicitly mentioned; however, the right to social and medical assistance (art. 13), the right to a decent standard of living, and the right of workers to a fair remuneration (art. 4) incorporate the right to food. Additionally, art. 14 recognises the right to benefit from social welfare services postulating the inherent right to food within its content.

The Charter of Fundamental Rights of the European Union recognises the right to social security and social assistance in art. 34. According to this instrument, the right to food derives from the entitlement to social services (para. 1) and the obligation to ensure a decent existence for all those in need of resources (para. 3).

Within the African Charter on Human and Peoples' Rights, the right to food is similarly perceived to be an inherent element of other rights, namely the right to life (art. 4), right to health (art. 16), and the right to economic, social, and cultural development (art. 22).⁴ In the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador), the right to food is explicitly enshrined in art. 12 (adequate nutrition) and 15 (adequate nutrition for children), next to the other socio-economic rights that implicitly presuppose the right to food, as an element of the

² See p. 5 for a definition.

³ OHCHR: Fact Sheet No. 34, p. 8, 9.

⁴ ACHPRCom, SERAC, CESR v. Nigeria, 2001, para. 64.

right to a dignified existence, such as the right to work (art. 6), the right to just, equitable, and satisfactory conditions of work (art. 7), and the right to social security (art. 9).

C. Human Rights Instruments in Switzerland

The right to food is acknowledged in Switzerland through the ratifications of international human rights instruments as well as in national law. The Universal Declaration of Human Rights is non-legally binding, however, it is still acknowledged as an important ethical obligation that every member State of the UN should adopt, respect and protect. Switzerland ratified the ICESCR in 1992 and it is, consequently, legally binding. It is however viewed by Swiss Courts as being non-self-executing and thus not directly justiciable according to Swiss Law.⁵

Additionally, the right to food is an important element of international customary law, which is binding for all states, irrespective of whether they have ratified specific human rights treaties or not.⁶

Switzerland has ratified the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and the Convention of the Elimination of All Forms of Discrimination against Women. Therefore, Switzerland has the obligation to handle the implementation of human rights recognised by these conventions, including the right to food.

In addition to these international obligations, the right to food is protected by the Swiss Federal Constitution. Firstly, the right to food can be interpreted as part of the right to life in dignity, which is guaranteed by art. 7. Secondly, art. 12 guarantees assistance in emergency situations, involving the provision of basic needs and therefore indirectly guaranteeing the right to food.

⁵ GOLAY, p. 47.

⁶ FAO RIGHT TO FOOD GUIDELINES, p. 103-106, OHCHR: Fact Sheet No. 34, p. 9.

D. The Normative Content of the Right to Food

The ICESCR will be the reference instrument on the international level regarding the right to food within this paper. Its importance is reiterated within the CESCR comment with: “*The human right to adequate food is of crucial importance for the enjoyment of all rights*”,⁷ and is viewed as being indispensable for the fulfilment of other human rights within the International Bill of Human Rights.⁸ Although the right to food is listed as an element of the right to a decent standard of living, one must view the right to food as a right in its own merit and not only applicable in the realisation of the right to a decent standard of living.

The CESCR General Comment on the Right to Food defines the right as follows “*The right to adequate food is realised when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.*”⁹ The Comment seeks to emphasise that the right is to be understood as a progressive realisation with multifaceted guarantees and not reduced to mere realisation of freedom from starvation. Key aspects of the right to adequate food are in its availability, accessibility and adequacy.

Adequacy entails the satisfaction of dietary needs on an individual level and also requires that the food be culturally acceptable to the benefactor and their culture.¹⁰ Sustainability of food sources is often also linked to the idea of adequacy.¹¹ In regards to *accessibility*, not only physical accessibility, but also economical accessibility is to be ensured in order to prevent other basic needs from being threatened or impeached upon in the process of acquiring sustenance.¹² Ensuring the realisation of the right should correspond to individual needs of the right-holders.

Obligations of a state to uphold the right to food as a human right contain three different levels: to *respect*, *protect*, and *fulfil*. The state has the obligation to respect one's right to food through refraining from intervening in current access methods to food, whilst to protect the right entails the duty to safeguard individuals and communities from third parties that might

⁷ CESCR: General Comment No.12. para. 1.

⁸ CESCR: General Comment No.12. para. 4.

⁹ CESCR: General Comment No.12. para. 6.

¹⁰ OHCHR: Fact Sheet No. 34. p. 3.

¹¹ CESCR: General Comment No.12. para. 7.

¹² CESCR: General Comment No.12. para. 13.

hinder the rights holders' access to food. The duty to fulfil once again is divided into the levels of *facilitation* and *provision*; facilitation requires the strengthening of access to food and one's food security. Lastly the inability of access to food invokes the states' duty to provide adequate food.¹³

The obligation to fulfil is also viewed as having *weak to strong provisions*, depending on the required state measures. A direct provision assistance in order to guarantee a person's freedom from hunger would be categorised as a *strong* provision.¹⁴

Whilst the ratification of many instruments assumes immediate obligations, the ICESCR requires states to take steps in order to progressively achieve the full realisation of the rights and goals within the Covenant. Progressive realisation does not exclude the requirement of immediate implementation of the right to food. For example, the adoption of proper legislation and the implementation of policies supporting the realisation of the content of the Covenant belong to the immediate obligations of states.¹⁵

States violate their duties according to the Covenant when they fail to ensure, within their power, the minimum element of the right to food, and freedom from hunger. In order to determine if an action or inaction is deemed a violation, the capacity of the state is essential, as one must distinguish between the *inability* and *unwillingness* to act.¹⁶ The inability of a state to implement the right must be proven by the said state. Violations may also occur in the form of insufficient regulation by a state to protect, which results in the right to food being negatively impacted. Furthermore, any form of discrimination regarding access to food would be qualified as a violation of the Covenant.¹⁷

¹³ See OHCHR: Fact Sheet No. 34, p.18-19.

¹⁴ See NORAD: Handbook in Human Rights Assessment, p.16.

¹⁵ See NORAD: Handbook in Human Rights Assessments, p. 11.

¹⁶ See CESCR: General Comment No.12. para. 17.

¹⁷ See CESCR: General Comment No.12. para. 18, 19.

III. Human Rights Impact Assessments

A. Brief Introduction

One could perceive HRIAs as the convergent of two trends. Firstly, they line up with the wider movement of impact assessments that has arisen over recent decades and whose goal is to draw attention to particular topics and the consequences thereon that a certain project could have in the long term, i.e. with sustainable development. An example of the embodiment of this movement is the International Association for Impact Assessment, which generally aims at sustainable development in a wide range of fields through the conduction of impact assessments in order to “*meet today's needs without compromising the opportunities of future generation.*”¹⁸ The United Nations Millennium Declaration¹⁹ together with its eight Millennium Development Goals²⁰ adopted in September 2000 by 193 member states of the United Nations and 23 international organisations provides another example of the growing willingness to develop a “*more peaceful, prosperous and just world.*”²¹

Secondly, HRIAs seem to emanate from the growing recognition of responsibility that has been developing since the 2000s of the Global North towards the Global South for the latter’s poverty or severe poverty. The Global North represents the “*economically developed societies of Europe, North America, Australia, Israel, South Africa, amongst others*”²² that are “*wealthy, technologically advanced, politically stable and aging as their societies tend towards zero population growth*”²³ and that has “*continued to dominate and direct the global south in international trade and politics.*”²⁴ On the other hand, the Global South represents the “*economically backward countries of Africa, India, China, Brazil, Mexico amongst others*”²⁵ that are “*agrarian based, dependent economically and politically on the Global North.*”²⁶ Thomas Pogge in his introduction to a publication gathering seminars made as part of the UNESCO Poverty Project and titled *Freedom from Poverty as a Human Right: Who*

¹⁸ See IAIA.

¹⁹ See United Nations Millennium Declaration.

²⁰ See Millennium Development Goals.

²¹ United Nations Millennium Declaration, para 1.

²² EKEDEGWA, P.338.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

*owes what to the very poor?*²⁷ states that our “*indifference is in decline*”²⁸ as regards the Global North’s responsibility for “*aggressively aggravating poverty abroad.*”²⁹ The Millennium Declaration³⁰ and Weisen Li in his essay for the UNESCO Poverty Project entitled *Severe Poverty and Human Rights Violation: From Moral Concern to Economic Reasoning*³¹ call for equity and direct help from the Global North to the Global South countries.

The concept of the HRIAs first appeared as early as 1979 when the Secretary General of the United Nations mentioned it in a report on the realisation of economic, social and cultural rights to the Commission on Human Rights.³² However, HRIAs have only started developing since the beginning of the 2000s³³ and some consider the HRIAs as still being in their “*infancy*”³⁴. This retarding is hardly understandable when one considers that other forms of Impact Assessments such as in particular social and environmental impact assessments – the latter developed in the 1960s³⁵ – are nowadays a well-entrenched and accepted concept that is “*routinely undertaken.*”³⁶ Human rights should be prioritised over social and environmental projects; all the more when it is considered that there have been repeated calls since 1979 from United Nations human rights bodies, academics, civil society organisations,³⁷ the organisation of the United Nations itself,³⁸ and “*other key actors for HRIAs*”³⁹ on governments to conduct HRIAs. As a result, and despite the importance of human rights, “[*t*]here is no universally accepted definition of what a HRIA is, and no generally accepted framework for how they should be carried out [...]”⁴⁰

²⁷ POGGE, PP. 1-9.

²⁸ POGGE, p.5.

²⁹ Ibid.

³⁰ United Nations Millennium Declaration, para. 5 and 15.

³¹ LI, p. 2.

³² UN SECRETARY-GENERAL, para. 314.

³³ HARRISON, p. 164; STEPHENSON AND HARRISON, p. 15.

³⁴ STEPHENSON AND HARRISON, p. 15.

³⁵ MACNAUGHTON, p. 64.

³⁶ HUNT AND MACNAUGHTON, p. 4.

³⁷ BERNE DECLARATION, p. 5.

³⁸ HARRISON, p. 163.

³⁹ Ibid.

⁴⁰ DE BECO, p.140.

B. Defining Human Rights Impact Assessments

As mentioned, there is no consensus on a HRIA definition and as is briefly illustrated in this section, statements diverge as to the content, use and focus of HRIAs.⁴¹ Therefore, the definition of HRIA given in the subsequent paragraphs is shaped in order to serve best the purpose of this paper. This definition introduces some concepts necessary for the understanding of the statements defended in this paper.

1. Impact Assessment

Defined in the simplest way by the IAIA, an impact assessment is “*the process of identifying the future consequences of a current or proposed action.*”⁴² Such a general and basic definition covers more than 50 types⁴³ of impact assessments internationally. This extends from Child Impact Assessment, Social Impact Assessment, Health Impact Assessment up to the well-established Environmental Impact Assessment. More precisely, impact assessments are a tool⁴⁴ “*for evaluating the effect of policies, practices, programmes and regulatory interventions across a wide range of different fields.*”⁴⁵ The aforementioned definition seems to be targeted at governmental and public actions but it must also be interpreted as encompassing private and non-governmental action such as the “*activities of multinational companies*”⁴⁶ and also investments.⁴⁷

It is necessary to mention that human rights impacts can be both positive and negative: a violation of human rights can be established whilst a state action can be found to enable the latter to fulfil its human rights obligations when for example distinct human rights come into play. A state may involuntarily violate human rights by working on fulfilling other human rights. Impact assessments allow their users to “*reduce negative effects and enhance positive ones.*”⁴⁸ Where not explicitly stated in this paper, only negative effects are considered.

⁴¹ See p. 12.

⁴² See IAIA.

⁴³ HARRISON, p.164.

⁴⁴ BERNE DECLARATION, p. 5; HARRISON, p.164.

⁴⁵ STEPHENSON AND HARRISON, p. 14.

⁴⁶ HARRISON, p.163.

⁴⁷ MACNAUGHTON, p.68.

⁴⁸ HUNT AND MACNAUGHTON, p. 8.

The use of impact assessments at the national level by the executive power is already well known to the greater population of democratic societies and in particular in the fields of health and the environment with the health impact assessments⁴⁹ and environmental impact assessments.

Impact assessments contain not only an evaluation but also and most importantly “*measures that [...] must [be] adopt[ed] to prevent violations or ensure their cessation as well as to ensure effective remedies*”.⁵⁰ Indeed, the impact assessments’ primary goal is to serve as the “*basis for the adoption of the necessary corrective measures*”⁵¹ in order to prevent the noted negative effect to happen again or continue.

Another distinction relevant for this paper is that between the assessment of *direct* and *indirect* as well as *intended* and *unintended* impacts. Whilst the direct impact assessments evaluate the effects generated by a state action or inaction itself or any other project, which amounts to an efficiency evaluation, the purpose of the assessment of indirect (or secondary) impact, in contrast, is to assess the possible or actual negative effects caused not by a state action or inaction itself, and linked closely with the latter. As indirect impacts “are not a direct result of the project, often produced away from or as a result of a complex pathway.”⁵² The distinction between *intended* and *unintended* impact assessments is primarily a question of relevant bodies’ *awareness* of the possible effects of the state action or inaction or any other project on the considered human rights. A combination of these different types is possible.

2. Human Rights-Based Impact Assessments

In a simple manner, Human Rights Impact Assessments are impact assessments whose subject of study are human rights. Landman sees them as a way to ‘*build attention to human rights into the project cycle.*’⁵³ In practice, HRIAs can analyse the effects on a wide range of human rights, whereby the concept of *human rights* may not be homogenous.

⁴⁹ MACNAUGHTON, p. 69.

⁵⁰ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, principle 14.

⁵¹ FAO VOLUNTARY GUIDELINES, p. 30.

⁵² WALKER AND JOHNSTON, p. 3.

⁵³ LANDMAN, p.128.

In Hunt and MacNaughton's view, HRIAs must be "*based on a framework of international legal obligations to which governments have agreed.*"⁵⁴ The latter authors believe that what differentiates Human Rights Impact Assessments from the other kinds of impact assessments is that they are based on legal obligations,⁵⁵ be they international or domestic. For MacNaughton, "*measuring the potential impacts of the proposed intervention against human rights standards, rather than against the status quo, is the key difference between HRIA and other types of impact assessment.*"⁵⁶ This definition makes sense since all states are member states of the UN and thus they have signed the Charter of the United Nations which contains human rights-based obligations. However, two comments must be made regarding Hunt and MacNaughton's statement.

Firstly, there are divergent views in that regard. The term *Human Rights Impact Assessment* may include undertakings which do not base their appraisal on *core* Human Rights, in the sense of norms and standards set out in international or domestic law. For example, some impact assessments study "*issues like corruption, peace and conflict and HIV/AIDS*"⁵⁷ which are indeed related to Human Rights but not Human Rights as such. Nevertheless, it is possible to transcribe the potential violations observed in times of war or in cases of corruption into the *language* of the *core* human rights, such as the right to life for example.

Secondly, some states may be tempted to argue that, since they have not ratified a certain treaty protecting a specific human right, they are not subject to its obligation. A State should not fail to respect *core* human rights simply because it has not yet ratified a convention legally protecting the said human rights; however, the arguments supporting such a statement do not fall within the scope of this paper.

This paper uses the concept of HRIAs in the sense that impact assessments are based on human rights that are binding for the state whose action is being studied. The question as to whether the *act* of carrying out HRIAs is of a binding nature or not is addressed in another section.⁵⁸

⁵⁴ HUNT AND MACNAUGHTON, p. 12.

⁵⁵ Ibid.

⁵⁶ MACNAUGHTON, p. 65.

⁵⁷ STEPHENSON AND HARRISON, p. 15.

⁵⁸ See pp. 16-19.

Furthermore, Hunt and MacNaughton distinguish between two types of HRIAs: first, the *ex ante* HRIAs, which are done while the planned state action is still being developed and has not yet been implemented. Thus, the negative effects are being assessed through hypotheses and projections. The *ex post* HRIAs appraise the effects of the considered state action after the implementation of the latter and thus the assessment examines the actual, rather than potential effects.⁵⁹

The Swiss non-governmental organisation the *Berne Declaration* offers a narrower conception of HRIAs. Firstly, it lines up with the aforementioned opinion that HRIAs should be based on legal norms⁶⁰ but added to that, the Berne Declaration believes that “*HRIAs differ [...] from other types of impact assessments [for] [...] they focus on poor, vulnerable or otherwise disadvantaged groups whose human rights are most likely to be endangered by particular provisions or policies. It is important to note that from a human rights perspective, it is not acceptable to make vulnerable groups worse off in a trade-off for an aggregate or sectoral positive impact*”.⁶¹ This perception is clearly in line with the driving movement behind the HRIAs that supports the idea that the Global North is obligated not to violate and to promote human rights in the Global South due to its responsibility in the latter’s poverty aggravation.⁶²

Although this paper recognises the obligation under international treaties of the Global North not to violate the human rights of those in the Global South as part of its general obligation not to violate any human rights, it considers that HRIAs should not only focus on vulnerable groups, but on any population that could undergo a violation of its human rights as a general rule, be it in the Global South and/or North. Nevertheless, this paper is supportive of the idea that vulnerable groups should be paid particular attention, as advised by the FAO.⁶³

⁵⁹ STEPHENSON AND HARRISON, p. 14.

⁶⁰ BERNE DECLARATION, p. 6.

⁶¹ BERNE DECLARATION, p. 6.

⁶² See p.10.

⁶³ FAO VOLUNTARY GUIDELINES, p. 30.

3. Impacts Specifically Relating to the Right to Food

Although the Impact Assessment has already been defined,⁶⁴ it is necessary to specify what *impact* means in terms of human rights and, more importantly for this paper, with respect to the right to food. As a general rule, this work should be done specifically when defining which human rights will fall under the scope of study. As stated above, the HRIAs considered in this paper are those based on a binding legal basis, which is the case for Switzerland concerning the right to food.⁶⁵ Hence, a negative *impact* means a violation of the right to food. The last sentence generates two observations. First of all, it is necessary to have an understanding of *what* the right to food is. In order to define the human right to food, one must look at the domestic and international laws, which apply in the considered zone. Secondly, in order to know what constitutes a violation, it is necessary to know what are the obligations of the states emanating from the definition given. These two steps were made earlier in this article.⁶⁶

C. Normative Framework of Human Rights Impact Assessments

Although the right to food imposes obligations on Switzerland as already mentioned⁶⁷ hereinabove, this is not sufficient to render HRIAs on the potential violations of the right to food mandatory. In fact, irrespective of the human rights upon which the impact assessment is based, there is no explicit legal obligation as such to carry out a HRIA.⁶⁸

To date, the obligation to conduct HRIAs is only explicitly set out in *soft law* – which can be defined as “*instruments that are not strictly legally binding but yet have legal significance.*”⁶⁹ For instance, already in 1990, the CESCR made in its General Comment No. 2, on International Technical Assistance Measures, the recommendation to UN agencies that they should take into consideration the proposal by the Secretary General in a report dated 1979 that a “*‘human rights impact statement’ be required to be prepared in connection with all major development cooperation activities.*”⁷⁰ Moreover, the CESCR has made direct

⁶⁴ See p. 11.

⁶⁵ See p. 3.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ MACNAUGHTON, p. 68-69.

⁶⁹ Ibid., p. 68.

⁷⁰ CESCR General Comment No. 2, para. 8 (b).

recommendations to some states so as to exhort them to conduct HRIAs under various circumstances. For instance, Germany, Japan, the United Kingdom and the Dominican Republic have received such recommendations.⁷¹ More relevantly, the Committee has also directly addressed recommendations to Switzerland.⁷²

Other international instruments have urged member states to perform HRIAs. For example, and very relevantly, Guideline 17.2 of the FAO Voluntary Guidelines on the Right to Food⁷³ recommends the conduction of *right to food impact assessments*. In addition, Olivier de Schutter, in his capacity as Special Rapporteur on the right to food, in 2011 issued Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements including a methodology on how to, as well as his views on the necessity to, carry out human rights impact assessments of trade and investment agreements.⁷⁴ Furthermore, the report of the Special Rapporteur on the Right to Food on “*climate change and the Right to Food*” recommends carrying out human rights impact assessments and thereby facilitating public participation before mitigation and adaption projects are authorised.⁷⁵ Katarina Tomasevski in her capacity as Special Rapporteur on the right to education in 1998 expressed the opinion that HRIAs should also be run on macroeconomic policies.⁷⁶ Furthermore, some other supervisory bodies and human rights experts also call for the conduction of HRIAs; for example, the UN Committee on the Rights of the Child, in its General Comment 5⁷⁷ as well as Paul Hunt in his capacity as Special Rapporteur on the right to health in his report from 2007.⁷⁸

However, it must be borne in mind that all these recommendations do not constitute obligations. Nevertheless, this paper together with Paul Hunt and Olivier de Schutter⁷⁹ is supportive of the opinion that states have an obligation to carry out HRIAs at a domestic but also on an international level and that this obligation can be derived from their already standing obligations under international treaties.

⁷¹ MACNAUGHTON, p. 68.

⁷² See p. 41.

⁷³ FAO VOLUNTARY GUIDELINES, Guideline 17.2.

⁷⁴ DE SCHUTTER.

⁷⁵ ELVER, para. 89 (e).

⁷⁶ KATARINA TOMASEVSKI, para. 10.

⁷⁷ CRC: General Comment No. 5, para. 45.

⁷⁸ HUNT, para. 37.

⁷⁹ MACNAUGHTON, p. 68-69.

As mentioned previously, HRIAs are a tool to assess the negative impacts of a state action or inaction on human rights protected by an international instrument.⁸⁰ In other words, HRIAs are a “*method to determine whether a proposal is consistent with the state’s*”⁸¹ obligation under international law and other international agreements to which it is party. Hence, if HRIAs enable a State to ascertain that it does not violate any of its obligations or to avoid, or to end, any violation, HRIAs should be legally required and thus, an obligation. Moreover, for every state having endorsed at least one international human rights treaty resulting in human rights based obligations,⁸² carrying out HRIAs thus becomes inevitable. The same applies to HRIAs assessing positive impacts. HRIAs, as mentioned hereinabove,⁸³ do not simply seek to “*reduce or mitigate potential negative effects, but also to promote positive ones*”⁸⁴. Therefore, conducting HRIAs on projects, in order to ensure that the latter fulfil the state’s obligation to progressively realise the economic and social rights and its obligation under the Charter of the United Nations to “*promote and encourage respect for human rights*”,⁸⁵ may prove to be a legal obligation.

The obligation to conduct HRIAs domestically is most clearly evident. States have to respect, protect and fulfil the human rights of the people within their territory. However, “*despite the universality of human rights, many States still interpret their human rights obligations as being applicable only within their own borders*”⁸⁶ and thus generate gaps in human rights based protection and regulation.⁸⁷ This issue underlies the concept of *extraterritorial obligations* (ETOs). The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights define ETOs as “*obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory*”⁸⁸ and as “*obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realise human*

⁸⁰ See p. 17.

⁸¹ MACNAUGHTON, p. 69.

⁸² HUNT AND MACNAUGHTON, p. 12.

⁸³ See p. 17.

⁸⁴ MACNAUGHTON, p. 65.

⁸⁵ Charter of the United Nations, Art. 1(3).

⁸⁶ ETO CONSORTIUM, p. 3.

⁸⁷ Ibid.

⁸⁸ Principle 8.

rights universally.”⁸⁹ Furthermore, the ETO Consortium refers to ETOs as the “*missing link in the universal human rights protection system.*”⁹⁰ This paper lines up with the ETO Consortium’s opinion that states obligations under international treaties shall also apply outside of their territory and thus performing HRIAs for state actions taking place or having consequences outside of a state’s territory shall also be an obligation.

It must be noted that two non-binding instruments addressing ETOs highly recommend the conduction of HRIAs. Principle 14 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and the Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights on principle 14.

In 1992, Switzerland ratified the International Covenant on Civil and Political Rights, which contains both the right to participation and to freedom of expression as set out respectively in Art. 25 and 19. Furthermore, five years later it also ratified the Convention on the Elimination of All Forms of Discrimination against Women, which requires in its Art. 7 that states take measures “to ensure women’s participation in the formulation and implementation of government policy.”⁹¹ In addition, Switzerland ratified in 2014 the Convention on the Rights of Persons with Disabilities, in which Art. 29 sets out a right to participation in political and public life.⁹²

Another relevant report is that of Magdalena Sepulveda, the Special Rapporteur on extreme poverty and human rights, where she reports on the right to participation in society of those in poverty.⁹³

MacNaughton argues that HRIAs are “*important means of informing public debate and thereby enhancing the right to take part in the conduct of public affairs recognised under Article 25 of the International Covenant on Civil and Political Rights.*”⁹⁴ This paper supports a more radical opinion in this respect; the obligation to conduct HRIA is partly covered by

⁸⁹ Ibid.

⁹⁰ Ibid, p. 3.

⁹¹ CEDAW, Art. 7.

⁹² CRPD, Art. 29.

⁹³ See SEPULVEDA.

⁹⁴ MACNAUGHTON, p. 69.

the legal obligations to ensure information and participation. Indeed, while conducting a HRIA, a state is given the opportunity to sound out the affected population and let them express their concern, which is an obligation under the instruments mentioned in the above part on the right to participation.⁹⁵

Despite the above, no state yet requires the obligation to conduct HRIAs within its domestic laws, whilst such is the case for many countries regarding Environmental Impact Assessments.⁹⁶

⁹⁵ See p. 7.

⁹⁶ MACNAUGHTON, p. 69.

IV. The Methodology of Human Rights Impact Assessments

A. Comparison of Human Rights Impact Assessment Strategies

The following section draws an overview of four human rights impact assessment initiatives in order to compare their approaches and strategies. The comparison of existing approaches to HRIAs suggested in the *NORAD Handbook*, the *Berne Declaration: Owning Seeds, Accessing Food*, *The Health Rights of Women Assessment Instrument* conducted by the Humanist Committee on Human Rights, and *The Case Study Using the Right to the Highest Attainable Standard of Health* by Paul Hunt and Gillian MacNaughton, allows to identify their key criteria and incorporate them into a methodology of HRIAs focused on the right to food.

1. Health and Human Rights Working Paper Series No 6. Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health

a) Introduction to the Case Study

Paul Hunt and Gillian MacNaughton focus on a Right-to-Health Framework for the impact assessment. The right-to-health approach is meant to help governments comply with their legal obligations to progressively realise human rights.⁹⁷ Hunt and MacNaughton based their study on the right to health although it could be, with some adjustments, applied to other human rights.

The authors intend to use existing impact assessments and adapt them to human rights. They suggest that an advantage to using independent HRIA methodology is that governments can integrate it into familiar impact assessments that have already proved their eligibility.⁹⁸ The objective is to develop a tool suitable for assessing proposed policies of governments⁹⁹ and predicting potential consequences, whether direct or indirect, of a prospective policy. As a result, the gathered information will be presented to the policy makers prior to decision-making in order to improve the policy and prevent violations of human rights.¹⁰⁰

In Hunt and MacNaughton's opinion, impact assessments generally include:

⁹⁷ HUNT AND MACNAUGHTON, p. 32.

⁹⁸ *Ibid.*, p. 31.

⁹⁹ *Ibid.*, p. 4.

¹⁰⁰ *Ibid.*, p. 32.

- *defining the policy, programme or project to assess;*
- *identifying the people who would be affected by the policy, programme or project;*
- *gathering and reviewing evidence about the potential effects of the policy, programme, or project on people and / or the environment;*
- *providing decision makers and people who may be affected with information about the potential effects;*
- *evaluating and proposing alternatives to reduce potential problems and increase potential benefits for people and / or the environment.*¹⁰¹

This is the basis for the approach in which the right to health, and potentially other human rights, is to be integrated.

The methodology of Hunt and MacNaughton is divided into two parts. Firstly, seven general principles of a rights-based impact assessment are presented:¹⁰²

1. Should be based on an explicit human rights framework,
2. Presuppose a progressive realisation of human rights,
3. Equality and non-discrimination should be guaranteed at all stages of the HRIAs,
4. Meaningful participation by all stakeholders must be secured,
5. Transparency must be ensured through protecting the right to information and freedom of expression,
6. Mechanisms for a state's accountability need to be established,
7. Recognition of the inter-dependence of all human rights.

Secondly, the authors recommend six steps for the integration of the right to health into existing impact assessments. This methodology can be also used for other human rights.

The six steps are:

1. Preliminary check of the proposed policy in order to determine whether a full-scale right-to-health impact assessment is mandatory,
2. Preparation of a human rights impact assessment plan and informing all stakeholders about it,
3. Collecting information and opinions about potential right-to-health impacts of the proposed policy,

¹⁰¹ Ibid., p. 8.

¹⁰² Ibid., p. 5.

4. Preparation of a draft impact assessment report with a rights-based analysis comparing the collected information on potential impacts on the right to health and the legal obligations of the state concerning the human right,
5. Engaging stakeholders in discussions on the draft impact assessment report and evaluating the options as well as encouraging them to provide comments and advice,
6. Preparation of a final report, which should be available to all stakeholders, with details about the final decision and the explanation for the choices made as well as mechanisms for its implementation and evaluation.¹⁰³

b) *Evaluation of the Case Study*

The methodology proposed by Paul Hunt and Gillian MacNaughton is specific and concentrates on one particular human right, the right to health. It is a theoretical yet comprehensive analysis and covers a broad range of aspects and violations that more general methodologies might not venture into.

Stakeholders play an important role in this assessment strategy. From the early stages they are engaged in the process of preparing of an assessment plan and facilitating the assessment with different perspectives.

Regarding the promotion of cooperation with stakeholders, taking into account the existence of boundaries, such as limited financial possibilities, for instance, the close interaction with stakeholders could prove to be beneficial. The interaction of both parties may result in higher levels of compliance to reach mutual satisfaction in terms of promoting human rights and economic growth.

Stakeholders can learn from this process and with an initial focus on human rights, they can adapt their activity early on. Constant human rights awareness might improve policy making in a way that in the future it will no longer be necessary to implement *ex post* HRIAs as there will no longer be violations of human rights.

The integration of HRIAs in existing impact assessments is an efficient and convincing approach. It is convenient to use one general foundation of impact assessments and adapt it to the different objects. That is why this model of HRIA may procure enhanced acceptance from the governmental parties.

¹⁰³ Ibid., p. 5, 35-45.

2. HOM Health Rights of Women Assessment Instrument

a) *Introduction to the Assessment Instrument*

The Health Rights of Women Assessment Instrument (HeRWAI) was developed by the Humanist Committee on Human Rights (HOM) as an instrument for non-governmental organisations to analyse the impact of a governmental policy on human rights, particularly those of women.¹⁰⁴ The normative basis of the HeRWAI is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Although it focuses on women's health rights, the methodology is applicable towards other human rights.

The focus of the HeRWAI is on governments' policies. "[...] *This is because policies (and their funding) are the main tool used by governments to make changes, and civil society can hold governments accountable for what they do or fail to do*".¹⁰⁵ The focus on governments is comprehensive as states are human rights' primary duty bearers, and is applicable towards existing policies and the possible impacts of policies in development. HeRWAI concentrates on certain governmental bodies, thus irrespective of governmental make up and region, said bodies hold obligations to implement human rights. As the HeRWAI Instrument focuses on health rights, the parts most relevant to our focus are within chapter 5, where the methodology of the Instrument is presented.

The HeRWAI accommodates a six-step methodology based upon data cumulating and consecutive analysis of the said data to be used for lobbying and improvement recommendations.¹⁰⁶ The steps are as follows:

- 1) *Identify the policy*
- 2) *Identify the government commitments*
- 3) *Describe the capacity for implementation*
- 4) *Assess the impact on health rights*
- 5) *Draw links between step 2 commitments and step 4 impacts*
- 6) *Generate recommendations and an action plan*¹⁰⁷

¹⁰⁴ BAKKER AND PLAGMAN, p. 6.

¹⁰⁵ Ibid., p.7.

¹⁰⁶ Ibid., p. 17.

The Instrument applies these steps to women's health rights and concludes with a summary and list of recommendations, and a plan of lobbying for improvement.

b) *Evaluation of HOM's Instrument*

The HOM's Instrument for the conduction of a HRIA is a hands-on approach regarding the assessment of governmental policy. The Instrument is applicable both as an *ex ante* and as an *ex post* evaluation mechanism.

The HOM Instrument is particular within its specificity, as its focal points are specific health rights and not human rights as a whole. Despite this distinctive feature, the Instrument remains applicable to this paper. Acknowledging the strong interrelation between human rights and the flexibility provided within the Instrument, its methods are also applicable to HRIAs pertaining to the right to food. An additional element of the Instrument coinciding with the intent of this paper is the focus on governmental policies and not actions of private entities.

3. The Berne Declaration: Owning Seeds, Accessing Food

a) *Introduction to the Berne Declaration's Study*

The Berne Declaration published in 2014 is a HRIA appraising the effects on human rights and in particular on the right to food of plant variety protection laws that are based on the UPOV 91. The latter is an international convention. The union behind UPOV 91 – the International Union for the Protection of New Varieties of Plants – aims at ensuring IP-rights based legal protection for plant breeders at an international level.

Considering that this paper's main aim is making recommendations as to which actions from the Swiss government should be subject to HRIAs, the Berne Declaration HRIA is particularly relevant for it offers the analysis of a legal act – the UPOV 91 convention. More accurately, this HRIA focused on the potential consequences of implementing Art. 14 and 15 of UPOV 91 to eventually find “*some clear evidence regarding potential human rights impacts and further areas of concern*”¹⁰⁸. Their findings highlight the highly tangible possibility for both articles to violate primarily the right to food as well as the rights to health and education¹⁰⁹ if implemented in the countries where the HRIA was conducted. In order to

¹⁰⁷ See *Ibid.*, p. 17-48.

¹⁰⁸ THE BERNE DECLARATION, p. 7.

¹⁰⁹ *Ibid.*, p. 7.

verify its initial suspicions based on already incriminating reports, the group of experts in charge of conducting the HRIA had to develop hypotheses based on causal reasoning.

The Berne Declaration HRIA's objectives are to “*raise awareness among actors in the North and South about the potential human rights impact of UPOV 91-like PVP laws*”,¹¹⁰ “*demonstrate the hands-on application of the HRIA approach*”¹¹¹ and finally to enable the people impacted negatively by UPOV 91 to make use of their report in order to ground their potential claim¹¹².

In order to establish the likeliness of the negative impacts, the group of experts in charge of this HRIA developed eight hypotheses; for each of the hypotheses a number of research questions were formulated,¹¹³ which were eventually answered by gathering evidence on the field.

This HRIA qualifies as an *indirect* impact assessment strategy, since UPOV 91's primary goal is not to have consequences, be they negative or positive, on human rights and particularly on the right to food, though one could concede that UPOV 91 regulates crops and the latter are inevitably linked to agriculture and thus to food. Concerning the question of the *intention* behind this HRIA, one could argue that, as the Berne Declaration report claims violations of the right to food, the UPOV 91 could have also conducted an impact assessment and made the same findings, and thus intervene so as to avoid the said violations. Therefore, one could say that this HRIA is intended.

Furthermore, this HRIA was made *ex ante* during 2012 and 2013. In all of the three countries subjected to the case study the plant variety protection laws were either not in line with UPOV 91, because the country had not ratified the convention as was the case of the Philippines, or because their amendment was too recent for the study, as in the case of Kenya, or their implementation and enforcement was not completed and thus had not created effect (Peru).¹¹⁴ However, there has been strong debate since the implementation of UPOV 91 as to whether a plant variety protection system based on the former was, in fact, beneficial for

¹¹⁰ Ibid., p. 10.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid., p. 19.

¹¹⁴ Ibid., p. 6.

developing countries¹¹⁵ and given the lack of studies and/or their inadequacy to small-scale agriculture and the informal seed sector,¹¹⁶ a case study appeared particularly appropriate.¹¹⁷

This HRIA offers an illustration of a hands-on seven-step methodology based on De Schutter's Guiding Principles:¹¹⁸ preparation, screening, scoping, evidence gathering, analysis, conclusions and recommendations, and monitoring and review.¹¹⁹

The Berne Declaration report offers a high diversity of its recommendations' recipients. Indeed, it offers thoughtful recommendations to governments depending on whether they are from the Global North or South, the UPOV as a union, "providers of technical assistance"¹²⁰ and/or civil society organisations.

b) *Evaluation of the Berne Declaration's HRIA on UPOV 91*

As stated, the strengths of this HRIA are its recommendations since they are addressed to a wide range of stakeholders. In addition, throughout the report, the group of experts paid heed to other human rights and their potential violation under UPOV 91: the rights of indigenous peoples, the right to participate in public affairs, women's rights, and farmers' rights.

Making the link between the hypothetical situation, once the State action has been implemented, and the negative impacts requires great experience and knowledge in the studied field. Being able to observe how the group of experts in charge of this HRIA developed its causal reasoning¹²¹ through detailed explanations of their steps and how they gathered the evidence is highly valuable when one is interested in seeing the application *in practice* of a HRIA methodology.

¹¹⁵ Ibid., p. 9.

¹¹⁶ Ibid., p. 9-10.

¹¹⁷ Ibid.

¹¹⁸ Ibid., p. 9.

¹¹⁹ Ibid., p. 6.

¹²⁰ Ibid., p. 7.

¹²¹ Ibid., p. 6.

4. The Norwegian Agency for Development Cooperation's Study Handbook in Human Rights Assessment: State Obligations Awareness and Empowerment

a) *Introduction to the NORAD Approach*

The Norwegian Agency for Development Cooperation (NORAD) published a handbook aimed at creating procedure for human rights impact assessments. "*The handbook, therefore, aims at providing the user with a practical tool for enhancing the human rights profile of development programmes.*"¹²² The Handbook is presented as a basis to assist in determining the necessity of a further detailed assessment and is not to be interpreted as a HRIA manual.¹²³

The Handbook's preliminary approach is to determine and define the human rights that are in question and subsequently the international instruments pertaining to these rights. Furthermore, they proceed in referencing the rights deemed most pertinent and the ensuing obligations of states involved with the ratification of the Covenants listed within the Handbook.¹²⁴

The Study proposes the key tasks of a HRIA as being an insurance that "*the State's human rights obligations under any relevant treaty [...] are identified, rights impact assessed and as such requires further assessment pertaining to the awareness and empowerment of the population.*"¹²⁵ A vital element of HRIAs of this kind presumes population involvement and postulates the right of access to information being present and an effective democratic governmental system. In this respect, *rights awareness* and *rights empowerment* within civil engagement become central to the HRIA process.¹²⁶

Chapter Three of the Handbook contains the catalogued approach to HRIA. The HRIA are divided into three main components of *state obligations, awareness and empowerment*. The state obligations are viewed as vital to the preparatory phase, i.e. cataloguing the legal framework, from which the assessment is to be conducted.¹²⁷

¹²² NORAD, p.5.

¹²³ See Ibid., p.7.

¹²⁴ See Ibid., p. 10-11.

¹²⁵ Ibid., p.16.

¹²⁶ See Ibid., p. 17.

¹²⁷ NORAD , p.19.

The quintessence of the study is incorporated within the section: "*content of the assessment*". This part analyses categorical steps necessary to evaluate potential effects on human rights. "*Throughout the form it is referred to groups that are affected by the programme. These can normally be divided into the following three categories;*

- *beneficiaries, or the group directly targeted [...],*
- *people who are directly involved (e.g. those employed by the programme);*
- *people who are affected in other ways, either positively or negatively [...]*¹²⁸

Once the summary of state obligations within concurrence of various Conventions under international human rights law has been conducted, the Handbook proceeds to propose a score system which consequently is applicable to potential effect assessments within the preparatory phase and to the confirmed effects in the follow up phase. This system is based on the following ten evaluating questions.

1. *What is the programme's assumed/actual impact on equality and non-discrimination?*
2. *Has the population directly affected been informed about the programme?*
3. *Does the programme respect/has the programme respected everyone's right to seek and impart information relevant to its implementation?*
4. *Does the programme respect/has the programme respected the right to express views freely in the preparation and implementation phases?*
5. *Does the programme promote/has the programme promoted participation in decision-making of groups affected?*
6. *Does the programme uphold/has the programme upheld the right to organise?*
7. *Does the programme respect/has the programme respected the right to just and favourable conditions of work?*
8. *Does the programme affect/ has the programme affected the fulfilment of the right to an adequate standard of living for target groups and other people affected, including access to adequate food and a continuous improvement of living conditions?*

¹²⁸ Ibid., p. 23.

9. Does the programme affect/has the programme affected the opportunity of people for self-provision in terms of income generating activities?

10. Does the programme address the right to compensation for those negatively affected by its implementation?¹²⁹

The scoring system presents eligible answers: positive impact, no change, no information available and negative impact. A low score indicates a potential demand of a revamped policy approach and conceivably, the opening of a new dialogue.¹³⁰

b) Evaluation of the NORAD Handbook's Approach

The NORAD Handbook delivers unsubstantial specificity regarding the effective conduction of an impact review and delivers in lieu a general checklist applicable as a pre-assessment determining the exigency of a HRIA. Subsequently, the study is not based upon the evaluating premise of a specific normative content of a human right.

The Handbook was published by a development agency and its assertion of interaction is the participation of the agency and thus the question of whether HRIAs should be conducted by governmental or private entities is left unremarked as NORAD is a governmental entity.

Rather than developing an indirect or direct impact assessment approach, the Handbook proposes a score system, which attempts to measure factual effects. This approach allows a more definite evaluation, hence applicable results. Albeit listed as applicable for *ex ante* evaluation, the study is exceedingly better suited for an *ex post* operation. The Handbook is conducted towards development projects and thus specific in its applicability within our paper, as the focus of this paper is governmental action in all regards and not limited to the development sector.

The provided checklist and score system could be effective in evaluating development within the Global North but may demonstrate more difficulty in its application within the Global South. The proposed system is strongly dependent upon citizen participation and the realisation of one's *rights awareness and rights empowerment*. This approach also presumes a democratic and interactive governmental system, which is regrettably not in constant concurrence with the reality of a potentially less developed area in the Global South.

¹²⁹ NORAD, p.26-33.

¹³⁰ Ibid., p.25.

Nevertheless, the ambition towards high levels of population participation is a right respecting approach and thus the implementation of such should be endeavoured.

Conclusively, whilst the Handbook provides useful orientation criteria for the preliminary stages of a HRIA, it is not sufficiently substantial or specific for a full-scale assessment of a potential right violation by a state action. Notwithstanding, certain aspects within the methodology could be useful and effective for further development within this paper.

B. Proposed Guide to Conducting a Human Rights Impact Assessment

1. Introduction

The following steps outline this paper's proposition of a methodology for the implementation of Human Rights Impact Assessments focused on governmental action. The methodology refers the right to food but the steps themselves are applicable to human rights in general.

The paper concentrates on an *ex ante* HRIAs methodology and aims to provide the necessary steps for assessment before an action is fully implemented. The methodology postulates the binding character of the right to food and its importance for the pursuit of other human rights, and that no trade-off system shall be allowed or introduced. Though in some cases trade-offs can be admissible on condition of proper reparation, in the paper, the right to food is viewed as being non-negotiable. Thus, allowing lesser violations with coinciding proportional restitution is rejected.

The proposed methodology considers both direct and indirect impacts of governmental actions. It does not differentiate whether the outcome is directly intended by the governmental action or is an indirect consequence of it.

HRIAs are still somewhat of a new instrument and their elaboration and conduction is still in the development phase. The following steps represent an attempt of further developing a HRIAs methodology on the basis of selected pre-existing HRIAs strategies.

2. Steps

a) Step 1: Analysing the Proposed State Action

The people nominated to carry out the HRIA, be it an independent NGO, a governmental organisation or a group of experts specifically composed to perform the HRIA, as in the case of the Berne Declaration report, should first study the action being assessed in order to have a comprehensive understanding of the nature of the action – a law, policies, agreements, treaties, programmes, projects, investments, procurement of goods, multilateral policy makings, judgments etc. They should come into play at this stage and already set the grounds for going further in the impact assessment process or put an end to the latter if the state action is not deemed relevant.

Furthermore, and as this is the case in the Berne Declaration HRIA, the people in charge of the HRIA should identify the provisions or actions that are most likely to violate human rights and try to refine the scope of study as much as possible. This stage may prove difficult; as said, this methodology applies *ex ante* to the state action or inaction in study. Thus, making predictions on the potential impacts and already being able to tell which provisions are relevant and exclude the non-relevant ones is a tricky step. Moreover, the report from the Berne Declaration urges being very selective when determining which rights may be violated and which elements of the states action or inaction will be focused on; the report concentrates primarily on the right to food and Art. 14 and 15 of UPOV 91. Despite their rather narrow object of study, their report is about 50 pages long and the whole research lasted two years. In their opinion, failing at being selective will make the exercise “*too complex and time-consuming.*”¹³¹ In sum, the step where the scope of research is being limited must be conducted with great care, considering the importance of being selective, even at such an early stage in the HRIA process.

Some state actions may be arising under a legal act; identifying the latter and analysing it is highly important in order to grasp the relationship between the state action and the different stakeholders. For example, the state action may emanate from a law, which itself is the result of a legislative delegation. Consequently, it is also necessary to identify which governmental body is involved in the process and which role they play. The Berne Declaration, for instance, addressed its recommendations to both governments of countries in the Global North and to those of developing countries, as well as to the UPOV secretariat and members, providers of technical assistance in the area of IP for agriculture including WIPO and to the NGO community, farmers’ organisations, women’s groups and indigenous peoples.¹³² The information on the legal basis, as well as the official body, will prove relevant when drafting the conclusions, recommendations and establishing responsibilities if any.

Moreover, identifying the content as well as the purpose of the action, for example, a housing proposal or a change in social benefits, is necessary for both direct and indirect HRIAs. However, its importance varies from one type to the other. Understanding the content and the

¹³¹ THE BERNE DECLARATION, p.44.

¹³² Ibid., p. 46-47.

purpose of the action enables additional proper experts in the field of study to be chosen, and thus defining the different experts' domains of responsibility.

In addition, it is necessary to estimate the geographical extent of the action's impact: will it only take effect in a certain region of the considered country or nationally? Will it have extraterritorial consequences? The considered state action could be a Swiss law project with consequences limited to the Swiss territory or, as in the Berne Declaration report, an international treaty emanating from an international governmental organisation to which Switzerland is party and having negative affects to the right to food in Global South countries.

b) *Step 2: Impacts Hypotheses and Detecting Potentially Vulnerable Groups*

After carrying out the first step and concluding at the end of the latter that there is sufficient concern on the considered state action or inaction to go further in the assessment process, it is time to determine questions to be answered and a mechanism to find a causal link between the hypothetical situation whereby the state action or inaction will have to be implemented and the violation of the considered human rights. For example, if one would apply this step to the right to food, one would need to find questions, the answers of which will be able to prove or set aside a violation in accordance with the definition of *impact* for the right to food, as explained before.¹³³

Once the strategy to identify the causal impact has been developed, it is necessary to determine the potentially affected groups in order to prepare the step where the evidence will be gathered.

The action considered could affect domestic populations as this could be the case in a law on state-subsidised housing or it could also affect only foreign population situated outside of the state's territory as this was the case in the Berne Declaration report on the effect of UPOV 91. It is also conceivable that a certain action could affect both domestic and foreign populations.

It is also necessary to detect the different roles played within the domestic and/or foreign populations affected by the HRIA. For instance, identifying the beneficiaries or the group directly targeted in accordance with the action's purpose should be an easy task. However, in the case of indirect HRIAs determining if some people, other than the beneficiaries of the

¹³³ See III. B. 3, p.14.

targeted group, are affected consequently to the considered action may prove difficult. The experts involved in the assessment of UPOV 91 called upon the help of many on-field experts so as to identify the possible consequences of UPOV 91.¹³⁴ However, it seems like identifying the consequences and the affected people was an on-going process that kept developing throughout the project.

Be the HRIA direct or indirect, the assessment of human rights violations ought not to be limited by a certain right. That is, although it may be chosen to focus on one particular right – for instance, the right to food – the group of experts in charge of the HRIA process should keep an eye out to any other possible human rights violations. The group of experts that conducted the Berne Declaration HRIA insisted repeatedly on the need to reduce as much as possible the scope of research of the assessment in order “*to keep the exercise manageable*”.¹³⁵ However, the experts deemed it highly important to pay heed to the rights of indigenous peoples, the right to participate in public affairs and women’s rights, as well as, but to a lesser extent, farmers’ rights.¹³⁶ Eventually, they report on all rights.

The Berne Declaration’s approach contradicts the idea defended in this paper that the set of human rights under study should be as narrow as possible to keep the HRIA manageable. On the other hand, ignoring human rights violations and not raising a hand by briefly reporting on a concern pertaining to distinct human rights in the final report, as it was done in the Berne Declaration, would seem contradictory to the concept of human rights itself. Moreover, because “*social, economic and biophysical impacts are inherently and inextricably linked*”¹³⁷, one should expect, should a HRIA find a breach of the right to food, that other human rights are being violated as well.

Furthermore, paying great consideration to the rights of vulnerable groups such as women, indigenous people, minorities, and disabled people, as it was done in the Berne Declaration’s HRIA, seems not only necessary but indispensable in the assessment process. Firstly, these groups require particular protection for they were determined as vulnerable. Secondly, it is precisely because of their vulnerability that the dedicated attention shall be paid to them. It is against them, if anyone, that violations are most likely to be found. In the Berne Declaration

¹³⁴ THE BERNE DECLARATION, p. 20.

¹³⁵ Ibid., p. 17.

¹³⁶ Ibid.

¹³⁷ IAIA.

report, the poorest farmers¹³⁸, as well as household led by women,¹³⁹ were found to be the groups whose right to food was most likely violated. Therefore, considering the interrelation of human rights and the legal and moral importance of focusing on vulnerable groups, experts in charge of carrying out the HRIA should not only focus on the right to food but also keep a close look on possible violations of other human rights and by paying particular attention to vulnerable groups.

c) Step 3: Legal Basis for Obligations

Once the group of people in charge of carrying out the HRIA has defined the focus and scope of its impact assessment, it will be necessary to identify the pertinent legal basis for the considered rights. For example, they will need a legal basis of the obligation towards the right to food at a local and international level, but also the rights of the vulnerable groups that have been identified so far.

One should establish which binding governmental obligations correspond to the specific human right in question, i.e. the right to food. The legal basis should be established on national, regional and international levels. Constitutions acknowledge basic rights on a justiciable level. Regional and international treaties, which often presuppose more comprehensive protection of the human rights they recognise, must be complied with according to the principle of law “*pacta sunt servanda*” and are therefore binding for all parties.

The accusation of violating human rights depends on the recognised legal obligations of states. The Right to Health Case Study by Paul Hunt and Gillian MacNaughton, as well as the HeRWAI, included a step that summarises and identifies obligations in their HRIA programmes. It seems to be an important part of the HRIA process; because where no legal basis is present, a following enforcement of human rights is not possible. Ultimately the core objective of HRIAs is securing human rights by preventing violations through the identification of governmental misconduct, which is only provable if a binding obligation is violated.

¹³⁸ THE BERNE DECLARATION, p. 45.

¹³⁹ Ibid., p. 7, 14, and 24.

d) Step 4: Evidence Acquisition

This is a key step for drawing links between the governmental action and human rights violations that prove the government's responsibility. The gathering of evidence is an essential part of all HRIAs presented in this report. Unlike to the NORAD Handbook, the HeRWAI and the *Berne Declaration*, this paper chooses to dedicate a separate step in the methodology to the research of evidence, allying with the Paul Hunt's and Gillian MacNaughton's case study.

Since this methodology is focused on an *ex ante* review, evidence for hypothetical and prospective violations of human rights through the governmental action must be gathered. It is challenging to gather evidence for risks of human rights violations or violations that have not yet occurred. To encourage the acceptance and credibility of the HRIA, evidence must establish a high level of probability. Otherwise, the proposed measures may be deemed disproportional. The governmental action must be analysed step-by-step to build an assumed causal chain that leads to the alleged violation of human rights.

The causal chain must be demonstrated with:

- Examples of previous similar undertakings that show violations of human rights are likely to be repeated. While conceding that similar actions violated human rights previously, experts recognise that the possibility that the action in question will violate human rights similarly is very high.
- Expert opinions on how a governmental action could lead to a violation of human rights. Experts have the know-how to present reliable answers and outlooks. It is important to gather several opinions, from different experts such as NGOs, university researchers, locals etc. supplying grounds for credibility and neutrality. Expert opinions need to argue an extensive probability of human rights violations, otherwise it is not an eligible point of consideration.
- Consultation of potential victims of the potential infraction, gathering opinions on how their human rights might be restricted and violated. People whose rights might be defied can express their concerns and predictions which show issues that are relevant to the research. The awareness of problem areas provides a frame for the analysis.
- Statistics that show possible outcomes of different governmental actions. On the basis of statistics, it might be confirmable that certain elements of a governmental action have a high possibility to breach human rights.

In the process of gathering evidence, special attention must be paid to *de facto* discrimination. Evidence that reveals *de facto* discrimination should be investigated immediately and no excuse can justify this violation if proven.

e) Step 5: Inform Stakeholders and Consultation

After evidence of possible violations or risks of violations is gathered and investigated, and the probability of hypothetical violations is proven, all stakeholders, such as responsible parties, official bodies involved and potential victims including vulnerable groups, must be informed. This is a step suggested by Paul Hunt and Gillian MacNaughton to inform stakeholders within the process of conducting the HRIA.¹⁴⁰ It seems important to engage stakeholders in the process, considering that the appraisees should have an opportunity to give explanations. The consultation with stakeholders is an important factor to identify the scope and problem areas of the governmental action. This contributes to the frame of analysis together with the evidence gathered (step 4), especially the consultation of people affected.

The information includes an instruction on the procedure of the HRIA, as well as the rights of the people affected and their possibilities to participate in the process of preventing the human right violation. The potential violation of human rights needs to be explained and the documentation of gathered evidence is to be presented. An effective exchange of statements presupposes the same level of information for all stakeholders. This HRIA focuses on governmental actions and therefore the state is the primary participant because it is both a stakeholder and agent.

The prospective violations of human rights have to be presented on the basis of a scenario that is reliable and based on evidence, gathered through step four. Legislative or executive bodies are advised or, after legal enactment, obliged to actively participate.

Subsequently, all stakeholders, including the state, have the opportunity to express and explain their opinion and defend it on the basis of presented evidence. The involvement of stakeholders is an important step to make their voices heard within the HRIAs procedure and to come to a solution through the process of cooperation rather than enforcement. This procedure encourages the acceptance of HRIAs. The intention of this HRIA methodology is

¹⁴⁰ See HUNT AND MACNAUGHTON, p. 37, 42.

not only to survey a state's actions but also to encourage the prevention of human rights violations through governmental action and therefore a pre-emptive comprehension of the risk of violations by the state is necessary.

f) Step 6: Analysis of Acquired Information

Evidence and knowledge accumulated throughout steps four and five need to be combined and analysed once the scope of possible violations of human rights is fully investigated. This step is aimed to draw links between the previous two steps. It should lead to a conclusion on whether potential human rights violations are connected to the governmental action.

This step operates with a two-step-questionnaire. If one of the questions is answered with an affirmation, the governmental action of any sort should be instantly rejected or reviewed by the government. The revised version of the governmental action should be a subject of the HRIA from the step one again. The answers to the questions will be analysed in the final report within step seven.

The two questions to be answered are the following:

- Does the main outcome of the governmental action violate the right to food?
- If that is not the case (but the right to food is violated), is the violation of the right to food caused by a necessary component of the governmental action?

These questions are relevant to all HRIAs, not only to the right to food.

This step is an addition to the four evaluated strategies of HRIAs.¹⁴¹ It was developed during the analysis of the existing HRIAs methodologies and is aimed to improve the process of coming to a conclusion. It is an effective way to target specific answers and consequences in the final report more efficiently.

The questionnaire divides the analysed action's results into two groups. Firstly, the group where a violation of the right to food it is the main outcome or a necessary component of the governmental action, and secondly, the results where the governmental action does not directly violate human rights or the segment, which defies human rights, is not fundamental and therefore dispensable. The report based upon the proposed HRIA methodology should not accept any sort of compensation and justification in the case where the violation of the

¹⁴¹ See Chapter IV. A.

right to food is the main outcome or based on a significant component of the governmental action.

Dividing into these two groups generates two possible outcomes in the final report. Firstly, the refusal of the governmental action or revision with recommendations; and secondly, an approval with recommendations for improvements if necessary.

g) Step 7: Summary Report

Once the analysis of the gathered information is processed, a summary report on the proposed governmental action must be prepared. If the planned action was evaluated as being predominantly rights violating, a detailed rejection report must be composed. Rejection is only to be recommended in cases where a violation or implementation of policy leading to violations of human rights belongs to the core content of the proposed action. Otherwise, a list of recommendations for revision of the action is to be composed. If no risks of violations were found, the summary report must contain implementation guidelines.

The rejection report must contain the gathered evidence underlining the hypothetical violations of the plan with the presentation of the believed gravity of effect and outlining the inadmissibility of implementation. The report must also entail the legal grounds for rejection, including not only the legal inconsistencies with national law but also international and regional human rights law as well.

If the action is to be revised and not rejected, a targeted list of revision points must be submitted to the governmental body that proposed the action. The revision points must outline which areas of the action plan induce a violation of human rights and to what extent they need to be reevaluated. The recommendations of revision themselves must be listed as non-exhaustive, and the governmental body is able to revise additional aspects of the action within its own methods.

Although the revisions shall not be of a strict binding nature, in the sense that a large margin of appreciation is left to the state within the revision process, without the recommended changes the action subjected to a new HRIA will once again either be sent back for revision or rejected on grounds of inadmissibility.

If the HRIA showed no probability of human rights violation in relation to the proposed action, the summary report must include guidelines to ensure the right respecting implementation.

Developing a summary report with recommendation is a step included in the previously evaluated HRIAs methodologies, i.e. the Case Study on the Right to the Highest Available Standard of Health,¹⁴² the HeRWAI Instrument by HOM¹⁴³ as well in the Berne Declaration's¹⁴⁴ usage of Oliver De Schutter's seven-step plan.¹⁴⁵

In the case of the right to food, a summary report would entail listings of probable direct and indirect violations of the right to food of the affected population and thus the inadmissibility of the action due to the states' pre-existing obligations to respect, protect and fulfil the right.

h) Step 8: Monitoring Systems

The proposed HRIA methodology requires two monitoring systems. The initial monitoring system is for the implementation process and is to be followed up by a second, post-implementation one after an adequate amount of time.

The initial monitoring system is to be set in place as an independent body to regulate the implementation of the proposed action, once it meets the HRIA requirements. This monitoring body must act independently from the directly involved implementers of the action, must gather their own assessment data and must ensure the gathered evidence within the HRIA is being effectively taken into consideration within the implementation process. The monitoring body must pay special attention to controlling that no perceivable indirect affect or discrimination takes place within the implementation process.

The secondary monitoring system is to be implemented after a certain amount of time with the goal of evaluating whether the implementation goals were met and the right was continuously upheld. This monitoring system requires further development possibly in the form of an *ex post* HRIA depending upon the initial conclusions of the *ex ante* assessment.

¹⁴² See HUNT AND MACNAUGHTON, 6 Steps.

¹⁴³ See BAKKER AND PLAGMAN, p. 48.

¹⁴⁴ See BERNE DECLARATION.

¹⁴⁵ See DE SCHUTTER.

V. Institutionalisation of Human Rights Impact Assessments in Switzerland

A. Normative Basis for Human Rights Impact Assessments within Switzerland

In order to propose HRIAs mechanisms to be implemented in Switzerland, one should refer to the normative basis for the obligation to conduct HRIAs. It has to be proven that Switzerland already has the duty to conduct HRIAs under international human rights law, though it is not recognised explicitly in the Swiss Constitution.

1. International Human Rights Treaties Ratified by Switzerland

As previously argued, there is an obligation to conduct HRIAs if a country has ratified at least one international human rights instrument.¹⁴⁶ The obligation to respect, protect and fulfil human rights is binding for Switzerland since it has ratified international human rights treaties such as the ICESCR, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and the Convention of the Elimination of All Forms of Discrimination against Women.

According to the Maastricht Guidelines: *“Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. [...] The obligation to protect requires States to prevent violations of such rights by third parties. [...] The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.”*¹⁴⁷ These duties include the obligation of Switzerland to predict and prevent violations of human rights; HRIAs are the ideal instrument for ensuring the timely prediction and prevention of human rights violations.

¹⁴⁶ See p. 16, 17.

¹⁴⁷ Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, para. 6.

2. Federal Constitution

On the national level, art. 2 of the Swiss Federal Constitution states that Switzerland aims to “*protect the liberty and rights of the people and safeguard the independence and security of the country*”. The fundamental rights guaranteed in the Federal Constitution purpose this aim and mark a step on the path of its fulfilment. These fundamental rights are the basis and point of orientation for the obligation of Switzerland to respect and protect human rights. To effectively realise this aim, Switzerland has to ensure that all possible measures of protection are taken. This is not the case until HRIAs are established because only by using the HRIAs method of predicting and preventing human rights violations, the latter can be effectively averted.

According to art. 5 (4) of the Swiss Federal Constitution, “*the Confederation and the Cantons shall respect international law*”. This article recognises extraterritorial obligations of Switzerland to respect human rights as consistent with international human rights law.

Based on these legal commitments, several recommendations were made which imply that HRIAs are indispensable for Switzerland to accomplish the realisation of its international human rights obligations.

3. Concluding Observations of the CESCR to Switzerland

The Committee on Economic, Social and Cultural Rights addresses Switzerland in its consideration of reports submitted by states parties under articles 16 and 17 of the ICESCR, and recommends that Switzerland undertakes “[...] *an impact assessment to determine the possible consequences of its foreign trade policies and agreements on the enjoyment by the population of the State party’s partner countries of their economic, social and cultural rights*”¹⁴⁸. Although the recommendation of the CESCR is not a binding legal document, it provides a basis for interpreting the duty to conduct HRIAs as an inevitable element of the obligations to respect, protect and fulfil socio-economic rights recognised in the ICESCR.

¹⁴⁸ CESCR: Concluding observations Switzerland, para. 24.

4. Statement of the Federal Council

In the answer to the parliamentary question by Carlo Sommaruga, “*Investitionen in die grossflächige Nutzung von Boden und Wasser in Entwicklungsländern*“ (investments in the extensive use of land and water in developing countries), the Federal Council of Switzerland states that in the boards of administration of international financial institutes, such as the World Bank and regional development banks, Switzerland lobbies for compliance with directives of the Voluntary Guidelines on the responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security endorsed by the UN Committee on World Food Security (CFS) in May 2012, for example, by demanding the implementation of social and ecological studies of effect (*Wirkungsstudien*) and participation of the local population as well as an improved accountability.¹⁴⁹ The Federal Council essentially describes an impact assessment and therefore implies the necessity of establishing HRIAs.

The paragraphs above show that there is sufficient normative basis for stating that, indeed, Switzerland has the duty to conduct HRIAs.

¹⁴⁹ SOMMARUGA, para. 8.

B. Switzerland's Obligations Towards the Global South

The international obligations to protect human rights are justiciable and claimable for every person affected, regardless of their geographic locality. Nonetheless, there are specific obligations that apply to the Global South while emphasising a special relevance of ensuring human rights in the poorest societies. On the international level, Chapter IX of the Charter of the United Nations regulates international economic and social co-operation.

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;*
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and*
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*

The Charter of the United Nations demands cooperation of all states and their respect for human rights resulting in the obligation to acknowledge and protect human rights in every country and under all circumstances. Assistance shall be promoted and Switzerland, amongst all other states, has the duty to respect, protect and fulfil human rights not exclusively in its territory, but also to do so in actions regarding the populations of other countries, for instance in the Global South. This cross-border protection is an important purpose of international cooperation. In the Declaration on the Right to Development, adopted by the United Nations General Assembly in 1986, cooperation amongst all states towards the observance and realisation of human rights is promoted in art. 3. Art. 4.2 recognises a specific obligation towards developing countries: *as a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.* This obligation to help developing countries derives from the human right to development that *“also implies the full realisation of the right of peoples self-determination, which includes, subject to the relevant*

provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.” (art. 1) The United Nations Millennium Development Goal No. 8 aspires the same intention to “*develop a global partnership for development.*” The targets 8. B, C, D focus on providing assistance and addressing the needs of developing countries. The Millennium Development Goals were formulated to be achieved until the year 2015. On the basis of the Millennium Development Agenda, the Sustainable Development Goals were formulated and enter into force as from January 2016. Target 17 of the SDGs is “*to strengthen the means of implementation and revitalise the global partnership for sustainable development.*” Global partnerships play an important role in promoting the equal realisation of human rights and in providing support for developing countries (for example, for those in the Global South).

In September 2011 the Maastricht Centre of Human Rights and the International Commission of Jurists adopted the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. The aim was to define and clarify extraterritorial human rights obligations of States. Principle 13 enshrines the obligation to avoid causing harm. This includes that “*States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct*”. Furthermore, principle 14 demands that “*States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights*”.¹⁵⁰ Regarding states that are members of international organisations, such as Switzerland that is a member of the UN, principle 15 states that the “*State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially*” and when competences are transferred to the international organisation it “*must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that State*”. These Principles define the scope of extraterritorial obligations of States. Regarding the obligations to respect, principle 19 enshrines a general obligation of all states to “*take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially, as set out in*

¹⁵⁰ See p. 18.

Principles 20 to 22". It is to be differentiated between direct and indirect interference. Firstly, "States have the obligation to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories" (principle 20). Secondly "States must refrain from any conduct which impairs the ability of another State or international organisation to comply with that State's or that international organisation's obligations as regards economic, social and cultural rights; or aids, assists, directs, controls or coerces another State or international organisation to breach that State's or that international organisation's obligations as regards economic, social and cultural rights, where the former States do so with knowledge of the circumstances of the act" (principle 21). Though the Maastricht Principles are not legally binding, they are based on international human rights law and underline the importance of extraterritorial obligations of States. In this sense, Switzerland has the duty to fulfil its international obligations not only within its own territory but also extraterritorially, including the Global South.¹⁵¹

On the national level, the Swiss Federal Constitution emphasises the obligation of the Confederation to "assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful co-existence of peoples as well as the conservation of natural resources" (art. 54). This article refers to societies in need and suffering from poverty. The Global South is comprised of many developing countries which meet these criteria. In conclusion, according to art. 54, Switzerland is obliged not only to refrain from violations of human rights but also to promote them in the Global South. This can be achieved by predicting and preventing human rights violations, i.e. by conducting HRIAs.

C. Initiatives and Practice of Human Rights Impact Assessments to Date within Switzerland

The global discussion on HRIAs has developed over the last ten years and Switzerland has taken part in it. In addition to FIAN Switzerland, other NGOs provide information, put forward their propositions concerning HRIAs strategies and promote their establishing in Switzerland.

¹⁵¹ See p. 17 and 18.

For example, the *Berne Declaration* and *3D → Trade Human Rights – Equitable Economy* focus on Swiss trade agreements. They state that Switzerland is obliged to conduct HRIAs in order to ensure that no human rights are harmed in the process of international commerce. Both NGOs contributed to the discussion on the development of HRIAs through their case studies and reports. The case study of the Berne Declaration *Owning Seeds, Accessing Food* is analysed within this paper.¹⁵²

At the moment, the “Responsible Business Initiative” (“Konzernverantwortungsinitiative”) aspires to introduce HRIAs in the form of companies’ due diligence. The human rights due diligence does not presuppose any governmental action and should be conducted by companies themselves. It does not apply to governmental action.

Dr. Elisabeth Bürgi Bonanomi, who specialises in Human Rights Assessments of Trade Agreements, stated in an interview¹⁵³ that the discussion about Human Rights Impact Assessments is much more active on the EU level than in Switzerland. Within the EU, Trade Sustainability Impact Assessments are established. Though they are not as precisely structured as HRIAs and the outcome of HRIAs is often not implemented, they also fragmentarily include human rights assessments.^{154, 155} The debate on the need for effective HRIAs in the EU is, inter alia, led by arguments of the UN Human Rights Council in its Universal Periodic Reviews, and the pressure of NGOs. The Universal Periodic Reviews aspire to the improvement of the human rights situation in every country. These are processes of regular review of the human rights records of all UN Member States.¹⁵⁶ They are provided with the opportunity to inform about the improvements of the human rights situation in their countries and share the best human rights practices that have proven to be effective. The States give recommendations to each other and the reviewed State can accept or decline these recommendations.¹⁵⁷ Additionally to the UN Human Rights Council, the CESCR also provided HRIA related recommendations in the past.

In the Universal Periodic Review of 2012, Switzerland got the recommendation to implement a HRIA in foreign trade policy and investment agreements. So far, the country has declined

¹⁵² <http://www.humanrights.ch/de/menschenrechteschweiz/aussenpolitik/aussenwirtschaftspolitik/wto/menschenrechtliche-vertraeglichkeitsprufungen-fr-freihandelsabkommen> (as accessed December 6, 2015).

¹⁵³ Dr. Bürgi Bonanomi was interviewed on December 3, 2015.

¹⁵⁴ BÜRGI BONANOMI

¹⁵⁵ BÜRGI BONANOMI AND LANNEN

¹⁵⁶ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (as accessed December 6, 2015).

¹⁵⁷ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (as accessed December 6, 2015).

to implement this recommendation.¹⁵⁸ Based on this recommendation that is not complied with, the advocates of HRIAs could campaign for its implementation, initiate an open discussion and exert pressure on the State to reconsider its decision. To date, the State Secretariat for Economic Affairs (SECO) has declined conducting HRIAs, even though other federal agencies, for example, the SDC, are increasingly demanding HRIAs. According to Dr. Bürigi Bonanomi, it is ultimately the SECO that will decide. The question of the institutionalisation of HRIAs in Switzerland, however, falls within the jurisdiction of the parliament.

In the view of the authors of this paper, the discussion concerning HRIAs deserves more attention. Establishing HRIAs of violations caused by state actions is indispensable for Switzerland to meet its legal obligations. But this action deficit is not yet present in the public's perspective. Public pressure has proven to be an effective measure to promote state actions. That is why the problem needs to be brought to the interest and attention of the public.

D. Official Governmental Bodies and their Obligation to Conduct Human Rights Impact Assessments

The principle of the separation of powers applies in Switzerland; at the federal level, the Federal Courts are in charge of the judiciary and the Federal Council together with the Federal Administration of the executive and the Federal Parliament are in charge of the legislature. However, this division is subject to exceptions.

The Federal Council, as well as the Federal Administration, have been granted some legislative and judiciary competences;¹⁵⁹ for example, the former is entitled by Art. 160 para. 2 and 182 of the Swiss Federal Constitution to issue respectively legislative initiatives and legislative ordinances while the latter can issue administrative ordinances. However, the legislative power of the Federal Council can be extended in any domain through a *legislative delegation* directly from the legislature, according to Art. 164 para. 2 of the Constitution. The

¹⁵⁸ Response of Switzerland concerning its UPR recommendations, 27.02.2013, No. 123.85, https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/internationale-organisationen/20130227-upr_stellungnahme-schweiz_EN.pdf (as accessed January 30, 2016).

¹⁵⁹ MAHON, pp. 152-154.

Federal Council and the Federal Administration have to address appeals based respectively on Art. 187 para 1 let. d of the Constitution.

In addition to its legislative competences, the Federal Assembly is in charge of, among other issues, approving international treaties on the grounds of art. 166, 140 and 141 of the Constitution. Furthermore, it is granted some judiciary competences in accordance with art. 173 and 157 of the Constitution.

The Federal Courts' main role is that of guardian of the proper and uniform application of federal law.¹⁶⁰ Thus, and as it is often the case when the Federal Courts sets a precedent, the latter may amount to the act of legislating.

When addressing the question of which official bodies should be subject to the obligation to conduct HRIAs, this paper is supportive of the idea that the question shall not be: “*which* official body should be subject to the obligation?” But rather: “*to which competence* the official bodies' actions can be linked?” Thus, not the official body itself, but the *nature* of the body's actions should be considered in order to determine whether there are grounds for the obligation to conduct HRIAs. As seen, there are some exceptions to the separation of powers in cases of overlap. Thus, it is more efficient to define which powers should be subject to the obligation of HRIAs.

Firstly, legislature appears to be the most relevant power. It is through the creation of laws, policies, decrees etc. that a state can have the greatest impact on human rights, be it positive or negative. Thus, as soon as the Federal Council and the Federal Administration, the Federal Assembly and the Federal Courts are legislating, attention should be brought to their considered action.

Another competence of concern is *executive*. Indeed, the main assignment of the executive power is applying laws and when doing so, it develops policies and programmes that are inevitably marked by the political views of the elected party in whose hands the executive power lays. Furthermore, a concern may be raised when, by determining the political goals that need to be achieved by the Federal Assembly,¹⁶¹ or the Federal Administration, in foreign affairs matters, a decision is made that could then have negative consequences on human rights. An example in foreign affairs matters is that of the *Berne Declaration*, where

¹⁶⁰ MAHON, p.161.

¹⁶¹ Ibid., p.151.

the latter lamented the fact that some developing countries were forced into joining UPOV 91 by developed countries through the use of the latter's trade force while there is no evidence that this international treaty is adapted to developing-countries' agricultural systems.¹⁶²

Since this paper's focus is *ex ante* HRIAs, the judiciary power, whose ruling on a case mainly happens *ex post*, is outside of the scope of this paper.

Since Switzerland is a federal state, the decision-making process takes place at three levels – the *Confederation*, the *Cantons* and the *Communes*, where it depends on each body's competence and, in accordance with the constitutional principle of subsidiarity: “*a higher authority should only perform tasks that cannot be performed by a lower authority.*”¹⁶³ The principle of the separation of powers also applies at the cantonal and communal level. Thus, the cantons all display a judiciary, executive and legislative power. The arguments that have been hereinabove developed as to the legislature and executive being the powers that should be subject to the obligation of conducting HRIAs, also apply at the cantonal level, be it in internal or foreign affairs. Indeed, in terms of external affairs which are *executive* matters, Art. 54 para.1 of the Swiss Constitution sets that foreign relations are the responsibility of the Confederation which includes international treaty making. However, according to Art. 56 of the Constitution, the cantons are granted a residual competence in matters of treaty making, whereby they can enter into treaties with foreign states provided the matter lies within the scope of their powers or they are dealing with foreign authorities standing hierarchically below the federal level.

E. State Actions Subjected to Human Rights Impact Assessments

Policies, laws and processes that show a high probability of affecting human rights, such as in cases where basic elements of the right are in danger of breach, must be subjected to HRIAs. At the very minimum any policy, law or process that could effectively prohibit people from exercising their rights should immediately be submitted for a HRIA. Additionally, any of the governmental forms of action with the potential to affect a large section of a population would need to be submitted to HRIAs as well, to allow the evaluation of all possible resulting effects, including those on human rights. An important evaluation point whence evaluating

¹⁶² BERNE DECLARATION, p. 9, 38.

¹⁶³ <https://www.admin.ch/gov/en/start/federal-council/political-system-of-switzerland.html> (accessed December 6, 2015).

the necessity of a HRIA is whether or not specific vulnerable groups are present and in higher risk of having their rights violated.

Taking an example from Environmental Impact Assessments, a premise of the basis for the proposed policy, law, or process would need to be included within the catalogue of laws of its kind. In environmental law, the basis for the EIA would be the Environmental Impact Assessment Act. Human rights impact assessments, however, do not have their own act and their application and inclusion is not limited to a particular set of laws instead, cover a much broader spectrum, thus implicating the demand for a similar Act for HRIAs in order for them to become established procedure within law, policy or action planning.

The Federal Office for the Environment FOEN, the federal government's centre of environmental expertise and a part of the Federal Department of the Environment, Transport, Energy and Communication,¹⁶⁴ published a Handbook for the process of EIAs. This handbook elaborates the implementation requirements of the Environmental Impact Assessments Act. The declared goal for the undertaking of EIAs is the affirmation of compliance with the environmental laws in place.¹⁶⁵ This goal as such is also applicable in other areas, for the purposes of this paper in compliance with international law regarding the right to food.

1. Processes Affecting the Right to Food

Within the prediction of potential environmental impacts, the proposed project is reviewed for environmental law compliance as an initial step. The same could be done in the initial steps of HRIAs by examining the proposed action for compliance with laws protecting human rights.

Whilst there is no specific HRIA act, a catalogue of acts and laws could be composed for the purpose of a preliminary evaluation of the legal compliance of a proposed action. Human rights and, in particular, the right to food may occur on a very broad legal spectrum e.g. social security acts, farming acts, zoning acts, immigration and asylum acts, agricultural acts and commodity price regulation acts. This list is in no means an exhaustive one, rather a preliminary illustration of a necessary legal catalogue. *The Swiss Working Paper on Sustainable Agriculture, Food Security and Nutrition in the Post 2015 Agenda* prepared by

¹⁶⁴ <http://www.bafu.admin.ch/org/index.html?lang=en> (accessed December 6, 2015).

¹⁶⁵ See UVP-Handbuch. margin. 1.1.

the Federal Office for Agriculture and the Swiss Agency for Development and Cooperation provide a chart, with which an appealing orientation towards the necessary areas could be made.¹⁶⁶ A point of orientation for legal compliance reviews could be the acts and laws based upon Art. 104 of the Swiss Constitution.

The commissioning of a conduction of a HRIA must, as other IAs, be content related. In regards to the right to food policies, laws and processes must be retraced to their legal source of origin and reviewed for compliance with laws protecting the right to food.

2. Processes Pertaining to the Global South

Processes pertaining to the Global South could be compared and subjected to similar provision as those in the Convention on Environmental Impact Assessment in a Transboundary Context. "*The Espoo (EIA) Convention sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries.*"¹⁶⁷

If one uses the already implemented system of EIAs as an orientation for an institutionalisation process of HRIAs, then the control mechanism established within EIAs for transboundary interaction becomes equally relevant. The provisions and duties of the convention are convertible towards duties in the application of transboundary HRIAs.

The convention begins in its first article with a list of definitions such as, parties, party of origin, affected party, terms and definitions, which would also be required for a similar HRIA convention.¹⁶⁸ Mentionable as well are the general provisions provided within Art. 2, herein the convention lists responsibilities and steps needing to be taken by the concerned parties.¹⁶⁹ Within these provisions it is established that the IA is to be done prior to implementation as well as the imperative of public awareness and participation, both elements are transferable towards HRIAs.¹⁷⁰ The Convention also requires the affecting party to notify the affected

¹⁶⁶ Swiss Working Paper on Sustainable Agriculture, Food Security and Nutrition in the Post-2015 Agenda, p. 6.

¹⁶⁷ <http://www.unece.org/env/eia/eia.html>(as accessed December 6, 2015).

¹⁶⁸ see Art. 1 Espoo Convention.

¹⁶⁹ see Art. 2 Espoo Convention, para. 1-2.

¹⁷⁰ see Art. 2 Espoo Convention, para 3 and 6.

party.¹⁷¹ Additionally transferable to HRIAs would be the clause of the preparation of the environmental impact assessment documentation¹⁷² as well as the post-project analysis.¹⁷³

The Convention contains a list of appendixes with criteria for the enactment of the document. Appendix I provides a list of activities that must be subjected to an EIA.¹⁷⁴ A similar list of activities for the practice of HRIAs would should be developed. However, as HRIAs cover a much broader spectrum and human rights violations can occur in multiple forms, the creation of said list would require extensive research and is an area for further development of the theme. Appendix II lists the content of the EIA documentation, a step effectively convertible to HRIAs as the parties should as well be held to a list of required elements when conducting their HRIAs. Appendix III contains general criteria to assist in the determination of the environmental significance of activities not listed within Appendix I. Whilst the criteria itself are not directly applicable to HRIAs, with perhaps the exception of paragraph 1 subsection c *Effects*,¹⁷⁵ the provision of evaluation criteria within the Convention is a good example for a HRIA convention or agreement.

An area of special consideration would also be that of Art. 101 of the Federal Constitution on the Swiss Confederation:

Foreign economic policy

1 The Confederation shall safeguard the interests of the Swiss economy abroad.

2 In special cases, it may take measures to protect the domestic economy. In doing so, it may if necessary depart from the principle of economic freedom.

The measures ensuing from Art. 101 need to be monitored, in particularly in regards to Swiss agriculture policies and subsidies and their effect on the Global South in regards to its agricultural freedom, exportation capacity and competition within the Global Market.

¹⁷¹ see Art. 3 Espoo Convention.

¹⁷² Art. 4 Espoo Convention.

¹⁷³ Art. 7 Espoo Convention.

¹⁷⁴ see Appendix I Espoo-Convention.

¹⁷⁵ see Appendix III Espoo-Convention.

3. Switzerland's Actions within Intergovernmental Organisations

As previously mentioned within this paper the powers deemed to be responsible for conducting HRIAs are that of the legislative and executive body. Swiss representatives acting within an intergovernmental organisations need to be held to the same obligations as governmental bodies within the state, otherwise, procedural loopholes could ensue. As such any processes or acts brought into power by active participation of Switzerland within an intergovernmental organisation need to be subjected to the same criteria and reviewed to the same degree for legal compliance as Swiss national acts or processes.

F. Recommendation for Legal Institutionalisation of Human Rights Impact Assessments in Switzerland

Human Rights Impact Assessments in Switzerland require a more concrete legal basis similar to that of EIAs. An incorporation of norms requiring HRIAs into the Swiss Constitution is not necessary. As previously mentioned, the international human rights treaties ratified by Switzerland and the Federal Constitution have recognised the rights being protected by a HRIA. The required steps are the establishment of concrete federal laws and acts determining the not only normative grounds for HRIA obligation and accountability but undertakings necessary for implementing HRIAs as well.

A governmental agency responsible for the management of HIRAs seems to be desirable and essential for establishing a HRIA precedent within Switzerland. The proposed agency would monitor the HRIA processes and be the addressee and coordinator of HRIAs similar to that of the Federal Office for the Environment in regards to EIAs.

A HRIA Act similar to EIA Act also seems prudent as guidelines needed for conducting HRIAs and a legal basis amounting to higher levels of governmental accountability towards its actions.

VI. Conclusion

This paper's aim was to answer the initially posed four fundamental questions. The success in addressing these questions is now to be appraised one after the other in order to examine to what extent they have been answered and which problems have been encountered while elaborating on them. Following that, the recommendations gleaned from the study conducted within this paper will be presented.

Before the posed questions could be addressed the topic in itself needed to be explored. An initial goal of the research was to determine what HRIAs are and how they are designed to be applied. Additionally, the normative content of the right to food and corresponding obligations to respect, protect and fulfil it were explored. Once the preliminary research was conducted and the content and scope of the paper was defined, the initially proposed questions could then be addressed.

The first question pertained to general criteria of the assessment of which undertakings and processes should be subjected to HRIAs. It was concluded that any governmental undertakings capable to affect human rights of a large portion of a population or a person's core human rights undeniably should to be subjected to HRIAs. Additionally, a call to the special attention towards particularly vulnerable groups was made.

The second fundamental question, concerning official bodies that should be obliged to conduct HRIAs, was approached from a general Swiss perspective, and hence the official Swiss bodies were looked at. It was deemed unnecessary and impossible to examine every official body so as to determine whether it should be subjected to the obligation of performing a HRIA. The question was answered by classifying the official bodies' actions according to the three powers – legislative, judiciary and executive. Swiss official bodies exercising their legislative and/or executive competences on federal, cantonal or communal level are most relevant obligors for conducting a HRIA. Both federal and cantonal authorities acting at a non-domestic level and especially towards the Global South may be under obligation to carry out a HRIA.

Regarding the third question, this paper reviewed and evaluated the four most promising and relevant HRIAs in regards to the general objective of the paper. On the basis of these studies,

the new methodology of conducting a Human Rights Impact Assessment was proposed and the significant role of civil society in HRIAs was emphasised.

In relation to question four, Environmental Impact Assessments, their recognition and implementation internationally and in Switzerland were analysed. The conclusive view of the paper is that the legal basis and institutionalisation of EIAs on federal level provides orientation for conducting HRIAs in Switzerland.

On the basis of the research, the following recommendations for implementing HRIAs can be proposed.

Regarding the implementation process of HRIAs:

- *The scope of the HRIA should be refined as much as possible, including the identification of provisions and actions that are most likely to violate human rights, through the bodies conducting the HRIA.*
- *Governmental bodies involved in the process and their role must be carefully identified. Since state actions arise under the empowerment of a legal act, the identification of the act and its analysis is important in order to grasp the relationship between the state action and different stakeholders.*
- *Whilst conducting the HRIA, the geographical extent of the action must be estimated in order to form a prediction of all possible human rights violations ensuing from the affecting governmental action.*
- *All parties within the domestic and/or foreign population affected by the action must be identified, including beneficiaries or groups directly targeted within the purpose of the action.*
- *When a HRIA focuses on one particular right, conductors of the HRIA, keeping the interrelation of human rights in mind, should maintain a close watch on any other possible human rights violations.*
- *Vulnerable groups must be identified and dedicated attention shall be paid to them, in view of the fact that their rights are most likely violated and require particular protection.*
- *To encourage acceptance and credibility of the ex ante HRIA, a high level of probability of the presumed human rights violations must be reached, in order not to be deemed disproportional.*

- *Special attention must be paid to the possibility of de facto discrimination and if evidence of it occurs it should be prevented.*
- *Stakeholders must be engaged in the HRIA process because they play an important role in the identification of the scope, and problem areas of the governmental action. A solution through cooperation, rather than through enforcement is desirable and would encourage the acceptance of HRIAs in general.*
- *No compensation or justification of any sort should be accepted if the main outcome or a significant component of the governmental action is a core human rights violation.*
- *The methodology proposes the implementation of two monitoring systems: one for the governmental action implementation process, followed by a second, post-implementation monitoring system, after an adequate amount of time has passed. The monitoring body should be independent from the initial proposer of the governmental action, as well as regulating the process of implementation, ensuring that it coincides with the premises within the summary report.*

Regarding the implementation of HRIAs within Switzerland:

- *Switzerland should promote assistance and cooperation with other states and should respect, protect and fulfil human rights not exclusively in its territory but also internationally. That is why its actions that affect human rights of the populations of other states should be an object of HRIAs.*
- *Switzerland should work on the implementation of the Sustainable Development Goals, especially Target 17 concerning assisting people in developing countries.*
- *Debates regarding HRIAs in Switzerland should be more prominent. For example, NGOs should attempt to raise awareness of the missing implementation of HRIAs and its necessity. Public discussions on HRIAs' development and drawbacks as well as on the UPR recommendations, which Switzerland has refused, should be promoted.*
- *Since legislature appears to be the most relevant power to have an impact on human rights, attention should be brought to their considered action as soon as the Federal Council and the Federal Administration, the Federal Assembly and the Federal Courts are legislating. This should also apply at the cantonal level.*

- *Policies, laws and processes that show a high probability of affecting human rights must be subjected to HRIAs and any policy, law or process that could effectively prohibit people from exercising their rights should immediately be submitted for a HRIA. In addition, any of the governmental proposed forms of action with the potential to affect a large section of a population would need to be submitted for a HRIA forthwith.*
- *EIAs could be used as an example for elaborating HRIAs. An act similar to the one regulating EIAs should be developed in order to establish HRIA procedure within law, policy and action planning.*
- *As in EIAs, in the initial steps of a HRIA, the proposed action should be reviewed for its compliance with international and national human rights instruments.*
- *Since there is no specific HRIA Act, a catalogue of acts should be composed in order to perform a preliminary evaluation of the legal compliance of a proposed action with human rights law.*
- *Some aspects are transferable from the EIA process towards HRIAs. The processes pertaining to the Global South could be compared and subjected to similar provisions as those in the Convention on EIAs in a Transboundary Context.*
- *According to art. 101 of the Federal Constitution on the Swiss Confederation, foreign economic policy should be an area of special consideration. This presupposes monitoring, in particular of agricultural policy and subsidiaries provided by the Swiss Government and their effect on the Global South.*
- *A governmental agency that manages HRIAs is to be established and should monitor the HRIA processes as well as being the addressee and coordinator of HRIAs.*
- *To prevent potential loopholes, Switzerland's' actions within intergovernmental organisations should be held to the same obligations as within the country. Therefore, any processes or acts brought into power through active participation of Switzerland within an intergovernmental organisation should be assessed in the same process as governmental actions.*

The authors of this paper wish to emphasise their disbelief of the fact that HRIAs still not being legally obligatory. Indeed, HRIAs represent not only the most effective way for a state to comply with its human rights-based obligations but also an unequalled measure for violation prevention. Despite the immense importance of this topic, it remains rather

theoretical in its nature, because there is no coherent practice in the field. The practical implementation of HRIAs will decidedly assist and enable its undoubted beneficial development.