

State Duties to Protect

A Swiss Constitutional Law Perspective

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I. Introduction

Most European countries' constitutional obligations guarantee and protect public security and fundamental rights. One aspect and often a prerequisite for the protection of public security and individual rights is the protection of critical infrastructure (CIP). CIP is of great importance in Switzerland, which is inevitable in an economically and technologically sophisticated and densely populated country. The duty of CIP has always been self-evident for the population, especially in the mountain region, which covers 60% of the country's territory and which is strongly exposed to the forces of nature. The oldest environmental provision on rivers and forests in the Swiss Federal Constitution¹ is 150 years old.² This makes the Swiss prominence of the duty to protect unique in Europe and thus the state duties to protect in Switzerland can serve as a benchmark for other countries as well. Germany also has to protect the population and critical infrastructure (CI) from the consequences of natural forces and even from impairments by individuals, based on the guarantor status of the state,³ but not all countries have such a developed guarantor status. Constructing a duty to protect is a first legal prerequisite for constructing re-

sponsibility and also liability of the state for the protection of CI.⁴

This article describes and analyses existing State duties to protect regarding CI in Switzerland. It shows the constitutional requirements of specific Federal or Cantonal duties to protect, especially with respect to *risk prevention, emergency response and the handling of disasters and distresses*. These duties to protect do not only guarantee specific State obligations to perform, including the provision of certain basic services, but they also stipulate diverse civic duties for citizens. This article argues that Switzerland constitutes a remarkable example of a highly developed protection of CI. It does so by showing many duties to protect in the Swiss legal order.

The article proceeds as follows. First, it shows the origin and sources of main duties to protect in Switzerland (II.). Thereafter, the different dimensions of the duty to protect are described (III.). One dimension is the guarantee and protection of public security and order (1.). Another dimension is the essential duty to protect constitutional fundamental rights and internationally guaranteed human rights (2.). Then the allocation of duties in federal states is being discussed, taking Switzerland as an example (IV.). The legal principles to be respected by the state regarding the protection of CI are described in the following chapter (V.), including the constraints of private rights in cases of disasters and emergencies. Finally, a conclusion is drawn (VI.).

II. Origin and Sources of Main Duties to Protect in Switzerland

Extraordinary natural disasters (1.) and the devastating effects of armed conflicts (2.) illustrate the origin of the State duty to protect. These duties have their roots primarily in the State's duty to maintain public security. Furthermore, the Precautionary

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1 Swiss Federal Constitution of 29 Mai 1874 (AS 1 38).

2 Art. 24 [Rivers and Forests]: ¹The Confederation has the right to high supervision over the control of river embankments and forests. ²It shall lend its support to works for the control and the embanking of mountain streams as well as the reforestation of their source areas. It shall lay down the regulations required to maintain such works and to preserve existing forests. Art. 24 para. 1 was revised on 11 July 1897. This provision has been incorporated in Art. 76 and 77 of the applicable Swiss Federal Constitution of 18 April 1999 (SR 102).

3 Lothar Michael/Martin Molok, *Grundrechte*, third ed. (Baden-Baden: Nomos Verlagsgesellschaft, 2012), at N. 511.

4 For details on state liability, see Anne van Aaken and Isabelle Wildhaber, in this issue.

Principle may be used to construct a duty to protect (3.).

1. Natural Disasters

The formation of water rights is adequate to illustrate how every time period has to struggle with new challenges. In the 19th century, efforts were made to protect humans, the ground and other assets from the threats of water.⁵ To reach this goal and to enable better living conditions, huge watercourse realignments (e.g. the rivers Rhine or Linth) and regulation was initiated. Additionally, hydraulic measures were taken in order to combat erosion and landslides.⁶ The need to avert the danger stemming from natural water led to the development of the water and forest rights and, consequently, to the State's duty to protect. Furthermore, the time of the huge building of railway infrastructure in the second half of the 19th century made the protection of forests and water necessary.⁷

With the turn of the century, the use of hydropower grew. This was a result of the slowdown of the development of the electrical engineering in the course of the second industrial revolution. With the incorporation of Article 24 in the Federal Constitution in 1897, the Federation had "high supervision on the police of dykes and forests"⁸. This Federal competence led to the enactment of the 1902 Forest Act, which played an important role in protecting forest areas from deforestation, by now an accepted duty to protect.

2. National Defence

Another example of Switzerland's long tradition for State duties to protect is the national defence. It requires the State not only to refrain from acting, but rather to take positive action. The Swiss Constitutional Order has certain roots in the military law, stemming from the Thirty Years' War. In 1647, the former Swiss Confederation and the Swiss Cantons decided to have a common defensive formation (so-called "Defensionalordnung"), which had an impact on the constitutional provisions concerning military affairs in the first Federal Constitution of 12 September 1848. These provisions were reinforced through the Constitutional revision of 19 April 1874.⁹ Article 58 paragraph 2 of the current Federal Constitution (FC)¹⁰ decrees that the army has to be appointed on its core duty to protect human life, notably the civilian population in armed conflicts, in instances of self-defence according to Article 51 UN-Charter.¹¹ By way of comparison, a referral to the Austrian constitution should take place (Article 9a, which includes the internal as well as the external security).¹² In Article 10 paragraph 15 of the Austrian constitution, the duty of the state is laid down for all military affairs; especially concerning matters pertaining to war damage and welfare measures for combatants and their surviving dependants as well as care of war graves.¹³

Defence means fending off attacks against the protected rights of the country and the population, particularly to prevent or reduce serious damages to

5 Walthers Burckhardt in: *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874*, third ed. (Bern: Verlag Stämpfli & Cie AG, 1931), Art. 24, at N. 1 et sqq.

6 Riccardo Jagmetti in: *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874*, third ed. (Basel/ Zurich/ Bern: Helbing & Lichtenhahn Verlag, Schulthess Polygraphischer Verlag and Verlag Stämpfli & Cie, 1996), Art. 24, at N. 1 et sqq.

7 Jagmetti in: *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874*, supra note 6, Art. 24, at N. 3 et sqq.

8 Anne Petitpierre, *Environmental Law in Switzerland*, second ed. (Bern: Verlag Stämpfli, 2012), at N. 62.

9 Augustin Macheret in: *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874*, third ed. (Basel/Zurich/Bern: Helbing & Lichtenhahn Verlag, Schulthess Polygraphischer Verlag and Verlag Stämpfli & Cie, 1988), at Art. 13 – 22; Hansjörg Meyer/Reto P. Müller in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed., (Zurich/St. Gallen: Dike Verlag and Schulthess Juristische Medien, 2014), Art. 58, at N. 1 et sqq.

10 Art. 58 para. 2 FC *Armed forces: The armed forces serve to prevent war and to maintain peace; they defend the country and its population. They shall support the civilian authorities in safe-*

guarding the country against serious threats to internal security and in dealing with exceptional situations. Further duties may be provided for by law; Hansjörg Meyer/Reto Patrick Müller in: *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874*, third ed., (Basel/Zurich/Bern: Helbing & Lichtenhahn Verlag, Schulthess Polygraphischer Verlag and Verlag Stämpfli & Cie, 1996), Art. 58, at N. 21 et sqq.

11 UN-Charter of 24 October 1945, 1 UNTS XVI. Art. 51: *Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.* See: Rainer J. Schweizer/Jan Scheffler, *Verfassungs- und völkerrechtliche Anforderungen an die Verteidigungskompetenz der schweizerischen Armee und an ihr zukünftiges Leistungsprofil*, in: ZÖR (2011) 66: 299 – 365, at p. 323 et sqq.

12 Art. 9a para. 1 and 2 of the Federal Constitution Law of Austria (B-VG), BGBl. Nr. 1/1930.

13 Art. 10 para. 15 B-VG, supra note 12.

buildings and CI as well as humanitarian disasters. Furthermore, the concept of defence includes the duty to eliminate severe misery and serious threats to preserve the existence and integrity of the Confederation.¹⁴

In the case of threat or damage of the highest protected rights through armed aggression or other severe acts of violence as well as through appalling disasters, the State finds itself in a *state of emergency* beyond the constitutional scope.¹⁵ In such a case, all resources should be put into defence, resistance, rescue and safeguarding the population, the political community, the legally justified State power and the independence of the country.¹⁶ Large armed conflicts do not only challenge the military forces of a neutral State in the long-term, but show that all efforts should be concerned first with the protection of the population and their livelihoods. After the horrible experience of World War II, precautions were made to protect the civilian population, important facilities and cultural assets against the harmful impacts of armed conflicts. Article 61 FC¹⁷ addresses these duties.¹⁸

3. The Precautionary Principle as a Source to Construct the Duty to Protect

The preference of prevention over reparation has national legal foundations in Article 73 FC¹⁹ and in international sources.²⁰ It should be noted that if the

CIP is related to the environment (for instance water protection), the precautionary principle has to be followed. "This principle takes into account the fact that damage to the environment is often latent for a long time and its impacts mostly appear long after the nuisance has started, that is when its consequences might already be irreversible."²¹ Examples are the broadly recognized Principle 15 of the *Rio Declaration on Environment and Development* of 1992²² or the *New Delhi Declaration of Principles of International Law Relating to Sustainable Development Law* of 2002²³. In case of an imminent threat to the environment and the population, appropriate risk management and a determined emergency response is required.²⁴ The precautionary principle is also used in other areas of law, for example in martial law.²⁵ It includes two main aspects: first, a "procedural" one, which implies that proponents of risky activities need to take into account potential environmental impacts as early as possible in their planning, and second, a "technical" one, which pleads for preferable measures that reduce the impacts on the environment. Furthermore, applying the principle of precaution is less expensive than compensating the damages afterwards.²⁶

III. Dimensions of the State's Duty to Protect in Switzerland

The State's duty to protect has several dimensions. Next to the duties to guarantee and protect public se-

14 Schweizer/Scheffler, *Verteidigungskompetenz der schweizerischen Armee*, supra note 11, at p. 323 et sqq.

15 Rainer J. Schweizer/Markus H. F. Mohler in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed., (Zurich/St. Gallen: Dike Verlag and Schulthess Juristische Medien, 2014), Vorbemerkungen zur Sicherheitsverfassung, at N. 13 et sqq.

16 Schweizer/Scheffler, *Verteidigungskompetenz der schweizerischen Armee*, supra note 11, at p. 310 et sq., 317 et sqq.

17 Swiss Federal Constitution (FC) of 18 April 1999 (SR 101); Article 61 FC Civil defence: ¹ *The legislation on the civil defence of persons and property against the effects of armed conflicts is the responsibility of the Confederation.* ² *The Confederation shall legislate on the deployment of civil defence units in the event of disasters and emergencies. (...)* ⁴ *The Confederation shall legislate on fair compensation for loss of income. (...)*

18 Valérie Anne Schmockler, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed., (Zurich/St. Gallen: Dike Verlag and Schulthess Juristische Medien, 2014), Art. 61, at N. 6 et sqq.

19 Reto Morel/Klaus. A. Vallender in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed., (Zurich/St. Gallen: Dike Verlag and Schulthess Juristische Medien, 2014), Art. 74 at N.20 et sqq.; Ursula Marti, *Das Vorsorgeprinzip im Umweltrecht. Am Beispiel der internationalen, europäischen und schweizerischen*

Rechtsordnung, (Zurich: Schulthess Juristische Medien, 2011), at p. 147 et sqq.

20 Marti, *Das Vorsorgeprinzip im Umweltrecht*, supra note 19, at p. 47 et sqq.

21 Petitpierre, *Environmental Law in Switzerland*, supra note 8, at N. 55.

22 Principle 15 of the Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1 (1992), 31 I.L.M. 874 (1992).

23 International Law Association (ILA) Resolution 3/2002: "New Delhi Declaration of Principles of International Law Relating to Sustainable Development" in ILA, Report of the Seventieth Conference, New Delhi (London: ILA, 2002), available online: <http://www.ila-hq.org>.

24 Marti, *Das Vorsorgeprinzip im Umweltrecht*, supra note 19, at p. 227 et sqq.

25 Art. 58 para. 2 FC; Meyer/Müller in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 10, Art. 58, at N. 1 et sqq.

26 Petitpierre, *Environmental Law in Switzerland*, supra note 8, at N. 55.

curity and order (1.), the essential duty to protect constitutional fundamental rights and internationally guaranteed human rights are further dimensions (2.).

1. Duties to Guarantee and Protect Public Security and Order

Starting point for considerations concerning State duties to protect with regard to CI is the overall security of the country. Public safety and order are central to a country's security. To protect and uphold them is a *primary* responsibility of the State. Public safety and order include the *integrity and the decisiveness of the applicable legal order, respectively*.²⁷ They demand the protection of the constitution's collectively and individually guaranteed fundamental and human rights. They include the care for the preservation of the natural and shaped habitat and infrastructure, the private and public goods as well as the institutions of the community with all legally regulated responsibilities and procedures. Public safety and order must not only be ensured when it comes to fundamental threats to the country's security and the foundation of the State or at least of the Constitutional Order of one or several Cantons,²⁸ but to protect and preserve them is a daily, ongoing task with a variety of preventive and repressive duties of the State and its members.²⁹ Primarily, the duties to preserve, protect and pursuit belong to the *legislator*, and the executive authorities are subsequently responsible for different secondary obligations, e.g. to enforce the prohibition of the impairment of the public security and order. If the legislator does not follow its duty, the executive is mandated to act in cases of serious and immediate danger where no other course of action is possible.³⁰ Although there is no further explanation of the term "security" in the FC, it is used in diverse ways, without substantive agreement on its content.³¹ It remains vague in the application.³² Alexander Ruch rightly notes that, in principle, semantic differentiations are constitutionally not intended. It would be better to speak of "security and protection of the country and the population".³³ In view of the tremendous change of the international security and its impact on the national security in Switzerland, a contemporary legal interpretation of the FC seems to be important. The term "security" should thus be considered to cover "human security" as emphasized by Kofi Annan, former UN Secretary-General, and as part of international humanitarian law.³⁴

With respect to the current risks and threats on the one hand and to the protected rights on the other hand the comprehensive term "security" can be described as follows:

- the integral protection of the country as a territory and living space (including its infrastructure as well as public and private property) and its legally regulated institutions and procedures (including its sovereignty) from international law violations, violence-intending (including otherwise extortionate) or violence-applying acts as well as technological and natural threats;
- the earliest possible and position-related measures to prevent, reduce or fend such threats on a national political level;
- interventions serving security with a preventive and repressive nature on a police and administrative level (legal and real acts);³⁵
- preservation and enforcement of the constitutionally guaranteed fundamental rights and other protected legal interests of the population (as a defence and protective duty) to which I will now turn.

27 For Germany: Erhard Denninger, *Polizeiaufgaben*, in: idem et al. (eds.), *Handbuch des Polizeirechts, Gefahrenabwehr, Strafverfolgung, Rechtsschutz*, fifth edition, (München: C. H. Beck, 2012), at N. 16 et sqq.; Schweizer/Mohler, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 15, Art. 57 at N. 8.

28 Rainer J. Schweizer/Reto Patrick Müller in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed., (Zurich/St. Gallen: Dike Verlag and Schulthess Juristische Medien, 2014), Art. 52 para 2, at N. 28 sqq.

29 Schweizer/Mohler, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 15, *Vorbemerkungen zur Sicherheitsverfassung* at N. 9.

30 Art. 36 para. 1 phrase 3 FC; Markus H.F. Mohler, *Grundzüge des Polizeirechtes der Schweiz* (Basel: Helbing Lichtenhahn Verlag: 2012), at N. 313 et sqq.; ECtHR Decision *Gsell vs. Switzerland*, request 12675/05 [2009], para. 55 et sqq.

31 Art. 2 para. 1 FC; Art. 41 para. 1 subpara. a FC; Art. 57 FC sq.; Art. 76 para. 3 FC; Art. 94 para. 1 FC; Art. 120 para. 2 FC; Art. 173 para. 1 subpara. a and b FC; Art. 185 FC.

32 Markus H.F. Mohler, *Vernetzung von Sicherheit*, in: Rainer J. Schweizer (ed.), *Sicherheits- und Ordnungsrecht*, Schweizerisches Bundesverwaltungsrecht vol. III-1, (Basel: Helbing & Lichtenhahn Verlag, 2008) at p. 521 – 624, para. 1.

33 Alexander Ruch, *Äussere und innere Sicherheit*, in: Daniel Thürer/Jean-François Aubert/Jörg Paul Müller, *Verfassungsrecht der Schweiz*, (Zurich: Schulthess Juristische Medien AG, 2001), at p. 892.

34 Kofi Annan, *In Larger Freedom. Towards Development, Security and Human Rights for all*, Summary, in: Report of the Secretary-General of the United Nations for Decision by Head of State and Government in September 2005, New York, 21 March 2005, A/59/2005.

35 Markus H.F. Mohler, *Vernetzung von Sicherheit*, supra note 32, at N. 69; Schweizer/Mohler, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 15, *Vorbemerkungen zur Sicherheitsverfassung*, at N.8.

2. Duties to Protect Constitutional Fundamental and International Human Rights

The jurisprudence of the European Court of Human Rights (ECHR) and of the national Supreme and Constitutional Courts of many European countries have long made clear that there are, independent of all security-political duties of a State, specific State duties to protect the safe-guarding of the basic rights of the State Constitutions and of the international and European human rights as codified in the ECHR.³⁶ The State not only has duties to defend, to desist and to respect towards the holders of fundamental and human rights, it also bears specific duties to protect in particular serious hazards and violations of fundamental human rights.³⁷ In other words, the highest Courts in Europe mandate States to protect the exercise of fundamental and human rights against serious threats and violations, preventively and repressively, actively and passively. This applies even if the impairment of fundamental rights does not have its origin in the State, but in private or foreign actions.³⁸ The legislator is primarily the duty bearer, but also has significant room to manoeuvre in the police laws and in other protective regulations (for example in health care).³⁹ Nevertheless, the duty to protect often

leads to an immediate obligation of the executive to intervene against private individuals, emanating a serious incident or impairment of fundamental and human rights (third party effects).⁴⁰

This has implications for CIP all over Europe, including Switzerland, which will be taken as an example. For certain fundamental and human rights the Swiss jurisprudence recognizes directly enforceable protection claims in accordance with the ECHR. These arise in particular from the protection of life and health according to Article 10 paragraph 2 FC,⁴¹ for example the claim on medical treatment and care,⁴² but also on the elimination of serious safety risks harmful to life and health in public space or caused by public facilities and buildings⁴³, from the freedom of religion and conscience (Article 15 FC)⁴⁴, the freedom of assembly (Article 22 FC)⁴⁵ or not least from the guarantee of ownership (Article 26 FC)⁴⁶. The Federal Constitution guarantees immediate help and assistance in states of emergency regardless of the specific duties to protect based on individual fundamental and human rights. This follows from the right to assistance when in need guaranteed by Article 12 FC.⁴⁷

In summary, at considerable impending or incurred damaging events the known case law about special fundamental rights implied duties to protect which has been developed by the ECHR⁴⁸ and the

36 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force September 3, 1953 [hereinafter ECHR].

37 See for legislation of the ECHR: Christoph Grabenwarter/Katharina Pabel, *Europäische Menschenrechtskonvention*, fifth edition, (München/Wien: C.H. Beck und Manz Verlag, 2012), at para 19 N. 1117 et sqq., 130 et sqq.; for Germany: Friedhelm Hüfen, *Staatsrecht II: Grundrechte*, third edition, (München: C.H.Beck, 2011), para 5 at N. 5 et sqq.; Samanta Besson, *Les obligations positives de protection des droits fondamentaux*, in ZSR (2003) Vol. I, 49 et sqq. 70 et sqq.; Rainer J. Schweizer, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed., (Zürich/St. Gallen: Dike Verlag und Schulthess Juristische Medien, 2014), Art. 35 at N. 13 et sqq., and Art. 10 N. 51 et sqq.

38 Decisions of the ECHR: *Lopez Ostra vs. Spain*, request 16798/90 [1994], para 51; *Guerra vs. Italy*, request 14967/89 [1998], para 58; *Osman vs. United Kingdom*, request 87/1997/871/1083 [1998], para 115 – 122; *Hatton vs. United Kingdom*, request 36022/97 [2003], para 116 et sqq.; *Di Sarno and others vs. Italy*, request 30765/08 [2012], para 108. Decision of the Swiss Federal Court (SFC): BGE 138 I 205, cons. 4 and 5, 210 et sqq.; 140 I 77, cons. 10, 89 et sq.

39 See Decision of the German Constitutional Court: BVerfGE 79, 174 [30-11-1988], 89.

40 See ECHR Decision *Paul and Audrey Edwards vs. United Kingdom*, request 46477/99 [2009], para 54 – 64; *İlbeyi Kemaloglu and Meryie Kemaloglu vs. Turkey*, request 19986/06 [2012], para 32 et sqq.; Decision of the SFC: BGE 126 I 112, cons. 4c, 119, and cons. 5c, 120 et sq; 133 I 110, cons. 7.1.1, 123 et sq.; 135 I 113 cons. 2.1, 117..

41 *Art. 10 para. 2 FC: Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement.*

42 ECHR *Reynolds vs. United Kingdom*, request 2694/08 [2012], para 60 et sqq.; *Bajic vs. Croatia*, request 41108/10 [2012], para 87 et sqq.; BGE 130 I 16, cons. 5.2, 20.

43 See SFC BGE 133 I 110, cons. 5.2.3, 120 et sq.; 118 Ia 427, Cons. 4b, 434; 104 Ia 480, cons. 4a, 485.; 99 I ia 747, cons. 2, 749. Decisions of the ECHR: *Banel vs. Lithuania*, request 14326/11 [2013], para 62 et sqq.; *Pereira Henriques vs. Luxembourg*; request 60255/00 [2006], para 54 et sqq.; *Vilnes and others vs. Norway*, requests 52806/09 and 22703/10 [2013], 233 et sqq. See more: Schweizer in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 41, Art. 10, at N.23 and 51 et sqq.

44 BGE 97 I 221 cons. 4d, 230.

45 BGE 132 I 256 E. 4.3, 263; 124 I 267, cons. 3, 269.

46 BGE 131 I 333, cons. 3 and 4, 337 et sqq.; SFC Decision in: ZBI 1987, 545 Cons. 2, 546.

47 *Art. 12 FC: Persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living.* See Lucien Müller, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed., (Zürich/St. Gallen: Dike Verlag und Schulthess Juristische Medien, 2014), Art. 12 at N. 13 et sqq.

48 For example against impairments of health resulting from exhaust fumes or excessive aircraft noise or against negligent homicide by public agencies. Grabenwarter/Pabel, *Europäische Menschenrechtskonvention*, supra note 41, § 19 at N. 3 et sqq., § 29 at N. 16 et sqq., § 22 N. 51 et sqq.

Swiss Federal Court⁴⁹ can be applied. This is notably important because it provides specific, partially preemptive legal duties for law enforcement. Cases of severe health damages or mortal diseases caused by air (e.g. waste gases as asbestos⁵⁰) or water pollution can serve as examples. Another example is the obligation of the security agencies to examine accidents properly, without prejudice. They have to determine and prosecute the legal responsibilities carefully.⁵¹ Those thoughts can be extended to CIP whenever fundamental human rights are at stake.

IV. Federalism and the Distribution of Competences and of Duties to Protect

1. General Distribution of Competences

According to the FC, the preservation, protection and enforcement of public security and order is a primary obligation of the federative States, the Cantons. It is also known as “police authority” of the Cantons. In daily practice, the Cantons are working closely together due to regional or nationwide contracts under public law.⁵² The Federation, however, is entitled to multiple special police powers, especially under criminal investigation law and in the cooperation with the member States of Schengen.⁵³ Also, the civil protection in a broader sense is a matter of the Cantons. They become active in many ways regarding local, regional and national disasters and emergencies, under the guidance of the Federation. They regulate the building and maintenance of protective structures (for example hospitals or shelters). In doing so, they appoint the police, the fire service, chemical and oil incident response teams, civil protection units, medical services (the so-called “koordinierter Sanitätsdienst”), technical services (for example for the power supply or information technology), specialists in coping with natural hazards (for example land or snow slides), or specialists in the protection of cultural assets and military units of territorial organisations.⁵⁴ The Federation has specific powers in civil protection in armed conflicts⁵⁵ and according to international and constitutional law powers in the protection of cultural assets in armed conflicts⁵⁶ and most recently powers in national disasters and states of emergency. Finally, it is up to the Cantons to grant assistance and protection of a decent life to the af-

ected people in cases of disaster and in states of emergency.⁵⁷ For all of these responsibilities it follows that the Cantons generally play a primary role in matters of security of CI.

It is important to recognise that in every Federal State other allocations of responsibilities between the central and member States are possible. In Austria for example, the Federation has all powers of legislation and execution in these matters.⁵⁸

2. Special Federal Duties to Protect

a. Disaster Control

For duties related to security policy and CI the Federal Constitution contains certain specific provisions that empower the Federation to legislate and allowing the use of Federal funds. In accordance with Article 61 paragraph 1 the FC determines that in general the non-military aid provided for civil protection in armed conflicts (in the narrow sense) should, in today’s view pursuant to Article 61 paragraph 2, primarily be used in cases of disaster and states of emergency, and subsidiarily to the use of the forces of civil protection of the Cantons.⁵⁹ The corresponding

49 BGE 135 I 113 cons. 2.1, at p. 117; 133 I 110 cons. 7.1.1., at p. 123 et sq.; 130 I 16, cons. 5.2, at p. 20; cf. Schweizer, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 41, Art. 35 at N. 13 et sqq.

50 See BGE 137 III 16 cons. 2.4.

51 Mohler, *Grundzüge des Polizeirechtes der Schweiz*, supra note 30, at N. 313 et sqq.

52 Schweizer/Mohler, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 15, Art. 57 at N. 15/6; Mohler, *Grundzüge des Polizeirechtes der Schweiz*, supra note 30, at N. 235 et sqq.

53 See Schweizer/Mohler, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 15, Art. 57, N. 17 et sqq.

54 Schmocker, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 18, Art. 61, at N. 34 et sqq.

55 Schmocker, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 18, Art. 61, at N. 12 and 41 et sqq.

56 Schmocker, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 18, Art. 61, at N. 14/5 and N. 23; Kerstin Odendahl, *Kulturgüterschutz, Entwicklung, Struktur und Dogmatik eines übergreifenden Normensystems*. Habil. (Tübingen: Mohr Siebeck Verlag 2004), at p. 375 et sqq., at p. 436 et sqq.

57 Generally the Canton where the people in need live, is responsible (cf. Art. 115 CF); but in case of catastrophes and emergencies the Canton of the place of happening is responsible for the first assistance.

58 Art. 10 of the Constitution of Austria, see supra 12.

59 Schmocker, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 18, Art. 61, at N. 16 – 21.

Federal Law⁶⁰ specifies the purpose of civil protection, namely in Article 2: “*The purpose of the civil protection system is to protect the population and its vital resources in the event of disasters, emergencies, or armed conflicts, and to contribute to bringing these events under control and limiting the damage they may cause.*”

Disasters are defined herein as natural or man-made damaging events and serious accidents, which cause so many damages and losses that the means of the concerned community are overstrained. Emergencies are defined herein as serious situations emerging out of social developments or technical incidences that cannot be overcome with the regular processes and with the available means.

b. Military Assistance in Extraordinary Cases

Beside the civil protection the Federation may subsidiarily use units of the army in the so-called assistant service in disaster relief in favour of the authorities of the Cantons, pursuant to Article 58 paragraph

2 phrase 2 FC⁶¹ and provided it was an extraordinary situation.⁶² For example, means of communication and transportation or the engineer corps may be particularly welcome for CIP.⁶³ The army may also carry out disaster relief abroad; in border areas humanitarian services by military personnel can even be declared mandatory.⁶⁴

c. Requirements for Technical Security

The Federation is empowered to legislate in particular for all technical sites and all installations for transport and energy.⁶⁵ This allows the regulation of numerous requirements for CI by Federal laws and decrees or as part of the federally concluded treaties (for example on civil aviation or on cross border rail traffic). This is a genuine task of the Federation. The Cantons have few competences regarding the choice of construction material, whereby they are limited through international and European law.

d. National Economic Supply

In addition, Article 102 FC⁶⁶ obligates the Federation to take economic precautionary measures, not only in the course of power-political or martial threats (like for example in the Ukraine), but also during manifold other serious states of shortages.⁶⁷ Such a highly developed protection of CI is not known by other countries. Therefore this is a speciality of the Swiss legal order. *The Federal Act on the National Economic Supply (NESA)*⁶⁸ legitimates the Federal Council (the Federal Government) to take different measures. In the event of an electricity shortage, the Federal Council can order precautionary measures, according to Article 23 NESA. It can also take extraordinary measures in the event of serious incidents resulting out of market disturbances, like regulation on the amount of production, the converting, the distribution and the consumption or the reduction of the consumption according to Article 26 NESA. Due to the general principle of social and economic subsidiarity, which is not explicitly mentioned in the FC, Article 26 of the NESA is applicable, if “the private sector is unable to counteract on its own”⁶⁹. In other words, the State has the duty to protect, if the capabilities of the economy are not sufficient. This reflects the liberal economic system of Switzerland, as stated in the Articles 27 and 94 FC.⁷⁰

60 Federal Law on population and civil defence of 04 October 2002 (SR 520.1).

61 See supra note 10.

62 Art. 67 para 1 lit. e and f Armed Forces Act of 3 February 1995 (SR 510.10). Meyer/Müller, *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 10, Art. 58, at N. 28 et sqq.

63 Federal Decree on Abroad Disaster Assistance (SR 974.03).

64 Art 69 para 3 Armed Forces Act of 3 February 1995, available on the internet at: <http://www.admin.ch/opc/en/classified-compilation/20070574/index.html> - fn2#fn2

65 See Art. 81 Public construction works, Art. 82 Road transport, Art. 83 National roads, Art. 87 Railways and other modes of transport, Art. 90 Nuclear energy, Art. 91 Transport of energy, Art. 92 Postal and telecommunication services.

66 Art. 102 FC National economic supply: ¹ *The Confederation shall ensure that the country is supplied with essential goods and services in the event of the threat of politico-military strife or war, or of severe shortages that the economy cannot by itself counteract. It shall take precautionary measures to address these matters.* ² *In exercising its powers under this Article, it may if necessary depart from the principle of economic freedom.*

67 Peter Hettich, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed., (Zürich/St. Gallen: Dike Verlag and Schulthess Juristische Medien, 2014), Art. 102, passim.

68 Federal Act on the National Economic Supply of 8 October 1982 (SR 531) underlies now a total revision; see the explanatory statement of the Federal Council concerning the total revision of the Federal Act on the National Economic Supply of 3 September 2014, (BBI 2014 7119) and the draft Act (BBI 2014 7185).

69 Art. 26 para. 1 NESA.

70 Draft Act of the Explanatory statement of the Federal Council concerning the total revision of the Federal Act on the National Economic Supply, supra note 72, at p. 15.

V. Legal Principles to be Respected when Protecting CI

Although the discretion of the State for CIP is broad, the State needs to respect certain principles (1.), even in extraordinary times, but it can also limit private rights (2.).

1. Legal Principles to be Respected

Concerning the State services in the averting of danger and in the mitigation of damages when disturbances from risky infrastructures happen, the equality before the law (Article 8 FC), the protection against arbitrary conduct (Article 9 FC), the right to assistance when in need (Article 12 FC) and the special goals of Article 41 FC concerning social objectives have to be respected.⁷¹ Further, Article 43a FC⁷² concerning principles for the allocation and fulfilment of State tasks demands an equal treatment in the State's basic services in paragraph 4. This applies, for example, to the water supply, the provision with staple food, fuel, power supply or IT-lines.⁷³ Affected citizens can therefore sue the Federation for the infringements of their actionable rights or even demand compensation. But there is no possibility for the Canton to sue the Federation.

All these principles can also be found in constitutions and legislation of other countries. Fundamental rights, as equal treatment and prohibition of arbitrary, are guaranteed in many constitutions.⁷⁴ Al-

so, a lot of countries know social rights, including rights to assistance when in need. Even in extraordinary circumstances, the State duties to protect are supported in the Constitution and the Cantonal Constitutions insofar as they provide special decision procedures to guarantee help and protection in urgent cases as well as extraordinary competences of the Federal and Cantonal Governments to take all possible measures to keep public safety. According to this principle, Article 185 paragraph 3 FC⁷⁵ authorises the Federal Council to take measures to safeguard *external and internal security*.⁷⁶ It goes without saying that the fundamental rights and human rights have to be respected nonetheless, with the exception of the case of an armed conflict or another public state of emergency.⁷⁷ This is also required by Article 15 ECHR and by Article 4 of the International Covenant on Civil and Political Rights (ICCPR).⁷⁸

2. Constraints of Private Rights in Cases of Disasters and Emergencies

a. Pre-emptive Legal Measures and Penalties

Due to the special constitutionally required duties to protect, the Federal and Cantonal legislator has provided various measures to enforce the damage prevention and the assistance in disasters, emergencies and states of shortage. The defence and overcoming of the results of disasters, states of shortage or emergencies and the support of the population in such sit-

71 Müller, in: *Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 51, Art. 12 at N. 1 et sqq; Margrith Bigler-Egger/Rainer J. Schweizer, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed. (Zurich/St. Gallen: Dike Verlag and Schulthess Juristische Medien, 2014), Art. 41 at N. 1 et sqq.

72 Art. 43a para. 4 FC: *Universally provided services must be made available to every person in a comparable manner.*

73 Schweizer/Müller, supra note 28, Art. 43a at N. 16 et sqq.

74 For example the principle of equality before the law is stated in Art. 3 of the German Constitution; Hufen, *Staatsrecht II*, supra note 41, at p. 693 sqq.

75 Art. 185 para. 3 FC: (...) ³ *It may in direct application of this Article issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration.*

76 Urs Saxer, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, third ed. (Zurich/St. Gallen: Dike Verlag and Schulthess Juristische Medien, 2014), Art. 185 at N. 58 et sqq.

77 See: *Article 15 ECHR Derogation in time of emergency: In time of war or other public emergency threatening the life of the*

nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law; Grabenwarter/Pabel, Europäische Menschenrechtskonvention, supra note 41, § 2 at N. 8 et sqq.

78 See Art. 4 ICCPR 1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

uations inevitably lead to constraints of rights of privates. The law on civil defence and the law on economic supply allow for special duties to tolerate. For example, in times of emergency the Federal Council has the power to requisite vessels or to construct machines, accommodations or emergency beds in order to guarantee the supply of essential goods and services. Unfortunately, there are often blanket regulations of these restrictions, but the principle of proportionality mentioned in Article 5 paragraph 2 FC is valid all the same.

With serious disturbances and damages of CI in mind, there is a need for pre-emptive legal measures, for example, requirements for private water use or penal provisions for crimes against infrastructure (see Article 221 and the following Swiss Criminal Code⁷⁹).

Special protective measures also concern the protection of considerable public goods (for example the traffic infrastructure) as well as the protection of the natural assets (such as inshore waters or alpine forestry), which belong to no legal entity.

b. Horizontal Duties to Protect between Privates

Especially in serious damage events, it appears that the Swiss Constitutional Order strongly ties the special duties to protect to horizontal duties between privates resulting out of fundamental rights (Article 35 paragraph 3 FC)⁸⁰. It is a controversy between many Swiss law scholars that there are no or just a few horizontal duties resulting from fundamental rights. The Constitution establishes the duty to provide medical assistance in emergencies (Article 10 paragraph 2 FC) not only for public, but also for private hospitals. The prohibition of degrading treatment (Article 10 para-

graph 3 FC) also prevails directly for private security services. Finally, the fundamental right to receive assistance when in need (Article 12 FC) has at least an indirect horizontal impact.

c. The Other Side of State Duties: Civic Services for Men and Women

It is crucial that Swiss law provides numerous civic duties, especially in the Cantons. A civic duty exists when a public task in the fields of security, health care, ecology, social affairs, education or politics cannot be fulfilled by the regular public agencies in a special event. For example, in the occurrences of large damage or in order to reinforce the staff of state emergency services, inhabitants of the endangered community in general, specialists or especially interested people are called in for service. Obviously, this can result in serious constrictions of fundamental rights, but it happens out of collective solidarity. In cases of disaster and states of emergency, these services are normally provided without compensation. However, it is not about the prohibition of slavery and forced labour under international law as stated in Article 4 paragraph 3 litera c and d ECHR.⁸¹

Increasingly and rightly so, gender equality and in particular – in a country with slightly more than 25% foreign resident population – the commitment of these parts of the population is demanded. An increasing number of Cantons obligate not only Swiss people, but also foreign residents to help in case of a disaster or emergency.⁸²

VI. Conclusion

Switzerland can serve as a benchmark for the development of State duties to protect, including CIP. The Federal Constitutional law of Switzerland contains both basic requirements to the Cantons and to the Federation for CIP. These requirements are grounded on the obligations to guarantee public safety and order as well as on specifications from a rich practice of Constitutional jurisprudence concerning specific fundamental and human rights based duties to protect.

For both types of requirements the legislators and the executive branches of the Federation and the Cantons provide a broad range of measures in order to respond appropriately depending on the situation

79 Swiss Criminal Code of 21 December 1937 (SR 311.0).

80 Patricia Egli, *Drittwirkung von Grundrechten*. (Zurich: Schulthess Juristische Medien, 2002) passim; Schweizer, in: *Die Schweizerische Bundesverfassung St. Galler Kommentar*, supra note 41, Art. 35 at N. 48 et sqq., especially in international law: *ibidem*: Art. 35 at N. 62.

81 (...) 3. For the purpose of this Article the term “forced or compulsory labour” shall not include: (...) (c) any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community; (d) any work or service which forms part of normal civic obligations. European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (CETS Nr. 005). Grabenwarter/Pabel, *Europäische Menschenrechtskonvention*, supra note 41, § 20 at N. 1 et sqq;

82 E.g. Canton Zug or Basel-Land.

and location of the threat. For example, rules applying in the cases of natural disasters or special states of shortages can largely be used as well in cases of threats or destruction of CI. Selective legal supplements may be reserved.

Principles regarding fundamental rights and similar rights in terms of service obligation towards damage prevention, assessment and removal are very important in most countries, but receive too little attention. This is even more so, since those duties are partially derived from international sources and the

ECHR and are thus equally applicable to other countries. The model of the Swiss duties to protect shows that it is important to have many State duties to protect regarding CI. Switzerland is well regulated for CI, because of the connection between general constitutional principles and special legal regulations (for example for emergency services). There is no need for further change in the legislation. Nevertheless, enforcement is often difficult. Therefore, it is essential to raise public awareness of this issue – not only on a national, but rather on an international level.