Implications of Soft Law Regimes for Small States: The Experience of Switzerland and Liechtenstein

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In recent years, numerous so-called soft law regimes have been established, often in combination with effective international oversight and rigorous review procedures. This contribution considers the specific impact such regimes may have on small and very small States. Relying primarily on the experiences of Switzerland and Liechtenstein with GRECO and the OECD respectively, it is argued that international standardisation might not always sufficiently take into consideration the sometimes peculiar historical, political and institutional characteristics of small States; also, there is some risk that small States are exposed to particular scrutiny. Sentiments of unfair treatment may in turn lead to an increasingly negative attitude towards soft law in general, as illustrated by the unexpected parliamentary opposition to the U.N. Migration Compact both in Liechtenstein and Switzerland.

Keywords: Small States – Soft Law – Sovereign Equality – GRECO – OECD – Migration Compact

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Introduction

The contributions in this issue of the Swiss Review revolve around the mutual relationship between small or very small States and international law: How are such States affected by the international normative order, and what role might they in turn play in it? In the absence of any superordinated enforcing authority, international law has not always been effective in preventing large and powerful States from pursuing their interests at the expense of smaller or less potent ones.[1] In the course of the 20th century, however, international law is supposed to have finally overcome the stigma of meekly endorsing the actions of the most assertive bully. The prohibition of the use of force has rightly been hailed as a historic milestone in this development,[2] and the doctrine of sovereign equality, enshrined in Art. 2(1) of the U.N. Charter, should ensure that even the smallest State is enjoying the rights deriving from full membership of the international community.[3]

Nevertheless, it remains a commonplace that scale and size are relevant for States – not only with regard to their domestic institutional set-up,[4] but even more so for their interactions with other States on the international plane.[5] The *implications* of size and scale will differ according to context and thus to different fields of international law. On the most fundamental level, the very existence of a State may be questioned due to its small size.[6] Small States may also face particular challenges in specific legal areas, such as trade law or human rights obligations.[7] Conversely, their mostly innocuous status may allow small States to play a disproportionally active role on the inter-

1 For a brief overview see e.g. Oliver Diggelmann, Völkerrecht: Geschichte und Grundlagen. Mit Seitenblicken auf die Schweiz, Baden 2018, 27 et sqq.

2 Oona A. Hathaway & Scott Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World, New York 2017, xv.

3 Art. 2(1) U.N. Charter does not merely restate the principle of State sovereignty and complement it with the concept of equality; instead, it gives «the idea of equality of States ... precedence over that of sovereignty», excluding «legal superiority of any one State over another ... .»: Bardo Fassbender, «Article 2(1)», in: Bruno Simma et al. (eds.), The Charter of the United Nations: A Commentary, vol. I, 3rd ed., Oxford 2012, para. 47.

4 On this aspect, see the contributions in Sebastian Wolf (ed.), State Size Matters: Politik und Recht im Kontext von Kleinstaatlichkeit und Monarchie, Wiesbaden 2016.

5 See e.g. Daniel Thürer, «Kleinstaat», in: Erhard Busek & Waldemar Hummer (eds.), Der Kleinstaat als Akteur in den internationalen Beziehungen, Schaan 2004, 363.

6 See in this issue Peter Bussjäger, «Liechtenstein in der Staatengemeinschaft», 30 Swiss Rev. Int'l & Eur. L. (2020), 129 et sqq.

7 See in this issue Patricia Schiess Rütimann, «Liechtenstein und die UNO-Frauenrechtskonvention CEDAW», 30 Swiss Rev. Int'l & Eur. L. (2020), 171 et sqq., and Charlotte Sieber-Gasser, «In engen Grenzen: Kleine Volkswirtschaften, der Handelskrieg und COVID-19», 30 Swiss Rev. Int'l & Eur. L. (2020), 205 et sqq.

national plane without raising too much suspicion.[8] Indeed, it would seem that small States set particularly great store by a functioning international legal order, based on the assumption that such an order provides some protection from arbitrary pressure or undue influence by larger powers.[9]

In a similar vein, this contribution asks whether State size might also be relevant when it comes to the *sources* of international law. Traditional and well-established sources such as international treaties and international customary law are increasingly complemented by so-called *soft law*. I would like to conjecture that, due to its specifics, soft law may affect small States differently. In what is, at this stage, a mere hypothesis and generalisation, I will outline certain aspects of soft law that seem less attuned to the historical, political, economic as well as the legal and institutional characteristics of smaller States.

As a preliminary step, I will briefly address both the classification of States as «small or very small» (I) and of law as «soft» (II). Subsequently, some features of soft law and their (possibly detrimental) implications for small States will be discussed (III). Procedurally, soft law most commonly emerges in the context of international organisations or fora. Institutionally, it may in turn lead to the establishment of new supervisory bodies and expert committees tasked with monitoring, if not enforcing newly formulated aims, standards or best practices. I posit that, *potentially,* such standard-setting affects small States disproportionally, at least in relation to the role they play in formulating the respective standards. The way in which these standards are monitored and (quasi-)enforced also raises questions or even concerns over democratic legitimacy. Such concerns are not exclusive to small States; but they would be particularly pressing if small States were proportionally more affected by soft law while being largely excluded from its elaboration.

These hypotheses require further empirical research, both with regard to the States concerned and the normative processes involved. At this stage, an inductive method with some preliminary examples has to suffice. In an admittedly highly eclectic approach, I first focus on Switzerland's (and, in passing, Liechtenstein's) expe-

8 For this role see e.g. Christian Wenaweser, «Herausforderungen und Chance des Kleinstaates», in: Erhard Busek & Waldemar Hummer (eds.), Der Kleinstaat als Akteur in den internationalen Beziehungen, Schaan 2004, 277–284, at 281 et sqq. Other examples are Switzerland's prominent role in codifying international humanitarian law, or the «good services» provided by Switzerland and other countries of similar size, such as Austria or Norway.

9 See in this issue Andreas Th. Müller, «Die Völkerrechtsfreundlichkeit der liechtensteinischen Rechtsordnung: Zwischen Offenheit und Selbstbehauptung», 30 Swiss Rev. Int'l & Eur. L., 147 et sqq. and for Switzerland e.g. Peter Saladin, «Kleinstaaten mit Zukunft?», in: Alois Riklin et al. (eds.), Kleinstaat und Menschenrechte, Basel 1993, 133–156, at 151; Daniel Thürer, «Kleinstaat», in: Arno Waschkuhn (ed.), Kleinstaat: Grundsätzliche und aktuelle Probleme, Vaduz 1993, 215–231, at 219; Helen Keller, Rezeption des Völkerrechts: Eine rechtsvergleichende Studie zur Praxis des U.S. Supreme Court, des Gerichtshofes der Europäischen Gemeinschaften und des schweizerischen Bundesgerichts in ausgewählten Bereichen, Berlin 2003, 341–344.

rience with the Group of States against Corruption (or GRECO, after its French acronym) (IV). As indicated by its denomination, GRECO was originally established, within the framework of the Council of Europe, with the aim of «improv[ing] the capacity of its members to fight corruption».[10] By now, however, GRECO's evaluation process is also addressing issues such as judicial selection in a detailed manner.[11] Second, I will (even more briefly) outline similar trends within the Organisation of Economic Co-operation and Development, or OECD (V). Finally, a possible nexus is suggested between the sometimes unexpected and often unwanted reverberations of soft law instruments and the recent controversy over the UN Migration Compact (VI).

These different aspects will be primarily looked at in the context of the experiences of Switzerland, traditionally considered a small State, and Liechtenstein, a very small State. In spite of this very limited sample, the inferences drawn are hopefully still indicative for possible answers to the underlying question: Is the increasing relevance of international soft law a development that might be more problematic to small States than to other States? Or to put it differently: If international law has made all States (at least nominally) equal – does soft law carry the risk of making, once again, some States more equal than others?

I. Small States

To assess possible answers to that question, the categories that it presupposes have to be addressed briefly. Over the past years, small and very small States have been the subject of substantial scholarly analysis in different disciplines.[12] Such analysis has been either thematically oriented – addressing for instance democracy in small States,[13] educational policies,[14] environmental protection,[15] or their economic devel-

10 Art. 1 GRECO Statute, Appendix to: Resolution (99) 5 Establishing the Group of States Against Corruption (GRECO), Committee of Ministers, 1 May 1999.

11 Infra, Section IV.

12 See e.g. the contributions in Romain Kirt & Arno Waschkuhn (eds.), Kleinstaaten-Kontinent Europa: Probleme und Perspektiven, Baden-Baden 2001, and Erhard Busek & Waldemar Hummer (eds.), Der Kleinstaat als Akteur in den internationalen Beziehungen, Schaan 2004. The topic now also has a dedicated journal (Small States & Territories Journal, based at the University of Malta, since 2018) and book series (The World of Small States, Springer, since 2017).

13 Jack Corbett & Wouter Veenendaal, Democracy in Small States, Oxford 2018.

14 Tavis D. Jules & Patrick Ressler, Re-reading Education Policy and Practice in Small States, Frankfurt 2017.

15 Geoffrey Palmer, «International Law, Small States and Environmental Issues», in: Geoffrey Palmer (ed.), Environment: The International Challenge, Wellington 1995, 175–189.

opment and competitiveness.[16] Alternatively, the situation in specific States has been studied.[17] The wide range of States that have thus been considered – including Norway, Iceland, Switzerland, Liechtenstein, San Marino and Andorra, but also Jamaica, New Zealand and several Pacific islands – indicates the vagueness of the small State concept. As a consequence, definitional questions figure prominently in the literature.[18] Most commonly, population size is used to distinguish small States and possibly very small or micro-States;[19] alternatively or cumulatively, territory and economic heft are also relied upon.[20]

The lack of any clear contours has led some authors to question the continuing relevance of the concept or category of small States.[21] Yet it has also been argued that providing an all-encompassing definition is unnecessary, even pointless, and that such definitional endeavours should be dismissed in favour of a problem-specific approach.[22] This approach is applied here as well. It seems particularly appropriate in a legal context, where neither small States nor very small States constitute recognised categories, nor even mere terms of art.[23]

Under international law, statehood is determined according to qualitative, not quantitative criteria. In theory, an entity is a State if it controls a territory (of unspecified extent), contains a population (again of undetermined size) and is headed by a sovereign government that is able to act on the international plane.[24] Once these criteria are met, the entity in question is a State. No matter how small, it enjoys formal equality with all other States.

We all know that in practice, this equality is of a qualified nature; it could be considered part of what has aptly been called the «myth system» of international

16 H. W. Armstrong & R. C. Read, «Comparing the Economic Performance of Dependent Territories and Sovereign Microstates», 48 Economic Development and Cultural Change (2000), 285–306; Martin Georg Kocher (ed.), Very Small Countries: Economic Success Against All Odds, Schaan 2002.

17 For a combination of a thematic approach with the in-depth analysis of a specific jurisdiction, see Sebastian Wolf, Peter Bussjäger & Patricia M. Schiess Rütimann, «Law, Small State Theory and the Case of Liechtenstein», 1 Small States & Territories J. (2018), 183–196.

18 E.g. Thürer, supra, n. 9, at 218; Sebastian Wolf, «Die Erforschung von Politik und Recht in Kleinstaat und Monarchie: Eine konzeptionelle Einführung», in: Wolf (ed.), supra, n. 4, 1–12, at 2–4; Baldur Thorhallsson, «Small States», 1 Small States & Territories Journal (2018), 17–34, at 18–19.

19 The suggested upper limits for the population of small States vary between 0.5m and 15m: Thorhallsson, supra, n. 18, at 18, with further references.

20 Thorhallsson, supra, n. 18, at 18 et seq., with further references.

21 See already Peter R. Baehr, «Small States», 27 World Politics (1975), 456–466, at 459–461, and, more nuanced, Daniel Thürer, «Dimensionen der Kleinstaatlichkeit», in: Mario Frick et al. (eds.), Ein Bürger im Dienst für Staat und Wirtschaft, Vaduz 2015, 135–145, at 138.

22 Saladin, supra, n. 9, at 136.

23 Thomas D. Grant, «Micro States», Max Planck Encyclopaedia of Public International Law (MPEPIL) (2013), para. 1.

24 Robert Y. Jennings & Arthur Watts, Oppenheim's International Law, Volume I: Peace, Parts 2–4, 9th ed., Oxford 1996, § 34.

law.[25] In various contexts, the acts of some States are legally more consequential than those of others: When considering the emergence of *ius cogens* norms, for instance, their recognition by the «essential components» of the international community is required;[26] similarly, the behaviour of powerful States may be more relevant for the formation of customary rules.[27] Some fissures in said myth were also exposed by discussions over membership or equal voting rights of (very) small States in universal international organisations.[28] A number of international organisations or institutions has indeed introduced weighted voting to reflect the different economic scale of their members.[29] Others, such as the Group of Seven (G-7) or the Group of Twenty (G-20), limit themselves on principle to economic and political heavyweights. The unsuccessful attempts of Switzerland to join the G-20[30] illustrate that even if a small State is punching well above its weight, it will not be allowed to compete in a higher division.

If, in the following, I refer to small or very small States, it is this inherent «smallness» that I allude to, and the vulnerability – political, economic, military – that it entails. Some small States may have disproportionally powerful economies, but their success also depends disproportionally on external trade and economic integration.[31] Accordingly, interruption of such trade and integration has particularly detrimental consequences, and the mere threat of it might be an effective means to coax small states into certain behaviour: In that sense, small State is as small State is *done to*. Yet small States are not merely defined by objective parameters such as population, terri-

25 W. Michael Reisman, The Quest for World Order and Human Dignity in the Twenty-first Century, Leiden 2012, 98.

26 International Law Commission, Report on the Work of its twenty-eighth Session: State Responsibility: Draft Articles, Art. 19, Commentary para. 61, in: Yearbook 1976, U.N. Doc. A/CN.4/SER.A/1976/Add.l, 1977, 119.

27 Tullio Treves, «Customary International Law», MPEPIL (2006), para. 36.

28 Cf. most notably the rejection of Liechtenstein's application to the League of Nation, Bussjäger, supra, n. 6, at 137. See also the proposal of Secretary-General U Thant to confer observer status instead of membership on micro States (Secretary-General, Introduction to the Annual Report on the Work of the Organisation, September 1968, U.N. Doc. A/7201/ADD.1(SUPP), para. 172), as well as later references to «the proliferation of micro-States» at the U.N.: International Law Commission: Summary records of the twenty-third Session: 1105th mtg, Relations between States and International Organisations, in: Yearbook 1971 U.N. Doc. A/CN.4/Ser.A/1971, 128.

29 Grant, supra, n. 23, para. 13.

30 Dominique Jordan, «Die G20 und die Schweiz», 10 Die Volkswirtschaft (2011), issue 84, 56–59, at 56.

31 Alberto Alesina & Enrico Spolaore, The Size of Nations, Cambridge, Mass. 2003, 82 et sqq.; Georges S. Baur, «Will New Developments in Global Economic and Financial Policy Erode International Law and the Soereignty of States?», in: Marcelo. G. Kohen (ed.), Promoting Justice, Human Rights and Conflict Resolution Through International Law: Liber Amicorum Lucius Caflisch, Leiden 2007, 1015–1036, at 1018–9, 1024,

tory, or GDP; they are equally shaped by their own perception of their relative position in international hierarchies:[32] Therefore, small State is also as small State *does*.

More importantly, small States often are the result of very specific historic developments. This applies to Switzerland and even more so to Liechtenstein, but also to other small and very small States. Several of these States survived the consolidation periods of (early) modern history due to some whim of fate.[33] One consequence of such historical quirks may be the survival of peculiar political or legal institutions that seem not only idiosyncratic, but anachronistic or even unacceptable in modern times. It would not come as a surprise if such remnants were to clash with guidelines or codes of practice that strive to establish harmonised and uniform rules and procedures: By their very nature, such standardisation efforts tend to result in what could be called a «monocultural» approach.

II. Soft Law

Are small States, as a consequence, affected – or «done to» – differently by soft law? Again, this requires a brief discussion of the concept of soft law, which is as vague and ambiguous as the category of small States. Even the origins of the term are not entirely clear, although it has been attributed to Lord McNair.[34] Definitions of soft law focus mostly on what it is *not*: It does not constitute binding norms, yet it is more than mere courtesy or non-committal promise.[35] In lieu of a positive definition, an enumeration of instruments that may constitute soft law is often provided, such as resolutions, recommendations, codes of practice and guidelines.[36] To complicate matters further, «legal soft law» is sometimes distinguished from «non-legal soft

32 Cf. Thürer, supra, n. 21, at 142.

33 For the continued existence of the Swiss Confederacy after the Napoleonic wars, see Andreas Kley, Verfassungsgeschichte der Neuzeit, 4th ed., Bern 2020, 225 et sqq. Even more illustrative is the survival of Liechtenstein simply due to the high regard of Napoleon for Prince Johann I. Josef of Liechtenstein (Herbert Haupt, «Liechtenstein, Johann I. Josef von», Historisches Lexikon des Fürstentums Liechtenstein online (HLFL) (2011), < https://historisches-lexikon.li/Liechtenstein,_Johann_I._Josef_von>).

34 René Jean Dupuy, «Declaratory Law and Programmatory Law», in: Robert J. Akkerman & Bert V. A. Röling (eds.), Declarations on Principles, Leiden 1977, 247–258, at 252. *Contra* Jean d'Aspremont, «Softness in International Law: A Self-Serving Quest for New Legal Materials», 19 Eur. J. Int'l L (2008), 1075–1093, at 1081.— At the very least, Lord McNair pointed out the «widely differing functions and legal character of the instruments which it is customary to comprise under the term ‹treaty›»: Arnold Duncan McNair, «The Functions and Differing Legal Character of Treaties», 11 British Y.B. Int'l L. (1930), 100–118, at 100.

35 E.g. Daniel Thürer, «Soft Law», MPEPIL (2009), para. 1–2.

36 Malcolm Shaw, International Law, 8th ed., Cambridge 2018, 88, with further references.

law».[37] Its numerous guises and the corresponding vagueness has solicited sharp, even scathing criticism of the concept.[38]

From a traditional, that is positivist, perspective, the notion of an amalgam of «vague legal norms», «precise non-legal norms», and «less precise non-legal norms», containing both non-enforceable subjective and enforceable objective elements,[39] does indeed seem paradoxical. From that perspective, the defining quality of a legal norm is its binding prescriptive nature, and the sanction that its violation entails.[40] There is no room for «half rights and obligations»; while they may seem «so natural in common life», they would, in the words of David Hume, be «perfect absurdities» before a court.[41] Other classic, if slightly more recent, definitions of law also stress its compulsory nature.[42] In this vein, sanctions or enforceability are such a central element of a legal order that their absence, or even questions over their effectiveness, may deprive a normative order of its legal nature.[43]

Accordingly, the traditional dogmatic approach, as mirrored by the declaratory list in Art. 38(1) ICJ-Statute, does not rank the sources of international law according to differing obligatory qualities.[44] Treaties, customary law and general principles are equally binding, with the subsidiary means of judicial decisions and academic writings serving to specify, not qualify their content. Yet it has long been acknowledged that this enumeration is not exhaustive: Unilateral acts, for instance, may also create legal obligations.[45] But whether the list of sources is complete or not, the emanating law is clearly binding and thus distinct from mere comity or morality. Such a clear distinction has been held indispensable «since it enables rules of law to be identified and distinguished from other rules (in particular from rules *de lege ferenda*) and

37 Tadeusz Gruchalla-Wesierski, «A Framework for Understanding Soft Law», 30 McGill L. J. (1984), 37–88, at 40; C. M. Chinkin, «The Challenge of Soft Law: Development and Change in International Law», 38 Int'l & Comp. L. Q. (1989), 850–866, at 851. Even more elaborate distinctions between hard-hard, hard-soft, soft-hard and soft-soft law have also been suggested: Arnold N. Pronto, «Understanding the Hard/Soft Distinction in International Law», 48 Vand. J. Transnat'l L. (2015), 941–956, at 950–955.

38 See Prosper Weil, «Vers une normativité relative en droit international?», 86 Revue Génerale de Droit international Public (1982), 6–47, Jan Klabbers, «The Redundancy of Soft Law», 65 Nordic J. Int'l L. (1996), 167–182, László Blutman, «In the Trap of a Legal Metaphor: International Soft Law», 59 Int'l & Comp. L. Q. (2010), 605–624, and esp. d'Aspremont, supra, n. 34, criticising support for soft law as «an endeavour by scholars to broaden the international law discipline beyond its original ambit with a view to expanding the potential objects that they can seize and study» (at 1076).

39 Gruchalla-Wesierski, supra, n. 37, at 40, 44.

40 Cf. the formulation by John Austin, The Province of Jurisprudence Determined, vol. I, London 1832, 2, 5 & 7.

41 David Hume, A Treatise of Human Nature, Oxford 2014 (orig. publ. 1739), bk. III, part II, sect. vi.

42 Hans Kelsen, Reine Rechtslehre, 2nd ed., Vienna 1960, 34.

43 It was for this very reason that international law has long struggled to fully qualify as law Cf. Austin, supra, n. 40, at 144.

44 Rüdiger Wolfrum, «Sources of International Law», MPEPIL (2011), para. 7–11.

45 Shaw, supra, n. 36, at 90 et seq.

concerns the way in which the legal force of new rules of conduct is established and in which existing rules are changed.»[46]

Yet in spite of the many (and well-founded) objections to the very concept of soft law, the existence, and proliferation, of a broad range of normative instruments *between* sources of international law «properly so called» and mere international «positive morality»[47] is a fact – and perhaps unavoidably so in a legal order that is itself characterised by pervasive vagueness.[48] As a consequence, there are numerous examples of proto- or quasi-law, of behaviour or values that are considered desirable or necessary, of «politically binding texts» that constitute «a sort of residual category with regard to the one of legally binding texts».[49]

The reasons for relying on such hybrid instruments are as manifold as their appearances and denominations.[50] One pertinent reason is that consensus for «hard law» remains elusive, because the matter under consideration is too complex, too consequential, or too controversial. In such situations, a non-committal or less-than-binding declaration, possibly complemented with a programme of action, might offer a compromise acceptable to all parties involved.[51] The impact of such instruments varies significantly; in the past, some endeavours to overcome disagreement through resolutions have remained largely inconsequential, particularly on a global scale.[52] In specific contexts, however, soft law instruments may have provided important leverage;[53] also, the combination with a convention will add to the relevance of such an instrument.[54]

46 Jennings & Watts, supra, n. 24, § 8.

47 Cf. Austin, supra, n. 40, at 1, 4.

48 Cf. Oliver Diggelmann, «Anmerkungen zu den Unschärfen des völkerrechtlichen Rechtsbegriffs», 26 Swiss Rev. Int'l & Eur. L. (2016), 381–390.

49 Robert Kolb, «To What Extent May Hard Law Content Be Incorporated Into Soft Instruments?», 29 Swiss Rev. Int'l & Eur. L. (2019), 344–355, 337.

50 For discussion of soft law instruments in different legal fields see e.g. John J. Kirton & Michael J. Trebilcock (eds.), Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance, Aldershot 2004; Cecilia M. Bailliet, Non-state Actors, Soft Law and Protective Regimes from the Margins, Cambridge 2012; Jürgen Friedrich, International Environmental «Soft Law»: The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law, Heidelberg 2013.

51 Cf. e.g. United Nations Conference on Environment & Development, Agenda 21, Rio de Janeiro, 3–14 June 1992, U.N. Doc. A/CONF.157/24 (Part I); Durban Declaration and Programme of Action, 8 September 2001, U.N. Doc. A/CONF.189/12.

52 Cf. e.g. U.N. General Assembly, Declaration on the Establishment of a New International Economic Order, 1 May 1974, A/Res/3201(S-VI) and U.N. General Assembly, Programme of Action on the Establishment of a New International Economic Order, 1 May 1974, A/Res/3202(S-VI).

53 For such leverage, the Final Act of the Conference for Security and Co-operation in Europe, 1 August 1975, 14 I.L.M. 1292 is usually adduced, although its assessment has significantly changed over time: Michael Wood & Daniel Purisch, «Helsinki Final Act (1975)», MPEPIL (2011), para. 23–24.

54 Cf. United Nations Conference on Environment & Development, Agenda 21, supra, n. 51, and the concurrent conclusion of the United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107.

Most importantly, follow-up procedures and institutional consolidation and perpetuation may ensure that both the scope and the effectiveness of a non-binding outcome document may increase over time.[55] The line between enforcement and monitoring is not always clearly drawn, and if vigorously monitored, the «violation» of soft-law instruments may be more consequential than breaches of «hard» law: In the absence of dedicated supervisory bodies, the latter may have to be dealt with under generic and sometimes cumbersome rules of State responsibility; they remain, so to say, an issue primarily for international lawyers to deal with. By contrast, a legally non-binding, but regular, rigorous and public assessment process may prove significantly more potent, particularly if it spills over from the purely technical into the political arena. In that sense, soft law becomes the inverse of a *lex imperfecta*:[56] Instead of an ineffective formal law, it is an informal prescript that may be effectively enforced.

III. Downsides of Soft Law? The Challenge of (Democratic) Legitimacy

A. Procedural Aspects of Creating Soft Law

It may well be true that the «dyad» of hard and soft law is an inapt description of what is actually a continuum of increasing normative authority and control.[57] But from a procedural point of view, such a continuum nevertheless has to be sequenced according to the relevant actors and the prescribed level of legislative or democratic participation. Domestic law usually contains provisions attributing the different competences involved in concluding international agreements – in itself a complex task, given the wide range of such agreements.[58] It also prescribes to what extent the conclusion of international agreements requires democratic legitimacy, conferred *ex ante* or *ex post* through approval by the legislative or the electorate.[59]

55 Such as the establishment of the U.N. Office of the High Commissioner for Human Rights by the World Conference on Human Rights Conference in Vienna (A/CONF.157/24 (Part I), II.A, para. 18), Mere working groups or review conferences, on the other hand, may not have much impact, cf. e.g. Report of the Durban Review Conference, Geneva, 20–24 April 2009, A/CONF.211/8.

56 Cf. Reisman, supra, n. 25, at 97.

57 See ibid., at 155.

58 For Switzerland, see e.g. Art. 166 & Art 184 Bundesverfassung der Schweizerischen Eidgenossenschaft, 18. April 1999, SR 101, and Art. 7a, Art. 7b & 48a Regierungs- und Verwaltungsorganisationsgesetz, 21 March 1997, SR 172.010. For the related legislatorial challenges see e.g. Oliver Diggelmann, «Verletzt die ‹Standardabkommen-Praxis› der Bundesversammlung die Bundesverfassung?», 115 Schweizerisches Zentralblatt (ZBl) (2014), 291–322; Helen Keller & Yannick Weber, «Die Zuständigkeit zur Kündigung völkerrechtlicher Verträge: Zugleich ein Beitrag zur Lehre der richtigen Regelungsstufe», 121 ZBl (2020), 119–146.

59 See e.g. the contributions in Andreas Th. Müller & Werner Schroeder (eds.), Demokratische Kontrolle völkerrechtlicher Verträge: Perspektiven aus Österreich und der Schweiz, Baden-Baden 2018.

Direct-democratic participation in establishing international or supra-national obligations carries risk;[60] in particular, it adds a significant element of unpredictability that policy-makers would much rather avoid. In the context of European unification for instance, such unpredictability, combined with institutional insufficiencies and flaws, has led to increasing scepticism over referenda or plebiscites.[61] The sheer size of the Union is one reason put forward in this context.[62] *Inverting* that argument, small commonwealths should be more suitable for popular participation in concluding international agreements. The potential benefit of such smallness is, after all, the participation of the citizenry on a large scale.[63] In Switzerland, continuous efforts have been made to offer voters as much say on entering international obligations as on the adoption of domestic laws.[64] For similar reasons, an optional referendum for international treaties was introduced in Liechtenstein in 1992.[65]

Yet since soft law instruments usually do not fall within the categories that are covered by electoral (or even legislative) approval, they eschew democratic control. This lack of democratic legitimacy is not a mere oversight or minor blemish: It may be exacerbated and amplified by the combination of specific characteristics of soft law.

Since it requires not the same level of consensus as hard law, soft law is more easily «concluded».[66] At the same time, the very lack of consensus for binding rules may lead to over-compensation in terms of content. Strictly *legal* obligations and the concreteness and specificity they usually entail result in a minimalist approach. The often aspirational character of political declarations and agreements, on the other hand, may induce the formulation of much more ambitious aims. If these aims are then effectively monitored by a supervisory body conducting reviews and assessments, or

60 For an overview of early objections to popular participation in the Swiss context see Lorenz Langer, «Staatsvertragsreferendum und Bilaterale Verträge», in: Andreas Glaser & Lorenz Langer (eds.), Die Verfassungsdynamik der europäischen Integration und demokratische Partizipation, Zürich 2015, 21–52, at 28–31.

61 For discussion, see Francis Cheneval, «Europäische Unionsbürgerschaft, EU-Vertragsreform und Direkte Demokratie», in: Otfried Jarren et al. (eds.), Entgrenzte Demokratie?, Baden-Baden 2007, 309–330, at 316–319.

62 Christoph Degenhart, «Direkte Demokratie in der europäischen Rechtsetzung?», in: Klaus Hofmann & Kolja Naumann (eds.), Europäische Demokratie in guter Verfassung?, Baden-Baden, 2010, 108–122, at 120.

63 See already Jacob Burckhardt, Weltgeschichtliche Betrachtungen, Stuttgart 1949 (orig. publ. 1905), 34: «*Der Kleinstaat ist vorhanden, damit ein Fleck auf der Welt sei, wo die grösstmögliche Quote der Staatsangehörigen Bürger in vollem Sinn sind, …*».

64 For a critical assessment, see Lorenz Langer, «Die Demokratie an der Ampel: Paternalismus, Populismus und Placebo-Knöpfe», Jusletter, 10 February 2020, <https://jusletter.weblaw.ch/juslissues/2020/1010/die-demokratie-an-de_03cd5c1a31.html>.

65 Peter Bussjäger, Art. 66bis, in: Liechtenstein-Institut (ed.), Kommentar zur liechtensteinischen Verfassung, Online-Kommentar, 21 February 2017, <https://verfassung.li/Art._66bis>, para. 2.

66 For soft law as a «non-consensual phenomenon», see Olufemi Elias & Chin Lim, «‹General Principles of Law›, ‹Soft› Law and the Identification of International Law», 28 Netherlands Y.B. Int'l L. (1997), 3–49, at 5.

issuing compliance reports, the distinction between soft and hard law may increasingly fade – as if the original decision not to enter into a legally binding agreement was overcome by some sort of *consensus superveniens*.

At the same time, such supervisory bodies may also tend to broaden the scope of their remit. As in any institution, there is bound to be some mission creep: Once a mechanism is set up, it is unlikely to be dismantled, even if it has fulfilled its original task. As a possible consequence, novel matters may come under its purview that were, originally, not meant to be regulated at all. And yet it is difficult to stop such normative overreach. Monitoring compliance with soft law is a less clear-cut task than adjudicating the violation of hard law. While States are found either in breach of a binding norm or not, compliance is a matter of degree – not necessarily a «pass» or «fail», but more like the erstwhile entry on report cards for «general conduct». It is also a *relative* matter, usually factoring in the performance of other States under the same regime. The «softness» of the respective precepts makes it harder, if not impossible, to halt this process of continuous expansion. As its denomination suggests, soft law is malleable, flexible, even phlegmatic or viscuous, and therefore difficult to contain or push back.

These qualities are not easily reconcilable with effective democratic control, either at the outset or at a later stage.[67] Nor are institutionalised supervisory and monitoring processes through expert groups particularly conducive to an approach that attributes primary importance to *democratic* approval. Technical bodies and groups of experts may dismiss popular resistance to international or regional standardisation as efforts to defend entrenched interests, or even, to put it more provocatively, as the stubborn refusal of the unenlightened to see the light. Thus, experts may acknowledge that a specific national setting enjoys «considerable public confidence», but that argument subsequently carries little weight.[68] Any incompatibility between democratic decisions and demanded result is for the national authority to solve – much like in the case of a conflict with a treaty obligation.[69]

B. Specific Problems of Soft Law for Small States

Smaller States with strongly developed democratic participation could be more affected by the sometimes strained relationship between (direct) democratic control and the obligation ensuing from soft law instruments. It may also be hypothesised that such instruments will be overwhelmingly oriented towards median practices: Towards the standards prevailing in larger States and in a majority of member States.

67 Cf. infra, n. 163 on the repeated votes in Switzerland on tax reform.

68 Cf. GRECO, Evaluation Report Switzerland, Fourth Evaluation Round, Council of Europe Strasbourg, 15 March 2017, GrecoEval4Rep(2016)5, para. 1, and infra, text accompanying n. 122 and 163.

69 Cf. Art. 27 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 332.

Yet as pointed out, small States are more likely to deviate from such a median[70] – for historical reasons, mostly, but possibly also in order to take advantage of economic opportunities and regulatory loopholes. So soft law could imply a disadvantage for small States on two levels: First, during the drafting process, which may take little heed of their idiosyncrasies, and second, when, by duly measuring everything by the same yardstick, the difference in scale might once more been underappreciated.

Soft law therefore carries the risk of neglecting the requirement of *relative* equality: That different situations must be treated differently. Yet there is also the perhaps more serious danger that *absolute* equality may be abandoned in a soft law context. Of course, «hard» international law is far from always being applied and enforced equally.[71] Yet one could argue that for soft law, a large margin of appreciation is inherent – not only a side effect, but a core element. It is conceivable that such discretion provides an opening for larger States to influence the focus of a soft law regime and the agenda of its supervision mechanisms.

IV. GRECO and the Comprehensive Fight Against Corruption

A. Institutional and Normative Developments

One example of soft law norms being continuously and persistently monitored is provided by the GRECO evaluation process. It will be discussed here in some detail, since it illustrates particularly well the gradual development of soft law, its linkages to hard law, the establishment of a supervisory apparatus, and the expansion of issues addressed.

As briefly set out above, this process is normatively and institutionally embedded within the Council of Europe (CoE). In the 1990s, the Council added the fight against corruption to its aims, mirroring increased international and regional efforts to fight corruption in the wake of the end of the Cold War.[72] In 1994, it was decided to set up a Multidisciplinary Group on Corruption, tasked with the preparation of a comprehensive programme of action against corruption, and with examining the possibility of drafting legal instruments; its mandate also referred expressly to the importance of elaborating an effective follow-up mechanism.[73] The programme of action was adopted in 1996 by the Committee of Ministers,[74] followed in 1997 by the

70 Supra, n. 33.

71 See e.g. on the sometimes uneven enforcement of international criminal law Lee J.M. Seymour, «The ICC and Africa», in: Kamari M. Clarke et al. (eds.), Africa and the ICC, Cambridge 2016, 107–126.

72 Kenneth W. Abbott, «Corruption, Fight against», MPEPIL (2009), para. 5.

73 Council of Europe, Resolution No 1 on Civil, Administrative and Criminal Law Aspects of Corruption, 19th Conference of European Ministers of Justice La Valetta, 15 June 1994.

74 Multidisciplinary Group on Corruption, Programme of Action Against Corruption, GMC (96) 95, Council of Europe, 21 November 1996.

adoption of Resolution (97) 24, setting out the «Twenty Guiding Principles for the Fight Against Corruption».[75] These principles were of a «soft» nature, with the Committee «inviting» member States to provide, inter alia, effective or appropriate preventive measures against corruption, to set up and strengthen specialised institutions, to encourage research, and «to develop to the widest extent possible international co-operation in all areas of the fight against corruption».[76]

Yet clearly, these principles were meant as a first step only, since the Multidisciplinary Group on Corruption was instructed «rapidly to complete the elaboration of international legal instruments»; concurrently, the Group was to «submit without delay a draft text proposing the establishment of an appropriate and efficient mechanism, under the auspices of the Council of Europe, for monitoring observance of these Principles and the implementation of the international legal instruments to be adopted».[77]

To that end, the Committee of Ministers subsequently authorised the «Partial and Enlarged Agreement Establishing the ‹Group of States Against Corruption – GRECO›»,[78] which was set up with 17 founding members in 1999.[79] The Group's aim is «to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field.».[80] Accordingly, GRECO would monitor the observance of the Guiding Principles as well as the «implementation of international legal instruments to be adopted in pursuance of the Programme of Action against Corruption».[81] Such legal instruments followed swiftly, addressing both the civil and criminal legal implications of corruption.[82] The respective conventions aim to further a coherent legislative approach to combatting corruption, and to ensure co-operation among member States.

75 Committee of Ministers, Resolution (97) 24: On the Twenty Guiding Principles for the Fight Against Corruption, 6 November 1997.

76 Committee of Ministers, supra, n. 75, *passim*. On the legal nature of CoE resolutions, see Jörg Polakiewicz, «Council of Europe», MPEPIL (2019), para. 11–13.

77 Committee of Ministers, supra, n. 75, operative clauses 2 & 3.

78 Committee of Ministers, Resolution (98) 7, Authorising the Partial and Enlarged Agreement Establishing the «Group of States Against Corruption – GRECO», 5 May 1998.

79 Committee of Ministers, Resolution (99) 5: Establishing the Group of States Against Corruption (GRECO), 1 May 1999. Such an agreement does not constitute an international treaty; it is based on secondary law of the CoE; CoE member States therefore do not have to formally accede, but can merely notify the General-Secretary accordingly: Waldemar Hummer & Juli Villotti, «Korruptionsbekämpfung auf internationaler und nationaler Ebene», 59 Jb. des öff. Rechts (2011), 339–387, at 359.

80 Art. 1 GRECO Statute. A definition of corruption, however, is not provided in the Statute.

81 Art. 2(ii) GRECO Statute.

82 Criminal Law Convention on Corruption, 27 January 1999, E.T.S. 173 and Additional Protocol to the Criminal Law Convention on Corruption, 15 May 2003, E.T.S. 191; Civil Law Convention on Corruption, 4 November 1999, E.T.S. 174.

Although not an international organisation, GRECO's structure mirrors the typical tripartite structure with a members' assembly, a bureau, and a secretariat.[83] Its main monitoring tool are periodical evaluations, initiated by a questionnaire addressed to the respective member State.[84] The answers are examined by GRECO evaluation teams (or «GETs»).[85] These teams are made up of experts which are «identified» by member States;[86] they conduct country visits and submit a draft report with recommendations, which will then be discussed and adopted by the plenary.[87] The obligations of additional reporting in case of non-compliance have been continuously increased.[88]

GRECO member States are evaluated in successive rounds. The first such round, starting in 1999, exclusively addressed some of the Guiding Principles, since no convention had been adopted by that time.[89] Starting with the second evaluation round, compliance with both Guiding Principles and conventional provisions was assessed, yet without distinction between their potentially differing legal nature.[90] For the third round, the provisions under evaluation were no longer listed separately; instead, two themes were set out in two corresponding questionnaires: incrimination[91] and transparency of party funding.[92] For the latter topic, the evaluation was to be based on the CoE's «Recommendation on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns» adopted in 2003 and to be monitored by GRECO.[93]

With the start of the fourth evaluation round in 2012, any reference to specific legal provisions enacted by the CoE was abandoned. For the topic of «corruption prevention in respect of Members of Parliament, Judges and Prosecutors», an extensive list of «reference texts» is provided, ranging from resolutions to recommenda-

83 Art. 9 & 19 GRECO Statute.

84 Art. 11 GRECO Statute.

85 GRECO, Guidelines for GRECO Evaluation Teams (GETs), GrecoEval5(2018)5-fin, 7 December 2018.

86 Art. 10(4) GRECO Statute. Most commonly, experts are seconded from national administrations, but also hail from academia or civil society.

87 Art. 13–15 GRECO Statute.

88 Cf. Rule 31 & Rule 31 rev. GRECO Rules of Procedure, Greco (2012) 26E, 19 October 2012; Rule 31 rev. *bis* GRECO, Rules of Procedure, Greco(2017)13, 23 June 2017.

89 GRECO, First Evaluation Round: Provisions Under Evaluation, Council of Europe, Strasbourg, 3 December 1999.

90 GRECO, Second Evaluation Round, Council of Europe: Provisions Under Evaluation – Evaluation Procedure, Council of Europe, Strasbourg 2002.

91 GRECO, Third Evaluation Round: Questionnaire on the Incriminations Provided for in the Criminal Law Convention on Corruption (ETS 173), its Additional Protocol (ETS 191) and Guiding Principle 2(GPC 2), Greco Eval III (2006) 1E Rev2, Council of Europe, Strasbourg, 1 June 2007.

92 GRECO, Third Evaluation Round: Questionnaire on Transparency of Party Funding, Greco Eval III (2006) 2E, Council of Europe, Strasbourg, 18 October 2006.

93 Committee of Ministers, Recommendation Rec(2003)4 on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns, Council of Europe, Strasbourg, 8 April 2003.

tions, opinions, reports, guidelines and handbooks not only from the CoE and its various organs or committees, but also from the United Nations, the OECD, and even NGOs such as Transparency International.[94] In the introduction to the corresponding expansive questionnaire, GRECO admitted to «breaking new ground» by «choosing corruption prevention in respect of members of parliament, judges and prosecutors»; yet it insisted on the «multidisciplinary nature of its remit» and pointed out that the «theme ha[d] clear links with [it]'s previous work».[95] Members States not only have to report on the legal regulation of relevant conduct, but also on, *inter alia*, ethical principles, rules of conduct, training and awareness.[96] With the fifth evaluation round, launched in 2017, this approach is maintained and even extended, since the aim is now not only to prevent corruption in central governments and law enforcement agencies, but also to «promote integrity».[97] Thus, GRECO is now assessing matters that go beyond the immediate threat of corruption as a practice; instead, corruption is seen as an institutional threat, hence necessitating an appraisal of the institutional set-up of States.

B. Institutional Incompatibilities? Evaluation Experiences in Switzerland and Liechtenstein

It would require an extensive *qualitative* analysis of all GRECO reports to establish how this continuous expansion of scope has affected the different member States, and whether it has had a disproportional impact on small and very small States.[98] It might be a coincidence that the last CoE member States to join GRECO were Monaco, Liechtenstein and San Marino; Switzerland also joined relatively late, in 2006.[99] A brief perusal of the reports on Switzerland and Liechtenstein, however, already provides some noteworthy insights.

94 GRECO, Reference Texts: Fourth Evaluation Round, Council of Europe, 2012, available at <https://www.coe.int/en/web/greco/round4/reference-texts>.

95 GRECO, Fourth Evaluation Round: Revised Questionnaire on Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors, Greco (2012) 22E, Council of Europe, Strasbourg, 19 October 2012, 2.

96 GRECO, Fourth Evaluation Round, supra, n. 95 sections 2, 7, 12, 17, 27.

97 GRECO, Fifth Evaluation Round: Questionnaire – Preventing Corruption and Promoting Integrity in Central Governments (Top Executive Functions) and Law Enforcement Agencies, Greco(2016)19rev, Council of Europe, Strasbourg, 11 December 2017. For «reference texts», see GRECO, Reference Texts: Fifth Round, Council of Europe, 2017, available at: <https://www.coe.int/en/web/greco/round5/reference-texts>.

98 From a quantitative point of view, several member States have had to submit a series of interim reports, with no significant deviation between smaller and larger States, cf. the list of reports available at <https://www.coe.int/en/web/greco/evaluations>.

99 Monaco joined in 2007, Liechtenstein and San Marino in 2010. The non-CoE member States Belorussia and Kazakhstan joined in 2011 and 2020: <https://www.coe.int/en/web/greco/structure/member-and-observers>.

For Switzerland as a late-comer, the first two evaluation rounds were combined. Of the 13 recommendations made by GRECO, Switzerland implemented twelve satisfactorily, with only one recommendation «partly implemented».[100] This respectable performance might have been spurred by reputational concerns; but it may also be connected to the fairly clearly delineated criteria of a technical and legal nature (albeit both soft and hard) that the first two evaluation rounds were concerned with.[101] In the *third round*, this technical purview applied to Theme I (incriminations) as well; of the five related recommendations, Switzerland eventually implemented three satisfactorily and two partly.[102] Yet the harmonious relationship came to a fairly abrupt end when Theme II (transparency of party funding) was considered. *None* of the six recommendations made was considered even partly implemented.[103] In a meeting requested by the Swiss Federal Council, the Swiss government made clear that it considered the matter of party funding not a primarily legal or technical problem, but an institutional and political issue that was relevant to several pillars of the Swiss commonwealth. First, direct democracy with its numerous players meant that regulating *political parties only* would be ineffective, while regulating *all actors* would be overly cumbersome. Second, in a federalist system such matters were better left to the cantons (some of which had autonomously decided to adopt minimum transparency rules). And third, as a reflection of the «great importance ... attached to private responsibility», the Swiss political system had traditionally spurned publicly financed parties in favour of a militia system supported by private donations.[104] As a consequence, no changes to existing legislation were made. Predictably, five GRECO follow-up reports all came to the same conclusion: None of the pertinent recommendations had so far been implemented.[105]

100 GRECO, Evaluation Report on Switzerland: Joint First and Second Evaluation Rounds, Greco Eval I-II Rep (2007) 1E, Council of Europe, Strasbourg, 4 April 2008, 42–43; GRECO, Compliance Report on Switzerland: Joint First and Second Evaluation Rounds, Greco RC-I/II (2009) 2E, Council of Europe, Strasbourg, 26 March 2010; GRECO, Addendum to the Compliance Report on Switzerland: Joint First and Second Evaluation Rounds, Greco RC-I/II (2009) 2EAddendum, Council of Europe, Strasbourg, 23 March 2012.

101 Supra, n. 89 and 90.

102 GRECO, Evaluation Report on Switzerland on Incriminations (ETS 173 and 191, GPC 2) (Theme I): Third Evaluation Round, Greco Eval III Rep (2011) 4E Theme I, Council of Europe, Strasbourg, 21 October 2011; GRECO, Compliance Report on Switzerland: Incriminations (ETS 173 and 191, GPC 2) – Transparency of Party Funding: Third Evaluation Round, Greco RC-III (2013) 17E, Council of Europe, Strasbourg, 21 November 2013, para. 8–30.

103 GRECO, Compliance Report, supra, n. 102, para. 40.

104 GRECO, Compliance Report, supra, n. 102, para. 35.

105 GRECO, Interim Compliance Report on Switzerland: Third Evaluation Report, Greco RC-III (2014) 14E, Council of Europe, Strasbourg, 20 June 2014, para. 27; GRECO, Second Interim Compliance Report on Switzerland: Third Evaluation Round, Greco RC-III (2015) 6E Second Interim report, Council of Europe Strasbourg: 19 June 2015, para. 21; GRECO, Third Interim Compliance Report on Switzerland: Third Evaluation Round, GrecoRC3(2016)8, Council of Europe Strasbourg: 1 July 2016, para. 24; GRECO, Fourth Interim Compliance Report on Switzerland: Third Evaluation Round,

To be clear: The justifications put forward by the Swiss Government may refer to the *myth* of a political system as much as to actual practice.[106] The Swiss system of party financing has been exposed to «autochthonous» criticism as well,[107] which in turn increasingly relies on the international normative standards invoked by GRECO.[108] Also, political efforts are made in Switzerland to reform party financing as well; in two cantons, transparency legislation was adopted, and a federal ballot initiative was launched in 2016.[109] The symbiotic relationship between these efforts and the pressure exercised by GRECO is noteworthy: Those launching the ballot initiatives relied, *inter alia*, on GRECO's reports for justification; in its fifth report, GRECO pointed in turn to the cantonal ballot initiative as evidence that «even in the particular political context of Switzerland», it was possible to find ways to meet demands for greater transparency «and to put an end to the Swiss exception in this area»: GRECO «invited» Parliament «to bear this in mind when adopting a position on the federal popular initiative».[110]

And Parliament did indeed heed GRECO's admonition. The Federal Council had recommended the rejection of the federal ballot initiative without any direct or indirect counter-proposal, thus insisting on the *status quo*.[111] A parliamentary commission, on the other hand, put forward an indirect (i.e. statutory) counter-proposal.[112] It was adopted by a clear majority in the Council of States[113] and will now be discussed in the National Council.

GrecoRC3(2017)10, Council of Europe Strasbourg: 23 June 2017, para. 19; GRECO, Fifth Interim Compliance Report on Switzerland: Third Evaluation Round, GrecoRC3(2018)7, Council of Europe Strasbourg: 22 June 2018, para. 24.

106 On the importance of myths in the Swiss political and constitutional set-up see Lorenz Langer, «Panacea or Pathetic Fallacy? The Swiss Ban on Minarets», 43 Vand. J. Transnat'l L. (2010), 863–951, at 916–923.

107 Martina Caroni, Geld und Politik: Die Finanzierung politischer Kampagnen im Spannungsfeld von Verfassung, Demokratie und politischem Willen, Bern 2009, 405 et sqq.; Patricia M. Schiess Rütimann, Politische Parteien: Privatrechtliche Vereinigungen zwischen öffentlichem Recht und Privatrecht, Bern 2011, 352–356.

108 Andrea Töndury, «Gekaufte Politik? Die Offenlegung der Politikfinanzierung als Erfordernis politischer Chancengleichheit», 119 ZBl (2018), 563–579. – Comments that tried to be mindful of the peculiarities of the Swiss system have, on the other hand, been scarce, see e.g. Corsin Bisaz & Uwe Serdült, «Offenheit des Politsystems dämmt Korruption ein», Neue Zürcher Zeitung, 31 May 2013, S. 21.

109 Eidgenössische Volksinitiative «Für mehr Transparenz in der Politikfinanzierung (Transparenz-Initiative)», successfully submitted in October 2017 (BBl 2017 6893).

110 GRECO, Fifth Interim Compliance Report on Switzerland, supra, n. 105, at para. 27.

111 The arguments put forward by the Government referred, once more, to «the peculiarities and the complexity of the Swiss political system, namely direct democracy, collegiate governments, and the militia system»: Schweizerischer Bundesrat, Botschaft zur Volksinitiative «Für mehr Transparenz in der Politikfinanzierung (Transparenz-Initiative)», BBl 2018 5623 5625, 29 August 2018.

112 Staatspolitische Kommission, Parlamentarische Initiative Mehr Transparenz in der Politikfinanzierung, BBl 2019 7875. 24 October 2019.

113 AB [Official Bulletin] 2019 V 1173.

Cantonal legislation, federal ballot initiative and parliamentary counter-proposal combined led to a more benevolent assessment by GRECO in its sixth report, which found Swiss compliance no longer to be «globally unsatisfactory».[114] The ensuing *discontinuation* of no-compliance proceedings was fairly prominently covered by Swiss media, even in the tabloid press.[115] Yet this relief is temporary and may be reversed if the pending proposals are not adopted.[116]

If the Swiss system of party financing is eventually brought into line with European standards, it may well proof beneficial to Swiss politics, ending backroom deals, undue influence of powerful interest groups, and hence skewed-agenda setting. On the other hand, it might accelerate the professionalisation of politics and generate the career politicians common, but not necessarily coveted in other CoE member States and beyond. Whatever the outcome, it will be difficult to quantify the role played by constant GRECO peer pressure.[117] The Group's sanctions in case of non-compliance are, at first sight, not particularly onerous[118] – but the proverbial constant dripping may still wear the stone.

It is also apparent that peculiar and unique[119] national institutions do not fare well in a setting that aims to establish common and uniform standards and procedures. Traditions practiced in a small state may have a more difficult stand against more widespread practices that are perceived as *de rigueur* and exclusively correct internationally. Swiss party financing may be so different from the State-centred party financing systems of other States as to be simply incomprehensible. This exclusive focus on prevailing standards at the expense of historical variances is also evident in the approach of GETs: In my (limited) experience, experts primarily benchmark the institutions they examine against what they are familiar with from their home juris-

114 GRECO, Sixth Interim Compliance Report on Switzerland: Transparency of Party Funding, GrecoRC3(2018)7, Council of Europe, Strasbourg, 21 June 2019, para. 51.

115 «Korruption: Greco beendet das Nichtkonformitätsverfahren gegen die Schweiz», Blick Online, 17 September 2019, <https://www.blick.ch/news/korruption-greco-beendet-das-nichtkonformitaetsverfahren-gegen-die-schweiz-id15520054.html>.

116 As pointed out by the parliamentary commission in the report on the pending counter-proposal: Staatspolitische Kommission, Parlamentarische Initiative «Mehr Transparenz in der Politikfinanzierung»: Bericht, BBl 2019 7875, 7881.

117 Cf. supra, n. 80.

118 Non-complying members have to submit regular reports, and their failings are reported first by GRECO to the Statutory Committee, then by the Statutory Committee to the respective member's permanent representative and eventually by the CoE Secretary-General to the foreign minister. High-level missions and public statements may also ensue (Rules 32 & 33 GRECO Rules of Procedure).

119 GRECO, Second Interim Compliance Report on Switzerland, supra, n. 105, at para. 20: «... Switzerland is therefore the only GRECO member State in which there is currently no legislation on the transparency of political funding.»

dictions;[120] significant differences are easily considered aberrations, with little curiosity shown about their genesis or possible benefits.

The more recent GRECO reports thus illustrate what I have termed a monocultural approach, which shines through in the fourth evaluation round as well, addressing corruption prevention in respect of members of parliament, judges and prosecutors.[121] At the very outset of its initial evaluation report, GRECO observes that Switzerland's institutions «differ in many respects from traditional democracies in the manner in which they function.»[122] Here, «traditional democracy» obviously does not refer to the temporal aspect. Democracy in Switzerland is not as old as the Swiss myth system suggests,[123] but it still outdates most other CoE member States by a considerable time span. Instead, «traditional» here means typical, i.e. the *currently* prevailing phenotype of democracy, from which Switzerland apparently diverges.

It does so in particular with regard to judicial selection.[124] The selection of judges in Switzerland, with a strong element of democratic legitimacy, widespread re-election requirements as well as unwritten rules of political representation and party membership, is indeed an outlier not only in the European judicial landscape.[125] GRECO acknowledges that «the political history and tradition of Swiss democracy ... explain this system of election of judges», yet it also insists that it would be «more compatible with the demands of a modern democratic society» to formalise judicial recruitment.[126]

The Swiss *Sonderweg* with regard to judicial elections has indeed deep historical roots;[127] at the same time, there are valid arguments why the current system might need reforming.[128] But does that necessitate an assessment of the Swiss judiciary under the auspices of the fight against corruption? The levy, for instance, that elected

120 This may apply to expert views more generally. See, in a different institutional setting and context, European Commission for Democracy Through Law (Venice Commission), Observations sur les amendements constitutionnels prooposés par la masion princière du Liechtenstein, CDL (2002) 151 Strasbourg, 4 December 2002, *passim*. Here, the criticism of a far-reaching power-shift from elected authorities to a monarchic ruler is certainly justified; yet the relevance of the constantly referred-to Belgian constitution to the situation in Liechtenstein might be less obvious. For monarchies, constitutional transplants have in general not been very successful.

121 Supra, n. 94.

122 GRECO, Evaluation Report Switzerland, supra, n. 68, para. 1.

123 Cf. supra, n. 106.

124 GRECO, Evaluation Report Switzerland, supra, n. 68, para. 83 et sqq.

125 For a general overview, see the contributions in Peter H. Russell & Kate Malleson (eds.), Appointing Judges in an Age of Judicial Power: Principle, Process, and Politics, Toronto 2006; Michal Bobek (eds.), Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts, Oxford 2015.

126 GRECO, Evaluation Report Switzerland, supra, n. 68, para. 99.

127 Lorenz Langer, «Voraussetzungen für das Richteramt», 15 Richterzeitung (2019), Rz. 25.

128 E.g. Martin Kayser, «Der Elefant im Gerichtssaal», 120 ZBl (2019), 589–590.

judges have to pay to their party, faces criticism in Switzerland as well;[129] yet it does not easily square with traditional notions of corruption.[130]

More importantly, when acceding to the Criminal Law Convention on Corruption and thus, concurrently, joining GRECO, Swiss decision-makers hardly foresaw this kind of persistent interest in several important aspects of the country's constitutional and political set-up. The Government, when presenting the accession bill to Parliament, asserted that the Swiss *lex lata* was up to, if not above the standard set by the relevant CoE instruments.[131] It narrowly described GRECO's task as «evaluating the measures taken by member States to combat corruption, *in particular the implementation of European conventions to combat corruption*».[132] Governments may have tendency to underestimate the normative obligations they are accepting, and even more so the subsequent development of such obligations: Switzerland has gained considerable pertinent experience with the European Convention on Human Rights (ECHR).[133] In the case of the ECHR, however, the continuous expansion in scope is effectuated by a judicial body, the European Court on Human Rights, which *must* apply the Convention to cases that are brought before it. With GRECO, on the other hand, the bases for evaluations have now been extended far beyond the original cast,[134] and the selection for each evaluation is made *ex ante* by government representatives.

The problem, I would therefore argue, is not a matter of substance, but of procedure. This is mirrored in Liechtenstein's experience with GRECO. When the principality decided to join GRECO as an «interim solution» prior to the ratification of the Criminal Law Convention on Corruption, it was mainly concerned with the reputation of Liechtenstein as an off-shore banking centre.[135] It presumably did not

129 Criticism by serving judges is particularly vociferous, see e.g. MARTIN BURGER, «Richterwahl, Parteienproporz und Parteisteuern», 121 ZBl (2020), 57–58.

130 Since office holders do not receive moneys but instead have to contribute a share of their income – a practice yet again linked to the traditional way of party financing.—As with party financing, the external pressure combined with internal criticism and a federal ballot initiative might eventually lead to a change in judicial selections, see e.g. ANDREAS GLASER, «Die Justiz-Initiative: Besetzung des Bundesgerichts im Losverfahren?», 28 Aktuelle Juristische Praxis (2019), 1251–1260.

131 Schweizerischer Bundesrat, Botschaft über die Genehmigung und die Umsetzung des Strafrechts-Übereinkommens und des Zusatzprotokoll des Europarates über Korruption (Änderung des Strafgesetzbuches und des Bundesgesetzes gegen den unlauteren Wettbewerb), 10 November 2004, BBl 2004 6983, 6993.

132 Schweizerischer Bundesrat, supra, n. 131, at 6990 (emphasis added).

133 Cf. the similarly over-optimistic assessment prior to ECHR accession: Schweizerischer Bundesrat, Bericht an die Bundesversammlung über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten, 9 December 1968, BBl 1968 II 1057, 1076: «*Unsere Verfassung garantiert demnach sämtliche Freiheitsrechte, die eines Tages aktuell werden könnten.*»

134 Supra, n. 94.

135 Cf. Regierung des Fürstentums Liechtenstein, Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Strafgesetzbuches, der Strafprozessordnung sowie weiterer damit zusammenhängender Gesetze (Abschöpfung der Bereicherung, Verfall, Einziehung, Geldwäscherei, Bestechung), Berichte und Anträge 2000/56, 2, 11.

expect that from the outset, some central tenets of its constitutional order would be questioned, such as the prerogatives of the prince or the selection process of judges.[136] Again: There may be numerous – and weighty – reasons to question whether a monarchic system is compatible with rule of law expectations in the 21st century, particularly if that monarchy has not only proceeded slowly, but occasionally even backtracked on the way to (substantial) constitutionalism.[137] Nevertheless, it could be argued that the particularly conspicuous difference of this historically contingent setting from the institutional median, combined with the smallness of the State concerned, facilitates criticism and peer pressure.

V. Financial Regulations: OECD, G-7 and G-20

Perhaps further research will indeed show that within GRECO, small States might suffer from an over-emphasis on absolute equality: With the aim of establishing a uniform understanding of the rule of law, no room is left for variation or divergence. The following section will raise the question whether in the context of soft law regulating financial flows, small States could run the exact opposite risk: that absolute equality is not always maintained and that large and powerful States might continue certain practices while preventing small States from doing so. Again, posing this question neither insinuates that such inequality is the intended goal rather than a side effect; nor do I suggest that the special attention attracted by some small States with regard to financial regulations was unwarranted.

Probably the most important institution in this context is the OECD.[138] With its historical roots in the reconstruction efforts after the Second World War, the OECD was founded to contribute to the development of the world economy, to sound economic expansion, and to the expansion of world trade in accordance with international obligations.[139] Today, its work «covers almost all areas of government with only a few exceptions such as defence, culture, and sport.»[140] Its membership has steadily increased to currently 37 States.[141] Yet the Organisation does not limit its

136 GRECO, Evaluation Report on Liechtenstein: Joint First and Second Evaluation Rounds, Greco Eval I/II Rep (2011) 1E, Council of Europe, Strasbourg, 21 October 2011, para. 49 et seq.

137 Cf. e.g. Gerard Batliner, «Der konditionierte Verfassungsstaat», in: Herbert Wille & Gerard Batliner (eds.), Verfassungsgerichtsbarkeit im Fürstentum, Vaduz 2001, 109–137, at 132 et sqq., and for the controversies over constitutional reforms in the early 2000s Christoph Maria Merki, Liechtensteins Verfassung, 1992–2003: Ein Quellen- und Lesebuch, Zurich 2015.

138 For an overview, see the contributions in Matthieu Leimbgruber & Matthias Schmelzer (eds.), The OECD and the International Political Economy Since 1948, Cham 2017.

139 Art. 1 Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, 888 U.N.T.S. 179.

140 Nicola Bonucci & Gita Kothari, «Organization for Economic Cooperation and Development (OECD)», MPEPIL (2013), para. 3.

141 With Colombia joining on 28 April 2020: <http://www.oecd.org/about/>.

purview to members, since it aims «to contribute to sound economic expansion in Member as well as *non-member countries* in the process of economic development».[142] According to its statute, the OECD does not primarily aim to draft binding instruments; instead, its members «promote» efficient use and responsible development of economic resources and «pursue» policies designed to achieve economic growth as well as the free flow of goods and capital.[143] Members agree to facilitate these aims through information sharing, consultations, studies, co-operation and «where appropriate ... co-ordinated action.»[144] To the same end, the Organisation itself may take decisions that are «binding on all the members», make recommendations to members, and «enter into agreements with Members, non-member States and international organisations».[145]

The OECD is known for its «innovative approach to standard-setting».[146] The broad range, but also the multi-layered and varying nature of what it terms «OECD Legal Instruments» is indeed noteworthy. International agreements negotiated under its auspices constitute binding obligations, as do decisions adopted by the Organisation.[147] Less clear is the «solemn character» of declarations setting long-term goals, or of recommendations «which are not legally binding» but are accorded «great moral force as representing the political will of Adherents», which are expected to «do their utmost to fully implement a Recommendation». These instruments may even be combined into «decision-recommendations», consisting of a legally binding decision, and morally binding recommendation.[148]

The remarkable influence of such instruments is best illustrated by the OECD model tax convention. When first seized with the matter in the early 1960s, the OECD member States came to the conclusion that a binding multilateral tax convention was not feasible.[149] Instead, through a succession of Recommendations, the use of a continuously evolving model tax convention was urged.[150] This approach was highly successful, establishing a common standard for OECD members and even

142 Art. 1(b) OECD Convention (emphasis added). For the extension to non-member States, see e.g. Baur, supra, n. 31, at 1030 et seq.

143 Art. 2 OECD Convention.

144 Art. 3 OECD Convention.

145 Art. 5 OECD Convention.

146 Bonucci & Kothari, supra, n. 140, at para. 45

147 See for an overview Directorate for Legal Affairs, OECD Legal Instruments, OECD 2018, <http://www.oecd.org/legal/legal-instruments.htm>.

148 Directorate for Legal Affairs, supra, n. 147; see also Bonucci & Kothari, supra, n. 140, at para. 35.

149 OECD, Model Tax Convention on Income and on Capital 2014 (Full Version) Vol. I, Paris 2015, Introduction, para. 37.

150 OECD, Recommendation of the Council concerning the Avoidance of Double Taxation, OECD/LEGAL/0056 30 July 1963; OECD, Recommendations of the Council concerning the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, OECD/LEGAL/0151, 11 May 1977; OECD, Recommendation of the Council Concerning the Model Tax Convention on Income and on Capital, OECD/LEGAL/0267, 23 July 1992. The current version, which is updated regularly, has been

non-members. Through wide-spread use, a combination with other, binding instruments,[151] and the endorsement in particular by the G-20, the Model Tax Convention turned into *de facto* law for instance with regard to the exchange of information.[152]

An effective implementation process played a pivotal part in this development. The Global Forum on Transparency and Exchange of Information for Tax Purposes, established in 2000, first focused on tax havens, exercising pressure through the publication of a black list that also included Liechtenstein.[153] The pressure resulted in a speedy revision of legislation and better implementation in the principality.[154] The Global Forum has now morphed into a system of rigorous peer reviews. Yet such review is not limited to its members, but extends to «jurisdictions identified by the Global From as relevant to its work» in order to ensure a «level playing field». [155]

This is a remarkable development: A mixture of soft law and binding agreements may be applied to (usually small) States without their consent. I should stress once more that just as with the fight against corruption, it is not the *aims* thus pursued that should give us pause: Preventing the use of tax havens, particularly by corrupt regimes to hide their ill-gotten gains, is certainly an issue that should be addressed by the international community. No State is a law unto itself, and no one suggests a return to the paradigm that «the rules of law binding upon States ... emanate exclusively from their own free will.»[156] Extrinsic «restrictions upon the independence of States»[157] are no longer taboo. Yet the end does not always justify the means. The fact that through sometimes opaque procedures and a sequence of decisions by a small group of big States, smaller States can be coaxed into certain forms of behaviour may offer advantages in the short term.[158] In the long term, however, it may set an unfortunate precedent.

adopted in 1997: OECD, Recommendation of the Council Concerning the Model Tax Convention on Income and on Capital, OECD/LEGAL/0292, 23 October 1997.

151 Such as the Convention on Mutual Administrative Assistance in Tax Matters, 25 January 1988, E.T.S. 127, which was a joint endeavour of both the CoE and OECD.

152 Bonucci & Kothari, supra, n. 140, at para. 55.

153 Baur, supra, n. 31, at 1027 et seq. For an overview of the combined efforts of the OECD, the G-7 and the Financial Action Task Force on Money Laundering established by the latter see Ronen Palan, Richrad Murphy & Christian Chavagneux, Tax Havens: How Globalization Really Works, New York 2010, 203 et sqq.

154 Hanspeter Lissy, «Finanzplatzkrise», HLFL (2011); Christoph Maria Merki, «Finanzdienstleistungen», HLFL (2011). For a detailed account, see David Beattie, Liechtenstein: A Modern History, 2nd ed., Triesen 2012, 379 et sqq.

155 Global Forum on Transparency and Exchange of Information for Tax Purposes, Tax Transparency, OECD 2018, 22 n. 9.

156 *Case of the S.S. «Lotus»,* PCIJ ser. A no. 10 (1927), 18.

157 Ibid.

158 It may be true that «OECD members and adhering non-members take their commitments just as seriously as if they were legally binding» (Bonucci & Kothari, supra, n. 140, at para. 65); yet whether «countries *voluntarily* submit themselves to critical reviews of their implementation of OECD standards» is another question (ibid., emphasis added). On the lack of transparency and uneven application, see also Baur, supra, n. 31, at 1032 et seq.

The legitimacy of self-defined and exclusive groups such as the G-20 has been questioned with some justification.[159] This legitimacy is even less sustainable if the rules thus set are not applied evenly. Already in the fight against money laundering, off-shore centres with links to powerful allies where treated more leniently.[160] When in 2009 the G-20 adopted grey and black lists of tax havens, they did not include any member of the G-20 itself, although in several member States some of the denounced tax practices were common.[161] Empirical work has shown that on average, international standards on corporate transparency are less consistently complied with in OECD countries than in some tax havens, and that the United States (and particularly U.S. states such as Delaware) are among the least compliant.[162] This tinge of «do as I say» does not increase legitimacy, particularly if the addressee had little or no say in the formulation of the rules to be followed.

Nor does such an enforcement of «hardened» soft law leave much room for democratic participation or approval. On the contrary, if a national electorate does get to vote on the implementation of a new regime thus created, a negative vote may be dismissed as the obstinate resistance by vested interests.[163] That may well be the case, but discerning «correct» democratic decisions from misguided ones is challenging. Government communication also mirrors this shift in the allocation of authority: In terms reminiscent once again of school rather than international law, «earning good grades» by an international monitoring body is prominently reported.[164]

159 Martin Zobl, Daniel Thürer & Kern Alexander, «Die Legitimation der G-20: Kritik aus völkerrechtlicher Sicht», 51 Archiv des Völkerrechts (2013), 143–169.

160 Palan et al., supra, n. 153, at 207.

161 «Haven hypocrisy: G20 and Tax», Economist, 26 March 2009.

162 Michael G. Findley, Daniel L. Nielson & J.C. Sharman, «Using Field Experiments in International Relations: A Randomized Study of Anonymous Incorporation », 67 International Organization (2013), 657–693, at 677. See also «Tax Havens: The Missing $20 Trillion», Economist, 16 February 2013, and «Financial Transparency: The Biggest Loophole of All», Economist, 20 February 2016. More recently however, some first steps towards changes in larger jurisdictions are being undertaken: «The War on Money-launderers' Vehicle of Choice Intensifies», Economist, 29 June 2019.

163 Cf. supra, n. 68. –An illustrative example is provided by two federal votes in Switzerland on tax reform, which were necessary to implement soft law requirements by the OECD, the G-20 and the EU. In 2017, the respective proposals were rejected by a clear majority (Unternehmenssteuerreformgesetz III, 12 December 2017, BBl 2017 3387); after combining the issue with added funds for social security, the bill passed in 2019 (Bundesgesetz über die Steuerreform und die AHV-Finanzierung (STAF), 19 May 2019, BBl 2019 4985).

164 Cf. e.g. Eidgenössisches Finanzdepartement, «Global Forum: gute Note für die Schweiz (Medienmitteilung)», 6 April 2020, <https://www.efd.admin.ch/efd/de/home/dokumentation/nsb-news_list.msg-id-78708.html>.

VI. (Over-)Ambitious Soft Law and the Opposition to the U.N. Migration Compact

As emphasised at the outset, the extent to which such developments affect small States in particular needs to be assessed in more depth. The same applies to the possible implications for the future attitudes towards soft law instruments – in general, but also in small States. In the absence of a thorough analysis, some circumstantial evidence might suggest that soft law instruments are now considered with more caution, and with some reservation. A case in point might be the opposition against the U.N. Global Compact for Safe, Orderly and Regular Migration.[165] Again, the following brief outline focusses on Liechtenstein and Switzerland.

The Government of Liechtenstein had supported the elaboration of the Pact and intended to adopt it.[166] Approval by the legislative was neither necessary nor planned; only after mounting pressure did the government schedule a hearing and publish an explanatory report.[167] In its report, the Government insisted that the Migration Compact was neither a binding instrument, nor did it create any new obligations: The commitments of the Compact did not amount to «hard, international legal obligations», but referred to the «political will of States to work towards the realization» of the stated goals.[168] The government also insisted that Liechtenstein already fulfilled most stipulations anyway and would enter reservations to the few that it did not. Nor would there be any follow-up mechanism – merely a global forum to «discuss and rate progress» in implementing the Compact.[169]

Yet during the subsequent discussion in the *Landtag*, these assurances were met with scepticism clearly echoing earlier negative experiences with soft law. Representatives were wary of Liechtenstein being once more pilloried and blacklisted.[170] Previous discord with GRECO, OECD and G20 was recalled;[171] the suitability of such ambitious undertakings for small States was questioned;[172] and there was a wide-

165 Global Compact for Safe, Orderly and Regular Migration, adopted on 11 December 2018 in Marrakech, U.N. Doc. A/CONF.231/3 (Annex).

166 Daniela Fritz, «Hoher Besuch aus den Vereinten Nationen ehrt Liechtenstein», Volksblatt, 25. August 2018, at 5.

167 «Migrationspakt: Regierung prüft Vorlage an Landtag», Volksblatt, 5. November 2018, at 5; Regierung des Fürstentums Liechtenstein, Bericht zu Traktandum 16 der Landtagssitzung vom 5./6./7. Dezember 2018, 27 November 2018.

168 Regierung des Fürstentums Liechtenstein, Bericht, supra, n. 167, at 12. — Incidentally, the Migration Compact *does* contain legal obligations, although they are established elsewhere and therefore stated only in a declaratory manner: Kolb, supra, n. 49, 336.

169 Regierung des Fürstentums Liechtenstein, Bericht, supra, n. 167, at 17. Cf. para. 48–54 Global Compact.

170 Landtag, Information und Diskussion betreffend den UN-Migrationspakt, Protokoll über die öffentliche Landtagssitzung vom 5./6. Dezember, 5 December 2018, 2716 (Alexander Batliner).

171 Landtag, supra, n. 170, at 2768 (Christoph Wenaweser).

172 Landtag, supra, n. 170, at 2781 (Eugen Nägele).

spread conviction that soft law was bound to harden,[173] just as informal monitoring would turn into supervision and enforcement.[174] In addition, the circumvention of democratically legitimised law-making procedures through soft law was censured.[175] As a consequence, when the Migration Compact was adopted by an Intergovernmental Conference in Marrakesh, Liechtenstein was represented only on the departmental level, and mainly to reassert the non-binding character of the Compact.[176] It also abstained when the U.N. General Assembly endorsed the Compact in a recorded vote.[177]

In Switzerland, which had supported and even facilitated the drafting of the Compact, the Government had already agreed on its adoption; the ministry of foreign affairs was mandated, with hindsight, to «consult with the respective parliamentary commissions about the Government's decision».[178] These commissions, however, submitted motions that called for parliamentary approval prior to the adoption of the Compact.[179] Insisting on its exclusive competence in the matter, the Government opposed the proposal; nevertheless, in anticipation of the parliamentary debate it decided not to send a delegation to Marrakesh.[180] After both motions passed,[181] the Government abstained from the vote in the General Assembly;[182] it also agreed to a parliamentary vote by the end of 2019 on whether to sign the Compact.[183]

173 Landtag, supra, n. 170, at 2757 (Herbert Elkuch), 2761 (Alexander Batliner), 2764 (Gunilla Marxer-Kranz), 2783 (Manfred Kaufmann), 2787 (Günter Vogt), 2795 (Thomas Rehak).

174 Landtag, supra, n. 170, at 2769 (Christoph Wenaweser), 2779 (Violanda Lanter), 2782 (Eugen Nägele), 2794 (Wendelin Lampert).

175 Landtag, supra, n. 170, at 2713 (Violanda Lanter), 2762 (Alexander Batliner), 2767 (Christoph Wenaweser), 2786 (Günter Vogt), 2790 (Jürgen Beck)

176 Daniela Fritz, «Liechtenstein pochte darauf, dass Pakt rechtlich nicht verbindlich ist», Volksblatt, 13 December 2018, at 1.

177 U.N. General Assembly, Global Compact for Safe, Orderly and Regular Migration, 19 December 2018, U.N. Doc. A/Res/73/195; U.N. General Assembly, Procès-verbal, 73rd sess., 60th plen. mtg., 19 December 2018, U.N. Doc. A/73/PV.60, 15.

178 Schweizerischer Bundesrat, «Bundesrat beschliesst Zustimmung zum UNO-Migrationspakt (Medienmitteilungen)», Bern, 10 October 2018.

179 Staatspolitische Kommission (Nationalrat), Motion: Uno-Migrationspakt – Zustimmungsentscheid der Bundesversammlung unterbreiten, Curia Vista 18.4093, 19 October 2018; Staatspolitische Kommission (Ständerat), Motion: Uno-Migrationspakt – Zustimmungsentscheid der Bundesversammlung unterbreiten, Curia Vista18.4103, 8 November 2018.

180 Schweizerischer Bundesrat, «Der Bundesrat wartet den Ausgang der parlamentarischen Debatte ab, bevor er sich endgültig zum Globalen Migrationspakt äussert (Medienmitteilungen)» Bern, 21 November 2018.

181 For the debates, see Ständerat, Motionen Uno-Migrationspakt, 29 November 2018, AB 2018 877 et sqq., Nationalrat, Motionen Uno-Migrationspakt, 3 December 2018, AB 2018 N 1924 et sqq., 6 December 2018, AB 2018 N 2013 et sqq., 11 December 2018, AB 2018 N 2100 et sqq.

182 Schweizerischer Bundesrat, Bericht über die Aktivitäten der schweizerischen Migrationsaussenpolitik 2018, 29 May 2019, BBl 2019 4333, 4351; U.N. General Assembly, Procès-verbal, supra, n. 177, 15.

183 Schweizerischer Bundesrat, «Der Bundesrat wird den Migrationspakt dem Parlament unterbreiten (Medienmitteilung)», Bern, 14 December 2018.

This vote has been postponed; the Government now intends to first present an explanatory report on the Compact in 2020.[184]

Migration in general is a particularly contentious and politicised subject for regulation. In numerous countries, opposition against the Compact was whipped up with populist scaremongering and doomsday scenarios of open borders.[185] But in the discussions in Switzerland and Liechtenstein, the Compact's uncertain *legal* implications were discussed at least as prominently, revealing increasing scepticism towards soft law instruments. Clearly, negative previous experiences with some similar commitments has led to distrust and resentment; the Migration Compact merely offered an opportunity to vent these sentiments. In both countries, outspoken executive support for the Compact was tempered or even thwarted by determined opposition in parts of the legislative.

For some time, the exclusive executive competence to join soft-law regimes, combined with the subsequent expansion of such regimes without democratic control, had raised concerns in Switzerland.[186] The Migration Compact renewed and accentuated these concerns: The Government was mandated to report on the «role of so-called soft law in international relations», on the raise of global networks, and on the «resulting creeping enfeeblement of the democratic rights of parliaments to participate in such questions in a timely manner *before* a legislative process is initiated that has not been authorised».[187]

In the resulting report, the Government argued that the continuous and consensual development of the international order through soft law was in the interest of States such as Switzerland; the alternative would be pure power politics, giving strong States an advantage over weaker States.[188] Yet somewhat contradictorily, the report noted that the drafting process of soft law «may be exposed to the interests of major powers to a larger extent than the formalised process of concluding a treaty.»[189] The Government did acknowledge that national decision-making processes are less effec-

184 Schweizerische Bundeskanzlei, Ziele des Bundesrates 2020, vol. I, Bern, 29 November 2019, 7; Fabian Schäfer, «Harter Widerstand gegen weiches Recht», Neue Zürcher Zeitung, 23 January 2020, at 4.

185 Cf. e.g. U.N. General Assembly, Procès-verbal, supra, n. 177, 3 (statement of the Hungarian representative): «Migration is a dangerous phenomenon that has shown itself capable of destabilising countries of origin and transit countries and inflicting enormous security risks on countries of destination by creating parallel societies, among other things.»

186 See Marco Romano, Parlamentarische Initiative: Zuständigkeiten des Parlamentes im Bereich der Aussenpolitik und der innerstaatlichen Gesetzgebung beibehalten, Nationalrat, Curia Vista 14.474, 12 December 2016 (demanding parliamentary approval for soft law that entails changes in domestic laws).

187 Aussenpolitische Kommission (Ständerat), Postulat: Konsultation und Mitwirkung des Parlamentes im Bereich von Soft Law, Curia Vista 18.4104, 12 November 2018 (emphasis added)

188 Schweizerischer Bundesrat, Konsultation und Mitwirkung des Parlaments im Bereich von Soft Law: Bericht in Erfüllung des Postulates 18.4104, Aussenpolitische Kommission SR, Bern, 26 June 2019, 3.

189 Schweizerischer Bundesrat, supra, n. 188, 4.

tive with regard to soft law;[190] the remedies suggested focus mainly on earlier and more extensive consultation.[191] The role of Parliament in *implementing* soft law legislations was also underlined.[192]

Conclusions

This analysis of the discussions in Switzerland and Liechtenstein shows that the Migration Compact was, to some extent, an accidental victim. Both countries had been involved in its drafting process, both Governments expected to participate, after a smooth adoption process, in a momentous, optimistic and highly symbolic Intergovernmental Conference in Marrakech. Yet the Compact, perhaps undeservedly so, turned into a crystallisation point for discontent over certain international soft law regimes that had been simmering for some time.

As the examples discussed above have shown, the scope of such regimes tends to expand and gradually encroach on new subject matters. Yet that process is less formalised than the drafting or amendment of treaties, and less restrictive than the establishment of customary rules. In more informal settings, there is also more room for manoeuvre and more flexibility. It would be naïve to assume that, for instance, the drafting of a treaty is a purely legal affair void of political powerplay. But once adopted, a treaty's scope is usually subject to legal construction by judicial mechanisms. By contrast, soft law tends to be supervised by more informal and *adhoc* bodies. Members of these bodies, often acting in part-time capacity, may be more inclined to orientate themselves towards a common denominator – particularly since their avowed aim is the establishment of uniform best practices and standards.

The more flexible nature of such standards also allows for varying degrees and flexible means of enforcement. One important means is peer pressure.[193] Yet at least in everyday usage, peer pressure is a term with mostly negative connotation: It implies action based on undue outside influence rather than on autonomous reflection.[194] We might also remember from personal experience that the «peers» in a group are not necessarily equal but tend to have differing levels of influence and status; accordingly, they might apply pressure unevenly. Uneven enforcement did occur within the framework set up by the OECD and G-20, mostly with small States at the receiving

190 Schweizerischer Bundesrat, supra, n. 188, 4.
191 Schweizerischer Bundesrat, supra, n. 188, 19.
192 Schweizerischer Bundesrat, supra, n. 188, 21.
193 Supra, n. 80.
194 Cf. «peer, *n.* and *adj.*», Oxford English Dictionary, 3rd ed. (online), lit. C.2.

end.[195] Also, in the context of GRECO it could be argued that understanding for historically contingent deviations in small jurisdictions is very limited.[196]

Yet that is, of course, only one side of the coin – the perspective from below, so to say, according to which intense scrutiny may be unjustified and even unfair, aiming not only at the enforcement of rules, but also at the elimination of competitive advantages of small actors. According to another narrative, or viewed from above, such uncomfortable pressure is the very purpose of the respective soft law regimes. Small States may tend to view their idiosyncrasies in an overly positive light, including the quality of their democratic institution.[197] Smallness may also help to cover up entrenched and intransparent power structures, and clientelism and patronage may play a larger part in small State settings.[198] Supervision would then be warranted, with soft law finally providing an overdue slap on the wrist for some cherry pickers.

Both perspectives are valid. In its recent report, the Swiss Government has stressed the positive aspects of soft law, emphasising the opportunity to shape such regimes through participation.[199] Yet participation is not always possible, and even if small States are admitted to the table, opposed interests of larger and more influential States may prevail. [200] Subsequently, the scope of regulation may continuously grow, domestic decision-making processes notwithstanding.[201]

The dilemma is not new to small States. In their external relations, they used to oscillate between a more defensive approach emphasising sovereignty, and more open policies stressing cooperation and solidarity.[202] The latter would suggest embracing the kind of soft law regimes discussed in this contribution, and welcoming the shared standards and joint oversight they entail. And indeed, Switzerland and Liechtenstein have, in recent years, mostly adopted such a policy. In areas such as financial regulation or tax regimes, cooperation has been the result of external pressure; in more aspirational fields such as human rights and the rule of law, the motivation to join international regimes has been more intrinsic. Yet as the reaction to the Migration Compact has shown, negative experiences in one field may now start to affect other fields. As a consequence, scepticism towards adopting new soft law regimes is likely to increase.

195 Supra, n. 161 & 162

196 Supra, n. 104 & 119.

197 Cf. supra, n. 106 & 128.

198 Jan Erk & Wouter Veenendaal, «Is Small Really Beautiful? The Microstate Mistake», 25 Journal of Democracy (2014), 135–148, at 140 et sqq.; Corbett & Veenendaal, supra, n. 13, at 151–153.

199 Schweizerischer Bundesrat, supra, n. 188, at 3.

200 Cf. supra, Section V.

201 Cf. supra, n. 163.

202 Thürer, supra, n. 9, at 229. In general, see Baldur Thorhallsson & Sverrir Steinsson, Small State Foreign Policy, in: The Oxford Research Encyclopaedia of Politics (Oxford University Press, 2017).