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on Civil and Political
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**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 40 OF THE COVENANT**

Third periodic report

SWITZERLAND *

[12 October 2007]

* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

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PART I

GENERAL BACKGROUND

I. ACCESSION OF SWITZERLAND TO MEMBERSHIP IN THE UNITED NATIONS

1. On 3 March 2003, following an intensive democratic debate, both the people (by a majority of 54.6%) and a majority of the cantons (11 cantons and two semi-cantons against nine cantons and four semi-cantons) approved the popular initiative “On the accession of Switzerland to membership in the United Nations”.¹
2. On 10 September 2002 Switzerland became a member of the United Nations. This move was among the Federal Council’s priorities for the 1999-2003 Legislature.²

II. SWITZERLAND IN THE HUMAN RIGHTS COUNCIL

3. Switzerland was elected to the Human Rights Council on 9 May 2006 by 140 votes out of 191 and took an active and constructive part in the work which led to the adoption of General Assembly resolution 60/251. Under this resolution:

- (a) Switzerland undertakes to cooperate fully with the Human Rights Council in order to make it a strong, effective and fair organ of the United Nations for the promotion and protection of human rights, in particular by making a firm commitment to work for the realization of civil, political, economic, social and cultural rights, including the right to development, and by treating all these rights on an equal footing;
- (b) Switzerland also reaffirms its support for the Office of the United Nations High Commissioner for Human Rights and the other relevant United Nations funds, programmes and agencies, in particular by contributing to the ongoing efforts to reform the treaty body system and by evaluating the usefulness of an expanded common core document supplemented by specific reports to be submitted to each treaty body;
- (c) Switzerland further undertakes to promote human rights at the international level by assisting States to fulfil their human rights obligations by means of human rights dialogues, exchanges of experts, technical cooperation, and advice;
- (d) Lastly, Switzerland recognizes its duty to promote human rights at the national level. In particular by:
 - Studying the possibility of withdrawing its reservations to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child;

¹ Pursuant to article 140, paragraph 1 (b), of the Federal Constitution, membership of collective security organizations and supranational communities must be submitted to a vote of the people and the cantons.

² FF 2000 2168.

- Ratifying the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (see para. 4 below);
- Considering the ratification of the Optional Protocol to the United Nations Convention against Torture, which it signed in June 2004 (see para. 4);
- Ratifying the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women;
- Ratifying in the near future the third Additional Protocol to the four Geneva Conventions;
- Cooperating fully with the treaty bodies by submitting reports in accordance with the established time-frames and by reacting promptly and in all good faith to the conclusions and recommendations of those bodies.

III. RATIFICATION AND SIGNATURE OF INTERNATIONAL INSTRUMENTS

4. Since the submission of its second periodic report (CCPR/C/CH/98/2), dated 30 September 2001, Switzerland has ratified or signed, *without reservation*, the following human rights instruments:

- The Rome Statute of the International Criminal Court of 17 July 1998; ratified by Switzerland on 12 October 2001³ (see para. 16);
- The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000; ratified on 26 June 2002 and entered into force for Switzerland on 26 July 2002;⁴
- The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 18 December 2002; signed on 25 June 2004 (see paras 20 and 147);
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000; ratified on 19 September 2006 and entered into force for Switzerland on 19 October 2006⁵ (see paras. 17, 150 and 168);
- The Convention against Transnational Organized Crime, signed on 12 December 2000, its Additional Protocol on the prevention, suppression and punishment of trafficking in persons, in particular women and children, and its Additional Protocol against illicit trafficking in migrants by air, land and sea; ratified on 27 October 2006 and entered into force for Switzerland on 28 November 2006⁶ (see para. 150);
- The Convention against Corruption, signed on 10 December 2003.

³ RS 0.312.1.

⁴ RS 0.107.1.

⁵ RS 0.107.2.

⁶ RS 0.311.54 and 0.311,541.

5. In addition, attention should be drawn to the signature, ratification and/or entry into force of the following regional human rights instruments:

- Protocols Nos. 1 and 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (ETS 151 and 152); entered into force on 1 March 2002;⁷
- The Additional Protocol to the Convention on the Transfer of Sentenced Persons of 18 December 1997; entered into force for Switzerland on 1 October 2004;⁸
- Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances (ETS 187); entered into force for Switzerland on 1 July 2003;⁹
- Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system for the Convention; ratified on 25 April 2006 (not yet entered into force);
- The Convention on Cybercrime (ETS 185); signed on 23 November 2001 (see para. 169);
- The Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist or xenophobic nature committed through computer systems (ETS 189); signed on 9 October 2003;
- The Additional Protocol to the Convention on Human Rights and Biomedicine on transplantation of organs and tissues of human origin (ETS 186); signed on 11 July 2002.

IV. WITHDRAWAL OF RESERVATIONS

6. Switzerland notified the Secretary-General of the United Nations on 9 January 2004 that it had withdrawn its reservation to article 14, paragraphs 3 (d) and (f) (free assistance of a legal counsel and an interpreter). The withdrawal was effected on 12 January 2004.

7. By a decision of 4 April 2004, notified to the Secretary-General of the United Nations on 1 May 2007, the Federal Council decided to withdraw the reservations to article 10, paragraph 2 (b), article 14, paragraph 1, and article 14, paragraph 5. The withdrawal was effected on 1 May 2007. It will be discussed in Part III of the present report (see paras. 344 *et seq.*).

V. AMENDMENT OF THE CONSTITUTION

8. As indicated in paragraph 7 of the second periodic report, the amendment of the Constitution embraces three projects: the updating of the Federal Constitution (entered into force on 1 January 2000); the amendment of citizens' rights; and the reform of the justice system.

9. The *amendment of citizens' rights* led to the conduct on 1 August 2003 of an expanded referendum on international treaties (art. 141, para. 1 (d), and art. 141a of the Constitution). The international treaties which are not subject to denunciation and which provide for membership of

⁷ RO 2003 2581 and 2584.

⁸ RS 0.343.1.

⁹ RS 0.101,093.

an international organization or contain important provisions establishing legal rules or whose implementation requires the adoption of federal laws are henceforth subject to referendum. On 31 May 2006 the Federal Council approved, for submission to Parliament, a message concerning the introduction of a general popular initiative;¹⁰ however, the two Chambers refused to take up the legislative work necessary for the introduction of the general popular initiative (art. 139, para. (a) of the Constitution) to enable 100,000 citizens entitled to vote to request the adoption, amendment or repeal of provisions of the Constitution or legislation.

10. The *reform of the justice system* is designed to safeguard the operational capacity of the Federal Court, improve legal protection, and lay the foundations for the unification of Switzerland's criminal procedure (see paras. 12 and 213 *et seq.*). The following legislation has entered into force:

- On 1 April 2003: the constitutional bases necessary for the unification of criminal procedure (art. 123 of the Constitution) and the creation of the Federal Criminal Court (art. 191a, para. 1);
- On 1 September 2005: the constitutional basis for the creation of the Federal Administrative Court (art. 191a, para. 2);
- On 1 January 2007: inter alia, the guarantee of access to a judge (arts. 29a and 191b), the guarantee of the independence of the Judiciary (art. 191c), the constitutional basis for the unification of civil procedure (art. 122), and legislation reinforcing the independence of the Federal Court (arts. 188-191).

VI. PRINCIPAL LEGISLATIVE PROJECTS COMPLETED (SUMMARY)

11. Switzerland has adopted the following principal pieces of legislation since the submission of the second periodic report:

- *Amendment of the Federal Act establishing measures for the maintenance of internal security* (incitement to violence and violence at sporting events; LMSI I) of 24 March 2006; entered into force on 1 January 2007 (see paras. 189 and 251);¹¹
- *Amendment of the Federal Act on acquisition and loss of Swiss nationality*, (Nationality Act (LN) of 29 September 1952; entered into force on 1 January 2006¹² (see paras 66 and 290);
- *Federal Aliens Act* (LEtr) of 16 December 2005; scheduled to enter into force on 1 January 2008 (see paras. 64 *et seq.*, 159 and 207 *et seq.*);¹³
- *Amendment of several provisions of the Federal Asylum Act* (LAsi) of 26 June 1998;¹⁴ entered into force on 1 April 2004 as part of the Federal Act of 19 December 2003 on the budget reduction programme 2003¹⁵ (see para. 136);

¹⁰ FF 2006 5001 *et seq.*

¹¹ RO 2006 3703.

¹² RS 141; RO 2005 5233.

¹³ FF 2002 3404 *et seq.*

¹⁴ RS 142.31.

¹⁵ RO 2004 1647; FF 2003 5091.

- *Partial amendment of 16 December 2005 of the Federal Asylum Act (LAsi) of 26 June 1998;*¹⁶ entered into force partially on 1 January 2007 (see paras. 113, 135, 138 *et seq.*, 184 and 414);¹⁷
- *Amendment of the Aliens Integration Order (OIE) of 13 September 2000; entered into force on 1 February 2006 (see para. 58);*¹⁸
- *Federal Act on elimination of inequalities affecting persons with disabilities (LHand) of 13 December 2002; entered into force on 1 January 2004 (see para. 32);*¹⁹
- *Federal Act on the principle of transparency in the administration (Ltrans) of 17 December 2004; entered into force on 1 July 2006 (see paras 250 and 274);*²⁰
- *Federal Act on employees of the Confederation (LPers) of 24 March 2000; entered into force on 1 January 2001 (see para 282);*²¹
- *Federal Act on the Federal Court (LTF) of 17 June 2005; entered into force on 1 January 2007 (see para. 213);*²²
- *Federal Act on the Federal Administrative Court (LTAF) of 17 June 2005; entered into force on 1 January 2007 (see para. 213);*²³
- *Federal Act on the Federal Criminal Court (LTPF) of 4 October 2004; entered into force on 1 April 2004 (see para 214);*²⁴
- *Amendment of the Swiss Civil Code of 10 December 1907;*²⁵
 - *Article 28b; entry into force scheduled for 1 July 2007 (see para. 93);*
 - *Article 114; entered into force on 1 June 2004 (see para. 288);*
- *Federal Act on the conditions and procedure regulating sterilization of persons (Sterilization Act) of 17 December 2004; entered into force on 1 July 2005 (see paras 243 *et seq.*);*²⁶
- *Federal Act on registered partnerships between persons of the same sex (Partnerships Act) of 18 June 2004; entered into force on 1 January 2006 (see paras. 28, 288 and 314 *et seq.*);*²⁷

¹⁶ RS 142.31.

¹⁷ RO 2006 4745; FF 2002 6359.

¹⁸ RS 142.205.

¹⁹ RS 151.3.

²⁰ RS 152.3.

²¹ RS 172.220.1.

²² RS 173.110.

²³ RS 173.32.

²⁴ RS 173.71.

²⁵ RS 210.

²⁶ RS 211.111.1.

²⁷ RS 211.231.

- *Partial amendment of the Federal Data Protection Act (LPD) of 19 June 1992,*²⁸
entry into force scheduled for 2007 (see paras. 245 *et seq.*);²⁹
- *Amendment of the Swiss Criminal Code of 21 December 1937:*³⁰
 - *General part (revised) of the Criminal Code; entered into force on 1 January 2007 (see paras. 148 and 164);*³¹
 - *Articles 123, 189 and 190; entered into force on 1 April 2004 (see para. 95);*
 - *Article 182; entered into force on 1 December 2006 (see paras. 151 and 168);*
 - *Article 197; entered into force on 1 April 2002 (see para. 165);*
 - *Article 386; entered into force on 1 January 2006 (see para. 54);*
- *Federal Act on the criminal status of minors (DPMIn) of 20 June 2003; entered into force on 1 January 2007 (see para. 295);*³²
- *Partial amendment of the Federal Act on assistance to victims of crime (LAVI) of 4 October 1991; entered into force on 1 October 2002 (see paras. 19 and 297);*³³
- *Federal Secret Investigations Act (LFIS) of 20 June 2003; entered into force on 1 January 2005 (see paras. 222 and 224);*³⁴
- *Federal Protection of Animals Act (LPA) of 9 March 1978; entry into force scheduled for late 2007 (see para. 343);*³⁵
- *Federal Act on monitoring of correspondence by post and telecommunications (LSCPT) of 6 October 2000; entered into force on 1 January 2002 (see paras. 223 *et seq.*);*³⁶
- *Federal Act on the transplantation of organs, tissues and cells (Transplantation Act) of 8 October 2004; entered into force on 1 July 2007 (see para. 174);*³⁷
- *Federal Act on measures to combat illegal employment (LTN) of 17 June 2005; entry into force scheduled for 1 January 2008 (see para. 318);*³⁸
- *Amendment of the Federal Civilian Service Act (LSC) of 6 October 1995; entered into force on 1 January 2004 (see paras. 263 *et seq.*);*³⁹

²⁸ RS 235.1.

²⁹ FF 2006 3421.

³⁰ RS 311.0.

³¹ RS 311.1.

³² RS 311.1.

³³ RS 312.5.

³⁴ RS 312.8.

³⁵ RS 455.

³⁶ RS 780.1.

³⁷ FF 2004 5115; henceforth RS 810.21.

³⁸ RO 2007 359.

³⁹ RS 824.0

- *Amendment of the Federal Act on allowances for loss of income for reasons of service or maternity* (Loss of Income Act (LAPG)) of 25 September 1952; entered into force on 1 July 2005 (see para. 89);⁴⁰
- *Federal Family Allowances Act* (LAFam) of 24 March 2006; entry into force scheduled for 1 January 2009 (see para. 293);⁴¹

VII. LEGISLATIVE TEXTS UNDER PREPARATION

1. Procedural law

12. On 12 December 2005 the Federal Council transmitted to Parliament a message on the *unification of criminal procedure law*⁴² (see paras. 178 and 216 et seq.). This measure consists of two draft texts: the Swiss Code of Criminal Procedure and the Federal Act on Juvenile Criminal Procedure (PPMin). Both these texts are essentially the same as the preliminary drafts transmitted by the Federal Council for consultation in June 2001. The Code provides for the adoption of a single model of criminal procedure (“Public Prosecutor” model), a uniform definition of the material competence of the criminal courts, and a unification of the appeals system. It includes a number of new elements, at present not found or found in only a few of the cantonal procedural codes. They provide inter alia for the establishment of a principle of extended opportunity, the possibility of agreements between the perpetrator of the offence and the victim and between the defendant and the public prosecutor, the reinforcement of the rights of defence, expansion of certain victims’ rights, expansion of the scope of witness-protection measures in the context of criminal proceedings, and a new measure of coercion: the monitoring of banking relationships. Parliament began to consider the Federal Council’s draft texts early in 2006, and they should have been adopted towards the end of 2007. Entry into force is scheduled for 2009 for the Confederation and 2010 for the cantons, following the adoption of the various acts establishing the new unified criminal procedure.

13. The unification of *civil procedure* is another integral part of the reform of the justice system (see para. 225). It is intended to simplify access to justice and thus facilitate the dispensation of everyday justice, contribute to the transparency and predictability of the rules, and make it possible to produce unified jurisprudence. An important place is accorded to the prior or extrajudicial settlement of disputes. The draft text also proposes a simplified procedure for minor lawsuits and social-law cases (rent, employment, consumer protection). The chief characteristics of the new procedure are a simplified format, oral proceedings, and a more active role for the courts. The Federal Council approved the message⁴³ concerning this project in June 2006. Parliament began its deliberations in January 2007 and should adopt the draft text towards the end of 2008. Entry into force is not foreseen before 2010.

2. Private law

14. On 28 June 2006 the Federal Council adopted a message concerning the *comprehensive revision of guardianship law*⁴⁴ (see para. 187). This revision is designed to safeguard and enhance

⁴⁰ RS 834.1.

⁴¹ FF 2006 3389.

⁴² FF 2006 1057 *et seq.*

⁴³ FF 2006 6841 *et seq.*

⁴⁴ FF 2006 6635 *et seq.*

the right of incompetent persons needing assistance in order to be independent, providing the necessary support while avoiding any social stigmatization of their situation. The present guardianship measures do not take sufficient account of the principle of proportionality. The standardized measures will therefore be replaced by a single concept - guardianship.

Guardianship comes into play when a person is no longer capable of protecting his interests owing to mental deficiency, a psychiatric disorder, or some other state of incompetence and when the support furnished by his relatives or by public or private services is no longer sufficient. Accordingly, in future the authority will not order a standard measure but one adapted to the specific case, so as to limit State assistance to what is strictly necessary. In addition, the new legislation establishes better protection for persons incapable of judgment living in homes or other medical-social establishments. The assistance to be furnished to such persons must be set out in a written contract in order to ensure a degree of transparency in the benefits provided. The new legislation also stipulates the conditions under which support measures may be authorized. The cantons must keep the above-mentioned establishments under supervision. The amendment of the provisions on the protection of adults also strengthens the legal protection of persons placed in institutions for purposes of assistance. Amongst other things it limits the power of doctors to order placement and includes important procedural rules in the legislation. It places the authority under an obligation to conduct periodic checks to determine whether the conditions for maintaining a measure are still met and whether the institution is still the appropriate one. Under the new legislation the organization of guardianship will be uniform and clear: all decisions relating to the protection of children and adults will be the responsibility of one and the same interdisciplinary authority; the cantons will be free to choose between an administrative and a judicial body. Parliamentary discussion began in the autumn of 2006.

15. On 28 February 2006 the Federal Council adopted a message on the application of the *conventions on the international abduction of children* and on the approval and implementation of the *Hague conventions on the protection of children and adults*.⁴⁵ Switzerland intends to continue to apply the Hague Convention on the Civil Aspects of the International Abduction of Children, which makes a significant contribution to the effectiveness of the fight against such abduction. The problem lies in the often excessive length of the procedures, which must be shortened and simplified. To this end the plan is that requests for the return of abducted children shall henceforth be handled in each canton by a single agency - the Supreme Court. Decisions ordering return must also address the modalities of enforcement and must be enforceable at law throughout Switzerland. In addition, the authorities will have to give greater emphasis to efforts to secure an amicable settlement of disputes between parents. Children will have to be given a greater say during the proceedings and have their interests represented therein by a lawyer. Lastly, the court will have to verify the situation in which children find themselves following their return. If, for example, a child cannot be entrusted to the parent who has remained in the State of origin and would have to be placed in a foster family, the return may not reasonably be requested.

3. Criminal law

16. On 17 August 2005 the Federal Council transmitted for public consultation the additional criminal-law measures required for the application of the Rome Statute of the International Criminal Court⁴⁶ (see para. 4 above). This preliminary draft text provides for the inclusion in the

⁴⁵ FF 2007 2433.

⁴⁶ FF 2005 4895.

Criminal Code of the notions of crime against humanity and war crimes. It also re-organizes jurisdictions with respect to criminal prosecution. The civil criminal-prosecution authorities of the Confederation will be responsible in principle for procedures connected with genocide, crimes against humanity and war crimes. The military justice system will come into play only in the case of acts committed by a member of the Swiss army or against a member of the Swiss army or when Switzerland is at war. The consultation procedure now having been completed, the Federal Council will transmit a message to Parliament in the course of 2007.

17. During the ratification of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* it proved necessary to extend the sphere of application of the criminal legislation concerning trafficking in human beings. The Optional Protocol entered into force for Switzerland on 19 October 2006 (see para. 4). The new article 182 of the Swiss Criminal Code entered into force on 1 December 2006.

18. On 8 February 2004 the people and the cantons approved the popular initiative “*Life imprisonment for sex offenders and violent offenders judged to be very dangerous and not susceptible of rehabilitation* (art. 123a of the Constitution). This provision of the Constitution is already in force and provides for the imprisonment of dangerous criminals *sine die* until they no longer constitute a danger to the community. It has still to be established in a legal instrument (see paras. 181 *et seq.*)

4. Public law

19. The *Federal Act on assistance to victims of crime* (LAVI)⁴⁷ is currently being revised. This Act entered into force in 1993, and its main principles have proved their worth (advice, financial assistance, and protection of victims’ rights in criminal proceedings). The comprehensive revision of the Act is designed to fill certain gaps and to improve its structure. The chief substantive changes include the extension from two to five years of the time limit for submission of a request for compensation and moral support. The text establishes special regulations for minors who are victims of serious offences, including offences against sexual integrity, for it allows minors to submit requests up to their 25th birthday. It also makes a clearer distinction between compensation payments and the longer-term assistance provided by counseling centres. Longer-term assistance will be furnished until the victim’s state of health has stabilized and the other consequences of the offence have been, as far as possible, eliminated or mitigated by compensation. Compensation will cover medical costs and care until the victim’s state of health has stabilized, as well as loss of income, loss of support, and funeral expenses. Victims of crime will continue to receive moral support. The text abolishes any right to compensation or moral support when the offence is committed abroad, but victims and their relatives domiciled in Switzerland will be entitled, as in the past, to the services of counseling centres (see paras. 96 and 157).

20. On 25 June 2004 Switzerland signed the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (see para. 4). The Federal Council has since, on 8 December 2006, adopted for submission to the Federal Assembly a message concerning the ratification and application of this Protocol.⁴⁸

⁴⁷ RS 312.5.

⁴⁸ FF 2007 261. The Parliamentary deliberations began in April 2007.

21. On 18 January 2006 the Federal Council submitted to the Chambers a *federal bill on the use of coercion and police measures in spheres within the jurisdiction of the Confederation* (LusC).⁴⁹ This draft text is designed to regulate uniformly the use of force by the police in areas falling within the purview of the Confederation, in particular in connection with the forced repatriation of aliens, and to ensure compliance with the principle of proportionality by authorities having to use police measures. Any recourse to physical force, auxiliary measures or weapons must be appropriate to the circumstances and entail the least possible damage to the physical integrity of the persons concerned. This legislation would prohibit the use of incapacitating devices (electroshock equipment) and of auxiliary measures which may constrict the breathing passages or cause major damage to the health of the persons in question. Medicaments may be applied or administered only for medical purposes. They may not be used at the site of police action in order to calm or anaesthetize a person. And the legislation obliges the authorities to assign to tasks which may involve the use of force by the police only officers specifically trained for such duties. If the text is accepted by the Chambers, the act could come into force in January 2008.

22. As a result of a Parliamentary initiative, a *draft amendment to the Federal Act on the acquisition and loss of Swiss nationality*⁵⁰ was prepared by the Political Institutions Committee of the Council of States.⁵¹ Following approval of the Federal Council,⁵² the draft text was accepted by the Council of States in December 2005. It is currently being examined by the Political Institutions Committee of the National Council. It confirms the principle of cantonal competence to appoint the decision-making bodies and determine the naturalization procedure. According to this text, a popular vote remains a possibility in all its forms (ballot, show of hands, or secret ballot at a communal assembly), but only when the application for naturalization is the subject of a request for rejection and provided that the decision-making body can state sufficient grounds in accordance with the law. The draft amendment also provides remedies against cantonal or communal decisions on ordinary naturalization (see also para. 71).

23. A debate has been going on for some time as to whether it is still possible to meet the information requirements for evaluating a situation and taking useful decisions as well as for detecting hidden dangers in good time. The current *amendment of the Federal Act on measures for the maintenance of internal security* (LMSI II) should take account of the development of the threats affecting Western Europe. It seeks to extend the quest for information by the intelligence services in a targeted manner in order to bring it up to European standards in this matter. The use of the new measures will be strictly controlled. The Federal Council was to approve a message for Parliament before the end of 2007.

24. The salient points of the ongoing amendments of legislation will be discussed under the relevant articles of the Covenant.

⁴⁹ FF 2006 2429.

⁵⁰ RS 141.0.

⁵¹ FF 2005 6495.

⁵² FF 2005 6655.

VIII. JURISPRUDENCE OF THE FEDERAL COURT RELATING TO THE COVENANT

25. During the period under review the Federal Court handed down a number of decisions on the rights and guarantees protected by the Covenant (13 published and 92 unpublished decisions). It will be seen not only that the number of decisions is very large but also that the Covenant is of increasing importance in the practice of the Federal Court. The most important decisions will be cited in connection with the articles of the Covenant to which they relate.

PART II

CONSIDERATION ARTICLE BY ARTICLE OF THE REALIZATION OF THE RIGHTS EMBODIED IN THE COVENANT

1. ARTICLE 1 (Right of peoples to self-determination)

26. It must be pointed out in connection with article 1, paragraph 2, that economic freedom is now mentioned expressly in article 27 of the Federal Constitution:

“Article 27. Economic freedom

1. Economic freedom is guaranteed.
2. It includes inter alia the free choice of occupation and free access to a gainful private economic activity and its free exercise.”

The other information given by Switzerland in its second periodic report still stands.

2. ARTICLE 2 (Non-discrimination in the exercise of the rights embodied in the Covenant)

2.1 Principle

27. The principle of equality of treatment and the prohibition of discrimination are now expressly stated in article 8 of the Federal Constitution:

“Article 8. Equality

1. All human beings are equal before the law.
2. No one shall suffer discrimination, in particular by reason of his origins, race, sex, age, language, social situation, lifestyle or religious, ideological or political beliefs or by reason of a physical, mental or psychological deficiency.
3. Men and women are equal before the law. The law shall provide for *de jure* and *de facto* equality, in particular in matters of the family, training and employment. Men and women are entitled to equal remuneration for work of equal value.
4. The law shall establish measures to eliminate inequalities affecting persons with disabilities.”

2.2 Same-sex couples

28. The *Federal Act on registered partnerships between persons of the same sex* (LPart; see para. 11) allows two persons of the same sex to have their partnership registered at a civil registry office and thus to invest it with legal status. The registration of a partnership creates a shared life entailing rights and duties. Where taxes, inheritance, social security and occupational insurance are concerned, for example, the registered partners have the same status as married couples. However, the new legislation does not allow two women or two men to adopt a child together or to resort to medically assisted procreation.

2.3 Prohibition of discrimination against persons with disabilities

29. In Switzerland some 700,000 persons, or almost 10 per cent of the population, have a disability. All of them are likely to be affected by inequalities in various areas of life.

30. The legislation on the equality of persons with disabilities includes a series of prescriptions for eliminating these inequalities. It is the fruit of the conviction that a disability cannot be reduced to a problem of an individual's health, for the social context has an impact as well. The aim of the equality legislation is precisely to modify the contextual disabling circumstances.

31. The Federal Constitution prohibits any discrimination based on a physical, mental or psychological deficiency (art. 8.2). It also requires the Legislature to take steps to eliminate inequalities affecting persons with disabilities (art. 8.4).

32. The *Federal Act on the elimination of inequalities affecting disabled persons* (Disabled Persons Act (LHand) (see para. 11)⁵³ is designed to prevent, reduce and eliminate inequalities affecting persons with disabilities. The Legislature intends to eliminate the obstacles to access to buildings and facilities, to allowances, training and further training, and to public transport.⁵⁴ In addition, the independence and integration of disabled persons is to be encouraged.

33. The Federal Office for Equality for Persons with Disabilities (BFEH) was established early in 2004 to contribute to the attainment of these goals. The mandate of BFEH, which is attached to the Federal Department of the Interior, is to:

- Discharge federal responsibilities relating to equality for persons with disabilities;
- Promote equality between disabled and non-disabled persons in public spaces;
- Commit itself to a policy capable of eliminating *de jure* and *de facto* inequalities.

The work of BFEH consists chiefly of the provision of information and advice, implementation and support of programmes and campaigns for the integration of disabled persons, and conduct or commissioning of scientific studies. Other tasks in this area are the responsibility of specific units of the Federal Administration. For example, arrangements to ensure disabled persons' access to public transport are a matter for the Federal Transport Office. BFEH coordinates the activities of

⁵³ RS 151.3.

⁵⁴ The application of the Act is regulated by two orders: Order of 19 November 2003 on the elimination of inequalities affecting persons with disabilities (Disabled Persons (Equality) Order (OHand; RS 151.31); and Order of 12 November 2003 on arrangements to guarantee access for persons with disabilities to public transport (OTHand; RS 151.34).

the other federal administrative units and collaborates closely with organizations providing assistance to persons with disabilities.

2.4 Prohibition of racial discrimination

2.4.1 Background

34. On 4 and 5 March 2002 Switzerland submitted its second and third periodic reports on the application of the International Convention on the Elimination of All Forms of Racial Discrimination to the United Nations Committee on the Elimination of Racial Discrimination (CERD).⁵⁵ In the autumn of 2006 it transmitted as one single document three periodic reports: the fourth (due on 29 December 2003), the fifth (due on 29 December 2005) and the sixth. In June 2003 it recognized the individual-communications procedure under article 14 of the Convention.

35. The Swiss Government regards its commitment to combat racism, anti-Semitism and xenophobia as a permanent task. It has made this clear in many replies to Parliamentary questions and in opinions on motions tabled on this subject. The efforts to combat racism were intensified still further during the period under review. Apart from the consistent and committed work done by various State and other bodies, much of the credit is due to two institutions created by the Confederation for this purpose: the Service against Racism (SLR) (see paras. 39 *et seq.*), which is part of the Federal Administration; and the Federal Commission against Racism (CFR) (see paras. 44 *et seq.*), an independent agency. The work of these institutions has made a substantial contribution to preventing racism, anti-Semitism, xenophobia and rightist extremism.

36. The criminal prohibition of racial discrimination has been in force since 1 January 1995 (see the second periodic report, paras. 19 *et seq.*). Article 261*bis* of the Criminal Code reads:

“Article 261 bis Racial discrimination

Anyone who:

Publicly incites hatred or discrimination against a person or group of persons on account of their racial, ethnic or religious affiliation,

Publicly propagates an ideology aimed at systematically debasing or denigrating members of a particular race, ethnic group or religion,

With the same aim, organises or encourages propaganda activities or takes part in them,

By means of utterances, writings, images, gestures or acts or in any other way, debases or discriminates against, in a manner that violates human dignity, a person or group of persons on account of their race, ethnic origin or religion or, for the same reason, denies, grossly minimises or attempts to justify genocide or other crimes against humanity,

Refuses to provide a public service to a person or group of persons on account of their racial, ethnic or religious affiliation,

Shall be liable to imprisonment or a fine.”

⁵⁵ See CERD/C/351/Add.2 and the summary records of the Committee’s 1495th and 1496th meetings, held on 4 and 5 March 2002 (CERD/C/SR.1495 and 1496).

37. In its replies to Parliamentary interventions calling for the repeal of this criminal provision against racism the Federal Council has reaffirmed that the law must punish anyone who, in public, incites hatred of or discrimination against other persons by reason of their racial, ethnic or religious affiliation, humiliates them in a manner detrimental to human dignity, or denies them a public service, as well as anyone who preaches a racist ideology. It has also reaffirmed that the freedom of expression is not absolute and that it may run up against limits, especially when the protection of the dignity or honor of another person is at stake. There is no question of abrogating article 262*bis* of the Criminal Code (or the corresponding article 171c of the Military Criminal Code), not least because this legislation is a concrete expression of Switzerland's efforts to fulfil its obligations under the International Convention on the Elimination of All Forms Racial Discrimination.⁵⁶ At this very moment an internal working group of the Federal Administration is studying the extension of the criminal legislation to the use of symbols calling for racial discrimination and the introduction of a more precise formulation of the offence referred to in the second part of the fourth paragraph of article 261*bis* of the Criminal Code (denial of genocide).

38. Switzerland takes an active part in the fight against discrimination and intolerance at the international level as well. In addition to the activities mentioned in its periodic reports to CERD (see para. 34), some of which are still continuing today, it has been the initiator of the following initiatives, inter alia:

- In the context of the Organization for Security and Cooperation in Europe (OSCE), in 2002 Switzerland, in conjunction with Kirgystan, introduced the initiative leading to Decision 6 of the Oporto Council of Ministers on tolerance and non-discrimination, which made the fight against all forms of intolerance, anti-Semitism, racism and xenophobia one of the priorities of the Organization. In 2003 and 2004, in the wake of that decision, a Swiss delegation made up of eminent experts delivered widely noted statements on anti-Semitism at top-level gatherings;
- In 2003 and 2004 Switzerland proposed in the Commission on Human Rights and in the Working Group on Minorities of the Subcommission on the Promotion and Protection of Human Rights the introduction of a special procedure to encourage States to implement the Declaration on the Rights of Persons belonging to Minorities, adopted by the United Nations in 1992. Switzerland considers that such a special procedure would complement the international arrangements to prevent genocide announced by the Secretary-General of the United Nations in the spring of 2004;
- In its capacity of “*national specialized agency*” the Federal Commission against Racism (CFR) is in regular contact with representatives of the European Commission against Racism and Intolerance (ECRI) and the Council of Europe, with the Office of the United Nations High Commissioner for Human Rights, and with the *International Coordinating Committee of National Institutions (ICC) for the promotion and protection of human rights*. Members of the Office of the President and the secretariat of CFR have also taken part in a number of international conferences on human rights and the battle against racism: for example, the second OSCE conference on tolerance and combating racism, xenophobia and discrimination, the follow-up meetings of the United Nations World Conference against Racism, and the ECRI round table on national agencies to combat racism.⁵⁷

⁵⁶ Reply of the Federal Council to the *Hess Bernhard* motion of 8 October 2005 “To abrogate the criminal provision against racism” (05.3013).

⁵⁷ See the CFR annual report for 2004.

2.4.2 Service against Racism (SLR)

39. As an expression of its intention to act on the outcome documents of the World Conference against Racism, the Swiss Government created in the Federal Administration the Service against Racism (SLR), by a decision of the Federal Council dated 21 February 2001. The task of this new body is to coordinate and establish country-wide the measures adopted by the Federal Administration to combat racism and extremism. SLR is the Confederation's chief spokesperson in its relations with the cantons and communes and third parties on racism issues. It promotes cooperation and exchanges of views with non-governmental organizations (NGOs) and research institutes working in this field, as well as with international specialized agencies (of the Council of Europe, the United Nations, and the European Union). It makes its specific knowledge available to other authorities and institutions and supports the concrete efforts to combat racism, xenophobia and rightist extremism through appropriate measures of assistance.

40. In collaboration with the Federal Department for Foreign Affairs (DFAE) SLR has undertaken to publish in three languages the second and third periodic reports submitted by Switzerland to CERD. In conjunction with CFR it has also published the final documents of the World Conference against Racism, held in Durban in 2001.

41. Unlike CFR, the Service has no mandate to mediate in cases of conflict. However, its Internet site does give a list of addresses of advice units and centres offering their assistance to victims of acts of racial discrimination. In accordance with its mandate SLR supports the training and further training of the personnel of services offering advice to victims of such acts.

2.4.3 Projects to combat racism and promote human rights

42. From 2001 to 2005 SLR was in charge of managing the Fund for Projects to Combat Racism and Promote Human Rights, which had 15 million francs to support training, awareness-raising and prevention projects and the services providing assistance to victims and advice for dispute settlement.⁵⁸ The purpose of the Fund was to help to secure recognition of the fight against racism and xenophobia as a painful undertaking - of course - but one which must be tackled and managed in Switzerland's everyday life. The Fund was intended to attend to as many sections of society as possible and to support the most varied, the most innovative and the most experimental types of project. The thematic targeting of the invitations to tender⁵⁹ made it possible to tackle concrete problems in various areas of society. The organizations and institutions working in each of these areas were thus able to understand the needs and possibilities of the fight against racism.

43. Since 2006 the Confederation has allocated an annual amount of 1.1 million francs to SLR to carry on its own work and to support the projects of other bodies. The aim is to encourage prevention and awareness-raising activities which will have a lasting impact in the long term. Through its targeted activities SLR will continue to contribute to education, professionalism and networking in the fight against racism. The fact that this topic is now taken into account in the programmes of other services of the Confederation, especially those concerned with integration,

⁵⁸ www.edi.admin.ch/frb/.

⁵⁹ 2001: Adult education; 2003: Youth; 2003: Implementation of the decisions of the World Conference against Racism; 2004: World of work; 2005: Long-term measures to promote human rights and non-discrimination in everyday life.

youth, health, education and research, will both contribute a substantial amount of added value and also cause the topic of racism to be seen in a new and multidisciplinary light.

2.4.4 Federal Commission against Racism (CFR)

44. CFR celebrated its tenth anniversary in 2005. The following discussion focuses on the main themes and topical projects of those years and on other the projects carried out by CFR during this period in fulfillment of its mandate

45. Having expended considerable effort over the past 10 years on tackling racism from the ideological and symbolical standpoints CFR now plans to give increased attention to achieving equality of treatment in actual practice. Where employment and housing are concerned, for example, it intends to work for an explicit prohibition of discrimination between individuals. It will also support the efforts to strength the instruments of the criminal law, in particular with a view to banning racist organizations and symbols.

46. CFR uses the press-release tool to make its views known on political developments whenever it detects or fears discrimination.⁶⁰ It states its views in the context of consultation procedures concerning matters falling within its mandate. For example, CFR has taken a position in the course of such procedures on the Federal Mediation Office Act, on the Aliens Integration Order, and on comprehensive amendment of the Federal Act on assistance to victims of crime. In addition to its biannual bulletin *Tangram*, CFR has published reports on specific subjects, such as for instance the studies “Blacks in Switzerland” (2004) and “Relations with the Moslem community in Switzerland” (2006). Its Internet site⁶¹ and the information to be found there are becoming increasingly important.

47. In exercise of its mediation function CFR advises persons who consider themselves victims of acts of racial discrimination and enterprises and advisory services which are having to deal with racism issues. At least one dispute is reported to the Commission every day. CFR is also the agency to which anyone may turn who wishes to submit a communication to CERD under article 14 of the International Convention and is seeking advice on the procedure to follow, the effectiveness of this move, and the chances of success.

2.4.5 Special Service against extremism the army

48. Following the press reporting of incidents involving the extreme right in foreign armed forces, this issue has become very topical in the Swiss army as well. The then head of the Federal Department of Defence, Public Safety and Sports (DDPS) ordered the chief of the Army General Staff to conduct an inquiry into rightist extremism in the Swiss army. In his report of 16 December 1998 he concluded that political extremism in the army did not represent a serious problem and that there was certainly no “army brand” of extremism. The deputy chief of the General Staff responsible for the Army Personnel Group was then put in charge of the overall coordination of this matter. In his report of 15 February 2001 to the head of DDPS he proposed a total of eight measures, including the creation of a central reception and coordination unit for matters connected with extremism. The Special Service started operations under the General Staff on 23 May 2002. It was re-attached to SLR for administrative purposes on 15 August 2005 in

⁶⁰ For example, there have been press releases concerning the desecration of graves in the Jewish cemetery of Vevey-Montreux and the arson attack on the Lugano synagogue.

⁶¹ www.edi.admin.ch/ekr/index/html.

order to optimize synergy and efficiency. This Service was created for three purposes: to establish a central reception and coordination unit within DDPS for matters connected with extremism; to acquire knowledge of the subject of extremism; and to plan suitable measures for the army.

2.4.6 Jurisprudence

49. On 13 December 2005 CFR published on its public Internet site a compilation of jurisprudence from 1995 to the end of 2003 concerning article 261*bis* of the Criminal Code.⁶² This compilation contains a completely anonymous summary of every decision handed down by a judicial authority during that period. This enables interested persons to research specific cases and to obtain an overview, thanks to the statistical data, of the state of the jurisprudence on article 261*bis*. The plan is for this data bank to be regularly updated.

50. According to the figures in the data bank, 241 reports were submitted to the judicial authorities between 1995 and 2003. In 118 cases the judicial authorities decided not to proceed, while criminal investigations were opened in 123 cases. More than 80 per cent of these cases resulted in conviction by a court. By way of example, five of the cases resulting in conviction are described below. Each of them relates to a different provision of the criminal legislation on racism:

- Article 261*bis*, paragraph 1: the inscription “Let’s bow our backs to the Star of David, the Gessler’s hat of our times!” was found to be an incitement to racial hatred and discrimination within the meaning of paragraph 1; the judges concluded in fact that “Gessler’s hat” constituted a symbol of oppression and subjugation and that Jews were thus being accused of wanting to subject other peoples or religious communities. Since it is in the order of things for oppressors to be hated, the court decided that this language constituted a call for hatred and scorn and even for the annihilation of Jews, similar to the call which William Tell had issued against Gessler.⁶³ The Zurich cantonal court imposed a fine of 25,000 francs on the accused.⁶⁴
- Article 261*bis*, paragraph 2: in 1999 the inscription in a visitors’ book of the sentences “Do business with a Jew and, I tell you, you’ll get swindling and trickery. Read Adolf Hitler’s *Mein Kampf*: what was true 50 years ago is still true today” was found in 2002 by the competent criminal prosecution authority of the canton of Zurich to be propagation of an ideology intended to humiliate or denigrate Jews systematically. A fine of 600 francs was imposed on the perpetrator.⁶⁵
- Article 261*bis*, paragraph 4, first part: during a quarrel the accused foreman called the injured party “Serbian pig”, “arsehole” and “bastard”, adding: “It’s war - I’ll have your hide!”. The competent criminal prosecution authority of the canton of Bâle-Campagne considered that such expressions as “Serbian pig” fell within the scope of

⁶² www.ekr-cfr.ch/ekr/db/start/index/html.

⁶³ Decision 2002-10 in the CFR data bank.

⁶⁴ The Federal Court rejected the application for annulment lodged against this decision (Decision No. 6S.614/2001 of 18 March 2002).

⁶⁵ Decision 2002-22 in the CFR data bank.

the Criminal Code because they were intended to humiliate and discriminate against a person by impairing his human dignity. The accused was sentenced in 2002 to a fine of 500 francs for racial discrimination and attempted use of threats and insults;⁶⁶

- Article 261*bis*, paragraph 4, second part: in a decision in 2000⁶⁷ the Federal Court found that the fact of disputing the use by the National Socialist regime of gas or gas chambers in order to exterminate human beings constituted in itself a gross minimalization of the holocaust. It stated that one of its grounds for reaching this conclusion was “because the systematic extermination of Jewish prisoners in the gas chambers (a unique event in human history) marked the National Socialist regime out from other totalitarian regimes which had used terror and because, for that very reason, the fact of denying the existence of the gas chambers was used by certain groups to attack the Jews.” The Federal Court thus confirmed the decision handed down in 1998 in first instance by a cantonal court in the canton of Aargau, under which the author of a revisionist work had been sentenced to 15 months’ imprisonment and a fine of 8,000 francs;⁶⁸
- Article 261*bis*, paragraph 5: in a decision in 2000⁶⁹ the Supreme Court of the canton of Zurich imposed a fine of 600 francs on the owner of a shop who had refused to serve a coloured customer and had shown him the door with the words “I don’t want people from your country.” The court held that the refusal of a public service, be it the performance of a service or the sale of goods, infringed the criminal law on racism (art 261*bis*, para. 5). The leniency of the punishment was justified by the fact that the offence was not a very serious one.

51. In a decision in 2003⁷⁰ concerning the denial of the Armenian genocide the Federal Court clarified the jurisprudence of article 261*bis*, paragraph 4, second part, of the Criminal Code by explaining that the offence in question constituted an offence against the public order. Individual legal rights were therefore protected only indirectly. Accordingly, individual victims could not appear as parties under the Act (LAVI) in a criminal action against the perpetrator, for the injury caused by this specific act could be only indirect, quite apart from the fact that the (mere) act of denying, grossly minimizing or justifying an instance of genocide within the meaning of paragraph 4 did not constitute an act of racial discrimination within the strict meaning of the term. While it was true that the act in question could also affect individuals, the injury suffered, even though it might be serious, remained indirect. A physical person was not therefore entitled to take part in an action as an injured party. It was accordingly for the competent cantonal criminal prosecution authority to decide whether it wished to institute proceedings; in order words, whether its suspicions were sufficiently well grounded to allow it to assume that the objective and subjective elements of the offence obtained.⁷¹ By a decision of 9 March 2007 the Lausanne district court sentenced Dogu Perincek, a Turkish politician, to a suspended 90-day

⁶⁶ Decision 2002-23 in the CFR date bank.

⁶⁷ Decision of 22 March 2000: No. 6S.719/1999.

⁶⁸ Decision 2000-11 in the CFR data bank.

⁶⁹ Decision 2001-19 in the CFR data bank.

⁷⁰ ATF 129 IV 95 *et seq.*

⁷¹ In the summer of 2005 the Winterthür public prosecutor opened an investigation of the President of the National Turkish Workers’ Party for violation of article 261*bis*, para. 4.

daily fine of 100 francs and a fine of 3,000 francs for violation of the anti-racism legislation. He was also ordered to pay the legal costs and pay to the Swiss-Armenian Association (ASA) a token amount of 1,000 francs. The courts had found him guilty of repeated denials of the Armenian genocide.

52. Pursuant to article 261*bis* of the Criminal Code, racist language and behaviour are criminal offences only if exhibited in public. In a decision of 2004⁷² the Federal Court clarified the meaning of “in public”. Up till then it had held that an act should be deemed public if it took place in a large group of persons who were not connected to each other by personal relationships. Owing to the restrictive nature of this definition it was possible to organize in Switzerland concerts for skinheads or events ventilating extreme-right ideas. It was sufficient to simulate a private group by controlling admission and not publicizing the venue of the meeting. Since making its jurisprudence clear the Federal Court holds that racist language or behaviour has been exhibited in public within the meaning of article 261*bis* and are therefore criminal offences as soon as they are no longer restricted solely to a very small private group. For example, meetings are no longer deemed private even if admission is controlled and the persons admitted are hand-picked. In the case of offences of racial discrimination under article 171*c* of the Military Criminal Code, the military courts have likewise given the same clarification of their jurisprudence as the Federal Court: racist acts committed in a military context are deemed in principle to have been committed in public. The fact, for example, that such an act is committed inside a barracks, or that only members of the army witness it, is not sufficient automatically to exclude its public nature.

53. In a decision of 2005⁷³ handed down under article 10 of the European Convention on Human Rights and article 19 of the International Covenant the Federal Court acknowledged the need to treat as humiliation or discrimination within the meaning of article 261*bis*, para 4, any behaviour denying the members of a population group, by reason of their race, ethnic origin or religion, an equal value as human beings or equal treatment in terms of human rights. However, the right to freedom of expression prevents any facile conclusion as to such humiliation or discrimination in the context of a political debate. The Federal Court thus argued that to make an unflattering remark about a small section of the population is not sufficient to satisfy the requirements for the offence as long as the author of the remark makes it in the broader context of an objective criticism based on facts.

2.4.7 Amendment of legislation to combat racism

54. Article 386 of the Criminal Code, which came into force on 1 January 2006 (see para. 11), reads:

“Article 386. Preventive measures

1. The Confederation may introduce information and education measures and other measures designed to avoid violations and prevent crime.
2. It may support projects aimed at the goal of the provision contained in paragraph 1 above.

⁷² ATF 130 IV 111 *et seq.*

⁷³ ATF 131 IV 23 *et seq.*

3. It may make commitments to organizations carrying out the measures mentioned in paragraph 1 and support or create such organizations.
4. The Federal Council shall determine the content, objectives and modalities of preventive measures.”

The Federal Council has expressly linked the application of this provision to support of projects to combat racism.

55. The amendment of the Federal Act on assistance to victims of crime, which also applies under certain circumstances to victims of racist attacks, is described in paragraph 19.

56. The Coordination Service to Combat Internet Crime (SCOCI) is attached to the Federal Police Office, having been set up in 2003 under an administrative arrangement between the Confederation and the cantons. SCOCI now enables the Confederation and the cantons to coordinate the measures which they take to combat Internet crime. It acts as a central contact point for persons wishing to report suspicious Internet sites and itself searches the Internet to track down criminal abuses (see paras. 170 *et seq.* below).

2.5 Integration of aliens

57. Improvement of the integration of aliens living in Switzerland is one of the main challenges which policy-makers and society have a duty to take up. From the standpoint of Switzerland's integration policy, integration should not be regarded as a one-way process, for it implies both the willingness of aliens to integrate themselves and the readiness of the Swiss to accept them.

58. One of the amendments to the *Aliens Integration Order* (OIE) (see para. 11) expressly emphasizes how important it is for aliens to assume their share of the responsibility. They are requested both to respect the legal order and the principles of democracy and to make a contribution to their own integration. This contribution entails amongst other things learning one of the national languages and a readiness to participate in economic life and acquire training.⁷⁴ The authorities may require persons from another State who are responsible for providing religious training or courses in the language and culture of their country of origin to attend language and integration courses before entering Switzerland. The cantons are required to nominate an office responsible for answering questions about integration.⁷⁵ The Federal Office for Migration (ODM) coordinates the measures on integration of aliens of the various federal services, in particular in the fields of unemployment insurance, vocational training and health, as well as ensuring exchanges of information and experience with the cantons.⁷⁶

59. Henceforth the competent cantonal services for integration matters will be authorized to accept requests for funding of integration projects. They will then transmit them to the Federal Aliens Commission (CFE) together with a recommendation. The migration authorities will now be obliged in addition to notify immigrants of offers of on-the-job vocational and careers training.

60. CFE is a driving force for the integration of aliens. It supports through its activities the Confederation's programme for the promotion of integration and studies questions of the peaceful

⁷⁴ OIE, art.3a.

⁷⁵ ODM press release: "Improving the integration of aliens", 7 September 2005.

⁷⁶ OIE, art. 14a.

coexistence of the Swiss and foreign populations. It works in particular to promote integration and establish equality of opportunities.

61. CFE conducts in-depth studies of integration topics, issues recommendations, supports selected research projects, gives its opinion on questions of migration and integration, in the context of the consultation arrangements, and endeavours to support and promote networking among the agencies of the State and civil society working in the field of integration. CFE also publishes the biannual magazine *terra cognita*, which covers various migration and integration issues, and disseminates the findings of research work in the series *Documents sur la politique d'intégration*. By creating the Swiss Integration Prize, awarded for the first time in 2005, CFE has equipped itself with a means of rewarding the best integration initiatives and projects.

62. Every year CFE selects the topics which it intends to study in depth as part of its political activity. In 2003 it considered the question of integration in the world of work. In 2004, when the topic was housing, it investigated housing, housing policy, and land development. In 2005 it conducted a detailed study of the openness of institutions with the aim of encouraging public authorities and organizations of civil society to adjust their services and institutions to a social reality in which migration is a prominent feature.

63. According to a study carried out in the autumn of 2004,⁷⁷ some 90,000 persons were living in Switzerland without papers⁷⁸ (see also paras. 410 *et seq.*). The “*Sans papiers*” working group, chaired by a member of CFE, was created by a CFE initiative with the support of the group calling for “A round table on persons without papers”. This independent expert body is examining the files on persons without legal residence to see whether there is any need to recommend regulatory measures to the competent cantonal authorities. It also has regular exchanges with the competent services of the Confederation and the cantons and is studying the possibility of strengthened collaboration.

64. Integration is also the chief theme of the new *Federal Aliens Act* (LEtr); see para. 11). It is designed to foster peaceful coexistence based on respect for the values set out in the Constitution and for the principles of tolerance.⁷⁹ The provisions on integration were considerably expanded as part of the amendment of the old Act. The draft text of the new Act covers the objectives now set out in the Aliens Integration Order, together with the tasks of ODM, CFE and the cantonal and communal authorities, attacks on aliens and the need to take account of the degree of integration when deciding on authorization of resident status. In order to encourage the integration of children taking advantage of the family reunification regulations, the Aliens Act states that reunification must take place within five years, or one year for children aged 12 to 18. This measure helps to ensure that children are integrated as soon as possible in Switzerland’s education system. Other conditions already in force, such as cohabitation in a common dwelling, economic independence of the family, and suitable housing, remain applicable. The Act also facilitates the job-mobility of workers from foreign States. In addition, the Confederation and the

⁷⁷ Gfs.bern, “*Recherche en politique, communication et société, Sans papiers en Suisse: c’est le marché de l’emploi qui est déterminant, non pas la politique d’asile* (Final report on the mandate of the Federal Office for Migration; final version dated 6 April 2005).

⁷⁸ Before the publication of this study the estimates of the number of persons living in Switzerland without papers ranged between 50,000 and 300,000. Apart from giving these figures, the study corrects the false idea which some people had of this phenomenon: the presence of these undocumented persons is due not so much to the asylum policy as to the situation in the jobs market.

⁷⁹ Message of 8 March 2002 concerning the Aliens Act (FF 2002 3516).

cantons and communes have a duty of information. On the one hand they must inform aliens about their rights and obligations and about living and working conditions in Switzerland, and on the other hand inform the Swiss population about the special situation of these aliens. Reliable and objective information is an essential precondition if people from different countries are to live together peacefully on a basis of mutual acceptance.⁸⁰

65. Since most of the persons admitted on a temporary basis usually remain in Switzerland for several years or even permanently, their status has been improved with regard to access to the jobs market⁸¹ and the possibility of benefiting under the integration measures.⁸² In addition the Act provides for family reunification for this group of persons three years after the award of temporary admission.⁸³ These integration measures are intended to help persons admitted on a temporary basis to secure economic and social acceptance. If their social participation in society is maintained in this way, it is easier for them eventually to return to their countries of origin.⁸⁴ The revised version of the OIE also includes measures to encourage integration in that the degree of integration is taken into account in decisions (sometimes taken early) on the granting of permanent residence or on return or expulsion. As part of its coordination function ODM, in conjunction with the competent cantonal migration offices, has formulated criteria on the legal concept of “successful integration” to serve as a guide for the authorities responsible for assessing that situation.⁸⁵

2.6 Limitation of the principle of equality by reason of nationality

66. On 26 September 2004 the Swiss people gave its opinion on the question of facilitated naturalization of young aliens. The amendment to the Constitution and the corresponding draft legislation provided that the right of naturalization should be accorded to young persons of the second generation provided that they satisfied the material conditions. It was also provided that the third generation should obtain Swiss nationality by birth. The proposal met with a clear rejection in the vote. Despite that setback, two essential elements of the envisaged *amendment to the Nationality Act* remain (see para. 11). First, from 1 January 2006 the authorities may charge only the costs of the procedure for naturalization at the cantonal or communal level. Second, children born after 1 January 2006 to a Swiss father who is not married to the mother acquire Swiss nationality by establishing their filial kinship with the father.⁸⁶ An alien child born before 1 January 2006 to a Swiss father who is acknowledged by the father before reaching the age of majority may submit an application for facilitated naturalization before his 22nd birthday. After that age he may still submit an application provided that he has close links with Switzerland.

⁸⁰ Message of 8 March 2002 concerning the Aliens Act (FF 2002 3558).

⁸¹ Amendment of the Aliens Limitation Order (OLE), which entered into force on 1 February 2006 (art.7, para. 3).

⁸² OIE, art. 2, para. 1 (b).

⁸³ LEtr, art. 85, para. 7.

⁸⁴ Message of 4 September 2002 concerning the amendment of the Asylum Act (FF 2002 6370).

⁸⁵ Circular of 1 February 2006 concerning the partial amendment of the OIE, with a list of the criteria. www.weisungen.bfm.admin.ch/rechtsgrundlagen/rechtsquellen/weitere/index_f.asp#inte.

⁸⁶ Before 1 January 2006 an alien child of an unmarried Swiss father who has been acknowledged by the father could submit an application for facilitated naturalization under certain conditions.

67. Switzerland recognizes no right to naturalization (see the second periodic report, para 215). However, the right of appeal and the authorities' obligation to justify any refusal make it possible for applicants to contest discriminatory or arbitrary decisions or decisions lacking due grounds.

68. The Federal Court has ruled in several decisions on the constitutionality of accepting or rejecting applications for naturalization through the ballot box. It is clear from Decision ATF 129 I 232 that the popular initiative "For a democratic naturalization procedure" is illegal and therefore invalid. In fact, the conduct of a popular ballot on applications for naturalization may be an infringement of the right to a hearing and the prohibition of discrimination, for there is no obligation to justify the result. In Decision ATF 129 I 217 the Federal Court gave its opinion on a large number of applications for naturalization rejected in March 2000 by the voters of the commune of Emmen. The vote had led to the rejection of all the applications submitted by nationals of the former Yugoslavia. The Court found that the applicants from the former Yugoslavia had been disadvantaged by reason of their origin and it invited the cantonal and communal authorities to replace the unconstitutional procedure of a secret ballot on such applications by a procedure in compliance with the Constitution.

69. In decision ATF 131 I 18 the Court explained that when a communal assembly confirms a proposal for rejection by the communal council it endorses, generally speaking, the council's arguments in justification. Accordingly, the arguments in justification of the communal assembly derive from the arguments of the communal council. The Court went on to emphasize that two spouses who submit individual applications for naturalization are in principle entitled to have their applications considered separately and, in the event of rejection, to receive separate statements of the grounds. Furthermore, in Decision ATF 132 I 196 the Court found insufficiently justified the rejection of an application by a communal assembly, against the opinion of the communal council, on the ground that the personal criticisms leveled against the candidate did not contain any arguments of general application for denying naturalization.

70. The cantons whose communes decide on naturalization by vote have aligned themselves with the jurisprudence of the Federal Court by introducing various types of measure, including the adoption or amendment of legislation, or by submitting recommendations to the communes.

71. The *draft amendment to the Federal Act on the acquisition and loss of Swiss nationality* (LN) (see para. 22) confirms the principle of the competence of the cantons to appoint the decision-making bodies and determine the naturalization procedure. The popular vote remains a possibility in all its forms (ballot, show of hands, or secret ballot at a communal assembly), but only when a request for rejection has been entered against an application for naturalization and provided that the body which takes the decision to reject can bring forward grounds which are sufficient and in conformity with the law. This means in practice that naturalization by vote is authorized by the method of optional referendum: as appropriate, a request for rejection, supported by the necessary number of signatures and due argument in justification, will be sent out to voters at the same time as the voting papers. However, applications for naturalization may not be submitted to a mandatory referendum, for this might result in rejection of the application without the grounds being expressly stated. The draft amendment also stipulates that the cantons are required to ensure protection of an applicant's privacy by publishing only such information as is necessary for determining whether he satisfies the naturalization requirements and by taking due account of the walk of life of the recipients of the information. It further requires the cantons to provide for the possibility of appeal to a court which rules in the final instance on cantonal and communal decisions on ordinary naturalization. After exhaustion of the cantonal remedies an

appeal may be lodged with the Federal Court under the Federal Court Act (LTF)⁸⁷ by recourse to the subsidiary constitutional right of appeal,⁸⁸ only a complaint of violation of constitutional rights may be raised in such an appeal.⁸⁹

72. This amendment might serve as a counter-proposal to the popular initiative of the Democratic Union of the Centre “For democratic naturalization”, which was entered on 18 November 2005 and was concluded on 9 January 2006. The purpose of this initiative is to invest the cantons with full competence to determine the body which grants the right in question. Starting from the premise that naturalization is a strictly political act and not an individual concrete act of an administrative nature, it excludes all possibility of appeal at the cantonal level. In its message to the Federal Chambers dated 25 October 2006 the Federal Council proposed submitting this initiative to the people and the cantons with a recommendation for rejection.⁹⁰

73. Three cantons also put down cantonal initiatives on this subject between November 2003 and November 2004. Noting that the purpose was largely the same as that of the initiative referred to in the preceding paragraph, the Council of States decided to proceed with the initiative of the canton of Schwyz. This initiative provides that it should be possible to obtain naturalization only by judicial means, that the sovereignty of the cantons with respect to procedure should be guaranteed, and that such procedure should be fair and conducted in such a way as to respect the personal dignity and rights of applicants. Consideration of the initiatives of the cantons of Lucerne and Aargau was suspended pending examination of the draft amendment to the Nationality Act.

2.7 Limitation of the principle of equality by reason of language, opinion or religion

74. This matter is discussed in the sections relating to articles 18, 19 and 27 of the Covenant.

3. ARTICLE 3 (Equality between men and women)

3.1 Background

75. Equality between men and women is addressed expressly in article 8, paragraphs 1-3 of the Federal Constitution:

“Article 8. Equality

1. All human beings are equal before the law.
2. Nobody shall suffer discrimination, in particular by reason of his origins, race, sex, age, language, social situation, lifestyle, religious, ideological or political beliefs or by reason of a physical, mental or psychological deficiency.
3. Men and women are equal before the law. The law shall provide for *de jure* and *de facto* equality, in particular in matters of the family, training and employment. Men and women are entitled to equal remuneration for work of equal value.”

⁸⁷ RS 173.110.

⁸⁸ LTF, art. 113.

⁸⁹ LTF, art. 116.

⁹⁰ FF 2006 8481.

76. An analysis of the degree of implementation of the equality measures adopted by the Federal Council appears in Switzerland's third periodic report on the application of the International Convention on the Elimination of All Forms of Discrimination against Women. The first and second periodic reports⁹¹ were presented in January 2003 to the Committee on the Elimination of Discrimination against Women (CEDAW) in New York. In its concluding observations the Committee congratulated Switzerland on the progress made and offered some recommendations to improve still further the application of the Convention.⁹² At the Beijing+10 Conference (New York, 2005) Switzerland completed in full the questionnaire on the implementation of the Beijing Platform for Action (1995), thus demonstrating that it had been fully implemented within 10 years as far as equality between men and women was concerned.⁹³

77. At the end of 2002 the Federal Council approved for submission to Parliament a report describing in detail the implementation of the national plan of action by the federal authorities.⁹⁴ It shows that most of the measures addressed to the federal authorities have been put into effect, sometimes very extensively, in such areas as training and the economy. But it is clear that the concept of gender mainstreaming, which the plan of action made its chief priority, is not yet sufficiently familiar and that its application is very variable.

3.2 Quotas for women in politics, training and employment

78. The second sentence of article 3, paragraph 2, of the Federal Constitution requires the Legislature to provide for *de jure* and *de facto* equality, in particular in matters of the family, training and employment. According to the jurisprudence of the Federal Court, the positive measures introduced by the Legislature to make equality a reality are admissible. The proposals for *fixed quotas* in politics have not obtained majority approval so far, at either the cantonal or the federal level. However, flexible quotas giving precedence to candidates' skills and according priority to the under-represented sex are already being applied, in particular in the areas of training and employment.

79. In a 1997 decision⁹⁵ the Federal Court found that fixed quotas designed to secure equal representation of women in the Legislature, the Executive and the Judiciary regardless of their qualifications constitute a disproportionate attack on the prohibition of discrimination between the sexes and are thus inadmissible. It pointed out that the establishment of political quotas is in contradiction with the principles of universal, free and equal suffrage. It is admissible only if the restrictions form an integral part of the election system, which is not the case for gender-based quotas. In another important decision dating from 1999⁹⁶ the Court found that flexible quotas are constitutional. The quota in question provided a guarantee of at least one third of the seats for the under-represented sex, but this quota was not intended to be achieved immediately and thus it did not automatically exclude consideration of the professional qualifications and skills of the candidates standing for election. The Federal Court allowed the possibility of limiting, in elections based on proportional representation, the principle of the equal weighting of votes and

⁹¹ www.equality-office.ch/f2/dokumente/cedaw.pdf.

⁹² www.equality-office.ch/f2/dokumente/CEDAW%20franz%20.pdf.

⁹³ See www.un.org/womenwatch/daw/Review/english/responses.htm.

⁹⁴ This report can be downloaded from www.equality-office.ch/f/publikationsliETS.htm.

⁹⁵ ATF 1231 152 *et seq.*

⁹⁶ ATF 1251 121 *et seq.*

the value of each vote in the count, even for reasons which have to do with the election system in only the broad sense (for example to protect regional or linguistic minorities). This may occur only on condition that the principle of proportionality is respected and that an overriding public interest so requires. Furthermore, the importance of the political rights at stake dictates that such restrictions should be allowed only with the greatest reluctance. If they are allowed, the award of seats in the form of quotas in popular ballots would constitute a prohibited limitation of the right to vote, for voting must be free and equal.

80. However, the Federal Court declared that gender-based quotas are admissible in the case of authorities not elected directly by the people, since they do not then jeopardize the freedoms of choice and vote and in this case the rules are sufficiently flexible to be deemed proportional in view of the established under-representation of women in the cantonal authorities. It also found admissible in principle electoral quotas (nomination quotas) which produce a balance between the sexes in candidate lists.

81. The latest decision of the Federal Court, handed down in 2005,⁹⁷ concerns a quota system applied to labour relations, in this case the award of relief posts in the University of Fribourg. According to its consistent jurisprudence in justifying restrictions of constitutional rights (here the right of a male candidate to enjoy equal treatment with female candidates) the Court holds that quotas based on the gender criterion are admissible as measures for the advancement of women, since they have a sufficient legal foundation and comply with the principle of proportionality. In concrete terms, they must be capable of attaining their declared objective, i.e. to make the principle of equality a reality (suitability or aptness rule), to constitute the most effective means of attaining that objective bearing in mind the situation of the men whose fundamental rights are affected (necessity rule), and to constitute a reasonable means of attaining the objective bearing in mind the interests at stake (proportionality in the narrow sense). Here again, fixed quotas for women seem “*difficult to admit, in view of the seriousness of the attack which they represent on the absolute prohibition of discrimination on the ground of gender*”. The Federal Court explained in this case that the automatic exclusion of male candidates was inadmissible in the absence of a formal law justifying such impairment of the rights of male candidates. It also cast doubt on the appropriateness and necessity of the fixed quota established by the University of Fribourg to promote equality, noting that it was in terms of proportionality that such a system was most at fault.

82. Since August 2002 two women have again been members of the seven-member Swiss Federal Government. The proportion of women has reached 25 per cent in the National Council and 23.9 per cent in the Council of States.

3.3 Regulations of significance for women

83. The *Federal Act on equality between women and men* (Equality Act (LEg))⁹⁸ is designed to promote actual equality between women and men in employment.

84. Pursuant to a Parliamentary motion the Federal Council commissioned, for the period January 2004 to spring 2005, a detailed evaluation of the effectiveness of the Equality Act. As part of this evaluation all the decisions handed down on equality by the competent courts were collected, systematically examined and evaluated. This exhaustive exercise produced 269 usable

⁹⁷ ATF 131 II 361 *et seq.*

⁹⁸ RS 151.1.

decisions. Most of them (57%) addressed questions of unequal remuneration. Next came cases of sexual harassment (21%), followed by arbitrary dismissals (19%).

85. All the cases submitted to the cantonal conciliation offices (355 in all) were also examined. Most of them were cases of wage discrimination (37%), followed by sexual harassment (26%).

86. The Federal Council presented the results of this evaluation and gave its opinion in a report dated 15 February 2006.⁹⁹ It concluded that the Equality Act had undeniably had positive effects since its entry into force 10 years earlier. It provides persons affected by discrimination with tools for asserting their rights. Nevertheless, the Act alone is insufficient to achieve equality in labour relations. This will require changes in the framework conditions at various levels and active discharge by enterprises of their responsibilities in this area.

87. On the basis of this report the Federal Council issued mandates to the Federal Bureau on Equality between Women and Men (BFEG) and the Federal Justice Office.¹⁰⁰ The emphasis is on targeted information and awareness-raising. Recommendations are made on ways of obtaining expert assessments on equality of remuneration in an effort to rationalize the judicial procedures. And the conciliation offices must be empowered to request the presentation of evidence. It will also be necessary to consider incentives for enterprises and the establishment of an investigatory authority. In the case of the public employment markets the Federal Council plans to devise a procedure for ensuring compliance with the legal requirements on equal remuneration. However, it is opposed to any extension of the protection against dismissal, for it would not solve the problem of fear of losing one's job.

88. Article 116, paragraph 3, of the Federal Constitution provides for *maternity insurance*:

“Article 116. Family allowances and maternity insurance

1. In the discharge of its duties the Confederation shall take into consideration the needs of the family. It may support measures designed to protect the family
2. It may introduce legislation on family allowances and operate a federal compensation fund for family allowances.
3. It shall introduce maternity insurance. It may also impose an obligation to contribute on persons who cannot benefit from maternity insurance.
4. It may declare compulsory affiliation to a family-compensation or maternity-insurance fund on a general basis or for certain categories of person and make its benefits dependent on a fair contribution by the cantons.”

89. As a result of the amendment of the *Federal Act on compensation for loss of income by reason of service or maternity* (see para. 11), all women in Switzerland engaging in a gainful activity are entitled, for 14 weeks (98 days) following the birth of a child, to an allowance equal to 80 per cent of their former remuneration up to a maximum of 172 francs a day. Farm women and women working in an enterprise owned by their husband also receive an allowance for loss of income, provided that they have their own income. The federal regulations represent a

⁹⁹ FF 2006 3061 *et seq.*

¹⁰⁰ FF 2006 3098.

minimum standard. More favourable provisions (higher allowances, longer periods of payment) may still be provided under individual labour contracts or collective labour agreements or under other provisions of public law, for example cantonal maternity insurance. The public authorities, which are often more generous, have maintained the acquired rights. The additional benefits offered by employers in the private sector have generally been maintained.

90. According to a comparative study made in 2004 by the Organization for Cooperation and Development in Europe (OCDE) on the subject of reconciliation of work and family life,¹⁰¹ action is needed with regard to places in public day-care centres in order to improve access to such facilities and increase the (full-time) participation of women in the world of work.

91. A system of financial assistance has been introduced at the federal level. This is an eight-year promotional programme designed to encourage the creation of more places for children and thus allow their parents to reconcile family life with work or training more efficiently. Parliament allocated a credit of 320 million francs for the duration of the programme (see para. 293).

92. Since 2001 almost all the cantons have enacted measures on *protection of victims of domestic violence* or are preparing to do so. Police legislation has accordingly been supplemented, codes of criminal procedure have been adapted, and specific laws on victim protection have been enacted. The commonest measures include the immediate expulsion of the person committing the violence and the prohibition of return to the home, sometimes with the imposition of compulsory counseling as well. Some cantons have also provided for prohibition of contact with the victim and, in specific cases, for prolonged surveillance. The cantonal measures on the short-term protection of victims constitute a necessary complement to the federal amendment of the provisions on protection of the individual in the Civil Code; the new provisions are designed to ensure more extensive protection (see para. 93 below).

93. The protection of the person under the Civil Code has been clarified to the effect that a victim of violence, threats or stalking is entitled to request the judge to prohibit the perpetrator from approaching the victim, frequenting certain places or making contact with the victim. The new article 28b reads:

“Article 28 b. Violence, threats and stalking

1. In cases of violence, threats or stalking the plaintiff may request the judge to prohibit the perpetrator from inter alia:
 1. Approaching the victim or entering a specified area around the victim’s home;
 2. Frequenting certain places, in particular streets, squares or districts;
 3. Making contact with the victim, including by telephone, in writing, or by electronic means, or to disturb the victim in other ways.
2. Furthermore, if the plaintiff lives in the same dwelling as the perpetrator, the victim may request the judge to have the perpetrator expelled for a specified period. This period may be extended once on justified grounds.

¹⁰¹ “Bébés et employeurs - comment réconcilier travail et vie de famille (vol. 3), Nouvelle-Zélande, Portugal et Suisse”, Editions OCDE.

3. The judge may, provided that such a decision seems fair in the circumstances:
 1. Require the plaintiff to pay to the perpetrator appropriate compensation for exclusive use of the dwelling;
 2. With the consent of the lessor, accord to the plaintiff alone the rights and obligations deriving from the lease.
4. The cantons shall designate a service to order immediate expulsion from a common dwelling in the event of a crisis and shall determine the procedure for so doing.”

94. These measures are not limited to victims of domestic violence but also provide protection for victims of stalking. Furthermore, if the perpetrator shares the victim’s dwelling, the judge may order the perpetrator’s expulsion for a specified period. The cantons must designate a service which can intervene in crisis situations. As mentioned earlier, most of the cantons have already done so.

95. Since 1 April 2004 ordinary bodily harm, sexual coercion or rape committed against a spouse or partner are no longer prosecuted only following a complaint but automatically and are thus regarded as formal offences (arts. 123, 189 and 190 of the Criminal Code; see para 11).¹⁰²

96. Persons who have suffered, as the result of an offence, direct injury to their physical, mental or sexual integrity may receive the benefits and assistance provided under the *Federal Act on assistance to victims of crime* (see para. 19), regardless of whether the perpetrator has been identified or whether the action in question constitutes an offence. The Act has three components: counseling, protection of the victim and the victim’s rights during criminal proceedings, and compensation and moral support. The cantons must establish counseling centres to offer victims medical, psychological, social, material and legal assistance. The services provided by these centres are free of charge. The authorities must protect a victim’s person at all stages of criminal proceedings: in cases of attacks on sexual integrity a confrontation may be ordered only if the right of the defendant to a hearing is an imperative requirement; at the victim’s request, such a confrontation must take place behind closed doors. In addition, any victim of an offence committed in Switzerland is entitled to compensation and moral support from the State if such victim satisfies the conditions fixed by law.

3.4 Exploitation of women

97. See paragraph 149 *et seq.*

3.5 Authorities

98. In recent years the Federal Bureau on Equality between Women and Men (BFEG) has been giving priority to the following subjects: equality in law; equality of opportunities in employment; equality of remuneration; international collaboration; and combating violence against women. BFEG also advises authorities, enterprises, organizations and individuals and constitutes a resource centre for equality in the Federal Administration. In addition to issuing publications for a specialized public it conducts regular events and maintains a documentation centre for informing and raising the awareness of a much broader audience. It also supports

¹⁰² RO 2004 1403 *et seq.*

projects and advisory services which contribute to the cause of equality between women and men.

99. The Federal Commission on Women's Issues (CFQF) has a mandate to advise the Federal Council on equality matters. It is regularly called upon to give an opinion on issues of the day and it participates in the consultation procedures on draft federal legislation in this area. It prepares background material and recommendations on equality matters and carries out public relations work.

100. Today various units of the Federal Administration have personnel or even entire services specializing in questions of equality, being mostly responsible for promoting equality of opportunities in personnel management. According to the latest evaluation report of the Federal Personnel Office (OFPER), almost 60 per cent of the personnel officers questioned confirmed that their office did not have the specific objective, over the preceding four years, of increasing the proportion of women occupying managerial positions to meet a fixed percentage target. Only a quarter of the offices accorded the under-represented sex the priority stipulated in the instructions in force. Fifty-seven per cent of managements have made the achievement of equality of opportunities between men and women a major cross-cutting task in their organization. But only 34 per cent of the offices have adopted an appropriate list of measures and barely one half of them have set themselves specific annual goals to promote equality of opportunities. Similarly, only one half of the male and female officials responsible for equality of opportunities have the necessary financial resources and powers or a concrete mandate. And the personal contribution to the promotion of equality of opportunities is mentioned only rarely in statements of the objectives of the managerial hierarchy and is therefore rarely evaluated. In 86 per cent of the offices this never happens or happens only in isolated instances.

101. Most of the cantons and some of the cities have established equality services responsible amongst other things for questions of training, work and the jobs market, the reconciliation of work and family life, violence against women, and the integration of migrant women. The equality services of the Confederation, the cantons and the communes meet in the Swiss Conference of Equality Officers. This Conference, which today has 24 members, supports, coordinates, designs and carries out activities of national and regional scope.

102. Measures have been introduced in recent years in many areas of life with a view to improving equality, combating discrimination and securing the advancement of women. The array of tools used includes the legal reforms mentioned earlier (amendment of legislation on domestic violence, interruption of pregnancy, compensation for loss of earnings owing to maternity), equality programmes as such, combining various activities in a single targeted policy (vocational training, personnel policies of the Federal Administration, etc.), funding of equality projects of State or private institutions (for example, financial assistance from the Confederation under the Equality Act, financial incentives for the creation of public day-care places for children (see para. 91)), and even systematic public relations work to combat stereotypes (the BFEG *Fairplay-at-home* and *Fairplay-at-work* campaigns, for example).

4. ARTICLE 4 (Derogation from established rights in states of emergency)

103. The Federal Constitution contains several provisions authorizing the adoption of emergency measures in certain circumstances:

- Article 165 provides for an accelerated legislative procedure for the adoption of emergency legislation (*droit de nécessité*);¹⁰³
- Articles 173, 184 and 185 authorize measures to be adopted under the Constitution in emergency situations.¹⁰⁴ Such measures must respect the rights accorded by the Federal Constitution.

104. However, the Federal Constitution does not contain any express provisions on extra-constitutional emergency legislation, which would apply in major crises (for example war, large-scale natural disasters, etc.) preventing institutions from functioning normally. The above-mentioned provisions of the Constitution do indeed apply in emergencies but they do not authorize derogation from the Constitution.

105. It is permissible for emergency measures to be declared when the very existence of the State is threatened and the constitutional procedures (including the ones described above) are no longer capable of removing the danger. The doctrine recognizes in very broad terms that, in such cases, the highest political organs of the State have both the power and the duty to take the necessary action, for the existence of the State cannot be sacrificed in such circumstances to respect for the Constitution. Given such a situation jeopardizing the existence of individuals and the State, the doctrine holds that the competent authorities are invested with the power to take all necessary action to safeguard the country's existence or independence. This power is invested primarily in the Federal Assembly. When the Federal Assembly declares emergency legislation the peoples' rights (consultation in a referendum) are suspended. This power is invested secondly in the Federal Council. It is also possible for Parliament to delegate its powers to the Federal Council. Such delegation of powers has occurred twice in the country's history, at the time of the World Wars of 1914-1918 and 1939-1945.

106. An emergency act, as described in paragraph 105, must comply with the following guiding principles:

- Its adoption presupposes a genuine state of emergency which can be expressed juridically in terms of the principle of proportionality; it follows *inter alia* that any measures not demanded by the state of emergency must be adopted in accordance with the ordinary constitutional procedure;
- The exercise of powers in connection with emergency legislation must be subject to the political control of the Federal Assembly, which must be able to rule periodically on the maintenance of the decisions taken. This was certainly the procedure followed

¹⁰³ RO 2000 2991. For example, the Emergency Act of 15 December 2000 introducing new emergency measures relating to the business stamp duty was adopted under this procedure. These "emergency procedures" concern only acts of general scope and not specific decisions in particular cases.

¹⁰⁴ For example, the Order of the Federal Council of 7 November 2001 banning the "Al-Qaida" group (RS 122).

during the two World Wars. This power would have to be yielded up only when even a part of Parliament could not meet for this purpose.

107. On 16 June 2003 the Federal Council repealed 23 acts adopted as emergency legislation; these acts had lost their purpose: many of them dated back to the period 1950-1985 and they had mostly been adopted on a temporary basis or simply submitted to the Federal Council for information in view of the emergencies occurring at the time.

108. The essential content of the rights referred to in article 4, paragraph 2, of the Covenant (and indeed of the ones set out in article 15, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)) are not under any kind of threat in Switzerland, even when an exceptional danger threatens the existence of the nation. The declaration of emergency legislation (see para. 104) would respect those rights in all cases. None of the acts repealed on 16 June 2003 (see para. 107) infringed article 4, paragraph 2, of the Covenant.

109. With regard to the right to life in particular (art. 6 of the Covenant), it may be stressed that the Swiss Legislature has completely abolished the death penalty, which was still in effect in the Military Criminal Code for serious crimes committed in time of war. By ratifying the second Optional Protocol to the Covenant Switzerland entered into an international commitment not to reintroduce the death penalty (see also para. 5 above on ECHR Protocol No. 13).

5. ARTICLE 5 (Prohibition of abuse of law; application of most favourable law)

110. The information given in paragraph 80 of the second periodic report is still current.

6. ARTICLE 6 (Right to life)

6.1 Principle

111. The right to life and the prohibition of the death penalty are now stated expressly in article 10, paragraph 1, of the Federal Constitution:

“All human beings have the right to life. The death penalty is prohibited.”

6.2 Right to assistance in situations of hardship

112. The right to life referred to in paragraph 81 of the second periodic report is now the subject of an express provision in article 12 of the Federal Constitution:

“*Article 12. Right to assistance in situations of hardship*

Anyone who is in a situation of hardship and unable to support himself has the right to be aided and supported and to receive the essential means of living a life of human dignity.”

113. Since 1 April 2004 persons subject to a decision of non-consideration [see para. 135 below] which has become *res judicata* are no longer entitled to any assistance benefits except for emergency aid (see para. 114). The partial amendment of the Asylum Act adopted on 16 December 2005 (see para. 11) envisages extending this measure to all negative decisions on the merits in asylum cases.

114. In March 2005 the Federal Court conducted a detailed examination of article 12 of the Federal Constitution.¹⁰⁵ The purpose of this exercise was to establish whether it was consistent with the Constitution to deny a minimum of emergency aid to asylum-seekers subject to a decision of non-consideration who fail to discharge their duty to collaborate in their return home. The Federal Court concluded that emergency aid includes all essential means in a situation of hardship, in the sense of aid intended to help people through a difficult period, such as food, clothing, accommodation and basic medical care. The Constitution guarantees what is essential to a life of human dignity and protects people from the shameful fate of having to beg. Furthermore, the right to emergency aid is closely linked to the protection of human dignity within the meaning of article 7 of the Constitution and belongs, as a human right, to any physical person when in need, regardless of that person's nationality or his status in the eyes of the aliens police. Accordingly, persons present in Switzerland illegally may also benefit under article 12 of the Constitution. Thus the minimum aid essential to living a life of human dignity may never be denied, and moreover the denial of emergency aid should never be used as a means of coercion to achieve the purposes of the aliens legislation.

115. The cantons are free to decide on the manner in which they provide the essential means of a life of human dignity. The Conference of Cantonal Directors of Social Affairs has issued recommendations on this subject in order to ensure that benefits are furnished in accordance with uniform criteria throughout Switzerland.¹⁰⁶

6.3 Assisted suicide

116. Assisted suicide is not punishable in Switzerland provided that the person providing the assistance is not acting from a selfish motive. Such is the *a contrario* interpretation of article 115 of the Criminal Code:

“Article 115. Incitement to suicide and assisted suicide

Any person who, acting from a selfish motive, incites another person to commit suicide or provides such person with assistance with a view to suicide shall be sentenced, if the suicide is consummated or attempted, to deprivation of liberty for a maximum period of five years or to a monetary fine.”

117. This liberal provision has fostered the birth of many assisted-suicide organizations. In May 2006 the Federal Council took note of the Administration report “Assisted dying and palliative medicine: should the Confederation legislate?”¹⁰⁷

118. This report states the following conclusions:

- Passive euthanasia (rejection of life-sustaining measures or interruption of such measures) and indirect active euthanasia (administration of substances to relieve suffering but having the secondary effect of shortening the life-span) are not expressly regulated by the Criminal Code. The absolute prohibition of homicide stipulated in the Criminal Code ensures a clear delimitation between a criminal act on

¹⁰⁵ ATF 1311 166 *et seq.*

¹⁰⁶ www.sodk-cdas-cdos.ch.

¹⁰⁷ www.ejpd.admin.ch/etc/medialib/data/gesellschaft/gesetxgebung/sterbehilfe.Par.0017.File.tmp/20060531_ber-sterbehilfe-f.pdf.

the one hand and non-criminal conduct on the other which is easily understood by medical practitioners and by the criminal prosecution authorities.

- The Legislature might well spell out, in the Criminal Code or in some other piece of legislation, the circumstances in which these two forms of euthanasia are not subject to punishment. But a legal regulation of general scope might not exactly embrace all the sensitive issues which may come up in each individual case. It would therefore be of no practical use. However, codes of ethics - in particular the guidelines of the Swiss Academy of Medical Sciences - constitute a more appropriate instrument for the detailed regulation of the very many complicated situations of this kind.

119. The Federal Council thus recommended to Parliament that it should not undertake a revision of the relevant provisions of the Criminal Code. Palliative medicine and palliative care (encompassing all forms of support offered to persons suffering from an incurable progressive illness) help to reduce the numbers of persons wishing to resort to assisted suicide or active euthanasia by enabling them not only to live out the last stage of their existence but also to die, in dignity. It is essentially a matter for the cantons to increase the availability of palliative care and to improve the supply of information and advice for persons suffering from an incurable illness and for their relatives.

6.4 Jurisprudence

120. It was the arrest of a drug addict by two Tessino police officers which led to the decision of the European Court of Human Rights of 7 February 2006 in the *Scavuzzo-Hager and others v. Switzerland* case. The person in question lost consciousness in the course of the police action and died three days later in hospital. The two police officers who made the arrest conducted the criminal investigation of this suspicious death themselves and thus they were never questioned by a criminal prosecution authority. The criminal proceedings instituted against them were subsequently dropped. Furthermore, the exact circumstances of the arrest were not established sufficiently clearly, and the criminal prosecution authorities did not examine the question of whether the police officers ought to have realized that the arrested man was in a vulnerable condition. In this decision the European Court found that the circumstances of the death had not been investigated effectively and that this constituted, from the procedural standpoint, a violation of article 2 of the Convention (right to life). It must be pointed out here that the Federal Court handed down a similar decision on 6 October 2005¹⁰⁸ (see para. 134).

¹⁰⁸ ATF 131 I 455.

7. ARTICLE 7 (Prohibition of torture)

7.1 Principle

121. The prohibition of torture is now stated expressly in article 10, paragraph 3, of the Federal Constitution:

“Torture and all other cruel, inhuman or degrading treatment or punishment are prohibited.”

7.2 Fourth periodic report of Switzerland to the Committee against Torture

122. On 6 and 9 May 2005 the United Nations Committee against Torture (CAT) considered Switzerland’s fourth periodic report.¹⁰⁹ In its concluding observations¹¹⁰ it welcomed inter alia the new draft unified federal code of criminal procedure, the prohibition of incommunicado detention (*mise au secret*) and the formulation of guidelines relating to forcible deportations by air, as well as the signing of the Optional Protocol to the Convention and the ratification of the Rome Statute on 12 October 2001.

7.3 Communications to the Committee against Torture

123. In March 2007 CAT considered 60 communications containing complaints against Switzerland. Seven of them were declared inadmissible, 15 were struck off the list, and six are still pending. In five of the 32 cases in which it ruled on the substance CAT found that the enforcement of the decisions to deport the complainants violated article 3 of the Convention.

7.4 Third and fourth visits of the Committee for the Prevention of Torture to Switzerland

124. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) made its third periodic visit to Switzerland from 5 to 15 February 2001. Over the 10 days the delegation visited reformatories, prisons, police stations, a psychiatric clinic, a frontier post, and a pre-deportation holding centre in the cantons of Basle, Berne, Fribourg, St. Gallen, Thurgau and Zurich. It also looked at the procedures followed and the means of coercion used during alien-deportation operations. It stated that during its visit it had not found any indication of the use of torture. During this visit it noted that the recommendations made as a result of its preceding visit had led to the introduction throughout the country on 1 January 2001 of a new system (“Train Street”) for transporting detainees. As it had done in 1996 CPT produced for the Federal Council a report dealing essentially with the situations found in the establishments which it had visited.

125. The Committee visited Switzerland for the fourth time from 20 to 24 October 2003 in order to visit the section of the prison at Zurich’s Kloten Airport holding persons pending deportation (Prison No. 2) and the transit area of the Airport. At the end of the visit the delegation informed representatives of the Confederation and of the canton of Zurich that it had found no indication of the use of torture or other serious maltreatment. In the report which it submitted to the Federal Council in March 2004 CPT stated in detail its views on the situations in Prison No. 2 and in the transit area of Zurich International Airport and addressed a number of recommendations, comments and requests for information to the Swiss authorities.

¹⁰⁹ CAT/C/55/Add.9.

¹¹⁰ CAT/C/CR/34/CHE.

126. In its reports of 27 February 2002 and 27 October 2004 the Federal Council described the steps taken in implementation of the CPT recommendations and also transmitted to CPT the replies to its comments and requests for information.¹¹¹

7.5 Incommunicado detention

127. Developments with regard to incommunicado detention are described in Part III of the present report (Replies to the matters of concern raised by the Committee in its concluding observations of 12 November 2001).

7.6 Medical experiments

128. The current legislation on medical research on human beings has gaps. The Confederation needs to be invested with increased powers in the field of health in order to regulate such research. To this end, in January 2006 the Federal Council tabled for consultation the following constitutional provision:

“Article 118 a. Research on human beings

1. The Confederation shall introduce legislation on medical research on human beings. In so doing it shall ensure the protection of human dignity and the human person, while taking due account of the freedom to conduct research.
2. It shall respect the following principles:
 - (a) Research may be conducted on a human being only when:
 1. Informed consent has been given or the law allows exceptions to such consent;
 2. An independent expert opinion has established that the protection of the person concerned is assured.
 - (b) Research may be conducted on persons incapable of judgment only when the most stringent requirements for their protection are met. In particular, the risks for and the coercion of such persons must be kept to the minimum possible when the research does not offer an expectation of improvement of their health.
 - (c) No one may be forced to participate in a research project. This rule is waived in the case of research projects involving persons incapable of judgement which offer an expectation of improvement of their health.
 - (d) The human body and parts of the human body may not be either given up or acquired for research purposes in exchange for payment.
3. In the performance of its functions the Confederation shall ensure enhancement of the quality and transparency of research on human beings.”

¹¹¹ The CPT report and the reports of the Federal Council are published on the web site of the Federal Justice Office: www.bj.admin.ch/etc/medialib/data/staat_buerger/menschenrechte.Par.0032.File.tmp/ber-cpt-besuch03.pdf.

129. The chief purpose of this draft provision is to protect human dignity and the human person during research work. It is founded on a broad acceptance of “experiments on human beings”. This notion encompasses not only experiments on persons but also research using biological material of human origin, personal data, corpses, and even human embryos and fetuses. The draft text gives practical effect to the provisions of the Constitution set out above. Research using living or dead human beings or biological material of human origin or personal data is permissible only if informed consent is given. Research involving extremely vulnerable persons (persons incapable of judgment, persons capable of judgment who are under age or in guardianship, persons in emergency situations, persons deprived of liberty, pregnant women) is permissible only if the same results cannot be obtained without their participation. Finally, the supply or acquisition of parts of the human body or corpses for research purposes in return for payment is prohibited.

130. This draft article of the Constitution is consistent both with the European Convention on Human Rights and with the United Nations Covenant.¹¹² Paragraph 2 (c) regulates the admissibility of forced experiments. Some participants in the consultation exercise were unhappy with the possibility of conducting experiments on persons incapable of judgment, against their wishes, even if some direct benefit for their health may be expected. As a result the Federal Council decided on 29 January 2007, while taking note of the consultation report, to reexamine the wording of the prohibition of the conduct of research against the wishes of the person concerned and to bring it into line with the Council of Europe’s Convention on Human Rights and Biomedicine.¹¹³ With one exception the draft article satisfied the requirements of that Convention. In its articles 16 and 17 the Convention makes experiments on human beings subject to a set of conditions, some of them very specific. The draft article reproduces those conditions which are fundamental, such as the informed consent of the persons concerned and the independent scrutiny of research projects, and extends their scope to research involving human beings in the broader sense (para. 2 (a)). In paragraph 2 (b) it also makes research involving persons incapable of judgment subject to additional requirements and sets out the principal condition: that the risks for and the coercion of the person concerned must be kept to the minimum possible when a direct benefit for their health cannot be expected from the research project. On the other hand, the determination of the modalities of research involving human beings, such as the requirement of a balanced risk/benefit ratio, is left to the Legislature. By analogy with article 21 of the European Convention, paragraph 2 (d) prohibits the sale of human bodies or parts thereof. According to article 17, paragraph 1, of the Convention, research involving persons incapable of giving their consent (paras (c) and (d): in Swiss law persons incapable of judgment) is permissible, amongst other conditions, only if the person concerned does not object.

131. It must be pointed out with respect to the medical experiments discussed in paragraph 96 of the initial report that at their 627th meeting the representatives of the Ministers of the Council of Europe adopted Recommendation No. R (98) 7 concerning the ethical and organizational aspects of health care in prisons. This Recommendation will be applied in Switzerland.

¹¹² See the commentary on the draft article of the Constitution concerning experiments on human beings, p. 28.

¹¹³ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (European Convention on Human Rights and Biomedicine; ETS 164.

132. Switzerland supported the adoption at the fifty-ninth session of the United Nations General Assembly of the Declaration on Human Cloning, which calls upon Member States to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life.¹¹⁴

133. Parliament is currently examining the Convention of the Council of Europe on Human Rights and Biomedicine with a view to its ratification by Switzerland.

7.7 Jurisprudence

134. In a decision of 6 October 2005¹¹⁵ the Federal Council ruled that anyone who claims with justification to have been treated in a degrading manner by a police officer is entitled to an effective and detailed official inquiry. Refusal to initiate such an inquiry constitutes a violation of the prohibition of torture.

7.8 Principle of non-refoulement in asylum cases

135. The *Federal Asylum Act of 26 June 1998* (LAsi), which entered into force on 1 October 1999, contains several provisions designed to combat abuses in asylum cases (see para. 11). The Act introduced a new ground of “non-consideration” (*non-entrée en matière*), which obtains when an applicant fails to produce identity papers within a time limit of 48 hours.¹¹⁶ The scope of this provision is limited to manifest cases of abuse. It has in fact been given a restrictive interpretation both by the Federal Office for Migration (ODM) and by the former Swiss Asylum Appeals Commission (CRA), now the Federal Administrative Court (TAF). The appeals authority had held that the notion of “persecution” should be understood not only to mean “serious harm” but also to encompass all the other obstacles to the enforcement of a deportation order: that such enforcement is unlawful, unreasonable, or simply impossible. However, since 2003 the appeals authority has restricted its interpretation of “persecution” and decided that it encompasses the obstacles to enforcement of a deportation order, provided that it is a question of harm arising from a human being, to the exclusion of the other obstacles to enforcement.¹¹⁷ Furthermore, CRA has held that the level of proof required by the competent authorities should not be too high. If the indications of persecution are not *prima facie* devoid of credibility, the question of refugee status should be examined as to the merits.¹¹⁸ The provision on interim protection described in the second periodic report (para. 93) has also entered into force, but it has not proved necessary to apply it in practice.

136. Since 1 April 2004 (amendment of the Act; see para. 11) the time limit for appeal against a decision of non-consideration is again five working days, and the remedy of appeal has generally had a suspensive effect. This offers the best safeguard of the rights of asylum-seekers who become subject to a decision of non-consideration and a deportation order.

137. The *asylum statistics* show a clear decline in the number of asylum-seekers in recent years, with a minor exception for 2006. In 2006, 10,537 persons applied for asylum in Switzerland, or

¹¹⁴ A/RES/59/280.

¹¹⁵ ATF 131 I 455 *et seq.*

¹¹⁶ LAsi, art. 32, para. 2 (a).

¹¹⁷ JICRA 1999 No. 18.

¹¹⁸ JICRA 1999 No. 17

4.7 per cent more than in 2005. In 2005, 10,062 persons applied for asylum, or 29.4 per cent fewer than in 2004 (14,248 applications). In 2003, there were 21,037 applications, or 21 per cent fewer than in 2002. Between January and December 2006, 11,171 applications were considered in first instance (12,695 in 2005). It may be pointed out that 1,857 persons obtained asylum in Switzerland in 2006 (1,497 in 2005; 1,555 in 2004). In 2006, there were 1,834 decisions of non-consideration (2,530 in 2005; 5,193 in 2004). The proportion of applications granted was 19.5 per cent in 2006. This figure was 6.7 per cent in 2003, 9.9 per cent in 2004, and 13.6 per cent in 2005. Despite the slight increase in applications in 2006 these figures show that the asylum policy is headed in the right direction and that persons suffering actual persecution do obtain protection in Switzerland.

138. The *partial amendment of the Asylum Act* (see para. 11) introduced a new formulation of the ground of non-consideration for failing to produce identity papers.¹¹⁹ The production of documents such as birth certificates or driving licences is no longer sufficient for a decision by ODM on the merits of the application, for these documents do not authorize a person to return to his country and they are moreover easily forged. Nevertheless, if an applicant can present a plausible case to the effect that for excusable reasons he has been unable to produce a travel document or an identity document to the authorities within 48 hours, ODM is obliged to proceed to consider the application. The same applies if refugee status is established at the end of the hearing or if a need arises for further investigation to establish refugee status or identify an obstacle to enforcement of a deportation order. It must be pointed out that every decision of non-consideration must be preceded by a detailed examination of all the documents in the file and that all such decisions must be accompanied by an explanation of the grounds.

139. The partial amendment of the Asylum Act also provides that all remedies shall have in principle a suspensive effect, thereby preventing the enforcement of a deportation order during appeal proceedings. This provides applicants with a further guarantee of respect for the principle of non-refoulement.

140. The cantons now have the possibility of granting a residence permit on humanitarian grounds to (former) asylum-seekers after five years' residence. The granting of residence permits on humanitarian grounds to persons admitted on a temporary basis is subject to a detailed review after five years.¹²⁰

141. The legislation now in force guarantees protection for all persons having refugee status. In addition, following any decision on an asylum application (on the merits or of non-consideration), ODM takes a decision on deportation. A decision to deport is not lawful if it infringes Switzerland's international commitments. Here the specific reference is to article 7 of the Covenant, article 3 of the European Convention on Human Rights, and article 10, paragraph 3, of the Constitution (prohibition of torture). For example, a person without refugee status who is at risk of inhuman punishment or treatment will be admitted to Switzerland provisionally and will not have to return to the country of origin or departure. This is also the case if deportation is not reasonable because the person would be under a real threat in his own country. This applies in particular to sick persons who cannot be treated in their own country or persons who would be confronted with a situation of widespread violence if they returned home.

¹¹⁹ This provision entered into force on 1 January 2007.

¹²⁰ This regulation has been in force since 1 January 2007 (see LAsi, art. 14).

142. The partial amendment also improves the status of persons admitted on a temporary basis, who will now have easy access to the jobs market and the possibility of family reunification after three years.

143. Unaccompanied minors will now also be assisted by a person whom they trust in the airport procedure and throughout all the stages of the decision procedure.¹²¹

144. In an important decision of 8 June 2006¹²² the former Swiss Asylum Appeals Commission (CRA) revised its jurisprudence on the relevance of non-State persecution for the granting of refugee status and decided to adopt the theory of protection. According to the practice followed up to that time by the Swiss asylum authorities, persecution was a decisive factor for the granting of refugee status if it emanated from the State or if, pursuant to the theory of imputability, the State could at least be held indirectly responsible for the persecution. In the case in question the Somalian asylum-seeker had been taken prisoner by a private clan militia, which had put him to forced labour and inflicted injuries by their ill-treatment. CRA concluded that the interpretation given to the Geneva Convention relating to the Status of Refugees led clearly to adoption of the theory of protection. The central question which that theory posed was whether the person under threat could find protection against persecution in his country of origin. The Commission was guided in its deliberations by the purpose of the Convention and by the fact that the other States parties now followed a practice consistent with the theory of protection. It admitted the appeal and ordered ODM to grant asylum to the applicant, who had already been admitted provisionally. This revision of the jurisprudence will have its consequences, in particular for refugees from countries incapable of providing protection or from failed States. According to the practice followed up to that time, such persons should already have been admitted provisionally, for it was impossible to enforce their deportation, so that this revision has an effect only on their legal status in Switzerland.

145. In another important decision, handed down on 9 October 2006,¹²³ CRA reviewed the phenomenon of marital abduction in Ethiopia. It concluded that under certain conditions the women in question satisfied the requirements for award of refugee status. It stressed in its decision that victims of marital abduction and rape did not obtain from the Ethiopian State the protection which could usually be expected by male victims of private violence. CRA regarded this gender-based discrimination as persecution providing grounds for assertion of the right of asylum. The case in question concerned a young Ethiopian woman who, at the age of 16, had been abducted, ill-treated and raped by a senior officer whom she refused to marry. CRA admitted the appeal and ordered the lower instance to grant the applicant asylum in Switzerland.

7.9 Principle of non-refoulement in cases of international judicial assistance

146. In an extradition decision handed down in 2003¹²⁴ the Federal Court confirmed its jurisprudence in this matter: “The minimum standards of protection of individual rights deriving from the ECHR or the International Covenant on Civil and Political Rights of 16 December 1966 (UN Covenant II; RS 0.103.2) are part of the international system of public law. These rights include protection against torture and cruel, inhuman or degrading treatment (ECHR, art. 3 and

¹²¹ This measure will come into effect on 1 January 2008.

¹²² In the *A.I.I., Somalia* case; JICRA 2006/18.

¹²³ In the *W.H., Ethiopia* case; JICRA, 2006/32.

¹²⁴ ATF 129 II 100, 104.

UN Covenant II, art. 7; see also art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 [RS O.105]), under which extradition is prohibited if the person concerned is at risk of torture, and the European Convention for the Prevention of Torture and Cruel, Inhuman or Degrading Punishment or Treatment of 26 November 1987 [RS 0.106].”

7.10 Switzerland’s international activities

147. The work on the ratification and application of the *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is mentioned in paragraphs 4 and 20.

8. ARTICLE 8 (Prohibition of slavery and forced labour)

8.1 Community service as a criminal punishment

148. Article 37 of the new general part of the Criminal Code authorizes the courts to order, instead of a sentence of deprivation of liberty of at least six months or a 180-days daily fine, a period of community service up to a maximum of 720 hours. This may not be done without the perpetrator’s consent. This public service must be performed for the benefit of social institutions, works of public utility, or persons in need. It is unpaid.

8.2 Trafficking in persons

149. Switzerland is a country of destination for trafficking in persons, and to a lesser extent a country of transit as well. As this is a criminal activity, the exact number of victims is unknown and is difficult to estimate. On the basis of international estimates and an estimate of the number of illegal prostitutes, the Federal Police Office thought in 2002 that 1,500 to 3,000 persons were victims of such trafficking in Switzerland. No more recent estimates are available. The victims of prostitution networks, mostly women, come mainly from East and South-East Europe, the Baltic countries, Brazil and Thailand. In recent years between 20 and 50 cases of trafficking in persons have been reported every year in Switzerland, together with more than twice that number of cases of incitement to prostitution (art. 195 of the Criminal Code). In 2005 there were 11 convictions for trafficking in persons and 12 for incitement to prostitution. This marks an increase over previous years, when the number of convictions for trafficking ranged between two and seven. Everything points to the conclusion that in this area the true crime rate is high.

150. To combat trafficking in persons is one of the Federal Council’s declared aims. It has committed itself to stepping up the international fight against the sale of persons and trafficking in persons. In this spirit Switzerland ratified in 2006 the two Additional Protocols to the United Nations Convention against Transnational Organized Crime, one concerning suppression of trafficking in persons, the other on trafficking in migrants, and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (see para. 4).

151. In connection with the ratification of the Optional Protocol on the sale of children, child prostitution and child pornography, the old article 196 of the Criminal Code was replaced by a new article 182. This amendment, which entered into force on 1 December 2006, extends the scope of the crime of trafficking in persons, which up to that time had applied only to trafficking for purposes of sexual exploitation, exploitation of labour, or removal of organs. The new provision reads:

“Article 182. Trafficking in persons

1. Anyone who, as supplier, intermediary or receiver, engages in trafficking in a human being for purposes of sexual exploitation or exploitation of labour or in order to remove an organ shall be liable to a sentence of deprivation of liberty or a monetary fine. Recruitment of a person for such purposes shall be deemed trafficking.
2. If the victim is a minor or if the perpetrator is a professional trafficker in persons, the penalty shall be deprivation of liberty for at least one year.
3. A monetary penalty shall be imposed on the perpetrator in all cases.
4. Anyone committing this offence abroad shall also be liable to punishment. Article 6 *bis* shall also apply.”

152. The Coordination Service to Combat Trafficking in Persons and Trafficking in Migrants (SCOTT), attached to the Federal Police Office, was set up in 2003. All the federal and cantonal authorities engaged in combating and preventing trafficking in persons or migrants have links to SCOTT, which coordinates the work of prevention, criminal prosecution and victim protection. SCOTT is responsible in particular for the implementation of the recommendations made in the interdepartmental report “Trafficking in persons in Switzerland”¹²⁵ and in the two Additional Protocols to the United Nations Convention against Transnational Organized Crime, which deal with trafficking in persons and trafficking in migrants. Where these matters are concerned, SCOTT is both a clearing house for information, coordination and analysis for the Confederation and the cantons and a contact and coordination point for international cooperation. Its purpose is to improve the measures of prevention, criminal prosecution and victim protection.

153. A new police unit entitled “Paedophilia, Trafficking in Persons and Trafficking in Migrants” was created in 2004. It supports the cantonal police forces in inter-cantonal and international investigations.

154. A number of cantons, including Zurich, Berne, Solothurn, St. Gallen and Lucerne, have established round tables to ensure close cooperation between the criminal prosecution authorities, migration services, and counseling centres providing assistance to victims.

155. Since January 2005 the Swiss office of the International Organization for Migration (IOM) in Berne has been offering cantonal authorities and public and private counseling centres assistance tailored to the needs of victims of trafficking in persons. This assistance includes support for voluntary return to the country of origin and enrolment of victims in rehabilitation and local vocational integration programmes. IOM is also active in the areas of awareness-raising and training.

156. With more particular reference to the exploitation of women, the canton of Neuchâtel adopted on 29 June 2005 a Prostitution and Pornography Act. This Act is designed to accord everyone the freedom of decision over their own body. It seeks to ensure that persons working as prostitutes - for the most part women - do not suffer any restrictions on their freedom of action

¹²⁵ This report is published on the web site of the Federal Justice Office:
www.ejpd.admin.ch/etc/medialib/data/kriminalitaet/gesetzgebung/menschenhandel.Par.0008.File.tmp/ber-menschenhandel-f.pdf.

and are not subjected to threats, violence or coercion, and that nobody should exploit situations of hardship or dependence to persuade them to engage in sexual acts.

157. Under the Federal Act on assistance to victims of crime (see para. 19), any person having suffered in Switzerland, as a result of an offence, a direct attack on his or her physical, sexual or mental integrity is entitled to counseling and assistance, regardless of nationality or residence status. Victims coming forward as witnesses also enjoy the procedural rights provided for victims and witnesses. In principle, victims of trafficking in persons may seek assistance from public or private counseling centres.

158. Residence status is also a decisive factor in the protection accorded to victims. The aliens legislation¹²⁶ authorizes the issuance of a residence permit in a personal case of extreme gravity or by virtue of considerations of general policy. If necessary, this possibility will be offered to victims of trafficking in persons during a “cooling off” period, then in appropriate cases for the duration of the criminal proceedings. Here is however no right to this option. A survey of the cantons showed that in 2006 victims obtained residence permit in 45 cases of trafficking in persons (46 cases in 2005). In 39 of these cases (30 in 2005) the authorities waived the issuance of deportation orders. The practice was clarified in an ODM circular dated 25 August 2004.

159. The new Aliens Act (see para. 11) will repeal the regulations currently in force, probably on 1 January 2008. Article 30, paragraph 1 (e), of the new Act provides expressly for the possibility of waiving the general conditions governing admission for victims of trafficking in persons. Their residence status will now be regulated by legal procedures.

160. The provision of assistance for return home is also possible. The federal authorities have also issued new guidelines to restrict the immigration of cabaret dancers and give them better protection.¹²⁷ As before, these guidelines apply to artistes who perform in cabaret stage shows and whose time in Switzerland is limited to a maximum of eight months per calendar year (short stay). They supplement earlier guidelines on matters of procedure and cover the following points, amongst others:

- Restriction of the maximum number of dancers;
- Limited validity of visas;
- Checks on validity of the application;
- Conditions for employment;
- Regular monitoring of compliance with requirements for lawful employment and the protection of employees.

¹²⁶ Art. 13, para. (f), and art. 36 of the Aliens Limitation Order (OLE, RS 823.21).

¹²⁷ Annex 4/8c to the LSEE Guidelines:
www.auslaender.ch/rechtsgrundlagen/weisungen_gruen/anhaenge48c_f.asp.

On 2 February 2006 the Federal Office for Migration (ODM) issued new guidelines to protect cabaret dancers.¹²⁸ These guidelines introduce inter alia:

- An obligation to pay dancers' wages into an account bearing their name, which they alone control;
- An obligation for employers to insure dancers from the moment they take up the job for medical, pharmaceutical and hospital expenses;
- A prohibition of demands for services not provided for in the contract;
- Reinforcement of the monitoring of the regulations already in force.

161. There is a standard work contract drawn up with the Swiss Association of Concert Cafés, Cabarets, Dancehalls and Discothèques (ASCO);¹²⁹ it entered into force on 1 March 1998, replacing the 1993 contract. It is intended to provide better protection for cabaret artistes and, in this respect, includes improvements in social security, the most important of which is the introduction of a daily allowance in the event of illness. The probation period has been abolished; cabaret owners are bound for the full term of the employment contract and cannot dismiss a dancer without justification. For the first time the standard contract prohibits employers from requiring the dancer to incite customers to consume alcohol. Subsequent changes include the insertion in the contract, from 1 January 2004, of provisions on working hours and night work. And on taking up their jobs dancers must undergo a medical examination to determine whether they are fit for night work. This examination must be repeated every two years.

162. It should also be pointed out that the Federal Office on Equality between Men and Women has produced general information sheets which Swiss consulates are asked to distribute to cabaret dancers along with their visa or assurance of a residence permit. These sheets have been translated into the languages of the main countries of origin and inform dancers of their rights and obligations and the services to which they may apply in case of need. Dancers are required to read the information sheet at the consulate. If they are making their first application for a visa of this kind, they must be given information, in the course of a brief interview, about what to expect in their work, as well as information about their rights and obligations. Lastly, a large majority of the cantonal authorities also give dancers a detailed information sheet indicating the cantonal regulations in force and the public services and specialized associations to which they may turn.

163. The Directorate for Development Aid and Cooperation (DDC) and Political Division IV of the Federal Department of Foreign Affairs (DFAE) provide operational support for a number of projects carried out abroad. Switzerland also plays an active role in international organizations working to combat trafficking in persons, including the United Nations, the Organization for Security and Cooperation in Europe, and the Council of Europe.

8.3 Sexual exploitation of children

164. Article 5 of the new general part of the Criminal Code (see para. 11) now recognizes the competence of the Swiss authorities to prosecute and try sexual offences committed against

¹²⁸ ODM Directives LSEE/cabaret dancers dated 2 February 2006:
www.fedpol.admin.ch/etc/medialib/data/kriminalitaet/menschenhandel.Par.0015.File.tmp/taenz_0601_f.pdf.

¹²⁹ See initial report, para. 110.

minors abroad by any person present in Switzerland who has not been extradited. Thus, the requirement of double criminalization has been abandoned and Switzerland's almost universal jurisdiction has been recognized.

165. Since 1 April 2002 (amendment of art. 197 of the Criminal Code; see para. 11) the acquisition or reception, by electronic or other means, or the possession of pornographic material portraying children or animals or acts of violence has carried a sentence of up to one year's imprisonment or a fine.

166. Since 1 October 2002 the statute of limitation on sexual acts committed against children and dependent minors and the acts on the exhaustive list of crimes against under-sixteens (murder, sexual coercion, abduction and kidnapping, etc.) runs in all cases until the victim's 25th birthday.¹³⁰

167. On 1 March 2006 the "Marche Blanche" association tabled a popular initiative requesting the insertion in the Constitution of a provision to the effect that punishable acts of a sexual or pornographic nature committed against a child below the age of puberty are not subject to a statute of limitation. The Federal Council concluded that this initiative was not likely to improve the prevention of paedophilia offences and decided to submit to Parliament an indirect counter-initiative. To this end, on 28 February 2007 it tabled for consultation new provisions according children aged under 16 years who fall victim to serious sexual offences or serious offences against their life or physical integrity a longer period for reflection than is at present available before lodging a criminal complaint. The statute of limitation for such offences would begin to run from the day on which the victim reaches the age of majority. A victim will thus be able to lodge a criminal complaint up to the age of 33.

168. As already mentioned in paragraph 4, on 19 September 2006 Switzerland ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The consequent new article 182 of the Criminal Code entered into force on 1 December 2006 (para, 11).

169. Switzerland also participated actively in the Council of Europe in the work of the committee of experts on crime in cyberspace. The Council of Europe's Convention on Cybercrime¹³¹ is the first international instrument on criminal offences committed via the Internet and other information technology networks. Its principal objective is to pursue a common criminal policy to protect society against cybercrime, in particular by adopting appropriate domestic legislation and strengthening international cooperation. Switzerland signed this instrument on 23 November 2001 (see para. 5).

170. The national Coordination Service to Combat Internet Crime (SCOICI), the central contact point for persons wishing to report suspicious Internet sites, was created on 1 January 2003 following several serious cases of sexual abuse of children, child pornography and paedophilia, many of which originated on the Internet or owed their widespread dissemination to the Internet. SCOICI makes a preliminary examination of all communications about suspicion - including those made anonymously - of offences committed via the Internet, saves the suspect data files and transmits them to the competent criminal prosecution authorities in Switzerland and abroad,

¹³⁰ Art. 97 of the Criminal Code.

¹³¹ ETS 185.

together with a brief legal assessment of the situation. SCOCI is also responsible for searching for illicit material on the Internet.

171. Opening messages (now almost 7,500 a year) are processed as they appear, with the aid of powerful software. Since 2003 between 50 and 80 cases have been transmitted every month to the criminal prosecution authorities. Most of these cases (almost 90%) have led to criminal investigations, during which prohibited material has usually come to light, and many cases have resulted in the conviction of suspects.

172. SCOCI finds a positive response in the media. There have been a number of specialized articles and public presentations which highlight its work. The reinforcement of existing contacts and the establishment of networking with specialized higher education institutions, police services, economic circles, non-governmental organizations, etc., is of increasing importance.

173. On 9 June 2006 the Council of States adopted a motion calling on the Federal Council to expand article 197, paragraph 3*bis*, of the Criminal Code in order to make the mere consumption of child pornography a criminal offence. The National Council has not yet dealt with this matter, which means that the motion has not yet been finally transmitted.

8.4 Federal Act on the transplantation of organs, tissues and cells

174. The *Federal Act on the transplantation of organs, tissues and cells* (Transplantation Act; see para. 11)¹³² regulates the prohibition of the sale of organs, the donation of organs free of charge, the definition of death, the requirements for consent to the removal of organs, tissues or cells from dead bodies, the criteria and procedure for their use, the conditions governing donations by living persons, xenotransplantation, and the transplantation of tissues and embryonic and foetal cells of human origin. The entry into force of the Transplantation Act and the regulations for its implementation was scheduled for 1 July 2007.

8.5 Civilian service

175. Matters connected with conscientious objection and civilian service are discussed in detail under article 18 (see paras. 262 *et seq.*).

9. ARTICLE 9 (Right to liberty and security)

9.1 Principle

176. The right to personal liberty is now expressly guaranteed by article 10, paragraph 2, of the Federal Constitution:

“All human beings have the right to personal liberty, including physical and mental integrity and liberty of movement.”

177. Article 131 of the Federal Constitution contains the following provisions on deprivation of liberty:

“1. No one may be deprived of his liberty except in the cases specified by law and in the forms which the law prescribes.

¹³² FF 2004 5115; RS 810.21.

2. Anyone who is deprived of his liberty has the right to be informed immediately, in a language which he understands, of the reasons for such action and of his rights. Such a person must be allowed to assert his rights. He has the right *inter alia* to notify his relatives.
3. Anyone who is held in custody has the right to be brought immediately before a judge, who shall order the continuation of such custody or release. Such a person has the right to be tried within a reasonable time.
4. Anyone who is deprived of his liberty without a court so ordering has the right to bring his case before a court at any time.”

9.2 European Committee for the Prevention of Torture (CPT) and United Nations Committee against Torture (CAT)

178. Both CPT and CAT have been recommending for some time that Switzerland should authorize detainees to communicate immediately with a defence counsel. The draft code of criminal procedure (P-CPP, para. 12) may provide a response to this recommendation: it authorizes a defence counsel to be present during all interrogations, including interrogations by the police, and to put questions, regardless of the detainee’s situation. He must also be allowed to talk freely with his client before an interrogation or while it is suspended (P-CPP, art. 156; see paras. 217 *et seq.*).

179. The draft code also regulates matters connected with deprivation of liberty, such as the conditions for use of handcuffs (art. 211) and home visits (art. 212). It provides that, in the event of arrest or preventive detention, the relatives must be notified immediately, together with the employer and the foreign consular office if the person concerned so wishes (art. 213). As an exception, information is not given if such action undermines the purpose of the examination proceedings or if the person concerned expressly states his opposition.

180. With regard to arrest procedures, article 218 provides that an arrested person may be held in custody for a maximum of 24 hours. At the end of that period the arrested person must be brought before a public prosecutor, who must bring him before a court competent to order detention measures, which will also be competent to order and/or extend pretrial detention (art. 224).

9.3 Life imprisonment

181. As mentioned in paragraph 11, article 123*a* of the Federal Constitution has been in force since 8 February 2004:

- “1. If a sex offender or a violent offender is deemed extremely dangerous and incorrigible in the expert assessments called for in the sentence, he shall be imprisoned for life on the ground of the high risk of re-offending. Early release or parole are excluded.
2. Fresh expert assessments shall be made only if new scientific knowledge establishes that the offender can be rehabilitated and that he would then no longer constitute a danger to the community. The authority which decides to allow release in the light of such assessments shall be responsible if the person concerned re-offends.

3. All expert assessments of an offender shall be conducted by at least two experts, who shall take into consideration all the relevant factors.”

182. Since this new provision of the Constitution is open to interpretation on many points, the Federal Council has drafted provisions on its application, which are currently before Parliament. The proposed additions to the general part of the Criminal Code regulate the circumstances under which a judge may order life imprisonment. They clarify, with the aid of a list of offences, which convicted persons should be regarded as extremely dangerous or incorrigible sex offenders or violent offenders. The draft legislation also indicates how to decide, in a specific case, whether the continuation of life imprisonment is still justified. The procedure adopted excludes automatic reconsideration, in accordance with the requirements approved in the popular initiative, while still respecting the principles of the European Convention on Human Rights. The cantonal enforcement authority, of its own accord or at the request of the person concerned, calls for a special federal committee to examine the sentence of life imprisonment. This committee, which the Federal Council must set up, considers whether there is any new scientific knowledge which might make treatment of the offender a possibility. If such treatment demonstrates that the danger which he represents can be decisively reduced, a competent judge will lift the sentence of life imprisonment and order it to be commuted to treatment in an institution. If the offender no longer constitutes a danger by reason of old age or serious illness or for some other reason, the judge may order his release on parole even without prior treatment.

9.4 Asylum procedure at airports

183. Regulations similar to the ones described in paragraphs 112 and 114 of the second periodic report now appear in articles 22 and 108 of the Asylum Act which entered into force on 1 October 1999:

“Article 22. Procedure at airports

1. Persons submitting a request for asylum at a Swiss airport shall be temporarily refused entry into Switzerland when it is not immediately possible to determine whether the conditions for obtaining an entry permit under article 21 have been satisfied
2. When notifying such temporary refusal to asylum-seekers the Office shall allocate them a place to stay at the airport for the probable duration of the procedure up to a maximum of 15 days; it shall provide them with suitable accommodation.
3. The temporary refusal and the allocation of a place to stay at the airport must be notified to the asylum-seeker within 48 hours of the submission of the request; the available legal remedies must be notified to him at the same time. Applicants have the right to a prior hearing and must have the possibility of representation.

Article 108. Examination of decisions to refuse entry into Switzerland and to assign the airport as a place of stay

1. Asylum-seekers may appeal against a decision temporarily to refuse entry them into Switzerland and to assign the airport as a place to stay (art. 22, paras. 1 and 2) up to the moment when deportation is notified and in accordance with article 23, paragraphs 1 and 2.

2. The Appeals Commission shall rule on such appeals, as a general rule on the basis of the file, within 48 hours.”

184. The partial amendment of the Asylum Act, adopted by Parliament in December 2005 (para. 11), provides for a new airport procedure. The period of assigned stay at the airport must not exceed 60 hours (art. 22, para. 5). Decisions in asylum cases - on the merits or of non-consideration - must however be notified within 20 days (art. 23).

185. On 11 April 2002 the Conference of Directors of Cantonal Departments of Justice and Police adopted a directive on forced repatriation by air.¹³³

9.5 Measures of coercion under the Asylum Act

186. New provisions on measures of coercion were adopted in the new Asylum Act (para. 11).¹³⁴ They are designed inter alia to encourage persons required to leave Switzerland to cooperate in their departure: extension of the maximum period of detention pending deportation from nine to 18 months, and introduction of detention for a maximum period of 18 months for refusal to cooperate. This measure applies in addition to detention with a view to deportation when deportation is possible and legal and may reasonably be required but the person concerned refuses to leave. Such detention may not exceed a maximum duration of 24 months in all (12 months for children aged 15 to 18 years). A further innovation is the introduction of a holding period of a maximum of three days for purposes of establishing identity (for example, to take a person to a consular office to obtain the necessary papers). The measures of allocation of a place to stay and prohibition of visiting specified places may now be ordered in the event of failure to comply with a departure time limit. Provision is made for the judicial monitoring of the legality and appropriateness of such detention.¹³⁵

9.6 Deprivation of liberty for purposes of assistance

187. In 2006 the Federal Council adopted a message concerning amendment of the Swiss Civil Code (protection of adults, rights of the person, and right of affiliation; see para. 14). This amendment also addresses deprivation of liberty for purposes of assistance (art. 397 (a) to (f) of the Civil Code). Its purpose is to strengthen the legal protection of persons placed or held in an institution against their will because they represent a danger to themselves or to others. To this end, the amendment regulates the treatment of mental disorders without the consent of persons placed in institutions. It establishes the initial duration of such placement ordered by a doctor at a maximum of six weeks; in the existing Code this duration is unlimited. And it provides that the protection authority must conduct periodic examinations. The new article 439 authorizes appeal to a judge in cases of placement ordered by a doctor, continuation by the institution, rejection by the institution of an application for release, treatment of a mental disorder without the consent of the person concerned, and the imposition of measures restricting his liberty of movement.

¹³³ www.ccdjp.ch.

¹³⁴ Most of these measures were taken from the Federal Act on the permanent and temporary residence of aliens and entered into force on 1 January 2007.

¹³⁵ FF 2002 3604 *et seq.*

9.7 Protection of witnesses outside proceedings

188. Both the current juridical system and the future code of criminal procedure establish entitlement to protection, such as guaranteed anonymity of witnesses in judicial proceedings. However, the Federal Council decided that this protection is insufficient when the alleged perpetrator of the offence has links to serious criminals and knows the witness or when he could discover the witness's identity away from the place of the hearing. Accordingly, it commissioned the Federal Department of Justice and Police to prepare proposals for the incorporation in federal law of arrangements for witness-protection measures to be taken outside the court. The aim is to do everything possible to persuade threatened persons to testify. In this same connection the Federal Council is now considering accession by Switzerland to the Convention of the Council of Europe on Action against Trafficking in Human Beings.

9.8 Seizure of materials containing incitement to violence

189. The amendment of 24 March 2006 of the Federal Act on measures for the maintenance of internal security (incitement to violence and violence at sporting events (LMSI I)), which entered into force on 1 January 2007, authorizes the police and customs authorities to seize, irrespective of the quantity, nature and type, materials which could be used for propaganda purposes and the content of which constitutes concrete and serious incitement to the use of violence against persons or objects. They pass such materials on to the Federal Police Office, which decides as to seizure or confiscation.

9.9 Secret prisons of the Central Intelligence Agency (CIA) in Europe

190. At the end of November 2005, when the media were carrying reports on alleged secret CIA prisons in Europe, the Secretary-General of the Council of Europe used his powers under article 52 of the European Convention on Human Rights to invite member States to explain how their domestic law ensured the effective application of and compliance with the Convention. They were asked to indicate, amongst other things, how their domestic law ensured that acts committed in their jurisdiction by agents of another State were regulated and monitored, how it prevented unlawful deprivation of liberty, the speed with which, when necessary, an investigation could be started, what juridical means were available for that purpose, and whether victims were guaranteed compensation. As the Secretary-General's report of 28 February 2006 shows,¹³⁶ Switzerland furnished full and satisfactory information.

9.10 Jurisprudence

191. During the period under review the European Court of Human Rights handed down two decisions on the rights to liberty and security. In both cases it found no violation of the European Convention: in *H.M. v. Switzerland* (decision of 26 February 2002) because the placement of the plaintiff in a medical-care home could not be deemed deprivation of liberty; and in *Minjat v. Switzerland* because the holding of the plaintiff in custody until the issuance of an order for continuation of the detention, accompanied by an explanation of grounds, could not be contested under domestic law and was not arbitrary either.

¹³⁶ SG/Inf (2006) 5 28 February 2006:
<https://wcd.coe.int/ViewDoc.jsp?id=976707&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

192. In a decision of 2 November 2003 the Federal Court found a violation of the right of all detainees to be brought immediately before a judge. It ruled in this case that the prefect of Lucerne who had ordered the detention combined the functions of investigation and, in part, of prosecution and that he was required to comply with the directives of the public prosecutor or of the executive and administrative organs to which he was answerable.¹³⁷

193. In a decision of 30 January 2004 the Federal Court confirmed its jurisprudence to the effect that the detention of an alien pending deportation may be ordered only if the deportation can be executed within the near future. If the State of origin does not accept the forced repatriation of its nationals, the deportation cannot be carried out within a foreseeable time-frame and therefore the detention breaches the principle of proportionality.¹³⁸

194. The Federal Court ruled in a decision of 2 July 2001 that regulations not providing for monitoring by a judge of placement for purposes of assistance until after the review of the measure by an administrative authority is inconsistent with the guarantee of rapid and direct access to a court.¹³⁹

10. ARTICLE 10 (Humane treatment of persons deprived of their liberty)

10.1 Background

195. Article 234, paragraph 1, of the draft code of criminal procedure (see para. 12) sets out the general principle that the liberty of persons deprived of their liberty under a criminal procedure may be restricted only to the extent required by the purpose of the detention and by the establishment's need for order and security. This principle also applies to the conditions under which persons deprived of their liberty may communicate with third parties (paras. 2-4).

196. On 11 January 2006 the Committee of Ministers of the Council of Europe adopted a new *Recommendation on the European Prison Rules*;¹⁴⁰ these Rules, particularly Nos. 56 to 62 on "Discipline and sanctions", apply by analogy to disciplinary measures in the context of arrest and the enforcement of sentences in general.

197. The pilot project mentioned in paragraph 122 of the second periodic report on recidivism rates and therapeutic treatment of sex offenders and violent offenders and/or offenders suffering from mental disorders was extended to the end of April 2005. The final report on this project is now being drafted.

198. In 2006, acting on a specific mandate, the Federal Public Health Office (OFSP) made an evaluation of the options for prevention, medical investigation and treatment of infectious diseases and of actions taken in this area with regard to drug use. Another mandate called for an expert legal assessment of responsibilities in relation to transmissible diseases and related drug problems in situations of detention and the rights of detainees to health care. The OFSP mission is to determine whether and to what extent it is necessary, desirable and possible for the

¹³⁷ ATF 131 I 36.

¹³⁸ ATF 130 II 56.

¹³⁹ ATF 127 III 385.

¹⁴⁰ R(2006)2.

Confederation to introduce measures to ensure the best possible treatment of transmissible diseases in a prison setting.

199. Since 2001 the Swiss Prison Personnel Training Centre has been running specific courses for the treatment of prisoners suffering from mental disorders. Each of these courses lasts seven weeks. This subject is also addressed in a special module in the basic training given to prison personnel.

10.2 Jurisprudence

200. In the case of a minor born in 1986, who had been convicted of robbery, theft and drugs offences, among other crimes, and committed to a closed institution on account of the danger which he represented to others, the Federal Court decided that even particularly difficult young offenders should not be kept in prison for long periods. It is of course possible to place minors temporarily in a reformatory while a suitable home is being found for them, but only in order to deal with a short-term emergency situation. Children should not be held for weeks and even less for months on end in a prison establishment simply because no suitable institution can be found for them. In the case in question it was hardly relevant that the child concerned declared himself in agreement with his treatment.¹⁴¹

11. ARTICLE 11 (Prohibition of imprisonment for debt)

201. In a decision of 12 May 2004¹⁴² the Federal Court voided a sentence which violated the prohibition of enforcement by committal. It referred in this decision to article 11 of the Covenant and affirmed that the prohibition of enforcement by committal was a principle of the Constitution which could also be linked to the principles of human dignity (art. 7 of the Constitution) and personal liberty (art. 10, para. 2).

202. In a fraud case in which the plaintiff had been kept in detention to prevent repetition of her offence the Federal Court dismissed the case of the plaintiff, who had argued that “to deem her indebtedness an indication of recidivism justifying the continuation of her detention was tantamount to restoring the imprisonment for debt prohibited by that article”.¹⁴³

12. ARTICLE 12 (Right to liberty of movement and freedom to choose one’s residence)

203. Article 24 of the Federal Constitution accords the freedom to choose one’s residence exclusively to Swiss citizens.

204. Pursuant to the new Aliens Act (LEtr; see para. 11), the holder of a residence permit (B permit) has the right to change his canton of residence provided that he is not unemployed and there is no reason for revoking his permit.

205. *The Agreement of 21 June 1999 between the Swiss Federation on the one hand and the European Community and its Member States on the other hand on the Free Movement of Persons*

¹⁴¹ Decision 6A.20/2006 of 12 May 2006.

¹⁴² ATF 130 I 169 *et seq.*

¹⁴³ ATF of 21 January 2005, 1P.750/2004..

(ALCP),¹⁴⁴ which entered into force on 1 June 2002, applies to the contracting parties. From 1 June 2007, 17 States (15 plus Cyprus and Malta) benefit from the freedom of movement provided for in the Agreement. The *Agreement of 21 June 2001 amending the Convention establishing the European Free Trade Association* (EFTA) sets out rules on the free movement of persons equivalent to the ALCP rules and applicable to nationals of the States members of EFTA: Iceland, Liechtenstein and Norway. The nationals covered by these Agreements, as employees for example, are entitled to obtain a residence permit valid for the whole of Swiss territory.

13. ARTICLE 13 (Expulsion of aliens)

13.1 Background

206. Paragraphs 132 and 133 of the second periodic report are still relevant.

207. The *Federal Aliens Act* (LEtr)¹⁴⁵ will revoke at the beginning of 2008 the Federal Act of 26 March 1931 on the permanent and temporary residence of aliens (LSEE; see para. 11). The new Act regulates inter alia the admission and residence of nationals of States not members of the European Union or EFTA (nationals of third States) whose status is not governed by the asylum legislation, regardless of whether they engage in a gainful activity. The Act posits a dual system of admission. While free movement between Switzerland and the States members of the European Union or EFTA has been in effect since 2002 (under transitional arrangements up to 2014), nationals of States not members of the European Union or EFTA are subject to restrictions. Only skilled workers and specialists are admitted to the labour market, and only to a limited extent. They may obtain a work permit provided that no worker with the required profile can be found in Switzerland or the European Union/EFTA and that the admission criteria are met. The new Aliens Act sets out for the first time the principles and objectives of the integration of aliens and establishes the necessary coordination arrangements. The situation of aliens staying in Switzerland legally and for the long term will be improved. Such aliens will be able to change their occupation or place of residence more easily, and the requirements for family reunification will be less stringent. Integration efforts will be encouraged, including through systems of incentives. Lastly, the new Act provides stiffer penalties to ensure compliance with the law. More effective measures of prevention will be introduced to combat crime and abuses in the areas covered by the Act. The penalties will be more severe, especially with regard to the activities of people-smugglers, illegal employment and marriages of convenience.

208. The Federal Aliens Commission (CFE) takes a positive view of the Act in principle, pointing to a number of improvements over the LSEE in force up to now:

- Easier movement (place of residence and work) for persons holding a temporary or permanent residence permit;
- Legal basis for the efforts to integrate aliens;
- Possibility of obtaining a permanent residence permit after five years' stay in Switzerland when integration has proved successful;

¹⁴⁴ RS 0.142.112.681.

¹⁴⁵ FF 2002 3604 *et seq.* On 24 September 2006 the Swiss people and all the cantons approved the new Aliens Act by 68 per cent of the votes cast.

- Possibility of family reunification for persons holding a short-term residence permit;
- Improved possibilities of integration for persons admitted provisionally (gainful employment and family reunification after three years);
- Improved protection of victims of domestic violence.

209. The problems relate chiefly, as CFE sees it, to differences between the provisions concerning nationals of European Union/EFTA States and those concerning nationals of third States:

- No unconditional right of family reunification for persons holding a temporary residence permit;
- Requirement of cohabitation for spouses;
- Family reunification for children only up to age 18 (the Agreement on the Free Movement of Persons allows such reunification up to age 21);
- Family reunification for children aged over 12 years only within a time limit of one year;
- No compulsory regulations on undocumented persons;
- No issuance of residence permits regardless of civil status;
- No entitlement to a permanent residence permit after 10 years' stay in Switzerland;
- Stronger measures of coercion, in particular an increase in the duration of detention.

210. Under article 121, paragraph 2, of the Act, which relates to article 185 of the Constitution, the Federal Council is entitled to expel from Swiss territory aliens who endanger Switzerland's internal or external security. The practice established under the old article 70 of the Constitution remains in effect. This measure is ordered by the Federal Council when there exists a danger to Switzerland's internal or external security, when the matter in question is of great political importance, or when reasons of internal or external policy justify the measure. This expulsion measure extinguishes all rights of residence. It may also be ordered against persons who have never lived in Switzerland or who are abroad at the time when the measure is ordered. There is no right of appeal against the decision of the Federal Council, and the procedural provisions may be applied restrictively for reasons of official secrecy. Expulsion for political reasons is an exceptional measure available to the Executive. Expulsion orders are enforced by the Federal Police Office.

211. The amended version of the Criminal Code (see para. 11) provides for the suppression of expulsion on criminal grounds. Furthermore, under the new Aliens Act only the federal authorities may order expulsion. Article 68 of the Act reads:

- “1. The Federal Police Office may expel an alien in order to safeguard Switzerland's internal or external security.
2. Such expulsion shall be subject to a reasonable time limit for departure.

3. It shall be accompanied by a prohibition of re-entry for a limited or unlimited period. The authority which took the decision may suspend such prohibition temporarily for sound reasons.
4. When an alien attempts to impair public security and order seriously or repeatedly, endangers them or represents a threat to internal or external security, the expulsion order shall be enforceable immediately.”

13.2 Jurisprudence

212. In Decision ATF 129 II 193 *et seq.*, the Federal Court held that an order to prohibit entry made for reasons connected with the protection of the interests of the country (art. 184, para. 3, of the Constitution) against an alien living in Switzerland who has acted on behalf of organizations whose activities are of such a kind as to destabilize the situation in Kosovo and in neighbouring territories, and thus to compromise relations between Switzerland and third States, is consistent with article 8 of the European Convention on Human Rights. According to this decision of the Federal Council, even article 13 of the International Covenant, which provides guarantees applicable to expulsion procedures, does not constitute an impediment to political expulsions, which are generally ordered without a hearing and are not subject to appeal, since such orders are made for reasons of national security. The Court held further that the same arguments were valid in the case of a prohibition on entry ordered for comparable reasons.

14. ARTICLE 14 (Guarantee of the right to due process)

14.1 Background

213. The *comprehensive reorganization of the Federal Judiciary* established in law an important component of the reform of the justice system approved by the people and the cantons on 12 March 2000 (see para. 12). The Federal Council transmitted a message on this subject to Parliament in February 2001. On 17 June 2005, after several years of deliberation, the Federal Chambers adopted the *Federal Act on the Federal Court (LTF)*¹⁴⁶ and the *Federal Act on the Federal Administrative Court (LTAF)*,¹⁴⁷ which both entered into force on 1 January 2007. The comprehensive reorganization of the Federal Judiciary entails a complete recasting of the regulations governing the arrangements and procedures in the Federal Court and its lower instances and of the remedies of appeal to the Supreme Court. The aims of this exercise are to improve the functioning of the Federal Court by securing an effective and sustainable reduction in its current case-load, then to improve the jurisdictional protection in certain areas, and lastly to simply legal procedures and remedies.

214. The *Federal Act on the Federal Criminal Court (LTPF)*¹⁴⁸ was adopted on 4 October 2002. The new Federal Criminal Court began its work in Bellinzona on 1 April 2004. The Criminal Division hears in first instance criminal cases falling within the federal jurisdiction. The Complaints Division has competence to rule *inter alia* on measures of coercion and on complaints brought against acts or omissions of the Procurator-General of the Confederation or a federal examining magistrate in criminal cases falling within the federal jurisdiction.

¹⁴⁶ RS 173.110.

¹⁴⁷ RS 173.32.

¹⁴⁸ RS 173.71.

215. The procedural guarantees, some of a general nature, others more specifically focused on criminal procedure, are set out in articles 29 to 32 of the Federal Constitution. The general guarantees include the right of parties to have their case heard within a reasonable time-frame (art. 29, para. 1), the right to a hearing (para. 2), the right of needy persons to free legal assistance (para. 3), the right of all persons to have their case heard by an independent and impartial court (art. 30, para. 1), and the public nature of judicial proceedings (para. 3). The more specifically criminal procedures are regulated by article 31 of the Constitution (which addresses the rights of suspects deprived of their liberty or, more particularly, remanded in custody) and by article 32, which states the principle of presumption of innocence (para. 1) and accords to all accused persons the right to be informed in detail of the charges against them (para. 2).

“Article 29. General procedural guarantees

1. Everyone has the right, in judicial or administrative proceedings, to have his case treated fairly and to be heard within a reasonable time.
2. The parties have the right to a hearing.
3. Any one who has insufficient resources is entitled, unless his case appears to lack any prospect of success, to free legal aid. He is also entitled to the free assistance of a defence counsel to the extent that the protection of his rights so requires.

Article 30. Guarantees of due process

1. Everyone whose case has to be heard in judicial proceedings has the right to have his case heard by a competent, independent and impartial court established by law. Extraordinary courts are prohibited.
2. Anyone against whom a civil action is brought has the right to have the case heard by a court in his place of domicile. The law may stipulate another forum.
3. The case shall be heard and the decision pronounced in public.

Article 31. Deprivation of liberty

1. Nobody shall be deprived of his liberty except in the cases stipulated by law and in accordance with the rules prescribed by law.
2. Anyone who is deprived of his liberty has the right to be informed immediately, in a language which he understands, of the reasons for such deprivation and of his rights. He must be given an opportunity to assert his rights. He has in particular the right to inform his relatives..
3. Anyone detained in custody has the right to be brought immediately before a judge, who shall order the continuation of his detention or his release. He is entitled to have his case heard within a reasonable time.
4. Anyone deprived of his liberty without a court order has the right to bring his case before a court at any time. The court shall rule as quickly as possible on the legality of such deprivation of liberty.

Article 32. Criminal procedure

1. All persons shall be presumed innocent until a confirmed sentence has been handed down in their case.
2. All accused persons have the right to be informed, as quickly as possible and in detail, of the accusations laid against them. They must have an opportunity to assert their rights of defence.
3. All convicted persons have the right to have their conviction examined by a higher court. Cases in which the Federal Court rules as sole instance are excepted.

14.2 Criminal procedure

216. The draft *code of criminal procedure* (P-CPP) mentioned in paragraph 12 is based on the constitutional guarantees, to which it gives practical effect in many of its provisions. With regard more specifically to the guarantee that suspects must be able to assert their rights (art. 31, para. 2, and art. 32, para. 2), the rights in question will now be defined in uniform language in the new code, which will be valid both for the Confederation and for all the cantons. If a suspect is to be able to assert his rights, he must be told what they are. The obligation to inform anyone deprived of his liberty about his rights (especially when held in custody) was already established in the Constitution (art. 31, para. 2).

217. The International Covenant contains several guarantees which must be respected in criminal proceedings and they are given effect in the draft code of criminal procedure. Reference should be made in this context to the rights of a person placed under arrest to have the immediate assistance of a lawyer, to inform one of his relatives, and to have himself examined by an independent doctor. These rights constitute the three pillars of protection against mistreatment of persons deprived of their liberty. In its report on its visit to Switzerland in February 2001 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) referred expressly, in connection with these rights, to the preliminary draft of the new code (AP-CPP) of 2001. It expressed satisfaction that this text took account of the CPT recommendations on the rights in question, but added that it required additional information on several points.

218. With regard to “the immediate assistance of a lawyer” CPT had suggested that access to a lawyer should be expressly guaranteed from the moment when a person is deprived of his liberty, in other words as soon as he is arrested by the police. To the extent that by “access to a lawyer” CPT means merely the opportunity which must be given to a person placed under arrest to make contact with a lawyer, the new code causes no difficulties. If, however, the phrase means that the police are not entitled to question such a person briefly (P-CPP, art. 214, para. 1 (b)) until his lawyer is present, such a requirement could not be met. When making an arrest, as regulated in article 214 of the draft code, the police must be able to carry out, without a lawyer being present, the necessary preliminary inquiries, which deal with only an extremely limited number of points. As a general rule, these inquiries must be made very quickly, so that it is impossible for practical reasons to satisfy the CPT requirements.

219. It should be added in connection with “the immediate assistance of a lawyer” that the draft code does not accord this right only to persons placed under arrest. On the contrary, defence

counsel are authorized in general terms to attend interrogations (including police interrogations) and may intervene on such occasions (P-CPP, art. 156).¹⁴⁹

220. With regard to the right to inform a relative (P-CPP, art. 213; AP-CPP, art. 225) CPT noted that the planned legislation satisfied its requirements; it even accepted the possibility that such notification might be waived (when the person concerned expressly states his opposition to notification or when the purpose of the examination proceedings prohibits it). It suggested nevertheless that the second of these exceptions should be defined more clearly in the draft legislation and be matched with appropriate safeguards (such a waiver should be noted in the record, for example). On this latter point, article 75 (f) of the draft code provides that the record of the proceedings must give details of the conduct of the proceedings and the orders issued by the criminal authorities.

221. The right of access to a doctor of one's choice is not addressed in the new draft code, not was it in the preliminary version of 2001. CPT, CAT and the United Nations Human Rights Committee all agree that a person placed under arrest must have the right, after each session of police questioning and before being brought before an examining magistrate, to request to be examined by an independent doctor (of his choice: an additional requirement raised by CPT). In its most recent report to CAT the Federal Council noted that, although the draft civil code did not expressly address that matter, which is not strictly speaking a matter of criminal procedure but relates instead to the right to personal liberty, a person placed under arrest has the right to be examined by an independent doctor, following his arrest and every time he so requests. The Federal Council added that the person's choice is taken into account to the fullest extent possible, subject to the availability of the doctor of choice and the obvious risk of collusion.

222. The *Federal Secret Investigations Act (LFIS)*¹⁵⁰ entered into force on 1 January 2005. A secret investigation is when police officers, who are not identifiable as such, enter criminal haunts under false identities to investigate a crime. The Federal Act takes into account the requirements of effective criminal prosecution but includes safeguards of due process consistent with the rule of law. This kind of infiltration by police officers occurs only in the investigation of particularly serious crimes, which are listed in full. Recourse to such operations must also be proportionate to the crime in question and have the approval of a judge.

223. The *Federal Act on monitoring of correspondence by post and telecommunications (LSCPT)*¹⁵¹ entered into force on 1 January 2002. The circumstances under which such monitoring may be authorized are now the same for the whole of Switzerland: there must be serious suspicion that the person concerned has committed one of the criminal offences listed in full in the Act. Furthermore, such monitoring must be justified by the seriousness of the act and must be ordered by a judicial authority.

224. The provisions of the LFIS and LSCPT are incorporated in the unified code of criminal procedure.

¹⁴⁹ Message, FF 2006 1173.

¹⁵⁰ RS 312.8.

¹⁵¹ RS 780.1.

14.3 Civil procedure

225. In June 2006 the Federal Council adopted a message concerning the *draft code of civil procedure* (see para. 11). An important place is given in this document to the prior or extra-judicial settlement of disputes. The parties must make an attempt at reconciliation or submit to mediation before going to court. Recourse to this preliminary procedure, in principle mandatory, ought to help to ease the burden on the courts, as well as facilitating the parties' access to justice (lowering the threshold). The cantons will still be able to refer the task of conciliation to a local justice of the peace (*juge de paix*). The conciliation authorities will also have increased powers (including competence to rule on disputes when the sums at stake are small). The various possibilities set out in the draft code will allow flexible application of procedural law in the light of the practical needs. The ordinary procedure corresponds to the traditional profile of a civil action: its main feature is the rule of explanation of positions, and the work of the court is limited essentially to the formal conduct of the proceedings. The draft text also proposes a simplified procedure for small claims and for social-law cases. The main features of this procedure are simplified formalities, oral hearings, and a more active role for the judge.

14.4 Jurisprudence

226. The European Court of Human Rights found a violation of article 6, paragraph 1, of the European Convention on Human Rights (ECHR) in the *Ziegler v. Switzerland* case.¹⁵² The Federal Court had not allowed the plaintiff to reply to the observations of the lower court and the other party. The Federal Court held that this refusal violated the right to a fair hearing. This right requires that plaintiffs should have the opportunity to familiarize themselves with any piece of evidence or any observation put to the judge and to discuss it. Two decisions were handed down in 2005 on the same legal point,¹⁵³ on each occasion in an action before the Federal Insurance Tribunal. The Federal Court and the Federal Insurance Tribunal have since modified their practice.¹⁵⁴

227. The European Court also found a violation of article 6, paragraph 1, of the Convention in the *Müller v. Switzerland* case.¹⁵⁵ This case dealt with the question of whether an interval of eleven and a half years in compensation proceedings for material expropriation was consistent with the criterion of "within a reasonable time" (ECHR, art. 6, para. 1). The Court endorsed the view of the Swiss Government that the length of the proceedings was partly justified by the complexity of the case and by the plaintiff's conduct. However, it found that the six-years duration of the proceedings before the Federal Court was excessive, especially as, apart from an on-site inspection, only insignificant procedural matters had been dealt with during that period.

228. The decision handed down on 1 March 2005 by the European Court in the *Linnekogel v. Switzerland* case dealt with the confiscation and destruction of recordings under an earlier order of the Federal Council concerning subversive propaganda. The fact that the plaintiff had not been able to have a court examine the measures ordered had violated his right of access to a court.

¹⁵² Decision of 21 February 2002.

¹⁵³ Decision of 12 July 2005 in the *Contardi v. Switzerland* case and decision of 11 October 2005 in the *Spang v. Switzerland* case.

¹⁵⁴ ATF 132 I 42 *et seq.*

¹⁵⁵ Decision of 5 November 2002.

229. The decision handed down on 12 July 2005 in the *Munari v. Switzerland* case concerned a criminal action in the canton of Tessino, which had been going on for eight and a half years in the same court. In the opinion of the Federal Court the principle of prompt justice had not been respected. The Tessino authorities concluded the proceedings 18 months later. Finding that the plaintiff remained nevertheless a victim of a violation of the Convention and that he had exhausted all the national remedies, the European Court endorsed the opinion of the Federal Court

230. In Decision 131 II 169 the Federal Court ruled that that the guarantee of due process within the meaning of article 29, paragraph 1, of the Constitution applied to all judicial and administrative proceedings. It goes further than the guarantee contained in article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the International Covenant, which apply only to judicial proceedings in connection with a criminal case and to actions concerning civil rights or obligations. The Federal Court noted further that the guarantee of due process does not give the person concerned an unlimited and unconditional right to bring a dispute to court. Access to the courts, while it must be guaranteed, does not mean that the action need not comply with the formal requirements concerning, inter alia, time limits and competence to take legal action. However, these limitations should not be so restrictive as to affect the substance of the right of access to the courts. They must pursue a legitimate goal and be proportionate.

231. In Decision ATF 130 II 126 *et seq.*, the Federal Court ruled that article 14, paragraph 3 (g) of the International Covenant expressly guarantees that a person charged with a criminal offence may not be forced to testify against himself or confess guilt. Any such person may, by exercising the right not to reply, remain silent without suffering any prejudice. And the duty of information set out in article 14, paragraph 3 (d), is a quite separate procedural guarantee. Statements made in ignorance of the right to remain silent may not in principle be used, for infringement of this guarantee is tantamount to a denial of formal justice. Exceptions to this prohibition of use must be based on a balance of interests and are permissible only under certain circumstances. In the case in question the Federal Court found that the right of a person charged with a criminal offence to remain silent established in article 14, paragraph 3 (g), had been violated because neither the police nor the examining magistrate had informed the person concerned of his right to remain silent and refuse to reply. In Decision ATF 131 IV 36 *et seq.*, the Federal Court declared that the conviction of a driver for obstructing a blood test in violation of certain legal requirements following an accident causing harm to third parties and for subsequently consuming alcohol was not inconsistent with the prohibition of compulsion to testify against oneself.

232. In a 2005 decision¹⁵⁶ the Federal Court ruled that, in addition to the duty of information set out in article 14, paragraph 3 (d), the judicial authorities must take concrete steps to ensure effective defence and that they are therefore required to give persons unfamiliar with the law and not represented by a lawyer general information about their rights in the proceedings, informing them in particular that they may call upon a defence counsel at any time.

233. The rights of defence deriving from the right to a hearing require, in accordance with the principle of fair treatment, that the record of the case should specify how the evidence was obtained. Thus the Federal Court ruled in a decision of 13 November 2002 that verbatim records transcribing into German tapped telephone conversations conducted in a foreign language could be used only if the file showed who had made the recordings and by what means.¹⁵⁷

¹⁵⁶ ATF 131 I 350.

¹⁵⁷ ATF 129 I 85.

234. The right to question a prosecution witness is absolute if his or her testimony is decisive from the standpoint of proof. The Federal Court found that this right had been infringed in a case in which there had been no cross-examination during the preliminary proceedings before the examining magistrate and in which the victim had refused, more than four years after the initial hearing, to reply to supplementary questions put by the defendant.¹⁵⁸

235. The Federal Court clarified this practice one year later. The formal criterion of the importance of the evidence obtained, whether decisive or not, could not determine the admissibility of recourse to anonymous witnesses. Instead the court must consider, as part of an overall assessment, whether the reduction of the rights of defence entailed by acceptance of anonymous witnesses serves interests meriting protection and, if so, whether the accused was nevertheless able to defend himself effectively and had therefore enjoyed due process. In the case before it the Court considered that the rights of defence had been insufficiently safeguarded, for neither the accused nor his counsel had had an opportunity to cross-examine, at least indirectly, one of the two prosecution witnesses.¹⁵⁹

236. In Decision ATF 129 I 281 *et seq.*, the Federal Court found that the right accorded to all persons charged with a criminal offence by article 2 of the seventh Additional Protocol to the European Convention on Human Rights and by article 14, paragraph 5, of the International Covenant to have his conviction reviewed by a higher court would be unacceptably voided of content if the necessary defence was limited to the proceedings in first instance and if a convicted person lacking the necessary resources had to take charge of the appeal proceedings himself, when representation by a lawyer would be essential for the effective exercise of his rights of defence. Where necessary defence is concerned, a defendant - or convicted person - whose poverty is recognized has, in principle, an unconditional right to free assistance, even in appeal proceedings which he initiates himself.

237. In view of the increase in free legal aid and the increasing competition with other professional groups to obtain the services of lawyers, the Federal Court amended its jurisprudence in a decision of 6 June 2006, arguing that there is no longer justification for limiting the remuneration of officially appointed counsel solely to the reimbursement of their expenses. Compensation for taking official assignments must be calculated in such a way as to enable lawyers to make a modest but not merely token profit.¹⁶⁰

238. In a 2002 decision¹⁶¹ the Federal Court found that the principle of *non bis in idem* derives not only from the Federal Constitution and from article 4 of the seventh Optional Protocol to the European Convention¹⁶² but also from article 14, paragraph 7, of the International Covenant. In another decision in that same year¹⁶³ it stressed that the procedural guarantee contained in article 14, paragraph 4, of the Covenant does not entail an obligation to provide legal protection free of charge.

¹⁵⁸ ATF 131 I 476.

¹⁵⁹ ATF 132 I 127.

¹⁶⁰ ATF 132 I 201.

¹⁶¹ ATF 128 II 355 *et seq.*

¹⁶² RS 0.101.07.

¹⁶³ ATF 128 I 237 *et seq.*

15. ARTICLE 15 (*Nulla poena sine lege*)

239. The updated information furnished by Switzerland in paragraph 148 of its second periodic report concerning article 1 of the draft amendment of the general part of the Criminal Code is still relevant.

240. In the amended Criminal Code (see para. 11 above) the principle of *nulla poena sine lege* is formulated as follows:

“Article 1. Nulla poena sine lege

A sentence may be pronounced or a measure ordered only in respect of an act expressly prohibited by law.”

16. ARTICLE 16 (Right to recognition of legal personality)

241. The information given Switzerland in its second periodic report (para. 150), which refers back to the initial report (paras. 306 to 309) is still relevant.

17. ARTICLE 17 (Right to personal privacy and privacy of the family)

17.1 Principle

242. Article 13 of the Constitution expressly guarantees all persons the right to personal privacy and privacy of the family.

“Article 133. Protection of privacy

1. All persons are entitled to respect for personal privacy and privacy of family life, home, correspondence, and relations established by post or telecommunications.
2. All persons have the right to be protected against the misuse of data concerning them.”

17.2 Right to personal self-determination: forced sterilization

243. The *Federal Act on the conditions and procedure applicable to forced sterilization of persons* (Sterilization Act),¹⁶⁴ which entered into force on 1 July 2005, regulates the circumstances in which a medical intervention to terminate a person’s reproductive capacity is now permissible. The aim is to prevent any repetition of the sterilizations carried out up to the 1980s, which now appear partially abusive. Henceforth, the sterilization of persons incapable of long-term judgement is permissible but only on an exceptional basis and subject to stringent conditions; the guardianship authority must also give its consent. The sterilization of persons of the age of majority who are capable of judgement may be carried out only if such persons, having been fully informed of the process and consequences of the intervention, have freely consented to it and have given their consent in writing.

244. On the other hand, the Federal Council has opposed the payment of compensation to victims of abusive sterilization or castration. It has entered reservations as to the appropriateness

¹⁶⁴ RS 211.111.11.

of introducing a specific compensation schedule which, while based on the Federal Act on assistance to victims of crime (LAVI), would provide for compensation for acts not covered by that legislation, either because they were committed before the Act entered into force or because they do not fall within the category of criminal offence. To establish for victims of abusive sterilization a compensation schedule different from the one applicable to the other categories of victim would hardly be justified, in the Council's view, for it would also constitute an attack on the principle of equality of treatment. The Council stressed that it did not wish to belittle the personal tragedies played out as a result of practices which today may be regarded as unacceptable, but that such tragedies had to be seen in the context of a constantly evolving society in which progress is born from the mistakes and injustices of the past. The recognition due from society to victims of abusive sterilization should not necessarily take the form of financial compensation, which would in any event come too late for some of the victims. The Council concluded that, rather than seeking to make permanent reparation for past injustices, it was preferable to allocate the available resources to improvement of the care and supervision of persons currently needing such measures.¹⁶⁵ Parliament endorsed this view and refused to introduce compensation for victims of abusive sterilization.¹⁶⁶

17.3 Privacy: data protection

245. It must be stressed in connection with the data protection arrangements referred to in paragraphs 151-153 of the second periodic report that on 24 March 2006 Parliament adopted a partial amendment of the *Federal Data Protection Act* (LPD).¹⁶⁷ This amendment was due to enter into force in the second half of 2007, once the Order on the Act's application¹⁶⁸ had been amended accordingly. The amended Act enhances the transparency of data collection: the person concerned must be aware of such collection and of the purpose of processing the data.

246. The amended Act introduces inter alia an obligation for private individuals and federal agencies to inform the persons concerned when they collect sensitive data about them and produce profiles of their personalities. The Act also adapts the provisions concerning transboundary data flows to the requirements concerning monitoring authorities and transboundary data flows contained in the Additional Protocol to the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.¹⁶⁹ The communication of data to foreign countries will be prohibited unless the recipient of the data is subject to legislation providing an adequate level of protection. However, the Act allows exceptions to the requirement of an adequate level of protection.¹⁷⁰

¹⁶⁵ See the report of the National Council's Legal Affairs Committee dated 23 June 2003 (FF 2003 5753) and the Federal Council's opinion dated 3 September 2003 (FF 2003 5797).

¹⁶⁶ See the summary of the discussion in Parliament:
www.parlament.ch/afs/data/f/rb/f_rb_19990451.htm.

¹⁶⁷ RS 235.1.

¹⁶⁸ Order on the Federal Data Protection Act (OLPD; RS 235.11).

¹⁶⁹ ETS No. 108.

¹⁷⁰ Even in the absence of adequate legislation, data may still be communicated if the person concerned has given his consent, if the transmission is directly related to the conclusion or execution of a contract and the data relate to one of the contracting parties, if the transmission is essential either to the protection of an overriding public interest or to the certification, assertion or defence of a right at law, if the transmission is necessary to protect the life or physical integrity of the person concerned, or if the

247. The amended Act also authorizes the federal official responsible for data protection and transparency to bring legal actions. This official will in future be able to bring before the Federal Court decisions of the federal departments or the Federal Chancellery which reject his recommendations to federal agencies and, when necessary, to appeal to the Federal Court against decisions of the Federal Administrative Court. At present, the case of a private person who does not comply with a recommendation of this official may be brought before the Federal Administrative Court for decision. The current Act does not say whether the official may appeal against such decisions. The Amended Act is clear on that point.

248. The Act also takes a first step in the direction of encouraging self-regulation by introducing the incentive of a certification standard which will reinforce data security.

249. The bilateral agreements between the European Union and Switzerland, in particular the agreement on membership of the Schengen and Dublin arrangements, have also entailed changes in the sectoral legislation governing data protection, notably in order to incorporate in these sectors of activity the relevant provisions of European Directive 95/46/CE of 24 October 1995 on protection of data concerning physical persons in the processing of personal data and on the free circulation of data.

250. Switzerland has also introduced a *Federal Act on the principle of transparency in the Administration* (LTrans; see para. 11)¹⁷¹ This Act confers on all persons the right to consult official documents and obtain information on their content from the authorities. However, this right may be restricted, in particular when such access may impair the privacy of third persons and the public interest in transparency is not deemed overriding. Moreover, access to official documents containing personal data is governed by the Federal Data Protection Act when the data in question has not been rendered anonymous.

17.4 Internal security

251. On 24 March 2004 the Federal Chambers adopted the *Amendment to the Federal Act of 21 March 1997 introducing measures for the maintenance of internal security* (LMSI I; incitement to violence and violence at sporting events). The new provisions lay the foundations for suppressing violence at sporting events and strengthening the capacity to confiscate propaganda materials inciting violence. The text provides inter alia for the centralized compilation of information about persons known to exhibit violent behaviour at sporting events in a national information system (HOOGAN). The new preventive measures (banning from the vicinity of sports grounds, bans on travel to a given country, obligation to report to the police, preventive custody, etc.) have a limited period of validity (until the end of 2009). On 30 August 2006 the Federal Council decided to implement the changes in the Act and its regulations from 1 January 2007. In mid-September it was to adopt a message concerning a constitutional provision on hooliganism with a view to the reintroduction of the three temporary measures. The cantons are considering whether the option of a concordat would be desirable. If they decide to proceed, the Federal Council will withdraw its message.

person concerned has made the data available to all and everyone and has not objected to the transmission. Data may also be communicated if there are sufficient guarantees, of a contractual nature for example, to ensure an adequate level of protection in the case in question or if the transmission is effected within a juridical person or between companies operating under a single management, provided that the parties are subject to data-protection rules which ensure an adequate level of protection.

¹⁷¹ RS 152.3.

252. A further *Amendment to the Federal Act introducing measures for the maintenance of internal security* (LMSI II; see para. 23) is designed to extend the search for intelligence by the information services. In the sole areas of terrorism, delivery of prohibited political and military information, and illicit trafficking in radioactive substances it will be possible, in the event of a concrete threat, to monitor correspondence by post and telecommunications for preventive purposes, to keep dangerous persons under observation in places which are not freely accessible, including by use of technical devices, and to conduct secret searches of computer systems. This amendment prompted some criticism during the consultation procedure. The Federal Council's message to Parliament was adopted on 15 June.

17.5 Privacy of the family

253. The information given by Switzerland in its second periodic report (para. 153 *et seq.*) is still relevant.

17.6 Jurisprudence

254. In a case concerning the abduction of a child by the mother¹⁷² the European Court of Human Rights criticised the cantonal authorities for being somewhat lax in their efforts to find the mother and her child. The Court found a violation of article 8 of the European Convention on Human Rights (ECHR) (procedural aspect).

255. According to a decision of the European Court of 13 July 2006, the Swiss courts had violated the plaintiff's right to personal privacy and family privacy (ECHR, art. 8) by refusing to allow the body of the alleged father to be exhumed for DNA analysis.¹⁷³ In the majority opinion of the Court, the protection of juridical safety is not of itself alone sufficient reason for denying the plaintiff the right to establish his origins. Two judges issued a dissenting opinion to the effect that, in such cases, member States should enjoy a wider margin of discretion and that the Federal Court had examined the case carefully and had provided sound arguments for its decisions.

256. In its decisions of 27 September 2001 on the admissibility of the application *G.M.B. and K.M. v. Switzerland* the European Court confirmed the decisions of the domestic courts denying a couple the free choice of family name for their child. Since the regulations on this point vary from State to State and in view of the amendments to national legislation in the offing, the Court concluded that each State should enjoy a consequent margin of discretion. It recognized further that the Swiss system had been designed to provide flexibility by allowing spouses the option of choosing the wife's name as the family name. And the Court stressed that the Swiss system helped to preserve family unity, recalling at the same time the jurisprudence which it had developed in the past to the effect that it is in the interest of the whole community to preserve a consistent body of family law whose primary concern is the welfare of the child.

257. On the subject of the admissibility of remedies, the Federal Court ruled in a decision of 11 September 2000 that same-sex couples may not assert the right to respect for their family life set out in article 8 of the European Convention. On the other hand, the protection of privacy within the meaning of article 13, paragraph 1, of the Federal Constitution and article 8, paragraph 1, of the Convention confers on homosexual couples, in certain circumstances, the right to obtain permits under the aliens legislation, in particular when an especially intense

¹⁷² Decision of 22 June 2006 in *Bianchi v. Switzerland*.

¹⁷³ Decision of 13 July 2006 in *Jäggi v. Switzerland*.

private relationship is threatened.¹⁷⁴ However, a stay of 10 years or more in Switzerland and a longstanding private relationship are not in themselves sufficient to justify a right to obtain a permit under article 8, paragraph 1, of the Convention.¹⁷⁵

258. In a decision of 1 June 2004 the Federal Court confirmed its jurisprudence to the effect that the right to family reunification requires that at least one of the persons concerned possesses a confirmed permit to live in Switzerland. It found that such a right existed in the case in question, in which a foreigner had lived in Switzerland with a residence permit for 20 years and there were no reasonable grounds for expecting that person to lead his private and family life elsewhere.¹⁷⁶

259. The Federal Court ruled in a decision of 29 May 2002 that the production of a DNA profile and its use by the State authorities fell within the scope of protection of the right to personal self-determination with respect to personal information within the meaning of article 13, paragraph 2, of the Constitution. Furthermore, the taking of the samples needed for DNA analysis, in this case a smear from the lining of the mouth, constituted an attack on physical integrity. However, in both cases the interference was minor and did not affect the substance of the guarantees. In a case involving an individual who had already been convicted of committing acts of a sexual nature against children and who was again trying to make contact with children through advertisements the Court found that the conditions were satisfied for producing a DNA profile and for using and recording it. It nevertheless called upon the Public Prosecutor, on the basis of the right to personal self-determination with respect to personal information, to ensure that the smear sample was destroyed once the DNA profile had been made. The specific provisions of the cantonal and regulations should not be applied on this point.¹⁷⁷

18. ARTICLE 18 (Freedom of thought, conscience and religion)

18.1 Background

260. The freedom of conscience and belief is guaranteed in article 15 of the Constitution:

“Article 15. Freedom of conscience and belief

1. The freedom of conscience and belief is guaranteed.
2. Everyone has the right freely to choose his religion and to form his ideological convictions and to profess them individually or jointly.

¹⁷⁴ ATF 126 II 425.

¹⁷⁵ ATF 126 II 377. Following the entry into force on 1 January 2007 of the Federal Act on registered partnerships between persons of the same sex (RS 211.231; see para. 314 below), the Federal Act on the permanent and temporary residence of aliens (LSEE; RS 142.20) was amended to provide that the registered partners of Swiss nationals or of persons holding permanent-residence permits should have the right to obtain a residence permit (see para. 317 below).

¹⁷⁶ ATF 130 II 281.

¹⁷⁷ ATF 128 II 259. Since 1 January 2005 the requirements for the use of DNA profiles in criminal proceedings and their entry in a federal information system have been governed by the Federal Act on the use of DNA profiles in criminal proceedings and on the identification of unknown and missing persons (RS 363).

3. Everyone has the right to join and belong to a religious community and to receive religious education.
4. No one may be forced to join or belong to a religious community, to perform a religious rite or to receive religious education.”

261. The Constitution does not state explicitly the principle of the religious neutrality of the State, but the jurisprudence has conferred constitutional status on such neutrality. This principle bars the State from interfering in religious matters or taking sides for or against a specific religion or belief and it confers the right of self-determination on churches. The religious neutrality of the State also applies with regard to schooling: public schools must be secular (see art. 62, para. 2, of the Constitution), and this secular requirement also applies to marriage and the civil registers of the State.

18.2 Civilian service

262. Article 59, paragraph 1, of the Constitution authorizes persons who cannot reconcile military service with their conscience to perform civilian service instead.

“Article 59. Military service and alternative service

1. All men of Swiss nationality are required to perform military service. The law shall provide for the alternative of civilian service.”

263. On 21 March 2003 the Federal Assembly approved the draft federal act amending the *Federal Civilian Service Act* (LSC).¹⁷⁸ The amended Act entered into force on 1 January 2004.

264. The revision of this legislation corrected some weak points in the Act: for example, some vague legal concepts such as “inability to reconcile military service with conscience” had to be clarified in order to render the practice transparent in respect of the conditions of admissibility.

265. Between October 1996, the date of entry into force of the Federal Civilian Service Act, and the end of July 2001 the central civilian service agency received 7,974 applications, an average of 1,644 a year. The demand was particularly strong in 2003 and 2004 (1,955 and 1,805 applications respectively). The applications peaked at 1,700 in 2005. Between October 1996 and the end of July 2001, 5,712 of the 7,164 applications subject to decisions in first instance were approved and 687 were rejected. The other 765 applications were found inadmissible or were withdrawn. The success rate was therefor about 80 per cent. Some 11 per cent of the applicants who were given a hearing were not admitted to civilian service.

266. In 2003, 3,481 persons subject to mandatory military service spent 325,181 days on service; in 2004, 4,341 persons performed 323,809 days of service; and in 2005, 4,409 persons admitted to civilian service spent 330,608 days on service.

267. It should also be mentioned that the option of performing military service without bearing arms is still available. The number of applications for such service has continued to decline.

¹⁷⁸ RS 824.0.

18.3 Religious and moral education

268. The principle of the religious neutrality of the State entails the prohibition of public denominational schools. Public education must be secular, compulsory and free. However, this does not mean that religion may not be included in the curriculum, but religious education may not be made compulsory, a provision stated expressly in article 15, paragraph 4, of the Constitution:

“No one may be forced to join or belong to a religious community, to perform a religious rite, or to receive religious education.”

269. Article 20a of the *Federal Act on work in industry, crafts and commerce* (the Labour Act (LTr))¹⁷⁹ entered into force on 1 August 2000. Paragraph 2 authorizes workers to suspend work on the occasion of religious festivals in addition to the ones treated as public holidays by the cantons, provided that advanced notice is given to their employers. Thus the adherents of religious faiths other than Catholicism and Protestantism, Jewish or Moslem workers for example, are treated the same as adherents of Switzerland’s traditional religious faiths.

270. On 15 May 2006 the most senior Christian, Jewish and Moslem leaders signed the instrument establishing the *Swiss Council of Religions*. This Council is intended to promote mutual understanding among religions and serve as an interlocutor able to advise the authorities. Religious peace in Switzerland is of course not under threat, but the country’s religious map has been transformed, and the religious landscape has become more gaily coloured. Christianity, Judaism and Islam now have a special responsibility for social and religious peace in Switzerland, but there is nothing to prevent the Council from opening its doors to other religions, to Buddhism and Hinduism for example. This new body will deal less with theological questions than with topical issues of religious and social policy: religious buildings; the ratio of religious symbols in public places; ecclesiastical training; and the enrolment of children in public schools. A working group known as the “Moslem workshop” was set up in 2004 in the Federal Department of Foreign Affairs to consider the question of Islamist movements. Its function is to study such movements but also to seek a dialogue and secure the implementation of a number of projects.

271. Article 171 of the Constitution of the canton of Vaud¹⁸⁰ expressly recognizes the Jewish community as an institution “in the public interest”. At their request, Vaud may also accord the same status to other religious communities, in the light of the duration of their establishment and their role in the canton. Article 131 of the Constitution of the canton of Zurich¹⁸¹ expressly recognizes the Jewish community and the Liberal Jewish community. Similarly, article 126 of the Constitution of the canton of Bâle-Cité¹⁸² recognizes the Jewish community and also provides for the possibility of other churches or religious communities to obtain such recognition by means of a constitutional amendment.

¹⁷⁹ RS 822.11.

¹⁸⁰ The new Constitution of this canton has been in force since 14 April 2003.

¹⁸¹ The new Constitution of this canton has been in force since 1 January 2006.

¹⁸² The new Constitution of this canton has been in force since 13 July 2006.

18.4 Jurisprudence

272. In a decision of 13 January 2003¹⁸³ the Federal Court ruled on an appeal by an Orthodox Jewish prisoner who had been found guilty of rape and murder and consigned to a special section owing to the risk of escape. He was appealing against decisions prohibiting him from taking part in a religious rite and sentencing him to three days' confinement to his cell for refusing to work on religious festivals. The Federal Court stressed in its decision that a prison regime which deprived the prisoner to a large extent of contact with the outside world could involve restrictions on the freedom of belief and conscience and thus on the freedom of religion. However, such restrictions must be closely circumscribed. In the case in question the Court considered that that condition had been satisfied, in particular because representatives of Switzerland's churches visited the prison regularly and had opportunities to speak both with the chaplain and with representatives of other religions. As to the other complaint lodged by the prisoner, religious festivals were celebrated by a representative of the faith and participation in the rite and contact with that representative were in principle possible. Furthermore, the need to pray more frequently and to meditate more deeply on one's religion on such occasions could be attended to outside working hours. In addition, the plaintiff had recognized that such religious festivals did not in principle prevent persons of his faith from working on the days in question. Accordingly, the decision of the cantonal authority was in compliance with the provisions of Article 36 of the Constitution permitting a restriction of fundamental rights and did not entail a violation of article 15 of the Constitution, article 9 of the European Convention or article 18 of the International Covenant.

19. ARTICLE19 (Freedom of opinion and expression)

19.1 Principle

273. The freedoms of opinion and information and the freedom of science, the arts and the media are expressly guaranteed by the Constitution:

“Article 16. Freedoms of opinion and information

1. The freedom of opinion and the freedom of information are guaranteed.
2. Everyone has the right freely to form, express and disseminate his opinions.
3. Everyone has the right freely to receive information, to obtain information from generally available sources and to disseminate it.

Article 17. Freedom of the media

1. The freedom of the press, television and radio and of the other forms of public telecommunication of programmes and information are guaranteed.
2. Censorship is prohibited.
3. The secrecy of media sources is guaranteed.

¹⁸³ ATF 129 I 74.

Article 20. Freedom of science

The freedom of scientific instruction and research is guaranteed.

Article 21. Freedom of the arts

The freedom of the arts is guaranteed.

19.2 Legislation

274. The *Federal Act on the principle of transparency in the Administration* (LTRans; see para. 11)¹⁸⁴ and its regulations (OTrans),¹⁸⁵ which entered into force on 1 July 2006, authorize easy access by private individuals to documents held by the Administration. The shift from the principle of secrecy to the principle of transparency has the effect of promoting administrative transparency and strengthening public trust in the institutions of the State. Anyone may demand access to such documents without having to justify a specific interest. It is sufficient to submit a request to the authority which produced the document or received it from a third party not subject to the Transparency Act. The applicant may consult the document on the spot or request that a copy be sent to him. The processing of such requests is in principle subject to a fee unless it entails little work. The right of access to administrative documents may be limited or denied in the cases listed in full in the Act. This applies, for example, when the consultation of certain administrative documents by a private individual may compromise the free formation of the position or wishes of an authority or threaten Switzerland's internal or external security. The Act specifies other exceptions to the principle of transparency: when the right of access may lead to the revelation of professional, business or industrial secrets. If the competent authority denies access to documents or does not grant it to the desired extent, an applicant whose request has not been met may submit a request for mediation to the federal official responsible for information and transparency. If this procedure does not produce agreement, the ordinary remedies become available, for the authority concerned will have handed down a decision which may be contested in the courts.

275. The canton of Fribourg has a new Constitution, which entered into force on 1 January 2005. Several pieces of legislation are being drafted with a view to implementing this Constitution, notably on information and transparency in cantonal business, which will regulate inter alia the consultation of official documents.

19.3 Jurisprudence

276. In three recent Swiss cases the European Court of Human Rights found infringements of the freedom of expression under article 10 of the European Convention.

The first case¹⁸⁶ concerned the imposition of a fine of 800 Swiss francs on a journalist who had published extracts from a diplomatic document classified as confidential and obtained as a result of violation of professional secrecy by a person unknown. The majority opinion of the Court was that the confidentiality of diplomatic reports was justified *a priori* but that it could not be protected regardless of the cost. It considered that the information contained

¹⁸⁴ RS 152 3.

¹⁸⁵ RS 152 31.

¹⁸⁶ Decision of 25 April 2006 in *Stoll v. Switzerland*.

in the document was likely to raise questions of a general interest and that the public had a legitimate interest in obtaining that information. Switzerland submitted the case to the Grand Chamber, where it is pending.

The second case¹⁸⁷ concerned the imposition of a fine of 500 francs on the plaintiff for instigating a violation of professional secrecy (art. 24 in combination with art. 320 of the Swiss Criminal Code). The plaintiff had requested an administrative assistant in the prosecutor's office of the canton of Zurich to supply information about possible previous convictions of suspects in a major housebreaking case. Having obtained this information he did not publish it or use it for other purposes. The Court found unanimously that the plaintiff's conviction constituted interference in the exercise of the freedom of expression which was unnecessary in a democratic society. The sentence, although a light one, represented a kind of censorship.

The *Monnat* case¹⁸⁸ concerned the broadcast by Television Suisse Romande (TSR), under the plaintiff's responsibility, of a programme criticizing Switzerland's attitude during the Second World War ("Switzerland's Lost Honour"). The Independent Radio and Television Complaints Authority (the Complaints Authority) had found that this broadcast had violated the programming legislation derived from the Federal Radio and Television Act (LRTV) and had ordered TSR to take suitable steps to correct the violation. In the Court's view, the broadcast in question raised a subject of major interest which had been widely discussed in the media. It was critical of the official Swiss attitude during the Second World War but not of the attitude of the Swiss people; the scope of admissible criticism was therefor broader, both for politicians and for officials acting in the performance of their official functions. The decision of the Complaints Authority, confirmed by the Federal Court, was likely to dissuade journalists from engaging in critical reporting on topics of that kind. It could therefor impede the media in their information and monitoring work and thus constituted a form of censorship.

277. In a decision of 7 July 2004 the Federal Court ruled that the erection of police barriers preventing access to Davos during the 2001 World Economic Forum had infringed the personal liberty of the journalists concerned and the freedoms of opinion, information and the press. However, it held that, in the absence of a specific legal basis, the alleged infringements could be considered under the general police clause.¹⁸⁹ An appeal against this decision is pending before the European Court of Human Rights. (see also para. 281).

20. ARTICLE 20 (Prohibition of propaganda for war)

278. Switzerland still lacks a specific provision of law prohibiting propaganda for war. Its reservation concerning article 20, paragraph 1, is therefor still in force.

279. The need is to introduce a new provision of criminal law prohibiting the exhibition or carrying in public of symbols of racial discrimination and the act of making such symbols accessible to the public in any other way. The Legal Affairs Committees of both Councils have concluded that this new provision should not be limited to the use of symbols of the extreme right

¹⁸⁷ Decision of 25 April 2006 in *Dammann v. Switzerland*.

¹⁸⁸ Decision of 21 September 2006 in *Monnat v. Switzerland*.

¹⁸⁹ ATF 130 I 369.

but apply to all symbols advocating extremist movements which espouse violence and racial discrimination

21. ARTICLE 21 (Right of peaceful assembly)

280. The right of peaceful assembly is guaranteed expressly in article 22 of the Constitution as a fundamental right. It is guaranteed both to Swiss citizens and to aliens.

“Article 21. Freedom of assembly

1. The freedom of assembly is guaranteed.
2. Everyone has the right to organize and to take part in meetings.”

281. As a result of the refusal of the communal authorities of Davos to issue a permit for a public demonstration on the occasion of the 2001 World Economic Forum, the Federal Court had to consider the question of the circumstances under which the freedom of assembly could be restricted. In weighing up the interests at stake, the Court found that, given the concrete risk of violence, the prohibition of the demonstration at Davos had not infringed the right of assembly or the freedom of expression and that the authorities had prevented only an assembly on the day, at the time and in the place desired, without issuing any absolute prohibition of demonstrations.¹⁹⁰

22. ARTICLE 22 (Freedom of association)

22.1 Trade-union freedoms

282. The Federal Act on employees of the Confederation (LPers)¹⁹¹ entered into force on 1 January 2001 for employees of the Federal Railways and on 1 January 2002 for the Federal Administration, decentralized administrative units, federal appeals and arbitration commissions, the Federal Court, and services of Parliament and the Post Office. Article 24 regulates the restriction of the rights of personnel. It provides inter alia that the Federal Council may restrict or suspend the right to strike if the security of the State, the protection of important interests arising from foreign relations, or the protection of the country’s supply of vital goods and services so requires.¹⁹²

283. The *Order on employees of the Confederation* (OPers)¹⁹³ entered into force on 1 January 2002. The exercise of the right to strike is regulated by article 96 of this Order:

¹⁹⁰ ATF 127 I 164 *et seq.*

¹⁹¹ RS 172.220.1.

¹⁹² Fuller information will be found in the reports of Switzerland dated 20 September 2002 and 5 October 2006 concerning the application of Convention No 87 on Freedom of Association and Protection of the Right to Organize and in its report dated 1 December 2006 concerning the application of the principles of the right to organize and collective bargaining, submitted to the monitoring bodies of the International Labour Organization.

¹⁹³ RS 172.220.11.3.

“Article 96. Prohibition of the right to strike

The exercise of the right to strike is prohibited to members of the categories of personnel listed below who perform functions essential to the protection of the security of the State, to the safeguarding of important interests arising from foreign relations, or to the protection of the country’s supply of vital goods and services:

- (a) Members of the headquarters staff of departments responsible for civil and military operations;
- (b) Members of federal criminal investigation authorities;
- (c) Personnel of the Federal Department of Foreign Affairs subject to the transfer regulations who are working abroad;
- (d) Members of the frontier-guard service and civilian customs personnel;
- (e) Members of the surveillance corps, military personnel of the air-traffic security service, and personnel of the military-security vocational training service.”

22.2 Protection of workers

284. In addition to the information contained in paragraph 188 of the second periodic report, reference should be made to the prohibition of dismissal of workers for membership of a trade union or engaging in other union activity. Dismissal for such reasons constitutes wrongful dismissal under article 336 of the Code of Obligations and opens up the possibility of a claim for compensation of up to six months’ wages (art. 336a).

285. On 14 May 2003 the Swiss Federation of Trade Unions submitted a complaint to the Committee on Freedom of Association (CFA) of the International Labour Organization (ILO).¹⁹⁴ The complaint contained allegations of violation of trade union rights in Switzerland under ILO Convention No. 98 on the Right to Organize and Collective Bargaining. The case came up in CFA on 17 November 2004. Following the discussion CFA took no decision on the substance. However, it noted that it felt that the sanction imposed under Swiss law was not a sufficient deterrent to ensure truly effective protection in practice against wrongful dismissal for trade union activity, since the legislation allowed employers, subject to payment of the compensation fixed by law for all cases of unjustified dismissal, to dismiss a worker for the actual reason of trade union membership or activity. CFA adopted a recommendation requesting Switzerland to produce a report containing additional information on the development of the situation since the submission of the complaint and on the steps taken after discussion with the social partners to ensure effective protection against wrongful dismissal for anti-trade-union reasons. Switzerland accepted the recommendation. On 16 June 2006 the Swiss Government adopted the supplementary report requested by CFA, in which it confirmed that Swiss law guaranteed adequate and sufficient protection of employees and established a fair balance between sanction and flexibility in the labour market. On 17 November 2006 CFA adopted a recommendation requesting the Swiss Government to take measures to provide the same kind of protection, including reinstatement, for trade union representatives victims of anti-trade-union dismissal and

¹⁹⁴ Case No. 2265: Complaint of the Swiss Federation of Trade Unions against the Government and State of Switzerland alleging violation of trade union rights.

for victims of dismissal in violation of the principle of equal treatment of men and women. CFA encouraged the continuation of tripartite discussions on the whole issue, including the situation in some cantons with regard to compensation for anti-trade-union dismissal. It also requested the Swiss Government to submit to it as soon as possible its comments on the latest allegations of the complainant organization. These requests are currently being studied by the Tripartite Federal Commission on ILO Affairs, which is made up of representatives of the Government, employers and trade unions.

22.3 Jurisprudence

286. In a decision of 15 November 2002 the Federal Court ruled that the freedom of association did not confer on occupational organizations the right to participate in legislative proceedings concerning labour relations in public law. Such a right would be inconsistent with the legislative sovereignty of the State. However, trade unions did have the right to an appropriate hearing in connection with the amendment of laws or regulations having a significant impact on the working conditions of their members.¹⁹⁵

23. ARTICLE 23 (Right to marry)

23.1 Principle

287. The Constitution expressly guarantees the right to marry:

“Article 14. Right to marry and to found a family

The right to marry and to found a family is guaranteed.”

23.2 Marriage to the child of a former spouse

288. It should be noted that in order to bring marriage and registered partnership into line with each other the Legislature amended the provisions on impediments to marriage in paragraph 8 of the annex to the *Federal Act on registered partnerships between persons of the same sex* of 18 June 2004 (Partnerships Act (LPart; see para. 11)¹⁹⁶. This amendment authorizes marriage to the child of a former spouse. Of course, the impediment of a kinship link with the child did not prevent persons from living with each other but it prohibited them from obtaining a legal framework for their shared life. Society now accepts that persons may live together without any legal bonds. The amendment thus brings the Act into line with society’s changing attitudes.¹⁹⁷ Mention may be made in connection with paragraph 194 of the second periodic report of the new divorce-law schedule. Since 1 June 2004 the period of separation in divorce law has been two instead of four years (arts. 114 *et seq.* of the Civil Code).

¹⁹⁵ ATF 129 I 113.

¹⁹⁶ RS 211.231.

¹⁹⁷ As a result of the entry into force of the amended provisions on impediments to marriage, an application by plaintiffs claiming that the prohibition on their marrying, which prevented them from leading their “de facto” family life together with the blessing of the law, submitted to the European Court of Human Rights, was resolved amicably (*Waser/Steiger v. Switzerland*; application No. 31990/02).

23.3 Forced marriage

289. Even in the absence of reliable statistics on forced and arranged marriages there is every reason to believe that this phenomenon is found in Switzerland. Nowadays forced marriages are offences under both the Civil Code and the Criminal Code. The Federal Council stated its opinion for the first time on the need for legislation in Switzerland in its reply of 16 February 2005 to the *Banga* question (04.1181) (“To combat forced marriages and provide better protection for the victims”), concluding that there was no need for legislation. It is already illegal for a minor to contract marriage (art. 94, para. 1, of the Civil Code), and the Civil Code also establishes grounds for annulling a marriage when one of the spouses married under threat of a serious and imminent danger to his or her life, health or honour or to the life, health or honour of a relative. (art. 107, para. 4). Where the criminal law is concerned, the Federal Council pointed out that forced marriage may already be covered by the criminal offence of coercion (art. 181 of the Criminal Code); such cases are automatically prosecuted and carry a sentence of a maximum of three years’ imprisonment or a fine. When an act of coercion within the meaning of article 181 of the Criminal Code, committed in order to force a person to marry, causes mental or physical problems, the person concerned may request the assistance of a victims’ advisory centre. Depending on the situation, such assistance may include the location of emergency accommodation or support for the person throughout the proceedings. The Federal Council was to submit to Parliament in autumn 2007 a comprehensive report on the problem of forced and arranged marriages containing a detailed analysis and, if necessary, proposals on action to be taken (initiative of the Political Institutions Committee of the National Council: “Suppression of forced marriages and arranged marriages” (05.3477)).

24. ARTICLE 24 (Rights of the child)

24.1 Background

290. The amended article 30 of the *Federal Act on the acquisition and loss of Swiss nationality* (Nationality Act (LN); see para. 11)¹⁹⁸ has been in force since 1 January 2006:

“*Article 30. Stateless children*

1. A stateless minor child may enter a request for facilitated naturalization if he or she has lived in Switzerland for a total of five years, including the year preceding the submission of the request.
2. Such a child acquires the cantonal and communal citizenship of his or her place of residence.”

291. This amendment renders null and void the reservation entered to article 7, paragraph 2, of the United Nations Convention on the Rights of the Child. Thus the Federal Council decided to withdraw it on 4 April 2007. This decision was notified to the Secretary-General of the United Nations on 1 May 2007.

292. The new *Federal Aliens Act* (LEtr; see para. 11) accords the right of family reunification to all holders of residence permits (art. 43). Family reunification is also possible for holders of short-term residence permits (art. 44). However, family reunification must be effected within a

¹⁹⁸ RS 141.

time limit of one year for children aged over 12 years (within five years in the case of younger children). In addition, the family must have the necessary financial means and suitable accommodation. The new Act also incorporates a new provision in the Civil Code, to the effect that “the presumption of the husband’s paternity ceases when the marriage is annulled on the ground that it was contracted in order to circumvent the provisions on the entry and residence of aliens” (new art. 109, para. 3, of the Civil Code). However, this provision must be seen from the restricted standpoint of the annulment of marriage within the meaning of the new article 105, paragraph 4, of the Civil Code, i.e. when one of the spouses does not wish to found a conjugal union but merely to circumvent the provisions on the entry and residence of aliens. Furthermore, in such cases, which should be rather rare in practice, the father may acknowledge the child. The mother and the child may also bring a paternity action.

293. On 24 March 2006 Parliament adopted the *Federal Family Allowances Act* (LAFam; para. 11),¹⁹⁹ which harmonizes for the whole country the conditions for award of family allowances, the number of children providing entitlement, the age limit, and the rules which apply when several persons may assert a right to family allowances in respect of the same child. This entitlement is available to employed persons and persons without gainful employment. In the latter case, however, the allowances are paid subject to the availability of resources and are funded by the cantons. Self-employed workers do not have this entitlement under the Act, but the cantons may award them family allowances. The Act stipulates a *child allowance* of at least 200 francs a month paid from the child’s birth to its 16th birthday and a *vocational training allowance* of at least 250 francs a month paid from age 16 until the completion of the child’s training but not beyond the 25th birthday. Only the full allowance is paid, the degree of employment no longer being taken into account. The cantons may award higher allowances and provide for birth and adoption benefits. Any other benefits must be funded outside the family allowances scheme. Entitlement to family allowances is available to married and unmarried parents, children of a spouse, children taken in to the family home, and the brothers and sisters and grandchildren of the holder of the entitlement if he or she bears most of the cost of their maintenance. Sixty-eight per cent of the people voted to accept the Act in the federal referendum of 26 November 2006. It will probably enter into force on 1 January 2009.

294. In the case of *public day-care arrangements*, a system of financial assistance was introduced at the federal level in February 2003. This is an eight-year programme of incentives to encourage the creation of day-care places for children so as to enable parents to combine family life with work or training more comfortably. Parliament allocated a credit of 320 million francs for the eight years of the programme. The applications for financial assistance accepted up to 31 January 2007 have led to the provision of 13,000 places.

24.2 Protection of minors

295. The *Federal Act on the criminal status of minors* (Minors Act (DPMin))²⁰⁰ entered into force on 1 January 2007. The new provisions introduced in this Act include the raising of the age of criminal responsibility from seven to 10 years. The new Act is deeply imbued with the principle that, where juvenile offenders are concerned, education and social integration take precedence over punishment.

¹⁹⁹ FF 2006 3389, RS 836.2.

²⁰⁰ RS 311.1.

296. The draft federal act on juvenile criminal procedure (para. 12) is one of the measures for unification of the criminal procedure legislation. This text also provides that the protection and education of minors shall be the decisive factors in the application of the law and that a minor's age and level of development must be taken into account in his or her favour (art. 4, para. 1). It is stated expressly that a minor's personal rights must be respected at all stages of proceedings; amongst other things, minors have the right to be heard and the right to respect for their privacy.

297. The partial amendment of the *Federal Act on assistance to victims of crime* (LAVI)²⁰¹ aimed at protection of a child's personal rights in criminal proceedings, which was announced in paragraph 207 of the second periodic report, entered into force on 1 October 2002 (see para. 11). However, the plan is to transfer to the future code of criminal procedure at a later stage the section on victims' rights in criminal proceedings.

298. With regard to the protection of children against sexual exploitation, the reader is referred to the information given in paragraphs 165 *et seq.* (see also para. 346 on the withdrawal of the reservation to article 10, paragraph 2 (b)).

24.3 Child abuse

299. The Federal Social Security Office (OFAS) published in October 2005 a study on "Violence against children: a plan for comprehensive prevention"; this plan is based on a new model of comprehensive prevention of child abuse. The purpose of this expert study is to promote the coordinated application of prevention measures to fill the existing gaps. The study's authors give much space to the design and even the very notion of prevention measures, to the role of prevention agents, and to enhanced professionalism in the provision of assistance and care for children. They point to the essential and natural role of parents in the protection of children while stressing that society is directly engaged at several levels by the problems of child abuse and sexual violence.

300. The OFAS Division for *family, generations and society*, which was created early in 2006, is responsible for coordination and information work and accords special attention to prevention in conjunction with organizations working in the field of child protection. This work includes, for example, reporting on the assistance and training options, supporting projects for the prevention of child abuse, and carrying out research. It is against this background that the present prevention plan was requested from the outside experts.

24.4 Naming of children

301. In the *G.M.B. and K.M* case²⁰² the plaintiffs argued before the European Court of Human Rights that Swiss legislation providing that a child of married parents acquires their family name is discriminatory and infringes the parents' right to personal privacy and privacy of the family (see para. 256).

24.5 Nationality of children

302. See the information on limitation of the principle of equality by reason of nationality given in paragraph 66.

²⁰¹ RS 312.5.

²⁰² Decision of 27 September 2001.

25. ARTICLE 25 (Political rights)

25.1 Principle

303. Article 34 of the Constitution guarantees political rights as fundamental constitutional rights:

“Article 34. Political rights

1. Political rights are guaranteed.
2. The guarantee of political rights protects the free formation of citizen’s opinions and the true and accurate expression of their will.”

25.2 Right to vote

304. The information contained in the previous periodic reports is still relevant. However, following the introduction of the new Constitution the right to vote and its exercise are now governed by articles 136 and 39:

“Article 136. Political rights

1. All Swiss men and women who are not disqualified by reason of mental illness or feeble-mindedness have political rights in federal matters from the age of 18 years.
2. They may take part in the election of the National Council and in federal referendums and launch and sign popular initiatives and requests for referendums in federal matters.

Article 39. Exercise of political rights

1. The Confederation shall regulate the exercise of political rights at the federal level; the cantons shall regulate these rights at the cantonal and communal levels.
2. Political rights shall be exercised in the place of domicile. The Confederation and the cantons may provide for exceptions.
3. No one may exercise political rights in more than one canton.
4. The cantons may provide that newly domiciled persons shall not enjoy the right to vote at the cantonal and communal levels until a maximum interval of three months has elapsed.”

25.3 Right to be elected

305. The information given in the second periodic report is still relevant.²⁰³ Articles 143 and 144 of the Constitution govern eligibility and disqualification.

²⁰³ See para. 219 of the second periodic report.

“Article 143. Eligibility

All citizens having the right to vote is eligible for election to the National Council, the Federal Council and the Federal Court.

Article 144. Disqualification

1. The functions of member of the National Council, the Council of States and the Federal Council and of judge of the Federal Court may not be exercised at the same time.
2. Members of the Federal Council and judges of the Federal Court assuming a full case-load may not perform any other function in the service of the Confederation or of a canton or engage in any other gainful activity.
3. The law may provide for other grounds of disqualification.

25.4 Conduct of elections

306. The information given on this subject in the second periodic report is still up-to-date.²⁰⁴ The cantons of Glarus and Appenzell Inner-Rhodes still have *Landesgemeinde* (citizens’ assemblies). Switzerland cannot therefore withdraw its reservation to article 25 (b) of the Covenant.

25.5 Introduction of the general popular initiative

307. On 31 May 2006 the Federal Council adopted a message on the introduction of the general popular initiative.²⁰⁵ This reform of the people’s rights, which was accepted by the people and the cantons on 9 February 2003, authorizes requests for amendment of legislation in addition to provisions of the Constitution (see para. 9).

308. This message also addressed other amendments of the legislation on political rights, including inter alia the phased introduction of electronic voting (para. 308), the compilation by the cantons of a central electoral roll of Swiss nationals living abroad, and clarification of what is meant by “proxy vote”. In September 2006 the Political Institutions Committee (CIP) of the National Council decided, subject to approval by the CIP of the Council of States, to submit to the Federal Assembly a draft amendment to the Constitution to allow review of the introduction of the general popular initiative.

25.6 Electronic voting

309. The Federal Council has submitted to Parliament a report on the pilot electronic voting projects. This kind of voting will facilitate the creation of the necessary conditions for the maintenance over the long term of Swiss institutions, which are founded on direct democracy in a society undergoing modernization, and it should therefore be phased in. With this report the Federal Council has concluded the studies conducted in response to various Parliamentary statements, studies addressing the possibilities, risks and feasibility of electronic voting in Switzerland. In 2004 and 2005 the Federal Chancellery and the cantons of Geneva, Neuchâtel and

²⁰⁴ See para. 220 of the second periodic report.

²⁰⁵ FF 2006 5001 *et seq.*

Zurich conducted five trials of electronic voting in federal ballots, which proceeded without problem. Electronic voting will enable future generations to participate in the democratic process even if living conditions change and will thus guarantee the legitimacy of political decisions through broad popular support. It will also ease the complexity of voting operations due to the increasing mobility of voters and the permanent increase in the number of Swiss nationals abroad who hold voting rights. The support of the people for electronic voting is assured. Surveys carried out under the pilot projects showed that the majority of the people are in favour. Although information technology offers an opportunity for direct democracy, it entails some risks as well. It will require the introduction of complicated organizational, technical and legal measures. The risk of abuse of a technical nature will necessitate permanent monitoring and the development of security measures. The benefits of electronic voting are clear from the economic standpoint, for it will both facilitate the rationalization of voting operations and the counting of votes and prove cheaper than postal voting.

25.7 Political rights of aliens in Switzerland

310. The information contained in paragraph 221 *et seq.* of the second periodic report remains in principle relevant.

311. During the period under review four cantons have granted aliens the right to vote in communal elections.²⁰⁶

25.8 Jurisprudence

312. The background to Decision ATF 129 I 185 *et seq.* was a new distribution of electoral circles which, in the opinion of the plaintiffs, restricted unreasonably the expression of the will of the electors (art. 25 (b) of the Covenant) and was inconsistent with the right of access to public posts under conditions of equality (art. 25 (c)). The Federal Court found that the complaints lacked merit. Under article 25 (b) of the Covenant the election process must be such as to ensure the expression of the free and uninfluenced will of the electors. This provision protects *inter alia* to right of persons holding the right to vote not to be subjected to inadmissible pressure or influence either in the formation or in the expression of their will. Article 25 (c) guarantees the right to have access, on general terms of equality, to public service - a notion which includes all official posts (executive, judicial, and public administration) carrying a sovereign authority, the holders of which are not elected but appointed by a unilateral act. In other words, in the Covenant political rights represent a lowest common denominator intended to allow adherence by the largest possible number of States, even undemocratic ones. It is therefore difficult to see how the contested demarcation of electoral circles could have impaired the free formation of the opinions of the plaintiffs or the expression of their will as electors (art 25 (b) of the Covenant and art. 34, para. 2, of the Constitution); furthermore article 25 (c) of the Covenant is not applicable to membership of the Communal Parliament of Zurich, which is determined by election and not by appointment by a unilateral act.

²⁰⁶ The cantons of Vaud (since 2002), Geneva (since 2005) and Fribourg (since 2005) granted aliens the right to vote in all their communes. In 2003 the canton of Grisons introduced optional suffrage for aliens, which all cantons have the option of introducing.

26. ARTICLE 26 (General principle of non-discrimination)

313. The regulation and application of the principle of equality in Swiss law are discussed above, mainly in the sections on articles 2 and 3 of the Covenant.

26.1 Registered partnerships

314. Following the entry into force of the *Federal Act on registered partnerships between persons of the same sex* (Partnerships Act (LPart); see para. 11 above) persons of the same sex living as partners may have their relationship registered by a civil registrar and thus invest it with legal status. The recognition by the State of same-sex partnerships is helping to eradicate the discrimination against the homosexual couples in the population and to diminish prejudice against homosexuality.

315. Partnerships are registered before a civil registrar. He witnesses the commitment of the partners to lead a life together and to assume towards each other all the rights and duties deriving from that commitment. For example, the partners owe each other assistance and respect. They contribute, each according to his capacity, to the maintenance of their joint estate. They take joint decisions concerning their common dwelling. Each partner has a duty to inform the other about his income, possessions and debts. Each partner also has the possibility of going to court in the event of disputes over specific matters.

316. The registration of a partnership has no effect on legal names. In everyday life the two partners may use a joint name - each of them adding the other's name to his or her own name - and thus give prominence to the relationship which unites them. However, this is not an official name and may not be entered in the civil registers. Persons whose partnership has been registered retain their cantonal and communal rights of citizenship.

317. If one of the partners is of foreign nationality, he or she is entitled to a residence permit issued by the aliens police. A civil registrar may refuse to register a partnership when the two persons in question clearly do not intend to lead a life together but are seeking to circumvent the regulations on the admission and residence of aliens.

318. The new Act provides more favourable conditions for ordinary naturalization by reducing to five years the necessary period of residence in Switzerland.

319. Where property relations are concerned, registered partners are subject to regulations similar to those of matrimonial law governing the separation of property. However, they may conclude a special agreement applicable in the event of dissolution of the partnership and provide, amongst other things, for dissolution according to the provisions of matrimonial law on the sharing of assets acquired after marriage. In the case of inheritance law, social security law and even occupational insurance, registered partners have the same status as married couples.

320. Partners may request the dissolution of their partnership by means of a joint application to a judge. One of the partners may also request dissolution if he or she has lived separately from the other partner for at least one year. In the event of dissolution, as in the case of divorce, the terminal benefits under occupational insurance acquired during the period of cohabitation are shared between the partners.

321. The adoption of children and recourse to medically assisted procreation are prohibited.

26.2 Jurisprudence

322. In a decision of 21 November 2003²⁰⁷ the Federal Court ruled that the communal popular initiative “The Swiss first!” in Zurich, which requested that the communes, under higher law, should give priority to the needs of Swiss nationals, was designed to favour the Swiss and thus to disadvantage foreigners when different treatment was not justified on objective grounds. It therefore infringed the guarantees of equality before the law and the prohibition of discrimination contained in the Federal Constitution.

323. The Agreement with the European Community on the Free Movement of Persons provides in its scope of application for more generous regulations on family reunification than are available in Swiss law, to the advantage of relatives of Swiss nationals living in Switzerland coming from a non-member State (right of family reunification for children up to age 21 instead of age 18; waiver of a preponderant relationship when the parents are separated or divorced). The Federal Court deemed itself bound, under the Constitution, by the provisions of the legislation in force and unable to bring that legislation into line with the Agreement on the ground of the right to equality and the prohibition of discrimination. However, the aliens authorities of the cantons remain free, in the exercise of their discretionary powers to grant residence permits, to accord Swiss citizens the same right in this regard as is accorded to citizens of States members of the European Union or EFTA.²⁰⁸ In confirmation of this jurisprudence the Federal Court voided a cantonal decision based on the constitutional right to derive from the provisions of the Agreement on the Free Movement of Persons a similar right to family reunification for a child of a Swiss father coming from a State not party to the Agreement. In the case in question it considered that the (temporary) inequality was due to reasons of a legislative nature which must be respected, since the Legislature intended to study the issue as part of the comprehensive review of the legislation (see para. 206 *et seq.*). Accordingly, the current practice prevailed over the right to equality.²⁰⁹

324. The Federal Court declared to be in conflict with the Constitution, by virtue of the prohibition of discrimination, the regulations of a public-law corporation which invoked the right to use of a name and the right of citizenship for the purpose of transmitting the status of member to descendants, excluding such transmission by its married nationals or by its unmarried nationals.²¹⁰

325. Pursuant to the principle of equal treatment the Federal Court ruled in a decision of 16 December 2004, concerning the entry in the civil register of a name existing in both masculine and feminine forms and transmitted by a mother to her son, that the name should be entered in the masculine form for that male child.²¹¹

²⁰⁷ ATF 129 I 392 *et seq.*

²⁰⁸ ATF 129 II 249.

²⁰⁹ ATF 130 II 137.

²¹⁰ ATF 132 I 68.

²¹¹ ATF 131 III 201.

27. ARTICLE 27 (Rights of minorities)

27.1 Framework Convention of the Council of Europe for the Protection of National Minorities

326. Following the submission by Switzerland of its initial report and the visit to Switzerland from 11 to 13 November 2003 by a delegation of the Advisory Committee to gather further information, on 10 December 2003 the Committee of Ministers of the Council of Europe adopted a resolution (ResCMN(2203)13) on the application by Switzerland of the Framework Convention for the Protection of National Minorities. The Committee found that Switzerland has made particularly commendable efforts in a number of fields in respect of its linguistic minorities. The institutional framework enables French-, Italian- and Romansh-speakers, as well as German-speakers of the cantons of Fribourg and Valais, to preserve and develop the essential elements of their identities, in particular their language and their culture. Moreover, a number of institutional arrangements ensure extensive political participation by linguistic minorities at all levels. The legal guarantees concerning the use of minority languages in relations with the administrative authorities are very extensive, and numerous efforts have been made to reinforce the position of Romansh. Increased attention could, however, be given to the principles enshrined in the Framework Convention when it comes to authorizing, at the infra-cantonal level, the use of a minority language in the aforementioned relations. In the field of education, the authorities should ensure that the needs of persons belonging to linguistic minorities as regards instruction in a minority language outside its traditional area of establishment are better taken into account, which is particularly important for the Italian- and Romansh-speakers. In the canton of Grisons, the greatest possible caution should be exercised in examining any change of the language of instruction at the communal level. There is scope for improvement to make it possible for Travellers to develop the essential elements of their identity. With a view to remedying the main difficulties these persons are faced with, in particular the lack of stopping places and transit sites, further measures, notably legislative ones, should be taken by the authorities. Furthermore, participation mechanisms for Travellers should be strengthened. On 22 June 2004 the Chairman of the Advisory Committee submitted to Switzerland a specific questionnaire adopted by the Committee. On the basis of the replies to this questionnaire by the various agencies and persons concerned (offices, cantons, inter-cantonal conferences, representatives of Travellers) Switzerland prepared its second report on the application of the Framework Convention, which it was to submit in the course of 2007. This report describes the action taken at the national and regional levels to improve the practical application of the Framework Convention and includes replies to the specific questions put to Switzerland by the Advisory Committee.

27.2 Linguistic minorities

327. The revision of the Constitution has offered an opportunity to reformulate the mandates of the Confederation and the cantons with respect to languages and to adapt these mandates to current needs. The mandates set out in the Constitution are designed to safeguard and reinforce the country's quadri-lingualism and to promote understanding and exchanges between its linguistic communities:²¹²

²¹² In Switzerland, Romansh and Italian are regarded as regional or minority languages and, as such, are the subject of promotional measures. Switzerland also recognizes Jenish and Yiddish as languages having no specific area of establishment.

“Article 4. National languages

The national languages are German, French, Italian and Romansh.

Article 18. Freedom of language

The freedom of language is guaranteed.

Article 70. Languages

1. The official languages of the Confederation are German, French and Italian. Romansh is also an official language for the relations which the Confederation maintains with Romansh-speakers.
2. The cantons shall determine their official languages. In order to preserve harmony among the linguistic communities, the cantons shall take into account the traditional geographical distribution of languages and indigenous linguistic communities.
3. The Confederation and the cantons shall encourage understanding and exchanges among the linguistic communities.
4. The Confederation shall support the multilingual cantons in the performance of their particular functions.
5. The Confederation shall support the measures taken by the cantons of Grisons and Ticino to preserve and promote Romansh and Italian.”

328. Various articles of the Constitution touch on the sphere of languages policy. Article 4 designates German, French, Italian and Romansh as the national languages. This article derives from a general conception of national languages which encompasses the written and spoken forms as well as the idioms and dialects of those four languages. It enshrines the principle of the equality of the four national languages.

329. Article 18 establishes the freedom of language as a fundamental right and it guarantees as a principle everyone’s right to express himself in the language of his choice, especially in his main language. The classification of the freedom of language as a fundamental right is also expressed in the prohibition of the use of a language as a reason for discrimination (art. 8, para.2) and in the right of the person concerned to be informed - in a language which he understands - of the grounds on which he has been deprived of his liberty and his personal rights (art. 31, para. 2) and of the charges laid against him (art. 32, para. 2).

330. Article 70, paragraph 1, designates German, French, Italian as the official languages of the entire Confederation. Romansh is also an official language for the relations of the Confederation with Romansh-speakers. The first sentence of paragraph 2 states that it is for the cantons to determine their official languages. In so doing, they are required to respect the traditional regional distribution of languages and to take into account indigenous linguistic minorities in order to preserve the good understanding among the linguistic communities. The principle of territoriality formulated here does of course make the freedom of language dependent on another consideration, but this principle is itself qualified in this way by the protection of minorities guaranteed by the Constitution.. The ultimate objective remains the preservation of linguistic peace. Paragraph 3 requires the Confederation and the cantons to take steps to encourage

understanding and exchanges among the linguistic communities. Implementation of the constitutional mandate implies that the Confederation and the cantons should cooperate in the formulation and application of concrete measures. Paragraph 4 obliges the Confederation to furnish financial support to the multilingual cantons in carrying out the specific tasks connected with multilingualism. Paragraph 5 requires the Confederation to support the measures taken by the cantons of Grisons and Ticino to preserve and promote Romansh and Italian. This support does not date from the introduction of an explicit constitutional basis in 1999. There were already in earlier times federal support measures derived from the 1938 article concerning languages. The principle of the quality of the national languages and the equality of the linguistic groups had prompted the Confederation to take action to safeguard and promote threatened national languages.

331. Other articles of the Constitution address linguistic diversity as the expression of one of Switzerland's essential characteristics, for example in connection with the encouragement of culture by the Confederation (art. 69, para. 3), radio and television (art. 93, para. 2) and the election of the Federal Council (art. 175, para. 4).

332. In the light of the new legal framework the Federal Administration prepared a languages bill designed to secure the extension of the principles of language policy set out in the Federal Constitution. It organized a consultation procedure on this subject and submitted to the Federal Council for approval a reworked bill and a message which took account of the outcome of the consultation exercise. On 28 April 2004 the Federal Council decided not to submit to the Chambers the draft *Languages Act* (LLC) and the corresponding message, citing the instructions to make savings which it had received from Parliament and the shortage of financial resources. The Federal Council reacted to this news by tabling two motions inviting the Federal Administration, nevertheless, to submit the text to Parliament, followed on 7 May 2004 by a Parliamentary initiative²¹³ along the same lines. The Committees on Science, Education and Culture of the two Councils both approved this initiative. In September 2006 the National Council's Committee proposed that the draft text should be approved.²¹⁴ In October 2006 the Federal Council confirmed its decision of April 2004 and rejected the text for the reasons mentioned above. It stressed that it was fully aware of the extreme political importance of multilingualism as an essential characteristic of Switzerland, that it was convinced that the Confederation already possessed the necessary tools for achieving that objectives of the Languages Act and that it was therefore able to fulfil its functions adequately.²¹⁵

333. In January 2003 the Federal Council commissioned the Swiss National Fund for Scientific Research to carry out a national research programme on the topic "Diversity of languages and language skills in Switzerland". This programme is intended to lay down scientific foundations for Switzerland's languages policy. The programme has five main components: clarification of the juridical and political conditions governing action on a languages policy; the current challenges in language teaching in schools; adult language skills; the use of languages in the economy; and the relationship between languages and the formation of a person's identity. The publication of the summaries of the programme's findings are scheduled for 2009, when the programme ends.

²¹³ Iv.pa.04.429 Federal Act on national languages.

²¹⁴ FF 2006 p. 8505.

²¹⁵ FF 2006 p. 8575.

27.3 European Charter for Regional or Minority Languages

334. The European Charter for Regional or Minority Languages of 5 November 1992 entered into force for Switzerland on 1 April 1998. Switzerland's third periodic report under the Charter, dated May 2006, sets out in detail its position on the recommendations made by the Committee of Ministers during its consideration of Switzerland's second periodic report, describing for example the project on the adoption of legislation for the application of article 70 of the Constitution (see para. 329), which was then being debated in Parliament, the removal of the practical obstacles to the use of Romansh in the cantonal administration and in the courts, and the increased use of Romansh by private radio and television stations.²¹⁶

27.4 Cultural minorities

335. Following a number of moves in Parliament, the Federal Department of the Interior (DFI) and the Federal Department of the Economy (DFE) have been working together since 2003 to prepare a joint report on the situation of Travellers in Switzerland. The draft report was submitted to the cantons and other interested parties for consultation, which took place between the end of June and the end of November 2005. DFI and DFE then consolidated the text, and the Federal Council adopted it by a decision of 18 October 2006. The report, divided into two parts, gives a detailed overview of the living conditions and the legal situation of Travellers in Switzerland. Part I lists the implications of an eventual ratification of the ILO Indigenous and Tribal Peoples Convention (No. 169). It analyses the obligations which Switzerland would have to assume towards Travellers if it ratified the Convention. Part II sets out the Confederation's options for action with regard to the creation of stopping places and transit sites for Travellers. The report concludes that Switzerland's positive law does not satisfy the requirements of the Convention. For this reason, and in view of the fact that the majority of the cantons are opposed, the Federal Council expressed the view that ratification of the Convention was not justified at present. But the consultation exercise also showed that measures to improve the situation of Travellers in Switzerland could already have been introduced under existing legislation. The proposal to convert disused military parade grounds into stopping places and transit sites met with broad support during the consultation. This proposal is also supported by the Confederation, provided that it does not create additional costs.

336. The Foundation called "Ensuring the Future of Swiss Travellers", which was established by the Confederation in 1997, has a mandate to safeguard and improve the living conditions of Travellers in Switzerland. The aim is contribute to the preservation of the cultural identity of a minority which is now recognized as such but which has long suffered discrimination in Switzerland. This Foundation works to achieve harmonious coexistence between Travellers and the sedentary population. Under the *Federal Act on the Foundation "Ensuring the Future of Swiss Travellers"* of 7 October 1994,²¹⁷ the Foundation was given a start-up capital of one million francs and has twice since been allocated a five-year framework credit providing 150,000 francs a year for operating costs. A message adopted by the Federal Council provides for the Foundation to be allocated a new framework credit of 750,000 francs for 2007-2011 for the continuation of its work.

²¹⁶ www.bak.admin.ch/bak/themen/sprachen_und_kulturelle_minderheiten/00506/00509/index.html?lang=fr.

²¹⁷ RS 449.1.

337. The Foundation acts as a forum where representatives of the Confederation, the cantons and the communes work together with Travellers to find amicable solutions to outstanding issues. Since its creation the Foundation has dealt mainly with the following questions:

- Lack of stopping places and transit sites;
- Regulation of permits to engage in commercial activities;
- Schooling of Travellers' children;
- Transit through Switzerland of isolated groups of Travellers, especially in summer.

338. The Foundation has already attained some of its objectives in various fields. For example, the legal status of Travellers has been improved.

339. It should also be noted that since 1986 the Confederation has been making a contribution to the "*Radgenossenschaft der Landstrasse*" (association of the open road), an association founded in 1975 to ensure the permanent maintenance of a range of assistance services for Travellers. This contribution consists of an annual lump sum to co-finance the association's secretariat, which has a mandate to provide services for Travellers seeking assistance and to cooperate with other Travellers associations. The amount of the annual lump sum depends on the recognized needs included in the association's budget and programme of work; it covers about 85 per cent of the association's total costs. The association acts as an intermediary between the authorities and Travellers, provides important services for Travellers experiencing problems with licences or school attendance, and offers advice on legal assistance and educational support. It also plays a role in making the general public more aware of Travellers' concerns. By supporting this association the Confederation is protecting the interests of a Swiss cultural minority through an organization independent of the State and managed by the Travellers themselves.

27.5 Jurisprudence

340. In a decision of 28 March 2003²¹⁸ the Federal Court ruled that development plans must provide suitable zones and sites where Travellers can live according to their traditions. If it is necessary to establish a new stopping place of above a certain size, a special-use plan must be drawn up in accordance with the town and country planning legislation. The Court thus rejected the application of a member of the Traveller community seeking a derogation for the development of a site for several caravans and facilities open to other members of the community on land in an agricultural zone. As a result of this decision greater account is taken of Travellers' needs in development planning and building regulations.

27.6 Religious minorities

341. At the time of the 2000 census (the latest to date) the religious affiliation of the population of Switzerland was distributed as follows: Roman Catholic Church - 41.82% (1990: 46.1%); Evangelical Reformed Church - 33.04% (1990: 38.5%); free evangelical churches - 2.21% (1990: 2.2%); Catholic Christian Church - 0.18% (1990: 0.17%); Orthodox Churches - 1.81% (1990: 1.0%); Islamic community - 4.26% (1990: 2.2%); Jewish community - 0.25% (1990: 0.25%); other churches and religious communities - 0.78% (1990: 0.4%); and no affiliation - 11.1% (1990: 7.4%). The changes over the 10-year period show a marked decline for Switzerland's two traditional Christian churches (Roman Catholic Church and Evangelical Reformed Church)

²¹⁸ ATF 129 II 321.

linked to the increase in the proportion of the population belonging to no religious community and the sharp rise in the Orthodox Churches and the Islamic community. The advance of these two communities is due, amongst other causes, to immigration from the Balkans (in particular from the States of the former Yugoslavia).

342. Projects for the construction of minarets have encountered opposition in several cantons. Appeals have been lodged in the cantons of Solothurn and Berne; the arguments put forward relate chiefly to construction and planning regulations. The two appeals are still pending. Furthermore, the parliaments of the cantons of St. Gallen and Solothurn have refused to introduce a general ban on minarets. Parliamentary initiatives calling for such a ban are pending in the cantons of Zurich and Ticino. In Berne, the cantonal parliament rejected a motion that proposals for the construction of any religious building should be submitted to the people. At the federal level, the collection of signatures for a popular initiative requesting a ban on minarets began on 1 May 2007.

343. On 16 December 2005 Parliament adopted a new *Federal Protection of Animals Act* (LPA).²¹⁹ During the consultation on the draft text in 2000 the Federal Council sought to ease the total ban on the ritual slaughter of mammals, which had existed in Switzerland since 1893. It proposed that, under certain conditions, animals could be slaughtered without stunning before bleeding, in order to accommodate, in a balance of the interests at stake, the freedoms of conscience and religion of the Jewish and Islamic communities. As a result of vigorous opposition from most of the cantons and a number of special-interest groups the Federal Council had to abandon this change. However, the new Act expressly establishes the right to import the meat of animals slaughtered in accordance with Jewish or Islamic rituals. It was to enter into force in 2007. A popular initiative entitled “For a modern concept of animal protection”, which provided inter alia for the prohibition of imports of the meat of animals slaughtered without stunning before bleeding, was rejected by the Council of State in October 2004 and by the National Council in June 2005. Another popular initiative (“Against the ritual slaughter of animals without prior stunning”), launched in 2002, failed to obtain the required number of signatures.

²¹⁹ FF 2006 317.

PART III

REPLIES TO THE AREAS OF CONCERN RAISED BY THE COMMITTEE IN ITS CONCLUDING OBSERVATIONS OF 12 NOVEMBER 2001 (CCPR/CO/73/CH)

I. RESERVATIONS TO THE COVENANT AND ACCESSION TO THE OPTIONAL PROTOCOL

344. *“The Committee remains concerned that the State Party has not seen fit to withdraw its reservations to the Covenant. It notes the mandate given to the federal administration to examine the question of the removal of reservations to human rights treaties and hopes that by the time the next report is considered all reservations to the Covenant will have been withdrawn. Further, the Committee reiterates its recommendation that the State party accede to the Optional Protocol to the Covenant.”*

1. Reservations withdrawn during the period under review

345. The reservation to article 14, paragraph 3 (d) and (f) (Free assistance of an officially appointed lawyer and an interpreter) was withdrawn on 12 January 2004 (see para. 6).

346. The Federal Act on the criminal status of minors,²²⁰ which entered into force on 1 January 2007 (see para. 11), provides that minors shall be placed in a special establishment or in a special division of a prison, where they are kept separate from adult detainees.²²¹ The entry into force of these provisions means that the reservation to article 10, paragraph 2 (b), of the Covenant falls.

347. The reservation to article 14, paragraph 1, of the Covenant is identical to the reservation to Article 6 of the European Convention on Human Rights entered by Switzerland on 29 August 2000.²²² The entry into force on 1 January 2007 of the Federal Act on the Federal Court (LTF)²²³ and of the Federal Act on the Federal Administrative Court ((LTAF)²²⁴ gave practical effect to the judicial procedure set out in article 30 of the Federal Constitution. Thus the reservation to article 14, paragraph 1, of the Covenant falls.

348. The Federal Criminal Court opened its doors on 1 April 2004, the date of the entry into force of the Federal Act on the Federal Criminal Court (LTPF; see para. 11)²²⁵ It hears in first instance criminal cases falling within the federal jurisdiction and hands down its decisions as the court immediately below the Federal Court. Accordingly, the reservation to article 14, paragraph 5, of the Covenant falls.

²²⁰ The Minors Act (DPMIn; RS 311.1).

²²¹ Minors Act, art. 6, para. 2.

²²² Federal Order of 8 March 2000 concerning reservations and declarations of interpretation entered by Switzerland to article 6 of the European Convention on Human Rights (RO 2002 1142) (see RO 2002 1143).

²²³ RS 173.110.

²²⁴ RS 173.32.

²²⁵ RS 173.71.

349. By a decision dated 4 April 2007, notified to the Secretary-General of the United Nations on 1 May 2007, the Federal Council announced the withdrawal of the reservations referred to in paragraphs 346-348 above.

2. Reservations maintained

350. It was not possible to withdraw the reservation to article 12, paragraph 1, of the Covenant during the period covered by this report. In fact, according to article 37, paragraph 1, of the Federal Aliens Act (LEtr; FF 2002 3604 *et seq.*), which will enter into force on 1 January 2008 (see para. 11), holders of a short-term or a standard residence permit wishing to move their place of residence to another canton must first obtain a permit from that canton. For the case of nationals of countries members of the European Union, see paragraph 205 above.

351. It was not possible to withdraw the reservation to article 20, paragraph 1, of the Covenant during the period under review for want of legislation expressly prohibiting propaganda for war. However, some forms of propaganda for war fall within the scope of the Swiss Criminal Code (see Title 13 on “Crimes or offences likely to compromise foreign relations”). In addition, articles 184 and 185 authorize the Federal Council to prohibit propaganda for war.

352. It was not possible to withdraw the reservation to article 25 (b) of the Covenant during the period under review because in two cantons the citizens’ assembly (*Landesgemeinde*) is the supreme electoral body (Appenzell Inner-Rhoden) or the legislative authority and the supreme electoral body (Glarus).

353. Switzerland did not withdraw during the period under review its reservation to article 26 of the Covenant out of a concern that this article’s scope of application might exceed the scope of article 14 of the European Convention on Human Rights.

3. Optional Protocol

354. Accession to the first Optional Protocol was included in the Legislature’s programme for 1999-2003. That programme indicated the wish to submit a message to Parliament concerning ratification of the Optional Protocol. That objective no longer appears on the agenda in the Legislature’s report for 2003-2007.²²⁶

II. COMPLIANCE WITH OBLIGATIONS UNDER THE COVENANT BY ALL THE CANTONAL AND COMMUNAL AUTHORITIES

355. *“The Committee is concerned that the application of the State party’s obligations under the Covenant in all parts of its territory may be hampered by the federal structure of the State party. It reminds the State party that under article 50 of the Covenant the provisions of the Covenant “shall extend to all parts of federal States without any limitations or exceptions. The State party should take measures to ensure that the authorities in all cantons and communities are aware of the rights set out in the Covenant and of their duty to ensure respect for them.”*”

356. Switzerland remains attached to the monistic concept of law, which it has already been applying for many years. Pursuant to article 5, paragraph 4, of the Federal Constitution rules of international law are automatically treated as national laws as soon as they enter into force. The

²²⁶ FF 2004 1035.

ranking of international conventions and cantonal and communal legislation in the legal hierarchy is therefore clear, for treaties ratified by the Confederation are deemed to be federal laws and federal laws take precedence over all cantonal and communal legislation.²²⁷ Pursuant to article 191 of the Constitution the Federal Court and the other authorities are moreover required to apply not only federal law but also international law. It should be pointed out that the Federal Court may monitor the constitutionality of legislation: see the core document dated 20 December 2000 (para. 45 and paras. 76 *et seq.*) constituting the first part of the reports on application of the United Nations human rights treaties.

357. In addition, article 54, paragraph 1, of the Federal Constitution confers on the Confederation comprehensive competence to conclude international treaties. The cantons are required to apply the treaties ratified by the Confederation on the same terms as all the other provisions of federal legislation. In performance of its supervisory functions the Confederation may when necessary enjoin the cantons to apply the international treaties correctly and promptly.²²⁸

358. The reform of the justice system has equipped Switzerland with the constitutional bases for unifying civil procedure and criminal procedure. The replacement of cantonal regulations by unified codes of procedure will facilitate the realization of the procedural guarantees contained in the Covenant.

III. URGENT LEGISLATION

359. ***“The Committee is concerned that urgent legislation “that has no constitutional basis”, permitted under article 165 of the Federal Constitution may lead to derogation from Covenant rights, without the requirements of article 4 of the Covenant being met. The State party should ensure that its framework for urgent legislation ensures compliance with its obligations under article 4 of the Covenant.”***

360. As already mentioned in paragraph 108, the essential content of the rights referred to in article 4, paragraph 2, of the Covenant are not under threat, even in the event of an exceptional danger threatening the existence of the nation. The declaration of an extra-constitutional emergency act (see para. 104 *et seq.*) would respect those rights in all cases.

IV. INCIDENTS OF RACIAL INTOLERANCE

361. ***“The Committee is concerned that incidents of racial intolerance have increased. While commending the continuous efforts made by the Federal Commission against Racism to combat anti-Semitism, racism and xenophobia, it notes that the Commission does not have the power to initiate legal action to combat racial incitement and discrimination. The State party should ensure rigorous enforcement of its laws against racial incitement and discrimination. It should consider broadening the mandate of the Federal Commission against Racism, or creating an independent human rights mechanism with the power to initiate legal action (articles 2 and 20 of the Covenant).”***

²²⁷ Art. 49, para. 1, of the Constitution.

²²⁸ Message of 20 November 2006 concerning a new federal constitution, p. 231 *et seq.*

1. Legal and judicial protection

362. For details of the anti-racist legislation, see paragraphs 36 and 37 above. For the jurisprudence of article 261*bis* of the Criminal Code, see paragraph 49 *et seq.* For measures of prevention, see paragraphs 54 *et seq.*

2. Service against Racism and Federal Commission against Racism

363. The establishment of the Service against Racism (SLR) in 2001 almost doubled the forces combating racism (see paras. 39 *et seq.*). SLR is responsible for establishing and coordinating the measures adopted by the federal administration to combat racism and extremism and acts as an intermediary with the cantons, the communes and third parties. This support enables the Federal Commission against Racism (CFR) to concentrate activities on awareness-raising and core activities. CFR is not an official agency for the protection of human rights within the meaning of the Paris Principles but rather a specialized national institution for combating racism. As such, it maintains links with other national agencies combating racism and defending human rights. This facilitates both the *transfer of know-how* and a comparison of the situation in Switzerland with the situation in other European countries (see paras. 44 *et seq.*).

3. Special Service against extremism in the army

364. The work of this Service has eight main components. These are, in addition to the operation of a central coordination unit to act as a contact point, the regular exchange of information among the federal authorities, the conduct of academic studies, in particular under the Swiss National Fund programme entitled “Rightist extremism: causes and action to be taken” (PNR 40+), the raising of awareness of extremism, the review of the information policy of the Federal Department of Defence, Public Safety and Sports (DDPS) in isolated problem cases, DDPS participation in the expert group on extremism (to explore the need for action in terms of federal law), the improvement of the monitoring of individuals for security purposes, and the determination of criteria justifying exclusion from service for extremist activities.

365. Experience shows that cases of extremism are statistically very rare in the army (<0.1% of personnel). Many members of the military, beginning with young officers, say that they are very aware of this problem. After studying the issue in detail the Federal Council decided not to introduce a regulation on exclusion for extremism. Such a move would have entailed determining, as part of a policy decision, what attitudes of mind are incompatible with service in the army, an exercise regarded as particularly sensitive on more than one count: inquisitorial approach, risk of abuse, militia system.

366. In current practice the regulations on exclusion already in place are effective against persons who clearly merit exclusion from the army. If exclusion is thought unnecessary, there are other steps which can be taken, such as early release, change of posting, or deferment of awards and promotions.²²⁹

²²⁹ Reply to the *Widmer* motion of 22 March 2006 (06.3080).

4. Official body for the protection of human rights

367. The debate on the establishment of a federal human rights commission was launched by two Parliamentary initiatives calling for the creation of such a body.²³⁰ The Federal Council was also requested to produce a report on this subject.²³¹ On the basis of a survey of experts and interested parties from the Federal Administration, Parliament, the cantons, and economic and academic circles, external experts commissioned by the Administration carried out an in-depth study and proposed six models of a federal human rights commission which took account of the Paris Principles, amongst other considerations.²³² In agreement with the sponsor of the initiative and on the basis of this report, the Federal Department of Foreign Affairs (DFAE) studied the possibility of adapting the terms of reference of an existing agency working in the field of human rights. An expansion of the mandate of the Federal Commission against Racism (CFR) was examined in this connection. DFAE considered that the work done so far and the contacts established showed that it was perfectly possible to find a very broad-based model which would take advantage of the effects of synergy. The consultations conducted also showed that the cantons were interested or potentially interested in the services which such a body would furnish. Being anxious to engage the cantons in the decision-making process from the outset, DFAE proposed that a joint working group of the Confederation and the cantons should be set up early in 2007 with a remit to report to the Federal Council,

V. EQUALITY BETWEEN MEN AND WOMEN

368. *“In relation to article 3 of the Covenant the Committee recognizes the progress made since the initial report in promoting equality of men and women and notes in particular the launching of the Plan of Action “Equality between women and men”. Nevertheless, it remains concerned that women are still disadvantaged in many areas, especially in the achievement of equal remuneration for work of equal value and in appointment to senior positions, in both the public and private sectors. The State party should implement its Plan of Action and adopt binding policies to ensure compliance with article 3 of the Covenant in all parts of its territory.”*

1. Equality of opportunities

369. The statistics on employees of the Federal Administration warrant citing in addition to the information given above on developments relating to article 3. They show that women account for 28.7 per cent of all personnel. Comparisons of the figures over several years underline women’s continued advance: the proportion of females has increased by 5.4 per cent in absolute terms since 1999. Their distribution among the salary groups gives a different picture. Only 8.1 per cent of personnel in the very highest salary grades are women. Women account for 20.2 per cent in the high salary grades and for 25 per cent in the intermediate grades. The largest proportion of women (38.8%) is found in the lower grades. And 18.8 per cent of federal personnel - chiefly women and employees in the grades at the bottom of the scale - work part-time.

²³⁰ Müller-Hemmi Vreni initiative of 10 December 2001 and David Eugen initiative, entitled “Federal Human Rights Commission” (01.461 and 01.463).

²³¹ Proposal of the Foreign Policy Committee of 9 September 2002, entitled “Federal Human Rights Commission”.

²³² Schläppi, 2003, *Möglichkeiten zur Schaffung einer nationalen Menschenrechtsinstitution in der Schweiz*.

370. Equality of opportunities between men and women is a major concern of the Confederation as an employer. New instructions on this subject have been in force since 1 March 2003. They provide notably that until parity is achieved in all fields of activity and at all levels departments must create the necessary conditions for increasing the proportion of the under-represented sex. Administrative units must provide the financial and human resources needed to implement suitable measures at all levels. These instructions also specify the departmental spheres of competence, stress the responsibility and duties of senior officials and of officials responsible for equality of opportunities in the Federal Administration, and confer the role of consultative body on the Federal Personnel Office (OFPER). In the light of their needs, departments must draw up for a four-year period a list of measures whose relative degree of priority is to be set each year. In addition, the instructions contain provisions on personnel recruitment, selection, hiring and evaluation. They stipulate that, given equality of qualifications, recruitment officers shall give priority to candidates of the under-represented sex until parity between men and women is achieved in the unit concerned. This applies in particular to trainee posts and managerial posts. The instructions provide for regular managerial monitoring, under the auspices of OFPER. The Federal Council receives an annual report from OFPER stating the current figures with regard to equality of opportunities and summarizing for the Council the reports which departments are required to submit to OFPER every four years.

371. On the instructions of the Federal Council, OFPER has established over recent years a system of periodic reporting of information about the sex distribution by age and by salary group. It has also produced tools (guides, check lists) for attaining equality of opportunities in the various areas of the work of departments and offices.²³³

2. Elimination of pay differentials in the Federal Administration

372. The salaries of employees of the Federal Administration depend on their post, experience and performance, in accordance with article 15, paragraph 1, of the Federal Act on employees of the Confederation (LPers).²³⁴ The Federal Personnel Order (OPers) spells out this principle: the decisive criteria for the evaluation of a post are the training required, the scope of the work, and the level of the requirements, responsibilities and risks inherent in the post. Every post is evaluated on the basis of this principle. The criteria used and the multi-stage evaluation procedure take account of the principle of equal pay for equal work. Subjective assessments based on criteria irrelevant to the post in question, such as sex, have no place in the Confederation's evaluation system. The correct use of this system prevents any arbitrary low evaluation of female staff or of posts occupied chiefly by women.

373. Starting salaries are determined on the basis of general directives, and account is taken of the final educational qualification required and the vocational and non-vocational experience which may be needed. Salary increases are based on employee evaluation and fall within a bracket of 0 to 6 per cent, depending on the duties performed. The annual reporting on the operation of the new salary system shows that, three years after its introduction, there is no systematic gap between women and men in terms of the award of post-evaluation steps. Men did indeed obtain A+ a little more often in the initial stage, but evaluations have tended to converge since 2004. The training of managerial personnel is proceeding in such a way as to ensure that personnel evaluation is non-discriminatory.

²³³ OFPER, "*L'égalité des chances entre femmes et hommes dans l'administration fédérale, Rapport d'évaluation*", Berne, 2004.

²³⁴ RS 172.220.1.

3. Public procurement

374. Pursuant to article 8, paragraph 1 (c), of the Federal Public Procurement Act (LMP),²³⁵ the public procurement services may award contracts only to bidders guaranteeing application of the principle of equal pay for women and men. Enterprises which do not apply this principle may be excluded from procurement procedures. However, this provision, which came into force in 1996, has been of little use, for want of mechanisms and procedures for monitoring pay equality in enterprises. A monitoring arrangement has since been devised, on the instructions of the Federal Bureau on Equality between Women and men (BFEG) and the Federal Procurement Commission (CAC). The Confederation tested this arrangement between 2001 and 2003 in a pilot phase. A wide gap between the sexes was found in two of the five enterprises studied. Of course, such monitoring requires detailed statistical information, but BFEG furnishes expert support to enterprises wishing to undertake self-monitoring. BFEG emphasizes the individual responsibility of enterprises and carries out information and awareness-raising activities to enhance the discharge of that responsibility. It also devised a useful test by which enterprises can quickly check whether they are ensuring equal pay.

375. BFEG is also empowered, under the Public Procurement Order, to conduct regular checks of compliance with the equality legislation. To date, no adequate legal procedure or arrangements have been established for sanctioning enterprises infringing the legislation. However, there are plans to expand the Public Procurement Act in this respect when it is next reviewed.

376. The equal-pay provisions in the Act apply only to goods and services provided in Switzerland. In this connection, the Directorate for Development and Cooperation (DDC) is in the process of incorporating an equal-pay clause applicable to all public procurement with respect to goods and services provided abroad.

4. Access to decision-making posts in the public and private sectors.

377. As noted in paragraphs 84 *et seq.*, on 15 February 2006 the Federal Council adopted, for submission to Parliament, an evaluation report²³⁶ on the effectiveness of the Federal Act on equality between women and men (Equality Act (LEg)).²³⁷ This report concludes that the Equality Act has undoubtedly had a positive impact since it entered into force 10 years ago. It provides persons affected by discrimination with means of asserting their rights. Nevertheless, the Act alone cannot achieve equality in labour relations. This will require amendment of the framework arrangements at several levels and success in persuading enterprises to discharge their responsibilities in this matter more actively. In the view of the Federal Council, the chief measures needed are the provision of better information to the public and greater awareness of the equality cause, as well as the introduction of incentives for enterprises.

²³⁵ RS 172.056.1.

²³⁶ FF 2006 3061 *et seq.*

²³⁷ RS 151.1.

VI. DISCRIMINATION IN THE PRIVATE SECTOR

378. ***“The Committee is concerned that legislation protecting individuals against discrimination in the private sector does not exist in all parts of the State party’s territory. The State party should ensure that legislation exists throughout its territory to protect individuals against discrimination in the private field, pursuant to articles 2 and 3 of the Covenant. “***

379. For information on the general prohibition of discrimination, see the sections above relating to articles 2 and 3 of the Covenant.

380. In addition to the instruments guaranteeing fundamental rights (the Constitution, the European Convention, the International Covenant), Swiss law provides the legal bases for preventing discrimination in the form of specific legislation. Pursuant to article 35, paragraph 3, of the Constitution, the authorities are required to ensure that the fundamental rights, to the extent applicable, should also be realized in the relations between individuals. Accordingly, the courts, by interpreting the provisions of civil law in private-law relationships and by invoking the State’s duty of protection, may also secure the application of the prohibition of any kind of discrimination between private individuals.

381. Several provisions of the law currently in force authorize measures to combat discrimination in the private sector. For example, article 28 of the Civil Code (protection of the person) applies not only to the moral worth of the human being but also to his or her occupational and social standing. Since racist defamation may be deemed an affront to human dignity, it infringes the principle of the protection of the person recognized in civil law. Similarly, article 328 (protection of the person of the worker), articles 336 *et seq.* (protection against wrongful dismissal) of the Code of Obligations and article 6 of the Labour Act accord comprehensive protection to persons whose personal rights are directly infringed by an act of discrimination. Furthermore, pursuant to article 8, paragraph 1 (b), of the Federal Public Procurement Act, contracts may be awarded only to bidders complying with Swiss legislation on worker protection, which includes the prohibition of all discrimination. The Federal Council is moreover convinced that the instruments developed and agreed by the social partners on the basis of freely consented collaboration provide a solid foundation for preventing and combating discrimination.

382. Swiss private law is founded on individual autonomy. In the law of contracts this individual autonomy manifests itself in the freedom to conclude contracts, which entails inter alia the freedom of transactions, the freedom to choose the other party to a contract, the freedom to determine the content of a contract, the freedom to choose the form of a contract, and the freedom to terminate a contract. According to the prevailing jurisprudence and doctrine and with the exception of a few special cases, a direct effect of the prohibition of all forms of discrimination in relations between private individuals is in principle excluded. The Federal Court ruled in a recent judgement²³⁸ that, in the absence of explicit legal bases, it was possible but quite exceptional to conclude that an obligation to enter into a contract in private law could exist on the basis of general principles. According to the Federal Court, such an obligation must be admitted when the following four conditions are met cumulatively: the service in question is the subject of a general public invitation to tender; the tender relates to current needs and is made known practically universally and may be accepted in everyday practice; owing to the bidder’s position of strength in the market the potential clients have no acceptable alternative to meet their normal needs; the bidder does not invoke objectively justified reasons for refusing to conclude the contract.

²³⁸ ATF 129 III 35.

VII. POLICE BRUTALITY

383. *“The Committee is deeply concerned at reported instances of police brutality towards persons being apprehended and detainees, noting that such persons are frequently aliens. It is also concerned that many cantons do not have independent mechanisms for investigation of complaints regarding violence and other forms of misconduct by the police. The possibility of resort to court action cannot serve as a substitute for such mechanisms. The State party should ensure that independent bodies with authority to receive and investigate effectively all complaints of excessive use of force and other abuses of power by the police are established in all cantons. The powers of such bodies should be sufficient to ensure that those responsible are brought to justice or, as appropriate, are subject to disciplinary sanctions sufficient to deter future abuses and that the victims are adequately compensated (article 7 of the Covenant).”*

1. Background

384. It must be pointed out by way of introduction that complaints brought against police officers are in principle a matter for the cantons. As of today, Switzerland does not possess a statistical database on this subject. It would nevertheless seem, in the light of information supplied by the cantons, that the most seriously affected regions are Ticino and Geneva, which are both border cantons with a high proportion of resident aliens. However, it is important to stress that allegations of police violence are very few in number. In 2004 in Geneva, for example, only 35 out of 4,923 arrests led to a criminal complaint and only one to a conviction.

385. Against that background it should also be pointed out that, according to the statistics, the proportion of aliens in detention was 70.5 per cent in 2005. Of these persons, 24.5 per cent were aliens resident in Switzerland, 17.8 per cent were asylum-seekers, and 38.4 per cent were aliens whose place of residence was abroad or unknown.

386. The use of force by the police must be limited to what is strictly necessary, and from the moment when the persons concerned are brought under restraint nothing can justify their ill-treatment. These are fundamental principles found in all the cantonal legislation on police work. This legislation provides that police officers must respect the principles of legality, proportionality and the public interest. This necessarily implies the prohibition of torture and cruel, inhuman or degrading punishment or treatment. However, almost all the cantons have adopted specific provisions on the police in their cantonal codes of criminal procedure (Vaud, Aargau, Schaffhausen, Fribourg) or specific internal directives (Geneva, Appenzell Outer-Rhodes, Aargau, Schaffhausen, Solothurn, Schwyz, Uri, Obwald) or even codes of ethics (Genera, Neuchâtel, Fribourg, Bâle-Campagne).

387. During their initial training police cadets in all the cantons take courses on “Ethics and human rights”, which include information and practical analyses. The problem of torture is also addressed specifically in these courses. The speakers and teachers are often experts on the subject, such as Switzerland’s representatives on the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) or the President of the Association for the Prevention of Torture (APT). Refresher sessions are held during further training, especially for ranking officers. In addition, some cantons hold regular meetings with NGOs working in this field, such as the Swiss Refugee Aid Organization (OSAR) and Amnesty International.

388. On 18 January 2006 the Federal Council transmitted to the Chambers the draft version of the *Federal Act on use of coercion and police measures in spheres within the jurisdiction of the Confederation*.²³⁹ If this text is accepted by the Chambers, the Act could enter into force in January 2008 (see para. 21).

389. A CPT delegation visited Switzerland in October 2003 (see para. 125). It found no indications of the use of torture or serious ill-treatment. The delegation confirmed that considerable progress had been made since its previous visit,²⁴⁰ in particular with regard to the deportation of aliens by air.²⁴¹

390. Since 2003 Swiss police officers have been participating in meetings with their counterparts in various European countries concerning diversity (the representation of minorities of a certain size in police forces). This concept was put into effect by the cantonal police of Bâle-Cité, which has officers of German, Italian, Austrian, Turkish, French, English and Polish nationality. Other cantons are currently considering whether to follow suit.

2. Arrangements for independent inquiries

391. The protection of the public against abuses of power by the police has improved. Since 2003 the canton of Zug has had a cantonal mediation service known as “*Vermittler in Konfliktsituationen*”.²⁴² Mediation services with general jurisdictions are also to be found in the cantons of Zurich, Bâle-Cité and Bâle-Campagne and in the cities of Winterthur, Berne and St. Gallen. Following the discovery of a series of cases of alleged abuse by the municipal police the City of Zurich²⁴³ established an independent contact and complaints service for matters concerning the police. When this service found no systematic abuse in the form of aggressive conduct by the municipal police and after the head of the service had proposed a number of measures to keep the use of violence to a minimum, the service was merged in mid-2003 with the Mediation Office of the City of Zurich. Over the last two years the complaints officer of the Department of Police and Military Affairs of the canton of Bâle-Cité²⁴⁴ recorded only a single case of police violence directed against a foreigner. Disciplinary action was taken against the guilty officer.

392. The canton of Geneva also has a specific procedure, operated independently of the police, to investigate allegations of maltreatment by the police. This is the Commissariat for Ethics, a body consisting of a commissioner for ethics, two deputies selected from outside the police force by the Council of State, and a secretariat (see art. 38 of the Police Act). Every month police headquarters staff draw up a list of all the situations and circumstances which necessitated the use of coercion. The Commissariat examines these lists and verifies that the principle of proportionality has been respected. It conducts administrative inquiries into allegations of ill-treatment. It also produces directives for police use.

²³⁹ FF 2006 2429.

²⁴⁰ During its previous visit in 2001 CPT had expressed concern about the use of coercive measures when aliens were being returned by air.

²⁴¹ Federal Department of Justice and Police, press release of 24 October 2003.

²⁴² www.zug.ch/vermittler.

²⁴³ www.om.stzh.ch.

²⁴⁴ This officer is regarded as a neutral and independent recipient of complaints.

393. Although the other cantons do not have specific bodies for handling complaints, they are no less sensitive to issues of independence and impartiality and have taken various steps to ensure respect for the principles of the Constitution. In several cantons complaints are transmitted directly to the prosecutor's office and the investigation is conducted by an examining magistrate (Neuchâtel, Schaffhausen, Berne, Vaud) or even by a magistrate from another canton (Appenzell Inner-Rhodes). In the canton of Valais an examining magistrate designates the persons who are to conduct the investigation (instead of the police commandant).

394. It should be stressed on this point that the draft unified code of criminal procedure provides that the decisions and procedural acts of police forces should be placed under court supervision (appeals authority; art. 401 of the draft text).

VIII. CRIMINAL PROCEDURE

395. ***“The Committee is concerned that many of the guarantees in articles 9 and 14 are not contained in the criminal procedure codes of some cantons and that a unified criminal procedure code has not yet been adopted. Consequently, rights under articles 9 and 14 are not always respected. The Committee is particularly concerned at persistent reports that detainees have been denied the right to contact a lawyer upon arrest or to inform a close relative of their detention. The State party should take measures to ensure effective implementation of all rights under articles 9 and 14 of the Covenant in all parts of its territory.”***

396. It must be pointed out that the rights mentioned expressly in articles 9 and 14 of the Covenant are all guaranteed in the Swiss judicial system. They appear expressly in the legislation in force or, failing that, the corresponding rights may be derived directly from higher law (Constitution, European Convention, International Covenant) and from the decisive jurisprudence of the Federal Court.

397. The new Federal Constitution states expressly the right to inform relatives (art. 31, para. 2) and the right to assert the rights of defence, including entitlement to legal assistance (art. 32, para. 2). The draft unified code of criminal procedure gives concrete effect to these rights in various provisions (arts. 213, 155 and 156; see para. 12 and paras. 216 *et seq.*).

IX. DEPORTATION OF ALIENS

398. ***“The Committee is deeply concerned that, in the course of the deportation of aliens, there have been instances of degrading treatment and use of excessive force, resulting on some occasions in the death of the deportee. The State party should ensure that all cases of forcible deportation are carried out in a manner which is compatible with articles 6 and 7 of the Covenant. In particular, it should ensure that restraint methods do not affect the life and physical integrity of the persons concerned.”***

399. This matter was addressed in the follow-up to the Committee's concluding observations of 4 November 2002.

400. On 18 January 2006 the Federal Court transmitted to the Chambers the draft *Federal Law on the use of coercion and police measures in spheres within the jurisdiction of the Confederation* (Coercion Act (LusC); FF 2006 2429; see para. 21).

401. Although the genesis of this draft act is due to the serious accidents which have occurred in the course of the forced deportation of aliens, its scope of application extends beyond such

deportation. It includes inter alia all the situations in which the federal authorities (in particular the criminal investigation police, customs officers, and the federal-buildings security service) have to use coercion in the discharge of their duties and in the course of the transport of persons by order of a federal authority. The text also covers private individuals working for such authorities as auxiliaries.

402. During its latest visit to Switzerland, in spring 2005, CPT welcomed the draft act. The only criticism offered by CPT concerned the use of incapacitating devices (electroshock apparatus), reference to which has since been struck out of the draft text.

403. On 11 April 2002 the Conference of Directors of Cantonal Police Departments (CCDJP) adopted a directive on forced deportation by air.²⁴⁵

404. Every year several training courses for police escorts are held in Switzerland. More than 200 police officers have taken these courses. The courses deal at length with the principle of proportionality, and the police officers are instructed in how to comply with that principle in the course of deportation exercises.

X. INCOMMUNICADO DETENTION

405. ***“While the Committee notes the delegation’s explanation that incommunicado detention is not practised in Switzerland, it is concerned that the criminal procedure code in some cantons would still seem to allow such detention. The State party should ensure that its laws throughout the country do not allow incommunicado detention in violation of articles 9 and 10 of the Covenant.”***

406. The term “incommunicado detention” now appears in only three cantonal procedural codes (Vaud, Geneva, Valais). Switzerland explained in its second periodic report that even though this term, certainly an unfortunate one, is still found in these three codes, the draconian measure of total isolation of a detainee has been completely abandoned by all Switzerland’s cantons. All that is now permitted is the temporary limitation, under judicial supervision, of a detainee’s contacts with the outside world. Contacts with representatives are always guaranteed. Accordingly, “incommunicado detention” has been abolished in Switzerland once and for all. (See also paras. 195 *et seq.*)

407. It is therefore logical that the *draft unified code of criminal procedure* should not provide for the possibility of incommunicado detention. In fact, persons deprived of their liberty always have the right to communicate freely, i.e. without supervision, with their defence counsel. Article 156 of this draft text states the right of defence counsel to be present during police questioning and to communicate freely with clients held in police custody (limited to 24 hours). Article 222 provides that, while a person is being held in custody or detained for security reasons, he may communicate with his counsel at all times and without supervision, either face-to-face or in writing. Only in exceptional cases may this right be subjected to a temporary restriction (within the meaning of art. 234, para. 4, of the draft code). A concrete risk of misconduct must exist before such action is taken. Restrictions of this kind must be limited in time and approved by a court. Even when such restrictions are imposed, they never have the effect of incommunicado detention because communication with defence counsel is never prohibited but merely restricted. Permissible restrictions include, for example, the requirement that a detainee’s personal contact

²⁴⁵ www.ccdjp.ch.

with his defence counsel should take place in a room equipped with a glass separator or that postal correspondence between counsel and client should be monitored.

408. Under article 234, paragraph 3, of the draft code, the content of correspondence with other persons may be monitored by the authority in charge of the proceedings in order to obviate any risk of collusion. Correspondence with the supervisory and criminal authorities is excluded from such monitoring.

409. Accordingly, not only is incommunicado detention not found in the draft code of criminal procedure but the rules contained therein would in any event prevent any measure whatsoever of that kind, for contact with defence counsel while remanded or otherwise held in custody is guaranteed.

410. The regulations of the draft code of criminal procedure give practical effect to the requirements of the Federal Constitution, the European Convention on Human Rights and the International Covenant with regard to the right to privacy - requirements which the cantonal codes of criminal procedure are already enjoined to respect.

XI. DISTINCTION BETWEEN CITIZENS AND NON-CITIZENS

411. “The Committee is concerned at the consequences of distinctions made in various pieces of legislation between citizens and non-citizens, the latter forming a considerable segment of the workforce. In particular, aliens without working papers run the risk of becoming victims of exploitation and abuse. Another vulnerable category of persons are foreign spouses of foreigners with residence permits, who are subject to deportation in the event of discontinuation of de facto cohabitation and, hence, may be forced to live in abusive relationships.

The State party should review its policies in relation to distinctions between citizens and aliens and between different categories of aliens, in particular in respect of those who do not have papers and spouses of foreigners with residence permits, in order to ensure that the rights of such persons under the Covenant are respected and ensured (articles 2, 3, 9, 12, 17 and 23).”

1. Background

412. Developments with regard to the integration of aliens and the limitation of the principle of equality are described above (paras. 57 *et seq.* and paras. 66 *et seq.*, respectively).

2. Foreigners without work permits

413. This matter was addressed in the follow-up to the Committee’s concluding observations of 4 November 2002.

414. According to a study carried out in autumn 2004 (see para. 63), some 90,000 persons are living in Switzerland without papers. Before the publication of this study the estimates of the number of such persons ranged between 50,000 and 300,000. Apart from giving these figures, the study also corrected the false ideas which some people entertained about this phenomenon: the presence of these persons is due not so much to the asylum policy as to the situation in the labour market.

415. When dealing with cases of persons not authorized to live in Switzerland the authorities proceed on the basis of the legislation applicable to cases of extreme necessity, which has long

been in existence and was discussed in the follow-up to the concluding observations. The circular issued by the Federal Office for Foreigners and the Federal Office for Refugees on 21 December 2001, discussed in the follow-up, was replaced by a circular of the Federal Office for Migration (ODM) dated 1 January 2007. Requests for waiver of the rule on the maximum numbers allowed in cases of special hardship (OLE, art 13 (f)) are examined individually and in detail by ODM. However, this procedure is subject to the issuance of a prior favourable opinion by the cantonal authority competent to grant the applicant a residence permit. When considering these cases of special hardship the authorities must take into consideration all the individual features. They obtain the necessary information for determining whether, in the light of the applicant's personal, economic and social circumstances, he can reasonably be asked to return to his own country and stay there. His future situation abroad has to be compared with his personal situation in Switzerland. Extreme necessity can in fact be admitted only if the alien in question is in a situation of hardship. This means that his living conditions must be worse than those experienced by the average alien and that the denial of a residence permit would have grave consequences for him. The decisive criteria for assessing extreme necessity are the length of time the applicant has been in Switzerland and the situation of his children's education, irreproachable conduct and good reputation, social integration of all the members of the family, their state of health, the applicant's employment circumstances, and the existence of family members, either in Switzerland or abroad. Account is also taken of the alien's housing and integration possibilities and, as appropriate, of earlier applications. Lastly, consideration is given to the attitude of the authorities responsible for applying the aliens legislation in the specific case.²⁴⁶ This procedure, which has proved satisfactory so far, must also be followed under the Aliens Act (para. 11).

416. In this circular ODM limits the category of persons who may assert a personal situation of special hardship (OLE, art 13 (f)) to persons whose status is regulated by the aliens legislation. Accordingly, asylum-seekers who have been living in Switzerland for several years and whose application has been rejected may no longer have recourse to article 13 (f).²⁴⁷ However, since 1 January 2007 they have the possibility of obtaining a residence permit, subject to certain conditions, under article 14, paragraph 2, of the amended Asylum Act. The person concerned must have lived in Switzerland for at least five years counting back from the submission of the application, and his place of residence must always have been known to the authorities. In addition, the case must be one of special hardship by reason of the applicant's strong roots in Switzerland. Applications of special hardship (art. 14 of the Asylum Act) may be considered in respect not only of aliens having an asylum application pending but also of aliens making an initial application. However, such persons must leave Switzerland if a situation of special hardship is not found.

417. Between September 2001 and May 2006 the authorities regulated the situation of about 1,900 persons. There were 1,168 rejections and 218 decisions of non-consideration.

418. The working group on persons without papers, chaired by a member of the Federal Aliens Commission (CFE), was established in response to a CFE initiative supported by the pressure group "For a round table on persons without papers". This independent expert body examines the

²⁴⁶ ODM circular of 1 January 2007 on the procedure for regulating the presence of aliens in personal cases of special hardship:
http://www.bfm.admin.ch/fileadmin/user_upload/Themen_deutsch/Rechtsgrundlagen/Rechtsquellen/Weisungen_Kreisschreiben_Asyl/weisung_asyle_52_4_7_010107_f.pdf.

²⁴⁷ See the IMES circular of 17 September 2004 (para. 61 above).

files of persons lacking legal residence status to determine whether to recommend regularization to the cantonal authorities. The working group confers regularly with the relevant services of the Confederation and the cantons and is considering the possibility of closer collaboration.²⁴⁸

419. The study conducted in autumn 2004 also shows that most persons without papers are gainfully employed, that they often work in precarious conditions for poor pay and with very long working hours.²⁴⁹ In order to combat illegal employment, the *Federal Act concerning measures to combat illegal employment (LTN)*,²⁵⁰ referred to in the follow-up, is scheduled to enter into force on 1 January 2008.

420. As of the end of January 2006, 24,000 asylum-seekers had been admitted to Switzerland on a temporary basis. Their employment rate (34%) is less than half the rate for foreigners in possession of residence permits. Experience has shown that most of these persons remain in Switzerland for a very long time or even for ever. In order to allow this group of persons to find jobs as quickly as possible, as well as to economize on social assistance, on 1 April 2006 the Federal Council amended the regulations on preferential recruitment (OLE, art. 7, para. 3): when the applicant is seeking his first job preference is given, apart from to Swiss workers, to foreign job-seekers who are already in Switzerland and in possession of a work permit. Aliens admitted on a temporary basis are accorded the same treatment.

421. The new Aliens Act (LEtr), scheduled to enter into force early in 2008, also facilitates the job mobility of workers coming from other States.

422. Where citizens of the EFTA countries or the 17 countries of the European Union are concerned, the Agreement on the Free Movement of Persons provides for liberty of movement from 2007, at the end of a transitional period of five years (see art. 10 of the Agreement and para. 205 above).

3. Foreign spouses of foreigners at risk of deportation

423. This matter was addressed in the follow-up to the concluding observations of 4 November 2002.

424. Article 50 of the new Aliens Act (LEtr) provides that the foreign spouse of a Swiss national or of a foreigner settled in Switzerland retains the right to receive a residence permit in the event of dissolution of the marriage, provided that it lasted at least three years and the spouse in question has been successfully integrated. This right also exists if continued residence in Switzerland is necessary for compelling personal reasons. Article 50 goes on to provide that the requirement of compelling personal reasons is satisfied, for example, when the spouse is a victim of domestic violence and when social reintegration in the country of origin seems highly unlikely.

²⁴⁸ Federal Aliens Commission: www.eka-cfe.ch/f/sapa.asp.

²⁴⁹ "Persons without papers in Switzerland", gfs.Berne (Political, communications and social research), February, 2005.

²⁵⁰ RO 2007 359.

XII. PUBLICIZING OF TEXTS

425. ***“The State party should widely publicize the text of its second periodic report, the written answers it has provided in response to the list of issues drawn up by the Committee and, in particular, the present concluding observations.”***

426. The Swiss Government publishes its periodic reports and the Committee’s concluding observations on the Internet sites of the Federal Department of Justice and Police²⁵¹ and of the Directorate for International Public Law of the Federal Department of Foreign Affairs.²⁵² Information may also be obtained on this subject from the sites of a number of Swiss NGOs working for the defence of human rights.²⁵³ The University of Berne, with financial support from the Confederation, has produced a universal index of human rights. This is an online data bank giving speedy access, by country and by right, to human rights information from the United Nations system. It includes all the observations and recommendations concerning Switzerland adopted by the treaty bodies (since 2000) and by the special procedures (since 2006).²⁵⁴

427. In addition to the publication on the Internet of the reports and concluding observations, copies of them are transmitted to all the cantons, which are all involved in the preparation of the reports and take an interest in their consideration and the Committee’s conclusions. The same is true of every federal agency and any other body directly involved.

428. The reports are available in French, German and Italian, and the concluding observations in French and English.

XIII. IMPLEMENTATION OF THE COMMITTEE’S RECOMMENDATIONS CONTAINED IN PARAGRAPHS 13 AND 15 OF ITS CONCLUDING OBSERVATIONS

429. ***“The State party is asked, pursuant to rule 70, paragraph 5, of the Committee’s rules of procedure, to forward information within 12 months on the implementation of the Committee’s recommendations contained in paragraphs 13 and 15 of the present concluding observations. The Committee requests that information concerning the remainder of its recommendations be included in the third periodic report, to be submitted by 1 November 2006.”***

430. Information on the implementation of the Committee’s recommendations contained in paragraphs 13 (deportation of aliens) and 15 (distinction between citizens and non-citizens) of the concluding observations of 12 November 2001 was transmitted within the time limit of 4 November 2002 in accordance with rule 70, paragraph 5, of the Committee’s rules of procedure. Information concerning the other recommendations contained in the concluding observations has been included in Part III of the present report..

²⁵¹ www.bj.admin.ch/bj/fr/home/themen/staat_und_buerger/menschenrechte2/uno-sozialpakt_und.html.

²⁵² www.eda.admin.ch/sub_dipl/f/home/arti/report/rapun/civ.html.

²⁵³ See in particular the site of the Swiss Association for Human Rights: www.humanrights.ch.

²⁵⁴ www.universalhumanrightsindex.org.

List of abbreviations

Legal texts

ALCP	Agreement on the Free Movement of Persons of 21 June 1999
DPMIn	Federal Act on the criminal status of minors of 20 June 2003
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms of 1 November 1950
EIMP	Federal Act on international assistance in criminal matters of 20 March 1982
LAfam	Federal Family Allowances Act of 24 March 2006
LAMal	Federal Sickness Insurance Act of 18 March 1994
LAPG	Federal Act on compensation for loss of earnings by reason of service or pregnancy
LAsi	Federal Asylum Act of 26 June 1998
LAVI	Federal Act on assistance to victims of crime of 4 October 1991
LAVS	Federal Act on old-age and survivors' insurance of 20 December 1946
LEg	Federal Act on equality between women and men of 24 May 1005
LEtr	Federal Aliens Act of 16 December 2005
LFIS	Federal Secret Investigations Act of 20 June 2005
LHand	Federal Act on the elimination of inequalities affecting disabled persons of 13 December 2002
LMP	Federal Public Procurement Act of 16 December 1994
LMSI	Federal Act on measures for the maintenance of internal security of 21 March 1997
LN	Federal Act on the acquisition and loss of Swiss nationality of 29 September 1952
LPA	Federal Protection of Animals Act of 9 March 1978
LPart	Federal Act on registered partnerships between persons of the same sex of 18 June 2004
LPD	Federal Data Protection Act of 19 June 1992
LPers	Federal Act on employees of the Confederation of 24 March 2000
LSC	Federal Civilian Service Act of 6 October 1995
LSCPT	Federal Act on monitoring of correspondence by post and telecommunications of 6 October 2000
LSEE	Federal Act on the permanent and temporary residence of aliens of 26 March 1931
LTAF	Federal Act on the Federal Administrative Court of 17 June 2005
LTF	Federal Act on the Federal Court of 17 June 2005

LTN	Federal Act on measures to combat illegal employment of 17 June 2005
LTPF	Federal Act on the Federal Criminal Court
LTr	Federal Act on employment in industry, crafts and commerce of 13 March 1964
LTrans	Federal Act on the principle of transparency in the Administration of 17 December 2004
LusC	Federal Act on the use of coercion and police measures in spheres within the jurisdiction of the Confederation
NGO	Non-governmental organization
OIE	Aliens Integration Order of 13 September 2000
OJF	Federal Judiciary Act of 16 December 1943
OLE	Aliens Limitation Order of 6 October 1986
P-CPP	Draft code of criminal procedure
PPF	Federal Criminal Procedure Act of 15 June 1934
PPMin	Federal Act on juvenile criminal procedure

Compilations of legislation and jurisprudence; messages of the Federal Council

ATF	Compendium of Decisions of the Swiss Federal Court
ETS	European Treaty Series
FF	<i>Feuille fédérale</i> (Official gazette)
RO	Official Compendium of Federal Acts
RS	Systematic Compendium of Federal Law
JICRA	Jurisprudence and News of the Swiss Committee for Asylum Appeals

Federal agencies, international organizations, committees and commissions

BFEG	Federal Bureau on Equality between Women and Men
BFEH	Federal Bureau on Equality for Persons with Disabilities
CAT	United Nations Committee against Torture
CCDJP	Conference of Directors of Cantonal Departments of Justice and Police
CERD	United Nations Committee on the Elimination of Racial Discrimination
CIP	Political Institutions Committee
CFE	Federal Aliens Commission
CFQF	Federal Commission on Women's Issues
CFR	Federal Commission against Racism
DDC	Directorate for Development Aid and Cooperation
DDPS	Federal Department of Defence, Public Safety, and Sports
DFAE	Federal Department of Foreign Affairs

DFE	Federal Department of the Economy
DFI	Federal Department of the Interior
ECRI	European Commission against Racism and Intolerance
EFTA	European Free Trade Association
ILO	International Labour Organization
IOM	International Organization for Migration
ODM	Federal Office for Migration
OECD	Organization for Economic Cooperation and Development
OFAS	Federal Social Security Office
OFPER	Federal Personnel Office
OFSP	Federal Public Health Office
OSCE	Organization for Security and Cooperation in Europe
SCOCI	Coordination Service to Combat Internet Crime
SCOTT	Coordination Service to Combat Trafficking in Persons and Trafficking in Migrants
SLR	Service against Racism

Documents

The Federal Constitution and all the legal texts and other documents cited or otherwise mentioned in this report may be obtained from the Federal Justice Office, Public Law Division, Unit for European law and protection of human rights, Bundesrain 20, 3003 Berne.
