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SUMMARY RECORD OF THE 1537th MEETING

Held at the Palais des Nations, Geneva,
on Thursday, 24 October 1996, at 10 a.m.

Chairman: Mr. AGUILAR URBINA

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GE.96-18686 (E)

The meeting was called to order at 10.10 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (agenda item 4) (continued)

Initial report of Switzerland (HRI/CORE/1/Add.29; CCPR/C/81/Add.8; CCPR/C/58/L/SWI/3)

1. At the invitation of the Chairman, Mr. Caflisch, Mr. Held, Mr. Crittin, Mr. Zürcher, Mr. Schürmann, Mr. Lindenmann, Mr. Bloch, Mrs. Perro, Mr. Voeffray and Mrs. Petter (Switzerland) took places at the Committee table.

2. The CHAIRMAN welcomed the delegation of Switzerland, which he thanked for its timely submission of a high-quality report (CCPR/C/81/Add.8). He invited the delegation to introduce the report, before replying to the written questions.

3. Mr. CAFLISCH (Switzerland) said that the initial report of Switzerland (CCPR/C/81/Add.8) had been formally approved by his Government, a sign of the importance it attached to the mechanisms monitoring the implementation of the international human rights instruments. The report described both the legal regime in force at the time it was adopted and the actual situation in the country. It had been translated into the other two principal official languages of Switzerland, German and Italian. The report should be considered in the light of the core document (HRI/CORE/1/Add.29), which had been drafted shortly after the entry into force for Switzerland of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4. His Government, which was firmly convinced that there could be lasting peace and security only in a community of States based on the principles of respect for human rights, the absence of discrimination, the primacy of the law and democratic control over the exercise of political power, had committed itself to human rights, democracy and the principle of legality, one of the five priority objectives of the country's foreign policy. To that end, it had decided that Switzerland should complete the list of United Nations human rights instruments to which it was a party.

5. When Switzerland had acceded to the two International Covenants on Human Rights in 1992, the only United Nations instrument in force for the country had been the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Since then, the Confederation had acceded (16 June 1994) to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, and to the International Convention on the Elimination of All Forms of Racial Discrimination on 28 September 1994. The last had required an amendment to the federal criminal legislation criminalizing various acts of incitement to racial hatred. The people had been consulted and had approved the new criminal provisions, which had made it possible for Switzerland to accede to the Convention and also, on 28 September 1995, to withdraw its reservation to article 20, paragraph 2, of the International Covenant on Civil and Political Rights. In 1996, a large majority of both houses of parliament had approved the proposal for ratification of the Convention on the Elimination of All Forms of

Discrimination against Women, which should be ratified shortly. Such was also the case of the Convention on the Rights of the Child, the procedure for approval of which by parliament was already well under way.

6. Switzerland was also bound by several regional instruments, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was regularly applied by the courts. Switzerland also participated actively in international efforts to strengthen existing protection mechanisms. It was deeply committed, for example, to the draft optional protocol to the Convention against Torture, which provided for a control mechanism based on visits to places of detention, and it hoped that the Working Group currently meeting at Geneva to consider the draft would successfully complete its work as soon as possible.

7. As for the principles governing the application of rules of international law within the Swiss legal system, he said that Switzerland was a country with a monist tradition: rules of international law, whether conventional, customary or unilateral, became part of domestic law as soon they entered into force for the country. Rules of the law of nations had immediate validity and all States bodies at all levels were bound to observe them.

8. With regard to the hierarchical position of international rules, both the Government and the highest Swiss court - the Federal Tribunal - had repeatedly reaffirmed the principle of the primacy of international law over national law, which obviously applied to the International Covenant on Civil and Political Rights.

9. Despite the fact that the rules of international law were part of Swiss domestic law, it did not necessarily follow that they were directly applicable and could be invoked before the national courts. According to the practice of the authorities and case-law, a treaty provision could be directly invoked in the courts only if, considered in its context and in the light of the subject and purpose of the treaty, it was unconditional and sufficiently precise to be applied as such and to provide the basis for a specific decision. Hence it was ultimately for the courts to determine on a case-by-case basis whether a treaty provision lent itself to direct application. It should be stressed, however, that the Federal Tribunal had stated that the guarantees arising from the Covenant were generally recognized as being directly applicable and that it had applied several of them directly without discussion.

10. The Covenant had regularly been invoked in court proceedings and applied by the courts since its entry into force. According to a survey by the Federal Tribunal, since the entry into force of the Covenant, approximately 40 judgements it had issued out of the total number of judgements filed (which represented only 30 per cent of the total number of judgements rendered) referred directly to the Covenant. The Federal Tribunal cases related mainly to the guarantees of a fair trial provided by article 14 of the Covenant, but they also related to the principle of equality between men and women, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to liberty and security, the right to freedom of movement, the right to respect for privacy and political rights. The decisions of the Council of Europe bodies were certainly better known than

those of the Human Rights Committee, but the preambular paragraphs of several Federal Tribunal judgements referred to Committee decisions on individual communications.

11. Mutual legal assistance was another illustration of the role of the Covenant. The Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981 provided that mutual assistance would be refused if the procedure in the requesting State would involve prosecution or punishment for political opinions, membership of a particular social group, race, religion or nationality, or if the procedure was not in conformity with the principles laid down in the European Convention on Human Rights. The Federal Tribunal believed that, since its entry into force, the Covenant was also implicitly covered by the Act, and it regularly referred thereto when assessing the quality of the guarantees provided by procedures abroad. As a result, the 1995 draft amendment to the 1981 Act explicitly mentioned the International Covenant on Civil and Political Rights.

12. The main new developments in the legislative area included the entry into force on 1 January 1995 of a federal act on coercive measures, which strengthened the legislation for expelling foreigners who had no Swiss residence permit and who were liable to expulsion. The legislation basically provided the competent authority with the possibility of ordering a detention in the preparatory stage for a period of not more than three months pending the residency decision, and detention pending expulsion for a period not to exceed six months, extendable for a further six-month period with the agreement of the cantonal judicial authority.

13. The above-mentioned detention measures could be ordered only on one of the grounds provided by the law (failure to cooperate during the asylum or expulsion procedure, risk of the person in question evading being sent back and a serious threat to the life and bodily integrity of others). In addition, there had to be a judicial control of the detention and its extension within a 96-hour period. At the end of one month, the detainee could lodge an application for release, on which the judge must rule within a period of eight days; after a further period of one month for preparatory detention and two months for detention pending expulsion, it was possible to request another judicial control, and, finally, an administrative appeal could be filed with the Federal Tribunal against cantonal decisions in last instance.

14. If expulsion was not legally possible, for technical reasons or because of threats of ill-treatment of the person in question in the State to which he would be expelled, the detention must be ended immediately. The courts, and particularly the Federal Tribunal, saw to it that the Act was implemented in strict respect for the law and for Switzerland's obligations under public international law.

15. The new Federal Law on Equality Between Women and Men, described in paragraphs 43 to 46 of the report, had entered into force on 1 July 1996. Although it was designed essentially to facilitate respect for the right to equal wages, it had the more general objective of bringing about sex equality in the employment field. Its main innovations were the prohibition of sex discrimination in employment, whether direct or indirect, easing of the burden

of proof when there was a probable indication of discrimination, right of action and recourse by trade unions and organizations promoting sex equality, possibility of obtaining the withdrawal of a retaliatory dismissal, increased protection against sexual harassment and the obligation for the cantons to establish a conciliation procedure. In addition, the Federal Office of Equality Between Men and Women had been granted legal status.

16. There had been an important new development in the situation involving conscientious objection, as described in paragraph 352 of the report. In early October 1996, the Civilian Service Act had entered into force. The legislature had not provided for a free choice between compulsory military service and civilian service, which, moreover, the Covenant did not require. To perform civilian service in replacement of military service, it was sufficient for the person in question to make it credible to a civilian commission that he could not reconcile the obligation of armed service with his conscience. Conscientious objection was thus no longer judged by the military courts, as indicated in the report, and no longer led to a criminal conviction but to a simple administrative decision.

17. Lastly, through a referendum the Swiss people and cantons had accepted an amendment to article 16 of the Constitution which would help the federal authorities in their task of encouraging understanding and exchanges between the national linguistic communities; it made Romansch, as well as German, French and Italian, an official Swiss language in the dealings of the administration or judicial authorities with Romansch-speaking citizens. The constitutional amendment had entered into effect immediately, and the Federal Tribunal had handed down the first judgement in Romansch in June 1996.

18. The CHAIRMAN thanked the Swiss delegation for its instructive statement and invited it to reply to the questions in the list of issues (CCPR/C/5/L/SWI/3), beginning with Part I, which read:

"Part I

(a) Status of the Covenant: Please clarify the status of the Covenant and the way it is implemented in law and in practice at both the federal and cantonal levels. Please indicate whether, during the period under review, there were any cases in which the provisions of the Covenant were directly invoked before the courts or mentioned in judicial decisions;

(b) Federalism: Please describe any factors or difficulties that might affect the implementation of the Covenant in Switzerland as a result of the wide legislative and political autonomy granted to cantons and communes as well as the extent of the rights of constitutional initiative and legislative referendum;

(c) Competence of the Federal Tribunal: Please clarify whether the Federal Tribunal has the right or competence to declare a federal or cantonal law unconstitutional on the ground of violation of Covenant or constitutional provisions (see para. 483 of the report);

(d) Protection against discrimination: Does article 4 of the Federal Constitution extend the protection of equality to all individuals within the territory irrespective of whether they are Swiss or not, as envisaged in articles 2 and 26 of the Covenant? Please indicate whether and when the provisions of the Penal Code and of the Military Penal Code punishing racial discrimination have come into force and whether this fact has already had an impact on the decision of the Federal Government to withdraw the relevant reservation (see paras. 19 and 380 of the report);

(e) Equality before the law: How is the principle of equality before the law and equal protection of the law, as set forth in article 26 of the Covenant, ensured under Swiss law?

(f) Equality of the sexes: With reference to paragraphs 34 and 42 to 58, please further describe remaining areas of discrimination against women and concrete measures taken to overcome the problems of wage differences, particularly in private-sector enterprises. In particular, what measures have been taken to enforce the application of wage equality in the private sector and increase the number of women acceding to university education (see paras. 42 and 50 of the report)? What are the power and activities of the Federal Office for the Equality between Men and Women?

(g) Protection of children: What is the legal position of children of seasonal or permanent foreign workers? Have any steps been taken to amend article 252 of the Civil Code under which filiation is established with reference to the father only by marriage to the mother, recognition, adjudication or adoption (see para. 42 of the report);

(h) Adoption: What is the legal situation of children adopted by Swiss parents under foreign law or brought into Switzerland for the purpose of adoption?

(i) Sexual exploitation of children: Has the Federal Council drafted an amendment to the Penal Code that would make it possible to initiate the criminal prosecution of persons residing in Switzerland who have engaged in sexual acts with children or have been involved in the traffic in children, even if the offences are not punishable in the countries in which they were committed (see para. 113 of the report)?

(j) Ill-treatment of the person: With reference to paragraph 81 of the report, what measures have been taken against the risk of being mistreated while in police custody? In addition to the cases referred to in that paragraph, have there been any complaints to the authorities during the period under review of torture, inhuman or degrading treatment or punishment of prisoners or detainees? If so, have charges been brought against the perpetrators of such acts and what measures have been taken to compensate the victims? Please provide statistics in that regard

and clarify whether there is an independent method of investigating complaints against the police, either Federal or Cantonal? If so how does it operate and what have been the results within the past years?"

19. Mr. CAFLISCH (Switzerland) said that he believed he had replied to question (a) in his introduction. Concerning question (b), federalism was not a serious obstacle to the implementation of the Covenant since, in accordance with Switzerland's monist tradition, guarantees arising from the Covenant formed an integral part of domestic law. In the event of violation of the Covenant by a cantonal legislative act or other cantonal measure, individual public-law remedies and administrative remedies were available. The Federal Tribunal was empowered to annul such acts or measures or to declare them inapplicable.

20. Regarding the influence of the right of initiative on the implementation of the Covenant, a distinction should be made between constitutional initiatives at the cantonal level and at the federal level. In the event of amendments to a cantonal constitution, the conditions and procedures for the initiative were those set forth in cantonal law, subject to the Confederation's guarantee pursuant to article 6 of the Federal Constitution. The guarantee was refused if the constitutional rule in question was contrary to federal law, which obviously included the guarantees contained in the Covenant. When the conformity of a cantonal constitutional law with federal law or with the Covenant was questioned in the context of proceedings before the Federal Tribunal, the Federal Tribunal adopted a cautious attitude and considered whether the new cantonal constitutional rule could be interpreted in a way that was in conformity with federal or international law.

21. In the case of amendment or revision of the federal Constitution, each canton had a right of initiative, subject to authorization from the Federal Assembly. In its messages on constitutional initiatives, the Federal Council examined whether the initiative was in keeping with Switzerland's international commitments. If it reached a negative conclusion, it recommended that parliament should declare the initiative null and void. Such a case had happened only once: the initiative in question had undermined the international rule of non-refoulement; parliament had followed the Federal Council's suggestions and declared the initiative null and void. At the federal level, the cantons had the right of referendum, a right which entailed only one effect: a federal legislative act voted by the Federal Assembly had to be submitted to the people for adoption or rejection.

22. Concerning the competence of the Federal Tribunal (question (c)), it was empowered, in respect of cantonal law, to invalidate a legislative instrument or decision that was not compatible with the fundamental rights guaranteed in the Constitution, the European Convention on Human Rights and the Covenant. The Federal Tribunal made liberal use of that competence, and the Committee was invited to refer to the many judgements mentioned in different contexts in the initial report. With regard to federal law, it was true that article 113, paragraph 1 (3) of the Constitution in principle prevented the Federal Tribunal from declaring a federal law or decision based on a federal law to be incompatible with the Constitution, the European Convention on Human Rights or the Covenant. It should be noted, however, that when a federal law provision

lent itself to different interpretations, the authorities were bound to choose the one that was most in keeping with the fundamental rights laid down in the European Convention. The same principle was also applicable to the Covenant. Article 113, paragraph 1 (3), contained no prohibition against examining compatibility with higher law. For example, the Federal Tribunal had already found federal laws to be incompatible with the Constitution or a convention, and the same was possible for the Covenant. Even though article 113 of the Constitution required a federal law to be applied, a finding of incompatibility by the highest court in the land would have consequences in the legislative sphere. Lastly, in its draft amendments to the Constitution, the Federal Council provided for the introduction of a constitutional court which would also deal with federal laws, a proposal that had been favourably received in the competent circles.

23. In reply to question (d), he referred to paragraph 13 of the report (CCPR/C/81/Add.8). It was true that the letter of article 4 referred only to Swiss, but that wording was accounted for by the fact that the Constitution dated back to 1874. According to the decisions of the Federal Tribunal, the provisions of article 1, paragraph 1, of the Constitution applied to foreigners as well as Swiss nationals.

24. The Penal Code and the Military Penal Code had been supplemented by two articles establishing a fine or imprisonment for racial discrimination. He read out the offences covered by those provisions, which were listed in paragraph 19 of the report (CCPR/C/81/Add.8). The introduction of those new criminal provisions had been accepted by popular referendum. Since their entry into effect on 1 January 1995, 10 or so judgements had been handed down in related cases, and a number of proceedings were still taking place in several cantons. The sole purpose of his Government's reservation to article 20, paragraph 2, of the Covenant was to make it possible for domestic law to be adapted to the Covenant's provisions. Once the corresponding amendments to domestic law had been made, the reservation had become pointless, and his Government had notified the Secretary-General of the United Nations of its withdrawal in a letter dated 28 September 1995.

25. In reply to question (e), he said that the principle of equality before the law was established in article 4 of the federal Constitution. That was an individual constitutionally-guaranteed right; in the event of violation, by legislative acts or cantonal measures, it was possible to file an appeal by means of a public-law remedy. As stated earlier, despite the letter of article 4 of the Constitution, that right also applied to foreigners. Equality before the law applied to State-sponsored benefits and also covered the principle of non-discrimination established in article 26 of the Covenant. He referred to a Federal Tribunal decision finding the refusal by a cantonal authority to hand over the contents of a file to a lawyer residing outside the canton to be discriminatory and unacceptable because it violated the provisions of article 4 of the federal Constitution, article 6 of the European Convention on Human Rights and article 14 of the Covenant. More generally, the legislature could not make any distinctions that were not based on reasonable grounds deriving from the situations to be resolved. Similarly, the legislature must make distinctions when the circumstances so required. The reasonable or objective grounds should be related to the matter to be resolved. Particular account should be taken of certain criteria, such as age

and professional experience in the case of civil servants. In other cases, the criterion might be the foreign nationality of the person concerned. With regard to discrimination based on sex, discriminatory treatment was only compatible with the provisions of article 4, paragraph 2, of the Constitution if biological or functional differences absolutely excluded equality of treatment.

26. Switzerland's reservation to article 26 of the Covenant was explained by the fact that, in general comment 18, the Committee had interpreted that provision as an autonomous right of independent scope, the application of which was not limited to the rights guaranteed by the Covenant. Thus interpreted, article 26 went beyond article 14 of the European Convention on Human Rights. In view of the fact that the Federal Tribunal could not annul a federal law on the grounds of its incompatibility with constitutional law and that the Federal Tribunal's jurisdiction to hear a case was sometimes restricted when it was called on to apply article 4 of the Constitution in the framework of a public-law remedy, his Government had deemed it necessary to enter a reservation to article 26 of the Covenant.

27. Regarding question (f), there were still a number of inequalities between the sexes in the employment legislation, in particular the regulations for day work and rest periods for women, exclusion of women from dangerous work and the obligation of employers to take the family situation of certain working women into account. There were also inequalities in the treatment of spouses, especially regarding the right to a name and cantonal citizenship. As for social benefits, the age of retirement was not the same for men and women (from 2004 onwards, it would be 65 for men and 64 for women). Conditions for obtaining a survivor's pension also differed according to whether a widow or widower was involved. With regard to wages, the Federal Law on Equality between Women and Men, which had entered into effect the previous July, contained measures aimed at achieving equality in the wage area. The measures were applicable to all workers in Switzerland. There was a general prohibition against discrimination, direct or indirect, on grounds of sex, which applied in particular to issues involving wages and working relations as a whole, recruitment, assignment of tasks, vocational training, working conditions, promotions and termination of employment. Differences in pay for identical work or work of equal value were prohibited. Sexual harassment in the workplace was also prohibited.

28. Wage discrimination could be referred to the courts, which were moreover empowered to take retroactive steps subject to a five-year statute of limitations. Discrimination was often difficult to prove, however, in view of companies' lack of transparency on wage policies. It had therefore been decided to ease the burden of proof, and the employer had currently to demonstrate that the relevant legal provisions had not been violated. Another obstacle that female workers had previously encountered in claiming their rights was the cost of the procedure. Judges often ordered expert opinions to be sought in such cases, and the cost of the trial - including the expert opinions - had been met by the losing party for lawsuits that cost more than Sw F 20,000. That measure had discouraged women who wished to institute proceedings. The New Federal Law on Equality between Women and Men had resolved the problem by making the legal proceedings free of charge whatever the cost of the lawsuit. The law also guaranteed the parties the right to be

represented. In order to settle lawsuits out of court, the cantons were required to establish a conciliation procedure, which was optional and free of charge.

29. The recently-adopted equality law strengthened individuals' protection against reprisals by their employers. A dismissal could be annulled by the judge when giving effect to a claim submitted by a female employee at the beginning of a conciliation procedure, or at the time when the employee introduced the action, if the dismissal had been unwarranted. The dismissal could be annulled during the procedure and up to six months after its conclusion. The dismissal had to be contested during the notification period, and the judge could order the person to be re-employed during the proceedings when it appeared likely that the conditions for annulling the dismissal would be met. The Federal Law on Equality between Women and Men also provided for the right of trade unions and women's organizations to institute court proceedings on grounds of discrimination. Two conditions, however, had to be met: the subject of the lawsuit must be an issue likely to involve a considerable number of work relationships, and the organization instituting the proceedings must have been in existence for at least two years. The new provision made it possible to deal with cases of collective discrimination or cases of a fundamental nature. It was often easier for an organization rather than a private individual to institute proceedings, in view of the risk of personal reprisals by the employer. The equality law also provided for measures of encouragement - in the form of financial assistance, programmes for the advancement of women and professional advisory services. It was too soon to assess the effectiveness of the law, which had come into force only a few months earlier.

30. In addition to those provisions, the Federal Office of Equality between Men and Women had taken a number of practical steps to combat wage discrimination. For example, it had recently developed a work-evaluation scale that was not discriminatory on sexual grounds, for use by personnel officers, the female workers themselves and the judicial authorities.

31. The Public Markets Act, which had entered into effect on 1 January 1996, also provided that contracts could be awarded only to tenderers who guaranteed their male and female employees equal pay for services provided in Switzerland. The awarder was entitled to monitor respect for the provisions relating to equality of treatment, a task that could be assigned to one of the Offices of Equality between Men and Women.

32. A number of measures had also been adopted to increase the number of women in higher education. Universities in several cantons (Basel, Bern and Geneva) had taken steps in that direction, and some had appointed officials to handle women's issues. Generally speaking, women's access to university education had improved considerably in recent years. Women had represented an average of 41.8 per cent of students in the 1995/96 academic year. There were, however, some substantial differences between the cantons, since women represented 55.9 per cent of students in Geneva as opposed to 20.7 per cent in Saint-Gall. The proportion of women in the two federal polytechnic schools was lower (16.1 per cent in Lausanne and 22.5 per cent in Zurich). The gaps could largely be explained by the choice of subjects, with women tending to enrol in human and social sciences, medicine and biology. On the other hand,

more women than men dropped out from their studies: one woman in three left the university without graduating, as opposed to one man in four. There, again, the gaps could be explained by the choice of field, with women often opting for branches with very flexible structures. In 1995, 38.7 per cent of the persons with primary degrees had been women and 27.9 per cent of persons with doctorates.

33. The proportion of women in the teaching profession decreased as the educational level rose. That situation had given rise to a federal decree providing for special incentive measures in the area. They consisted primarily of special subsidies aimed at increasing the proportion of women in the teaching profession, so that at least one third of the posts financed by the Confederation would be occupied by women. In addition, the Swiss National Fund for Scientific Research had, since 1991, been awarding special fellowships to women who wished to resume medical or natural-science studies. In general, it could be said that women had guaranteed access to the university in Switzerland.

34. In reply to the question on the power and activities of the Federal Office for Equality between Men and Women, he said that the Office promoted the achievement of equality between men and women in all areas and endeavoured to eliminate all forms of discrimination against women, whether direct or indirect. More specifically, it informed the public, advised individuals and the authorities and took part in the preparation of relevant Confederation legislation aimed at the achievement of equality. It also prepared studies and dealt with applications for financial aid to advisory services and programmes to promote equality. Since the entry into force of the Federal Law on Equality between Women and Men, the Federal Office reported directly to the Federal Department of the Interior.

35. Filiation (question (g)) was governed by articles 252 et seq. of the Swiss Civil Code. There were two separate situations with regard to the establishment of paternal filiation. If the child's mother was married, her husband was presumed to be the father. That presumption of paternity could be challenged in the courts, under certain conditions stipulated in articles 256 et seq. of the Civil Code. If the child's mother was not married paternal filiation was established either by a declaration recognizing the child or by a paternity judgement. The individuals empowered to act in that area were the mother and the child. The rules establishing paternal filiation if the father was not married to the child's mother featured a differentiated system of presumption of paternity and burden of proof designed to provide for all possible cases. Filiation could also result from adoption. The Swiss system was aimed at providing maximum protection of the interests of all the people involved, and there were no plans to change it in the near future. It would be difficult to change systems without endangering the rights of the children or those of the parents. Generally speaking, the existing system had no discriminatory features. Consequently, his delegation would like the Committee to clarify question (g), the justification for which did not seem apparent.

36. In reply to question (h), he said that there were two different situations with regard to the legal position of foreigners: cases where

children were adopted abroad by Swiss nationals and cases where children were adopted in Switzerland by Swiss nationals. In the former case, the adoption decision must be recognized in conformity with article 78 of the Federal Act concerning International Private Law, following which the child acquired Swiss nationality. In the latter, the status of a child brought to Switzerland for adoption was governed by the decree limiting the number of foreigners. In that type of situation, authorization to enter Switzerland was issued, together with a yearly residence permit, until the adoption was completed. Once the adoption was completed, the child acquired Swiss nationality.

37. Adoption also had a private aspect, however. There was the question whether or not an adoption abroad could be recognized in Switzerland. In the absence of an international agreement in the area, such adoptions could be recognized if they had taken place in the State in which the adopting parents were domiciled or if at least one of the adopting parents was a national of that State. The Swiss system made a distinction between “simple” and “full” adoption abroad. Simple adoption left some connection to the biological family intact, whereas, in the case of full adoption, the connection was considered to be broken and the child was fully integrated into his or her adoptive family. It should also be noted that adoption, which had fundamentally different effects from filiation under Swiss law, was recognized in Switzerland only with the effects linked to it in the State where it had taken place. In other words, simple adoption abroad was recognized in Switzerland only as simple adoption. With full adoption, the child essentially acquired the status of legitimate child of the adoptive parents, and the links to the biological parents were considered to be broken. In cases where an adoption was recognized only as simple adoption, it was possible to apply for a status of full adoption to be recognized in Switzerland, once the requirements of private international law and internal Swiss law - in particular that of a two-year trial period - were fulfilled. If no adoption had taken place abroad, or if it was not possible for the adoption to be recognized in Switzerland, parents wishing to adopt a child must obtain prior authorization from the competent authority in the place in which they were domiciled in Switzerland and fulfil all the requirements established by the federal legislation governing the placement of children.

38. The answer to question (i), whether the Federal Council had drafted an amendment to the Penal Code that would make it possible to initiate the criminal prosecution of persons residing in Switzerland who had engaged in sexual acts with children or had been involved in the traffic in children, even if the offences were not punishable in the countries in which they were committed, was in the negative. Parliament had twice, however, asked the Federal Council, in June 1994 and February 1995, to study the advisability of amending the relevant criminal legislation, and more specifically articles 4 to 6 bis of the Penal Code. The Federal Council had decided to treat that question in the context of the overall revision of the general part of the Penal Code which was currently under way and should be completed in approximately one year's time. It had, nevertheless, pointed out that the lack of dual criminal liability of such an act did not, in principle, prevent prosecution of the person or persons responsible. As far as the Swiss authorities were concerned, the main difficulty lay elsewhere: there was frequently insufficient evidence to prosecute. The Government was, however,

seriously studying the possibility of dropping the dual criminal liability rule in cases of sexual exploitation of children, both to emphasize the seriousness of the offence and the need for punishment and to simplify the relevant procedure.

39. Replying to question (j) on ill-treatment, he said that the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment had visited Switzerland in the framework of its periodic controls from 11 to 23 February 1996, covering 31 detention centres, psychiatric care centres and asylum-seekers' shelters in six cantons of the Confederation. In comparison with its first visit, in July 1991, the Committee had had no difficulty in obtaining access to all the establishments selected. The European Committee's detailed report had recently been submitted to the Federal Council. It would be recalled that the reports of the European Committee were meant for the Governments of the States concerned and were published only at the latters' request. Out of a desire for transparency, the Federal Council intended to have the European Committee's report on Switzerland published once the observations of the Federal Government and the authorities of the cantons concerned had been added. In the meantime, the report would remain strictly confidential, but he could state that it would on the whole be positive.

40. Following the European Committee's first visit in 1991, when it had made some criticisms of conditions of detention in some Swiss detention centres, the Federal Council had undertaken a thorough study of prison medical and paramedical structures and of the situation regarding the cells' lighting, size, ventilation and sanitary facilities. The results of the inquiry had shown that conditions of detention in Swiss prisons were generally in conformity with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Conditions of detention in police custody, however, left something to be desired from the point of view of cell size and facilities. Consequently, the head of the Federal Department of Justice and Police had asked the authorities of the cantons concerned to take steps to improve the cells' sanitary facilities, and the necessary improvements had been made.

41. The CHAIRMAN invited the members of the Committee to ask any additional questions related to part I of the list of issues.

42. Miss CHANET thanked the Swiss delegation for its introduction to and oral clarifications of Switzerland's initial report. There were a large number of positive points with regard to the direct application of the Covenant in Swiss law; if only that were the case in more States parties to the Covenant.

43. Concerning the principle of equality before the law, she wondered at the wording of article 4 of the Swiss Constitution, which stipulated: “All Swiss are equal before the law. In Switzerland there are no subjects nor any privileges of place, birth, person or family”. Article 4 of the Constitution as worded did not establish, therefore, all the principles of equality listed in articles 2 and 26 of the Covenant, namely, the prohibition of discrimination based on race, colour, language, religion, political opinion,

birth or other status. She would thus appreciate some clarification as to the extent to which the provisions of the Swiss Constitution met the requirements of articles 2 and 26 of the Covenant.

44. While she understood that the Swiss Government had been led to enter its reservation to article 26 of the Covenant as a result of the Committee's general comment 18 on non-discrimination, she wished to draw the Swiss delegation's attention to the Committee's general comment 24 on issues relating to reservations made upon ratification of the Covenant. The Committee had adopted the latter general comment quite recently, at its fifty-second session in 1994, and the Swiss Government might not yet be aware of its existence, but the Swiss authorities who examined it would undoubtedly realize that the reservation to article 26 was not justified.

45. She welcomed the adoption of the new Federal Law on Equality between Women and Men. Paragraph 429 of the report, however, stated that there were still some inequalities between men and women with regard to divorce. She would like details of the remaining inequalities and of the steps being taken to remedy the situation. On the matter of the protection of children, the questions in section (g) had, perhaps, been poorly worded, for the answer sought was how filiation was established for adulterine children, that is born of a father and mother both of whom were married, and not for “natural” children. In other words, was it possible for adulterine children to be recognized under Swiss civil law? It was also stated, in paragraph 449 of the report, that the legislation on naturalization was not fully compatible with the requirements of article 26, paragraph 3, of the Covenant; she would like to know whether steps had been taken to amend the legislation in force so as to remedy the situation.

46. According to paragraph 420 of the report, the Federal Tribunal stated that any person suffering from a mental illness was unable to enter into marriage, even if the person was capable of discernment. She would like to know the status of the draft amendment to the Civil Code removing that impediment, which she found surprising. Lastly, on the matter of ill-treatment during police custody, the Committee had received some distressing information, confirmed by non-governmental sources, of serious cases of torture, accompanied by racist remarks, the victims being mainly foreigners, with absolutely no attempt to prosecute those responsible, even in cases where the prison medical staff had reported prisoners arriving with obvious signs of bodily injury after their period in police custody. She asked whether the federal Government had given effect to the European Committee's recommendation to combat such practices.

47. Mr. KLEIN thanked the delegation of Switzerland for its introduction. Referring to question (j) on ill-treatment, he asked the delegation to state exactly what recommendations had been made by the European Committee for the Prevention of Torture after its visit to Switzerland in July 1991. Such information and information on the follow-up by the Swiss federal authorities to the European Committee's recommendations would be of use to the Human Rights Committee in determining the extent to which Switzerland was fulfilling its obligations under article 7 of the Covenant. In addition, he wished to know whether the case-law of the Swiss courts included examples of inhuman and

degrading treatment by members of the police and whether the Swiss courts had adopted a precise definition of such treatment. He would also like to know how allegations of ill-treatment by the police were followed up and whether there were special bodies responsible for investigating such allegations. With regard to the status of the Covenant under internal legislation, he asked whether any of the provisions of articles 6 to 27 of the Covenant (part III) were not directly applicable by the Swiss courts.

48. Mr. EL SHAFEI thanked the Swiss delegation for its introduction to Switzerland's initial report and its detailed oral replies. One of his additional questions concerned whether the federal Government intended to reconsider and possibly withdraw the reservations it had entered, on ratifying the Covenant, to a large number of articles, namely, articles 10, 12, 14, 20, 25 and 26, which gave reason to fear that the Covenant was not fully recognized and implemented in Switzerland. He would also like to be told exactly which rights admitted no derogation in cases of public emergency, in accordance with article 4 of the Covenant, for there was no mention of that point in either the initial report, the core document or the information provided orally by the Swiss delegation.

49. He hoped that the latest report of the European Committee for the Prevention of Torture would be published shortly and made available to the Human Rights Committee. For his part, he had read a report by the Association for the Prevention of Torture according to which there were serious problems in Switzerland with respect to conditions of detention in prisons and the treatment of persons in police custody, who were generally foreigners or marginal. Treatment of asylum-seekers was also reported to be of particular concern. In that connection, he asked what the rights of detainees were, in particular regarding the receiving and sending of mail and receiving of visits. He would also like to know what procedure was followed in considering complaints of ill-treatment and torture and what rule was applied to ensure that no testimony given under duress was admitted by the courts.

50. Mr. ANDO said that he had four questions to ask, the first of which concerned Switzerland's reservations to article 26 of the Covenant on equality before the law and the equal protection of the law. The Committee's difficulty with regard to article 26 was to define its scope, since the Covenant also contained article 2, paragraph 1 of which set forth a provision that was quite similar except for the fact that its scope was limited to the rights recognized in the Covenant. The Committee had concluded that article 26 contained an autonomous right, independent of its context, and therefore guaranteed equal protection of the law in all areas, including those covered by the International Covenant on Economic, Social and Cultural Rights. In other words, if any legislation existed, the State party must apply it to all, without discrimination.

51. Switzerland's reservation to article 26 removed that possibility however; the only remaining protection was that provided by article 2, paragraph 1. The issue was dealt with in paragraphs 483 to 485 of the initial report (CCPR/C/81/Add.8): one of the arguments put forward was that the Swiss authorities had entered a reservation to article 26 to the effect that the equality of all persons before the law and their entitlement without any

discrimination to the equal protection of the law would be guaranteed only in connection with other rights contained in the Covenant (see para. 484); the aim was to avoid establishing different levels of protection in two international human rights instruments covering similar ground, the Covenant and the European Convention on Human Rights (para. 484). He would like further information concerning that justification, which he did not find convincing.

52. His second question was whether the provisions of international human rights instruments were directly applicable by national courts. Paragraph 69 of the core document (HRI/CORE/1/Add.29) gave the criteria, based on the decisions of the Federal Tribunal, for a rule contained in an international human rights convention ratified by Switzerland to be directly invoked by a citizen. Paragraph 52 of the core document listed the relevant provisions of the Federal Judicial Organization Act (art. 86, para. 4) relating to the admissibility of remedies for violations of "directly applicable" provisions of multilateral human rights conventions. He would like to know whether the criteria for deciding whether those provisions were directly applicable were the same as those referred to in paragraph 69, or whether there was a difference.

53. His third question related to derogations from the guarantees set forth in the Covenant and the Federal Constitution. Paragraph 64 of the core document (HRI/CORE/1/Add.29) stated that, in the event of necessity, article 89 bis of the Constitution permitted the urgent implementation of federal decisions derogating from the Constitution, provided that the people and cantons ratified them within one year of their implementation. In his view, such ratification by the people and cantons was a mere procedural guarantee; it did not really limit abuses. Paragraph 65 of the document stated that the principle of "general police power" enabled the authorities to issue orders or take individual decisions without any legal basis whenever the exercise of that freedom constituted a grave and imminent danger to, or actually disturbed, public order. Hence there was no legal limit on possible restrictions on rights and freedoms. Finally, paragraph 66 of the core document stated that, since 1974, any derogation from fundamental freedoms must be in keeping with the requirements of article 15 of the European Convention on Human Rights. In other words, the guarantee retained by Switzerland against misuse of the general police power was to be found in the European Convention on Human Rights.

54. His fourth question related to the protection of children. Paragraph 490 of the initial report (CCPR/C/81/Add.8) spoke of nomads and their difficulty in exercising all the rights set forth in the Covenant - particularly the right to education for their children - because their way of life was not geared to regular school attendance. A Research Commission had analysed the situation and made a set of proposals in a 1983 report; he would like further information on the proposals in question and on whether they had been put into effect.

55. Lord COLVILLE said that he was concerned about questions under both parts I and II of the list of issues. First of all, he was deeply concerned by the statement in paragraph 369 of the initial report to the effect that the

freedom of expression of foreigners was subject to specific restriction. He was also not clear about the methods of applying the Covenant's provisions in Switzerland. Article 6 of the Constitution established what the cantons were not authorized to do, but it did not contain any provisions enabling the federal authorities to ask the cantons to take steps to conform to the international obligations accepted by the federal Government. For example, article 14, paragraph 3 (f), of the Covenant recognized the right of everyone charged with a criminal offence to have the free assistance of an interpreter if he could not understand or speak the language used in court, yet paragraph 261 of the initial report (CCPR/C/81/Add.8) stated that the cantonal code of Zug was the only one that did not make provision for the presence of an interpreter.

56. Article 9, paragraph 4, of the Covenant recognized the right of anyone deprived of liberty by arrest or detention to take proceedings before a court, in order that that court might decide without delay on the lawfulness of the detention and order release if the detention was not lawful. According to paragraph 135 of the initial report, most cantons provided for direct recourse to a court, whereas others had a system whereby the prisoner must first appeal to the authority that ordered the measure and then, if the appeal was rejected, initiate recourse to the court (three cantons). He would like to know the duration of the procedure in the three cantons in question and whether it was in conformity with the provisions of article 9 of the Covenant. He would also like to know whether he was mistaken in concluding that no such remedy existed in the canton of Zurich, which did not appear in the list in note 76. The two examples he had just given made him wonder to what extent the federal Government had the means to ensure that the rights laid down in the Covenant were actually exercised by all citizens throughout the territory of Switzerland.

57. In a similar vein, paragraph 128 of the initial report stated that the right of access to a lawyer was, in principle, guaranteed only after the arrested person had appeared before a magistrate for the first time. The following paragraph referred to the Federal Council's position that it would be paradoxical to authorize the assistance of a lawyer right from the beginning of the period of police custody, whereas cantonal procedures excluded it subsequently until the end of the first hearing before a magistrate. In such cases also, he would like to know how the federal Government could influence cantonal practice.

58. Also in connection with police custody, he would like to know whether confessions obtained by coercion, or perhaps even torture, were admissible in criminal proceedings, and what remedies were available to an individual who stated that he or she had been coerced into confessing. The Committee had no statistics or descriptions on the procedure for filing complaints of ill-treatment by the police. If the issue was within the competence of the cantons, there might be 26 different systems in existence; he would nevertheless appreciate further details on the availability and effectiveness of remedies for ill-treatment during police custody.

59. Mr. BHAGWATI, having stressed the excellence of the report and the information provided in the delegation's frank and detailed replies, said that

he would like more details on a few points. First, while it was possible to refer directly to the provisions of the Covenant in the courts in Switzerland, and as many as 40 decisions of the federal Tribunal did so, he was concerned at the fact that a provision of the Covenant could not be directly invoked in court by a citizen unless it met the criteria for so doing - set forth in paragraph 69 of the core document (HRI/CORE/1/Add.29) - a situation which was ultimately decided by the court.

60. On another matter, he would like to know whether the provision contained in article 113, paragraph 1 (3), of the Constitution, according to which the Federal Tribunal heard complaints concerning the violation of the constitutional rights of citizens as well as individual complaints concerning the violation of concordats and treaties, empowered the Federal Tribunal to declare federal legislation unconstitutional if it infringed the constitutional rights of a citizen or rights recognized by the Covenant. Did the Covenant take precedence over federal law?

61. Turning to criminal prosecution for acts committed for racist reasons (report, para. 18), he noted that racist propaganda or the minimizing of genocide and racial persecution were not expressly condemned in current Swiss law. He would like to know whether any draft legislation had been prepared on the subject. He would also like to know what the functions and powers of the Federal Commission on Racism, mentioned at the end of paragraph 19 of the initial report (CCPR/C/81/Add.8), would be. In addition, what was the composition of the Federal Office of Equality between Men and Women mentioned in paragraph 47 of the report and how many women held full-time positions on the staff of the Office?

62. The first question in section (g) of part I of the list of issues did not appear to have received a reply. Could the wife and children of a seasonal foreign worker join the worker in Switzerland? Was it true that foreign workers could not request family reunification until they had lived in Switzerland for 18 months? What was the status of children of foreign workers in general?

63. He would like to know the legal status of children adopted by Swiss parents outside the country. If there had been a full adoption under the legislation of a foreign country, was the adoption recognized in Switzerland, or did the child have to be adopted under Swiss law? If the child had been brought to Switzerland for adoption because no adoption procedure existed in the country of origin, could the adoption take place immediately, as soon as the child arrived, or was there a waiting period? What happened if the child was not adopted? Was the child entitled to sickness and disability insurance before the adoption?

64. Mr. PRADO VALLEJO said that the Swiss delegation had given an excellent introduction to a report that was itself of sound quality. He would like clarifications on a few points of particular concern. The first related to the authorized length of pre-trial detention, which was excessively long, up to six months extendable for a further six months. That was all the more

serious since, as was repeatedly pointed out, pre-trial detention was the period when most human rights violations occurred, and because that practice was hardly in keeping with the presumption of innocence.

65. His second concern was treatment in police custody. The members of the Committee had been given information attesting to deliberate and unjustified acts of physical violence, and at times even acts of torture, of detainees by the police. They had reportedly occurred in all the cantons, but particularly in the Canton of Geneva. It was reportedly a common and racist practice to force detainees, especially ones from third-world countries, to strip. The police apparently sought pretexts to justify such practices and, according to Amnesty International, such acts did not become public because the victims were afraid to complain.

66. One case had become public, however, that of an African travelling to the United States of America who had been arrested by the police when in transit through Geneva airport, beaten, had his passport taken away and had finally been sent back to Africa. The individual had complained to Amnesty International, which had published his story. Unfortunately, according to the information received, the police usually prevented inquiries into such events - which were unacceptable - from coming to term.

67. He was concerned about people who had been arrested and placed in custody, since they were not in practice authorized to inform their families immediately. That right was recognized by the Federal Code but was not applied. Similarly, a person arrested by the police did not have immediate access to a lawyer, in any case not during the investigation, since access to a lawyer was, in principle, guaranteed only after the arrested person had appeared before a magistrate for the first time.

68. His last question concerned family reunification for refugees. Switzerland had been very generous in receiving refugees but, according to his information, it would appear that legitimate refugees were not entitled to family reunification and that appeared to be quite inhuman.

The meeting rose at 12.55 p.m.