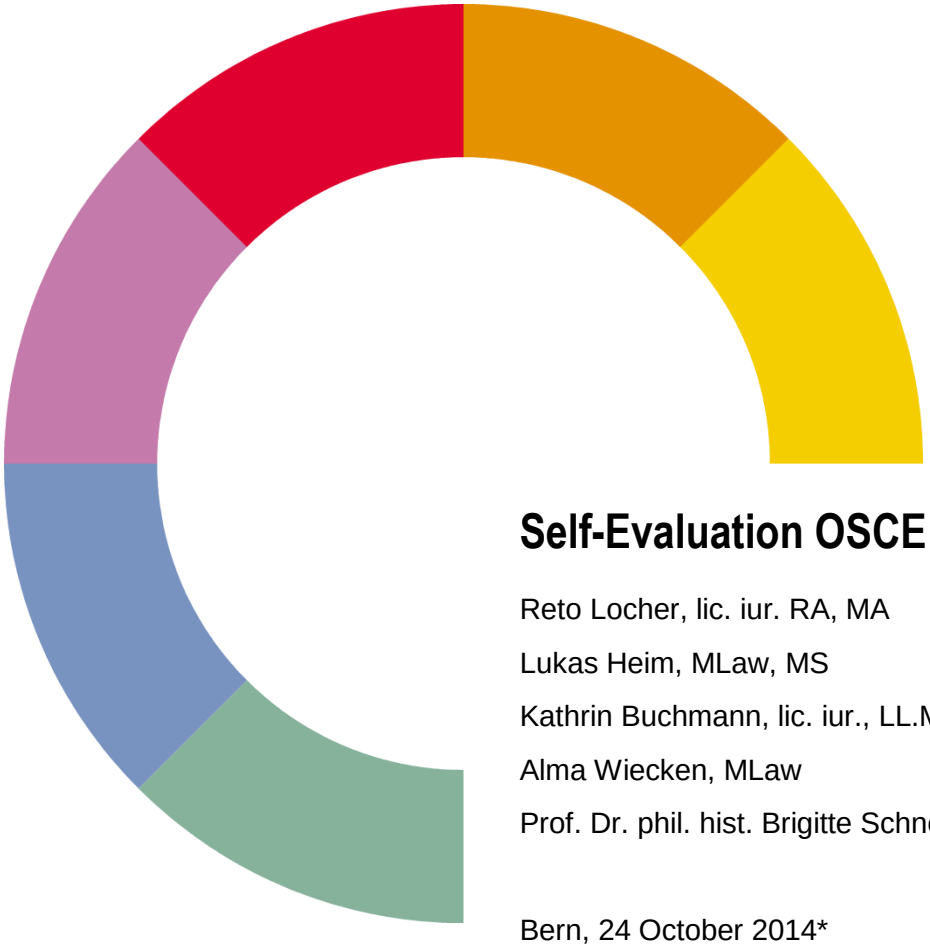

Self-Evaluation OSCE Chairmanship

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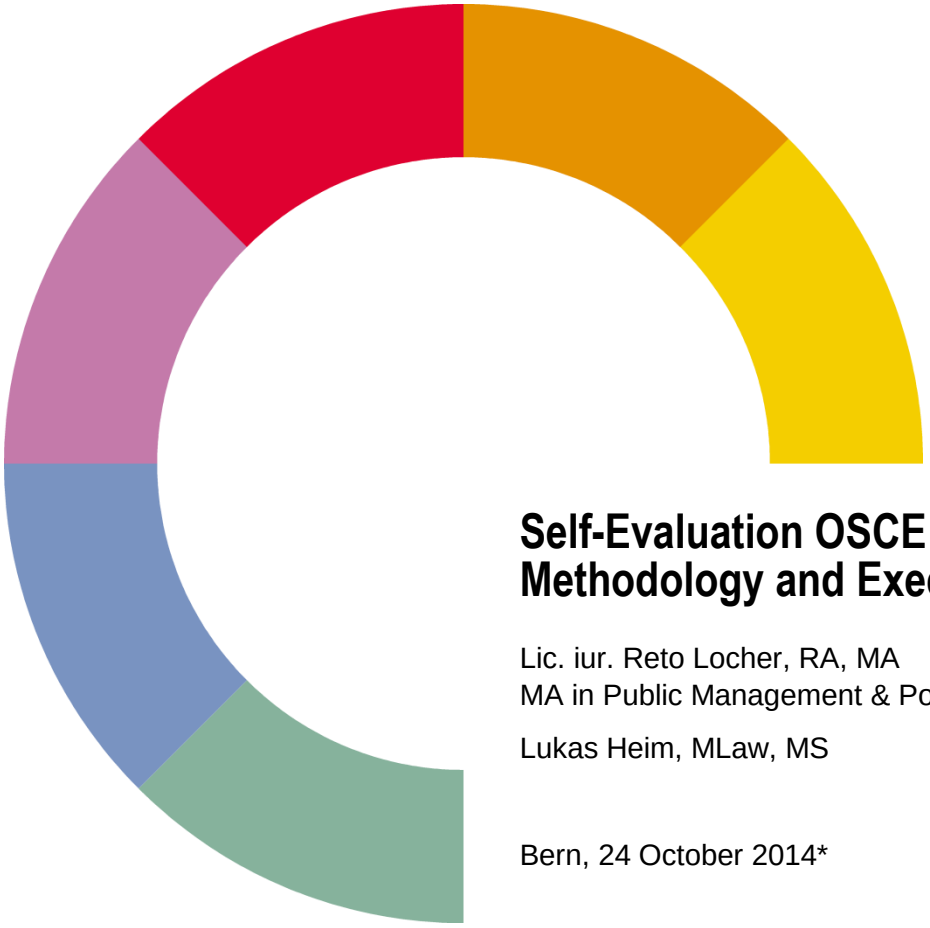
This evaluation has been composed by the Swiss Center of Expertise in Human Rights (SCHR) from December 2013 until April 2014, mandated by the Task Force OSCE Chairmanship 2014 of the Swiss Federal Department of Foreign Affairs. It consists of the following parts:

* The report was updated in October 2014 prior to its publication to include the latest developments in the field of election observation.



Self-Evaluation OSCE Chairmanship Methodology and Executive Summary

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This study reflects the opinion of the authors and only binds the Swiss Center of Expertise in Human Rights.

* The report was updated in October 2014 prior to its publication to include the latest developments in the field of election observation.

CONTENTS

I. METHODOLOGY

1. Mandate and development of the self-evaluation concept

Switzerland defined three priorities for its OSCE Chairmainship during 2014: (1) promoting security and stability, (2) improving people's living conditions and (3) strengthening the OSCE's capacity to act. Within this framework and in recognition of the OSCE's multidimensional approach to security, an important focus of the Chairmanship is strengthening the human dimension of the OSCE. To improve implementation of OSCE human dimension commitments and for a better follow-up on related findings and recommendations by OSCE structures, Switzerland is ready to present to the OSCE a self-evaluation of its endeavours to implement these commitments. The Chairmanship mandated the Swiss Center of Expertise in Human Rights[1] to develop a self-evaluation concept and to carry out such an evaluation based on the following cornerstones:

- The objective of the self-evaluation is an assessment of whether and to what extent Switzerland has implemented relevant OSCE Human Dimension Commitments.
- The self-evaluation is limited to issues addressed in recent OSCE monitoring reports covering Switzerland (exclusively or together with other OSCE participating states).
- The methodology of the self-evaluation has to be designed in a way that allows future Chairmanships to use it. With such an approach in mind, the methodology developed makes it more likely that the instrument of self-evaluation establishes itself over time and becomes a regular and standard tool of the OSCE in the mid-term.
- The evaluation has to be conducted by an independent institution and not by the administration.

2. Monitoring processes in the OSCE

Monitoring by OSCE institutions, including the Special and Personal Representatives, is undertaken based on a multitude of mandates and standards. Some OSCE structures are covering their issues periodically and systematically, while others take more of an *ad hoc* or opportunity driven approach, or their monitoring activities are a mix of the two approaches. For instance, OSCE election observations take place on a regular basis and according to comprehensive monitoring standards.[2] The OSCE Office for Office for Democratic Institutions and Human Rights (ODIHR) publishes annually a hate crime report. In other thematic areas, the compilation and publication of reports depend more on the priorities of the current OSCE Chairmanship, as well as on the mandate and the priorities set by the Special or Personal Representatives. Here monitoring reports are often published at varying intervals. Whether standardized or not, all these re-

[1] The Swiss Center of Expertise in Human Rights is mandated by the Federal Department of Foreign Affairs and the Federal Department of Justice and Police to promote and facilitate the process of implementing international human rights obligations of Switzerland by providing advice and services to authorities at all national and sub-national levels, non-governmental organizations and the private sector.

[2] Election Observation Handbook, p. 13 ff., available at: http://www.osce.org/odihr/elections/68439?download=true (last checked on 25 October 2013).

ports usually include findings and make recommendations on how to tackle identified shortcomings in light of relevant OSCE human dimension commitments.

For the purpose of this evaluation, two standardized monitoring processes were identified: OSCE election observations and ODIHR's annual hate crime report. It appears that the other OSCE reports dealing with human dimension commitments follow less a standardized methodology, although some reports are published annually. Against this background, some guidelines on what OSCE reports to draw from for the self-evaluation were defined:

1) Time: the analyzed reports have to be current: preferably 5, 10 years maximum since the publication date.

2) Relevance: the thematic area (e.g., elections, minorities, gender) and the issues within the thematic area raised (e.g., funding of election campaigns, use of minority languages in courts, paternity leave) in the OSCE reports have to be relevant for the OSCE participating State undertaking the self-evaluation. Relevance should be assessed from both an internal and an external perspective. For example, religious tolerance (i.e. the ban of the construction of minarets) is a relevant issue for Switzerland, especially from an external perspective (one indicator of several: this issue gets a lot of international media attention).

3. Key elements of the evaluation

The evaluation concept suggests that the OSCE reports that are part of the self-evaluation should be analyzed based on the following aspects:

1) Identification and analysis of the relevant OSCE commitments.
2) Identification and analysis of the relevant OSCE reports which contain findings and recommendations addressed at the participating State concerned (for this self-evaluation this is Switzerland).
3) Assessment of the relevance of the shortcomings for the participating State concerned (Switzerland). When assessing the significance of the shortcomings, it is important to adequately consider specific features of that state (such as its organizational structure, the existence of minorities, linguistic diversity etc.). Thus, the evaluation should not be too formalistic but should consider the particular context.[3]
4) Assessment of the efforts that the state concerned (Switzerland) has made to address relevant shortcomings and identification of areas where further action is needed. For this purpose, the following indicators are used:
   a) Do competent authorities accept that the respective situation is problematic in light of relevant OSCE commitments?
   b) Did competent authorities take steps to change the relevant legislation or practices, if such changes are necessary, and / or take other actions to tackle the criticized situation?
   c) Are steps taken in line with relevant OSCE commitments? To what extent?
   d) What (to the extent that relevant data are available) is the impact of measures taken?

[3] For example, the Swiss Federal Election System is not deficient per se because – contrary to many states around the globe – Switzerland has no "classic" formal independent national election body. Switzerland has a federal structure and the operational implementation of the federal elections takes place in the cantons and the communities. The federal level only defines certain principals that are binding for the cantons and the communities.

4. Self-evaluation by future OSCE Chairmanships

The developed methodology is flexible enough to be used for self-evaluations by future OSCE Chairmanships. At the same time, the approach taken is principled enough to guarantee a consistent methodology and comparability of the results of the evaluations. Serbia will hold the OSCE Chairmanship next year. During meetings and consultations with the Serbian Ombudsman and the Ministry of Foreign Affairs of the Republic of Serbia in Belgrade, the idea of a self-evaluation, as well as the evaluation concept (including the methodology developed) were welcomed.

5. Selected topics for the self-evaluation of Switzerland

Based on the methodology explained before, the SCHR identified the OSCE reports and topics relevant for the self-evaluation by the OSCE Chairmanship 2014. This research showed that the following topics should be part of the the self-evaluation of Switzerland, arranged in five substudies:

5.1. Substudy 1: Election Observation

Election observation is among the better known and one of the core monitoring processes of the OSCE. The key documents for this substudy are the final election observation reports of the OSCE regarding the Swiss Confederation Federal Elections of 2007[4] and 2011[5]. The analysis made in these OSCE reports is conducted on the basis of a standardized methodology and based on research and country visits by ODIHR. Furthermore, the Swiss Federal Chancellery has issued a Report on the Recommendations of the OSCE/ODIHR 2007 Election Assessment Mission 2007,[6] which is also part of the evaluation.

5.2. Substudy 2: Intolerance

The substudy about intolerance is divided into two sections: (1) hate crimes and (2) intolerance issues. Hate crimes are defined as “criminal acts with a bias motive”[7]. The part on hate crimes is based on ODIHR’s annual hate crime reports, which are compiled and published on the basis of a standardized methodology and as a result of inputs from various States, NGOs as well as research by ODIHR. Since 2008, these reports use a standardized methodology. Therefore, a certain comparability of the results is guaranteed. Specifically, the hate crime reports 2005-2011 are part of the substudy’s evaluation to the extent that they mention Switzerland. In the 2011 report, for instance, Switzerland was mentioned with regard to anti-Semitic incidents,[8] and intolerance against Muslims[9] and Christians[10]. In the section about intolerance issues, the Report of the Per-

4 http://www.osce.org/odihr/elections/switzerland/31390 (last checked on 25 October 2013).

5 http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/osce.Par.0017.File.tmp/-120130_odgal0077%20final%20report.pdf (last checked on 25 October 2013).

6 http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/osce.Par.0018.File.tmp/Bericht-_Umsetzung_OSZE_Empfehlungen_zu_den_Eidg_Wahlen_vom_21102007_en.pdf (last checked on 24 October 2013).

7 See http://www.osce.org/odihr/66388 (last checked on 25 October 2013).

8 Ibid., p. 64.

9 Ibid., p. 70 und 72.

sonal Representatives of the OSCE Chair-in Office on Tolerance Issues[11] forms the basis of the substudy's analysis. The report followed a visit to Switzerland by the OSCE Personal Representative on Tolerance issues in November 2011 and addressed a number of issues such as racism and hate crimes, intolerance against Muslims, the situation of travelers (Jenisch) the ban on the construction of minarets.[12] The report first outlines the relevant legal basis, followed by specific recommendations how to improve the current situation.[13]

5.3. Substudy 3: Freedoms of Expression and Assembly

In the first part, this substudy assesses a selection of laws and practices across Switzerland on demonstrations. In the second part, the substudy takes a closer look at access to official documents. The first part is based on the OSCE/ODIHR Report from 2012, Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States.[14] The report was published after OSCE monitors visited protests in a number of participating States between May 2011 and June 2012 including several demonstrations in Switzerland. Switzerland is mentioned, in particular, in relation to protests in the city of Bern and the town of Davos against the World Economic Forum, and concerning a demonstration during a ministerial conference of the World Trade Organization in Geneva.[15] The OSCE Report Freedom of Expression on the Internet from 2011[16] is the first comprehensive study of legal provisions and practices related to freedom of expression on the Internet. While Switzerland is mentioned in the report,[17] no major gaps are identified. Therefore, this issue is not part of the substudy. Instead, access to official documents is assessed in light of OSCE commitments and recommendations.

5.4. Substudy 4: Trafficking in Human Beings

This substudy assesses Switzerland's efforts in combating trafficking in human beings in six areas: (1) coordination and cooperation among different actors, and monitoring of anti-trafficking responses; (2) collection and availability of data, and research about trafficking in human beings; (3) identification of trafficking victims; (4) protection of and support for trafficking victims; (5) criminalization of traffickers and non-punishment of trafficking victims; (6) and trafficking for labour exploitation. A number of annual reports and research papers by the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings are the foundation of the substudy. The Special Representative 2008 Annnual Report[18] with its focus on coordination, co-

10 Ibid., p. 77.

11 http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/osce.Par.0035.File.tmp/ciogal0262%-203%20PRs%20tolerance%20Swiss%20Country%20Report.pdf (last checked on 25 October 2013).

12 Ibid., p. 3 ff.

13 Ibid., p. 6 ff.

14 http://www.osce.org/odihr/97055 (last checked on 25 October 2013).

15 Ibid., N. 198 on p. 76.

16 http://www.osce.org/fom/80723 (last checked on 25 October 2013).

17 Ibid., p. 8 f.

18 http://www.osce.org/cthb/36159?download=true (last checked on 25 October 2013).

operation and monitoring and the 2010 Annual Report[19] dealing with the situation of domestic workers are particularly relevant.

5.5. Substudy 5: Gender Equality

In December 2013, a delegation of the gender equality section of OSCE ODIHR visited Switzerland. In meetings with authorities and civil society representatives, the OSCE collected information about gender equality in Switzerland. As part of this, an SCHR delegation met with the OSCE delegation. Following this country visit, a report on gender equality in Switzerland was published on 27 March 2014, covering these issues: implementation of UN Security Council Resolution 1325, women's economic empowerment (as recommended by the OSCE Special Representative on Gender) and domestic violence against women. Given gender equality is an important priority for ODIHR and the very timely OSCE gender quality report concerning Switzerland, it was decided to make gender equality part of the self-evaluation.

6. Organization of the project

The SCHR developed the evaluation concept, was in charge of the overall project management, and researched and wrote the substudies 1, 3, 4 and 5. Two independent experts were tasked with substudy 2. The proposed methodology was designed in a way that allows future Chairmanships to use it. Given Serbia's OSCE Chairmanship in 2015, the evaluation concept was shared and discussed with the Serbian Ombudsman and the Ministry of Foreign Affairs of the Republic of Serbia in November 2013. Moreover, the Serbian Ombudsman gave feed-back on the first drafts of each substudy. In addition, a network of Swiss NGOs was invited to provide input (list of issues and of existing position papers and other documents) on the topics of this evaluation before the authors drafted their substudies. While this informed the research and drafting process, the SCHR and the authors are solely responsible for the content of the evaluation.

II. EXECUTIVE SUMMARY

In this section, the condensed findings and recommendations of the substudies 1-5 will be presented. For details, please consult the relevant information in the individual substudies below.

1. Substudy 1: Election Observation

The evaluation report regarding Election Observation focuses on two issues particularly problematic for Switzerland with regard to the key principles of the OSCE commitments: the regulation of party and campaign financing and the right to vote of Swiss citizens residing abroad.

In the field of party and campaign financing, different internal standards of the OSCE – even if legally not binding – as well as universal and regional human rights instruments and electoral good practice require Switzerland to regulate these issues. In addition, Switzerland has ratified the Criminal Law Convention of the Council of Europe as well as the UN Convention on Corruption, both recommending the implementation of different measures with regard to the party and

[19] http://www.osce.org/cthb/74730 (last checked on 25 October 2013).

campaign financing. The OSCE/ODIHR Election Assessment Mission Report 2007 notes that "there are no legal provisions on party and campaign financing at federal level", and therefore "parties can receive unlimited funds from any source without any requirement of disclosure".[20] Under reference to Switzerland's commitments in this field, the EAM Report 2007 recommended the Swiss authorities to consider the introduction of an obligation of disclosure of parties' and political associations' final income, sources and expenditures. This view is shared by informations provides by Swiss NGOs, namely Transparency International Switzerland, who calls for the adoption of different measures, in particular transparency in the funding of candidates, parties and referendum/initiative committees. While different parliamentary interventions tried to push the issue, the Swiss government has not undertaken any steps to improve the current situation to date. On several occasions, the Swiss government explained its inactivity, arguing that due to the particularities of the Swiss political system, the introduction of the measures required by the OSCE, but also by the Group of States against Corruption GRECO that deals with corruption issues within the Council of Europe, or in the context of the implementation the UN Convention against Corruption, is difficult. Therby, it refered to the numerous votes taking place at federal level and the difficulties to identify the relevant actors involved in a campaining, what would only be possible with a great effort. On the other hand it refered to the system of direct democracy that would possibly be endangered by the introduction of legal obligations to disclose campaign financing, since the willingness of private donors to engage financially in politics would be questioned. The arguments of the Swiss government have been noted by the OSCE/ODIHR Election Assessment Mission as well as in the context of the Third Evalaution Round of GRECO, but were obviously not assessed relevant with regard to the implementation of the measures urged of Switzerland by these organizations. Therefore, and since no new legal regulation at federal level regarding the issue of party and election financing has been introduced to date, the OSCE/ODIHR Election Assessment Report 2011 in summary reiterates its recommendations made in its report 2007, stating that "the authorities should consider introducing an obligation for public disclosure of candidate and party campaign receipts, sources, and expenditures" and "whether such requirements should extend to interest groups making political donations or expenditures and to referenda and popular initiatives as well as elections" [21]. GRECO also insists on its recommendations made in the framework of the Third Evalaution Round: Since Switzerland has not implemented the relevant measures sufficiently, it has to provide another report in this regard to GRECO by April 2014. In summary, even though the Swiss government has obviously accepted that the lack of rules in this field is problematic in the light of the relevant commitments regarding party and campaign financing, it is not willing to adapt the relevant measures to comply with its obligations.

We recommend to the Swiss government to take concrete steps to adopt and implement the measures recommended by the OSCE/ODIHR EAM Reports and by GRECOs Third Evaluation Round in order to fully comply with international good practice in the field of party and campaign financing. As a first step, the Swiss government should set up a group of experts to identify a way to implement these measures, taking into account the specific peculiarities of the Swiss political system. The high level of intransparency regarding the influence of interest groups in the political process risks to undermine the proper functioning of Swiss democracy in the future and carries a significant potential for corruption.

[20] EAM Report 2007, p. 6.

[21] EAM Report 2011, p. 10.

With regard to the right to vote of Swiss citizens living abroad, Swiss citzens living abroad are granted the right to vote for the National Council if they are registered as voters at a Swiss consulate. The competence for legislation on elections for the Council of States rests with the cantons. The difficulties in this field are connected with the procedures of postal voting: The Federal Law on Political Rights requires cantons to send the postal voting materials to registered voters by the latest ten days before election day, and cantons can provide longer deadlines. According to the OSCE/ODIHR Election Assessment Report 2007, this can result in inequalities and should be addressed. Furthermore, the report estimates this short deadline as problematic, as the ballots may not be delivered to voters in time since this depends on the respective postal system in the voter's country of residence.[22] In its Implementation Report, the Federal Chancellery acknowledges that the ten days deadline to send the election material to voters is relatively short for Swiss citizens living abroad. The problem is tackled with several "postal measures" established by the Conference of Chancellors. Furthermore, the inclusion of Swiss consulates, as proposed in the Election Assessment Report 2007, was tested but judged unfit. Finally, the EAM Report 2011 reiterates its recommendation to introduce a longer dead line time for the delivery of ballot packs for Swiss citizens living abroad. In the meantime, Switzerland has implemented this recommendation. On 26 September 2014, the Swiss Parliament adopted several changes of the Federal Law on Political Rights, including an earlier deadline for the noticification of candidatures which will allow to distribute postal voting material at least three weeks before election day. This modification has to be welcomed as it will facilitate timely exercise of the right to vote by Swiss citizens living abroad to exercise their right to vote. The new provisions are expected to enter in to force after the referendum deadline (15 January 2015).

As an alternative to postal voting, and in order to facilitate voting for Swiss citizens living abroad, Swiss authorities introduced and expanded internet voting in recent years. The OSCE/ODIHR Election Assessment Report 2007 notes that this form of voting "should be only considered based on a broad consultation on consensus" since it can pose a potential risk factor to the integrity of elections.[23] The Implementation Report of the Federal Chancellery notes that in the elections 2011, 22'000 Swiss citizens living abroad had the opportunity of "e-voting", and for the elections 2015, the great majority should have access to internet voting. In its Election Assessment Report 2011, OSCE/ODIHR notes that, in general, the efforts made by the Swiss authorities with regard to the introduction and expansion of internet voting are appreciated. Nevertheless, the report lists several deficits regarding legal and technical issues that still have to be improved by the Swiss authorities. The introduction of a new legal basis with regard to the further expansion of internet voting, entered into force on 15 Januar 2014, is certainly a step in the right direction. But such expansions can only be conducted seriously if increased security conditions are guaranteed. In this regard, it is commendable that Swiss authorities are taking the security challenges in this field very seriously and take efforts to tackle the problems in this field. Due to the highly technical questions in the context of internet voting, it can not be fully assessed in the framework of this evaluation report whether the measures taken by the Swiss authorities already fully comply with the recommendations made in the Election Assessment Report 2011.

We recommend that Swiss authorities pay attention to ensure that the technical standards required by the OSCE/ODIHR Election Assessment Report 2011 in the field of internet voting are fully implemented when the new law on the expansion of internet voting will be applied.

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22 EMA Report 2007, p. 20.

23 Ibid.

2. Substudy 2: Intolerance

Switzerland has partially fulfilled the OSCE's commitments in several areas. For example, Switzerland nominated the Federal Departement of Foreign Affairs as the national point of contact on hate crimes to periodically report to the ODIHR reliable information and statistics on hate crimes, as requested by the OSCE Ministerial Council. The Federal Commission against Racism (FCR) compiles and provides the relevant data. Nevertheless a number of gaps in the implementation of OSCE's commitments can be identified.

A large gap in the implementation of commitments relates to combating and monitoring hate crimes. Despite the fact that Switzerland has made a commitment to the OSCE to combat hate crimes, part of the legal basis for a complete implementation is missing. Although Switzerland generally refers to article 261bis of the Swiss Criminal Code in this context, it has to be stressed that this legal provision does not fulfil all of OSCE's requirements regarding legislation against hate crimes. For example, Art. 261bis Swiss Criminal Code protects only a very restricted category of people, whereas the ODIHR's definition of hate crime includes a much wider range of protected characteristics like language and sexual orientation. *We recommend that Swiss authorities adopt appropriate and more effective legislation.*

The OSCE Personal Representative, on the occasion of his country visits, criticized the increasingly intolerant and discriminatory climate regarding Muslims and other minorities in Switzerland. The anti-minaret initiative, which had been perceived as discriminatory against Muslims internationally, was mentioned in particular. On a positive note, as a consequence following the anti-minaret initiative, the federal government was seeking an increased dialogue with the Muslim population. Yet, this dialogue was closed before any real outcomes were achieved. It is important that the federal and cantonal authorities are continuing their efforts and are not trying to shirk their responsibilities by pointing to the distribution of powers and duties in the federal state.

The OSZE is fundamentally concerned about the nature of political discourse in Switzerland. Particularly in times of federal popular votes, referendums or elections the discourse risks turning discriminatory. Swiss Courts tend to classify the protection of the freedom of expression as more important than the protection against discrimination during political discourse. While political discourse must be allowed to be robust, effectively combatting discrimination and defamation in electoral campaigns, as required in OSCE commitments. *We recommend to further clarify the precise limits of the freedom of expression and, if necessary, to develop tools that include positive measures such as sensitization campaigns or the development of codes of conduct by political parties well as prohibitions and sanctions where adequate.*

3. Substudy 3: Freedoms of Expression and Assembly

This substudy takes a closer look at the laws and practices in Switzerland in relation to demonstrations and access to official documents. Four aspects about peaceful protests are reviewed: (1) authorization and notification of demonstrations; (2) unauthorized demonstrations; (3) demonstrations in relation to high-level events and (4) access of journalists to demonstrations. Concerning access to official documents, the assessment is focusing on the adoption of access to information legislation on the federal and cantonal levels. The selection is based on findings and recommendations by the OSCE and research by the substudy's author. The OSCE also published reports referring to Switzerland in relation to other freedom of expression and assembly aspects,

such as freedom of expression on the Internet. However, in a Swiss context the issues considered seem more relevant.

Authorization and notification of demonstrations: A review by the OSCE of pertinent cantonal and municipal legislation in the cities of Geneva and Bern and the town of Davos, concludes that while the legal requirements and restrictions for peaceful assemblies differ in content, they all have in common that a prior authorization is needed for holding non-spontaneous assemblies. According to the OSCE, while a notification system is preferable, there is no evidence for overly restrictive authorization practices in the three municipalities. A prior permit requirement for all non-spontaneous assemblies appears to reflect cantonal and municipal regulations across Switzerland.

Based on these findings, we encourage authorities to consider the introduction of a notification system for at least for some types of demonstrations beyond spontaneous assemblies, and if prior authorization is required, legislation should contain „a legal presumption that the authorization will be issued and that any refusal of authorization will be based on clearly defined criteria".[24]

Unauthorized demonstrations: Laws and practices concerning unauthorized demonstrations appear mostly to reflect the principle, that just because an assembly has not been authorized or is otherwise not meeting all legal requirements, the demonstration cannot be automatically be prevented or dispersed. However, the OSCE monitors also note that some legislation and practices concerning unauthorized demonstrations are problematic in light of OSCE commitments and human rights standards on freedoms of assembly and expression.

We recommend making the principle of allowing peaceful, but unauthorized demonstrations to go ahead, to not punish participants of such demonstrations and to deal with potentially or actually violent protesters individually (including arrest, prosecution and punishment), the standard rule of police engagement, if not already done so. This principle also should apply if prior permission for the demonstration was sought and rejected, but people, nevertheless, took to the streets, as long as protests are (mostly) peaceful.

Demonstrations in relation to high-level events: Davos as the host town of the annual summit of the World Economic Forum (WEF), Geneva as the home of the UN Office in Geneva, several UN agencies, the World Trade Organization and numerous permanent representations, and Bern as the capital city and seat of the federal government all have seen their fair share of high-level events. In general, authorities have been willing to accommodate related protests. At times, restrictions concerning the location of protests have been unsatisfactory in light of the sight-and-sound principle: protests should be allowed to take place within sight and hearing distance to the event or of the people the protests are aimed at.

Based in these findings, we encourage all concerned actors to seek solutions regarding the location of protests that give sufficient weight to the sight-and-sound principle.

Access of journalists: Overall, limitations on access for journalists covering demonstrations appear not to be a frequent concern in Switzerland. Nevertheless, occasionally, some problematic restrictions exist, as two isolated but problematic cases from 2008 of detained journalists during or just before a demonstration illustrate.

[24] OSCE Monitoring Report 2012, p. 12.

To prevent similar incidents, and to maintain and further improve media access, we recommend to the cantonal police forces making the handling of the media including during demonstrations part of the training for police officers (if not already done so).

Access to official documents: The adoption of the Federal Act on Freedom of Information in the Administration (FoIA) in 2006, with its switch from the principle of secrecy to the principle of transparency, marked a turning point in the federal government's approach to granting access to official documents. Several cantons pioneered access to information friendly legislation. At the same time, a number of cantons still lack laws granting access to official documents on the principle of transparency. Moreover, even where new legislation is in place, practices seem not always to fully reflect the change to the principle of transparency. As a result, access to official documents sometimes remains difficult.

Therefore, we recommend, in particular, to cantons with laws that still contain the principle of secrecy as the rule to adapt access to information legislation based on the principle of transparency.

4. Substudy 4: Trafficking in Human Beings

This substudy takes a closer look at the laws, practices and institutional arrangements in place in Switzerland that aim to combat and prevent trafficking in human beings. Six aspects are evaluated: (1) coordination and cooperation among different actors, and monitoring of anti-trafficking responses; (2) collection and availability of data, and research about trafficking in human beings; (3) identification of trafficking victims; (4) protection of and support for trafficking victims; (5) criminalization of traffickers and non-punishment of trafficking victims; (6) and trafficking for labour exploitation. The selection is based on findings and recommendations by the OSCE, especially by the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings, complemented by research from the Swiss Centre of Expertise in Human Rights (SCHR).

(1) Coordination, cooperation and monitoring: Various authorities and other actors with very different roles and at times conflicting priorities have to work together to combat trafficking. Switzerland's federal structure makes coordination and cooperation even more complex. Overall, Switzerland has come a long way in implementing OSCE commitments concerning coordination and cooperation of anti-trafficking efforts. The creation of a National Coordination Mechanism (NCM) has been instrumental. Nevertheless, there is still room for improvement. The study identifies three areas where coordination, cooperation or monitoring could be further enhanced: representation in the National Coordination Mechanism (NCM), cooperation and coordination among cantonal authorities and monitoring of anti-trafficking efforts.

Based on these findings, we recommend having cantonal child protection and labour inspection authorities represented in the NCM, to establish coordination mechanisms in cantons still lacking such a forum and to strengthen the NCM's monitoring role of anti-trafficking efforts.

(2) Collection and availability of data, research: Both the OSCE and the UN human rights expert body CEDAW identified important gaps in the collection and availability of data concerning trafficking in human beings to Switzerland. During the past years, the OSCE and CEDAW recommendations have been largely implemented. There remain some smaller gaps. In addition, the crime, conviction and victim support statistics, each only capture cases registered for one or another purpose and merely represented the tip of the iceberg. The real numbers mostly remain in the dark.

Against this background, we recommend, in particular, making more data from the conviction statistics concerning human trafficking publicly available, to include more information about trafficking offenders in the crime, conviction and victim protection statistics and to distinguish between the different types of human trafficking, and to commission or carry out studies that shed some light on the real numbers of trafficking, namely for labour exploitation.

(3) Identification of trafficking victims: While officers and staff from several authorities are among the most likely persons to encounter trafficking victims, the may not always realize this. Also, trafficking victims can be reluctant to contact authorities because of their irregular status or as they have been traumatized. Many trafficking victims have very limited possibilities of contact with the outside world.

Based on an analysis of these aspects of victim identification, we recommend making human trafficking part of the basic training of all relevant actors (if not already done so), namely the police, prosecution officials, migration authorities, labour inspectors and staff working at victim protection centers. In-depth training for selected staff of the different actors also should be provided or enhanced, and the creation of specialized units at the different authorities be considered.

(4) Victim protection: The study takes a look at various aspects of victim support and protection: victim protection centres; safe houses for trafficking victims; the witness protection programme by the Federal Office of Police and other police protection measures; reflection time, stay and residence in Switzerland.

Based on an analysis of these elements of victim protection and support, we recommend, in particular, to make the measures of the federal victim protection program available also to trafficking victims not taking the witness stand if, after assessing all circumstances, this appears to be the only effective method to protect a trafficking victim. The substudy also recommends strengthening understanding about and the use of resident permits for protecting trafficking victims.

(5) Criminalization of traffickers and non-punishment of trafficking victims: An effective criminal justice response against human trafficking includes prosecutors and criminal courts. Some cantonal prosecutors have been very active in investigating human trafficking cases and in bringing them to court. For a long time, however, sentences in Switzerland for human trafficking have been rather low in comparison to sentences for other serious crimes. This appears to have changed recently. According to the U.S. State Departments human trafficking report, Swiss courts started sentencing convicted offenders of human trafficking to significant prison terms.

Against this background, we recommend to cantonal prosecutors to strengthen and enhance cooperation, especially if a trafficking case has links to several cantons.

(6) Labour exploitation: The involvement of labour inspection authorities in anti-trafficking efforts has been very limited in comparison to other authorities. Domestic workers including of diplomats and irregular migrants are particularly at risk of labour exploitation. Moreover, this type of human trafficking appears to be often overlooked, and its real scope is unknown.

Based on these findings, we recommend stepping up involvement of and training efforts for labour inspection authorities, to swiftly adopt and disseminate the NCM's draft guidelines on labour exploitation, and to strengthen research on labour exploitation.

5. Substudy 5: Gender

The Report of the OSCE gender equality delegation focused on three particularly interesting issues for Switzerland: Women's economic empowerment, the implementation of the UN Security Council Resolution 1325 and – at request of the OSCE Special Representative of the Chairperson-in-Office on Gender issues – domestic violence.

In the field of women's economic empowerment, Switzerland has strong obligations to guarantee gender equality: On the international level, it is bound by the International Covenant on Civil and Political Rights (Art. 3 and 26 CCPR), the Convention on the Elimination of all Forms of Discrimination against Women (Art. 11 CEDAW), the ILO Conventions No. 100 (Equal Remuneration Convention) and No. 111 (concerning Discrimination in respect of Employment and Occupation), that ban all forms of gender discrimination in this context. On the national level, Art. 8 para. 3 of the Swiss Constitution grants equality between men and women, and the Gender Equality Act (GEA), implementing this constitutional norm, addresses in particular equality at the workplace. Despite these norms, considerable inequalities between women and men persist in reality. These inequalities in particular concern the following areas: *The participation in paid work* (women's employment rate is still lower than men's, although it has increased during the last decades); *the professional status of women* is – despite equal education – lower than men's; *the representation in leadership positions*, where women are underrepresented in management positions; *the sex segregated labour market* (the Swiss labour market is characterized by a pronounced sex-segregation); *equal pay for women and men,* which is still not reality as women's average income is lower than men's (23.6% in the private and 14.7% in the public sector); *unpaid care work* (women carry out 64% of the unpaid work), *negative financial incentives* (both tax systems and social security schemes discourage women's participation in the paid labour market); and *sexual harassment* (both women and men are confronted with sexual harassment in the working place). Due to the persisting discrimination of women in economic life, the CEDAW Committee, the CESCR Committee and the Human Rights Council have addressed Switzerland in recent years and made several recommendations to improve the current situation. On the other hand, gender equality at the working place is one of the priorities of the Federal Office on Gender Equality (FOGE) and of gender equality offices on the cantonal and communal level, as well as among the major objectives of the Swiss Government for the legislative period 2011-2015. In particular, achievements can be noticed regarding the *legal procedures based on* the Gender Equality Act (different legal institutions on different levels regularly deal with cases of gender based discrimination), *the counselling services* addressing different issues linked to gender equality in the working place, *gender equality in the public administration* (for instance targets for women's percentage in leading positions), *the activities to achieve equal pay (*for instance monitoring instruments and dialogues with companies), the *strengthening of the low income sector* by the commitment of the Federal Council to ratify the ILO convention No. 189 concerning decent work for domestic workers, measures to improve *the integration of female migrants* into the labour market and *the enhancement of the compatibility between family life and gainful employment* (for instance by encouraging the creation of child care facilities by federal, cantonal and communal administrations).

For the further improvement in the field of women's economic empowerment, we recommend the improvement of the access to justice in cases of gender based discrimination, the enhancement of the commitment of the private sector regarding equal pay and the increase of the number of women in leadership positions (underpinned by more binding obligations for businesses), the increase of the efforts to overcome gender segregation in the labour market by addressing stere-

otypes on all levels amongst others and to further enhance the compatibility between family and working life by the increase of high quality and affordable child care facilities as a precondition for women's full participation in paid employment.

About the implementation of UN Security Council Resolution 1325, Switzerland has for many years considered the protection of civilians as a major priority in its foreign policy and has confirmed its commitment through the adoption of a National Action Plan (NAP) for the implementation of UN SC Resolution 1325. Monitoring of the National Action Plans 1 and 2 show that there is considerable progress in realizing the targets fixed. For instance, the number of women participating in peacebuilding activities has been increased in recent years. Furthermore, the Swiss Departement of Foreign Affairs has committed to foster the participation of women in peacebuilding processes. Moreover, in order to enhance the gender competences of the overall staff in peace missions, a gender perspective has been integrated into all training modules for civil and military peace mission delegations and participants are familiarized with the code of conduct concerning sexual exploitation and abuse that has been put in place by the United Nations. At the same time, there is a certain gap between Switzerland's commitment for women, peace and security in the foreign policy documents at the international level on the one hand and the measures taken domestically on the other hand. For instance, the number of women in decision-making positions within the diplomatic corps as well as on senior management positions in the Departement of Foreign Affairs should be further raised. In addition, more women should be integrated into the domestic security sector as well as in the police forces, even though in this regard the possibilities of the federal administration are limited due to the federal structures and the competences of the cantons and the communes in this context.

We recommend to further monitor the implementation of the National Action Plan. Moreover, the gender balance in peace missions and other relevant bodies as well in domestic security and police services should further be improved, and the engagement for the protection of women and girls in conflict situations, for the integration of women in peace building processes and for combatting impunity of sexual violence should be pursued both on a bilateral and on a multilateral level. Finally, an increase of financial resources – for instance through gender sensitive budgeting – would give all the strategic commitments further credibility.

As far as domestic violence is concerned, we broadly agree with the analysis and the conclusion made by the Report of the OSCE gender equality delegation. The high rate of completed homicides of women that were killed as a result of domestic violence is alarming and apparently a specific Swiss phenomenon that should be further analysed. Furthermore, article 55a of the Swiss Criminal Code that allows victims to withdraw their complaints and end proceedings, results in practice in a very high number of criminal proceedings not resulting in court proceedings. This effect was not intended by the legislator and should be further analysed.

We recommend that the Swiss authorities adapt a comprehensive domestic violence legislation focused on prevention and combating violence against women, including criminal investigation, prosecution and adequate punishment of those found guilty, and provide social services to victims and their families. Furthermore, the number of shelters for women should be increased, and the financing of the existing institutions be secured. In addition, Switzerland should ratify the Convention on preventing and combating violence against women and domestic violence of the Council of Europe (Istanbul Convention). This convention contains a detailed list of measures that states have to take into account regarding prevention, protection, support, legal measures, investigation, criminal prosecution, procedural rights, migration and asylum, and international collaboration and explicitly refers to violence against women in its different forms. Finally, the application

of article 55a of the Swiss Criminal Code and its impact on the prosecution of perpetrators should further be analysed, and this legal provision revised if necessary.

ANNEX SOURCE MATERIALS

Federal Chancellery, Implementation of Recommendations of the OSCE/ODIHR 2007 Election Assessment Mission Report, July 2011, available at: http://www.bk.admin.ch/-themen/pore/nrw/index.html?lang=de&download=NHzLpZeg7t,lnp6I0NTU042l2Z6ln1-acy4Zn4Z2qZpnO2Yuq2Z6gpJCGeoF6f2ym162epYbg2c_JjKbNoKSn6A--. (last checked on 2 April 2014).

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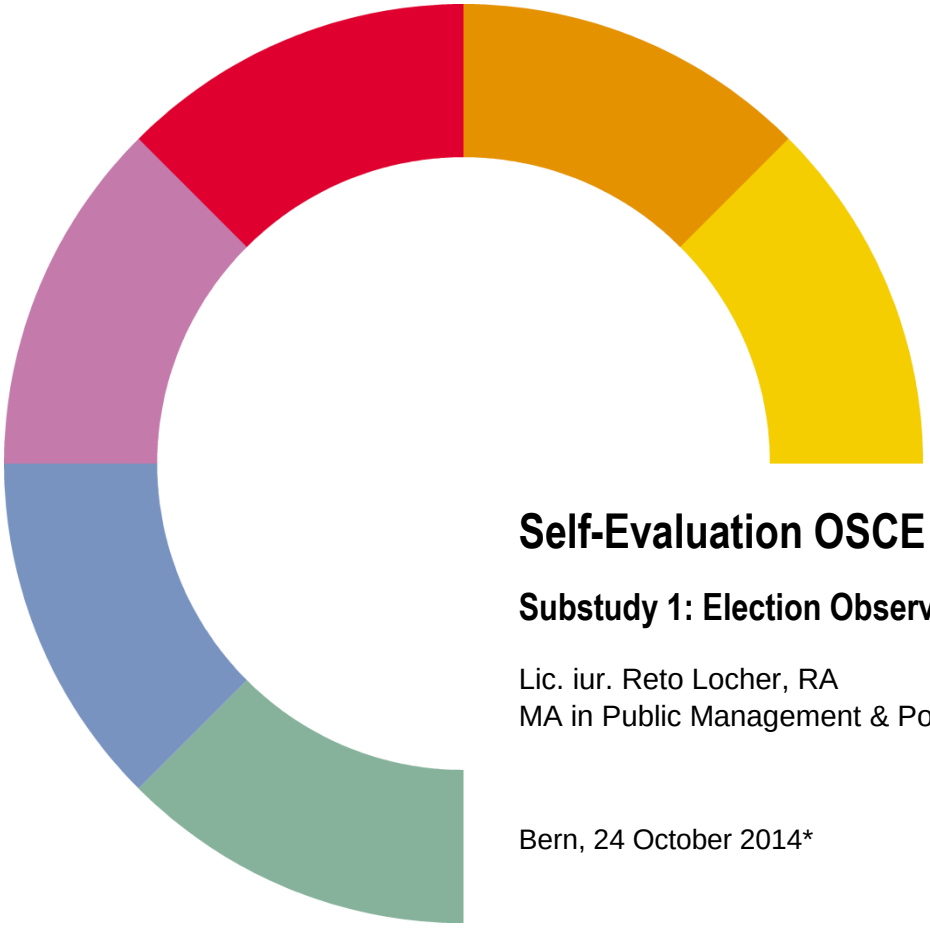
OSCE, Swiss Confederation Federal Assembly Elections 23 October 2011, OSCE/ODIHR Election Assessment Mission Report, Warsaw 30 January 2012, available at: http://www.-eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/osce.Par.0017.File.tmp/-120130_odgal0077%20final%20report.pdf (last checked on 2 April 2014).

OSCE, Swiss Confederation Federal Elections 21 October 2007, OSCE/ODIHR Election Assessment Mission Report, Warsaw 3 April 2008, available at: http://www.-osce.org/odihr/elections/switzerland/31390 (last checked on 25 October 2013).



Self-Evaluation OSCE Chairmanship

Substudy 1: Election Observation

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Bern, 24 October 2014*

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* This substudy was updated in October 2014 prior to its publication to include the latest developments in the field of election observation.

CONTENTS

LIST OF ABBREVIATIONS

CERD	International Convention on the Elimination of All Forms of Racial Discrimination 7 March 1966, 660 UNTS 195
CoE	Committee of Ministers of the Council of Europe
ECHR	European Convention on Human Rights of 4 November 1950; 213 UNTS 221, ETS No 5
GRECO	Group of States against Corruption
ICCPR	Convenant on Civil and Political Rights of 16 December 1966; 999 UNTS 171
NGO	Non-Governmental Organization
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights

I. OSCE STRUCTURE DEALING WITH ELECTION OBSERVATION

Election observation is a core activity and a flagship of the work of the Office for Democratic Institutions and Human Rights (ODIHR), created to promote the human dimension commitments of the Organization for Security and Co-operation in Europe (OSCE). In the landmark 1990 Copenhagen document, the member states of the OSCE declared "the will of the people, freely and fairly expressed through periodic and genuine elections is the basis of the authority and legitimacy of all government".[1] To put it in other words, democratic elections are "a key pillar of long-term security and stability".[2]

The purpose of an election observation undertaken by ODIHR is "to assess the extent to which an electoral process complies with OSCE commitments and other international standards for democratic elections, whether national legislation reflects these commitments and how it is implemented". In terms of its objective, the election observation has to identify "areas of improvement and to formulate concrete and operative recommendations that will support the efforts by OSCE participating States to conduct democratic elections in line with OSCE commitments".[3] Finally, the mandate of ODIHR to observe elections was first stated in paragraph 8 of the Copenhagen Document and later confirmed in other meetings of the organization.[4]

II. OSCE COMMITMENTS AND CRITERIAS FOR THE SELECTION OF THE ANALYSED RECOMMENDATIONS

1. Relevant OSCE committments: overview

The relevant OSCE commitments covering elections are contained in the Election Observation Handbook on p.17 ff. These commitments include:

– *Internal standards* of the OSCE (laid down in paras. 6-8 of the Copenhagen Document);[5]
– Legal obligations with regard to *Universal Human Rights Instruments* (for instance the UN Charter, the Universal Declaration of Human Rights [UDHR], the Convenant on Civil and Political Rights [ICCPR], as well as other UN human rights instruments, such as for example the Convention on the Elimination of All Forms of Racial Discrimination [CERD]);[6]
– Legal obligations with regard to *Regional Human Rights Instruments* (for instance the European Convention on Human Rights [ECHR])[7] and
– *Electoral good practice* (for instance the recommendations of the Committee of Ministers of the Council of Europe [CoE] and other election-related documents published by the European Commission for Democracy through Law [Venice Commission]).[8]

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1 Election Observation Handbook (6th edition), p. 7ff., available at http://www.osce.org/odihr/elections/68439?download=true (last checked on 5 March 2014) (hereinafter: Election Observation Handbook).

2 Ibid., p. 13.

3 Ibid., p. 14.

4 Ibid.

5 Ibid., 3.1, p. 17-19.

6 Ibid., para. 3.2, p. 19-20.

7 Ibid., para. 3.3, p. 20-21.

„The key principles laid down in the OSCE commitments in the context of election observation can be summed up" in the following words: "universal, equal, fair, secret, free, transparent and accountable".[9]

The relevant OSCE commitments in the context of OSCE election assessment missions concerning Switzerland will be specified in the analysis of the different recommendations discussed in this evaluation report.

2. Criteria for the selection of the analysed recommendations and relevant documents

During the period covered by this evaluation report, OSCE/ODIHR carried out two election assessment missions during the federal parliamentary elections 2007 and 2011. In its Election Assessment Mission Report 2007, OSCE/ODIHR treated different topics and in total made 15 recommendations to be implemented by the Swiss authorities. In July 2011, the Federal Chancellery published an Implementation Report with regard to these recommendations. In its Election Assessment Mission Report 2011, OSCE/ODIHR evaluated the federal parliamentary elections and in total made 23 recommendations to be implemented by the Swiss authorities. This evaluation report focuses on two issues particularly problematic for Switzerland with regard to the key principles of the OSCE commitments: the regulation of party and campaign financing and the right to vote of Swiss citizens residing abroad. Other issues treated by the EAM Report 2007 are less pertinent since they concern OSCE standards that are not fully applicable to the federalistic and therefore highly decentralized political system of Switzerland (see section III. 1.1 below).[10]

The most important documents for the following analysis are:

– the Election Assessment Mission Report of the Swiss Confederation Federal Elections 21 October 2007 of April 3 2008[11], containing observations and recommendations by the OSCE/ODIHR Election Assessment Mission (EAM) (hereinafter: EAM Report 2007);
– the Report of the Federal Chancellery Implementation of the Recommendations of the OSCE/-ODIHR 2007 Election Assessment Mission Report of July 2011 (hereinafter: Implementation Report)[12]; and
– the Final Report of the OSCE regarding the Swiss Confederation Federal Elections 2011 of 23 October 2011 (hereinafter: EAM Report 2011).[13]

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8 Ibid., para. 3.4, p. 21.

9 Ibid., p. 7.

10 As it will be presented in section III. 1.1 below, the Federal Law on Political Rights only sets out the minimal conditions for the federal elections, while detailed procedures and their implementation are left to the cantons (and communes). Therefore, for instance recommendation no. 4 of the EAM Report 2007, demanding the harmonization of rules with regard to campaign (e.g. concerning the conditions for the distribution of parties' leaflets), is difficult to implement, since this is a field of competence of the communes (see EAM Report 2007, p. 9). Another example is recommendation no. 10 of the EAM Report 2007 regarding the limitation of the risk of multiple voting by the introduction of "provisions that allow for tracking the issuing of provisional registration cards, possible ID checking of voters and consistent crossing off the voters from the voters list", since "the issuing of provisional registration cards is regulated by cantons". See EAM Report 2007, p. 18 and Implementation Report, p. 6.

11 http://www.osce.org/odihr/elections/switzerland/31390 (last checked on 7 March 2014).

12 http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/osce.Par.0018.File.tmp/Bericht-_Umsetzung_OSZE_Empfehlungen_zu_den_Eidg_Wahlen_vom_21102007_en.pdf (last checked on 24 7 March 2014).

III. PARTY AND CAMPAIGN FINANCING

1. Analysis, recommendations and relevance

1.1. Introduction

"Switzerland is a confederation in which the 26 cantons retain substantial authority over the conduct of elections. Relations between the federal government and the cantons operate under the principle of subsidiarity, with federal legislation setting out minimal conditions while detailed procedures and their implementation are left to the cantons".[14] Furthermore, in many cantons the communes are responsible for the election procedures and set the principles with regard to the election procedure. As a consequence, Switzerland has to be characterized as a "highly decentralized system" with a "broad range of cantonal [and communal] variations". (…) Federal legislation provides rules for elections to the National Council (…)", while "competence for legislation for the Council of States rest with the cantons".[15]

1.2. Analysis and recommendations

With regard to the party campaign financing in Switzerland, the EAM Report 2007 states that "there are no legal provisions on party and campaign financing at federal level", and that "parties can receive unlimited funds from any source without any requirements of disclosure".[16] Moreover, the report notes that many interlocutors indicated that the lack of rules in this field "allows powerful groups and individuals to influence elections, and in particular referenda on question that concern them".[17]

In the field of party and campaign financing, the following OSCE commitments are relevant: First of all, Decision No. 5/03 of the Maastricht Ministerial Council 2003[18] states that there is a need for transparency of election procedures. Furthermore, the Council of Europe's Commission for Democracy and Law (Venice Commission), with whom ODHIR regularly cooperates,[19] points out in its Guidelines and Report on the Financing of Political Parties[20] that "the transparency of private financing of each party should be guaranteed" (para. 7) and that "the transparency of electoral expenses should be achieved through the publication of campaign accounts" (para. 12). Additionally, according to its Code of Conduct for Elections, the Venice Commission notes that "political parties, candidates and election campaign funding must be transparent (para. 2.3 dd). Moreover, in its Guidelines on Political Party Regulation of 2010[21], the Venice Commission stated different principles concerning the funding of political parties. These principles include restrictions and limits on private contributions, spending limits for campaigns, requirements that increase the

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13 http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/osce.Par.0017.File.tmp/-120130_odgal0077%20final%20report.pdf (last checked on 7 March 2014).

14 EAM Report 2011, p. 1.

15 EAM Report 2007, p. 1.

16 Ibid., p. 6.

17 Ibid.

18 Available at http://www.osce.org/mc/40533 (last checked on 20 February 2014), p. 81.

19 See Election Observation Handbook, p. 16, 50 and 98.

20 Available at http://www.osce.org/odihr/37843 (last checked on 20 February 2014).

21 Available at http://www.osce.org/odihr/77812 (last checked on 20 February 2014).

transparency of party funding (…) and independent regulatory mechanisms and appropriate sanctions for legal violations.[22]

Furthermore, Switzerland has ratified the Criminal Law Convention on Corruption adopted by the Council of Europe[23], whose implementation includes the duty to introduce legal measures regarding the party and campaign financing amongst others.[24] Finally, according to the UN Convention against Corruption[25], "each State Party shall also consider taking appropriate legislative and administrative measures (…) to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties" (Art. 7 para. 3).

Referencing these commitments, the EAM Report 2007 recommends Switzerland to consider the introduction of an obligation for disclosure of parties' and political associations' final income, sources and expenditures.[26]

1.3. Relevance

As mentioned above, the lack of rules regarding funding of political parties and campaigns makes it difficult for voters to know which interest groups are supporting a political party or a certain campaign. Therefore, they do not have all the information necessary for the free formation of opinion, a fundamental right in a democratic society. Furthermore, the principle of equal opportunities between different parties and candidates can be affected by the explosion of campaign-costs. Thus, party and campaign financing is of high relevance for the functioning of a democratic society, no matter how a state is structured.[27]

2. Informations provided by Swiss NGOs in the field of Election Observation

Several Swiss NGOs working on party and campaign financing provided the SCHR with information with regard to this issue. The major NGO covering this issue is the Swiss branch of Transparency International, "Transparency International Schweiz" (hereinafter: TI Switzerland). TI Switzerland states its position in a paper entitled "Politikfinanzierung in der Schweiz".[28] In summary, it calls for the public disclosure of donations to candidates and parties as well as for initiative/referendum committees, a general limit for donations to parties as well as for election and

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22 Ibid., p. 67, para. 160.

23 Criminal Law Convention on Corruption of 27 January 1999, entered into force for Switzerland on 1 July 2006 (SR 0.311.55).

24 Transparency of Political Party Funding is regulated by "articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and election campaigns and – more generally – Guiding Principle 15 on financing of political parties and election campaigns", see the GRECO, Third Evaluation Round, Evaluation Report on Switzerland Transparency of Political Party Funding (Theme II) of 21 October 2011, available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/-GrecoEval3%282011%294_Switzerland_Two_EN.pdf (last checked on 12 March 2014).

25 UN Convention against Corruption of 31 October 2003, entered into force for Switzerland on 24 October 2009 (SR 0.311.56).

26 EAM Report 2007, p. 7, recommendation 2.

27 See the informations on the webside of human rights, http://www.humanrights.ch/de/Schweiz/Inneres/-Innenpolitik/idart_9026-content.html (last checked on 5 March 2014), „Beeinträchtigung der freien Meinungsbildung, der politischen Rechte und der Chancengleichheit".

28 http://www.transparency.ch/de/PDF_files/Dossiers/Dossier_Politikfinanzierung.pdf (last checked on 27 February 2014).

referendum/initiative committees, transparency regarding the accounting of national and cantonal parties as well as election and referendum/initiative committees. These principles should be monitored by an independent body.[29] The "Schweizerischer Friedensrat" principally supports the position of TI Switzerland and demands transparency regarding the financing of parties and election campaigns as well as of referendum/initiative committees, notably on the federal level.

3. Achievements and remaining gaps

3.1. Implementation Report

The Implementation Report expresses Switzerland's position on the recommendation of the EAM Report 2007 regarding party and campaign financing. The report, dating from June 2011, states that, compared to 2007, "no new legal regulation at federal level of the issue of party and election financing" has been introduced. Moreover, the report notes "that transparency should also extend to referendum/initiative campaigns and respective committees" what "further complicates regulation efforts". Although several parliamentary initiatives tried to introduce regulation on party financing, neither of them has reached the necessary majority in the federal parliament.[30] Moreover, several other "parliamentary interventions have been launched and in part dealt with recently.[31] On the other hand, on cantonal level, "the cantons of Geneva and Ticino have pioneered by introducing rules on transparency of party financing". Furthermore, the report refers to an evaluation of the Group of states against Corruption (GRECO) that was taking place at the time. The results of this evaluation were expected by October/November 2011. Finally, the report notes that the Swiss authorities take into account ODIHR Guidelines with regard to the funding of political parties[32] and consider "the launch of a tool to be used by parties on a voluntary basis for financing transparency purposes".[33]

3.2. Assessment of the Implementation Report

In summary, since 2007 no progress regarding the introduction of regulations concerning party and campaign financing has been achieved on the federal level. Switzerland has obviously accepted that the lack of rules in this issue is problematic in the light of the relevant OSCE commitments and further provisions in this field. While certain members of parliament tried to push the issue, the government remained passive. In its reply to a parliamentary intervention regarding the disclosure of campaign financing[34], the Federal Concil resumes its position on this topic an, reit-

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29 Ibid., p. 16.

30 Implementation Report, p. 2, para 2.2. Footnote 6 refers to several parliamentary initiatives with regard to the introduction of regulations on party financing.

31 Ibid., p. 3, referring to the parliamentary interventions mentioned in footnote 8.

32 The report refers to the guidelines on political party regulation by OSCEODIHR and Venice Commission (2010), chapter XII „Funding of political parties". See p. 3, footnote 9.

33 Ibid.

34 Reply of the Federal Council of 16 September 2011 to the parliamentary intervention Motion der Staatspolitischen Kommission 11.3467 ''Offenlegung der Finanzierungsquellen von Abstimmungskampagnen''of 9 May 2011, available at http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20113467 (last checked on 12 March 2014).

erating his arguments stated on other occasions.[35] The Federal Council argues that due to the peculiarities of the Swiss political system, the introduction of disclosure rules is difficult: votes are taking place very often in Switzerland, and as people can vote by post, ballots are open from one up to four weeks, what makes it difficult to determine the relevant point in time with regard to the amount that has been used to finance a campaign. A further challenge is the identification of the different actors involved in a campaign (not only political parties and initiative/referendum committees, but also ad-hoc interest groups and individuals are involved). Therefore, the identification of these, actors would in the opinion of the Federal Council, only be possible with great effort. In addition, the introduction of legal obligations to disclose campagn financing would endanger the system of direct democracy, since the willingness of private donors to engage financially in politics would be questioned. For these reasons, the Federal Councel refuses the introduction of legal measures regarding the disclosure of campaing financing because of the difficulties in the implementation, the enforceability and sanctions with regard to such measures.

Allthough the Federal Council stated that he would take into account the recommendations of GRECOs Third Evaluation Round[36] and those of the OSCE/ODIHR EAM Mission 2011 with regard to the introduction of possible legal measures in the field of campaign and party financing[37], the Swiss government has not undertaken any active steps in order to improve the situation and comply with OSCE commitments and international good practice. In other words, there is no pending legal proposal launched by the Swiss government to improve the actual deficits. The lack of rules regarding the party and campaign financing in Switzerland is clearly contrary to the OSCE commitments in this field: Even though not legally binding, the rules and good practice established by the Venice Commission (see section III. 1 above) are common international good practice. Furthermore, Switzerland has ratified the UN Convention against Corruption, containing rules concerning transparency of candidature funding as well as of the funding of political parties.[38] Allthough the Federal Council made clear in his message to the Convention that it will be difficult to draft and adopt a law with regard to these issues, referring to the peculiarities of the Swiss political system such as direct democracy, federalism, and the “Milizsystem” amongs others[39], its complete inactivity in this matter is in our view contrary to the spirit, the purpose and the aim of the Convention: The total lack of rules concerning party and campaign financing can promote corruption, and according to the Convention, Switzerland is free to adopt laws compatible and in line with its political system.

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35 As for instance in its reply to the parlamentary intervention Motion Chopard-Acklin 11.3116 “Mehr Transparenz in der Parteienfinanzierung” of 16 March 2011, available at http://www.parlament.ch/d/suche/seiten/-geschaefte.aspx?gesch_id=20113116 (last checked on 13 March 2014) and in its reply to the parliamentary intervention Interpellation Tschümperlin 10.3900 “Finanzierung von Abstimmungskampagnen” of 1 December 2010, available at http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20103900 (last checked on 13 March 2014).

36 See http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3%282011%294_Switzerland_-One_EN.pdf (last checked on 27 February 2014) [hereinafter: GRECOs Third Evaluation Round] and section III. 3.3.2 below.

37 See the reply of the Federal Council to the parliamentary intervention 11.3467 mentioned in footnote 34.

38 According to article 7 para. 2. “each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and electon to public office”. Moreover, para. 3 states that „each State Party shall consider taking appropriate legislative and administravite measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties”.

39 BBL 2007 7349, 7367.

3.3. Additional sources of information

3.3.1. EAM Report 2011

The EAM Report 2011 reiterates its position stated in the EAM Report 2007, noting that in Switzerland there are "no limits on campaign expenditures and no disclosure requirements", that "parties can receive unlimited funds from any source, including foreign donors, corporations, and government contractors". According to interlocutors, "undisclosed funding may allow powerful interest groups and individuals to influence elections and, in particular, referendums on questions that concern them". Moreover, the report states that "most parties have expressed their reservations about publishing the names of their donors" and assert "that privacy is a central value in Swiss society and have concerns that publishing donors' names would discourage contributors". On the other hand, "there was an active debate on the merits of regulating campaign finance disclosure, income, and expenditure". Finally, the report notes that "several initiatives to introduce regulation of party and campaign financing at federal level have recently been undertaken, but none has been successful".[40]

Not suprisingly, the recommendations of the EAM Report 2011 in summary reiterate the recommendations of the EAM Report 2007, stating that "the authorities should consider introducing an obligation for public disclosure of candidate and party campaign receipts, sources, and expenditures". Furthermore, "authorities should consider whether such requirements should extend to interest groups making political donations or expenditures and to referenda and popular initiatives as well as elections". The goal of the implementation of these recommendations is compliance with international good practice, increased electoral transparency and better information of voters.[41] The Swiss government has not yet issued a report on the implementation of these recommendations.

3.3.2. Report of the Group of States against Corruption (GRECO)

In 2006, Switzerland has ratified the Criminal Law Convention on Corruption in 2006. The implementation of this convention includes the duty to introduce legal measures regarding the party and campaign financing amongst others.[42] The Group of States against Corruption (GRECO), dealing with corruption issues within the Council of Europe, analyzed the implementation of Switzerland's obligations, regarding the funding of political parties amongst others and recommended to improve transparency in this field in its Third Evaluation Round 2011. GRECO recommended Switzerland to implement 6 measures to tackle the existing deficits.[43] These measures include

– the introduction of "accounting rules for political parties and election campaigns that provide for full and appropriate accounts to be kept" and further measures in this context[44];
– the introduction of "a general obligation for political parties and candidates to elections to provide information on all donations received, including donations in kind, above a certain size" as

40 EAM Report 2011, p. 9f.

41 Ibid., p. 10.

42 See footnote 24 above.

43 GRECOs Third Evaluation Round, para. 65

44 Ibid., para. 65 i.

well as the introduction of "a general ban on donations from persons or bodies that fail to reveal their identity to the political party or candidate concerned[45];
– "to seek ways to increase the transparency of the financing of political parties and election campaigns by third parties[46];
– to ensure that, as far as possible, independent audits are carried out on political parties subjects to the obligation to maintain accounts and on election campaigns accounts;[47]
– to ensure the effective and independent supervision of the financing of political parties, and election campaigns, in accordance with Article 14 of Council of Europe Reccomendation Rec(2003)4 on common rules against corruption in the funding of political parties and election campaigns;[48] and
– that future rules on the financing of political parties and election campaigns be accompanied by effective, proportionate and dissuasive sanctions.[49]

In a meeting with a delegation of GRECO in April 2013, the Swiss government explained the lack of efforts made by the Swiss authorities with regard to these measures with the peculiarities of the Swiss political system, i.e. the system of direct democracy, the federal organization and the traditional funding of political parties by private donors, linked to the Swiss "Milizsystem".[50] GRECO reviewed the effort of Switzerland with regard to the implementation of its recommendations and published a report in October 2013, noting that the measures taken by the Swiss authorities are not sufficient at all. Amongst others, the report states that the peculiarities of the Swiss system are no obstacle to comply with the recommendations made by GRECO. Therefore, as a next step, the Swiss authorities have to provide another report regarding the implementation of GRECO's recommendations by April 2014.[51]

3.4. Comments on the EAM Report 2011 and the report of GRECO

As already mentioned in section III. 3.3.1, the Swiss government has not issued a report on the implementation of the recommendations made in the EAM Report 2011, as the Swiss Government has not made any efforts to adapt the recommendations made in the EAM Report 2011. With regard to the findings of the GRECO report, the Swiss government seems not to be willing to comply with its commitments deriving from the ratification of the Criminal Law Convention on Corruption and its implementation mechanisms. In this regard, GRECO does not accept the reference of the Swiss government to the peculiarities of the Swiss political system as a justification for the incompliance of Switzerland regarding GRECO's recommendations.

45 Ibid., para 65. ii. Cantons are invited to adopt such measures as well.

46 Ibid., para 65. iii. Cantonal authorities are invited to consider these matters.

47 Ibid., para. 65 iv. Cantons are invited to do the same.

48 Ibid., para. 65 v. Cantons are invited to do the same.

49 Ibid., para. 65 vi.

50 http://www.news.admin.ch/message/index.html?lang=de&msg-id=48464 (last checked on 27 February 2014).

51 On the website of humanrights.ch, there are comprehensive informations on this issue, http://www.-humanrights.ch/de/Schweiz/Inneres/Innenpolitik/idart_9026-content.html (last checked on 27 February 2014).

IV. THE RIGHT TO VOTE OF SWISS CITIZENS RESIDING ABROAD

1. Analysis, recommendations and relevance

1.1. Introduction

The right to vote of Swiss citizens residing abroad derives from the principle of universal suffrage, one of the "key principles enshrined in the OSCE commitments and other international standards to which particular attention should be paid in election-related activities".[52] This principle "requires that all eligible citizens should be given the right to vote and to stand for office. (…) In line with good international practice, enfranchisement of voters living abroad could also be considered".[53] In general, the Swiss electoral procedures "allow voters a choice as to where and when they cast their vote, including in person, by post or during an early voting period in advance the election day".[54] The recommendations that will subsequently be analysed deal with the issue of postal voting with the focus on the deadlines regarding the distribution of postal voting material to registered voters living abroad. These deadlines may affect the factual possibility of Swiss citizens living abroad to exercise their right to vote.

1.2. Observation and recommendation on postal voting

As already mentioned, Swiss federal legislation only provides rules for elections to the National Council.[55] In this regard, "the Federal Law on Political Rights requires the cantons to deliver the postal voting materials to registered voters by the latest ten days before election day".[56] Cantons can provide longer deadlines and "communes are responsible for posting ballot packets".[57]

The EAM Report 2007 notes that "the dates by which the cantons and communes send the voting materials to the voters are inconsistent throughout the Federation" and "different voters may have from ten to 30 days or more to consider their voting option. (…) This should be addressed in order to provide equal opportunities for all citizens who vote in the federal elections".[58]

1.3. Observation and recommendation on out of country voting

The Federal Law on the Political Rights of Swiss citizens residing abroad[59] grants Swiss citizens residing abroad its political rights. They need to be "registered with a Swiss consulate abroad, can register on the voter list in their commune of origin or a commune in which they have lived in the past. They can vote by mail, or cast their ballot in person".[60] The communes are responsible

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52 Election Observation Handbook, p. 21f.

53 Ibid., p. 23.

54 EAM Report 2007, p. 2.

55 The competence for legislation for the Council of States rest with the cantons, see para III. 1.1 above.

56 Art. 33 para. 2 of the Federal Law on Political Rights of 17 December 1976 (SR 161.1); see EAM Report 2007, p. 16.

57 Ibid.

58 Ibid, p. 17.

59 Federal Law of 19 December 1975 on the Political Rights of Swiss citizens residing abroad (SR 161.5).

60 EAM Report 2007, p. 20.

to “mail the postal ballots to the Swiss registered voters living abroad using the regular mail by the federal deadline of ten days prior to election day. Swiss consulates are not involved either in the delivery or recovery of the ballots. As an alternative to the postal voting and especially as an opportunity to “increase the access of voters to the voting process” (…), “the Swiss Abroad organization supports the consideration of internet voting for Swiss citizens living abroad “. Since it can also pose a risk factor with regard to the integrity of elections, it “should only be considered based on broad consultation and consensus”.[61]

Based on these conditions the OSCE/ODIHR EAM considers the ten day deadline as having “the potential to disfranchise the Swiss voters living abroad, as they depend on the respective postal system in their country of residence to receive the ballots in time. A longer period could be beneficial and possibly increase the turnout of this category of Swiss citizens. A solution could be to consider other methods and voting channels which may include the Swiss consulates to be involved in a swift delivery of ballots back to Switzerland”.[62]

2. Achievements and remaining gaps

2.1. Implementation Report

In its Implementation Report, the Federal Chancellery comments on the recommendations of the EAM Report 2007 regarding timely reception of ballots by out of country voters.

With regard to the recommendation on postal voting, the Federal Chancellery acknowledges that the 10 days deadline to send the election material to voters is relatively short and problematic with regard to the right to vote for Swiss citizens residing abroad. The Federal Chancellery explains the short deadline, that “has so far been considered to be sufficient, expect for Swiss abroad”, with “the complexity of the preparation and print of ballot lists”.[63] It further notes that “the cantons can adopt longer deadlines” and that “a package of “post” measures has been adopted and will be introduced by cantons to improve situation for Swiss abroad.” The Conference of Chancellors, “an established platform regrouping federal and cantonal Chancellors”, has discussed and adapted this package which is directed and coordinated by the canton of Aargau. *Regarding the issue of internet voting*, the report notes that in the federal elections 2011, 22’000 Swiss citizens residing abroad will for the first time have the opportunity of “e-voting”. Moreover, for the elections 2015, “the great majority should have access to the e-voting channel”. The Federal Chancellery estimates that “e-voting clearly improves the chances of Swiss abroad to participate in future federal elections”.[64]

With regard to the recommendation on out of country voting (section 1.3 above), the Federal Chancellery generally refers to its reply on the recommendations on postal voting (see above). Concerning the recommendation to consider including the Swiss consulates to be involved in a swift delivery of ballots back to Switzerland, “voting at the consulates has been examined and judged unfit mainly because it actually delays delivery of ballots back to Switzerland”.[65] Additionally, “voting rights are linked to a commune/canton and several types of ballots (local, cantonal,

61 Ibid.

62 Ibid.

63 Implementation Report, p. 5, para 2.8.

64 Ibid.

65 Ibid., p. 7, para 2.13.

federal) could take place the same day". Therefore, depending on "the commune and canton where Swiss abroad exercise their political rights, the consulate will have to deliver ballots back to potentially 2'700 communes and 27 cantons which is impossible". Instead of that, "e-voting (…) has been introduced to facilitate ballot returning for Swiss abroad".[66] For the elections in 2011, the Federal Council "authorized four cantons to offer internet voting to some 22'000 Swiss abroad", with the aim of offering internet voting "to almost all registered Swiss abroad at the October 2015 elections". Internet voting was first offered for federal votes in 2004 and since 2008, Swiss citizens residing abroad can benefit from it. Internet voting is offered by 13 cantons now and "almost half of all registered Swiss abroad could benefit from Internet voting at the last federal vote (February 2011).[67]

2.2. Assessment of the Implementation Report

Since the two recommendations are connected with each other, its implementation will be assessed together. First of all, it can be ascertained that the Swiss government has accepted the deficits noted in the EAM Report 2007, responding on all the issues raised. *With regard to the "package of 'post' measures"* to improve the problems resulting from the short deadlines to send the election materials to voters, the impact of these measures is difficult to asses in the context of this evaluation since we do not dispose of detailed informations about the measures taken by the Conference of Chancellors mentioned in section 2.1 above. The reasons for the minimal deadline of 10 days, that is to say the complexity of the preparation and print of ballot lists in the context of the highly decentralized Swiss political system, with the cantons and communes that are mainly responsible for the enforcement of the election processes, are not decisive: these problems could easily be solved by introducing an earlier deadline for the notification of candidatures, so that a longer deadline for the distribution of the postal voting materials – at least for Swiss abroad – could be introduced. Since the short deadline can be a risk for Swiss citizens residing abroad to exercise their right to vote, it is important to undertake all possible efforts to optimize the current system. The reasons mentioned in the Implementation Report regarding the ineligibility of the inclusion of Swiss consulates in the voting process seems plausible – this option was obviously seriously considered and judged by the Swiss authorities. Therefore, as it was already stated by the Federal Chancellery, the introduction and expansion of internet voting is in our view the best option to facilitate ballot returning for Swiss citizens living abroad and to generally make the exercise of the right to vote for Swiss citizens residing abroad more attractive. Hence, the efforts of the Swiss authorities in this regard and the plans to expand internet voting for all Swiss citizens residing abroad for the elections 2015 have to be appreciated.

2.3. EAM Report 2011

As in the EAM Report 2007, the EAM Report 2011 also deals with the issue of the right to vote of Swiss citizens residing abroad. First of all, the report treats the question of the right to vote for citizens residing abroad *with regard to the Council of States* which is in the competence of the

66 Ibid.

67 Ibid.

cantons. According to the report, only 11 cantons provide this right for Swiss citizens living abroad.[68]

Moreover, the report deals with *the issue of postal voting*, and reiterates its critique regarding the short deadline for the delivery of the ballot papers to the voters at least ten days before election day.[69] *Regarding the "package of 'post' measures"* mentioned in the Implementation Report[70], the "Federal Chancellery staff advised the OSCE/ODIHR EAM that due to issues identified in 2007, they have worked closely with the federal postal service to improve the delivery and return of postal votes to ensure that voters can be confident that their packs are received in time to be counted". Nevertheless, OSCE/ODIHR EAM was informed by the Council of the Swiss Abroad "that it had received some complaints from Swiss voters abroad who received their ballots late". Therefore, OSCE/ODIHR EAM recommends to Switzerland to consider the introduction of a longer lead time for the delivery of ballot packs for Swiss citizens living abroad".[71]

Finally, the report deals with *the issue of internet voting,* noting and partly repeating repeats facts about the development of internet voting in Switzerland in recent years. Amongst others, it is stated that "internet voting is also viewed as a means of facilitating voting for Swiss citizens living abroad, who often face difficulties with postal voting".[72] In general, the OSCE/ODIHR EAM considers "the careful, limited, and step-by-step manner in which Switzerland is introducing and testing internet voting (…) [as] a good practice, both ensuring the integrity of the systems used and build public confidence in the process. In general, the OSCE/ODIHR EAM found the internet voting trials to work reliable and enjoy wide public trust".[73] On the other hand, the report lists several deficits with regard to legal and technical issues. Concerning *legal provisions,* OSCE/ODIHR EAM recommends Switzerland to further detail regulations on internet voting and to develop a formal procedure on how to dispose of electronically stored personal data "in order to ensure data protection standards are adhered".[74] On the issue of *internet voting process*, the report recommends Switzerland several measures concerning the improvement of the security of the voting process.[75] Regarding *the management* of internet voting, the report recommends Switzerland that, "as a good practice, all cantonal authorities should consider directly employing a core of technical staff to ensure adequate supervision and control of their internet voting system, and to avoid excessive reliance on external operations". In addition, "it is recommended that all cantons adhere to good practice when handling cryptographic material (…)".[76] With regard to *the issue of testing and certification,* the report recommends Switzerland to hold mandatory end-to end tests of all internet voting systems before each election "to ensure compliance with legislation, guarantee system security and accuracy, and to protect the secrecy of vote".[77] Furthermore, the estab-

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68 "There are an estimated 695'000 Swiss citizens living abroad, amounting to almost ten per cent of the electorate. Of these, 125'567 (18.1 per cent) were registered to vote". EAM Report 2011, p. 5.

69 Even though the materials are generally sent out sooner in practice. Ibid., p. 13.

70 See para. 2.1 above.

71 "This should, however, be considered in conjunction with other election deadlines, including those for candidate registration". EAM Report 2011, p. 13.

72 Ibid., p. 15.

73 Ibid., p. 16.

74 Ibid.

75 See ibid., p. 17f.

76 For details of this recommendation, see ibid., on the end of p. 18.

77 Ibid., p. 19.

lishment of an independent body to certify all systems, including through independent, third-party testing, is recommended "in order to meet legal requirements and to ensure the integrity of internet voting systems". Moreover, in line with international good practice, the OSCE/ODIHR EAM recommends the Swiss authorities "that evaluations of internet voting be carried out by an independent body and that the reports are made public" .[78] Finally, *with regard to oversight mechanisms,* in order to maintain the high public confidence in internet voting, the OSCE/ODIHR EAM recommends the Swiss authorities to make further efforts to "exchange good practice amongst cantons, explain technical and operational elements, and ensure appropriate safeguards for transparency and accountability. In this regard, "the Federal Chancellery, possibly through the internet voting task force, could take a leading role in communication information to political parties, civil society, and the general public".[79]

2.4. Comment on the EAM Report 2011

With regard to the OSCE/ODIHR EAM recommendations to introduce a longer deadline to send the election material to voters, the Swiss Parliament, on 26 September 2014, adopted several changes of the Federal Law on Political Rights, including an earlier deadline for the noticification of candidatures. This allows to distribute postal voting material at least three weeks before election day, a measure that will help Swiss citizens living abroad to exercise their right to vote in time.[80] The new provisions are expected to enter into force after the referendum deadline (15 January 2015) has expired.

At the same time, the efforts of the Swiss authorities with regard to the introduction, expansion and testing of internet voting have to be appreciated. This process is, especially with regard to diverse technical and organizational issues, is a big challenge and Swiss authorities are obviously on the right path in this matter, in spite of the recommendations with regard to legal and technical issues mentioned above. In this context, the Federal Council introduced a new legal basis concerning the conditions for a further expansion of internet voting that entered into force on 15 January 2014.[81] According to it, the expansion of internet voting can only be realized if the safety of the voting process is guaranteed. In particular, the principle of verifiability is a core element of the new measures: for instance, voters are able to control if their vote has reached the system without manipulation. If these measures already fully comply with the recommendations made in the EAM Report 2011 can, due the highly technical questions in this context, not be analysed indepth in the framework of this evaluation report. Nevertheless, it can be noted that Swiss authorities are taking the security issues in this matter very seriously and take efforts to tackle the challenging matters in the context of internet voting.

78 Ibid.

79 Ibid., p. 20.

80 Article 33 para. 2 of the revised Federal Law on Political Rights, see BBL 2013 9217 as well as http://www.admin.ch/opc/de/federal-gazette/2014/7271.pdf (last checked on 19 October 2014).

81 Verordnung vom 24. Mai 1978 über die politischen Rechte (VPR; SR 161.11). See https://www.news.admin.ch/message/index.html?lang=de&msg-id=51407 (last checked on 14 March 2014).

V. CONCLUSIONS

The evaluation report regarding Election Observation focuses on two issues particularly problematic for Switzerland with regard to the key principles of the OSCE commitments: the regulation of party and campaign financing and the right to vote of Swiss citizens residing abroad.

In the field of party and campaign financing, different internal standards of the OSCE – even if legally not binding – as well as universal and regional human rights instruments and electoral good practice require Switzerland to regulate these issues. In addition, Switzerland has ratified the Criminal Law Convention of the Council of Europe as well as the UN Convention on Corruption, both recommending the implementation of different measures with regard to the party and campaign financing. The OSCE/ODIHR Election Assessment Mission Report 2007 notes that "there are no legal provisions on party and campaign financing at federal level", and therefore "parties can receive unlimited funds from any source without any requirement of disclosure".[82] Under reference to Switzerland's commitments in this field, the EAM Report 2007 recommended the Swiss authorities to consider the introduction of an obligation of disclosure of parties' and political associations' final income, sources and expenditures. This view is shared by informations provides by Swiss NGOs, namely Transparency International Switzerland, who calls for the adoption of different measures, in particular transparency in the funding of candidates, parties and referendum/initiative committees. While different parliamentary interventions tried to push the issue, the Swiss government has not undertaken any steps to improve the current situation to date. On several occasions, the Swiss government explained its inactivity, arguing that due to the particularities of the Swiss political system, the introduction of the measures required by the OSCE, but also by the Group of States against Corruption GRECO that deals with corruption issues within the Council of Europe, or in the context of the implementation the UN Convention against Corruption, is difficult. Therby, it refered to the numerous votes taking place at federal level and the difficulties to identify the relevant actors involved in a campaining, what would only be possible with a great effort. On the other hand it refered to the system of direct democracy that would possibly be endangered by the introduction of legal obligations to disclose campaign financing, since the willingness of private donors to engage financially in politics would be questioned. The arguments of the Swiss government have been noted by the OSCE/ODIHR Election Assessment Mission as well as in the context of the Third Evalaution Round of GRECO, but were obviously not assessed relevant with regard to the implementation of the measures urged of Switzerland by these organizations. Therefore, and since no new legal regulation at federal level regarding the issue of party and election financing has been introduced to date, the OSCE/ODIHR Election Assessment Report 2011 in summary reiterates its recommendations made in its report 2007, stating that "the authorities should consider introducing an obligation for public disclosure of candidate and party campaign receipts, sources, and expenditures" and "whether such requirements should extend to interest groups making political donations or expenditures and to referenda and popular initiatives as well as elections" [83]. GRECO also insists on its recommendations made in the framework of the Third Evalaution Round: Since Switzerland has not implemented the relevant measures sufficiently, it has to provide another report in this regard to GRECO by April 2014. In summary, even though the Swiss government has obviously accepted that the lack of rules in this field is problematic in the light of the relevant commitments

82 EAM Report 2007, p. 6.

83 EAM Report 2011, p. 10.

regarding party and campaign financing, it is not willing to adapt the relevant measures to comply with its obligations.

We recommend to the Swiss government to take concrete steps to adopt and implement the measures recommended by the OSCE/ODIHR EAM Reports and by GRECOs Third Evaluation Round in order to fully comply with international good practice in the field of party and campaign financing. As a first step, the Swiss government should set up a group of experts to identify a way to implement these measures, taking into account the specific peculiarities of the Swiss political system. The high level of intransparency regarding the influence of interest groups in the political process risks to undermine the proper functioning of Swiss democracy in the future and carries a significant potential for corruption.

With regard to the right to vote of Swiss citizens living abroad, Swiss citzens living abroad are granted the right to vote for the National Council if they are registered as voters at a Swiss consulate. The competence for legislation on elections for the Council of States rests with the cantons. The difficulties in this field are connected with the procedures of postal voting: The Federal Law on Political Rights requires cantons to send the postal voting materials to registered voters by the latest ten days before election day, and cantons can provide longer deadlines. According to the OSCE/ODIHR Election Assessment Report 2007, this can result in inequalities and should be addressed. Furthermore, the report estimates this short deadline as problematic, as the ballots may not be delivered to voters in time since this depends on the respective postal system in the voter's country of residence.[84] In its Implementation Report, the Federal Chancellery acknowledges that the ten days deadline to send the election material to voters is relatively short for Swiss citizens living abroad. The problem is tackled with several "postal measures" established by the Conference of Chancellors. Furthermore, the inclusion of Swiss consulates, as proposed in the Election Assessment Report 2007, was tested but judged unfit. Finally, the EAM Report 2011 reiterates its recommendation to introduce a longer dead line time for the delivery of ballot packs for Swiss citizens living abroad. In the meantime, Switzerland has implemented this recommendation. On 26 September 2014, the Swiss Parliament adopted several changes of the Federal Law on Political Rights, including an earlier deadline for the noticification of candidatures which will allow to distribute postal voting material at least three weeks before election day. This modification has to be welcomed as it will facilitate timely exercise of the right to vote by Swiss citizens living abroad to exercise their right to vote. The new provisions are expected to enter in to force after the referendum deadline (15 January 2015).

As an alternative to postal voting, and in order to facilitate voting for Swiss citizens living abroad, Swiss authorities introduced and expanded internet voting in recent years. The OSCE/ODIHR Election Assessment Report 2007 notes that this form of voting "should be only considered based on a broad consultation on consensus" since it can pose a potential risk factor to the integrity of elections.[85] The Implementation Report of the Federal Chancellery notes that in the elections 2011, 22'000 Swiss citizens living abroad had the opportunity of "e-voting", and for the elections 2015, the great majority should have access to internet voting. In its Election Assessment Report 2011, OSCE/ODIHR notes that, in general, the efforts made by the Swiss authorities with regard to the introduction and expansion of internet voting are appreciated. Nevertheless, the report lists several deficits regarding legal and technical issues that still have to be improved by the Swiss authorities. The introduction of a new legal basis with regard to the further expansion of internet

84 EMA Report 2007, p. 20.

85 Ibid.

voting, entered into force on 15 Januar 2014, is certainly a step in the right direction. But such expansions can only be conducted seriously if increased security conditions are guaranteed. In this regard, it is commendable that Swiss authorities are taking the security challenges in this field very seriously and take efforts to tackle the problems in this field. Due to the highly technical questions in the context of internet voting, it can not be fully assessed in the framework of this evaluation report whether the measures taken by the Swiss authorities already fully comply with the recommendations made in the Election Assessment Report 2011.

We recommend that Swiss authorities pay attention to ensure that the technical standards required by the OSCE/ODIHR Election Assessment Report 2011 in the field of internet voting are fully implemented when the new law on the expansion of internet voting will be applied.

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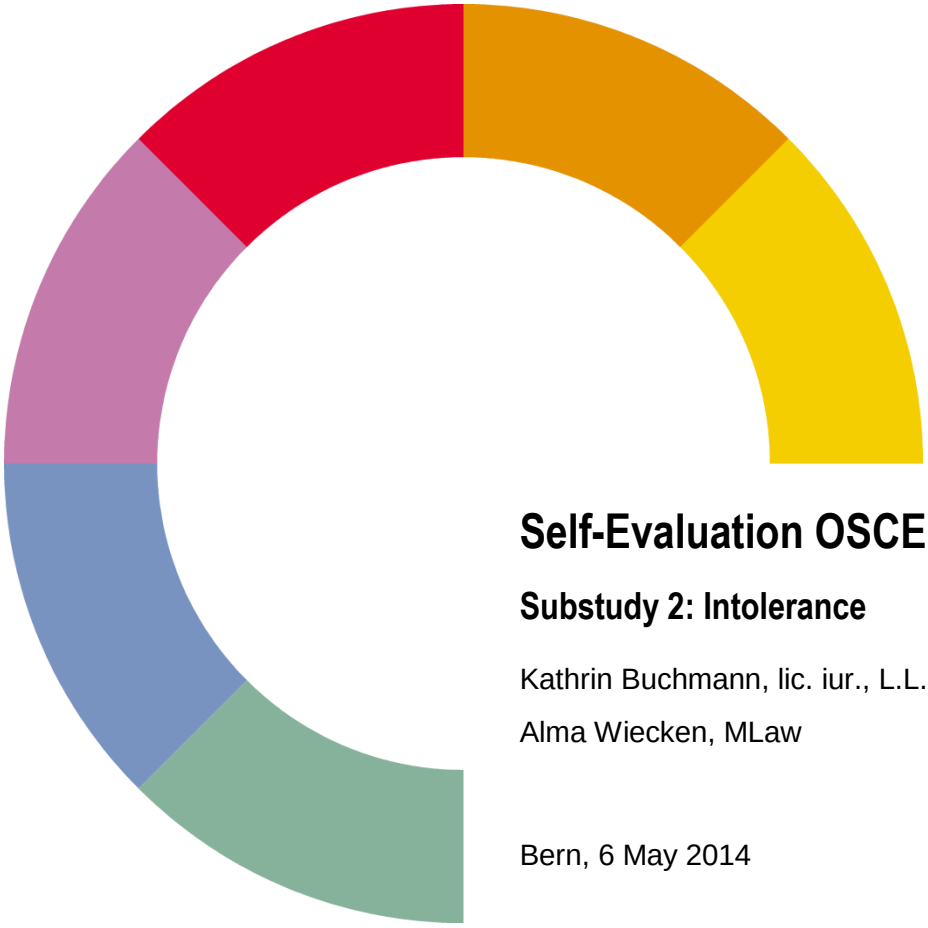

Self-Evaluation OSCE Chairmanship

Substudy 2: Intolerance

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Bern, 6 May 2014

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This study reflects the opinion of the authors and only binds the Swiss Center of Expertise in Human Rights.

Contents

LIST OF ABBREVIATIONS

Art.	Article.
CICAD	Coordination Intercommunitaire contre l'Antisémitisme et la Diffamation.
CSCE	Conference on Security and Co-operation in Europe.
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms.
ECRI	European Commission against Racism and Intolerance.
EKM	Eidgenössische Kommission für Migrationsfragen.
EKR	Eidgenössische Kommission gegen Rassismus.
FCM	Federal Commission on Migration.
FCR	Federal Commission against Racism.
FRB	Fachstelle für Rassismusbekämpfung.
GRA	Stiftung gegen Rassismus und Antisemitismus.
ICCPR	UN Declaration on Human Rights, the International Covenant on Civil and Political Rights.
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination.
NGO	Non-governmental organisation.
No.	Number.
ODIHR	Office for Democratic Institutions and Human Rights.
OSCE	Organisation for Security and Cooperation.
PCS	Police Crime Statistic.
SCRA	The Service for Combating Racism.

I. HATE CRIMES AND INTOLERANCE IN THE OSCE

The Organisation for Security and Cooperation (OSCE) has its origins in the early 1970's, when the 'Conference on Security and Co-operation in Europe' (CSCE) was established to improve relations between the Communist bloc and the West.[1] After two years of meetings in Helsinki and Geneva, the Helsinki Final Act was signed on the 1st of August 1975. This OSCE document, which linked human rights with security concerns, established ten fundamental principles. The so-called "Decalogue" set out to govern the behaviour of states towards their citizens as well as towards each other. Concerning the implementation of human rights and fundamental freedoms, part of Principle VII states that:

„The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States."[2]

By recognising their universal significance for maintaining peace and security, human rights were declared a legitimate subject of international relations and removed from the area of internal affairs.[3]

The mandate and the activities of the OSCE cover all three dimensions of the Helsinki Declaration: the politico-military, the economic and environmental, as well as the human. The human dimension includes the protection of human rights and fundamental freedoms, the promotion of the rule of law and democratic institutions, as well as tolerance and non-discrimination. It is an indispensable component of the comprehensive security concept of the OSCE. The OSCE Office for Democratic Institutions and Human Rights (ODIHR) is primarily concerned with the human dimension, as it is the principle body for promoting human rights within the OSCE.[4]

1. The ODIHR's mandate regarding hate crime and intolerance

In accordance with its mandate contained in a variety of documents, ODIHR assists participating states with the implementation of OSCE commitments concerning tolerance and non-discrimination. In this context, it also supports efforts to respond to and combat hate crimes and incidents of racism.

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1 Until 1990, the CSCE functioned mainly as a series of meetings and conferences. With the end of the Cold War, the CSCE embarked on a new course, which led to the acquisition of permanent institutions and operational capabilities. As part of this process of institutionalisation the name was changed from CSCE to OSCE in 1994.

2 OSCE, 'Final Act of the Conference on Security and Co-Operation in Europe, Helsinki', 1975 <http://www.osce.org/mc/39501?download=true> [accessed 21 February 2014].

3 OSCE, 'Report of the CSCE Meeting of Experts on National Minorities, Geneva', 1991 <http://www.osce.org/hcnm/14588> [accessed 21 February 2014].

4 The ODIHR, originally named 'Office for Free Elections', was created in 1990 by the Charter of Paris. In order to extend practical co-operation among participating states in the human dimension, the ministers decided to give additional functions to the Office for Free Elections. To reflect the broadened mandate it received at the 1992 Helsinki Summit, the name of the office was changed to ODIHR in 1992.

In 2004, the OSCE Ministerial Council established that the OSCE Office for Democratic Institutions and Human Rights (ODIHR) should serve as a collection point for information and statistics on hate crimes as well as making them publicly available.[5] ODIHR therefore provides an annual hate crime report. The report contains facts and other information about the extent and types of hate crimes in the OSCE region, including information on the principal hate crime categories, developments in legislation and responses to hate crimes by governments and NGOs.

In order to improve the co-ordination between participating states and the implementation of commitments regarding intolerance and discrimination, the Chairman-in-Office of the OSCE appoints personal representatives. Presently, there are three personal representatives to promote greater tolerance and combat racism, xenophobia and discrimination.[6] In a non-standardised monitoring process, the personal representatives undertake country visits and submit reports, containing recommendations to the relevant states.

Two country visits were made to Switzerland so far.

- In 2007 Ambassador Ömür Orhun the Personal Representative of the OSCE on Combating Intolerance and Discrimination against Muslims, visited Switzerland and submitted a report concerning his visit.[7]
- In 2011 the three personal representatives on Tolerance Issues visited Switzerland and submitted their report to the Chairman in Office.[8]

1.1. OSCE commitments to combat intolerance

The implementation of human rights and fundamental freedoms, is one of the ten essential principles of the OSCE mentioned in the Helsinki Final Act. [9] On this basis, the participating states have repeatedly reiterated their goal of eliminating discrimination and to combat intolerance in numerous documents.[10]

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5 OSCE, 'Ministerial Council Decision No. 13/06, Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding, Brussels', 2006: <http://www.osce.org/mc/23114> [accessed 21 February 2014].

6 The Personal Representative on Combating Racism, Xenophobia and Discrimination, also focusing on intolerance and discrimination against Christians and members of other religions, the Personal Representative on Combating Anti-Semitism and the Personal Representative on Combating Intolerance and Discrimination against Muslims.

7 OSCE, 'Ministerial Council Decision No. 4/03, Tolerance and Non-Discrimination, Maastricht', 2003: <http://www.osce.org/mc/40533> [accessed 21 February 2014].

8 OSCE, 'Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues from November 7-9, 2011, Country Visit Switzerland': <http://tandis.odihr.pl/documents/07042.pdf> [accessed 22 February 2014].

9 OSCE, 'Final Act of the Conference on Security and Co-Operation in Europe, Helsinki', 1975 <http://www.osce.org/mc/39501?download=true> [accessed 21 February 2014].

10 OSCE, 'Ministerial Council Decision No. 4/03, Tolerance and Non-Discrimination, Maastricht'; OSCE, 'Ministerial Council Decision No. 12/04 Tolerance and Non-Discrimination, Sofia', 2004: <http://www.osce.org/mc/23133> [accessed 23 February 2014]; OSCE, 'Ministerial Council Decision No. 10/05 Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding, Ljubljana', 2005: <http://www.osce.org/mc/17462> [accessed 23 February 2014]; OSCE, 'Ministerial Council Decision No. 13/06, Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding, Brussels'.

Regarding the terminology of intolerance and discrimination, there has been no consistency in the debates, discussions, and decisions on tolerance and non-discrimination issues of the OSCE. The 2002 Porto Ministerial Council decision on tolerance and non-discrimination provides working definitions of the various forms of intolerance and discrimination; it marked the turning point in the OSCE's approach to these issues.[11]

1.2. ODIHR's definition of hate crime and OSCE commitments to combat hate crimes

1.2.1. ODIHR's definition of hate crime

According to ODIHR's definition "*a hate crime is a crime that is motivated by intolerance towards a certain group within society. For a criminal act to qualify as a hate crime, it must meet two criteria:*

1. The act must be a crime under the criminal code of the legal jurisdiction in which it is committed;

2. The crime must have been committed with a bias motivation.

"Bias motivation" means that the perpetrator chose the target of the crime on the basis of protected characteristics.

A "protected characteristic" is a fundamental or core characteristic that is shared by a group, such as "race", religion, ethnicity, language or sexual orientation.

"The target of a hate crime may be a person, people or property associated with a group that shares a protected characteristic."[12]

1.2.2. Commitments to combat hate crime

The concept of 'hate crime' was first acknowledged at the 1991 Geneva Meeting, where participating states expressed their concern about crimes based on prejudice, discrimination, hostility or hatred.[13]

In the Copenhagen Document, participating states pledged to take effective measures to provide protection against any acts that constitute incitement to violence against people or groups based on national, "racial", ethnic or religious discrimination, hostility or hatred,.[14]

The first time the term 'hate crime' appeared in the OSCE's commitments, was at the Maastricht Ministerial Council Meeting of 2003. Decision No 4 of the meeting in Maastricht recognised the importance of legislation to combat hate crimes. It urged participating states to inform the ODIHR about existing legislation regarding crimes fuelled by intolerance and discrimination and, when needed, to seek the ODIHR's assistance in the drafting and review of these legislations.[15]

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11 OSCE, 'Ministerial Council Decision No. 6 Tolerance and Non Discrimination, Porto', 2002: <http://tandis.odihr.pl/documents/03547.pdf>.

12 The Definition can be found on: <http://www.osce.org/odihr/66388> [accessed 21 February 2014].

13 OSCE, 'Report of the CSCE Meeting of Experts on National Minorities, Geneva', p. 7.

14 OSCE, 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE", 5-29 June 1990': <http://www.osce.org/node/14304> [accessed 21 February 2014].

15 OSCE, 'Ministerial Council Decision No. 4/03, Tolerance and Non-Discrimination, Maastricht'.

In two Permanent Council decisions, states committed themselves to combat hate crimes also through legal means by agreeing to „*Consider enacting or strengthening legislation that prohibits discrimination based on, or incitement to hate crimes motivated by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.*“[16] In Decision No. 633, on promoting tolerance and freedom of the media on the internet, participating states were urged to „*study the effectiveness of laws and other measures regulating internet content, specifically with regard to their effect on the rate of racist, xenophobic and anti-Semitic crimes.*“[17] states endorsed their previous commitments and decided to intensify implementation efforts in the field of legislation in Decision No. 12/04 on tolerance and non-discrimination[18]

1.3. Other international sources of obligations and commitments

Since the beginning, the OSCE has emphasised the importance of other international sources of obligations and commitments in the field of human rights and fundamental freedoms. The Helsinki Declaration states that: „*In the field of human rights and fundamental freedoms the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.*“[19]

To analyse to what extent Switzerland has implemented relevant OSCE human dimension commitments, it is also important to consider other international sources of obligations and commitments.

The most important obligation to take into account is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[20]

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16 OSCE, ‘Decision No. 607 Combating Anti-Semitism’, 2004 <http://www.osce.org/pc/30980> [accessed 21 February 2014]; OSCE, ‘Decision No. 621 Tolerance and the Fight against Racism Xenophobia and Discrimination’, 2004 <http://www.osce.org/pc/35610> [accessed 21 February 2014].

17 OSCE, ‘Decision No. 633 Promoting Tolerance and Media Freedom on the Internet’, 2004 <http://www.osce.org/pc/16912> [accessed 27 February 2014].

18 OSCE, ‘Ministerial Council Decision No. 12/04 Tolerance and Non-Discrimination, Sofia’.

19 OSCE, ‘Concluding Document of Helsinki - The Fourth Follow-up Meeting’, 1992 <http://www.osce.org/mc/39530?download=true>.

20 In addition, the following United Nations conventions are relevant: 1948 Convention on the Prevention and Punishment oft the Crime of Genocide, Articles 1-3; 1948 Universal Declaration of Human Rights, Articles 2 and 7; 1966 International Covenant on Civil and Political Rights, Articles 19 and 20; 1973 International Convention on the Suppression and Punishment oft the Crime of Apartheid, Articles 1, 2 and 4; 1979 Convention on the Elimination of all Forms of Discrimination against Women, Articles 2 and 3; 1989 Convention on the Rights of the child, Article 2; 2001 Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance, Articles 13, 15, 28, 48, 54, 81, 82, 84, and 106.

II. IMPLEMENTATION OF THE OSCE COMMITMENTS IN SWITZERLAND

An analysis of how and to what extent Switzerland has implemented the OSCE commitments will be carried out below, using three subareas. The selection is based on the deficits identified in the hate crime reports and the reports of the personal representatives, regarding compliance with relevant OSCE commitments.

Further criteria for the selection were the practical meaning, the domestic political relevance as well as the significance of the topic for the external perception of Switzerland.

1. Data collection and monitoring of hate crimes

As ODIHR underlines repeatedly and consistently the importance of coherent data on hate crimes, it is important to evaluate the situation in Switzerland, regarding the collection and monitoring of hate crimes.

1.1. OSCE commitments regarding data collection and monitoring of hate crimes

The first commitment by the participating states - to collect data about crimes - is to be found in the report of the CSCE Meeting of Experts on National Minorities in 1991.[21] This obligation, to collect and maintain reliable information and statistics about hate crimes, was regulary repeated in different council decisions.[22]

The most recent detailed decision on combating hate crimes was made at the Ministerial Council Meeting in Athens 2009.

It calls on the participating states to:

„1. *Collect, maintain and make public, reliable data and statistics in sufficient detail on hate crimes and violent manifestations of intolerance, including the numbers of cases reported to law enforcement, the numbers prosecuted and the sentences imposed. Where data-protection laws restrict collection of data on victims, States should consider methods for collecting data in compliance with such laws;*

(...)

6. Promptly investigate hate crimes and ensure that the motives of those convicted of hate crimes are acknowledged and publicly condemned by the relevant authorities and by the political leadership

(...)

9. Nominate, if they have not yet done so, a national point of contact on hate crimes to periodically report to the ODIHR reliable information and statistics on hate crimes.“[23]

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21 OSCE, ‘Report of the CSCE Meeting of Experts on National Minorities, Geneva’, <http://www.osce.org/hcnm/14588> [accessed 14 March 2014].

22 OSCE, ‘Ministerial Council Decision No. 4/03, Tolerance and Non-Discrimination, Maastricht’, <http://www.osce.org/mc/19382> accessed 14 March 2014].

23 OSCE, ‘Ministerial Council Decision No. 9/09 Combating Hate Crimes, Athens’, 2009, p. 9, <http://www.osce.org/cio/40695> [accessed 21 February 2014].

1.2. Observations and recommendations by the OSCE

Observations and recomendations regarding data collection and monitoring of hate crimes, were formulated both in the Annual Hate Crime Reports (2006-2012) as well as in the report of the personal representatives of the OSCE Chair-in-Office on their visit to Switzerland in November 2011 concerning tolerance issues.[24]

1.2.1. Hate Crime Report

Keeping in mind that the concept of the Hate Crime Report is not designed to formulate specific recommendations to individual states, it is nonetheless important to identify the general recommendations and requirements formulated in the reports. In the preparatory study 'Combating Hate Crimes in the OSCE Region', ODIHR formulated very detailed recomendations regarding hate crimes and data collection.[25] These recommendations remain up to date as ODIHR has repeatedly underlined their importance and the lack of coherent and reliable data on hate crimes in the Annual Hate Crime Reports.[26]

Relevant recommendations for Switzerland:

„1. Enact legislation requiring the relevant national criminal justice authorities to record and report on incidents motivated by hate or bias at the local and national level.

2. Utilise the template developed by the ODIHR's hate crime experts in order to further strengthen the capacity of law enforcement officers to identify and report on hate crimes and incidents.

3. Strengthen existing methodologies for identifying and monitoring hate crimes and incidents and for the collection of data on types of crime or incident, perpetrators and victims, as well as the legal or other follow-up to the crime, including prosecution and length of sentences.

4. Develop a harmonised and consolidated approach to the collection of data on hate crimes by relevant local government authorities in order to facilitate the collection of data.

5. Strengthen their efforts to establish specific mechanisms for registering, recording, and publicly reporting hate crimes, including official databases and annual reports.

6. In order to enhance the quality of data, classify data according to:

- *Bias motivations*
- *Target groups within each of the preceding categories*

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[24] OSCE, 'Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues from November 7-9, 2011, Country Visit Switzerland', p. 6, <http://tandis.odihr.pl/documents/07042.pdf> [accessed 14 March 2014].

[25] OSCE and ODIHR, 'Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation, and National Initiatives', 2005, p. 67 <http://www.osce.org/odihr/16405> [accessed 21 February 2014].

[26] See OSCE and ODIHR, 'Hate Crimes in the OSCE Region: Incidents and Responses: Annual Report for 2009', p. 14, <http://www.osce.org/odihr/73636?download=true> [accessed 21 February 2014]; OSCE and ODIHR, 'Hate Crimes in the OSCE Region: Incidents and Responses: Annual Report for 2012', p. 7, <http://tandis.odihr.pl/hcr2012/pdf/Hate_Crime_Report_full_version.pdf> [accessed 21 February 2014].

- Type of offence or incident (physical assault, murder, destruction of property etc.)"[27]

1.2.2. 2011 Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues

As part of their visit to Switzerland in 2011, the representatives on tolerance issues confirmed the necessity for reliable data, and recommended to: *„Improve data-collection on hate crimes and prosecutions under Articles 261 and 261bis of the Swiss Criminal Code, analyse these data, including by disaggregating them with respect to targeted groups, and report regularly to ODIHR*".[28]

1.3. Implementation in Switzerland

As required in the Ministerial Council Decision 9/09,[29] Switzerland nominated the Federal Commission against Racism (FCR) as the national point of contact on hate crimes, to periodically report to the ODIHR reliable information and statistics on hate crimes.

For the report, the FCR uses different statistics to provide the most detailed and complete overview possible. The following statistics are used:

1.3.1. FCR Database on judgements and decisions regarding Art. 261bis of the Swiss Criminal Code

The FCR maintains a database of judgements and decisions relating to Art. 261bis (Anti-Racism Norm) of the Swiss Criminal Code, which are pronounced by cantonal law enforcement agencies and courts as well as by the Federal Supreme Court.[30/31] Based on the Federal Decree for Communication (Mitteilungsverordnung des Bundes)[32] the cantonal authorities transfer the cantonal judgements and decisions to the Federal Intelligence Service (FIS). The FIS collects and anonymises the judgements and decisions and forwards them in anonymised form to the FCR.[33] Decisions regarding Art. 171c of the Swiss Military Criminal Code are transmitted by the Attorney General of the Armed Forces.[34]

The database provides statistics that classify data according to bias motivation, target groups and type of offence or incident. Furthermore, the database supplies information about the

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27 For further Recommendations see: OSCE and ODIHR, 'Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation, and National Initiatives', p. 6, <http://www.osce.org/odihr/16405> [accessed 14 March 2014].

28 OSCE, 'Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues from November 7-9, 2011, Country Visit Switzerland', p. 6.

29 OSCE, 'Ministerial Council Decision No. 9/09 Combating Hate Crimes, Athens', p. 3, para. 9.

30 See <http://www.ekr.admin.ch/services/f518.html>.

31 For the legal aspects see: Bernhard Waldmann, 'Kurzgutachten Prof. Bernhard Waldmann zur Weiterleitung kantonaler Strafurteile Zu Art. 261bis StGB zwecks erstellung und Veröffentlichung einer Urteilssammlung durch die EKR' (Fribourg, 2004).

32 'Verordnung über die Mitteilung kantonaler Strafentscheide vom 10. November 2004 (Mitteilungsverordnung; SR 312.3)' <http://www.admin.ch/opc/de/classified-compilation/20041752/201201010000/312.3.pdf> [accessed 22 February 2014].

33 From 1995-1999 the Office of the Attorney General of Switzerland (Bundsanwaltschaft) transmitted the Decisions.

34 The Military Criminal Code includes an Article 171c whose content is equivalent to that of Article 261bis of the Criminal Code.

number of criminal charges that acctually lead to a criminal proceeding and how many criminal proceedings lead to a conviction or an acquittal.

It should be noted that the accuracy and coherence of the database depends on the completeness of the data transmitted.

Over the last year, it became evident that there was a large discrepancy between the number of criminal acts recorded in the Police Crime Statistics on racial discrimination, and the number of judgements and decisions in the FCR data-base.

1.3.2. Police Crime Statistics

The Federal Office for Statistics has completeley updated the Police Crime Statistics (PCS)[35], over the past four years. This has closed long-standing gaps, and makes new data available. Standardised principles are being used to record and evaluate the data for the statistics in question. For the monitoring of hate crimes, the number of contraventions of Art. 261bis and 261 of the Swiss Criminal Code known to the police are of particular interest. A new feature of the PCS might play a significant role in the monitoring of hate crimes. Since the restructuring of the PCS, it is possible to record offences, which do not fall under Art. 261bis StGB (e.g. a racially motivated offence not committed in public), as having a racial motif. As this feature is only optional, and the validitiy of the record depends decisively on the relevant training and instruction of the police, the data is currently not used for the Hate Crime Report.

1.3.3. Other sources of monitoring hate crimes

There are other mechanisms monitoring racist and discriminatory incidents, such as:

- Counselling network for victims of racism (Beratungsnetz für Rassismusopfer)[36]
- Foundation against racism and antisemitism GRA[37]
- Coordination Intercommunitaire contre l'Antisémitisme et la Diffamation CICAD[38]

[35] See: < http://www.bfs.admin.ch/bfs/portal/de/index/themen/19/03/02/key/02/01.html> [accessed 22 February 2014].

[36] The ‚Counselling Network for Victims of Racism' («Beratungsnetz für Rassismusopfer») was set up in 2005 as a joint venture between the association ‚humanrights.ch' and the FCR. It is a network comprising 11 professional agencies from all of Switzerland, offering advice concernig racist discrimination: <http://www.network-racism.ch/de/home.html> [accessed 22 February 2014].

[37] The goals of the Foundation against racism and antisemitism are to prevent and fight discrimination and violence, as well as racism and antisemitism. A chronology listing racist incidences is published annually in Switzerland in <http://www.gra.ch/lang-en> [accessed 22 February 2014].

[38] The CICAD publishes an annual report on antisemitic incidents in the region Suisse Romande. <http://www.cicad.ch/fr> [accessed 22 February 2014].

1.4. Gaps in the implementation of commitments

At first glance, one would think that Switzerland has implemented adequate mechanisms to comply with the OSCE commitments on collecting hate crime data. Especially the PCS is a powerful instrument to collect data on Art. 261bis of the Swiss Criminal Code. Although it has a lot of potential, problems might arise when looking at the matter more in detail.

1.4.1. Terminology

One of the problems in relation to the collection and interpretation of official data on hate crimes is the use of the term 'hate crime' itself. At the Maastrich Ministerial Council meeting, Switzerland commited to maintaining information and statistics on 'hate crimes', although the concept of 'hate crime' does not exist in Switzerland. At the moment, the obligatory data on hate crimes supplied to ODIHR by Switzerland only include offences covered by Art. 261bis of the Swiss Criminal Code.[39]

Art. 261bis Swiss Criminal Code has been in force since the 1st of January 1995, and serves the implementation of commitments, which Switzerland entered into with the ratification of the 'International Convention on the Elimination of All Forms of Racial Discrimination' (ICERD).

Art. 261bis Swiss Criminal Code protects against racial discrimination in public. Acts, which deprive people implicitly or explicitly of their equal rights or even their right to exist on the basis of their "race", religion or ethnic background, are hereby punishable by law. These acts, however, are only punishable if they take place in public, meaning that no confidential or personal relationship exists between the persons present.[40] A further limitiation of the scope of Art. 261bis Swiss Criminal Code is the category of people protected by this legislation. Only persons or groups are protected which are assaulted on the basis of their "race", ethnicity and religion. Differences in legal status are not recorded: In principle, 'foreigners' or 'asylum seekers' are therefore not part of the protected categories, except when these or similar terms are used as synomyms for the protected categories.[41]

The first core question is therefore, if the reported incidents violating Art. 261bis of the Swiss Criminal Code match the definition of a hate crime. As there is no valid definition in Switzerland, it is necessary to consider the ODIHR working definition of hate crime:

*"The **first element** of a hate crime is that an act is committed that constitutes an offence under ordinary criminal law. This criminal act is referred to as the "base offence". If there is no base offence, there is no hate crime.*

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39 However, in this context Art. 261 Swiss Criminal Code (Attack on the freedom of faith and the freedom to worship) is also to be considered.

40 See case-law: BGE 123 IV 202 E. 3d S. 207; BGE 130 IV 111 E. 3.

41 Marcel Alexander Niggli, Rassendiskriminierung, Ein Kommentar zu Art. 261bis StGB und Art. 171c MStG, 2. Aufl., Zürich 2007, pp. 229-233. See also Stefan Trechsel, Schweizerisches Strafgesetzbuch, Praxiskommentar, Zürich 2008, Art. 261bis N 11; Dorrit Schleiminger, Kommentar zu Art. 261bis, in: Marcel Alexander Niggli/Hans Wiprächtiger (Hg.), Strafrecht II, Kommentar, Basel u.a. 2007, Art. 261bis N 16.

*The **second element** of a hate crime is that the criminal act is committed with a particular motive, referred to as "bias". This means that the perpetrator intentionally chose the target of the crime because of some protected characteristic*."[42]

Analysing this definition of 'hate crimes' in more detail, it can be noted that the underlying facts of 261bis of the Swiss Criminal Code do not comply with the definition mentioned above. The concept of 261bis of the Swiss Criminal Code might be closely related to hate crimes, but it lacks some of the essential elements mentioned in the definition above:

1. Art. 261bis of the Swiss Criminal Code exclusively considers incidents committed in public, whereas the term 'hate crime' also includes acts which are commited in private, the deciding factor is only the 'bias motive'.
2. Art. 261bis Swiss Criminal Code protects only a very restricted category of people, whereas the definition of hate crime includes a much wider range of protected characteristics like language and sexual orientation.
3. A decisive element of hate crimes is the existence of a 'base offence', which would be punishable even without a bias motive. If the bias motivation is missing, some of the offences mentioned in Art. 261bis of the Swiss Criminal Code would not be prosecuted. The decisive factor in these cases is the discriminatory aspect of the relevant behaviour.

This is why on the one hand, offences are registered which do not fulfil the definition of hate crimes, and should, ideally, not be recorded as part of the hate crime statistics. On the other hand, many offences which comply with all of the prerequisites of a hate crime are not recorded (e.g. grivous bodily harm with racist motives and racial insults not carried out in public), as they do not fall under Art. 261bis of the Swiss Criminal Code.

Besides, Swiss criminal law does not provide for an increased penalty in the case of crimes committed with a bias motivation as required by the OSCE.[43] Increasing a penalty is only possible in cases where the same offender commits several separate acts punishable under criminal law, and cases where one and the same act is an offence against several different statutory provisions (concurrence of offences, Art. 49 Swiss Criminal Code).

In conclusion it is fair to say that the data on Art. 261bis Swiss Criminal Code collected by the FCR and the PCS do not comply with the requirements set out by the OSCE.

To fully comply with the OSCE commitments regarding hate crimes, Switzerland should introduce specific hate crime legislation.

1.4.2. Measures to improve data collection

Although the PCS mentioned above is the only tool available at the moment, it can only become a reliable source of official data about hate crimes, if the racial motivation for a crime is recorded systematically.

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[42] OSCE and ODIHR, 'Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation, and National Initiatives', p. 12.

[43] OSCE, 'Ministerial Council Decision No. 9/09 Combating Hate Crimes, Athens', p. 2, para. 2.

In order to enable such a systematic recording of hate crimes, standardised guidelines and definitions have to be compiled, and the employees of the Police Force have to be trained accordingly.

ODIHR has developed different tools to help participating states to address those problems effectively. 'Training against Hate Crimes for Law Enforcement' (TAHCLE) is a programme designed to improve police skills in recognising, understanding and investigating hate crimes. A cooperation with ODIHR in this field would considerably improve the quality of data.

2. Intolerance and Discrimination against Muslims

2.1. Relevant commitments

Besides the numerous general commitments to combat intolerance and discrimination[44], there are decisions and commitments specificaly pointing out the importance of combating intolerance and discrimination against Muslims.[45] One of those specific OSCE commitments dates to the 2002 Porto Ministerial Council Meeting, which explicitly *"(...) condemns the recent increase in acts of discrimination and violence against Muslims in the OSCE area and rejects firmly the identification of terrorism and extremism with a particular religion or culture."*[46] The latest call to prevent intolerance against Muslims was made at the Ministerial Council in Kiev on the 6th of December 2013.[47]

In addition to the above mentioned OSCE commitments, there are other relevant international sources referred to in OSCE documents, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or the ountry-specific recommendations made by the European Commission against Racism and Intolerance (ECRI).[48]

2.2. Observations and recommendations by the OSCE

Observations and recommendations regarding Switzerland were formulated both in the Annual Hate Crime Reports (2007-2012) as well as in the Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues. Due to the perceived, increasingly biased and discriminatory portrayal of Muslims in public discourse, in particular during the election campaigns in 2007, the Personal Representative of the Chairman-in-Office of the OSCE on Combating Intolerance and Discrimination against Muslims, visited Switzerland in November 2007.

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44 See 1.1. above.

45 OSCE, 'Ministerial Council Decision No. 13/06, Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding, Brussels', p. 12; OSCE, 'Ministerial Council Decision No. 12/04 Tolerance and Non-Discrimination, Sofia', p. 4,5; OSCE, 'Ministerial Council Decision No. 10/05 Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding, Ljubljana', p. 3.

46 OSCE, 'Ministerial Council Decision No. 6 Tolerance and Non Discrimination, Porto'.

47 OSCE, 'Decision No. 3/13 Freedom of Thought, Conscience, Religion or Belief, Kiev', 2013: <http://www.osce.org/mc/109339> [accessed 23 February 2014].

48 ECRI is a human rights body of the Council of Europe. ECRI prepares reports and issues recommendations to member States: <http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp> [accessed 21 February 2014].

2.2.1. Hate Crime Report

An often repeated topic concerning Switzerland was the controversial debate on the federal popular initiative against minarets (Volksinitiative «Gegen den Bau von Minaretten»), first mentioned in the 2007 Hate Crime Report.[49] The debate attracted considerable international interest, and was mentioned again in the 2009 Hate Crime Report. The popular initiative was regarded as a particularly significant event touching on the portrayal of Muslims in Europe. Several organisations expressed concerns that the ban could create tensions, and generate a climate of intolerance against Muslims. Several NGOs reported a perceived increase in hostility towards Muslims associated with the referendum. The mosque in Geneva was vandalized prior to the vote.[50]

2.2.2. 2007 Report of the Personal Representative of the OSCE on Combating Intolerance and Discrimination against Muslims

Similiar to the Report of 2011, the Representativ was concerned about the intolerant climate regarding the Muslim community, and in particular about the manner in which the debate about the initiative against minarets was conducted in Switzerland. In this context he made the following recommendations:

"*1. The Swiss government should endeavour to encourage the cantons in which other religions are officially recognised, to do the same for Islam. If this is not possible, it is advisable that the government follow the recommendation of the FCR, to recognise Muslims as a national religious minority.*

3. The Swiss government should take all necessary measures to develop effective awareness campaigns and tools in dealing with the negative impact of racist and xenophobic speech in society, including anti-Muslim discourse. The government is encouraged to address various shortcomings mentioned in this report through a comprehensive strategy. The government can consider employing certain mechanisms, which would prevent racist and discriminatory initiatives for referenda, while respecting freedom of expression."[51]

2.2.3. 2011 Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues

The report on the country visit in Switzerland highlights the growing intolerance and discrimination against Muslims as a consequence of international tensions, and points out that after 09/11, immigrants from Albania, Kosovo and Bosnia for example, were no longer primarily defined by their ethnicity, but by their religion. In this critical situation the media depicted all Muslims in a negative light. In addition to this, Switzerland attracted international attention with the anti-minaret-initiative. Even if the popular initiative had little practical impact on the freedom of Muslim worship in Switzerland, the provocative and polarising campaign

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[49] OSCE and ODIHR, 'Hate Crimes in the OSCE Region: Incidents and Responses: Annual Report for 2007', p. 132: <http://www.osce.org/odihr/33989> [accessed 21 February 2014].

[50] OSCE and ODIHR, 'Hate Crimes in the OSCE Region: Incidents and Responses : Annual Report for 2009', pp. 39, 68.

[51] OSCE, 'Report of the Personal Representative of the OSCE on Combating Intolerance and Discrimination against Muslims, 12-14 November 2007', p. 10.

suggested that the voters saw it as a way to express their unease over the growing presence of Muslims in Swiss society.

Against this background the representatives made the following recommendations:

„1. Support and promote the formation of an umbrella organisation for Muslims, although the lack of such an organisation should not prevent an inclusive policy towards existing Muslim NGO's.

2. Continue the dialogue with industry and commerce in order to prevent discrimination against Muslims, particularly Muslim women wearing the hijab, in the labor market, and disseminate educational material aimed at combating anti-Muslim stereotypes, including material prepared by OSCE/ODIHR.

3. Consider what measures can be taken to overcome the most negative cultural and social effects of the 2009 ban of minarets, also in preparation for a future repeal of the ban". [52]

2.3. Implementation in Switzerland

2.3.1. Dialog with the Muslim community

Following the vote on the ban of minarets, regular meetings were held from 2010 to 2011, between the Federal Administration and national and international representatives of Muslim communities. Together, they compiled the report 'Muslim Dialog 2010'.[53] The report summarises the results of the dialog and shows what kind of measures were taken or planned by the federation, to improve the integration and to promote equal opportunities for Muslims. Unfortunately, the dialog did not lead to any real results and was officially ended by the Federal Administration.[54]

2.3.2. Report of the Federal Council about the situation of Muslims in Switzerland

As a reaction to the vote on the ban of minarets, three members of parliament asked the Federal Council to carry out an evaluation in order to assess the situation of Muslims in Switzerland. In the Report, published in 2013, the Federal Council came to the conclusion that there is no need for specific measures regarding the integration of Muslims in Swiss society.[55][56] Moreover, it was stressed that Art. 72 of the Swiss Constitution determines that the cantons should regulate the relations between religious communities and the state, and

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52 OSCE, 'Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues from November 7-9, 2011, Country Visit Switzerland', pp. 6, 7.

53 Eidgenössisches Justitz und Polizei Departement, 'Muslim-Dialog 2010, Austausch zwischen den Bundesbehörden und Musliminnen und Muslimen in der Schweiz, Bern', 2011 <https://www.bfm.admin.ch/content/dam/data/migration/berichte/ber-muslimdialog-2010-d.pdf> [accessed 24 February 2014].

54 „Bundesrat nimmt Bericht ‚Muslim-Dialog 2010' zur Kenntnis" <http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2011/2011-12-160.html> [accessed 24 February 2014].

55 Bundesrat, 'Bericht des Bundesrates über die Situation der Muslime in der Schweiz', 2013 <http://www.ejpd.admin.ch/content/dam/data/pressemitteilung/2013/2013-05-08/ber-d.pdf> [accessed 24 February 2014].

56 „Keine spezifischen Massnahmen nötig, um Muslime besser zu integrieren" http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2013/2013-05-08.html [accessed 24 February 2014].

not the federal authorities. Pragmatic solutions for specific problems concerning Muslim communities should therefore be sought at a regional level.[57]

2.3.3. Other activities

- The Service for Combating Racism (SCRA)[58] gives financial support to anti-racism and human rights projects.[59]
- The Federal Commission against Racism (FCR) regularly contributed to the public debate through various publications and media releases.[60]
- The Federal Commission on Migration (FCM) addresses questions related to Muslims in Switzerland through publications.[61]

2.4. Gaps in the implementation of commitments

Even though the federal authorities established a dialog with the Muslim community identifying points of concern in response to the public discourse relating to the anti-minaret-initiative, concrete measures were not taken. This is partly because the Federal Council considers that there is no need for specific measures regarding the integration and non-discrimination of Muslims in Swiss society. The fact that the cantons are responsible for the relationship between the state and religious communities as set out in the constitution is another factor preventing standardised measures on a national level. It can only be hoped that the federal authorities are not trying to shirk their responsibilities by pointing to the distribution of powers and duties in a federal state. With regards to the OSCEs' recommendations mentioned above, the following, still existing problems have to be mentioned:

2.4.1. Formation of an umbrella organisation for Muslims

The OSCE recommended to the federal authorities, to promote and encourage an umbrella organisation for Muslims. The OSCE and the FCR co-hosted a meeting in Bern, where the creation of an umbrella organisation was discussed.[62]

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57 Eidgenössisches Justitz und Polizei Departement, Muslim-Dialog 2010, Austausch zwischen den Bundesbehörden und Musliminnen und Muslimen in der Schweiz, 2011, p. 11.

58 <http://www.edi.admin.ch/frb>[accessed 24 February 2014].

59 A detailed list of financially supported Projects can be found in: FRB, 'Bericht der Fachstelle für Rassismusbekämpfung 2012-Übersicht und Handlungsfelder', 2013 <http://www.edi.admin.ch/frb/02015/index.html?lang=de&download=NHzLpZeg7t,lnp6I0NTU042l2Z6ln1acy4Zn4Z2qZpnO2Yuq2Z6gpJCEen94f2ym162epYbg2c_JjKbNoKSn6A--> [accessed 22 February 2014].

60 See: FCR, 'Mehrheit und Muslimische Minderheit in der Schweiz, Stellungnahme der EKR zur aktuellen Entwicklung', 2006 <http://www.ekr.admin.ch/pdf/Bericht_Muslime9174.pdf> [accessed 27 February 2014]; FCR, 'Muslimfeindlichkeit', 2010 <http://www.ekr.admin.ch/pdf/Tangram_25.pdf> [accessed 27 February 2014].

61 See: FCM, 'Muslime in der Schweiz Identitätsprofile, Erwartungen und Einstellungen eine Studie der Forschungsgruppe «Islam in der Schweiz»', 2010 <https://www.ekm.admin.ch/content/dam/data/ekm/dokumentation/materialien/mat_muslime_d.pdf> [accessed 2 March 2014].

To this day, such organisation has not been created. However, this is not mainly due to a lack in effort on the side of the federal authorities, but due to the inhomogeneous nature of Muslim communities in Switzerland. There are many different, largely non-related Muslim communities, which organise themselves mainly on the basis of ethnic, national or language affiliations.[63]

2.4.2. Recognition of the adherents of Islam as a religious community

As mentioned above, the OSCE recommended to the Swiss government to encourage the cantons where other religions are officially recognised to do the same for Islam or, if that is not possible, to recognise Muslims as a national religious minority in the sense of the Framework Convention for the Protection of National Minorities.[64]

The Federal Constitution of Switzerland does not include a clause concerning the official recognition of religions. Instead, it only recognises freedom of religion and belief to all citizens, and leaves it to the cantons how to establish their relationship with the Church and other religious institutions.[65] The cantons are free to regulate their relationship to different religious communities. The affiliation between state and church can be one of complete separation between the two (Geneva and Neuchâtel), or cantons may allow certain religious communities to establish themselves as legal entities under public law and are granted a varying degree of rights, including the right to tax their adherent.[66] Religious communities that are not officially recognized in this way still can freely organize themselves as associations.

However, it appears that the federal authorities are reluctant to encourage cantons to officially recognise Islam as a religion on the grounds that this issue is exclusively within the competencies of cantons. The question regarding the recognition of Muslims as a national religious minority has never been seriously discussed on a federal level. However, discussions about the establishment of Islam as a public law entity with the same rights as officially recognized Christian churches have started recently in the Canton of Basel-Stadt.[67]

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62 'Press Releas: Switzerland's Muslims Discuss Creation of Umbrella Organization at Meeting Co-Hosted by OSCE/ODIHR' <http://www.vioz.ch/2010/20101024_OSZE_Zusammenkunft_Muslime_Bern.pdf> [accessed 24 February 2014].

63 Bundesrat, p. 3.

64 See: <http://www.coe.int/t/dghl/monitoring/minorities/default_en.asp> [accessed 25 February 2014]. The recognition of Muslims as a national community was also proposed by the FCR, see: EKR, 'Mehrheit Und Muslimische Minderheit in der Schweiz, Stellungnahme der EKR zur Aktuellen Entwicklung', p. 41.

65 Art. 72 of the Swiss Constitution.

66 In general the protestant cantons enable a closer relationship between the former ‚state church' and the political administration, whereas cantons with a traditional cathlic background tend to leave the church more to its own devices. The overall development seems to point to an increasing break-up between the church and the state. See: < http://www.hls-dhs-dss.ch/textes/d/D11457.php>. See also: Staat und Religion in der Schweiz – Anerkennungskämpfe, Anerkennungsformen, Eine Studie des Schweizerischen Forums für Migrations- und Bevölkerungsstudien (SFM) im Auftrag der Eidgenössischen Kommission gegen Rassismus (EKR), Bern, 2003, <http://www.ekr.admin.ch/pdf/staat_religion_gesamt_def-d3fa2.pdf> [accessed 7 March 2014].

67 See Fabienne Riklin, Islam soll zur Landeskirche werden, Schweiz am Sonntag, 1 March 2014 <http://www.schweizamsonntag.ch/ressort/politik/islam_soll_zur_landeskirche_werden/> [accessed 10 March 2014].

2.4.3. Cemeteries

The arrangements concerning burial services usually fall under the jurisdiction of the municipalities, which issue the orders for burial regulations.[68] Due to the federal system, the federal government has only a very limited scope for intervention in this area.

On a positive note, it has to be said that an increasing number of municipalities agree to set up Muslim cemeteries. However, unfortunately there are also municipalities, which do not allow such cemeteries. This can lead to public debates, often turning discriminatory against Muslims.

2.4.4. The ban on headscarves and veils

The debate regarding the ban on headscarves and veils highlights once again that there is not enough protection on the federal level against discriminatory measures, which interfere with the freedom of religion of the Muslim community. To this day, it remains uncertain whether a possible ban on headscarves on a federal level would contravene against the federal constitution.[69] This situation has prompted a few schools to prohibit the wearing of headscarves in their regulations. In Bürglen (Canton of Thurgau), two Macedonian girls wearing a headscarf were excluded from school because the school's regulations ban the wearing of headdress. Although the Swiss Federal Court ruled that the two Macedonian girls are allowed to wear headscarves to school, it did not answer the basic question whether the ban on headscarves in Swiss schools would be in breach of the Swiss constitution. The Federal Court based its verdict solely on the missing legal basis.[70]

In a local referendum in the municipality of Au-Heerbrugg (Canton of St. Gallen), voters decided to impose a ban on Muslim girls wearing headscarves at a local primary school, thus ensuring to provide a legal basis for the ban of headscarves in school.[71] It can be expected that this case will provide the Federal Court with an opportunity to decide whether such ban is compatible with religious freedom.

In Ticino, voters approved a ban on face-covering headdress in public places, which is predominantly targeted at banning burqas. The Federal Assembly will have to rule on whether the change to the cantonal constitution violates the Federal Constitution.[72]

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[68] For more detailed information about the legal aspects of Muslim cemeteries, see: Prof. Walter Kälin and Lic. iur. Andreas Rieder, '„Bestattung von Muslimen auf Öffentlichen Friedhöfen im Kanton Zürich" Gutachten Im Auftrag des Kirchenratspräsidenten Pfarrer R. Reich, des Generalvikars von Zürich und Glarus, Weihbischof P. Henrici, und des Präsidenten der Römisch-Katholischen Zentralkommission des Kantons Zürich, Dr. R. Zihlmann.' <http://www.zh.ref.ch/handlungsfelder/ds/interreligioeserdialog/christlich-islamischer-dialog/gutachten%20kaelin-rieder> [accessed 25 February 2014].

[69] In 2011 the FCR released a statement regarding the ban on headscarves: http://www.ekr.admin.ch/pdf/110530_CFR_prise_position_foularde1a3.pdf [accessed 24 February 2014].

[70] 'Urteil vom 11. Juli 2013 (2C_794/2012)' <http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm> [accessed 27 February 2014].

[71] http://www.nzz.ch/aktuell/schweiz/au-heerbrugg-fuehrt-kopftuchverbot-wieder-ein-1.18239244 [accessed 24 February 2014].

[72] http://www.nzz.ch/aktuell/schweiz/starkes-votum-gegen-verhuellte-gesichter-1.18154797 [accessed 24 February 2014].

3. Discriminatory Political Discourse and Federal Popular Initiatives

Discriminatory political discourse, federal popular initiatives and campaigns in Switzerland are often mentioned by foreign media, and are the source of a debate about the fine line between the fundamental right to freedom of expression and the protection against racial discrimination. Particularly in times of federal popular votes, referendums or elections, the topic rarely ceases to dominate public debate. It can be observed that the political debate is focussing very often on asylum seekers and asylum policy and is tending to depict an image of a threatening mass immigration and asylum seekers as the main group involved in criminal activities.

It has to be emphasised that it was a conscious decision by the authors not to speak about 'hate speech' in this context. The following examples are not intense enough to qualify as 'hate speech'.[73]

3.1. Relevant OSCE commitments

When discussing discourses and manifestations of hate and intolerance, it is important to examine these issues from within a broader human-rights perspective. The right to freedom of expression is guaranteed by major human-rights treaties and by commitments made by OSCE participating states. These core values of human and civil rights are also referred to in key international instruments such as the UN Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Regarding hate-motivated or discriminatory political discourse, Ministerial Council Decision No. 10/05 emphasised "*the need for consistently and unequivocally speaking out against acts and manifestations of hate, particularly in political discourse*".[74] In addition, Ministerial Council Decision No. 10/07 called "*for continuing efforts by political representatives, including parliamentarians, strongly to reject and condemn manifestations of racism, xenophobia, anti-Semitism, discrimination and intolerance, ... while continuing to respect freedom of expression*".[75] The issue of political discourse was also highlighted in Ministerial Decision No. 13/06 in which the Ministerial Council "*deplore[d] racist, xenophobic and discriminatory public discourse, and stresse[d] that political representatives can play a positive role in the overall promotion of mutual respect and understanding and have a significant impact in defusing tensions within societies, by speaking out against hate-motivated acts and incidents"*.[76]

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[73] For further information see: Anne Weber, *Handbuch Zur Frage Der Hassrede* (Strasbourg, 2009).

[74] OSCE, 'Ministerial Council Decision No. 10/05 Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding, Ljubljana'.

[75] OSCE, 'Decision No. 10/07 Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding, Madrid', 2007 <http://www.osce.org/mc/29452> [accessed 25 February 2014].

[76] OSCE, 'Ministerial Council Decision No. 13/06, Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding, Brussels', p. 06.

3.2. Observations and recommendations by the OSCE

3.2.1. Hate Crime Report

Already in the first Hate Crime Report of 2006, ODIHR stated that electoral campaigns, in which political leaders exploit the xenophobic fears and latent racism of the electorate through speeches or slogans, could cause a public climate of intolerance and fear.[77] Discriminatory public and political discourse was therefore seen as a dangerous breeding ground for discrimination and hate related crimes against the minorities concerned. Specifically concerning Switzerland, the Hate Crime Report 2007 mentions the discriminatory electoral campaign and a series of posters playing on racist and xenophobic fears.[78]

3.2.2. 2007 Report of the Personal Representative of the OSCE on Combating Intolerance and Discrimination against Muslims

As part of the country visit, the Personal Representative criticised the right wing politicians and media of constantly projecting a negative image of minority groups in general and Muslims in particular. He recommended that the government should consider employing specific mechanisms, to prevent racist and discriminatory popular initiatives for referendums, while respecting the freedom of expression.[79]

3.2.3. 2011 Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues

In the 2011 report, the Representatives mentioned the peculiar characteristics and problems of direct democracy and federalism in Switzerland as regards discriminatory popular initiatives and referendums like the anti-minaret initiative. The Representatives recommended continuing the national debate on how to strengthen direct democracy to contribute to a stable and open society, while avoiding their possible misuse for discriminating against unpopular minorities.[80]

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[77] OSCE and ODIHR, 'Hate Crimes in the OSCE Region: Incidents and Responses : Annual Report for 2006', p. 61.

[78] For example one poster depicted three white sheep booting a black sheep out of the country. In another, a minaret was shown tearing apart the Swiss flag. An analysis on media reporting during the 2007 general elections concerning foreigners and ethnic minorities, done by the University of Zurich, which was commissioned by the FCR, clearly shows the extent of stereotyping of Muslims especially by right wing politicians: EKR and Forschungsbereich Öffentlichkeit und Gesellschaft, Universität Zürich, 'Ausländer nd Ethnische Minderheiten in der Wahlkampfkommunikation - Analyse der Massenmedialen Berichterstattung zu den Eidgenössischen Wahlen 2007', 2007 <http://www.ekr.admin.ch/pdf/Analyse+f%25C3%25B6g+an+Medien+DEF+07-12b73a.pdf> [accessed 2 March 2014].

[79] OSCE, 'Report of the Personal Representative of the OSCE on Combating Intolerance and Discrimination against Muslims, 12-14 November 2007'.

[80] OSCE, 'Report of the Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues from November 7-9, 2011, Country Visit Switzerland', pp. 5, 6.

3.3. Implementation in Switzerland and gaps

3.3.1. Federal popular initiatives for constitutional amendments

The international and national outcry concerning discriminatory federal popular initiatives led to a political and public debate on how to address popular initiatives and referendums comprising elements, which violate human rights and international commitments.

As requested by the Parliament in two postulates[81], the Federal Council engaged with these problems in some detail in two reports in 2010 and 2011.[82] To diffuse the situation, the Federal Council proposed a preliminary examination analysing the compatibility between the wording of new popular initiatives and international commitments, as well as the civic rights guaranteed in the constitution. Parliament welcomed the propositions made by the Federal Council and commissioned the Federal Council in two motions,[83] to develop a draft proposal. Serious objections were brought forward against the draft proposal, during the consultation procedure. Particularly the political parties and associations had a critical attitude towards the proposal. Due to this reason, the Federal Council proposed to parliament to not further pursue the two motions.[84] However, this does not mean that the Federal Council assesses the current legal situation as satisfactory. In fact, the Federal Council recognises the need for action and again wants to be involved in developing measures, which will contribute to the improvement of the compatibility between international and federal law.

3.3.2. No coherent legislation or case-law to combat discriminatory discourse

Given the lack of a firm understanding of what racial discrimination really means, and where the permissible limits are, there is a great deal of discretionary scope when it comes to protection against discrimination. The results of exploring the boundary between freedom of expression and protection against discrimination usually favour the former of the two interests.

This is especially apparent in different judgements concerning alleged discriminatory political discourse and campaigns.

In recent years, many complaints have been lodged on the basis of Article 261bis of the Criminal Code against the publication of political posters, which were perceived as defamatory and discriminatory. However, no one has ever been prosecuted.

The judgement of the Federal Court[85] concerning a poster put up ahead of the Federal Assembly elections in various places in Valais, can serve as an example. The picture showed Muslims kneeling to pray in front of the parliament building. As a result, the picture mainly showed the posteriors of the people praying. The text "Use your heads" and the

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81 Postulate 07.3764 and Postulate 08.3765

82 Bericht des Bundesrates über das Verhältnis von Völkerrecht und Landesrecht (BBl 2010 2263); Zusatzbericht des Bundesrats zu seinem Bericht über das Verhältnis von Völkerrecht und Landesrecht (BBl 2011 3613)

83 Motion 11.3468 and Motion 11.3751

84 Bericht des Bundesrates zur Abschreibung der Motionen 11.3468 und 11.3751 der beiden Staatspolitischen Kommissionen über Massnahmen zur besseren Vereinbarkeit von Volksinitiativen mit den Grundrechten: <http://www.ejpd.admin.ch/content/dam/data/staat_buerger/gesetzgebung/voelkerrecht/ber-br-d.pdf>

85 Urteil vom 27. Juli 6B_664/2008: <http://relevancy.bger.ch/php/aza/http/index.php?lang=de&zoom=&type=show_document&highlight_docid=aza%3A%2F%2F27-04-2009-6B_664-2008> [accessed 28 February 2014].

slogan "Vote SVP, Switzerland free forever" was added. The Federal Supreme Court considered that the freedom of expression had to be rated higher than the protection against discrimination during elections and political disputes (Art. 261bis Swiss Criminal Code) . There are several other judgements confirming that the Federal Supreme Court gives precedence to freedom of expression over the protection against discrimination, when weighing up the balance between the two.[86]

Against this background, it is difficult to fulfil the commitments with regard to combating discriminatory and defamatory political discourse and campaigns, as required by the OSCE standards.

III. CONCLUSION

Switzerland has partially fulfilled the OSCE's commitments in several areas. For example, Switzerland nominated the Federal Departement of Foreign Affairs as the national point of contact on hate crimes to periodically report to the ODIHR reliable information and statistics on hate crimes, as requested by the OSCE Ministerial Council. The Federal Commission against Racism (FCR) compiles and provides the relevant data. Nevertheless a number of gaps in the implementation of OSCE's commitments can be identified.

A large gap in the implementation of commitments relates to combating and monitoring hate crimes. Despite the fact that Switzerland has made a commitment to the OSCE to combat hate crimes, part of the legal basis for a complete implementation is missing. Although Switzerland generally refers to article 261bis of the Swiss Criminal Code in this context, it has to be stressed that this legal provision does not fulfil all of OSCE's requirements regarding legislation against hate crimes. For example, Art. 261bis Swiss Criminal Code protects only a very restricted category of people, whereas the ODIHR's definition of hate crime includes a much wider range of protected characteristics like language and sexual orientation. *We recommend that Swiss authorities adopt appropriate and more effective legislation.*

The OSCE Personal Representative, on the occasion of his country visits, criticized the increasingly intolerant and discriminatory climate regarding Muslims and other minorities in Switzerland. The anti-minaret initiative, which had been perceived as discriminatory against Muslims internationally, was mentioned in particular. On a positive note, as a consequence following the anti-minaret initiative, the federal government was seeking an increased dialogue with the Muslim population. Yet, this dialogue was closed before any real outcomes were achieved. It is important that the federal and cantonal authorities are continuing their efforts and are not trying to shirk their responsibilities by pointing to the distribution of powers and duties in the federal state.

The OSZE is fundamentally concerned about the nature of political discourse in Switzerland. Particularly in times of federal popular votes, referendums or elections the discourse risks turning discriminatory. Swiss Courts tend to classify the protection of the freedom of expression as more important than the protection against discrimination during political discourse. While political discourse must be allowed to be robust, effectively combatting

[86] Other judgements concerning discriminatory political discourse: http://www.ekr.admin.ch/services/f524/2011-015N.html, <http://www.ekr.admin.ch/services/f524/2008-005N.html?db=N&searchindex=2008-005>; <http://www.ekr.admin.ch/services/f524/2011-010N.html>.

discrimination and defamation in electoral campaigns, as required in OSCE commitments. *We recommend to further clarify the precise limits of the freedom of expression and, if necessary, to develop tools that include positive measures such as sensitization campaigns or the development of codes of conduct by political parties well as prohibitions and sanctions where adequate.*

ANNEX SOURCE MATERIALS

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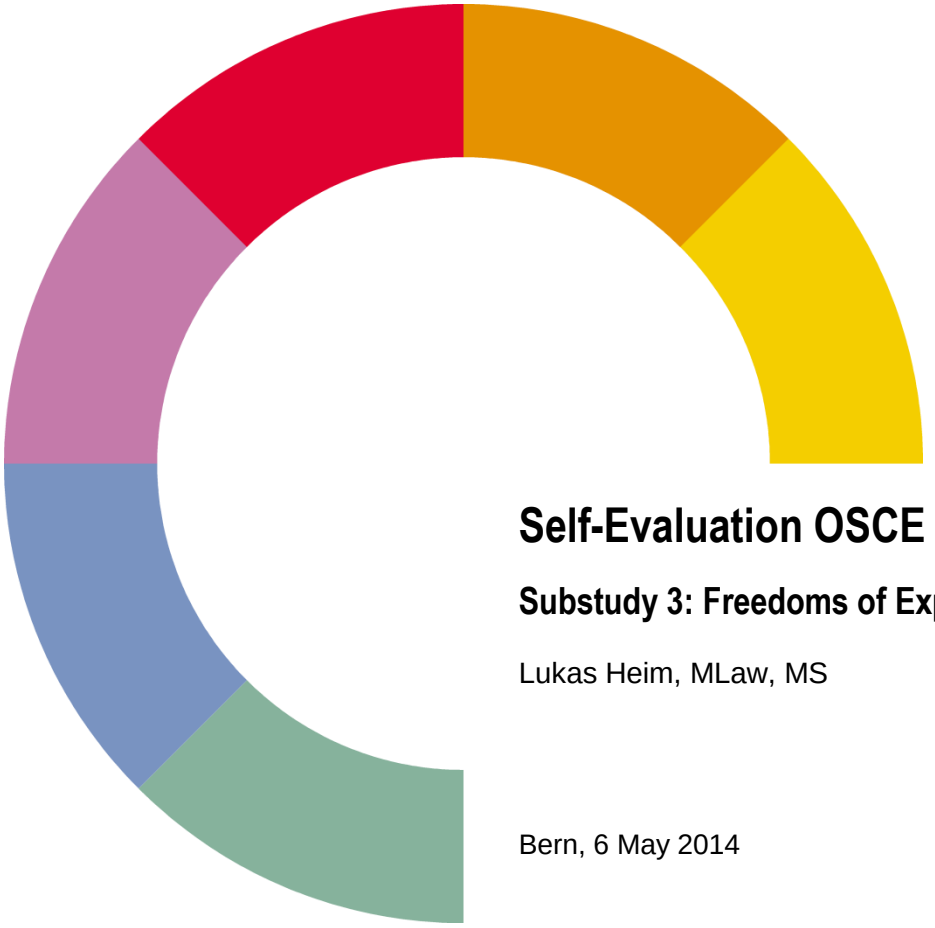

Self-Evaluation OSCE Chairmanship

Substudy 3: Freedoms of Expression and Assembly

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Bern, 6 May 2014

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CONTENTS

I. FREEDOMS OF EXPRESSION AND ASSEMBLY AS A CONCERN TO THE OSCE

Only if everyone is free to express their, at times opposing and unpopular, views and only if people are able to protest in public for and against different causes, decisions, and events, can the fundamental freedoms enshrined in human rights and reflected in numerous OSCE commitments be respected, protected and fulfilled. If people cannot access and impart all sorts of information, the public will not be able to take informed decisions when participating in votes and elections and journalists' ability to report and present accurate and important news will be limited. Nevertheless, the freedoms of expression, information and assembly are not absolute. They can be limited for a number of reasons. For example, if a view expressed consists of hate speech inciting to violence it can be legitimate to restrict such speech. It is a complex and often not easy task to draw the line between these freedoms and legitimate aims for restrictions. However, given freedom of expression, information and assembly are essential for the functioning of any democracy, the line should not be drawn too quickly.

This is why the OSCE has recognized the fundamental importance of these freedoms: "The participating States (…) recall in particular that freedom of expression is a fundamental and internationally recognized human right and a basic component of a democratic society and that free, independent and pluralistic media are essential to a free and open society and accountable systems of government."[1] The OSCE participating States also reaffirmed "everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards".[2] In regognition of the significance of these commitments, the OSCE participating States agreed in December 1997 to establish a media freedom body. Since then, the OSCE Representative on Freedom of the Media (OSCE RFOM) has been a crucial actor for monitoring media freedom and respect for OSCE commitments on the freedoms of expression, the media, and information across the OSCE region. ODIHR is another OSCE structure, which has made valuable contributions in this area, especially in relation to freedom of assembly.

On the international stage, Switzerland has been a determined supporter of freedom of expression and freedom of assembly including as an OSCE participating State and during the current Chairmanship as well as, most recently, by sponsoring a resolution adapted by the UN Human Rights Council on on the promotion and protection of human rights in the context of peaceful protests.[3] This substudy takes a closer look at Switzerland's record at home concering these freedoms in light of relevant OSCE commitments and reports.

II. INPUT FROM NON-GOVERNMENTAL ORGANIZATIONS

A number of Swiss NGOs shared their perspectives in regard to the focus area of this study. In particular:

Media diversity and access to official documents: Reporters Without Borders Switzerland (RWB) noted the increasingly concentrated ownership of legacy media outlets in Switzerland, which is

[1] OSCE PC.DEC No. 193, Mandate OSCE RFOM (Copenhagen 1997), para. 1.
[2] OSCE/CSCE Copenhagen Document Human Dimension (Copenhagen 1990), para. 9.2. At the time, the OSCE still was the Conference on Security and Co-operation in Europe (CSCE).
[3] See https://www.news.admin.ch/message/index.html?lang=en&msg-id=52478 (accessed 1 April 2014). As per 1 April the final version of the UN HRC Resolution on the promotion and protection of human rights in the context of peaceful protests was not available yet.

particularly concerning under the aspect of media diversity. RWB suggested the existing competition legislation and its application to the Swiss media landscape should be analysed. RWB also recommended having a closer look at the current system of public support for the media, especially to assess if it is adequate and whether it promotes media diversity. Concerning access to official docments, RWB mentioned that several cantons still are lacking access to information legislation which is based on the principle of transparency (this will be dealt with in this study in more detail), that a number of federal agencies, including the Swiss National Bank, are exempted from the Federal Act on Freedom of Information in the Administration (FoIA) and that in practice access to official documents often remains difficult.

Participation of asylum-seekers in demonstrations: The Swiss Refugee Council expressed its reservations about art. 3(4) of the amended Swiss Asylum Act and the related art. 116 (c) and (d) of the Asylum Act as in force since 1 February 2014. The latter legal norm provides that anybody who "carries out public political activities as an asylum seeker in Switzerland solely with the intention of establishing subjective post-flight grounds" is liable to a fine. Aiding somebody in such an activity, namely through planning and organization, can be punished with a fine too.

A lot will depend on how art. 116 (c) and (d) are interpreted and applied in practice. An overly broad application of these provisions certainly would risk to run counter the freedoms of expression and assembly and related OSCE commitments. Particularly relevant will be, how relevant authorities will handle questions in relation to burden and standard of proof. Putting the burden and standard of proof too heavily on the asylum-seeker, the issuance of heavy fines, and the punishment without exceptions of asylum-seekers who do not have a previous history of political activism in the host country (including for organizing and participating in demonstrations) all are likely to be disproportionate and, therefore, are also likely to violate the freedoms of expression and assembly. Decisions and general practice by authorities in relation to Art. 116 (c) and (d) need to reflect the importance of these freedoms in a functioning democracy.

While it was not possible to cover all of the concerns shared by RWB and SRC, some of the issues brought forward are dealt with in this study. In addition, the Ombudsman of the Republic of Serbia provided feed-back on a draft of this substudy. This has informed the research and drafting process. At the same time, the SCHR and the author are solely responsible for the substudy's content.

III. FREEDOMS OF ASSEMBLY AND EXPRESSION: DEMONSTRATIONS

In Switzerland, many people, as well as political, religious and other groups with very different causes and worldviews have been exercising their right to demonstrate. For example, in March 2014, about 120 media workers were protesting against announced job cuts in front of a media company's headquarters. The referendum of 9 February 2014 leading to a very narrow victory of those in favour of curbing immigration triggered a series of demonstrations, including one with 12'000 participants on the Federal Square in Bern. At the same location, back in 2012, over 10,000 youths demanded fewer restrictions and more freedoms to party and enjoy themselves. A number of times, several thousand of Tamils rallied on the Place des Nations near the UN Office in Geneva. Or farmers parked about 250 tractors near a distribution and logistics center of a major supermarket chain to protest the company's pricing policy. In January 2014, a group of about 30 people was meeting in the center of Davos, where the World Economic Forum (WEF) was held at the same time. No consolidated data appears to be publicly available about the number,

type and size of demonstrations taking place, being notified, authorized or rejected in Switzerland each year. Despite this, it is safe to say that demonstrations held in public spaces are regular and numerous.

Switzerland's federal structure means that, at least potentially, authorities of 26 cantons and 2352 municipalities[4] are involved in registering, policing, authorizing, prohibiting or enabling demonstrations. Their actions are based on a multitude of federal, state (cantonal) and municipal administrative legislation, which provide a large and varied legal framework. This smorgasbord of administrative rules is embedded in the overarching norms of the federal and cantonal constitutions and of international human rights law guaranteeing the right to demonstrate.

In addition, there are a number of OSCE commitments, which refer to, reflect and complement international human rights law guaranteeing freedom of assembly and expression. Already in the Helsinki Final Act of 1975, the participating States "[m]ake it their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating States […]".[5] In 1990, "[t]he participating States reaffirm that […] everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards"[6] and later that year the Heads of State of all participating States "[…] affirm that, without discrimination, every individual has the right to […] freedom of association and peaceful assembly […]".[7] In 2008, the OSCE participating States held: "[…] We reiterate that everyone has the right to freedom of thought, conscience, religion or belief; freedom of opinion and expression, freedom of peaceful assembly and association. The exercise of these rights may be subject to only such limitations as are provided by law and consistent with our obligations under international law and with our international commitments. […]".[8] These commitments are complemented by detailed joint OSCE and Council of Europe guidelines on freedom of assembly.[9]

A systematic and comprehensive overview of all cantonal and municipal laws and practices concerning demonstrations would go beyond the scope of this study. Instead, the substudy presents a selection of recurring challenges based on OSCE monitoring complemented by the author's own research. The following analysis relies, in particular, on an OSCE ODIHR monitoring report from 2012.[10] Between May 2011 and June 2012, ODIHR assessed three assemblies taking place in Switzerland: a summit protest in Geneva during a World Trade Organisation Ministerial Conference in 2011 and two different protests on different days against the World Economic Forum during the 2012 summit. Based on these materials, the following evaluation takes a closer look at four aspects of the right to demonstrate: authorization and notification systems for demonstrations (1.); unauthorized demonstrations (2.); demonstrations in relation to high level events (3.) and media access to demonstrations (4.).

[4] As per 1 January 2014, according to the Federal Statistical Office. See (German) http://www.bfs.admin.ch/bfs/portal/de/index/regionen/11/geo/institutionelle_gliederungen/01b.html or http://www.bfs.admin.ch/bfs/portal/fr/index/regionen/11/geo/institutionelle_gliederungen/01b.html (French) (both accessed 13 March 2014).
[5] Helsinki Final Act (Helsinki 1975), 1. Human Contacts, p. 38.
[6] OSCE/CSCE Copenhagen Document Human Dimension (Copenhagen 1990), para. 9.2.
[7] Charter of Paris for a New Europe (Paris 1990), Human Rights, Democracy and Rule of Law, p. 3.
[8] OSCE MC Declaration 60th Anniversary UDHR (Helsinki 2008).
[9] OSCE and Council of Europe Guidelines on Freedom of Assembly.
[10] OSCE ODIHR Monitoring Report 2012.

1. Authorization and notification

Across the OSCE region, different legal regimes concerning the administrative policing of assemblies exist. Some of these systems are limited to or give preference to notifications, others require prior authorization or put in place a mixed system.

1.1. OSCE findings and recommendations

The OSCE ODIHR monitoring report from 2012 notes that for demonstrations "[i]n Switzerland […] permit or authorization systems are in place" and "regulatory and legislative frameworks on assemblies differ at the cantonal level, but, in general, the organizers of assemblies need to seek authorization from the local authorities in the cantons of Bern, Geneva and Graubünden."[11] The report then presents and analyses the relevant provisions for the authorization of demonstrations. Even though the Law on Demonstrations in Public Spaces in the Canton of Geneva[12] and the applicable municipal ordinances of the city of Bern and the town of Davos differ in content, they all have in common that, as a rule, prior authorization is required for holding protests in a public space.

The OSCE monitoring report holds that "[n]otification systems for assemblies are, in principle, preferable to authorization systems."[13] This is in line with the joint OSCE and Council of Europe guidelines on freedom of assembly, which provide that "[a]ny legal provisions concerning advance notification should require the organizers to submit a notice of the intent to hold an assembly, but not a request for permission. A permit requirement is more prone to abuse than a notification requirement, and may accord insufficient value to the fundamental freedom to assembly, and the corresponding principle that everything not regulated by law should be presumed to be lawful. It is significant that, in a number of jurisdictions, permit procedures have been declared unconstitutional."[14] The joint OSCE Council of Europe guidelines add, that "a permit requirement based on a legal presumption that a permit for the use of a public place will be issued (unless the regulatory authorities can provide evidence to justify a denial) can serve the same purpose as advance notification."[15]

The OSCE monitoring report observes that "[t]he authorization requirements in place in Geneva, Bern and Davos […] apply to all types of assemblies."[16] Taking a look at the implementation by the different authorities of the authorization system typically in place for demonstrations in Switzerland, the OSCE monitoring report then finds that "[t]here is no indication that the Geneva authorization regime (or the less detailed ones in force in Bern and Davos) has resulted in the denial of authorization for a significant number of assemblies. When ODIHR monitored a small protest on 17 December 2011 against the WTO Ministerial Conference in Geneva, with approximately 150 participants, the demonstration had, in fact, been authorized. However, the current legal and regulatory framework in force in Geneva is not fully consistent with the principle of presumption in favor of holding assemblies and could lead to restrictions on assemblies based on their con-

[11] OSCE Monitoring Report 2012, paras. 45 and 47. The Canton of Graubünden is where Davos, the host town of the WEF summit, is located.
[12] The assembly in Geneva monitored by the OSCE took place in 2011. When the OSCE Monitoring Report was published in 2012 a new cantonal law regulating demonstrations had been adopted. Thus, the OSCE report refers to both the old and new legislation.
[13] OSCE Monitoring Report 2012, para. 50.
[14] OSCE and Council of Europe Guidelines on Freedom of Assembly, para. 118.
[15] OSCE and Council of Europe Guidelines on Freedom of Assembly, para. 119.
[16] OSCE Monitoring Report 2012, para. 53.

tent."[17]

The OSCE monitoring report then specifies that "[t]he authorization system in the Geneva Canton may leave open the possibility for the competent authorities to impose content-based restrictions on assemblies in light of the regulating body's role in considering the 'correlation between the demonstration's theme and potential unrest' (Article 5.1 of the Geneva Canton Law on Demonstrations in Public Spaces)".[18] The OSCE adds that a "preferable formulation is included, for example, in the Geneva Canton Law on Demonstrations in Public Spaces, which grants the regulatory body the power to impose the presence of assembly stewards when this is justified by a risk of breach of public order. However, such a provision could become problematic if it is applied without being based on a rigorous and diligent assessment. Such assessment should reflect the specific circumstances of the assembly in question and, whenever possible, be carried out in consultation with assembly organizers. The obligation, imposed on the organizers of the WTO-related protest in Geneva, to ensure the presence of assembly stewards appeared to lack a clear justification. The assembly, even at its peak, did not gather more than 150 participants and remained easy to police, with no significant risk involved."[19]

The OSCE monitors also voiced another, very serious concern in relation to the law of 2012: "New provisions in Geneva introducing potential restrictions for organizers, who do not comply with legal requirements for assemblies, or whose assemblies cause serious damage, are highly problematic. Restrictions on the freedom of assembly of individuals solely on the basis of their previous failure to comply with legal requirements for assemblies are not in line with international standards that allow States to impose limitations on freedom of assembly only when there are compelling arguments to do so and only on the basis of legitimate grounds defined in human rights law (…). Such concerns are compounded by the fact that these provisions explicitly state that bans on future assemblies can be applied even where the organizers bore no responsibility for acts that led to severe damages."[20]

The OSCE monitoring report then recommends to all concerned participating States including to but not only Switzerland:

- *"where there are authorization requirement for assemblies, to consider amending legislation to introduce a notification system;*
- *to ensure that notification or, where they are retained, permit requirements are only imposed when necessary to facilitate freedom of assembly or to protect public order, public safety, and the rights and freedoms of others, and to only limit the regulation of assemblies to the minimum extent necessary;*
- *where an authorization system is retained, to ensure that this is based on a legal presumption that the authorization will be issued and that any refusal of authorization will be based on clearly defined criteria based on time, place and manner considerations and will be subject to prompt judicial review."*[21]

[17] OSCE Monitoring Report 2012, para. 54.
[18] OSCE Monitoring Report 2012, para. 71.
[19] OSCE Monitoring Report 2012, para. 139.
[20] OSCE Monitoring Report 2012, para. 145.
[21] OSCE Monitoring Report 2012, para. 55.

1.2. Achievements and remaining gaps

As mentioned earlier, given the limited time and resources available, it is not possible to gather a more complete picture of legislation and practices concerning demonstrations in Switzerland. The following assessment of achievements and remaining gaps, therefore, focuses on the OSCE findings from above. Given that Bern as the capital of Switzerland, Davos as the location of the World Economic Forum and Geneva as seat of many international organizations have each particular significance as locations for demonstrations, such an approach provides a practically relevant assessment.

The current ordinance of the city of Bern regulating demonstrations and other manifestations in public spaces maintains the established system for regulating demonstrations. With the exception of spontaneous rallies, demonstrations in public spaces require prior authorization. According to the municipal ordiance, spontenaous assemblies are demonstrations in immediate reaction to an unforeseen event, taking place the latest two days after the event became known. Spontaneous demonstrations are subject to a notification system.[22] In Davos the five members of the municipal council (Kleiner Landrat) can authorize demonstrations in public spaces of the town. Thus, any demonstration, unless spontaneous, requires prior permission. In Geneva, the cantonal law on demonstrations from 2012 is still in force even though one provision was repealed in the meantime. The most problematic article, which provided for restrictions on demonstrations based on previous failures of the organizers to comply with legal requirements, was found by the Federal Court[23] to be in breach of the freedoms of assembly, expression and information. Article 10 of the 2012 law provided that authorities may not authorize demonstrations during a period of one to five years by organizers who did previously not comply with legal requiremens or if during previous demonstrations particpants did not comply with legal requirements. The federal judges found that such restrictions on demonstrations were neither necessary nor proportionate to achieve a legitimate aim. This development is commendable. The other provisions considered as reason for concern by the OSCE remain in force. Importantly, the Federal Court concluded that these provisions can be interpreted in a way, which conforms with constitutional fundamental rights.

It would be useful to have data about authorized and unauthorized demonstrations collected, consolidated and made publicly available by the Federal Statistics Office. The collection and publication of such data would allow authorities, organizers of demonstrations, civil society and the public to get an accurate picture about the number, type, location, size of demonstrations taking place or being rejected each year across Switzerland.

It is recommended that federal, cantonal and municipal legislation regulating the authorization of demonstrations not already containing „a legal presumption that the authorization will be issued and that any refusal of authorization will be based on clearly defined criteria based on time, place and manner considerations" shall be amended. This is particularly true for the Geneva legislation mentioned earlier.

Moreover, considering the OSCE recommendation that a notification system is preferable, cantonal and municipal branches of government are encouraged to consider a notification system at least for some types of demonstrations beyond spontaneous demonstrations (e.g. depending on the size, time or place). Moreover, the OSCE recommends that if an advance notification system for spontaneous demonstrations exists as in Switzerland, the „law should explicitly provide for an

[22] Articles 2 and 3 of the Municipal Ordinance on Manifestations on Public Grounds.
[23] Federal Court, Judgment of 10 July 2013 (1C_225/2012).

exception from the requirement where giving advance notice is impracticable“. It is recommended to amend existing provisions concerning spontaneous demonstrations accordingly.

It is also recommended to carry out or commission a study that takes a comprehensive look at the existing legislative frameworks and authorization practices concerning demonstrations. The study sould also look at best practice examples of notification systems in other OSCE participating States and assess if and for what types of demonstrations the introduction of such a system would be feasible in Switzerland including, in particular in the cities of Bern and Geneva and the town of Davos given their importance as locations for demonstrations. Authorities of these municipalities should be consulted in the course of research.

2. Unauthorized demonstrations

The legal consequences and policing practices concerning unauthorized demonstrations are not easy to define given the numerous cantonal and municipal acts and ordinances, as well as authorities competent in this matter. This is especially true for planned (unspontaneous) demonstrations lacking an authorization.

2.1. OSCE findings and recommendations

All the federal, cantonal and municipal legislation and authorization decisions have to be in line with the constitutional and international human rights guarantees concerning freedom of assembly and freedom of expression. Therefore, a closer look at the case law of the Federal Court, the Swiss top judicial body, will shed some light on accepted practices. The findings of the OSCE monitoring report provide additional insights. For this purpose, it is useful to distinguish different types of unauthorized demonstrations. First, two situations of planned but unauthorized demonstrations can be distinguished: (1) Planned demonstrations taking place may lack an authorization because authorities rejected a request but people, nevertheless, take to the streets. Or (2) the demonstration is unauthorized because no authorization was sought for a non-spontaneous demonstration. Finally, (3) spontaneous rallies represent a third type of unauthorized demonstrations.

Demonstration after authorization was rejected: In a judgment from 2008, the Federal Court found that a municipal ordinance of the city of Thun prohibiting and sanctioning the conduct of and participation in a non-spontaneous demonstration after authorities issued a rejection decision is not in breach of freedom of assembly and expression guarantees.[24] The federal judges added that sanctions need to be proportionate, and punishment of participation in such a demonstration is subject to some limitations. Given that a rejection decision was taken (and upheld if appealed), police typically will prevent or disperse such a demonstration.

Planned demonstration with no previous authorization sought: In the same decision, the federal judges held that the municipal ordinance provided a solution in accordance with constitutional requirements for planned rallies where no authorization was sought before people demonstrated.[25] According to the ordinance, authorities have to make an assessment at the time of the demonstration and refrain from dispersing it and punishing organizers if the rally remains peaceful. This solution, the federal judges wrote, is in line with freedom of assembly and freedom of expression guarantees, as it recognizes that just because a demonstration has not been authorized it is not automatically prohibited, and cannot, as a matter of course, be dispersed or prevent-

[24] Federal Court, Judgement of 17 March 2009 (1C_140/2008), para. 7.1.
[25] Federal Court, Judgement of 17 March 2009 (1C_140/2008), para. 7.2.

ed. If, however, the demonstration turns violent, police are authorized to act, according to the ordinance upheld by the Federal Court. Still, participants voluntarily or upon police demand leaving the demonstration will not be punished. Organizers and participants refusing to follow police orders can be sanctioned.

The OSCE monitored an anti-WEF assembly in the city center of Bern from 21 January 2012. [26] The organizers of the demonstration announced the rally but did not seek prior authorization. Authorities decided to prevent and disperse the assembly after assessing that there was a security risk. Representatives of the cantonal police stressed to OSCE monitors that this was an exceptional measure and that, normally, unauthorized demonstrations are facilitated by the police. OSCE monitors welcomed this general approach. At the same time, the OSCE took a closer look at the decision to prevent the assembly: "While it is positive that the Bern Canton Police appears to have a general policy of facilitating unauthorized assemblies, the approach adopted before the publicly announced, but not authorized, anti-WEF assembly in January 2012 raises a number of questions in relation to its compliance with OSCE commitments and international human rights standards."[27] The OSCE monitors then specify that "[t]he pre-emptive decision by the local police, in conjunction with the Bern city authorities, to prevent the assembly from taking place was motivated by security considerations and the possibility of violence during the assembly. The planned protest may have indeed involved a risk of violent or potentially violent incidents. Nevertheless, it is not clear whether there were compelling reasons to impose an effective ban on this unauthorized assembly. The detention of two individuals who had caused damage to the National Bank in Zurich (apparently by scribbling graffiti and throwing red paint on the building) and calls for violence published on the Internet were among the factors cited by the Bern Canton Police in its security assessment of the assembly. However, they do not appear, as such, to provide sufficient evidence that the participants in the assembly were themselves going to use or incite imminent violent action and that such action was likely to occur. Indeed, the police operation that led to the immediate kettling of the small group of people who had started to gather at the planned location of the assembly was not accompanied by significant incidents. The kettling left out of the police cordons a significant number of individuals who had planned to take part in the protest. Those outside the police cordons protested against the police operation, but did not appear to engage in violent conduct."[28]

Spontaneous demonstrations: When people assemble in direct reaction to a specific event, political decision, vote, election, or to another reason, there is no time to go through an authorization procedure. Swiss legislation and practices appear to reflect this by providing an exception to spontaneous assemblies from the authorization requirement. For example, the municipal ordinance of the city of Thun considered by the Federal Court provided that spontaneous assemblies need not be authorized but have to be notified to authorities. The Federal Court found that such a system is in line with the freedoms of assembly and expression.[29]

OSCE recommendations: After considering the question of policing unauthorized demonstrations or of assemblies otherwise not compliant with legal requirements, the OSCE monitoring report recommends to participating States including but not only to Switzerland:

- *"to ensure that, whenever possible, peaceful assemblies that do not meet relevant legal requirements are facilitated by police forces and other competent authorities;*

[26] OSCE Monitoring Report 2012, p. 97.
[27] OSCE Monitoring Report 2012, para. 163.
[28] OSCE Monitoring Report 2012, para. 164.
[29] Federal Court, Judgement of 17 March 2009 (1C_140/2008), para. 8.

- *to ensure that police restrictions on such peaceful assemblies are only imposed on grounds that are legitimate under OSCE commitments and international human rights law, to protect national security or public safety, public order, public health or morals (when the behavior is deemed criminal and has been defined in law as such) or the rights and freedoms of others;*
- *in particular, to ensure that lack of compliance with formal legal requirement for assemblies does not constitute, as such, sufficient grounds for the dispersal of the assembly;*
- *regulating protest camps and other similar assemblies, in accordance with the principle of proportionality, to ensure that the least intrusive measures to achieve the legitimate objectives being pursued are adopted, whenever possible, following discussions and in agreement with the protesting groups;*
- *to ensure that the eviction of protest camps does not result from individual unlawful acts of protesters or others in or around the camp when the assembly remains otherwise peaceful."*[30]

Regarding spontaneous assemblies, the joint OSCE and Council of Europe guidelines recommend that if "legislation requires advance notification, the law should explicitly provide for an exception from the requirement where giving advance notice is impracticable. Such an exception would only apply in circumstances where the legally established deadline cannot be met. The authorities should always protect and facilitate any spontaneous assembly so long as it is peaceful in nature."[31]

2.2. Achievements and remaining gaps

As mentioned before, it has not been possible to analyse all the relevant municipal and cantonal legislation and practices including in relation to unauthorized assemblies. Instead, the substudy focuses on selected situations in Bern, Davos and Geneva. Announced but unauthorized anti-WEF protests were staged in the inner city of Bern also in 2013 and 2014. Authorities appear to have taken a more tolerating approach than in 2012, when they kettled protesters and prevented the unauthorized assembly. According to news reports, on January 2014 cantonal police forces marked a heavy presence in the inner city of Bern and carried out identity checks among the demonstrators "because the presence of some militant protesters could not be excluded". Ten protesters were temporarily brought to a police station for additional investigations. According to police, a number of pepper sprays and helmets were confiscated. At the same time, the rally of about 50 protesters, which had been announced but for which no authorization was sought, could go ahead. Similar unauthorized protests in 2014 and 2013, including a flashmob at the train station of Bern, were tolerated, with the police carrying out identity checks and temporary arrests of individuals considered a risk (namely because of a history of willful damage to property). Also in Davos, besides authorized demonstrations, a number of small, unauthorized rallies were allowed to go ahead during the WEF in 2013 and 2014. In Geneva, in 2013 and 2014, authorities appear to have facilitated unauthorized demonstrations as long as they were peaceful.

From the limited samples considered, it seems that, overall, authorities in Bern, Davos and Geneva in the last couple of years have taken an approach to unauthorized demonstrations in line with OSCE commitments. The policing by the cantonal police in Bern of anti-WEF protests in 2013 and 2014 marks a clear improvement to the approach taken in 2012. To allow the largely peaceful, announced but unauthorized anti-WEF protests to go ahead, and to deal with potentially violent protesters individually is in line with OSCE and joint OSCE and Council of Europe recommendations on unauthorized, peaceful assemblies. Authorities in Bern, Davos, Geneva and elsewhere are encouraged to continue policing unauthorized demonstrations along these lines.

[30] OSCE Monitoring Report 2012, para. 167.
[31] OSCE and Council of Europe Guidelines on Freedom of Assembly, section 4.2.

Finally, one major concern remains. Based on the Federal Court's decision about the municipal ordinance of the city of Thun regulating manifestations in public spaces,[32] it seems that there is room for policing practices, which could be problematic in light of OSCE commitments and recommendations on unauthorized assemblies. As stated above, participating States should "ensure that, whenever possible, peaceful assemblies that do not meet relevant legal requirements are facilitated by police forces and other competent authorities". In light of the judgment, a possible argument would be that if a request by the organizers for prior authorization of a demonstration was made and rejected, the police, always or at least normally, not only is allowed but has a duty to disperse the demonstration and that participants will, as a matter of course, be punished. The better approach in light of relevant OSCE commitments would be to handle this type of unauthorized demonstrations in the same way as other unauthorized manifestations: as long as the rally is peaceful it should be allowed to go ahead, participants should not be punished and violent or potentially violent protesters should be dealt with individually.

It is, therefore, recommended to police forces, in particular to the cantonal police forces in the cities of Bern and Geneva, and the different cantonal police forces deployed to Davos during the WEF, to make such an approach the standard rule of police engagement with any unauthorized demonstration including if authorization was sought and rejected. This leaves open the possibility of dispersing the demonstration for security or public order reasons or using police cordons or other policing measures to enforce restrictions regarding space, time and manner of the assembly. Individual arrests of violent protesters and criminal responsibility also would not be excluded by such an approach, while ensuring respect for freedom of assembly and freedom of expression.

3. Demonstrations in relation to high level events

3.1. OSCE findings and recommendations

Switzerland is home to the UN Office in Geneva, several UN agencies, the World Trade Organization and numerous permanent representations. In addition, the town of Davos is hosting the annual summit of the World Economic Forum. Thus, Swiss authorities especially in Geneva and Davos have seen their fair share of ensuring security at high level events and locations, which are also popular for staging protests. In addition, the city of Bern as the capital and seat of the federal government is another important place for demonstrations. Authorities in Bern, Davos and Geneva, overall, have shown their willingness to accommodate assemblies in relation to high-level summits in line with constitutional and international human rights obligations, as well as OSCE commitments. At the same time, OSCE monitors have identified a number of challenges.

According to the OSCE monitoring report, "[o]n 28 January 2012, ODIHR monitored a protest against the WEF Annual Meeting in Davos. Between 25 and 29 January 2012, the Graubünden Canton Police enacted restrictions on access to certain areas of the town close to the venues of the meeting. They affected access to these areas by all individuals with the exception of police and security personnel, residents, and individuals who (as participants, organizers, accredited media, etc.) were taking part in the WEF meeting or related activities. As a result, neither the protest that took place on 28 January 2012 nor a related Occupy Davos camp could be within sight and sound of the WEF delegates. In addition, ODIHR was informed that security considerations played a role in the decision, which was reached through negotiation with the organizers, to move the 28 January protest from the location where it had been originally planned, closer to the secu-

[32] See III.2.1 and Fn 24.

rity zones and the congress centre, to a square in front of the local municipal building. In contrast, in Geneva, the anti-WTO protest took place within a relatively close distance from the venue of the WTO Ministerial Conference."[33] The OSCE monitors, who assessed a number of assemblies in several OSCE participating States including Switzerland and the United States of America, added that "in Davos and Chicago, assembly participants could gather in the town or city where the Summit was organized but not near the Summit venues. These situations remain unsatisfactory from the point of view of ensuring that protesters are close enough to their audience to effectively convey their message. However, a positive aspect to be highlighted is that, during negotiations between local authorities and assembly organizers (in Davos and Chicago) […] public visibility considerations were taken into account and, in some cases, led to a partial accommodation of the organizers' requests. It should be noted, however, that an appeal should be possible if the de facto restrictions emerging from such negotiations are not actually agreed upon by all participants in the negotiations."[34]

In relation to the sight-and-sound principle, the OSCE recommends to the participating States including but not only to Switzerland:

- *"to ensure that security or other considerations do not disproportionately limit the ability of assembly participants to convey their message within sight and sound of their intended audience;*
- *to ensure that, where security or other considerations may result in time, place and manner restrictions on assemblies, these are, whenever possible, previously discussed with the organizers of assemblies, and that suitable alternatives in line with the sight-and-sound principle are proposed; whenever possible, a negotiated and agreed solution should be considered the most desirable outcome."*[35]

The joint OSCE and Council of Europe Guidelines on Freedom of Assembly explain the rationale of the sight-and-sound principle. Restrictions on and alternatives regarding time and place of a demonstration are not impermissible as such. However, the joint OSCE and Council of Europe guidelines emphasize that "[a]ny alternative must be such that the message that the protest seeks to convey is still capable of being effectively communicated to those to whom it is directed – in other words, within "sight and sound" of the target audience".[36]

3.2. Achievements and remaining gaps

In Davos, in 2013 and 2014, the municipal council (executive) authorized a number of assemblies on the town square, about one and a half kilometer (or slightly less than a mile) away from the congress center where the main events of the WEF were taking place at the same time. When at an authorized assembly of about 100 participants roughly half of the participants started marching, heading closer to the WEF venues, they were stopped by the police. One member of the executive explained the police measure. He said that, as a liberal, he thinks that also opposing views should be allowed to be presented in public, while in the particular case security resons justified the limitation.

Balancing the security measures for the numerous high-level participants at the WEF with the freedoms of assembly and expression of protesters is a formidable task. Authorizating several demonstrations during the WEF in the town center is certainly a very welcome practice by the

[33] OSCE Monitoring Report 2012, para. 74.
[34] OSCE Monitoring Report 2012, para. 90.
[35] OSCE Monitoring Report 2012, para. 92.
[36] OSCE and Council of Europe Guidelines on Freedom of Assembly, para. 45.

members of the Davos executive branch of government, giving due consideration to freedoms of assembly and expression including relevant OSCE commitments. The location is central and relatively close to the event against which the demonstrators are protesting. However, the solution does not provide an optimal location in light of the sight-and-sound principle. With nearly one and a half kilometer away, WEF participants are unlikely to have any exposure to the protests except through the media. Thus, the concerns voiced by the OSCE monitors in 2012 remain valid for 2013 and 2014.

The solution provided to protesters in Geneva during a WTO Ministerial Conference in December 2011 is a better practice to follow. It is important to remember, that any restrictions regarding the location of a demonstraton should be limited to security or other legitimate grounds. Clearly, local authorities and experienced police forces are best placed to define the necessary security measures for such an event as the annual WEF summit. Inconvenience or awkward moments for WEF participants, however, do not justify restricting demonstrations closer to the WEF venues. Organizers of anti-WEF protests in Davos, the members of the Municipal Council, police representatives and other officials involved in ensuring security, and WEF organizers are all encouraged to seek solutions regarding the location of protests that give more weight to the sight-and-sound principle. They are encouraged to sit down together at the same table, as has happened in previous years, to find, if necessary with the help of a mediator, an improved solution. The same recommendation applies to other high-level events including in Bern and Geneva.

4. Access of journalists

The OSCE has stressed that journalists „have a very important role to play in providing independent coverage of public assemblies. Media reports and footage provide a key element of public accountability, both for organizers of events and law-enforcement officials."[37]

4.1. OSCE findings and recommendations

Overall, limitations on access for journalists covering demonstrations are not a frequent concern in Switzerland. Nevertheless, occasionally some problematic restrictions exist, as two isolated but problematic cases illustrate. The OSCE Representative on Freedom of the Media (OSCE RFOM) inquired in 2008 about the temporary detention of two journalists during a police intervention against an unauthorized anti-WEF demonstration in the city of Basel. Subsequently, the OSCE RFOM „was informed by the Delegation of Switzerland, that an investigation by the cantonal police of Basel is ongoing. An independent report on the case, published on 6 March 2008, concluded that the detentions were not justified. The police of Basel accepted this criticism, and as a result of the incident the police corps intends to hold talks with journalists' association, in order to agree on common procedures for easy identification of journalists, given the wide range of press cards in circulation."[38] In relation to another unauthorized demonstration against the WEF in 2008, in Bern, stopped, shackled and brought two journalists to a police station. The two media professionals intended to report about the unauthorized demonstration and were on their way to the protest location a couple of hundred meters away.

In relation to media access to demonstrations, the OSCE monitoring report about freedom of assembly recommends to participating States including but not only to Switzerland:

- *"to ensure that journalists are able to provide coverage of public assemblies without hin-*

[37] OSCE Monitoring Report 2012, para. 226.
[38] OSCE RFOM Yearbook 2008, p. 77.

drance;
- *in particular, to ensure that access is provided to the greatest extent possible to assembly monitors and journalists, to all locations where they may carry out their activities;*
- *to ensure that identifiable journalists without accreditation, except under circumstances where resources, such as time and space at certain events, are limited, are not restricted in their ability to report on assemblies;*
- *to ensure that journalists and assembly monitors are only detained by the police if they engage in unlawful conduct and not as a result of mass arrests or their lack of credentials; they should not be arrested as a result of their failure to leave an area once a dispersal order is given, unless their presence would unduly interfere with police action."*[39]

The joint OSCE and Council of Europe Guidelines on Freedom of Assembly mention that "[m]edia reports can […] provide an otherwise absent element of public accountability for both organizers of assemblies and law-enforcement officials. Media professionals should, therefore, be guaranteed as much access as is possible to an assembly and to any related policing operation." The OSCE / Council of Europe guidelines, furthermore, present and endorse the recommendations by the OSCE RFOM.

A special report by the OSCE RFOM about the handling of the media during political demonstrations contains six recommendations to both authorities and the media:

"1. Law-enforcement officials have a constitutional responsibility not to prevent or obstruct the work of journalists during public demonstrations. Journalists have a right to expect fair and restrained treatment by the police.
2. Senior officials responsible for police conduct have a duty to ensure that officers are adequately trained about the role and function of journalists and particularly their role during a demonstration. In the event of an over-reaction from the police, the issue of police behaviour vis-à-vis journalists should be dealt with separately, regardless of whether the demonstration was sanctioned or not. A swift and adequate response from senior police officials is necessary to ensure that such an over-reaction is not repeated in the future and should send a strong signal that such behaviour will not be tolerated.
3. There is no need for special accreditation to cover demonstrations except under circumstances where resources, such as time and space at certain events, are limited. Journalists who decide to cover 'unsanctioned demonstrations' should be afforded the same respect and protection by the police as those afforded to them during other public events.
4. Wilful attempts to confiscate, damage or break journalists' equipment in an attempt to silence reporting is a criminal offence and those responsible should be held accountable under the law. Confiscation by the authorities of printed material, footage, sound clips or other reportage is an act of direct censorship and as such is a practice prohibited by international standards. The role, function, responsibilities and rights of the media should be integral to the training curriculum for law-enforcers whose duties include crowd management.
5. Journalists should identify themselves clearly as such, should restrain from becoming involved in the action of the demonstration and should report objectively on the unfolding events, particularly during a live broadcast or webcast. Journalists' unions should agree on an acceptable method of identification with law enforcement agencies and take the necessary steps to communicate this requirement to media workers. Journalists should take adequate steps to inform and educate themselves about police measures that will be taken in case of a riot.
6. Both law enforcement agencies and media workers have the responsibility to act according to a code of conduct, which should be reinforced by police chiefs and chief editors in training. Police chiefs can assist by ensuring that staff officers are informed of the role and function of journalists. They should also take direct action when officers overstep the boundaries of these duties. Media workers can assist by remaining outside the action of the demonstration and clearly identifying

[39] OSCE Monitoring Report 2012, para. 241.

themselves as journalists."[40]

4.2. Achievements and remaining gaps

In Basel authorities acknowledged that the arrests of the two journalists in 2008 were not justified and happened among mass arrests of protesters, many of which were later deemed unjustified too. As mentioned above, authorities promised to sit down with journalism organizations and to make the handling of the media part of the demonstration policing training. While also some criticism was accepted by authorities in Bern, it appears that the handling of these two journalists by the police was not considered as particularly problematic.

Overall, journalists are granted access to demonstrations, including unauthorized ones. From the limited research possible for this substudy, it appears that no such incidents took place since 2008 and that the arrests of the journalists represent isolated cases. Still, the arrests illustrate the importance of making the handling of the media including during demonstrations part of the (crowd control) training of the cantonal police forces. Such training should target officers deployed on the street, senior officers taking strategic and tactical decisions on policing demonstrations and relevant other authorities. It is recommended to translate the six recommendations by the OSCE RFOM into the Swiss official languages and make them part of already existing or new training module at the five police academies and the Swiss Police Institute about the handling oft the media (at demonstrations or in general). Journalism organizations or representatives and police officials should establish an informal, but regular forum of exchange, where, among other things, the different roles of the police and the media in relation to demonstrations can be discussed.

IV. FREEDOM OF INFORMATION: ACCESS TO OFFICIAL DOCUMENTS

Access to information is an important element of the human right to freedom of expression. Of particular importance is access to official documents, that is, information held by the government. Each Member of Parliament can give away a badge granting unimpeded access to the Federal Parliament building to two person of his or her choice. Should it be known who these badge holders are and what interests they represent? Should, at least after some time, the meeting schedules of ministers be made public or parts of it made available to the media upon request? Should a journalist be given the names of all the companies that made business with a specific federal agency over a specific period? Or have public universities to reveal the sources and amounts of private funding?

If the right to access official documents is well respected, protected and fulfilled by federal, state (cantonal) and municipal authorities, it can be an effective way of holding those in power accountable, contribute to keeping the public well informed and, as a result, improve the functioning of democracy. Of course, the right to access official documents is not absolute. There are legitimate reasons to keep certain government information secret or make specific official documents available only at a certain point. Typical legitimate reasons are national security or the protection of personal data of others. In addition, any restrictions of the right to access official documents, require a well defined and otherwise adequate legal basis, and have to be proportionate (i.e. have to be suitable and necessary) to protect national security or another legitimate aim.

[40] OSCE RFOM Handling of the Media During Political Demonstrations 2007, p. 8.

To guarantee access to information to journalists, and others involved in reporting and producing journalistic content, is particularly important given the media's watchdog role and its high visibility and ability to reach a wide audience. For example, in the area of public procurement, giving access to procurement data can help journalists and others to assess compliance with applicable rules. In some instances, access to procurement data and public contracts has helped journalists to identify suspected cases of corruption. A best practice example of access to official documents is the release of an internal administrative instruction issued by the police commandant of the city of Zürich. After the purchase of two multicopters by the city police force, a journalist wanted to verify official assertions that the use of the two drones has been limited to taking pictures from large road accidents, blazes and during hostage taking situations. Authorities also said that no use of the drones is made during demonstrations, festivals or other similar events. Upon an access to information request, the police shared the document with the journalist. After reviewing the instructions, he found that the official statement had been accurate. In another case, federal authorities explained that a water dam above a nuclear plant would be earthquake-proof and could hold enough water also during extreme floods. Upon request, authorities refused to give a journalist access to a recent inspection report on the dam's security, citing terrorism related concerns.

1. OSCE commitments, findings and recommendations

The OSCE has adopted a number of commitments on access to information. Namely, "[The participating States] express their determination to guarantee the effective exercise of human rights and fundamental freedoms (…) In this context they (…) will also take effective measures to facilitate access to information on the implementation of CSCE [Conference for Security and Co-operation in Europe i.e. the OSCE] provisions and to facilitate the free expression of views on these matters."[41] Moreover, "[t]he participating States recognize that vigorous democracy depends on the existence as an integral part of national life of democratic values and practices as well as an extensive range of democratic institutions. They will therefore encourage, facilitate and, where appropriate, support practical co-operative endeavours and the sharing of information, ideas and expertise among themselves and by direct contacts and co-operation between individuals, groups and organizations in areas including the following: (…) – access to information and protection of privacy".[42] Also, "[e]ach participating State will, with due regard to national security requirements, exercise restraint in its military expenditures and provide for transparency and public access to information related to the armed forces."[43] Regarding journalists, "[t]he participating States reaffirm the right to freedom of expression, including (…) the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards" and "[t]he participating States will not discriminate against independent media with respect to affording access to information, material and facilities."[44] The OSCE participating States also pointed out that "[w]e reaffirm the importance of independent media and the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information (…)".[45]

[41] OSCE/CSCE Vienna Concluding Document (Vienna 1989), para. 26.
[42] OSCE/CSCE Copenhagen Document Human Dimension (Copenhagen 1990), para. 26.
[43] CSCE/OSCE Budapest Document, Towards a Genuine Partnership in a New Era (Budapest 1994), para. 22.
[44] OSCE/CSCE Moscow Document (Moscow 1991), paras. 26 and 26.2.
[45] OSCE Istanbul Document (Istanbul 1999), para. 26.

The OSCE, in particular the OSCE Representative on Freedom of the Media (OSCE RFOM), has been actively compiling comparative information on the right to access information across the OSCE region. Moreover, the OSCE RFOM recently launched a valuable toolkit produced by two NGOs on access to information for journalists.[46] The OSCE also has been providing pertinent analysis and made important recommendations on access to information both concerning the OSCE region in general and I relation to laws, decisions and practices on access to information in specific participating States. For example, the OSCE RFOM has analysed legal amendments about access to official documents in e.g., Albania, Bosnia and Herzegovina, Denmark, Spain and several other countries but not Switzerland. The OSCE RFOM also has published a report on access to information by the media in the OSCE region, [47] which consists of a standard questionnaire completed by the participating States. This has proven valuable insofar as it has allowed for a quick overview and comparative analysis, mainly of the legal situation.

The OSCE report about access to information also contains a section about Switzerland, which includes a brief outline of the Federal Act on Freedom of Information in the Administration (FoIA) from 2006. The report also gives a brief overview of the personal and material scope of the FoIA, which, namely, does not apply to court documents and contains a number of quite broad exceptions, such as national security, documents relating to ongoing negotiations or national economic interests. Still, the adoption of the FoIA in 2006 has marked a turning point in the federal government's approach. Before, secrecy was the principle enshrined in law as the defining guideline for federal authorities when handling access to information requests and exceptions could only be made in a limited number of cases.

For official documents issued by cantonal and municipal authorities, cantonal laws on access to information apply. Some cantons have been pioneering access to information friendly legislation. In 1995, the canton of Bern was the first government to adapt legislation containing the principles of transparency and freedom of information instead of the principle of secrecy. The cantons of Geneva and Solothurn followed shortly afterward. Today, only a minority of cantons have retained laws that define secrecy of official documents as the rule and access to such information as the exception.

2. Achievements and remaining gaps

As mentioned before, the adoption of the FoIA marked a turning point for the right to access official documents. Similar cantonal legislation had preceded this change on the federal level. All this has been very welcome also in light of OSCE commitments on access to information. To be effective, legislative changes have to be followed by changes in administrative practice. Certainly, the shift to the principles of transparency and freedom of information has had an important impact on the federal and most cantonal administrations. Requests for information, including the media, are dealt with more expediently and are likely to be granted more often. At the same time, some media outlets and civil society actors have voiced concerns that the federal FoIA has not been well understood by all officials and across all federal agencies. To get a reliable picture about federal and cantonal practices is recommend to collect and make data about all access to information requests and decisions (endorsements and rejections) publicly available.

Given government media offices often are the first and main entry point for journalists, spokespersons of all federal agencies and departments should receive extensive training about access

[46] Access Info and n-ost, Legal Leaks Toolkit.
[47] OSCE Access to Information by the Media 2007 (updated 2008).

to information and the Federal Act on Freedom of Information. . The same recommendation applies to spokespersons of cantonal authorities.

In the canton of Uri the principle of transparency and freedom of information has been incorporated into cantonal law in 2007. This is very commendable. The manner in which access to official documents is granted gives reason to some concern though. If an information request is endorsed, access to an official document is granted only on-site. Thus, to have a look at the official document, the person who requested access has to travel to the cantonal archive, to the administration building or any other location, where the official document is held. This is particularly an impractical way of granting access if the person is living far away, namely outside Switzerland. It is recommended to widen the possibilities for accessing official documents including sharing paper copies by postal mail or making digital versions of the requested documents available.

The cantons of Aarau, Appenzell Ausserrhoden, Lucerne, Obwalden, St. Gallen, Thurgau and Zug are currently considering legislation incorporating the principles of transparency and freedom of information, which is commendable. They should adapt swiftly such legislation and define exceptions narrowly i.e. in line with the requirements of a legitimate aim, clearly defined and otherwise adequate legal basis and proportionality.

Finally, cantons with legislation that still contain the principle of secrecy as the rule and where no significant efforts have been taken to change such legislation until now, are strongly encouraged to amend in the near future the relevant provisions in line with federal and most cantonal laws. At the time of writing, these were the cantons of Appenzell Innerrhoden, Glarus, Graubünden and Nidwalden.

Given access to official documents is particularly important for the media. Federal and cantonal legislation should reflect this. Journalists, or other persons reporting or otherwise involved in the process of producing journalistic content, do not need to be given special status. However, it is recommended that laws and decisions reflect the fact that a request for information comes from a journalist. Given the media's watchdog role, there is a particularly strong interest for a positive and timely response to access to information requests.

Last but not least, the media itself has been active in improving access to official documents. An example is the initiative by several of the major Swiss media outlets with the website https://www.oeffentlichkeitsgesetz.ch as its backbone. Information about the principles of transparency and freedom of information is presented in an accessible way, and the Federal Act on Freedom of Information is explained. In a blog section, journalists write about their experiences in using the FoIA in their work. The aim of this initiative is to promote freedom of information and the use of freedom of information legislation by the media. This commendable initiative should be maintained and strengthened. It is recommended to make the initiative more widely known among journalists. Editors-in-chief are encouraged to tell their staff to make (more and better) use of existing freedom of information legislation.

V. CONCLUSIONS

This substudy takes a closer look at the laws and practices in Switzerland in relation to demonstrations and access to official documents. Four aspects about peaceful protests are reviewed: (1) authorization and notification of demonstrations; (2) unauthorized demonstrations; (3) demonstrations in relation to high-level events and (4) access of journalists to demonstrations. Concern-

ing access to official documents, the assessment is focusing on the adoption of access to information legislation on the federal and cantonal levels. The selection is based on findings and recommendations by the OSCE. The OSCE also published reports referring to Switzerland in relation to other freedom of expression and assembly aspects, such as freedom of expression on the Internet. However, in a Swiss context the issues considered seem more relevant.

Authorization and notification of demonstrations: A review by the OSCE of pertinent cantonal and municipal legislation in the cities of Geneva and Bern, and the town of Davos, concludes that while the legal requirements and restrictions for peaceful assemblies differ in content, they all have in common that a prior authorization is required for holding non-spontaneous assemblies. A prior permit requirement appears to reflect cantonal and municipal regulations on demonstrations across Switzerland.

After reviewing progress and remaining gaps in Switzerland in light of OSCE findings and recommendations about the authorization and notification of demonstrations, the study recommends:

(R1) In line with joint OSCE and Council of Europe guidelines on peaceful assemblies, cantonal and municipal branches of government are encouraged to consider the introduction of a notification system at least for some types of demonstrations beyond spontaneous demonstrations (e.g. depending on the size, time or place of the demonstration).

(R2) It is recommended to amend existing cantonal and municipal provisions concerning spontaneous demonstrations if they are not already exempting spontaneous demonstrations from a prior notification system if advance notice is impracticable.

(R3) It is recommended that cantonal and municipal legislation regulating the authorization of demonstrations not already containing „ a legal presumption that the authorization will be issued and that any refusal of authorization will be based on clearly defined criteria based on time, place and manner considerations and will be subject to prompt judicial review"[48] shall be amended accordingly.

(R4) It is also recommended carrying out or commission a study that takes a comprehensive look at the existing legislative frameworks and authorization practices concerning demonstrations across Switzerland.

(R5) Moreover, it could be useful to have data about authorized and unauthorized demonstrations collected, consolidated and made publicly available by the Federal Statistics Office.

Unauthorized demonstrations: Laws and practices concerning unauthorized demonstrations appear largely to reflect the principle, that just because an assembly has not been authorized or is otherwise not meeting all legal requirements, it cannot be automatically be prevented or dispersed. However, the OSCE monitors also note that some legislation and practices are problematic in light of OSCE commitments and human rights standards on freedoms of assembly and expression. The study assesses achievements and remaining gaps based on these OSCE findings and related recommendations. Distinguishing between (1) planned (non-spontaneous) demonstrations where prior authorization was sought but rejected and people, nevertheless, took to the streets, (2) planned (non-spontaneous) demonstrations where no prior authorization was sought and (3) spontaneous demonstrations, a number of recommendations are made:

[48] OSCE Monitoring Report 2012, p. 12.

(R6) Swiss authorities are encouraged to continue and bolster the common practice to allow peaceful but unauthorized demonstrations to go ahead, to not punish participants and organizers of such demonstrations and to deal with potentially or actually violent protesters individually.

(R7) It is recommended to the cantonal police forces to make this principle the standard rule of police engagement, if not already done so, including if prior authorization for the demonstration was sought and rejected, but people, nevertheless, took to the streets.

Demonstrations in relation to high-level events: Davos as the host town of the annual summit of the World Economic Forum (WEF), Geneva as the home of the UN Office in Geneva, several UN agencies, the World Trade Organization and numerous permanent representations, and Bern as the capital city and seat of the federal government all have seen their fair share of high-level events. In general, authorities have been willing to accommodate related protests. The authorities of Davos, for example, have been sitting down with the different actors in order to allow demonstrations during the WEF summit. While local authorities and the police are best placed to assess security risks and decide on security measures, the solution of authorizing protests over one kilometre away from the main location of the WEF summit is unsatisfactory in light of the sight-and-sound principle: demonstration should be allowed to take place within sight and hearing distance to the event or of the people the protests are aimed at. Based on this assessment, the study recommends:

(R8) Organizers of anti-WEF protests in Davos, WEF organizers, police representatives and other officials involved in ensuring security and the members of the Municipal Council are all encouraged to seek solutions regarding the location of protests that give more weight to the sight-and-sound principle. They are encouraged to sit down together at the same table, as has happened in previous years, to find, if necessary with the help of a mediator, an improved solution. The same recommendation applies to other high-level events including in Bern and Geneva.

Access of journalists: Overall, limitations on access for journalists covering demonstrations appear not to be a frequent concern in Switzerland. Nevertheless, occasionally, some problematic restrictions exist, as two isolated but problematic cases from 2008 of detained journalists during or just before a demonstration illustrate. To prevent similar incidents and to maintain and further improve media access, the study recommends:

(R9) The handling of the media including during demonstrations should be made part of the training of the cantonal police forces (if not already done so). Such training should target officers deployed on the street, senior officers taking strategic and tactical decisions on policing demonstrations and other relevant authorities.

(R10) It is also recommended translating the six recommendations by the OSCE Representative on Freedom of the Media about the handling of the media during demonstrations into the Swiss official languages and make them part of already existing or new training modules at the five police academies and the Swiss Police Institute about the handling oft the media (at demonstrations or in general).

(R11) Journalism organizations or representatives and police officials should establish an informal, but regular forum of exchange, where, among other things, the different roles of the police and the media in relation to demonstrations can be discussed.

Access to official documents: The adoption of the Federal Act on Freedom of Information in the Administration (FoIA) in 2006, with its switch from the principle of secrecy to the principle of

transparency, marked a turning point in the federal government's approach to granting access to official documents. Several cantons pioneered access to information friendly legislation. However, a number of cantons still lack laws, which would grant access to official documents on the principle of transparency. Moreover, even where new legislation is in place, practices seem not always to fully reflect the change to the principle of transparency. As a result, access to official documents sometimes remains difficult. For example, several media outlets, journalists and civil society actors have voiced concerns that the federal FoIA has not been well understood by all officials and across all federal agencies. To further improve access to official documents in Switzerland, the study recommends:

(R12) To get a reliable picture about federal and cantonal practices, it is recommended to collect, compile and make data about all access to information requests and decisions (endorsements and rejections) publicly available including from cantons, where the principle of secrecy has been retained.

(R13) Given government media offices often are the first and main entry point for journalists, official spokespersons of all federal agencies and departments should receive extensive training about access to information and the Federal Act on Freedom of Information. The same recommendation applies to spokespersons of cantonal authorities.

(R14) Cantons currently considering access to information legislation based on the principle of transparency should adapt swiftly such legislation and define exceptions narrowly i.e. in line with the requirements of a legitimate aim, clearly defined and otherwise adequate legal basis and proportionality.

(R15) Cantons with laws that still contain the principle of secrecy as the rule and where no significant efforts have been taken to change such legislation until now are strongly encouraged to amend in the near future the relevant provisions in line with federal and most cantonal laws.

(R16) It is recommended that laws and practice reflect the fact that a request for information comes from a journalist. Given the media's watchdog role, there is a particularly strong interest for a timely and positive response to access to information requests (i.e. to grant access).

(R17) An initiative by several major Swiss media outlets to promote freedom of information and the use of freedom of information legislation by the media (https://www.oeffentlichkeitsgesetz.ch) should be maintained and strengthened. It is recommended to make the initiative more widely known, especially among journalists. Editors-in-chiefs are encouraged to tell their staff to make (more and better) use of existing freedom of information legislation.

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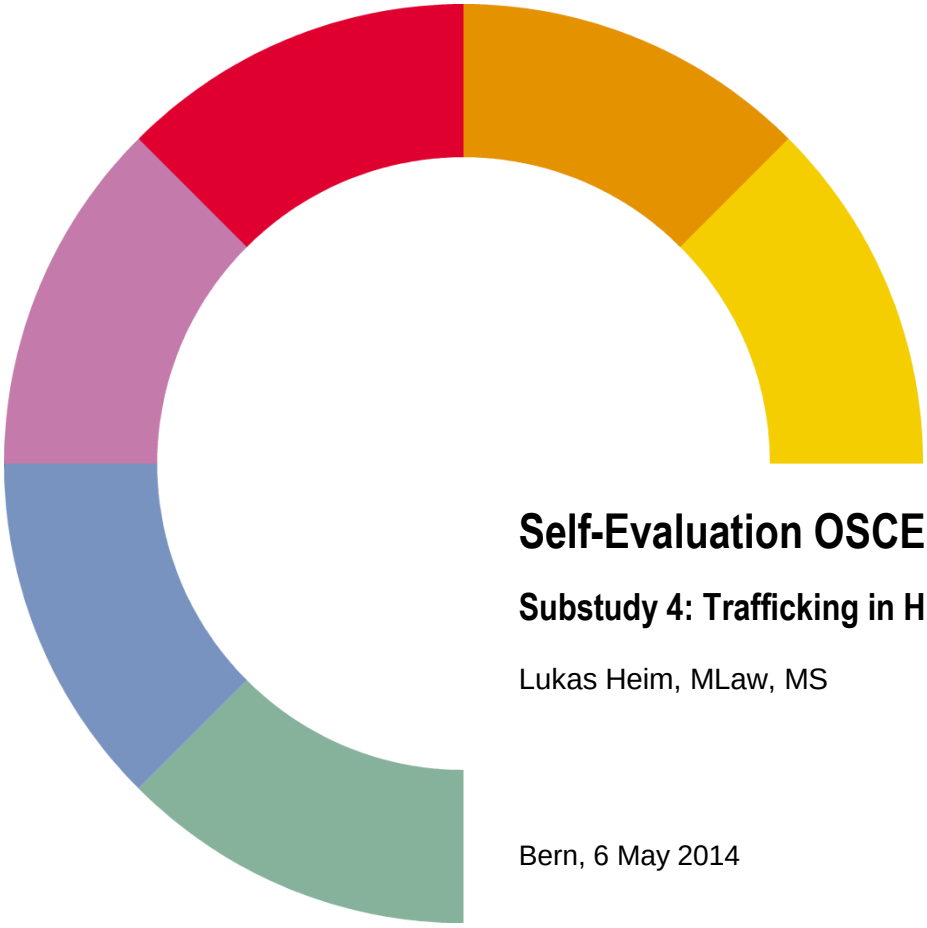

Self-Evaluation OSCE Chairmanship

Substudy 4: Trafficking in Human Beings

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Bern, 6 May 2014

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This study reflects the opinion of the author and only binds the Swiss Center of Expertise in Human Rights.

CONTENTS

I. HUMAN TRAFFICKING AS A CONCERN TO THE OSCE

Trafficking in human beings causes enormous suffering to individuals and violates their human rights. As victims they have to be protected and assisted. Human trafficking also is an extremely serious crime, committed many times every day (even though the real numbers largely remain in the dark). To fight impunity by investigating, prosecuting and punishing the perpetrators is not only helping to redress the injustice the trafficking victim has suffered but also is in the public's interest. Trafficking in human beings regularly takes place across international borders and often with links to organized crime. Therefore, the fight against human trafficking also has an important national and international security dimension. All these reasons of why it is important to combat trafficking are reflected in the OSCE Declaration on Trafficking in Human Beings from 2002 (excerpt):

"We, the members of the Ministerial Council of the OSCE, declare that trafficking in human beings represents a dangerous threat to security in the OSCE area and beyond.

We declare that trafficking in human beings and other modern forms of slavery constitute an abhorrent violation of the dignity and rights of human beings.

We recognize that trafficking in human beings represents a serious and rapidly expanding area of transnational organized crime, generating huge profits for criminal networks that may also be associated with criminal acts such as trafficking in drugs and arms, as well as smuggling of migrants.

We recall and reaffirm our full adherence to the OSCE's commitments to combating trafficking in human beings (…) and declare our determination to strengthen co-operation in addressing trafficking in human beings in countries of origin, transit and destination."[1]

Over the years, the OSCE has adopted several decisions containing numerous commitments addressing human trafficking. The OSCE Ministerial Council Decision on Combating Trafficking in Human Beings adopted by all 57 OSCE participating States in 2003 in Maastricht[2] has been a particularly important step. The decision endorsed a comprehensive and detailed OSCE Action Plan,[3] which has been complemented at its ten years anniversary in 2013 by an addendum.[4] The participating States in 2003 also agreed to create an OSCE mechanism against trafficking, the Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, which has been tasked, among other things, to "[a]ssist OSCE participating States in the implementation of commitments and full usage of recommendations proposed by the OSCE Action Plan to Combat Trafficking in Human Beings".[5] Other OSCE structures involved in anti-trafficking efforts include the Office for Democratic Institutions and Human Rights (ODIHR), the Secretary General, and relevant structures of the Secretariat including the Office of the Co-ordinator for OSCE Economic and Environmental Activities (OCEEA), the Strategic Police Matters Unit (SPMU), and the Senior Gender Adviser. OSCE field operations are also taking part in anti-trafficking activities. In addition, the annual OSCE Human Dimension Implementation Meeting, the OSCE Review Conferences and similar other events have contributed to the monitoring of the implementation of OSCE commitments in relation to human trafficking.

[1] OSCE MC Declaration on Trafficking in Human Beings (Porto 2002), section I.
[2] OSCE MC Decision 2/03 (Maastricht 2003).
[3] OSCE Action Plan to Combat Trafficking in Human Beings (2003).
[4] Addendum OSCE Action Plan to Combat Trafficking in Human Beings (2013).
[5] OSCE MC Decision 2/03 (Maastricht 2003), para. 2(a).

Concerning Switzerland, the OSCE has pointed out both progress and shortcomings. For example, the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings (hereinafter the OSCE Special Representative) has pointed out that with Switzerland's federal structure, coordination and cooperation among different actors combating human trafficking is particularly complex. The Special Representative also has welcomed measures taken by Swiss authorities to address trafficking in domestic workers of diplomats for labour exploitation.

Overall, while the human dimension commitments and the 2003 OSCE Action Plan are comprehensive, systematic and detailed, the monitoring of their implementation by OSCE structures could be more systematic and periodical. For this to be possible, the relevant OSCE structures need to have the necessary resources and capacity. For example, in the future, the OSCE Special Representative could contribute to the self-evaluation by the Chairmanship. The anti-trafficking body of the OSCE could make a visit to the OSCE Chairmanship country several months before the self-evaluation is drafted a regular feature of her or his activities (unless human trafficking is unlikely to be part of the self-evaluation). At the same time, the existing monitoring activities by OSCE structures have been very valuable in highlighting some important challenges Switzerland was or still is faced with when combating trafficking. The OSCE has, in particular, helped to highlight the risk of human trafficking in domestic workers of persons with privileges and immunities, the need for a national referral and coordination mechanism or the importance of involving different sorts of actors in the fight against trafficking.

The following assessment of Switzerland's efforts in combating trafficking in human beings takes the relevant human dimension commitments as a reference point. The substudy then draws from the limited analysis and recommendations explicitly addressed at Switzerland by OSCE structures. In addition, the substudy relies on research by the Swiss Center of Expertise in Human Rights (SCHR). In total, six areas have been assessed: coordination, cooperation and monitoring (III.); collection and availability of data, research (IV.); identification of trafficking victims (V.); victim protection (VI.); criminalization of traffickers and non-punishment of victims (VII.) and labour exploitation (VIII.).

II. INPUT FROM NON-GOVERNMENTAL ORGANIZATIONS

A network of Swiss non-governmental organizations (NGOs) shared their perspectives on the evaluation including the focus area of this study. The NGO FIZ Advocacy and Support for Migrant Women and Victims of Trafficking provided a comprehensive list of issues to be considered in this substudy: public funding of prevention activities and for specialized support for human trafficking victims; re-trafficking; governmental duties to protect trafficking victims; variations of cantonal practices in relation to coordination, sensitization and trainings; need for resources to gather alternative evidence during criminal proceedings (instead of the trafficking victim taking the witness stand); victim protection in criminal proceedings (private court sessions, anonymization, avoiding direct confrontation between victim/witness and a suspected offender); need to strengthen rights of victims in criminal proceedings (e.g., cost risks when appealing decisions, standing of the victim in proceedings); automatic confiscation of profits made through human trafficking; identification of trafficking victims; asylum-seekers as trafficking victims; victim protection and support; residence permits for victims with irregular stay, in practice, dependent on cooperation with law enforcement authorities; wide discretion and uneven practices among cantonal migration authorities in relation to residence status of trafficking victims; shortcomings of current system for issuing resident permits on humanitarian grounds; limitations of federal witness protection programme in

relation to trafficking victims. While it was not possible to cover all of the concerns shared by FIZ, several of the issues brought forward are dealt with in this study. In addition, the Ombudsman of the Republic of Serbia provided feed-back on a draft of this substudy. While all this has informed the research and drafting process, the SCHR and the author are solely responsible for the substudy's content.

III. COORDINATION, COOPERATION AND MONITORING

1. OSCE commitments, findings and recommendations

To protect and assist victims of human trafficking and to prosecute and punish traffickers, various authorities, national and local NGOs and intergovernmental organizations with very different roles and at times conflicting priorities have to work together. Border guards, prosecutors, labour inspectors, police officers, staff from victim protection centers, migration officials, experts of international organizations such as the OSCE, medical personnel, civil society organizations specialized in supporting, for example, women, children, sex workers or migrants, and officials coordinating international assistance in criminal matters or consular officials, have all their share in anti-trafficking efforts.

Switzerland is organized as a federal state with two major levels of government: the federal government and the 26 state (cantonal) governments.[6] This bottom-up structure allows authorities familiar with the local situation to address concerns close to the people they serve. At the same time, the federal structure makes coordination and cooperation more complex. For example, if the traffickers are members of a criminal organization the Office of the Attorney General (federal prosecutor's office) is responsible for the prosecution of suspects. Otherwise, the prosecutor's office of the canton where the trafficking took place is competent. Or a counsellor of a victim prevention center may hear about a domestic worker who was employed in different households across Switzerland, where each time she was prevented from leaving the house, had her passport taken away and had to work long hours without any days off. To investigate the crime, the police forces and prosecutors of several cantons and possibly the trafficking experts of the federal police need to be involved. Thus, also authorities with comparable tasks but from different levels of government and from different cantons need to work side by side.

The importance of coordination and cooperation is reflected in numerous OSCE commitments. The OSCE Ministerial Council recognized in several decisions "the primary responsibility of participating States in combatting trafficking based on an integrated and co-ordinated approach which includes prevention of trafficking, protection of victims and prosecution of traffickers and their accomplices"[7] and emphasized "that the complexity of trafficking in human being requires a multidimensional and multi-actor response that should be co-ordinated at the national, regional and international levels."[8] Several commitments urge governments to promote "co-operation and co-ordination between law enforcement personnel, labour inspectorates, social protection units,

[6] Of the 26 cantons, six have only one representative instead of two in the Council of State (Senate) and count only half a vote when calculating the majority of cantons required for a federal constitutional initiative to pass. Otherwise, these six cantons have the same amount of autonomy as the other 20 cantons.
[7] E.g., OSCE MC Decision No. 1 (Vienna 2000), para. 3; OSCE MC Decision 13/04 (Sofia 2004), preamble.
[8] OSCE MC Decision 14/06 (Brussels 2006), preamble.

medical institutions, immigration and border service officials, civil society organizations, victim support services, and the business community and other relevant actors".[9]

A number of OSCE commitments recommend to the participating States "to establish National Referral Mechanisms (NRMs), as well as to appoint national co-ordinators".[10] The 2003 OSCE Action Plan recommends "to consider establishing Anti-Trafficking Commissions (tasks forces) or similar bodies responsible for co-ordinating activities within a country among State agencies and NGOs, and for elaborating measures to prevent THB [trafficking in human beings], to punish perpetrators of THB and to protect its victims".[11] The 2013 Addendum, which complements the 2003 OSCE Action Plan, recommends that participating States should take action aimed at „[e]nlarging, where appropriate, multi-disciplinary partnership in the framework of NRMs, such as national co-ordinator/co-ordination mechanisms or other national structures, to facilitate dialogue and co-operation between public authorities, NGOs, trade unions and other relevant institutions engaged in anti-discrimination programmes and protection of the rights of women, children, members of ethnic, national and religious minorities, and migrants to contribute to the identification of trafficked persons and advance the protection of the rights of potential, presumed and actual victims of THB." In addition, several OSCE commitments ask the OSCE governments to "consider appointing National Rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements."

The OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings (OSCE Special Representative) quoted in her 2008 annual report the Swiss officials' own statement: "While co-ordination between levels of government is critical, there are additional challenges. Switzerland alluded to the challenges of broad co-ordination and co-operation at multiple levels of government: Because of Switzerland's federal structure, implementing laws in the field of prosecution and victim protection lies mainly in the jurisdiction of the cantons. Co-operation mechanisms at operational level need to be established in 26 different cantons. Promoting a unified approach takes time."[12]

2. Achievements and remaining gaps

Switzerland has come a long way in implementing OSCE commitments concerning coordination and cooperation of anti-trafficking efforts. The creation of a National Coordination Mechanism (NCM) in 2002 has been instrumental. Operational since January 2003, the Swiss Coordination Unit against the Trafficking in Persons and Smuggling of Migrants (KSMM/SCOTT) is headquartered at the Federal Office of Police within the Federal Ministry of Justice and Police. The KSMM/SCOTT consists of a steering committee and a permanent secretariat whose head serves as the National Coordinator (NC) and National Rapporteur (NR). While the KSMM/SCOTT steering committee decides on the priorities in a national action plan, the secretariat "ensures the flow of information between all KSMM/SCOTT members".[13] As a result, many authorities are working more systematically together within and between cantons and across government levels, and specialized NGOs are more often being involved.

[9] E.g., OSCE MC Decision 14/06 (Brussels 2006), para. 2; OSCE MC Decision 13/04 (Sofia 2004), para. 2.
[10] E.g., OSCE MC Decision 8/07 (Madrid 2007), para. 8; OSCE MC Decision 14/06 (Brussels 2006), para. 2. See also OSCE MC Decision No. 1 (Vienna 2000), para. 11 and OSCE MC Declaration on Trafficking in Human Beings (Porto 2002), section II.
[11] OSCE Action Plan to Combat Trafficking in Human Beings (2003), section VI., para. 2.
[12] OSCE SR 2008 Report, p. 36.
[13] See http://www.ksmm.admin.ch/content/ksmm/en/home/die_ksmm.html (accessed 3 March 2014).

NCM membership: KSMM/SCOTT members include nine federal agencies, five inter-cantonal conferences (coordination mechanisms for authorities of different cantons with the same function), two NGOs and with the IOM also one intergovernmental organization. Despite this broad and inclusive membership, there remains an important gap. In line with OSCE commitments and international human rights obligations to criminalize different forms of human trafficking,[14] the Swiss Parliament adopted in 2006 a broader definition of human trafficking. Since then, the Swiss Penal Code not only punishes human trafficking for sexual exploitation but also for labour exploitation and for organ removal. If the trafficking victim is a child there is a higher minimum sentence. Therefore, all relevant actors including authorities likely to come across child trafficking victims or victims exploited for their labour should be involved in the NCM. This is why labour inspection, child protection and social services authorities should be taken on board by the KSMM/SCOTT. The KSMM/SCOTT, therefore, may invite the Cantonal Conference for the Protection of Adults and Children (KOKES/COPMA), an inter-cantonal coordination mechanism, and the Association of the Swiss Labour Market Agencies (VSAA/AOST) to join the KSMM/SCOTT as members. The KSMM/SCOTT also may invite the Swiss Conference for Social Aid (SKOS/CSIAS) to become a member (currently only the expert body of the SKOS/CSIAS for victim protection and support, the SVK-OGH/CSOL-LAVI, participates in the KSMM/SCOTT).

Role and status of a National Rapporteur or other monitoring mechanism: Besides coordinating, it is also important to monitor anti-trafficking efforts. The importance of monitoring is reflected in the OSCE commitments concerning the appointment of a National Rapporteur (NR) or the creation of another national monitoring mechanism. In many participating States including Switzerland, the National Coordinator (NC) also takes on the role of National Rapporteur (NR) with both roles typically incorporated into the National Coordination Mechanism (NCM). While this is a satisfactory arrangement, the OSCE Special Representative also has emphasized that the national monitoring mechanism's „work needs to be capable of rendering objective and independent analysis, and of publishing findings and criticism of government anti-trafficking efforts".[15] In Switzerland the NCM does not have an oversight function. Given that many of the relevant actors are cantonal authorities, giving more independence and authority to the KSMM/SCOTT, a federal body, could impinge on the autonomy of cantons. A workable solution therefore would need to reconcile effective countrywide monitoring with cantonal sovereignty. It is recommended to enhance the current system, where the KSMM/SCOTT has published a detailed progress report five years after its inception[16] and is currently working on a second assessment. The secretariat of the KSMM/SCOT should be mandated and given the resources to assess anti-trafficking efforts across Switzerland more regularly. Such an assessment does not need to be as comprehensive as the two more long-term monitoring reports by KSMM/SCOTT of 2007 and the one currently being finalized, as recommend in the National Action Plan.[17] Rather, an annual or biannual assessment by KSMM/SCOTT could focus on a few best practices, some important progress made on any past shortcomings, identify remaining or new significant gaps, and make recommendations to who should take what action by when. It would then be the responsibility of the federal or cantonal officials, governments, courts and parliaments or the task of NGOs and other actors addressed in the assessment to follow-up. Such an assessment should be made a permanent element of KSMM/SCOTT's annual or bi-annual report, which should be made available to the

[14] On criminalization of trafficking in human beings see VII.
[15] OSCE SR 2008 Report, p. 65.
[16] KSMM/SCOTT, Bekämpfung des Menschenhandels in der Schweiz, Fortschritt, Situation, zukünftige Prioritäten / Lutte contre la traite des êtres humains en Suisse, Progrès, situation et priorités (2007).
[17] Action 6b of National Action Plan 2012-2014.

public. Such a solution has the advantage of respecting the far reaching sovereignty of cantons. At the same time, it honors the OSCE Special Representative's recommendation that periodic monitoring reports „should serve as the basis for a full, open and transparent process of outside review and debate by stakeholders and interested parties in and out of government".[18]

Cooperation and coordination among cantonal authorities: Thanks to the resourcefulness of the KSMM/SCOTT, the determination of authorities of several cantons and the initiative of civil society representatives, there are a number of cantonal roundtables that serve as a regular forum for information sharing, and coordination and cooperation of anti-trafficking activities by different professionals of the same canton. As a result of these efforts, there are other well established and functioning cantonal coordination mechanisms (CMs). However, this is not the case everywhere. Thus, cooperation and coordination among authorities of the same canton but with different roles remains a significant challenge. According to the KSMM/SCOTT as per October 2013, 10 out of 26 cantons had not yet established a roundtable.[19] It is therefore recommended to these cantons to initiate the creation of such a mechanism. The KSMM/SCOTT developed detailed guidelines for improving coordination and cooperation, namely by giving detailed information about how to establishing cantonal roundtables and other cooperation and coordination mechanisms.[20] These guidelines, together with already well-established and functioning roundtables and other, more formal coordination mechanism in other cantons, can provide helpful guidance. Authorities with limited resources (namely given the size of the canton) may consider participating in and contributing to existing roundtables and other coordination mechanisms of other cantons.

In particular, in cantons lacking a coordination mechanism, collaboration between staff from the public prosecutors' office or the police and staff working at victim protection centers is often not well established. Also, without cantonal coordination mechanism, involvment of specialized NGOs such as FIZ is very limited and *ad hoc* or lacking completely. All this not only means that some trafficking victims might not get the information, protection and assistance they need. Lacking or too limited cooperation between police, prosecution, victim protection centers, NGOs and others often results in the victim being much less open and honest during questioning by the police or the public prosecutor. Close coordination and cooperation between authorities and civil society involvement helps a trafficking victim to gain trust and be more cooperative including during questioning. The well established procedures in the cantons of Basel-Stadt and Zürich can serve as best practice examples. In both cantons police officers refer a potential human trafficking victim for a first interview to a trafficking expert of the organization for Advocacy and Support for Migrant Women and Victims of Trafficking (FIZ), an NGO running a counselling and support program for women who have been victims of human trafficking.

[18] OSCE SR 2008 Report, p. 104.
[19] As per 8 October 2013, the cantons of AG, BE, BL, BS, FR, GE, LU, NE, SG, SO, SZ, TG, TI, VD, VS, ZH had established or were in the process of establishing a roundtable. AR, AI, GL, GR, JU, NW, OW, SH, UR still had no roundtable as per October 20013. See http://www.ksmm.admin.ch/content/ksmm/de/home/themen/menschenhandel/kantonale_kooperationsmechanismen.html (accessed 25 February 2014).
[20] KSMM/SCOTT, Kooperationsmechanismen gegen Menschenhandel, Leitfaden / Mécanismes de cooperation contra la traite d'êtres humains, guide pratique (2005).

IV. COLLECTION AND AVAILABILITY OF DATA, RESEARCH

1. OSCE commitments, findings and recommendations

To have reliable data about human trafficking is both difficult and necessary to understand the scope and nature of the problem as well as to decide what needs to be done. If statistics show, for example, that over the past year there has been a spike in human trafficking for labour exploitation, with most victims coming from the same country and working in a specific sector of the economy, labour inspection authorities can be alerted, prosecutors across the country can systematically share information about labour exploitation cases, federal ministry of justice officials can request international legal assistance in criminal matters from authorities in the country of origin of suspected traffickers, and bilateral development cooperation programs in the country of origin of the trafficking victims can be initiated.

The significance of data collection and analysis is highlighted in a number of OSCE commitments. The Ministerial Council urged the participating States "to improve research and the system of data collection and analysis, with due regard to the confidentiality of data, and where possible to disaggregate statistics by sex, age, and other relevant factors as appropriate, in order to better assess the character and scope of the problem and develop effective and well-targeted policies on trafficking in human beings.".[21] The 2003 OSCE Action Plan calls upon the governments of the OSCE region to put efforts in "[c]ollecting separate data related to women, men and children victims of trafficking, and improving research into and analysis of subjects such as the character and scale of THB [trafficking in human beings] and the trafficking and exploitation mechanisms deployed by the organized criminal groups, in order to develop effective and well-targeted prevention measures on trafficking in human beings." [22]

In Switzerland the Federal Statistical Office (FSO) compiles, consolidates, analyses and makes all sorts of data available. This includes numbers and other information collected from a wide variety of cantonal and federal authorities. Concerning human trafficking, Swiss authorities acknowledged as early as 2001 that no reliable data about profits made through human trafficking is available and that there exists a huge gap between estimates about how many humans are trafficked each year to and through Switzerland on one hand and the numbers of actually registered cases for investigation, prosecution and with convictions.[23] Moreover, at least until recently, some of the latter data were incomplete, at times lacking or at least not made accessible.

In 2007, the OSCE Special Representative held that in the OSCE region as a whole "data on the degree of impact and effectiveness of responses to THB [trafficking in human beings] is lacking. The evidence *appears* to indicate results are unsatisfactory in terms of the low numbers of prosecutions and convictions of traffickers, the continued prevalence of THB, and the limited extent and scope of protection afforded to victims. However, greater efforts should be made to establish a reliable knowledge base."[24] The UN Committee on the Elimination of Discrimination against Women (CEDAW), the human rights expert body monitoring compliance with the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women, echoed the OSCE Special Representative's criticism in 2009 when considering the state report of Switzerland. While a

[21] OSCE MC Decision 14/06 (Brussels 2006), para. 3.
[22] OSCE Action Plan to Combat Trafficking in Human Beings (2003), section IV, para. 1.1.
[23] Menschenhandel in der Schweiz, Bericht der interdepartementalen Arbeitsgruppe Menschenhandel, Bundesamt für Justiz / Traite des êtres humains en Suisse, Rapport du groupe de travail interdépartemental traite des êtres humains au Département fédéral de justice et police (2001).
[24] OSCE SR 2007 Report, p. 12.

lot of useful statistics were provided by Swiss authorities including about human trafficking, the lack of data in some areas was noted. Of particular concern was the incomplete data about criminal proceedings and convictions in connection with human trafficking. While the KSMM/SCOTT initiated an overview in 2007 with some cantons providing data, this task was a difficult one. Given there was no reporting requirement, data of several cantons was lacking. Against this background, CEDAW in its concluding observations called upon Switzerland "to collect and analyse data on all aspects of trafficking, disaggregated by age and country of origin, in order to identify trends and root causes, as well as priority areas for action, and to formulate relevant policies. It requests that such information, as well as information on the impact of the measures taken to combat trafficking, be included in the State party's next periodic report."[25]

2. Achievements and remaining gaps

During the past years, the OSCE and CEDAW recommendations to Switzerland concerning data collection and analysis about human trafficking have been largely implemented. The FSO compiles three statistics based on data from cantonal authorities concerning human trafficking: crime statistics (information about registered offences and registered suspects), conviction statistics and victim support statistics. All three statistics now contain detailed information about human trafficking, such as how many human trafficking crimes have been registered by the 26 cantonal police forces, sex, age range and other information about victims and suspected or convicted perpetrators and connections between victims and defendants. Additional data is available from the Federal Office for Migration (FOM) about temporary and other residence permits issued to trafficking victims and from the Federal Office of Police's annual reports.

At the same time, each of these statistics only captures cases registered for one or another purpose. These figures are only representing the tip of the iceberg and the real numbers are still unknown. Therefore, it is very commendable that the National Action Plan calls for a study about the scope of human trafficking in Switzerland.[26] A pilot study (Dunkelfeld-Vorstudie) by the Swiss Center of Expertise in Human Rigths (SCHR) is a first positive step in that direction. Another example of valuable research is the still ongoing study by researchers of the University of Zürich about trafficking for labour exploitation.

There remain a number of small gaps. Statistics about convictions now are systematically shared by cantonal authorities with the FSO and made available to the KSMM/SCOTT. A group of researchers from the University of Neuchâtel also was granted access to conviction data. However, up to now many data from the conviction statistics cannot be shared but within a small circle of experts. The current setting also limits the dissemination and impact of studies based on such confidential data. While respect of the privacy and data protection rights of convicts is important, these rights need to be balanced with the public's interest to know. This allows for an open and informed debate about the role of the criminal justice system in combatting trafficking and gives a wider range of anti-trafficking actors the information they need to do their work well. Given that a lot of the convictions statistics data reveals little information about individual cases, authorities should consider allowing certain statistical information about convictions related to human trafficking to be made regularly and systematically available to the public.

[25] CEDAW/C/CHE/CO/3, 7 August 2009, para. 30.
[26] Action 6a of National Action Plan 2012-2014.

Also, some statistics do not contain information about the country of origin of the trafficker or the designation is too broad to be useful. Authorities should consider compiling this information and share with relevant actors, namely the KSMM/SCOTT, so that anti-trafficking efforts can be more targeted. This also allows Swiss authorities to better define the focus of their international bilateral cooperation in areas such as assistance in criminal matters or the implementation of prevention and development cooperation projects.

Moreover, current statistics generally do not distinguish between different forms of trafficking. It is recommended that police, prosecutors, courts and victim protection centers are compiling data about human trafficking cases by distinguishing between sexual exploitation, labour exploitation, and organ removal, as well as by indicating if the victim has been a child (besides the sex and/or gender of the victim). Finally, further research particularly about human trafficking for labour exploitation should be carried out, considering this appears to be a particularly underreported type of human trafficking.[27]

V. IDENTIFICATION OF TRAFFICKING VICTIMS

1. OSCE commitments, findings and recommendations

Combatting trafficking begins with the identification as a trafficking victim. This is not an easy task. Many trafficking victims are kept far away from public and authorities' view. Some trafficked domestic workers are not allowed to leave the private households of their abusive employers. Trafficked sex workers might be reluctant to talk about their situation during a police control. Others may not tell their full story during a labour inspection because they work on a construction site or as hotel maids without a residence permit, and are lacking social security and health insurance. Border guards, police officers, prosecutors, migration officials and others most likely to be in contact with trafficking victims do not always realise that they are facing someone who has been trafficked.

Concerning human trafficking for labour exploitation, OSCE participating States agreed that they should "[e]nsure effective complaint procedures where individuals can report in a confidential manner circumstances that might be indicative of a situation of trafficking for labour exploitation, such as exploitative working and living conditions".[28] This recommendation also provides valuable guidance concerning other types of trafficking, such as sexual exploitation, organ removal and child trafficking. The 2003 OSCE Action Plan recommends improving identification by "[e]stablishing well-publicized telephone "hotlines" in the countries of origin, transit and destination, which should … facilitate the anonymous reporting of cases or suspected cases of THB [trafficking in human beings]."[29] The Ministerial Council also decided that the OSCE governments should improve identification of trafficking victims by "[c]onducting training programmes for relevant officials, as well as other persons likely to come into contact with presumed trafficking victims, such as health workers, social workers, labour inspectors, and others, in order to improve their ability to identify trafficking victims and refer them to assistance and protection services".[30]

The OSCE Special Representative has made the country visits an inherent part of her monitoring activities. After such visits, she has frequently recommended to OSCE government to step up

[27] On trafficking for labour exploitation see VIII.
[28] OSCE MC Decision 8/07 (Madrid 2007), para. 11.
[29] OSCE Action Plan to Combat Trafficking in Human Beings (2003), section IV., para. 4.11.
[30] OSCE MC Decision 8/07 (Madrid 2007), para. 6c.

their efforts in identifying trafficking victims. Even though the OSCE Special Representative has attended events, participated in seminars, met authorities and given key note speeches in Switzerland, she has not made a formal country visit to Switzerland yet. Still, several recommendations for specific countries are valid for other participating States too including Switzerland. For example, following her visit to the UK in 2011 she recognized that much progress had been made. She also pointed out that „challenges in victim identification remain in the UK as in the majority of OSCE participating States. The Special Representative further wishes to suggest that these challenges may be addressed in the implementation of the UK Government's Strategy by adopting a more integrated and holistic approach to human trafficking. In particular, the aim of fighting human trafficking as a form of organized crime should be more effectively combined with a human rights-centered approach, which should lead to an increased number of identified victims."[31] This recommendation is valid for Switzerland too.

2. Achievements and remaining gaps

Switzerland has made substantial progress over the past decade in identifying trafficking victims. With the creation of the KSMM/SCOTT, as well as by establishing roundtables and other coordination mechanism in a number of cantons, the drafting of KSMM/SCOTT guidelines, as well as by organizing seminars, conferences and by offering trainings, namely for interested police officers and prosecutors, a comprehensive and more coordinated system has been put in place which allows to better identify trafficking victims. At the same time, adapting and complementing existing human trafficking trainings could help to further improve the identification of trafficking victims.[32]

Cantonal police forces: With their diverse everyday tasks aimed at fighting crime and maintaining public order, police officers are among the officials most likely to interact with trafficking victims. This is why members of the cantonal police forces can have an extremely important role in identifying potential victims. This is why the introduction of a training module about human trafficking at the Swiss Police Institute, the national police institution responsible for the education of higher ranking, non-commissioned and commissioned police officers, has been very valuable. Also, some cantonal police forces have specialized units with human trafficking experts. These efforts should be maintained and enhanced, as they have made an important contribution to increase awareness about and created important skills to address human trafficking among Swiss police forces. This, in turn, has helped to improve victim identification. At the same time, many police officers are not and do not need to be human trafficking experts. Yet, given the nature of their work, any police officer can encounter a human trafficking victim but without realizing it. To avoid that potential trafficking victims are falling through the cracks and improving prospects that traffickers are prosecuted and punished, every member of the police force should have a basic understanding about the problem of human trafficking. It is therefore recommended to make a brief module about human trafficking part of the ten months basic training for police recruits at one of the five police academies in Switzerland.

Migration officials: People claiming asylum can be victims of human trafficking irrespective if they are refugees or not. The inclusion of instructions about identifying human trafficking victims in an Federal Office of Migration (FOM) circular about assessing asylum claims is an important element to that end. Also, FOM staff specialized in gender-related persecution has been active in raising awareness about human trafficking and how this relates to the work of the FOM. To ensure that

[31] OSCE SR UK country visit 2011, para. 9.
[32] For achievments, gaps and recommendations regarding coordination and cooperation see III.

these efforts, namely the instruction about trafficking in the FOM circular, are also fully reflected in practice, it is recommended that a module about human trafficking is part of the refugee status determination training for staff from the Federal Office for Migration (FOM) (first instance decisions) and the Federal Administrative Court (appeal decisions) if not already done so. It is also recommended to the FOM to put a referral system with other relevant anti-trafficking actors in place.

Labour inspection officials: Given labour inspection authorities have not been involved as much as other officials in combating human trafficking, it is recommended to involve them more systematically[33] and to make a brief module about human trafficking part of the basic training labour inspection officials receive upon their recruitment and/or during their career.

Consular staff: Consular staff can have an important role in identifying potential trafficking victims even before they reach the country of destination. This has been reflected in recent efforts by the Federal Council and in particular the Federal Department of Foreign Affairs (FDFA). It is recommended to make a brief module about human trafficking part of the basic training consular staff receives before their first deployment. Consular staff to be deployed to countries where particularly many trafficking victims come from should receive more extensive training, namely if it is their first assignment but also if they have already had a long career with the FDFA but have limited or no experience in identifying human trafficking victims.

Staff of victim protection centers: Staff of victim protection centers often help victims of different sorts of serious crimes not only victims who have been trafficked. To increase understanding about human trafficking among victim proctection center staff, it can be useful to make existing trainings available to them or to offer and conduct separate trainings.

Contact possibilities for victims: As recommended in several OSCE commitments, trafficking victims should have the possibility to easily reach out to authorities, victim protection centers and NGOs. The availability of a telephone hotline is just one example. Other ways of communicating might work better given that some trafficking victims are put under enormous pressure by their exploiters, for example a domestic worker who is not allowed to leave her household and only can use the phone with the employer being present. Communication possibilities should be open for third parties to report anonymously and securely potential trafficking cases. In Switzerland, several cantonal victim protection centers and the NGO FIZ are running telephone hotlines. Authorities also have funded a telephone hotline for Russian speaking sex workers. Such and similar initiatives should be sustained and expanded. Many trafficking victims are well hidden from authorities' and NGOs reach, often do not speak any of the official languages. Some trafficking cannot write. Thus, communication should be made as easy as possible. It is recommended to make different types of communication available and advertise them through targeted dissemination. This might include the advertising of an easy to remember number for sending texts (SMS), possibilities of contacting the police, labour inspectors or others via SMS, email or by letter, an easy to use and secure online platform for leaving written or recorded messages (esp. for victims not able to write) in their mother tongue, and the installation of letter boxes at places where trafficking victims are likely to pass by such as at restrooms of restaurants, bars and nightclubs, canteens near construction sites or at grocery stores.

[33] For involving labour inspection authorities in existing coordination mechanisms including in the KSMM/SCOTT see III.

VI. VICTIM PROTECTION

1. OSCE commitments, findings and recommendations

Once a trafficking victim has been identified, the next step is to refer her or him to a place where she or he receives protection and assistance. In Switzerland, NGOs, the police and prosecutors, migration officials, as well as social workers, lawyers, psychologist and others working at victim protection centers, are involved. With the adaption of the Victim Protection Act of 2007, each canton is obliged to create a victim protection center, which can be a public institution or a private organization. Some cantons run joint victim protection centers. While these centers are open to trafficking victims, they support victims of different sorts of serious crimes. The NGO Advocacy and Support for Migrant Women and Victims of Trafficking (FIZ) is running the only center in Switzerland specialized in supporting women who have been trafficked. FIZ's services include psychological and legal counselling, financial aid, and since 2010 a safe house with space for up to six women. FIZ has currently service agreements with several cantons and the city of Zürich to provide support to trafficked women. In 2012, 98 victims of human trafficking were registered by the different victim protection centers. In the same year, FIZ supported 209 trafficking victims, of which 100 were new cases. In 2013, the Federal Office for Migration (FOM) issued temporary residents permits (typically valid for a couple of months) to trafficking victims with irregular residence status, who have been witnesses in criminal proceedings against traffickers. Following a pilot project in 2010, the FOM is also running a reintegration support program for trafficking victims returning to their country of origin.

A number of OSCE commitments address assistance and protection of trafficking victims. The OSCE 2003 Action Plan contains the most comprehensive and specific recommendations. For example, OSCE governments should improve their anti-trafficking efforts by „[c]onsidering the need for adopting legislation which will provide the legal basis for rendering assistance and protection to victims of THB [trafficking in human beings], especially during pre-trial investigations and in court proceedings".[34] The OSCE 2003 Action Plan also recommends to OSCE participating States to protect trafficking victims by „[e]stablishing appropriate mechanisms to harmonize victim assistance with investigative and prosecutorial efforts" and by „[e]stablishing shelters, run by governmental bodies, NGOs, or other institutions of civil society to meet the needs of trafficked persons; these shelters are to provide safety, access to independent advice and counselling in a language known by the victim, first-hand medical assistance, and an opportunity for reflection delay after the experienced trauma. Shelters may be established on the basis of already existing facilities such as crisis centers for women" and by „ [p]roviding access to shelters for all victims of trafficking, regardless of their readiness to co-operate with authorities in investigations."[35] The Action Plan also calls on authorities to improve protection by „[d]eveloping social assistance and integration programmes, including legal counselling in a language known by the victim, medical and psychological assistance and access to health care, to be made available either in shelters or other relevant institutions", by „[c]onsidering on a case-by-case basis, if appropriate, the provision of temporary or permanent residence permits, taking into account such factors as potential dangers to victims' safety" as well as by „[c]onsidering, if appropriate, the provision of work permits to victims during their stay in the receiving country."[36]

[34] OSCE Action Plan to Combat Trafficking in Human Beings (2003), section V., para. 2.1.
[35] OSCE Action Plan to Combat Trafficking in Human Beings (2003), section V., paras. 3.4, 4.1 and 4.2.
[36] OSCE Action Plan to Combat Trafficking in Human Beings (2003), section V., paras. 5.3, 6.1, 8.2 and 8.3.

2. Achievements and remaining gaps

With the establishment of victim protection centers across Switzerland and thanks to the specialized services by NGOs, in recent years more human trafficking victims have been better protected and assisted. However, the implementation of the Federal Victim Protection Act varies significantly from canton to canton. During the UN Human Rights Council's Universal Periodic Review (UPR) in 2012, Switzerland was recommended to define a national strategy to combat trafficking in human beings, which should also include a national approach to the protection of trafficking victims. This recommendation has been reflected in the adaption of the National Action Plan (NAP) 2012-2014. Concerning protection of trafficking victims, the NAP tasked the KSMM/SCOTT to create an interdisciplinary working group to "[c]ompile a national protection programme for human trafficking victims, providing information on protection procedures and tools."[37] The NAP also recommends that the KSMM/SCOTT working group should draw from the expertise and experience of the victim protection program of the NGO FIZ. This ongoing effort toward a national victim protection program is a very positive step and should be continued and made a priority by the KSMM/SCOTT.

Physical protection of trafficking victims: A place at a safe house can be an extremely effective and valuable way of protecting a trafficking victim from violence and other threats. The importance of secure and accommodating housing is reflected in OSCE commitments. Currently, the six spaces at the safe house of the NGO FIZ are the only offering tailored to the specific situation and needs of trafficking victims. Other safe houses, namely for women with violent partners or for children of abusive parents, exist and often are open to trafficking victims too. However, demand may outstrip supply. Therefore, public contributions and programs, and private initiatives to fund and create additional places for trafficking victims are strongly encouraged, including support for existing programs such as the FIZ safe house.

Federal witness protection program: Another important achievement in the protection of trafficking victims is the witness protection program run by Federal Office of Police (FOP) following the adaption of the Federal Act on Extraprocedural Witness Protection in 2010, bringing domestic legislation and arrangements in line with the Council of Europe Convention on Action against Trafficking in Human Beings. Trafficking victims who decide to cooperate with law enforcement authorities already were protected *during* criminal proceedings before by, for example, visual shielding, alteration of their appearance and/or voice alteration or questioning without the defendant (including defense attorney) being present. With the witness protection program trafficking victims who are taking the witness stand can now be protected also after criminal proceedings. Possible measures include relocation to a new place of residence in our outside Switzerland and the creation of a new identity with a corresponding new living history (legend). The FOP estimates that there are between 10 to 15 cases per year and about 140 consultations by cantonal authorities (the data from the FOP does not distinguish between witnesses who have been a victim of human trafficking and others).

The witness protection programme has been an important achievement also in improving the protection of trafficking victims and in raising the likelihood that traffickers are prosecuted and convicted. Importantly, the extraprocedural witness protection program is only available for witnesses of serious crimes (such as organized crime, terrorism and human trafficking), and only if without the testimony of the witness in question, the prosecution of the defendants would be made 'disproportionally difficult', and if there is a threat to the witness' limb or life. This does not

[37] Action 14 of the National Action Plan 2012-2014.

mean that no protection measures are available in other cases. Cantonal police forces still will protect a trafficking victim at risk. In such situations, some cantonal police forces, victim protection centers and NGOs have established close cooperation. Cantonal police forces still can consult with the witness protection experts of the Federal Office of Police. However, some of the far reaching measures, such as identity change, are not available outside the federal witness protection program. It is understandable that the federal witness protection program is restricted to a few cases per year, given the limited resources available. However, some of the measures such as identity change can at times be the only effective method to protect a trafficking victim also if she or he is not a witness because she or he is not cooperating in criminal proceedings or not deemed an important witness or if the risks are not a threat to life but, while still serious, more subtle. It is recommended to amend the Federal Criminal Procedure Code and/or the Federal Victim Assistance Act to enhance the set of measure available to crime victims including of human trafficking based on their protection needs and to include specifically the possibility of an identity change if no other effective protection is available.

Stay and residence in Switzerland: Trafficking victims with irregular residence have the right to a recovery and reflection of at least 30 days irrespective whether they choose to cooperate with prosecutors. This is in line with OSCE commitments and international treaty obligations, namely article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings. Resident permits for longer stays are typically granted if the presence of the trafficking victim is deemed necessary by authorities because she or he is a witness in a criminal investigation or criminal proceedings. At times, confusion has arisen among cantonal migration authorities in situations when the crime site and the place of residence of the victim were in different cantons. The National Action Plan, therefore, recommends to "[c]arry out specialised training courses for members of the migration authorities" for them to "be able to correctly apply on a case-by-case basis the provisions regarding the stay of victims."[38]

While each case needs to be considered on its own merits, as a rule, trafficking victims who are cooperating with law enforcement officials should be granted residence permits for longer periods than three or six months. Many criminal proceedings take longer, and the issuance of a long-term residence permit gives the trafficking victim often much needed security and stability. Thus, migration officials could make an important contribution to the well-being and protection of the trafficking victim and, at the same time, help to improve the quality of the criminal proceedings. In addition, within their competence and discretion, migration authorities should issue temporary resident permits (beyond the typically short reflection and resting period) also to trafficking victims who are not involved in criminal proceedings (because they have not been asked to be a witness despite pressing charges or because the preferred not to report any trafficking crime) if, after considering all the circumstances, this appears necessary for the time being for the protection and support of the victim. Migration authorities also should consider issuing long-term resident permits to trafficking victims based on their protection needs, especially if after assessing all circumstances this appears to be the only sustainable durable solution for the effective protection of the trafficking victim. Currently, only very rarely a trafficking victim with irregular residence not cooperating with authorities in investigating and prosecuting a crime will be granted a temporary resident permit, typically on humanitarian grounds (Härtefälle/cas de rigeur).

[38] Action 17 of the National Action Plan.

VII. CRIMINALIZATION OF TRAFFICKERS AND NON-PUNISHMENT OF VICTIMS

1. OSCE commitments, findings and recommendations

Investigating, prosecuting, judging and punishing traffickers is an indispensable element of any effective strategy to combat trafficking. To put traffickers behind prison bars not only helps to protect trafficking victims and to hold perpetrators accountable. If well implemented, criminalization also contributes to prevent future cases of trafficking. However, across the OSCE region, human trafficking remains a highly profitable crime, where the risk of being caught is still very small. A fact reflected by the OSCE in its commitments. In 2008, the OSCE Ministerial Council was "[r]eiterating its concern that, despite sustained measures taken at the international, regional and national levels, (…) few traffickers have been brought to justice".[39]

In Switzerland, in 2012, the NGO FIZ supported 209 human trafficking victims of which 100 were new cases. In the same year, 98 victims of human trafficking were registered by victim protection centers, 78 human trafficking cases were registered for prosecution and typically in a one digit number of cases, there is a conviction.[40]

There are a number of OSCE commitments concerning the criminalization of trafficking. In particular, each OSCE participating State "[c]ommits to take necessary measures, including by adopting and implementing legislation, to criminalize trafficking in human beings, including appropriate penalties, with a view to ensuring effective law enforcement response and prosecution. Such legislation should take into account a human rights approach to the problem of trafficking, and include provisions for the protection of the human rights of victims, ensuring that victims of trafficking do not face prosecution solely because they have been trafficked".[41] The OSCE Ministerial Council also „[e]ncourages those participating States that have not yet done so to ensure that all forms of trafficking in human beings as defined in the OSCE Action Plan are criminalized in their national legislation and that perpetrators of human trafficking do not enjoy impunity". The OSCE 2003 Action Plan defines that for the purpose of human trafficking "[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".[42] This definition is based on the UN Protocol against Trafficking.[43] In OSCE commitments addressing labour exploitation, OSCE participating States are called upon to „[e]sure effective sanctions when employers or recruitment agencies create situations of debt bondage" and to „[c]onsider ensuring that contractors who knowingly use subcontractors involved in trafficking for labour exploitation can be held accountable for that crime".[44]

2. Achievements and remaining gaps

A main achievement in the criminalization of trafficking in human beings has been the adoption of a new, wider definition of human trafficking by the Swiss Parliament in 2006. While before only

[39] OSCE MC Decision 5/08 (Helsinki 2008), preamble.
[40] Conviction statistics are, for the most part, not publicly available. For details see IV.
[41] OSCE MC Decision No. 1 (Vienna 2000), para. 9.
[42] OSCE Action Plan to Combat Trafficking in Human Beings (2003), section II. This definition is taken from and in line with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.
[43] Article 3(a) UN Protocol Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.
[44] OSCE MC Decision 8/07 (Madrid 2007), para. 17.

trafficking for sexual exploitation was part of the Swiss Penal Code, since then also human trafficking for labour exploitation and organ removal are punishable under Article 182 of the Penal Code. This brought Swiss criminal law in line with relevant OSCE commitments, as well as with international human rights and other treaty obligations, namely the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and the Council of Europe Convention on Action against Trafficking in Human Beings.

To make Article 182 of the Swiss Penal Code effective in practice, cantonal prosecutors and cantonal criminal courts have an important role to play, complemented by the work of the Federal General Attorney's Office and the Federal Criminal Court. Some cantonal prosecutors have been very active in investigating human trafficking cases and in bringing them to court. Prosecutors of other cantons are encouraged to rely on these examples as best practices. Prosecutors of different cantons are encouraged to coordinate and cooperate with each other in specific trafficking cases reaching across several cantons but also to have exchanges and common trainings.[45]

Criminal courts across Switzerland are an important actor too in combatting human trafficking. According to a worldwide annual assessment by the US State Department, sentences in Switzerland for human trafficking have been rather low in comparison to sentences for other serious crimes. In its most recent report, the U.S. State Department notes that Swiss authorities have improved their law enforcement efforts. Courts now were "sentencing convicted offenders to significant prison terms."[46] While judges, within the prescribed range, have a wide discretion in the sentencing of a convicted trafficker, they always should be aware of the seriousness of the crime of human trafficking. Not only does human trafficking have extremely negative consequences for the victims, but it often also is connected to organized crime, which can seriously undermine national security and public order.

Finally, the non-punishment principle for victims of human trafficking should be respected by both prosecutors and judges, in line with the OSCE commitment of "ensuring that victims of trafficking do not face prosecution solely because they have been trafficked".[47] The OSCE Special Representative, in a paper about the non-punishment principle containing a detailed analysis of the principle and numerous recommendations to policy and law makers, stressed that "[t]he rationale for non-punishment of victims of trafficking is that, whilst on the face of it a victim may have committed an offence, such as irregular crossing of a State frontier or theft, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not, therefore, be considered accountable for the unlawful act committed. The same applies where the victim has escaped from their trafficker and the crime they have committed arises as a direct consequence of their trafficked status."[48] The OSCE Special Representative recommends, among other things, that "States should encourage National Rapporteurs or equivalent mechanisms to regularly review the practical implementation of the non-punishment principle with regard to victims of trafficking, especially women and children."[49] In line with this recommendation, the KSMM/SCOTT may con-

[45] On coordination and cooperation see III.
[46] U.S. Department of State, Trafficking in Persons Report 2013, p. 350.
[47] OSCE MC Decision No. 1 (Vienna 2000), para. 9.
[48] OSCE SR Non-Punishment (2013), para. 5.
[49] OSCE SR Non-Punishment (2013), Recommendation 29.

sider carrying out or commission a review of the existing practice by federal and cantonal authorities in light of the non-punishment principle of trafficking victims.

VIII. LABOUR EXPLOITATION

1. OSCE commitments, findings and recommendations

Besides hosting embassies in its capital Bern, Switzerland is home to permanent representations as well as to the UN Office in Geneva (UNOG), several UN agencies and other intergovernmental organizations including the World Trade Organiztion (WTO) in Geneva. According to the Federal Statistics Office (FSO), in 2012, there were 23,800 diplomats or officials of international organizations residing in Switzerland. Numerous diplomats employ their own domestic workers as do many of the wealthy residents and citizens. There were an estimated 69,000 domestic workers in Switzerland in 2008, according the secretariat of the International Labour Organization (ILO).[50] Of these, 59,000 were women. In addition, there are many households with elderly and frail people, which increasingly employ migrant care workers. There is also a significant demand for other workers from abroad especially in some sectors of the economy, such as construction or hospitality services (but also for highly skilled jobs in the health, pharma, or information and communication technology sectors). While many of these migrants came voluntarily to Switzerland, some might be victims of trafficking. Awareness among Swiss authorities on human trafficking in domestic workers has greatly improved in recent years, also thanks to efforts by the Federal Department of Foreign Affairs (FDFA). However, the risks and scope of trafficking in other sectors of the economy are not as well understood.

The importance of combatting trafficking for labour exploitation is reflected in numerous and sometimes very specific OSCE commitments. The OSCE Ministerial Council "[e]ncourages the participating States to combat trafficking in human beings for labour exploitation in a more proactive manner" including by „[e]nsuring that their national criminal legislation [against] trafficking in human beings for labour exploitation complies with the requirements of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the UN Convention against Transnational Organized Crime".[51] OSCE commitments also require participating States to „[e]nsure effective and proportionate sanctions against those who facilitate trafficking for labour exploitation" and, in particular, should „[c]onsider ensuring that contractors who knowingly use subcontractors involved in trafficking for labour exploitation can be held accountable for that crime". Importantly, the OSCE governments are "[r]ecognizing that persons with irregular immigration status are likely to be more vulnerable to trafficking for labour exploitation".[52] OSCE countries are also asked to protect trafficking victims by „[e]nsuring that minimum labour standards are reflected in their labour laws, and that their labour laws are enforced, in order to reduce the potential of trafficking in human beings for labour exploitation".[53] The OSCE Ministerial Council also "[c]alls upon participating States to … [p]rovide increased efforts and more effective procedures to identify victims of trafficking [for labour exploitation] and, in this respect, provide training and resources necessary for this task the their labour inspectors and,

[50] International Labour Office of the International Labour Organization (ILO), Domestic workers across the world: Global and regional statistics and the extent of legal protection, Geneva, 2013.
[51] OSCE MC Decision 14/06 (Brussels 2006), para. 6(a).
[52] OSCE MC Decision 8/07 (Madrid 2007), preamble.
[53] OSCE MC Decision 14/06 (Brussels 2006), para. 6(b).

where appropriate, step up inspections in sectors vulnerable to labour exploitation".[54] Moreover, the OSCE governments also should combat trafficking for labour exploitation by "[p]romoting outreach strategies, including in co-operation with relevant NGOs, to provide information on trafficking in human beings for labour exploitation to migrant communities and to persons working in low wage labour and particularly vulnerable sectors such as agriculture, construction, garment or restaurant industries, or as domestic servants, in order to improve victims' access to assistance and justice and encourage persons with information on possible trafficking situations to refer victims to such assistance and to report to appropriate authorities for investigation when there are reasonable grounds to believe that a crime has occurred".[55]

The 2003 OSCE Action Plan also contains various recommendations addressing trafficking for labour exploitation. Namely, countries of destination should take preventive action by "[i]mplementing measures to reduce 'the invisibility of exploitation'. A multi-agency programme of monitoring, administrative controls and intelligence gathering on the labour markets, and, where applicable, on the sex industry…" and by "[a]ddressing the problem of unprotected, informal and often illegal labour, with a view to seeking a balance between the demand for inexpensive labour and the possibilities of regular migration…" as well as by raising awareness about the risks of trafficking for labour exploitation before potential victims travel to the country of destination by "[e]ncouraging national embassies to disseminate information on relevant national legislation such as family law, labour law and immigration law as is of interest to potential migrants, including through NGOs".[56] The OSCE Ministerial Council also "[c]alls upon participating States to … intensify efforts to prevent child labour, by considering signing and ratifying the ILO Convention on the Worst Forms of Child Labour, 1999, if they have not already done so, and if they are already parties to it, by implementing its provisions".[57]

When addressing trafficking for labour exploitation specifically in Switzerland, the OSCE Special Representative has largely focussed on the situation of domestic workers. As one measure to combat labour exploitation of domestic workers in Switzerland and elsewhere, the OSCE Special Representative has recommended to all OSCE governments who have not done so yet to "[r]atify ILO Convention 189 on Decent Work for Domestic Workers."[58] The Special Representative has commended Swiss authorities for their efforts "to protect the rights of domestic workers, as well as the preventative framework established by Switzerland to protect the rights of domestic workers employed in diplomatic households, including through out-of-court mediation tools."[59] [60]

[54] OSCE MC Decision 8/07 (Madrid 2007), para. 4.
[55] OSCE MC Decision 14/06 (Brussels 2006), para. 6.
[56] OSCE Action Plan to Combat Trafficking in Human Beings (2003), section IV., paras. 3.2 and 4.3.
[57] OSCE MC Decision 8/07 (Madrid 2007), para. 20.
[58] OSCE SR 2013 Report, p. 23.
[59] OSCE SR 2011 Report, p. 19.
[60] The OSCE Special Representative also has collected two case studies about domestic workers in Switzerland in a report about domestic servitude. In the first case study, a Philippino maid was helped by the NGO FIZ following the escape in Switzerland from her employer. The third country national had taken his mother to Switzerland for medical treatment. In the second case study, a young Eastern European women working for a Swiss-Russian family living in Switzerland fled her employers after a seven year ordeal of domestic servitude. She had to work long hours, was not allowed to get out of the house, was refused to return to her home country when she asked to leave, had her passport taken away, was threatened given her irregular residence, only could use the phone in the employer's presence and was raped twice by the employers' son. See OSCE OSCE SR, Unprotected Work and Invisible Exploitation: Trafficking for the Purpose of Domestic Servictude, Research Paper, Vienna 2010, pp. 18 and 20.

2. Achievements and remaining gaps

Domestic workers: The Federal Council recommended in its dispatch from August 2013 to the Swiss Parliament to authorize the ratification of the ILO Convention No. 189 concerning decent work for domestic workers. Of the 21 cantons responding during preceding consultations, all supported ratification, as did the domestic workers' representatives. According to the Federal Council, the current legal framework and practice fully comply with the obligations of the ILO 189 Convention. Making the Convention part of Swiss law will underpin the current system with international and legally binding minimum standards strengthen the protection of domestic workers and will greatly increase Switzerland's credibility when advocating other governments to combat trafficking in domestic workers. It is, therefore, recommended to the members of the National Council and the Council of States to authorize swiftly the ratification of the ILO Convention No. 189 concerning decent work for domestic workers.

As far as domestic workers of regular households go, they are already protected by federal and cantonal labour legislation. Particularly important is the Federal Council's Ordinance about the Collective Labour Agreement for Employees in Households[61] from 2010, which sets minimum hourly wages. Other working conditions are part of Cantonal Collective Labour Agreements for Household Employees. While no major legislative gaps seem to exist, the major challenge lies in the identification and referral of domestic workers who have been trafficked for labour exploitation. Here, the role of cantonal labour inspection authorities is extremely important. See the recommendations below concerning labour exploitation in general.

Domestic workers of diplomats: Concerning the protection of domestic workers in diplomatic households from labour exploitation, the Private Household Employees Ordinance adopted by the Swiss Federal Council in 2011 is particularly noteworthy. The ordinance requires "[p]rivate household employees [of diplomatic staff, consular employees and senior officials of intergovernmental organizations] must appear in person before the competent Swiss representation for their place of residence to lodge their visa request and collect their visa." The requirement for domestic workers of diplomats to meet Swiss visa authorities in person gives consular and protocol staff access to a group of persons who are otherwise extremely difficult to reach. Labour inspection authorities often have difficulties to carry out inspections in regular private households let alone in households of diplomats and of other persons who are protected by diplomatic immunities. By interviewing and informing prospective domestic workers of diplomats about their rights before they enter their country of work, Swiss consular officials, if well trained,[62] can make an important contribution to prevent or at least refer for monitoring potential trafficking cases. The Private Household Employees Ordinance also contains minimum rules about working conditions. In particular, it gives domestic workers the right to move freely, including the right to leave the household outside working hours, the right to three meals a day, grants them at least one day off per week and sets a monthly minimum salary in cash of 1,200 Swiss francs from which no deductions are permissible. The Ordinance also requires employers to register their household staff for social security and health insurances and to pay for these.[63] Diplomat employers are protected under international immunities and privileges (which can be waived by the sending state or intergovernmental organization). The Ordinance, therefore, encourages beneficiaries of immunities and privileges such as diplomats to come to an amicable agreement with their household staff if

[61] Normalarbeitsvertrag für Arbeitnehmerinnen und Arbeitnehmer in der Hauswirtschaft / Le contrat-type de travail (CTT) pour les travailleuses et les travailleurs domestiques.
[62] For recommendations on training of consular staff about human trafficking see V.
[63] Articles 28-61 Federal Private Household Employees Ordinance (2011).

disputes out of the working contract arise. The might refer the case to a dispute settlement mechanism, such as the Office of the Amiable compositeur in Geneva.[64] Overall, Switzerland has put in place a system for the protection of domestic workers of diplomats that contains no major gaps. For it to work well in practice all authorities involved need to cooperate and coordinate their work. Consular and protocol staff at the FDFA has to be well aware of the risks of domestic servitude. It is recommended to include in the basic training for newly recruited consular staff a module about human trafficking.

Labour inspection authorities: In general involvement of labour inspection authorities in efforts to combat human trafficking has been very limited in many OSCE countries including Switzerland. Often, the role labour inspection officials could have in identifying trafficking victims and potential trafficking perpetrators is not well understood and defined, neither by labour inspection officials themselves nor the other actors involved in anti-trafficking efforts. Also, at times it can be hard to distinguish between labour exploitation and violations of labour laws. This, in turn, can make the identification of victims extremely difficult and can mean that they are not referred to the right instances, are not getting the protection and assistance they need and perpetrators are not held accountable.

Irregular migrants: A particular challenge is the situation of irregular migrants in the Swiss labour market. With their insecure status, they are particularly at risk of labour exploitation. This means that migration officials, police and labour inspection authorities should not make migration management their only priority when faced with irregular migrant workers. Instead, they should be alert and consider the possibility that an irregular migrant might be a trafficking victim for labour exploitation. Potential trafficking victims, should and can be granted a resting and reflection period. They also might be granted a temporary residence permit during criminal proceedings or in very exceptional cases on humanitarian grounds. However, with an estimated 70,000-300,000 sans-papiers living in Switzerland and absent the political will to regularize their status, many of them will remain particularly vulnerable to labour exploitation.

Criminal responsibility for labour exploitation: With the amendment adapted by the Swiss Parliament in 2006, trafficking for labour exploitation (and for organ removal) was included in the Swiss Penal Code. Before, only trafficking for sexual exploitation was punishable. Accomplice can be anyone who acts as a provider, customer or intermediary. The criminalization of this form of trafficking is in line with OSCE commitments and international human rights obligations. In addition, the adaption in 2005 of a Federal Act against Black Market Labour,[65] sanctions employers who fail to register their employees and who do not pay for their employees' social security and other compulsory insurances. Fallible employers can be excluded from public procurement for several years. The Federal Act also makes the exchange of information between federal and cantonal labour inspection authorities easier. All this can help to combat labour exploitation.

Recommendations: Given there is only a very limited understanding about the scope of human trafficking for labour exploitation, guidelines that help to identify labour exploitation and to distinguish labour exploitation from violations of labour laws are essential. The National Action Plan's recommendation to "[c]ompile guidelines on fighting human trafficking for the purpose of labour

[64] See http://www.eda.admin.ch/eda/en/home/topics/intorg/un/unge/gepri/manlab/manla1.html (accessed 3 March 2014).
[65] Bundesgesetz über Massnahmen zur Bekämpfung der Schwarzarbeit (Bundesgesetz gegen die Schwarzarbeit, BGSA) / La loi fédérale concernant des mesures en matière de lutte contre le travail au noir.

exploitation"[66] is currently implemented by the KSMM/SCOTT. The existing draft guidelines should be swiftly adopted by the KSMM/SCOTT steering committee and be disseminated especially among cantonal labour inspection authorities. Indeed, to identify cases of trafficking for labour exploitation, the role of cantonal labour inspection authorities is extremely important. Besides involving cantonal labour inspection authorities in the KSMM/SCOTT and cantonal coordination mechanisms, a short module about human trafficking for labour exploitation should be made part of the basic training for newly recruited labour inspection officials. The KSMM/SCOTT guidelines, once adopted, should be shared (in hardcopy or digital format) with each labour inspection official. In addition, each cantonal labour inspection authority should consider training some of its staff more extensively in order to have a small pool of experts. Moreover, exchanges between inspection authorities of different cantons about labour exploitation are encouraged. Labour inspection authorities also should not hesitate to bring in anti-trafficking experts of other cantonal labour inspection authorities or from the outside. Finally, labour inspection authorities across Switzerland should consider prioritizing inspections in sectors of the economy where labour exploitation of trafficked workers is most likely to occur based on experience and, as soon as it is available, applied research. To get a sound understanding of the scope and nature of labour exploitation, research in that area should be commissioned and facilitated. In that respect, already initiated research such as the study by an interdisciplinary team of the University of Zürich is commendable.

Finally, when considering measures concerning irregular migrants, such as supporting return to the country of origin or defining criteria for regularising their status in Switzerland, members of the legislative and executive branches involved in drafting and passing relevant legislation need to take into account, that many irregular migrants have been living in Switzerland for several or many years and often are part of the labour market. While there is no perfect solution (doing nothing included), a (unintended) consequence of their insecure status is that they are particularly vulnerable to labour exploitation. Therefore, any legislation concerning irregular migrants should aim to improve the identification, protection and assistance of trafficking victims among this group of people.

IX. CONCLUSIONS

This substudy takes a closer look at the laws, practices and institutional arrangements in place in Switzerland that aim to combat and prevent trafficking in human beings. Six aspects are assessed: (1) coordination and cooperation among different actors, and monitoring of anti-trafficking responses; (2) collection and availability of data, and research about trafficking in human beings; (3) identification of trafficking victims; (4) protection of and support for trafficking victims; (5) criminalization of traffickers and non-punishment of trafficking victims; (6) and trafficking for labour exploitation. The selection is based on findings and recommendations by the OSCE, especially by the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings, complemented by research from the Swiss Center of Expertise in Human Rights (SCHR).

(1) Coordination, cooperation and monitoring: Various authorities with very different roles and at times conflicting priorities have to work together to combat trafficking. Civil society organizations

[66] Action 7 of the National Action Plan. According to the NAP (p. 13): "Few cases of human trafficking for the purpose of labour exploitation have been identified up to now. This is because there is no clear distinction between the violation of labour laws and labour exploitation."

have a crucial role in advocating for and supporting trafficking victims. Switzerland's federal structure makes coordination and cooperation even more complex. Overall, Switzerland has come a long way in implementing OSCE commitments concerning coordination and cooperation of anti-trafficking efforts. The creation of a National Coordination Mechanism (NCM) has been instrumental. Operational since January 2003, the Swiss Coordination Unit against the Trafficking in Persons and Smuggling of Migrants (KSMM/SCOTT) is hosted within the Federal Ministry of Justice and Police. Nevertheless, there is still room for improvement. The study identifies three areas where coordination, cooperation or monitoring could be further enhanced: representation in the National Coordination Mechanism (NCM), cooperation and coordination among cantonal authorities and monitoring of anti-trafficking efforts.

Concerning these three areas, the study recommends:

(R1) *NCM membership:* In line with the internationally agreed definition, Switzerland recently added human trafficking for labour exploitation and organ removal to the list of trafficking crimes. To combat these forms of trafficking effectively, relevant actors should be represented in the NCM. The KSMM/SCOTT, therefore, may invite the Cantonal Conference for the Protection of Adults and Children (KOKES/COPMA), an intercantonal coordination mechanism, and the Association of the Swiss Labour Market Agencies (VSAA/AOST) to join the KSMM/SCOTT as members. The KSMM/SCOTT also may invite the Swiss Conference for Social Aid (SKOS/CSIAS) to become a member (currently only the expert body of the SKOS/CSIAS for victim protection and support, the SVK-OGH/CSOL-LAVI, participates in the KSMM/SCOTT).

(R2) *Coordination among cantonal actors:* According to the KSMM/SCOTT as per October 2013, 10 out of 26 cantons had not yet established a roundtable (or any other cantonal coordination mechanism) which would bring together cantonal prosecutors, migration authorities, social workers, labour inspectors, civil society representatives and other actors. It is recommended to the cantons still lacking a coordination mechanism to initiate the creation of such a forum. The KSMM/SCOTT guidelines on coordination and cooperation can provide valuable guidance.

(R3) *Monitoring:* Respecting the far reaching autonomy of cantons, the Swiss NCM has no oversight function. Such an approach does not exclude an important part for KSMM/SCOTT in monitoring the effectiveness of current responses. The secretariat of the KSMM/SCOT should be mandated and given the resources to evaluate anti-trafficking efforts across Switzerland annually or biannually. Such an assessment could be less comprehensive than the two KSMM/SCOTT progress reports (from 2007 and currently being drafted) and focus on a few best practices, important progress made, identify remaining or new significant gaps, and make recommendations to who should take what action by when. It would then be the responsibility of the actors addressed to follow-up.

(2) Collection and availability of data, research: Both the OSCE and the UN human rights expert body CEDAW identified important gaps in the collection and availability of data concerning trafficking in human beings to Switzerland. During the past years, the OSCE and CEDAW recommendations have been largely implemented. There remain some smaller gaps.

Against this background, the study recommends:

(R4) Much data from the conviction statistics including about human trafficking are open to a small circle of experts only. Given that much of these data reveal little or no information about convicted individuals, authorities should consider allowing much more statistical information about convictions for human trafficking to be made regularly and systematically available to the public.

(R5) Authorities should include information about the country of origin of suspected traffickers (crime statistics and victim support statistics if they contain information about supposed offenders) and of convicted traffickers (conviction statistics) in their statistics and share this information with relevant actors, namely KSMM/SCOTT, so that anti-trafficking efforts can be more targeted.

(R6) Currently, most official statistics do not distinguish between different forms of human trafficking. It is recommended that police, prosecutors, courts and victim protection centers are compiling data about human trafficking cases by distinguishing between sexual exploitation, labour exploitation, and organ removal, as well as by indicating if the trafficking victim has been a child.

(R7) The crime, conviction and victim support statistics, each only capture cases registered for one or another purpose and merely represented the tip of the iceberg. The real numbers mostly remain in the dark. Therefore, support for current research about human trafficking is needed and commendable, and further research should be carried out or commissioned.

(3) Identification of trafficking victims: While officers and staff from several authorities are among the most likely persons to encounter trafficking victims, the may not always realize this. Also, trafficking victims can be reluctant to contact authorities because of their irregular status or as they have been traumatized. Many trafficking victims have very limited possibilities of contact with the outside world.

Based on an analysis of these features, the study recommends:

(R8) Existing efforts, such as the creation of specialized units at some cantonal police forces and the training module about human trafficking at the Swiss Police Institute, the national police institution responsible for the education of higher ranking, non-commissioned and commissioned police officers, should be maintained and enhanced.

(R9) Given the nature of their work, police officers are among the most likely authorities to encounter a human trafficking victim, at times without realizing it. To avoid that potential trafficking victims are falling through the cracks and to improve prospects that traffickers are prosecuted and punished, every member of the police force should have a basic understanding about the problem of human trafficking. It is, therefore, recommended making a brief module about human trafficking part of the ten months basic training for police recruits at one of the five police academies in Switzerland.

(R10) Asylum-seekers and refugees can be trafficking victims. To ensure their identification, protection and assistance, it is recommended that a module about human trafficking is part of the refugee status determination training for staff from the Federal Office for Migration (FOM) and the Federal Administrative Court. It is also recommended putting a referral system with the relevant anti-trafficking actors in place.

(R11) It is recommended to make a brief module about human trafficking part of the basic training consular staff receives before their first deployment. Consular staff to be deployed to countries where particularly many trafficking victims come from should receive more extensive training.

(R12) Staff of victim protection centers often help victims of different sorts of serious crimes not only victims who have been trafficked. To increase understanding about human trafficking, it can be useful to make existing trainings about human trafficking also available to staff from victim protection centers or to conduct separate trainings.

(R13) Given many trafficking victims have few possibilities of interaction with the outside world, it is recommended to make a wide range of contact possibilities available especially in areas traf-

ficking victims are likely to visit. Communication opportunities include telephone hotlines, communication via short text messages, online platforms including communication via secure audio recordings (some trafficking victims might not be able to write), leaflets and posters at grocery stores, restaurants, on construction sites and alike.

(4) Victim protection: The study takes a look at various aspects of victim support and protection: victim protection centers; safe houses for trafficking victims; the witness protection programme by the Federal Office of Police and other police protection measures; reflection time, stay and residence in Switzerland. Based on an analysis of these elements, the study recommends:

(R14) The Federal Victim Protection Act requires the establishment of (public or private) victim protection centers. However, implementation varies significantly from canton to canton. Therefore, the National Action Plan tasked the KSMM/SCOTT to create an interdisciplinary working group to compile a national protection programme for human trafficking victims. This ongoing effort toward a national victim protection program is a very positive step and should be continued and made a priority by the KSMM/SCOTT.

(R15) Currently, the six spaces at the safe house of the NGO FIZ are the only offering tailored to the specific situation and needs of trafficking victims. Other safe houses exist and often are open to trafficking victims too. However, demand may outstrip supply. Therefore, public contributions and programs, and private initiatives to fund and create additional places for trafficking victims are strongly encouraged, including support for existing programs such as the FIZ safe house.

(R16) Currently, the federal victim protection programme is only available to trafficking victims if they cooperate with prosecutors, are considered to be a main witness in the criminal proceedings and if the victims/witness faces a threat to life. It is understandable that the federal witness protection program is restricted to a few cases per year, given the significant costs some of the witness protection measures imply. On the other hand, some of the program's protection tools can at times be the only effective method to protect a trafficking victim also if she or he is not part of criminal proceedings, not deemed an important witness or if the risks are not a threat to life but while still serious are more subtle. It is recommended to amend the Federal Criminal Procedure Code and/or the Federal Victim Assistance Act to enhance the set of measure available to crime victims including of human trafficking and to include specifically the possibility an identity change if no other effective protection is available.

(R17) At times, the involvement of several cantons in a trafficking case has created confusion about which cantonal migration authority should and can issue a resident permit to a trafficking victim. Thus, the recommendation contained in the NAP to "[c]arry out specialised training courses for members of the migration authorities" for them to "be able to correctly apply on a case-by-case basis the provisions regarding the stay of victims"[67] is reiterated.

(R18) While each case needs to be considered on its own merits, as a rule, trafficking victims who are cooperating with law enforcement officials should be granted residence permits for longer periods than three or six months. Many criminal proceedings take longer, and the issuance of a long-term residence permit gives the trafficking victim often much needed security and stability.

(R19) In addition, migration authorities should issue temporary resident permits also to trafficking victims who are not involved in criminal proceedings (beyond the typically short reflection and resting period) if after considering all the circumstances this appears necessary for the time being

[67] Action 17 of the National Action Plan to Fight Human Trafficking 2012-2014.

for the protection and support of the victim. Migration authorities also should consider issuing long-term resident permits to trafficking victims if, after assessing all circumstances, this appears to be the only sustainable, durable solution for the effective protection of the trafficking victim.

(5) Criminalization of traffickers and non-punishment of trafficking victims: An effective criminal justice response against human trafficking includes prosecutors and criminal courts. Some cantonal prosecutors have been very active in investigating human trafficking cases and in bringing them to court. For a long time, however, sentences in Switzerland for human trafficking have been rather low in comparison to sentences for other serious crimes. In its most recent report, the U.S. State Department noted a change, stating that Swiss courts started sentencing convicted offenders of human trafficking to significant prison terms.

Against this background, the study recommends:

(R20) Examples of cantonal prosecutors who have been active in prosecuting suspected perpetrators of human trafficking should serve as best practices for prosecutors of other cantons.

(R21) Prosecutors of different cantons should strengthen coordination and cooperation when investigating and prosecuting individual trafficking cases. Specialized prosecutors from different cantons are encouraged to have regular exchanges and joint trainings.

(R22) While judges have wide discretion in the sentencing of a convicted trafficker (within the prescribed range), they always should be aware of the seriousness of this crime.

(R23) Both prosecutors and judges should respect the non-punishment principle for victims of human trafficking.

(R24) Finally, in line with a recommendation by the OSCE Special Representative, the KSMM/SCOTT may consider carrying out or commission a review of the existing practice by federal and cantonal authorities in light of the non-punishment principle of trafficking victims.

(6) Labour exploitation: The involvement of labour inspection authorities in anti-trafficking efforts has been very limited in comparison to other authorities. Domestic workers including of diplomats and irregular migrants are particularly at risk of labour exploitation.

The SCHR substudy, therefore, recommends:

(R25) It is recommended to the members of the National Council and the Council of States to authorize swiftly the ratification of the ILO Convention No. 189 concerning decent work for domestic workers.

(R26) The KSMM/SCOTT draft guidelines on labour exploitation should be swiftly adopted by the KSMM/SCOTT steering committee and afterward be disseminated, especially among cantonal labour inspection authorities.

(R27) To get a sound understanding of the scope and nature of labour exploitation, research in that area should be commissioned and facilitated, and ongoing research should be disseminated to relevant actors once finalized.

(R28) It is recommended to involve cantonal labour inspection authorities much more in anti-trafficking efforts, namely by becoming a member of KSMM/SCOTT and cantonal coordination mechanisms, as well as through a short training module about human trafficking for all labour inspection officials and more comprehensive training for selected labour authorities.

(R29) Labour inspection authorities across Switzerland should consider prioritizing inspections in sectors of the economy where labour exploitation of trafficked workers is most likely to occur based on experience and, as soon as it is available, applied research.

(R30) While there is no perfect solution (doing nothing included) regarding the situation of irregular migrants (sans-papiers), an unintended consequence of their insecure status is that they are particularly vulnerable for labour exploitation. Any legislation concerning irregular migrants should aim to improve the identification, protection and support of trafficking victims among this group of people.

ANNEX SOURCE MATERIALS

FEDERAL DEPARTMENT OF JUSTICE AND POLICE (FDJP) / FEDERAL OFFICE OF POLICE (FEDPOL) / DIRECTORATE STAFF OFFICE, SWISS COORDINATION UNIT AGAINST THE TRAFFICKING IN PERSONS AND SMUGGLING OF MIGRANTS (KSMM/SCOTT), National Action Plan to Fight Human Trafficking 2012-2014, approved by the KSMM/SCOTT Steering Committee on 1 October 2012, available at: http://www.ksmm.admin.ch/content/ksmm/en/home/dokumentation/nap.html; cited as National Action Plan 2012-2014.

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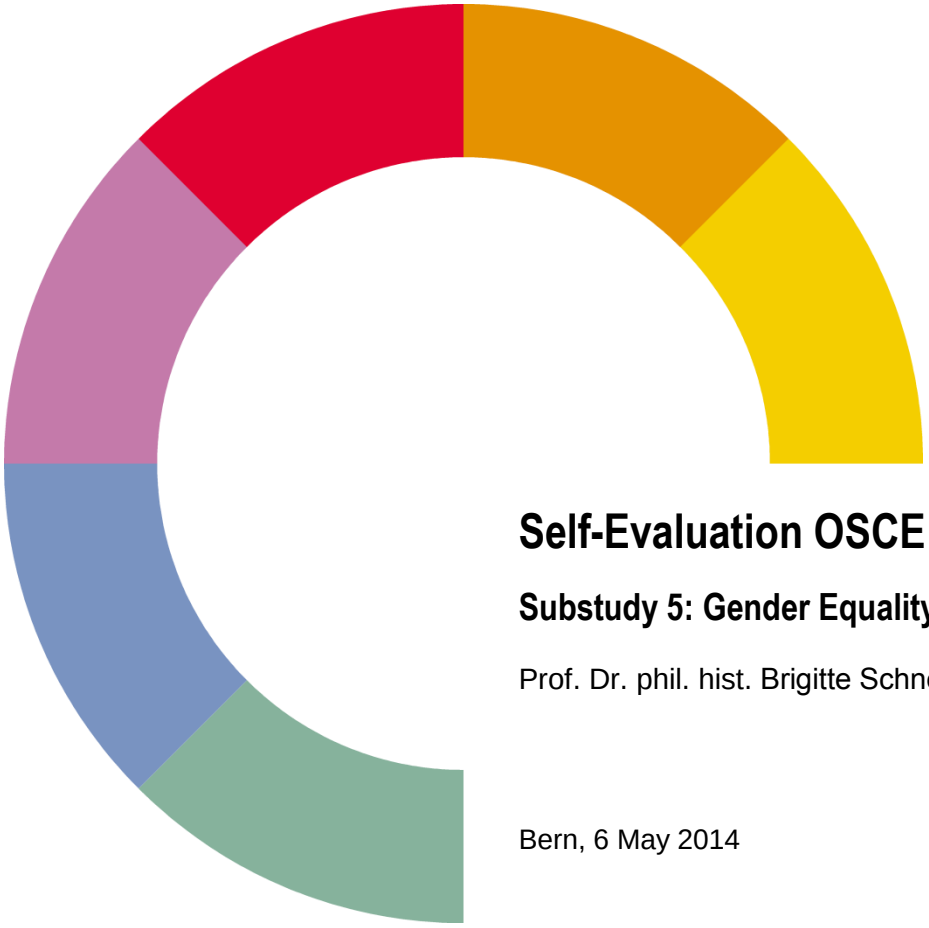

Self-Evaluation OSCE Chairmanship

Substudy 5: Gender Equality

Prof. Dr. phil. hist. Brigitte Schnegg †

Bern, 6 May 2014

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This study reflects the opinion of the authors and only binds the Swiss Center of Expertise in Human Rights.

CONTENTS

I. INTRODUCTION

"The full and equal exercise by women of their human rights is essential to achieve a more peaceful, prosperous and democratic OSCE area. We are committed to making equality between men and women an integral part of our policies, both at the level of our States and within the Organization". With this statement, the heads of member states of the Organization for Security and Co-operation in Europe (OSCE) at the Istanbul Summit in 1999 declared their commitment for gender equality.[1] In June 2000, the Permanent Council adopted a first Action Plan for Gender Issues.[2] This document states that the promotion of equality between women and men is an integral element of policies and practices of the OSCE and that it falls under the joint responsibility of the participating States, of the Chairperson-in-Office, of the Secretary General and of the heads of institutions and missions. In its 535th plenary meeting in December 2004, the Permanent Council reinforced this commitment by the adoption of a new Action Plan for the Promotion of Gender Equality,[3] which sets out the priorities of the OSCE in promoting gender equality, in the Organization and in all participating States, and ensures the monitoring of its implementation. The measures of the Action Plan include gender mainstreaming all activities, policies, projects and programmes of the Organization as well as assisting participating States in promoting gender equality in their countries. Since 2004, the commitment of the Action Plan has been reiterated through a number of ministerial decisions.
With its commitments to respect the principles of gender equality in its own organization and to promote gender equality within its member states, OSCE is fully in line with the normative framework of other international bodies such as the United Nations and the European Council. It follows the standards of gender equality such as they are fixed – among others – in the CEDAW convention, in the general recommendations of the CEDAW Committee, in the Beijing Platform for Action, in the Agreed conclusions of the UN Commission on the Status of Women or in other UN resolutions.

OSCE has fixed six priority areas for implementing gender equality:

a) protection against discrimination;
b) prevention of violence against women;
c) promotion of women's participation in the political and public sphere;
d) promotion of women's participation in conflict prevention and resolution;
e) enhancement of equal opportunities for women in the economic sphere; and
f) creation of national mechanisms to promote the advancement of women.

Furthermore, OSCE has established a Gender Section working for the enactment of the gender equality principles of the organization. It assists, promotes and monitors the implementation of the OSCE standards.

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1 OSCE, Charter for European Security, para. 23, available at http://www.osce.org/mc/17502?download=true (last checked on 10 April 2014).

2 OSCE, Decision No. 353 Action Plan for Gender Issues, 1 June 2000, available at http://www.osce.org/pc/26462?download=true (last checked on 10 April 2014).

3 OSCE, DECISION No. 638 Action Plan for the Promotion of Gender Equality, 2 December 2004, available at http://www.osce.org/pc/14713 (last checked on 10 April 2010).

The commitment for gender equality is not limited to the Organization's own activities, but also engages its member states. This is particularly relevant for the country that holds the chair. Therefore, the OSCE Senior Adviser on Gender Issues Ambassador Miroslava Beham and OSCE Special Representative on Gender Issues June Zeitlin made a country visit to Switzerland in December 2013 in order to discuss different aspects of gender equality with the Swiss Government – in particular the Foreign Ministry – and with the civil society. In addition to these interviews, the OSCE delegation has monitored the state of gender equality in Switzerland based on the relevant reports, documents and data from different actors.[4]
The investigation of the OSCE gender equality delegation to Switzerland has focused on three major topics:

a) The implementation of the Swiss Gender Equality Law (which addresses in particular non discrimination of women in the economic field);
b) the National Action Plan regarding UNSCR 1325 (addressing in particular issues of women, peace and security); and
c) the efforts of Swiss authorities to prevent domestic violence.

The present substudy will further highlight these three fields of activities of gender equality in Switzerland. It agrees in many respects with the conclusions made by the OSCE gender equality delegation.

II. WOMEN'S ECONOMIC EMPOWERMENT

1. Obligations, analysis, commitments and recommendations

Switzerland has strong obligations to guarantee gender equality in the economic field. Binding international norms and standards such as, among others, the International Covenant on Civil and Political Rights (Art. 3 and 26), the Convention on the Elimination of all Discimination against Women (CEDAW) (Art. 11), ILO Convention Nr. 100 (Equal Remuneration Convention) and ILO Convention Nr. 111 (concerning Discrimination in respect of Employment and Occupation) ban all forms of gender discrimination in this context.

Furthermore the Swiss constitution (Art. 8.3) grants equality between women and men:

> "Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women have the right to equal pay for work of equal value."

The Gender Equality Act (GEA), implementing this constitutional norm, addresses in particular equality at the workplace.[5] It prohibits discrimination based on sex, including marital status, family situation or pregnancy, and it applies in particular to hiring, allocation of duties, setting of working conditions, wage, basic and advanced training, promotion and dismissal. A particularity of the

[4] The documents are listed in the Report "Visit to Switzerland at request of OSCE Mission to Vienna By June Zeitlin, the Special Representative of the OSCE Chairperson-in-Office on Gender Issues, Ms. Miroslava Beham, Senior Gender Advisor, and Ms. Ana Lukatela, Gender Advisor, Gender Section" (December 9-December 11, 2013) (hereinafter: Report of the OSCE gender equality delegation), p 1-2.

[5] Gender Equality Act of 24 March 1995 (GEA, SR 151.1), available at http://www.admin.ch/opc/en/classified-compilation/19950082/index.html (last checked on 10 April 2010)

GEA lies in the obligation for the employer accused for discriminatory behaviour to prove his innocence instead of an obligation for the plaintiff to prove the misconduct of the blaimed employer (reversed burden of proof).GEA also prohibits sexual harassment at the work place.

Yet, in reality, considerable inequalities between women and men persist, as the OSCE delegation in its report has noted. The delegation's assessment of the economic situation mainly focus on women's participation in the labour market which is limited through several factors such as gender stereotypes, care responsibilities and a lack of child care infrastructure as well as tax systems. In addition, it refers to the persisting gender pay gap and to sexual harassment and it notes that gender equality services are not in a situation to monitor all data due to a lack sufficient resources.

With the present paper we generally confirm the observations of the OSCE delegation. We will however broaden the focus a little bit and we are going beyond the delegation's recommendations.

The persisting inequalities between women and men in the economic field in particular concern mainly the following points:

a) Participation in the paid work force: Women's employment rate is still lower than men's (61% compared to 75%). However, it has increased during the last decades and is now among the highest of all European countries. [6] In particular, mothers stay in the workforce more often after the birth of their children than they used to.
However, women's gainful economic activity is predominantly part time employment: 58% of the economically active women work part time, compared to 14% of men; and 25,7% of these women have a volume of work below 50%.[7] Women reduce their gainful employment after they have children, in order to cope with the requirements related to childcare and domestic work. This choice has negative impacts on their economic situation. Part time jobs usually are less qualified, lower paid, have fewer social protection schemes and career opportunities than full time positions. Women are not always working part time by choice. A considerable number among them would prefer to have a higher percentage or even a full time job. This is particularly true for single mothers.[8]

b) Professional status: During the last few decades, women have reached an equal level of education as men. However this equal education does not translate into an equal representation of women in executive or leading positions. All available indicators show that women's professional status is lower than men's and that women are clearly underrepresented in leadership positions. This underrepresentation is even more pronounced in highest positions such boards of directors (13%), management boards (6%) or CEO's (6%)[9]. The percentage of women in leadership positions is not higher in the public sector. Even if the numbers are slightly rising, the progress is very slow, and Switzerland is behind other comparable European countries such as for example Germany.

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6 Auf dem Weg zur Gleichstellung, ed. by the Swiss Federal Statistical Office 2013, p. 11 and 36, http://www.bfs.admin.ch/bfs/portal/de/index/themen/20/22/publ.html?publicationID=5212 (last checked on 16 March 2014) (hereinafter: Gleichstellung).

7 Swiss Federal Statistical Office, Gleichstellung, p. 12.

8 Ibid., p. 13 f.

9 See Ibid., p. 15 and Guido Schilling, Schillingreport 2014 – Weniger Ausländer in den Geschäftsleitungen, Frauenanteil in den Verwaltungsräten steigt, available at http://www.schillingreport.ch/upload/-public/5/4175/Medienmitteilung.pdf (last checked on 10 April 2014).

c) Sex-segregated labour market: The Swiss labour market is characterized by a pronounced sex-segregation. While there are very few women in professional fields such as technical professions, ingeneering, natural science, financial sector etc., they are dominant in the fields of health care, teaching, social work or the humanities. The underlying choices of women and girls, or of men and boys respectively, are strongly influenced by gender stereotypes, which are remarkably persistent.

d) Equal pay: Women's average income in Switzerland is lower than men's. The difference amounts to 23,6 % in the private sector and 14,7 % in the public sector. The pay gap increases proportionally with the level of income and is highest among the top earning professions. Women not only have lower salaries, they also receive less special boni than men. On the other hand, the pay gap between women and men is smaller in the lower paid sectors. Overall, women, and in particular migrant women, are overrepresented in the low paid sector[10].
There are a number of external reasons why women earn less than men, such as differences in professional experience, qualification, education, professional status and job discriptions, responsibilities, and marital status. Many of these external factors are related to the distribution of paid and unpaid labour within the families (see below). However, 37.6 % of the unequal pay in the private and 21,6% in the public sector cannot be justified through external factors. This share has to be considered a consequence of gender-based discrimination.[11] The gender pay gap in Switzerland is decreasing, but at a very slow pace.

e) Unpaid care work: In Switzerland, the overall amount of time being dedicated to unpaid care work is almost as high as the total of paid working hours a year. It is a major challenge for families to divide the limited amounts of time at their disposal between gainful employment, housework and time spent with the family. This question is particularly urgent in Switzerland as the regular amount of working hours per week is higher than in most other Western European countries. While women carry out about 64% of unpaid and only 36% of paid work, the ratios are the exact opposite for men. Even if men's engagement in childcare is growing, the major responsibility for the unpaid work in household and families stays with women. They are not only spending more hours on unpaid care work, they also are adapting their professional careers to the needs of the families: They step back, when the care needs in the family are increasing and/or when the public infrastructure is decreasing or even missing at all. [12] Affordable child care facilities are still not available in sufficient number, despite considerable efforts to expand the offer. And school schedules are not matching the working day hours. That means that care persons, mostly mothers, have to be available at home when children are returning from school. This situation requires a high disponibility of women for unpaid care work, which negatively impacts their position in the labour market (see above) as well as their social protection

10 In 2010, 19,1% of the gainfully employed women were in the pow income sector compared to 6,9% of men, see Federal Office for Gender Equality (FOGE)/Swiss Federal Statistical Office (eds.), Auf dem Weg zur Lohngleichheit, Tatsachen und Trends, p. 13, available at http://www.ebg.admin.ch/dokumentation/00068/-00311/00334/index.html?lang=de (last checked on 10 April 2014) (hereinafter: Lohngleichheit).

11 FOGE/Swiss Federal Statistical Office, Lohngleichheit, p. 5.

12 Mascha Madörin/Brigitte Schnegg/Nadia Baghdadi, Advanced Economy, Modern Welfare State and Traditional Care Regimes: The case of Switzerland in: Razavi, S. und Staab, S. (eds.), Global Variations in the Political and Social Economy of Care.Worlds apart, New York 2012, p. 43-60.

status, which is mainly based on formal employment. The situation is particularly critical for single mothers and low income families.

f) Negative financial incentives: Both tax systems and social security schemes discourage women's full participation in the paid labour market. Taxes are disproportionately increasing with a second income in a married couple. In addition to that, child care facility fees are growing when the overall family income is rising. This often leads to a situation, where families have almost no financial profit from a second paid job.[13]

g) Sexual harassment: Both women and men are confronted with sexual harassment in the workplace, even though it is forbidden by the Gender Equality Act. Studies show that approximately 20% of the Swiss have experienced sexual harassment at the workplace. The prevalence of women is almost triple of that of men (28,3% women, 10% men).[14]

International treaty bodies have addressed Switzerland because of persisting discrimination of women in the economic life. In 2009 the CEDAW Committee called for effective measures to guarantee economic equality, to undertake steps in order to minimize segregation on the labour market, to reduce the pay gap and to create better opportunities for women to fully participate in gainful employment. Furthermore the Committee called for more efforts to improve the compatibility of family and work life and to promote the equal sharing of responsibilities between women and men with regard to paid and unpaid work. It recommended concrete measures such as positive action, more child care facilities or paid paternity leaves. In 2010 the Committee on Economic, Social and Cultural Rights (CESCR) made similar suggestions and recommended that Switzerland intensifies voluntary measures to reduce inequalities between women and men in the public and in the private sector. In particular, the efforts to implement equal pay for equal work should be enhanced. Switzerland should develop broad and innovative initiatives to implement the Gender Equality Act such as media campaigns or the introduction of quotas. In 2012, in the context of the Universal Periodic Review of the Human Rights Council, several countries have addressed gender inequalities on the labour market and invited Switzerland to take appropriate measures to end such inequalities, to promote equal pay, to improve the compatibility between family life and employment and to foster women's access to leadership positions.[15] A special concern of several treaty bodies is the situation of female migrant workers in Switzerland. These institutions critizise their discrimination on the Swiss labour market.

2. Achievements and remaining gaps

Gender equality at the workplace is one of the priorities of the Federal Office on Gender Equality (FOGE) and of gender equality offices on the cantonal and communal level. It also figures among

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13 Regina Schwegler/Susanne Stern/Rolf Iten, Familienfreundliche Steuer- und Tarifsysteme. Vergleich der Kantone Basel-Stadt und Zürich. Schlussbericht, Zürich 2012; Monika Bütler: Arbeiten lohnt sich nicht – ein zweites Kind noch weniger. Zum Einfluss einkommensabhängiger Tarife in der Kinderbetreuung". In: Perspektiven der Wirtschaftspolitik 8 (2007), No. 1, p. 1-19.

14 Silvia Strub/Marianne Schär Moser, Risiko und Verbreitung sexueller Belästigung am Arbeitsplatz. Eine repräsentative Erhebung in der Deutschschweiz und in der Romandie, Bern 2008 and Franciska Krings et al.: Sexuelle Belästigung am Arbeitsplatz. Wer belästigt wen, wie und warum? Besseres Verständnis heisst wirksamere Prävention, Bern 2013.

15 Christina Hausammann/Brigitte Schnegg, Umsetzung der Menschenrechte in der Schweiz. Eine Bestandesaufnahme im Bereich der Geschlechterpolitik, Swiss Center of Expertise in Human Rights (ed.), Bern 2013, p. 7-9.

the major objectives of the Swiss Governement for the legislative period 2011-2015. There are many achievements and also many ongoing endeavors to notice. In this substudy we concentrate on the most important ones:

- Legal procedures based on GEA: Legal institutions on different levels, from mediation bodies to the federal court, regularly deal with cases of gender based discrimination mainly concerning wages, dismissals or sexual harassment. These cases are listed in an electronic database.[16] Sensitizing campaigns try to broaden the information about the access to justice in cases of gender based discrimination. The FOGE financially supports projects, including projects of enterprises, which aim to enhance gender equality in the work place.
- Counselling services: There exist many counselling services, including online services, addressing different issues linked to gender equality at the workplace, such as career building, women in leadership positions, compatibility of work and family life, sexual harassment etc. These services are offered both by public and by civil society based institutions, many of them with public financial support,
- Gender equality in the public administration: The Swiss Government repeatedly declared its committment to equal opportunities for men and women within the federal administration. There have been taken a number of concrete measure to this end, among others targets for women's percentage in leading positions, including for the management boards of enterprises under the influence of the state. Monitoring mechanisms have been put in place.The canton of Basel Town has introduced a law which fixes a 30%-quota for women in supervisory boards, and this law has been adopted in a public vote. The cities of Bern, Zürich and Schaffhausen have introduced 35%-quotas for women in leadership positions.
- Equal pay: The activities to achieve equal pay for equal work concentrate mainly on four levels: a) monitoring instruments allowing employers to have a transparent view on the gendered wage situation in his enterprise (FOGE has developed a very performative tool for this purpose called LOGIB), b) dialogues with companies in order to encourage them to introduce equal pay on a voluntary bases, c) combatting gender based discrimination through legal action, often supported by trade unions,[17] d) obligation for the federal administration to mandate only entreprises which conform to the GEA and respect equal pay. Not all of these measures have been equally successful. In particular the outcome of the equal pay dialogues is not really satisfactory.
- Low income sector: The Federal Council has committed itself to ratify the ILO convention no. 189 concerning Decent Work for Domestic Workers.[18]
- Female migrant workers: The Federal Office for Migration supports measures to improve the integration of female migrants into the labour market.
- Compatibility of family and work: Enhancing the compatibility between family life and gainful employment has been one of the priorities in the field of economic empowerment of women in Switzerland during the last years. A number of studies have been carried out to have a clear-

16 See http://www.gleichstellungsgesetz.ch

17 See Susy Staub-Moser, Lohngleichheit und bundesgerichtliche Rechtsprechung – Egalité des salaires et jurisprudence du Tribunal fédéral, AJP 2006, S. 1360 ff.

18 Botschaft zum Übereinkommen (Nr. 189) der Internationalen Arbeitsorganisation über menschenwürdige Arbeit für Hausangestellte vom 28. August 2013, BBl 2013 6927.

er view of the unequal distribution of paid and unpaid work between women and men. The statictics have been improved in order to have better data on the issue. There exist a number of councelling services to advice parents in their attempts to reconcile their care and work obligations. Both the federal administration and cantonal as well as communal administrations have encouraged the creation of child care facilities. The financial support of Federal government has allowed to increase the number of child care facilities by 79%. However it is difficult to have a clear overview because stastical data on this topic is still not available.

Despite considerable achievements and ongoing endeavors in the field of women's economic empowerment, there is still a long way to go until economic equality in facts will be achieved in Switzerland. Different evaluation and monitoring processes[19] have shed a light on what could be major entry points for further improvement.

- The access to justice in cases of gender based discrimination has to be improved. The evaluation of the GEA has shown that women prefer not to charge their employers for discrimation because they fear the loss of their work place or because of high costs.
- Particularly in the private sector there is more commitment needed to seriously advance equal pay and to increase the number of women in leadership positions in order to overcome the persisting glass ceiling. Voluntary measures have proved not to be sufficient; they have to be underpinned by more binding obligations for businesses.
- Ongoing efforts are needed in order to overcome the gender segregation on the labour market. They have to address gender stereotypes on all levels as well as identify and eliminate structural root causes.
- Compatibility between family and working life has to be further enhanced. Quality and affordable child care facilities in a sufficient number are a precondition for women's full participation in the gainful employment. Day schools should be put in place in order to facilitate combining work and family. Persons, mainly women, taking up care responsibilities should not only be appreciated by the society for this crucial contribution to the well being of people, but also at least have aedaquate social protection while and after doing unpaid care work. This is also necessary with regard to new challenges linked to the increasing care needs for elderly and frail persons. Negative financial incentives, for exemple in tax systems, discouraging women's participation in paid employment should be eliminated rapidly. Last but not least the equal sharing of responsibilities between women and men for family and housework as well as for gainful employment is crucial for women's economic empowerment and for gender equality in the economic field.

III. THE IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTION 1325

The report of the OSCE gender equality delegation delivers a very comprehensive overview over Switzerland's implementation activities with regard to the UN Security Council Resolution 1325. We broadly agree on the conclusions of the delegation. Therefore, we concentrate on very few aspects that we consider of particular relevance.

[19] Such as recommendations of the international treaty bodies, the CEDAW reports and shadow reports, evaluation of the Gender Equality Act, evaluations of the National Action Plan on the implementation of the Beijing Platform for Action as well as specific studies such as Hausammann/Schnegg, (see footnote 15).

The seriousness of the problems addressed by UN SC Resolution 1325 is well known. Civilians, and in particular women and children, are the main victims of armed conflicts. They are exposed to serious acts of violence during the conflicts, during flight and in post-conflict situations and their human rights are severely injured. In many armed conflicts systematic rapes are used as a weapon of war, irrespective of the international law, and too often these crimes remain unpunished.

Switzerland, as depositary state of the Geneva Conventions and of the ICRC, has for many years considered the protection of civilians as a major priority of its foreign policy. It has confirmed its commitment through the adoption of a National Action Plan (NAP) for the implementation of UN SC Resolution 1325 in 2007. Switzerland was among the first UN member states to adopt such a plan. The report of the OSCE delegation gives a detailed account of the contents of the NAP, the process of its implementation and monitoring as well as on the follow up 2010-2012 to the first NAP (2007-2009). We refer to this document and abstain from repeating all the facts established there.

Monitoring of the National Action Plans 1 and 2 show that there is considerable progress in realizing the targets fixed. At the same time they also indicate remaining gaps.

Substantial efforts have been made to increase the number of women participating peacebuilding activities. The expert pool for civilian peacebuilding created in 2000 with experts available for temporary civilian peace projects is actually gender balanced, with 168 men and 162 women listed. The share of women in civil peace missions increased from 38% in 2007 to 46% in 2011. It is slightly above one third in Election Observation teams (37%). In military peace missions however, the situation is still not satisfactory with only 7,34 % women.

The Swiss Department of Foreign Affairs is also committed to foster the participation of women in peace building processes where it is involved in such processes, be it as a moderator, be it in bilateral and multilateral contexts[20].

It is not just the number of women in the peace missions that matters, but also the gender competence of the overall staff. In order to enhance such capacities, a gender perspective has been integrated in all training modules for civil and military peace mission delegations.[21] Participants are also familiarized with the code of conduct concerning sexual exploitation and abuse (SEA) that has been put in place by the United Nations.[22] The code of conduct is part of the employment contract for all members of Swiss civil peace missions.

In general, the Swiss Foreign Policy tends to intergrate gender concerns of UN SC Resolution 1325 in its bilateral and multilateral activities. The Department of Foreign Affairs as enhanced its engagement for the protection of women and girls against gender based violence in conflict situations. It supports the ICC in its efforts to held perpertrators accountable for war crimes, including sexual violence, and it is active in the attempts to integrate sexual violence in the “Dealing-with-the-Past” initiatives. It participates in the creation of multilateral mechanisms to document and

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20 See Swiss Federal Departement of Foreign Affairs (EDA), For Peace, Human Rights and Security. Switzerland’s commitment to the world, ed. Federal Department for Foreign Affairs, Bern 2013.

21 The Swiss Government gives financial support to several centres of competence in the field, who offer gender sensitive training modules, namely GCSP (Geneva Centre for Security Policy), GICHD (Geneva International Centre for Humanitarian Demining) and DCAF (Geneva Centre for the Democratic Control of Armed Forces) as well as KOFF/Swisspeace.

22 United Nations, Protection from Sexual Exploitation and Abuse by UN and Related Personel, available at http://www.un.org/en/pseataskforce (last checked on 10 April 2014).

prosecute sexual violence in the context of Justice Rapid Response schemes as well as in endeavors to engage non state actors such as armed groups and international security companies in complying with the principles of international humanitarian law[23]. Furthermore it pays special attention to the specific needs of women and girls in situations of armed conflict and humanitarian disaster. As highlighted by the OSCE report, Switzerland also successfully campaigned for the integration of a gender perspective in the Arms Trade Treaty as well as in Small Arms and Light Weapons Strategy Paper and the Mine Action Strategy 2012-2016.

Swiss Department of Foreign Affairs financially supports women's NGOs engaged in peace activism.

The OSCE delegation observed in its report that there is a certain gap between Switzerland's commitment for women peace and security in the foreign policy documents and at the international level on the one hand and the measures taken domestically on the other hand. This assessment is certainly correct. We agree with the delegation's conclusions that the number of women in decision making positions within the diplomatic corps as well as on senior management positions in the Department of Foreign Affairs needs to be raised further, even if progress is visible. There is no doubt that further steps to integrate more women in the domestic security sector as well as in the police forces would be desirable. But the possibilities of the federal administration are limited here because these are areas of influence of the cantons or of the municipalities.

We consider very interesting the OSCE delegation's recommendation to integrate a gender sensitive budget analysis in the budget accountability framework and to earmark a share of the funds for Women, Peace and Security issues. Political advances to introduce general gender budget processes in the Swiss administration have been rejected in the past. But it would still be worthwhile to take a new initiative and to implement such mechanism limited to the context of peace and security activities. In conclusion, the NAP provide Switzerland with a strong tool to implement UN SC Resolution 1325. The endeavors to implement the women peace and security agenda of UN SC 1325 and the following UN SC Resolutions (1820, 1888, 1889, 1960, 2106, 2122) and to monitor this implementation should further continue.

IV. DOMESTIC VIOLENCE

The Report of the OSCE gender equality delegation refers to important issues related to domestic violence against women and subsequently makes recommendation to improve the current situation. Since we all in all agree with the issues raised and the conclusions made by the delegation, we limit this section to some issues of particular importance in the field of domestic violence against women and will comment the recommendations made by the delegation. For details, we will refer to the findings in the comprehensive report on human rights related to gender issues published by the SCHR in 2013.[24]

[23] Switzerland initiated a multi stakeholder initiative for an International Code of Conduct for Private Security Service Providers which also includes the issue of sexual violence.

[24] Hausammann/Schnegg, p. 21-37. An overview of the international obligations and national laws to protect women from domestic violence can be found in Hausammann/Schnegg, p. 24-31.

In its report, the OSCE gender equality delegation highlights the high rate of completed homicides of women that were killed as a result of domestic violence.[25] This is indeed a very alarming rate, since this seems to be a specific Swiss phenomenon.[26] Moreover, the report refers to article 55a of the Criminal Code[27] that explicitly allows victims of domestic violence to withdraw their complaints and end proceedings. The report states that in 2011, "about 5500 criminal proceedings involving domestic violence were opened, but around 70% were withdrawn by the victims before they went to a court hearing".[28] We also consider the application of this article as problematic, since – according to a study – the suspension of proceedings is in practice – in contrast to the intention of the legislator – not the exception but the rule.[29]

In its recommendations, the report first notes that Switzerland "should consider the adoption of comprehensive domestic violence legislation focused on prevention and combating violence against women, facilitating prosecutions where appropriate and providing necessary social services to its victims and their families".[30] We fully agree with this recommendation that is in line with the recommendations made by the CECR Committee[31] and the CEDAW Committee[32] in this regard. In its reply on a rejected parliamentary intervention to introduce a national law regarding the protection of violence, the Federal Council pointed out that the regulatory area concerned lies first and foremost in the competence of the cantons and not of the federal level.[33] Secondly, the report claims to set minimum standards to be set for shelters and other services for victims of domestic violence and "incentives provided to cantons to provide additional services and alleviate the overcrowding and inaccessibility of these shelters".[34] We fully agree with this recommendation. As noted at the beginning of the report, "there are 18 women's shelters for victims of domestic violence (…) in Switzerland".[35] Depending on the method of calculation, this leads to around 482 to 735 missing spaces in women's shelters.[36] In addition, the financing of the existing institutions is – in contrast to the recommendations of the CEDAW Committee – not secured.[37] Thirdly, the report recommends Switzerland to undertake research "on the use and the effectiveness of existing programs for perpetrators".[38] Even though this recommendation is in our opinion less urgent than the two other recommendations, such an evaluation would be an important measure

25 Report of the OSCE gender equality delegation, p. 4.

26 Hausammann/Schnegg, p. 23 f., with reference to a study by Martin Killias/Carin Dilitz/Magaly Bergerioux, Familiendramen – ein Schweizer "Sonderfall", Universität Lausanne, 2006, Crimiscope, Nr. 33, Dezember 2006, p. 1-8.

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

28 Report of the OSCE gender equality delegation, p. 5.

29 See Hausammann/Schnegg, p. 33, with further critique with regard to this norm.

30 Rec. No. 5, p. 8.

31 CESCR Committee, Concluding Observation Switzerland, 19 November 2010, para. 13.

32 CEDAW Committee, Concluding Observation Switzerland, 7 August 2009, para. 28; see Hausammann/Schnegg, p. 28.

33 Hausammann/Schnegg, p. 36.

34 Rec. No. 6, p. 8.

35 Report of the OSCE gender equality delegation, p. 5.

36 Hausamann/Schnegg, p. 31.

37 Ibid, p. 36, referring to CEDAW Committee, Concluding Observation Switzerland, 7 August 2009, para. 28.

38 Rec. No. 7, p. 8.

Finally, the report recommends Switzerland to "move swiftly to ratify the Istanbul Convention".[39] We fully support this recommendation, since the Istanbul Convention contains a detailed list of measures that states have to take into account. This includes the areas prevention, protection and support, legal measures, investigation, criminal prosecution, procedural rights, migration and asylum and international collaboration. Furthermore, the Istanbul Convention explicitly refers to violence against women in its different forms of appearances, and namely with regard to domestic violence.[40]

V. CONCLUSION

The Report of the OSCE gender equality delegation focused on three particulary interesting issues for Switzerland: Women's economic empowerment, the implementation of the UN Security Council Resolution 1325 and – at request of the Special Representative of the Chairperson-in-Office on Gender issues – domestic violence.

In the field of women's economic empowerment, Switzerland has strong obligations to guarantee gender equality: On the international level, it is bound by the International Convenant on Civil and Political Rights (Art. 3 and 26 CCPR), the Convention on the Elimination of all Forms of Discrimination against Women (Art. 11 CEDAW), the ILO Conventions Nr. 100 (Equal Renumeration Convention) and Nr. 111 (concerning Discrimination in respect of Employment and Occupation), that ban all forms of gender discrimination in this context. On the national level, Art. 8 para. 3 of the Swiss Constitution grants equality between men and women, and the Gender Equality Act (GEA), implementing this constitutional norm, addresses in particular equality at the workplace. Despite these norms, considerable inequalities between women and men persist in reality. These inequalities in particular concern the following areas: *The participation in paid work* (women's employment rate is still lower than men's, although it has increased during the last decades); *the professional status of women*, that is – despite equal education – lower than men's; *the representation in leadership positions*, where women are underrepresented in management positions;*the sex segregated labour market* (the Swiss labour market is characterized by a pronounced sex-segregation);, *equal pay for women and men,* which is still not reality as women's average income is lower than men's (23.6% in the private and 14.7% in the public sector); *unpaid care work* (women carry out 64% of the unpaid work), *negative financial incentives* (both tax systems and social security schemes discourage women's participation in the paid labour market); and *sexual harassment* (both women and men are confronted with sexual harassment in the working place). Due to the persisting discriminiation of women in economic life, the CEDAW Committee, the CESCR Committee and the Human Rights Council have addressed Switzerland in recent years and made several recommendations to improve the current situation. On the other hand, gender equality at the working place is one of the priorities of the Federal Office on Gender Equality (FOGE) and of gender equality offices on the cantonal and communal level, as well as among the major objectives of the Swiss Government for the legislative period 2011-2015. In particular, achievements can be noticed regarding the *legal procedures based on* the Gender Equality Act (different legal institutions on different levels regularly deal with cases of gender based discriminiation), *the counselling services* addressing different issues linked to gender equality in the

[39] Convention on preventing and combating violence against women and domestic violence of 11 Mai 2011; see Report of the OSCE gender equality delegation, Rec. No. 8, p. 8.

[40] Hausamann/Schnegg, p. 25 f.

working place, *gender equality in the public administration* (for instance targets for women's percentage in leading positions), *the activities to achieve equal pay (*for instance monitoring instruments and dialogues with companies), the *strengthening of the low income sector* by the commitment of the Federal Council to ratify the ILO convention no. 189 concerning decent work for domestic workers, measures to improve *the integration of female migrants* into the labour market and *the enhancement of the compatibility between family life and gainful employment* (for instance by encouraging the creation of child care facilities by federal, cantonal and communal administrations).

For the further improvement in the field of women's economic empowerment, we recommend the improvement of the access to justice in cases of gender based discrimination, the enhancement of the commitment of the private sector regarding equal pay and the increase of the number of women in leadership positions (underpinned by more binding obligations for businesses), the increase of the efforts to overcome gender segregation in the labour market by addressing stereotypes on all levels amongst others and to further enhance the compatibility between family and working life by the increase of high quality and affordable child care facilitites as a precondition for women's full participation in paid employment.

With regard to the implementation of UN Security Council Resolution 1325, Switzerland has for many years considered the protection of civilians as a major priority in its foreign policy and has confirmed its commitment through the adoption of a National Action Plan (NAP) for the implementation of UN SC Resolution 1325. Monitoring of the National Action Plans 1 and 2 show that there is considerable progress in realizing the targets fixed. For instance, the number of women participating in peacebuilding activities has been increased in recent years. Furthermore, the Swiss Departement of Foreign Affairs has committed to foster the participation of women in peacebuilding processes. Moreover, in order to enhance the gender competences of the overall staff in peace missions, a gender perspective has been integrated in all training modules for civil and military peace mission delegations and participants are familiarized with the code of conduct concerning sexual exploitation and abuse that has been put in place by the United Nations. At the same time, there is a certain gap between Switzerland's commitment for women, peace and security in the foreign policy documents at the international level on the one hand and the measures taken domestically on the other hand. For instance, the number of women in decision making positions within the diplomatic corps as well as on senior management positions in the Departement of Foreign Affairs should be further raised. In addition, more women should be integrated in the domestic security sector as well as in the police forces, even though in this regard the possibilities of the federal administration are limited due to the federal structures and the competences of the cantons and the communes in this conntext.

We recommend to further monitor the implementation of the National Action Plan. Moreover, the gender balance in peace missions and other relevant bodies as well in domestic security and police services should further be improved, and the engagement for the protection of women and girls in conflict situations, for the integration of women in peace building processes and for combatting impunity of sexual violence should be pursued both on a bilateral and on multilateral level. Finally, an increase of financial resources – for instance through gender sensitive budgeting – would give all the strategic commitments further credibility.

With regard to domestic violence, we broadly agree with the analysis and the conclusion made by the Report of the OSCE gender equality delegation. The high rate of completed homicides of women that were killed as a result of domestic violence is alarming and apparently a specific Swiss phenomenon that should be further analysed. Furthermore, article 55a of the Swiss Crimi-

nal Code that allows victims to withdraw their complaints and end proceedings results in practice in a very high number of criminal proceedings not resulting in court proceedings. This effect was not intended by the legislator and should be further analysed.

We recommend that the Swiss authorities adapt a comprehensive domestic violence legislation focused on prevention and combating violence against women, including criminal investigation, prosecution and adequate punishment of those found guilty, and provide social services to victims and their families. Furthermore, the number of shelters for women should be increased and the financing of the existing institutions be secured. In addition, Switzerland should ratify the Convention on preventing and combating violence against women and domestic violence of the Council of Europe (Istanbul Convention). This convention contains a detailed list of measures that states have to take into account with regard to prevention, protection, support, legal measures, investigation, criminial prosecution, procedural rights, migration and asylum, and international collaboration and explicitely refers to violence against women in its different forms. Finally, the application of article 55a of the Swiss Criminal Code and its impact on the prosecution of perpetrators should further be analysed and this legal provision revised if necessary.

ANNEX SOURCE MATERIALS

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