

# **ACCESS TO JUSTICE FOR CHILDREN: SWITZERLAND**

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## **I. What is the legal status of the Convention on the Rights of the Child (CRC)?**

### **A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?**

Switzerland ratified the CRC on 24 February 1997.<sup>1</sup> Switzerland is a monist State: any treaty ratified by the Swiss government does not require further implementing legislation in order to take force, which occurs automatically upon ratification.<sup>2</sup> As such, the CRC and other relevant ratified international instruments constitute a core part of domestic law.<sup>3</sup> The CRC entered into force in Switzerland on 26 March 1997.<sup>4</sup>

### **B. Does the CRC take precedence over national law?**

In principle, yes, the CRC does take precedence over national law. Article 5 of the Swiss Constitution requires the Confederation and all of the *cantons*<sup>5</sup> to respect international law.<sup>6</sup> The Swiss Federal Council has stated that “this duty applies to all organs of the state and derives from the principle that the standards of international law, in principle, outweigh those of domestic law.”<sup>7</sup> The Federal Supreme Court has also stated that international law takes precedence over national law.<sup>8</sup>

### **C. Has the CRC been incorporated into national law?**

Yes, the CRC has been incorporated into national law in Switzerland. However, Switzerland ratified the CRC with the following declaration and reservations, which are still in force:

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<sup>1</sup> Human Rights Information Platform, ‘International Convention on the Rights of the Child (CRC) – Implementation in Switzerland’, available at:

<http://www.humanrights.ch/en/Switzerland/UN-Conventions/Child/index.html>.

<sup>2</sup> Swiss Federal Department of Foreign Affairs, ‘The relationship between national and international law’, available at: <http://www.eda.admin.ch/eda/en/home/topics/intla/cintla/natint.html>.

<sup>3</sup> *Initial report of Switzerland to the UN Committee on the Rights of the Child*, CRC/C/78/Add.3, 19 October 2001, para. 15. Available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f78%2fAdd.3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f78%2fAdd.3&Lang=en) (“2001 CRC Report”).

<sup>4</sup> *Ibid.*

<sup>5</sup> Switzerland's 26 cantons are the federal states of the Swiss confederation.

<sup>6</sup> SR 101, Federal Constitution of the Swiss Confederation of 18 April 1999, art. 5 (Status as of 3 March 2013) (“Constitution”).

<sup>7</sup> Swiss Federal Council, ‘La relation entre droit international et droit interne: Rapport du Conseil fédéral’, 5 March 2010, section 8.4, p. 2107, citing Message du 20 novembre 1996 relatif à une nouvelle constitution fédérale, FF 1997 I 136 (“L’art. 5, al. 4, «impose à la Confédération et aux cantons l’obligation de respecter le droit international. Ce devoir s’adresse à tous les organes de l’Etat et découle du principe qui veut que les normes de droit international l’emportent par principe sur celles de droit interne.”), available at:

<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/cintla.Par.0052.File.tmp/La%20relation%20entre%20droit%20international%20et%20droit%20interne.pdf>.

<sup>8</sup> See, e.g., 125 II 417 – PKK.

- Switzerland refers expressly to the obligations of all States to apply the rules of international humanitarian law and national law to the extent that they ensure better protection and care of children who are affected by an armed conflict;
- Reservation concerning article 10, paragraph 1: Swiss legislation, which does not guarantee family reunification to certain categories of aliens, is unaffected;
- Reservation concerning article 37(c): The separation of children deprived of liberty from adults is not unconditionally guaranteed;
- Reservation concerning article 40: The Swiss penal procedure applicable to children, which does not guarantee either the unconditional right to assistance or separation, where personnel or organisation is concerned, between the examining authority and the sentencing authority, is unaffected.<sup>9</sup>

Several domestic laws are either modelled after the CRC or reflect its normative principles. For example:

- Article 11 of the Swiss Constitution provides children with “the right to the special protection of their integrity and to the encouragement of their development”, enabling them to “exercise their rights to the extent that their power of judgment allows.”<sup>10</sup>
- Article 41 of the Swiss Constitution includes social objectives and obligations with language echoing that of the CRC.<sup>11</sup>
- Article 15 of the Swiss Constitution guarantees the freedom of religion.<sup>12</sup> Parents may choose their child’s religion; once the child reaches maturity, the parents must respect the child’s beliefs and may not force him/her to change or keep the religion.<sup>13</sup>
- Article 123 of the Swiss Constitution enables the Confederation to subsidise “institutions that conduct educative measures for the benefit of children, adolescents and young adults” with respect to criminal law and procedure.<sup>14</sup>

Switzerland does not have a consolidated or comprehensive Children's Act; rather, laws relating to children's rights can be found throughout federal legislation and ordinances and cantonal legislation. Relevant legislation includes:

- The Criminal Code (SR 311).
- The Civil Code (SR 210), article 14 of which utilises the same definition of the child as that found in the Convention.<sup>15</sup>
- The Federal Act on the Criminal Status of Minors, 20 June 2003 (SR 311.1).
- The Federal Ordinance regulating the Placement of Children, 19 October 1977 (SR 211.222.338).

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<sup>9</sup> United Nations Treaty Collection, ‘CHAPTER IV: HUMAN RIGHTS: 11. Convention on the Rights of the Child; Declarations and Reservations’, available at: [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-11&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en#EndDec).

<sup>10</sup> Constitution, art. 11.

<sup>11</sup> See *Ibid.*, arts. 41(1)(e), (f) (“children and young people . . . can obtain an education and undergo basic and advanced training in accordance with their abilities; . . . children and young people are encouraged to develop into independent and socially responsible people and are supported in their social, cultural and political integration.”).

<sup>12</sup> *Ibid.*, art. 15.

<sup>13</sup> Philippe Meyer and Martin Settler, ‘Droit de la filiation (art. 270 à 327 CC)’, 264 (2006).

<sup>14</sup> Constitution, art. 123.

<sup>15</sup> Compare SR 210, Swiss Civil Code of 10 December 1907, art. 14 (Status as of 1 July 2013) (“Civil Code”) (“A person is of age if he or she has reached the age of 18”) with Convention on the Rights of the Child, art. 1, 20 November 1989, 1577 UNTS 3 (“a child means every human being below the age of eighteen years”).

- The Federal Act concerning Assistance to Victims of Offences of 23 March 2007 (SR 312.5) and the Ordinance on Assistance to Victims of Offences of 27 February 2008 (SR 312.51).
- The Federal Asylum Act of 26 June 1998 (SR 142.31) and Ordinance 1 on Asylum Procedure, 1 October 1999 (SR 142.311).
- The Federal Act on Foreign Nationals of 16 December 2005 (SR 142.20).
- The Federal Act on Medically Assisted Procreation of 4 December 2000 (SR 810.112.2).

Other measures, such as legislative procedure and cantonal legislation on education, explicitly reference the CRC and require consistency with its provisions.<sup>16</sup>

In 2007, upon the 10<sup>th</sup> anniversary of Switzerland's ratification of the CRC, Child Rights Network Switzerland noted several shortcomings in Switzerland's implementation of the Convention, including the need for a coordination office, an action plan, and an inter-cantonal application mechanism.<sup>17</sup> Such criticism led the Swiss Government to increase its focus on children's rights: in 2008, it adopted a national "Strategy for a Swiss Child and Youth Policy" that is in part based on the CRC.<sup>18</sup> The policy seeks several goals, including new federal laws and amendments to existing laws that comport with those of the CRC.<sup>19</sup> Other laws and amendments have been enacted specifically regulating and promoting "prevention, awareness-promotion and information measures in line with articles 19 and 34" of the CRC, as well as empowering administrative agencies, including the Federal Social Insurance Office (BSV) to report on and coordinate the implementation of the CRC.<sup>20</sup>

#### D. Can the CRC be directly enforced in the courts?

Yes, the CRC can be directly enforced in the courts to the extent that the provisions invoked are "directly applicable". According to Switzerland's report to the UN Committee on the Rights of the Child, "[a] provision is directly applicable when this rule, considered in its context and in the light of both the subject and the purpose of the treaty, is unconditional and sufficiently precise to produce a direct effect, to apply as such to a particular case and to constitute the basis for a concrete decision".<sup>21</sup>

Article 190 of the Swiss Constitution states that the "Federal Supreme Court and the other judicial authorities apply the federal acts and international law."<sup>22</sup> The Federal Supreme Court has stated that, in order for it to directly enforce a treaty provision, the

<sup>16</sup> 2001 CRC Report, paras. 11, 23(b), 23(l).

<sup>17</sup> Human Rights Information Platform, 'La Convention pour les droits de l'enfant en Suisse a dix ans – bilan intermédiaire', available at: [http://www.humanrights.ch/fr/Suisse/interieure/Groupes/Enfants/idart\\_5110-content.html](http://www.humanrights.ch/fr/Suisse/interieure/Groupes/Enfants/idart_5110-content.html) ("Selon le Réseau suisse des droits de l'enfant, il manque en Suisse un bureau de coordination, un plan d'action, un mécanisme inter-cantonal d'application de la Convention. Le Réseau demande au Conseil fédéral de prendre enfin au sérieux cette priorité. Il appelle la tenue d'une conférence nationale qui permettrait de faire la synthèse de la vision de tous les acteurs importants quant à l'avenir de la jeunesse en Suisse").

<sup>18</sup> Swiss Federal Social Insurance Office (BSV), 'Fact sheet "Child and youth policy in Switzerland"', March 2013, p. 1, available at:

[http://www.bsv.admin.ch/themen/kinder\\_jugend\\_alter/00065/index.html?lang=en](http://www.bsv.admin.ch/themen/kinder_jugend_alter/00065/index.html?lang=en).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid., at 2.

<sup>21</sup> 2001 CRC report, para. 16.

<sup>22</sup> Constitution, art. 190.

provision must: (1) relate to the rights and obligations of the individual; (2) be sufficiently concrete and clear to be applied to a specific legal case by an authority or court; and (3) be aimed at the authorities responsible for applying the law and not at legislatures.<sup>23</sup>

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Yes, there are examples of domestic courts using or applying the CRC or other relevant international instruments. For example, in a case concerning a child's right to visit when she did not personally know her father, the Court stated that CRC article 12 on the right to be heard "is a directly applicable legal rule" that can be appealed (though the court ultimately found that the claim in that particular case was unfounded).<sup>24</sup> Several other decisions by the Swiss Federal Supreme Court have concerned, cited or discussed the CRC since it was adopted in 1997.<sup>25</sup> Several decisions have directly applied other relevant instruments, such as the European Convention on Human Rights.<sup>26</sup>

## II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Generally speaking, individuals in Switzerland may "bring lawsuits seeking damages for or cessation of a human rights violation."<sup>27</sup> Given the multiple legal bases for the protection of children's rights—including the CRC (which is directly incorporated into Swiss domestic law),<sup>28</sup> the Swiss Constitution,<sup>29</sup> and the existence of government administrative agencies tasked with the protection of children's rights<sup>30</sup>—there are several procedural and substantive foundations to bring a case challenging violations of children's rights.

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

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<sup>23</sup> See Swiss Federal Department of Foreign Affairs, 'The relationship between national and international law'.

<sup>24</sup> BGE 124 III 90 (1997) – *Julia X*.

<sup>25</sup> See, e.g., BGE 136 I 285 (2010); BGE 135 I 153 (2009) – *Postmortaler Familienschutz*; BGE 135 I 79 (2008) – *Schwimmunterricht Schaffhausen*; BGE 131 III 553 (2005); BGE 130 III 530 (2004); BGE 128 IV 154 (2002); BGE 128 I 63 (2002) – *Kenntnis der Abstammung*; BGE 126 II 377 (2000) – *Saisonnier F. A.*; BGE 125 I 257 (1999) – *Vormundschaftsakten*; BGE 124 III 90 (1997) – *Julia X*; BGE 124 II 361 (1998); BGE 123 III 445 (1997) – *Elterliches Sorgerecht*.

<sup>26</sup> In one landmark 1999 case, the Federal Tribunal refused to apply a Swiss statute on the basis that it violated the ECHR. BGE 125 II 417 – *PKK*. This was notable due to the fact that the Swiss Constitution does not empower the Court to do so on the basis of a statute's unconstitutionality. Swiss Constitution, art. 190. In other words, the Court, "[b]y applying international human rights provisions . . . engage[d] in a new type of *de facto* constitutional review" that was "not otherwise provide[d] for[.]" Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law', 3 ICL J. 170, 182 (2009).

<sup>27</sup> United States Department of State Bureau of Democracy, Human Rights and Labour, 'Country Reports on Human Rights Practices for 2012: Switzerland 2012 Human Rights Report', 19 April 2013, p. 6, available at: <http://www.state.gov/j/drl/rls/hrrpt/2012/eur/204346.htm>.

<sup>28</sup> See part I above.

<sup>29</sup> Constitution, art. 5.

<sup>30</sup> See part I.C above.

This depends on the circumstances. The Swiss Civil Code vests parents,<sup>31</sup> or in cases where the child has no parents, an appointed guardian,<sup>32</sup> with the “power to represent the child in all dealings with third parties.”<sup>33</sup> However, the Swiss Civil Code further states that persons “capable of judgement but lacking capacity to act”,<sup>34</sup> which would include some children,<sup>35</sup> may “*exercise their strictly personal rights independently*; cases where the law requires the consent of the legal representative are reserved. . . . unless a right is so strictly personal that any form of representation is excluded.”<sup>36</sup>

In its report to the Committee on the Rights of the Child, Switzerland explained that “strictly personal rights” are:

very closely bound up with the personality of each individual . . . [such as] the entire range of physical, mental, moral and social characteristics constituting a person . . . [they] include the right to life, to physical, mental and moral integrity and the right to enjoy respect for private and intimate matters, as well as the right to honour and freedom of movement. The exercise of these rights within the meaning of . . . the Civil Code consists not only in the ability to perform juridical acts, but also the ability to have them enforced at law. *In the framework of their strictly personal rights, therefore, minors capable of forming their own views can by themselves bring proceedings and also appoint a lawyer to defend their interests.*<sup>37</sup>

In light of the above, it follows that, where the rights of a child “capable of judgement” are violated, and those rights constitute “strictly personal rights” under the Swiss Civil Code, then such child could bring proceedings without a parent or guardian. If, however, such rights are not “strictly personal rights”, then that child would require the assistance of a representative, which, under Swiss law, would be that child’s parents or, if necessary, an appointed guardian.

### C. In the case of infants and young children, how would cases typically be brought?

Such cases would typically be brought by the child’s representative (i.e. parents or appointed guardian).<sup>38</sup>

Additionally, each canton has its own child protection authorities.<sup>39</sup> Depending on the nature of its organisation (i.e. administrative or judicial), such an authority would take the necessary action to investigate and pronounce protective measures where the well-being of a child seems to be threatened.

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<sup>31</sup> Civil Code, art. 304.

<sup>32</sup> See Ibid., arts. 327a-327c.

<sup>33</sup> Ibid., art. 304; see Ibid. arts. 327b (“A child subject to guardianship has the same legal status as a child subject to parental care”), 327c (“A guardian has the same rights as the parents”).

<sup>34</sup> Ibid., art. 19c

<sup>35</sup> 2001 CRC Report, para. 47.

<sup>36</sup> Civil Code, art. 19c [emphasis added].

<sup>37</sup> 2001 CRC Report, para. 47 [emphasis added].

<sup>38</sup> See part II.B above.

<sup>39</sup> See Peter Seigenthaler, ‘Protection of children stepped up’, 11 January 2013, available at: [http://www.swissinfo.ch/eng/swiss\\_news/Protection\\_of\\_children\\_stepped\\_up.html?cid=34684916](http://www.swissinfo.ch/eng/swiss_news/Protection_of_children_stepped_up.html?cid=34684916).

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Children or their representatives may be eligible to receive free or subsidised legal assistance in bringing these kinds of cases. Article 29 of the Swiss Constitution guarantees “[a]ny person who does not have sufficient means [with] the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.”<sup>40</sup>

Under Title 8, Chapter 4 of the Swiss Civil Procedure Code, a “person is entitled to legal aid if (a) he or she does not have sufficient financial resources; and (b) his or her case does not seem devoid of any chances of success.”<sup>41</sup>

Under the Federal Act on Administrative Procedure, “[i]f it is necessary in order to safeguard his rights, the appellate authority, its president or the instructing judge shall appoint a lawyer to represent the party”<sup>42</sup> Furthermore, [a]fter the appeal has been filed, the appellate authority, its president or the instructing judge shall on request relieve a party who does not have the required financial means of the requirement to pay procedural costs, unless his application appears to have no prospect of success.”<sup>43</sup>

Furthermore, the Civil Procedure Code contains special provisions for the representation of children in family law matters. Article 299 provides that, if necessary, the court shall appoint a person experienced in welfare and legal matters to act as welfare agent for the child. The court shall consider appointing a representative in particular if: (1) the parents submit different prayers for relief regarding allocation of custody or care or other important questions concerning their personal relations with the child; (2) the child protection authority or one of the parents so requests; (3) based on hearing with the parents or the child or based on other reasons, the court has serious doubts about the parents' joint applications relating to the allocation of custody or care or the manner in which the personal relations should be dealt with, or is considering ordering measures for the protection of the child. If the child with the capacity to consent so requests, a representative must be appointed. The child may challenge the rejection of his or her request by filing an objection.<sup>44</sup> The child's representative may file applications and appellate remedies to the extent they concern the allocation of the custody or care, important questions of personal relations, or measures for the protection of the child.<sup>45</sup>

Free or subsidised legal assistance is provided by the cantons themselves, each of which provides guidelines and information for prospective litigants. Examples for each of Switzerland’s three official national-level languages, by canton, can be found below:

- German (Canton Zurich):  
[http://www.gerichte-zh.ch/fileadmin/user\\_upload/Dokumente/Themen/Allgemeine\\_Dokumente/Prozesskosten/M\\_URB\\_AV.pdf](http://www.gerichte-zh.ch/fileadmin/user_upload/Dokumente/Themen/Allgemeine_Dokumente/Prozesskosten/M_URB_AV.pdf).

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<sup>40</sup> Constitution, art. 29.

<sup>41</sup> SR 272, Swiss Civil Procedure Code of 19 December 2008, art. 117 (Status as of 1 May, 2013) (“Civil Procedure Code”).

<sup>42</sup> Federal Act on Administrative Procedure, art. 65(2).

<sup>43</sup> *Ibid.*, art. 65(1).

<sup>44</sup> Civil Procedure Code, art. 299 and Civil Code, arts. 314a, 314a bis and 314b.

<sup>45</sup> *Ibid.*, art. 300.

- French (Canton Geneva): <https://ge.ch/justice/assistance-juridique>.
- Italian (Canton Ticino): <http://www4.ti.ch/?id=1691>.

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

If the case concerns the violation of a child's "strictly personal rights" under Swiss law (see part II.B above), then there are no such limits or conditions.

### III. How can children's rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

See part IV.A below.

The European Court of Human Rights decides cases concerning alleged violations of any of the rights contained in the European Convention on Human Rights.<sup>46</sup> Any individual, group of individuals or an NGO who is a victim of a violation of one of these rights may submit a complaint to the Court,<sup>47</sup> but the complaint will be admissible only if all domestic remedies have been exhausted.<sup>48</sup> Anonymous complaints are not permitted.<sup>49</sup> The procedural rules for the Court do not make any child-specific provisions. Persons may initially present an application themselves or through a representative, however, all applicants must be represented at hearings thereafter.<sup>50</sup> After examining the case, the Court renders a judgment which is binding on the State<sup>51</sup> and also has powers to award monetary compensation to the victims of human rights abuses.<sup>52</sup> It is also worth noting that the Court has an established practice of referring to other international human rights instruments, including the CRC, as guides to interpretation of the European Convention.

Finally, once all domestic remedies have been exhausted, complaints against violations of children's rights may be submitted to the UN Committee on the Rights of the Child under the third Optional Protocol to the CRC,<sup>53</sup> which Switzerland has ratified. Complaints can be made directly by both an individual child or a group of children, or

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<sup>46</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), 1950, Articles 19 and 32, available at: <https://www.crin.org/en/library/legal-database/european-convention-protection-human-rights-and-fundamental-freedoms>.

<sup>47</sup> Ibid., Article 34.

<sup>48</sup> Ibid., Article 35.

<sup>49</sup> Ibid.

<sup>50</sup> Rules of Court, July 2014, Rule 36, available at: [http://www.echr.coe.int/documents/rules\\_court\\_eng.pdf](http://www.echr.coe.int/documents/rules_court_eng.pdf).

<sup>51</sup> European Convention on Human Rights, Article 46.

<sup>52</sup> Ibid., Article 41.

<sup>53</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2013, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en).

indirectly, on their behalf by an adult or an organisation.<sup>54</sup> The violations must concern a right granted by either the CRC, the Optional Protocol on the sale of children or the Optional Protocol on the involvement of children in armed conflict<sup>55</sup> and must have occurred after the entry into force of the Protocol on 24 July 2017.<sup>56</sup> Anonymous complaints are inadmissible and so are complaints not made in writing.<sup>57</sup> In addition, only complaints made in one of the working languages of the UN will be accepted.<sup>58</sup> After examining the complaint, the Committee can make recommendations to the State, which are not legally binding.<sup>59</sup>

B. What powers would courts have to review these violations, and what remedies could they offer?

Courts may strike down cantonal acts and provide damages for violations of children's rights. Courts may also issue judgments for specific performance, declaratory judgments, cease-and-desist orders, as well as judgments changing a legal right or status.<sup>60</sup> They may not strike down federal acts, but may review them and declare federal acts as violating constitutional or international law.<sup>61</sup> In the event that a court finds a federal act to violate human rights or constitutional rights (including children's rights) it may refuse to apply the act.

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Civil proceedings must name the parties and their representatives in the statement of claim.<sup>62</sup> Administrative appeal petitions must contain the signature of the appellant or his/her agent.<sup>63</sup>

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

While Switzerland has not adopted the legal concept of class action lawsuits—considering them to be inconsistent with the Swiss legal tradition<sup>64</sup>—the law does provide mechanisms for litigation brought by a representative group. Namely,

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<sup>54</sup> Ibid., Article 5.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid., Article 7(g).

<sup>57</sup> Ibid.

<sup>58</sup> Office of the United Nations High Commissioner for Human Rights, '23 FAQ about Treaty Body complaints procedures', available at:

<http://www2.ohchr.org/english/bodies/petitions/individual.htm#contact>.

<sup>59</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 10.

<sup>60</sup> Schellenberg Wittmer, 'Switzerland', available at:

<http://www.swlegal.ch/CMSPages/GetFile.aspx?disposition=attachment&guid=2d7c9663-0a98-4029-ab51-806460ab9251>.

<sup>61</sup> See Constitution, arts. 190–191.

<sup>62</sup> Civil Procedure Code, art. 221.

<sup>63</sup> Federal Act on Administrative Procedure, art. 52.

<sup>64</sup> See generally André Brunschweiler et al., 'Switzerland', in INTERNATIONAL CIVIL PROCEDURE, SECOND EDITION SWI-1, SWI-13 (Dennis Campbell, gen. ed. & Christian Campbell, ed., 2011); Samuel P. Baumgartner, 'Class Actions and Group Litigation in Switzerland', 27 Nw. J. INT'L L. & BUS. 301, pp. 310–312 (2006–2007).

article 89 of the Swiss Civil Procedure Code enables “[a]ssociations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals [to] bring an action in their own name for a violation of the personality of the members of the group.”<sup>65</sup> The group, in turn, may request the court to “prohibit an imminent violation”; “put an end to an ongoing violation”; or “establish the unlawful character of a violation if the latter continues to have a disturbing effect.”<sup>66</sup>

Furthermore, article 90 allows a plaintiff to combine two or more claims against the same party in one action, if they are within the material jurisdiction of the same court and they are subject to the same type of procedure.<sup>67</sup>

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

Yes. As described in part III.D above, article 89 of the Civil Procedure Code could enable a non-governmental organisation (NGO) to file a challenge to a potential children’s rights violation.

Article 74 of the Civil Procedure Code enables “[a]ny person who shows a credible legal interest in having a pending dispute decided in favour of one of the parties [to] intervene at any time as an accessory party” to the dispute.<sup>68</sup> Although this provision enables *persons* to intervene, article 52 of the Civil Code provides associations with legal personality.<sup>69</sup> As such, when read in conjunction, as well as alongside the broader policy aims of article 89 of the Civil Procedure Code, these provisions seemingly enable an NGO to intervene in an already-filed case.

**IV. Practical considerations.** Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Where a case is filed and the initial filing process depends on the basis for the claim. If the violation of children’s rights is rooted in the Constitution or the CRC, then the complainant can file a lawsuit in the cantonal court of first instance with appropriate jurisdiction. However, before initiating litigation, an attempt at conciliation before a conciliation authority is required,<sup>70</sup> though there are exceptions to this rule.<sup>71</sup> For a civil case, the complainant must file a statement of claim, containing: the designation of the parties and their representatives, if any; the prayers for relief; a statement of the value in dispute; the allegations of fact; notice of the evidence offered for each allegation of fact; and the date and signature.<sup>72</sup> The statement may include a statement of legal grounds.<sup>73</sup>

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<sup>65</sup> Civil Procedure Code, art. 89.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, art. 90.

<sup>68</sup> *Ibid.*, art. 74.

<sup>69</sup> Civil Code, art. 52(1)–(2).

<sup>70</sup> Civil Procedure Code, art. 197.

<sup>71</sup> *Ibid.*, art. 198.

<sup>72</sup> *Ibid.*, art. 221(1).

Additionally, the complainant must also include a separate filing with the statement of claim that states: a power of attorney where a party is represented; the authorisation to proceed or the declaration that conciliation is being waived, if applicable; the available physical records to be offered in evidence; and a list of the evidence offered.<sup>74</sup>

With respect to criminal cases, anyone who suffers harm due to an act may file a criminal complaint with the police or prosecutor's office requesting that the person responsible be prosecuted. If the victim is a minor, he/she is entitled to file a complaint if he/she is capable of judgement. If the victim does not have the legal capacity to act, his/her legal representative is entitled to file a complaint. If he/she is under guardianship, the adult protection authority is also entitled to file a complaint.<sup>75</sup> If the police are aware of a criminal act, they must initiate a preliminary proceeding; in the case of severe criminal acts, the police inform the prosecutor's office, which then initiates the proceedings. The cantonal criminal court of first instance will hear the case.<sup>76</sup> If, however, the criminal matter falls under federal jurisdiction, then only the Federal Criminal Court may hear the matter.<sup>77</sup> Children, as victims of criminal acts, have rights under the Federal Act concerning Assistance to Victims of Offences of 23 March 2007 and the Ordinance on Assistance to Victims of Offences of 27 February 2008.<sup>78</sup>

Finally, if the violation occurs as a result of a government authority decision or action, then a case could be filed with the Federal Administrative Court (if the authority in question is a federal government agency)<sup>79</sup> or a cantonal court (if the authority is a cantonal government agency).<sup>80</sup> The complainant must be specifically affected by the decision and have an interest worthy of protection in order for the court to modify or annul it.<sup>81</sup> When, however, the object of the appeal is a cantonal act, the definition of complainant includes any person to whom the statute may presently or prospectively apply.<sup>82</sup> Judicial procedure would vary depending on the canton. In general, the complaint must include: the parties and governmental authority that has issued the sovereign act; an allegation of facts; readily-available evidence; and a statement of legal grounds. The evidence and contested sovereign act must include an instruction on the right to appeal, and also designate the time for complaints and the governmental

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<sup>73</sup> Ibid., art. 221(3).

<sup>74</sup> Ibid., art. 221(2).

<sup>75</sup> Criminal Code, art. 30.

<sup>76</sup> SR 312.0, Swiss Criminal Procedure Code of 5 October 2008, arts. 13, 19 (Status as of 1 May 2013) ("Criminal Procedure Code").

<sup>77</sup> SR 173.31, Federal Criminal Authorities Organisation Act of 19 March 2010, art. 35 (Status as of 1 December 2012).

<sup>78</sup> See generally, SR 312.5, Federal Act concerning Assistance to Victims of Offences of 23 March 2007 (Status as of 1 January 2011); SR 312.51, Ordinance on Assistance to Victims of Offences of 27 February 2008 (Status as of 1 January 2009).

<sup>79</sup> The Federal Administrative Procedures Act and Law on the Federal Administrative Court govern the appeal process for decisions made by federal administrative authorities: See generally, SR 172.021, Federal Act on Administrative Procedure of 20 December 1968 (Status as of 1 May 2013); SR 173.32, Federal Administrative Court Act of 17 June 2005, art. 31 (Status as of 1 July 2013).

<sup>80</sup> Swiss Federal Supreme Court, 'The Paths to the Federal Supreme Court: An Outline of Switzerland's Judiciary Structure', 2013, pp. 19, 26, available at [http://www.bger.ch/wege\\_zum\\_bundesgericht\\_e.pdf](http://www.bger.ch/wege_zum_bundesgericht_e.pdf). For an administrative case regarding an act by a cantonal administrative authority, the cantonal code of administrative procedure applies.

<sup>81</sup> Federal Act on Administrative Procedure, art. 48.

<sup>82</sup> Ulrich Häfelin, et al., Bundesgericht und Verfassungsgerichtbarkeit nach der Justizreform - supplement zur 6. Auflage des « Schweizerisches Bundesstaatsrechts, N° 2002.

authority.

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

See part II.D above.

The Civil Procedure Code enables parties to apply for aid “before or after an action becomes pending.”<sup>83</sup> The application must contain: (1) the party’s financial circumstances (including income and assets); (2) the party’s position on the merits of the case; and (3) the intended evidence. The application may also include a preferred legal agent.<sup>84</sup>

Legal aid comprises: (1) an exemption from the obligation to pay advances and provide security; (2) an exemption from court costs; and (3) the appointment by the court of a legal agent under the legal aid system if this is necessary to protect the rights of the party concerned, and in particular if the opposing party is represented by a legal agent. Legal aid may be granted for all or part of the case.<sup>85</sup>

Cost payment depends on the outcome of the case. If the party receiving legal aid loses the case, then the canton remunerates the legal agent and covers the court costs.<sup>86</sup> Additionally, the opposing party’s advances must be refunded and the party receiving legal aid must pay party costs to the opposing party.<sup>87</sup> If the party receiving legal aid is successful, then the canton remunerates the legal agent if “compensation from the opposing party is irrecoverable or likely to be irrecoverable.”<sup>88</sup> The canton may then enforce the claim for costs for 10 years, and the party receiving legal aid must reimburse “as soon as he or she is in a position to do so.”<sup>89</sup>

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children’s rights organisation, or under an agreement that does not require the payment of legal fees up front?

In principle, yes, though it is unlikely in practice. While firms may regulate their own internal pro bono activity, the country lacks a culture of pro bono legal service: the government legal aid system is considered sufficient; the Swiss Bar Association has not defined pro bono work; and there are few centralised organisations committed to such services.<sup>90</sup>

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<sup>83</sup> Civil Procedure Code, art. 119(1).

<sup>84</sup> Ibid.

<sup>85</sup> Ibid., art. 118.

<sup>86</sup> Ibid. art. 122(1).

<sup>87</sup> Ibid.

<sup>88</sup> Ibid. art. 122(2).

<sup>89</sup> Ibid. art. 123.

<sup>90</sup> Latham & Watkins LLP, ‘A Survey of Pro Bono Practices and Opportunities in Various Jurisdictions: Prepared by Latham & Watkins LLP for the Pro Bono Institute’, August 2012, p. 313, available at: <http://www.probonoinst.org/wpps/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf>.

That said, there are several organisations that are committed to children's rights, and one in particular devoted to legal representation of children for the protection of their rights. *Juris Conseil Junior* (JCJ), a Geneva-based non-profit organisation founded by the Geneva Bar and the Central Office of Social Assistance, provides legal representation and assistance "on a case by case basis," in which appointed attorneys work together with their minor clients to develop financial solutions to representation.<sup>91</sup> JCJ also has a free confidential hotline for minors and their representatives; first-time consultations are free.<sup>92</sup> The organisation lists its main goal as "enabling young people to access law and justice in the spirit of the UN Convention on the Rights of the Child".<sup>93</sup>

Other organisations also provide support for the goals of children's rights and the CRC's aims, though it is less clear as to whether they can represent children in court proceedings. Chief among these is the Children's Rights Network Switzerland, an umbrella organisation of approximately 50 NGOs devoted to promoting the CRC. Its members include the International Institute of the Rights of the Child (*Institut International des Droits de l'enfant*); the Swiss chapter of the International Social Service (ISS); and Children's Advocate Switzerland (*Kinderanwaltschaft Schweiz*).

- D. **Timing.** How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

With respect to non-criminal cases, limitation periods are a matter of substantive law; any relevant limitation period would depend on the substantive law to which a claim of violation of children's rights is anchored. As a general rule, the limitation period for civil law claims is 10 years; this applies to all claims for which Swiss civil law does not provide otherwise. However, tort claims become time-barred one year after the injured party became aware of the loss or damage and of the identity of the person liable for it, or, in any case, 10 years after the harmful event has occurred. If the action for damages is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim.<sup>94</sup>

The right to prosecute is subject to a time limit of: 30 years if the offence is punishable by a custodial sentence of life; 15 years if the offence is punishable by a custodial sentence of more than three years; and seven years if the offence is punishable by a different penalty.<sup>95</sup> The limitation period begins on the day on which: the offender committed the offence; the final act was carried out if the offence consists of a series of acts carried out at different times; or the criminal conduct ceases if the criminal conduct continues over a period of time.<sup>96</sup>

There are several additional safeguards concerning limitation periods and crimes against children. Under article 97(2) of the Swiss Criminal Code, sexual acts committed against children under the age of 16 and dependent minors over the age of 16, as well as

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<sup>91</sup> See generally *Juris Conseil Junior*, 'Présentation', available at: <http://www.jcj.ch>.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Code of Obligations, art. 60.

<sup>95</sup> Criminal Code, art. 97(1).

<sup>96</sup> *Ibid.*, art. 98.

the offences of homicide, assault, female genital mutilation, human trafficking and indecent assault involving a child under 16, are subject to a limitation period until the child turns 25.<sup>97</sup> Sexual offences committed against minors under the age of 12 are not subject to limitation periods.<sup>98</sup>

Furthermore, there is no limitation of the right to prosecute the offences of genocide, crimes against humanity, war crimes, or “felonies that have caused or threatened to cause danger to life and limb to a large number of persons as a method of extortion or duress, in particular through the use of means of mass destruction, the causing of catastrophes, or as part of a hostage taking offence”.<sup>99</sup>

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

In Switzerland, rules governing evidence are part of the broader procedural codes. As such, provisions on types and admissibility of evidence, as well as provisions concerning the special protection of children, can be found in the Swiss Codes of Civil Procedure and Criminal Procedure, respectively.

The Swiss Civil Procedure Code requires evidence to prove any fact that is “legally relevant and disputed.”<sup>100</sup> There are six types of admissible evidence: testimony; physical records; inspection; expert opinion; written statements; and questioning and statements of the parties.<sup>101</sup>

With respect to children, article 168 states that “provisions relating to matters of children in family law proceedings are reserved.”<sup>102</sup> This carve-out likely concerns article 298, which governs child hearings in divorce proceedings. It requires that the child is “heard in person and in an appropriate way by the court” or an appointed third party.<sup>103</sup> In turn, only “relevant” information is placed on record and “communicated to the parents or the child’s welfare agent.”<sup>104</sup> Additionally, the court must “take appropriate measures to ensure that taking evidence does not infringe the legitimate interests of any parties or third party”;<sup>105</sup> such a provision could apply to child rights and interests.

The Swiss Criminal Procedure Code also contains provisions relating to children and evidence. Article 163 provides that a person has “capacity to testify” in a criminal case if “he or she is over the age of 15 and has the required mental capacity with regard to the subject matter of the examination hearing.”<sup>106</sup> However, under the general provisions in article 149, the court may “order further protective measures in accordance with article 154 [protecting child victims in criminal proceedings]” if a child

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<sup>97</sup> Ibid., art. 97(2).

<sup>98</sup> Ibid., art. 101.

<sup>99</sup> Ibid.

<sup>100</sup> Civil Procedure Code, art. 150(1). Evidence “may also be required to prove common practice [and] local usages.” Ibid., art. 150(2).

<sup>101</sup> Ibid., art. 168(1).

<sup>102</sup> Ibid., art. 168(2).

<sup>103</sup> Ibid., art. 298(1).

<sup>104</sup> Ibid., art. 298(2).

<sup>105</sup> Ibid., art. 156.

<sup>106</sup> Criminal Procedure Code, art. 163(1).

testifies as a “witness or person providing information”.<sup>107</sup>

Article 154 requires the child to be heard “as quickly as possible” and authorises the “authority [to] exclude the confidant from the proceedings if this person could exert a decisive influence on the child.”<sup>108</sup> Additionally, if the hearing “could be a serious psychological burden for the child,” then the provision requires a number of protective measures, which the judge could apply to child witnesses under article 149 (see above). These include the following:

- A confrontation hearing with the accused may be ordered only if the child expressly requests the confrontation hearing or the accused's right to be heard cannot be guaranteed in any other way;
- The child may not normally be interviewed more than twice during the entire proceedings;
- A second interview shall take place only if the parties were unable to exercise their rights at the first interview or the examination hearing is essential in the interests of the enquiries or of the child. If possible, the child should be questioned by the same person who conducted the first interview;
- Examination hearings shall be conducted in the presence of a specialist by an investigating officer specifically trained for this purpose. Unless a confrontation hearing is held, audio and video recordings shall be made of the examination hearing;
- The parties shall exercise their rights through the person asking the questions; and
- The person asking the questions and the specialist shall record their special observations in a report.<sup>109</sup>

F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

According to a survey of civil trial length by the Organisation for Economic Cooperation and Development (OECD) using data from the OECD and the European Commission for the Efficiency of Justice (CEPEJ): the average length of a first instance trial in Switzerland is 131 days;<sup>110</sup> a second instance trial (an appeal) takes an average 142 days;<sup>111</sup> and the average length of a trial at the highest court is 95 days.<sup>112</sup> As a result, the average overall length of a trial that reaches the Swiss Federal Supreme Court is 368 days—just over a year.<sup>113</sup> Notably, this was the shortest period for all of the 35 countries analysed in the survey.<sup>114</sup>

However, it is important to emphasise that the above figures are averages that contemplate *all* civil disputes in Switzerland. A survey of proceedings that concern child rights or of criminal proceedings may demonstrate different results.

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<sup>107</sup> Ibid., art. 149(4).

<sup>108</sup> Ibid., art. 154(2) – (3).

<sup>109</sup> Ibid., art. 154(4).

<sup>110</sup> Organisation for Economic Cooperation and Development, ‘Economics Department Policy Note 18: What Makes Civil Justice Effective?’, 18 June 2013, p. 11, available at: <http://www.oecd.org/eco/growth/Civil%20Justice%20Policy%20Note.pdf>.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid., pp. 2, 11.

<sup>114</sup> See Ibid., p. 2.

G. Appeal. What are the possibilities for appealing a decision to a higher court?

If the matter is brought before a cantonal court of first instance, then it may be appealed to the cantonal high court,<sup>115</sup> and then the Swiss Federal Supreme Court.<sup>116</sup> Matters brought before the Federal Administrative or Criminal Courts may also be appealed to the Federal Supreme Court.<sup>117</sup> As the court of final appeal, the Federal Supreme Court issues final rulings on disputes among individuals and between individuals and the government.<sup>118</sup>

As Switzerland has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),<sup>119</sup> a complainant may seek further review of the decision from the European Court of Human Rights once he/she has exhausted the appeals process within Switzerland.<sup>120</sup> To do so, the complainant must, within six months of the final court decision, allege that Switzerland violated one of the rights protected by the ECHR, causing him/her to personally suffer a “significant disadvantage”.<sup>121</sup> See above in III.A. for more information.

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Given the independence of the Swiss judicial system, court decisions are unlikely to have any direct or pronounced political repercussions. However, some controversial issues may elicit attention and action. In response to a school’s ban on headscarves, two Muslim girls in canton Thurgau challenged the policy in court. The cantonal court ruled in their favour, finding that the prohibition violated their freedom of religion. The canton appealed to the Federal Supreme Court, which affirmed the decision. Subsequent publicity and controversy over the case has spurred other cantons to explore changes in their laws regarding headscarves in public schools.

I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Parties and courts may find it challenging to enforce monetary damages against individuals, as individuals may not be deprived of the minimum income needed to survive.

V. **Additional factors**. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

Under the Swiss political system, changes to the Constitution may be made by popular

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<sup>115</sup> See Brunschweiler et al., SWI-6–SWI-7.

<sup>116</sup> Ibid., SWI-8.

<sup>117</sup> SR 173.110, Swiss Federal Supreme Court Act of 17 June 2005, art. 86 (status as of 1 July 2013).

<sup>118</sup> Tribunal Federal, ‘Justice at the federal level’, available at: [http://www.bger.ch/bg\\_leporello\\_e.pdf](http://www.bger.ch/bg_leporello_e.pdf).

<sup>119</sup> Swiss Federal Department of Foreign Affairs, ‘European Convention on Human Rights’, available at: <http://www.eda.admin.ch/eda/en/home/topics/intorg/euroc/coeuhr.html>.

<sup>120</sup> See European Court of Human Rights, ‘The ECHR in 50 Questions’, July 2012, p. 7, available at: [http://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf).

<sup>121</sup> Ibid.

initiative. Given that some popular initiatives have generated changes relevant to children's rights, the process is briefly outlined below as an example of a relevant national practice.

Articles 138 and 139 of the Constitution delineate the procedures for a total and partial revision of the Constitution, respectively.<sup>122</sup> Any member of the Swiss electorate (including those living abroad) may launch a popular initiative to amend the Constitution.<sup>123</sup> If the initiative is successful, the amendment will be put to a popular vote. A majority of both the national electorate and the cantons (a "double majority") must approve the amendment in order for it to pass. The Swiss Federal Assembly may propose a counter-proposal to the initiative.<sup>124</sup>

If the initiative or the counter-proposal passes the vote, the Federal Assembly will draft legislation on the basis of the amended article(s) in the Constitution.<sup>125</sup> Federal popular initiatives may only amend the Constitution, and not revise or introduce new federal laws. Some cantons, however, allow "legislative initiatives", which are requests to amend existing laws.<sup>126</sup>

An initiative can be launched as follows:

1. An initiative committee of between seven and 27 voters, is formed.
2. The committee drafts a titled initiative in German, French or Italian; the Federal Chancellery provides the committee with sample signature lists.
3. The committee submits the text to the Federal Chancellery, which translates the proposal in the other official languages, for the committee's approval.
4. The Federal Chancellery checks the text and title's conformity with legal requirements, and decides whether the proposal may proceed, publishing its decision in the Federal Gazette. The committee then has 18 months to collect and submit at least 100,000 validated signatures to the Federal Chancellery.
5. Once the Federal Chancellery validates the signatures, the initiative is put to a vote.

In 2008, Marche Blanche, an anti-pedophilia activist group, successfully carried out a popular initiative in pursuit of a constitutional amendment declaring that "[t]he right to prosecute sexual or pornography offences involving prepubescent children and the penalties for such offences is not subject to a time limit."<sup>127</sup> Following the vote, the Federal Council proposed and enacted modifications to laws, including the Swiss Criminal Code and the military law and criminal law system for minors' protection.

*This report is provided for educational and informational purposes only and should not be construed as legal advice.*

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<sup>122</sup> Constitution, arts. 138–139.

<sup>123</sup> Swiss Federal Department of Foreign Affairs, 'People's Rights', available at: [http://www.swissworld.org/en/politics/peoples\\_rights/peoples\\_rights/](http://www.swissworld.org/en/politics/peoples_rights/peoples_rights/). "In theory, an initiative can only deal with constitutional matters, but in practice they have been held on a variety of issues."

<sup>124</sup> Constitution, art. 139(5).

<sup>125</sup> Ibid., art. 139(4).

<sup>126</sup> Swiss Confederation, 'Popular initiatives', available at: <https://www.ch.ch/en/popular-initiatives/>.

<sup>127</sup> Marche Blanche, 'Initiative populaire fédérale "Pour que les pédophiles ne travaillent plus avec des enfants"', available at: <https://www.admin.ch/ch/f/pore/vi/vis329t.html>.