NGO-REPORT ON THE SECOND PERIODIC REPORT OF SWITZERLAND

on the

International Covenant on Civil and Political Rights (CCPR) to the Human Rights Committee

Berne, October 2001

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I. Preamble

This commentary by non-governmental organisations on the „Second Periodical Report of the Swiss Government on the UN Human Rights Committee's CCPR" does not claim to be a comprehensive parallel commentary on the Swiss report. Rather, it was prompted by a desire to illustrate the gaps in the official report i.e. to illuminate areas where the compliance of Swiss law with the Covenant appears at the very least in question, and areas to which we believe little or no significance has been accorded in the official report.

II. General remarks

Switzerland ratified the International Covenant on Civil and Political Rights (CCPR) at a relatively late stage i.e. in 1992. In accordance with Swiss practice the Covenant became a component of national law on its ratification, ranking alongside the constitution. To date no special announcement has been issued on the Covenant, probably due to the belief that the rights enshrined in the CCPR were already guaranteed by the European Convention on Human Rights and the constitution or jurisdiction (so-called unwritten constitutional law), although the human rights recognised in the total revision of the Swiss constitution which came into force on 1 January 2000 have now largely been transcribed into written constitutional law.

Since presentation of the first report in 1995, Switzerland has ratified various other human rights conventions, in particular the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). While both these accords gained at least a certain degree of publicity and attention thanks to the women's movement and child protection organisations, the significance of the pacts has been given scant public attention.

Universal human rights treaties not ratified by Switzerland

The following is a list of the main universal or regional human rights conventions not yet ratified by Switzerland:

- Optional Protocol to the International Covenant on Civil and Political Rights dated 19.12.1966 (individual right to lodge complaints; 98 ratifications)
- Optional Protocol to the Convention on the Elimination of Discrimination against Women dated 6.10.1999 (individual right to lodge complaints; 26 ratifications)
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts dated 25.5.2000 (not yet in force; signed by Switzerland on 7.9.2000)
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography dated 25.5.2000 (not yet in force; signed by Switzerland on 7.9.2000)
- Convention against Discrimination in Education dated 14.12.1960

European human rights treaties not ratified by Switzerland:

- Protocol to the Convention of Human Rights and Fundamental Freedoms (ECHR) dated 20.3.1952 (protection of property, right to education and obligation to observe free and secret voting; 38 ratifications; signed by Switzerland on 19.5.1976)

- Protocol No. 4 to the ECHR dated 16.9.1963 freedom from imprisonment for debt, freedom to choose place of residence and leave any country, including the home country, prohibition against collective expulsion; 31 ratifications)
- Protocol No. 12 to the ECHR dated 4.11.2000 (general prohibition on discrimination, 1 ratification, 26 signatures, not yet in force)
- European Social Charter dated 18.10.1961 (21 ratifications. Signed by Switzerland on 6.5.1976)
- Supplementary Protocol to the European Social Charter dated 5.5.1988 (Equal rights for men and women in the workplace, right to information from employer, right of older persons to social security; 10 ratifications)

It is with some concern that the non-governmental organisations note that no improvement has been made on the following points since the first report by Switzerland in 1995:

- Switzerland has still not ratified the *Optional Protocol to the ICCPR* (individual right to lodge complaints).While the Federal Council has variously described the right to individual appeal as desirable, no concrete steps have yet been taken and the government has still not withdrawn the *reservation on Art. 26 CCPR* (comprehensive protection under the law). To date, therefore, no „effective" complaint concerning a breach of the prohibition on discrimination under the terms of CCPR Art. 2 Par. 3 has been possible either nationally (on the grounds of Art. 191 of the federal constitution, which declares federal laws as the authoritative source for authorities applying the law; see paras. 245 *et seq.* State Report) or internationally on the grounds of all non-compliant federal laws.
- Various examples in recent times demonstrate that Swiss authorities have no comprehensive awareness of their human rights obligations. This is repeatedly expressed in statements by the Federal Council. To illustrate the point, witness the way the Federal Council handled two initiatives concerning ratification of the 1999 Optional Protocol to the Convention on the Elimination of Discrimination against Women and the Supplementary Protocol No. 12 to the European Human Rights Convention: Both were rejected by the Federal Council on the grounds that the impact on Swiss legislation of the prohibition on discrimination was difficult to quantify. The still valid reservation on CCPR Art. 26 as well as the non-ratification of the Optional Protocol to the CCPR were not addressed in any way whatsoever. Yet another example is the way in which neither the Concluding Observation of the Human Rights Committee dated October 1996 on the First State Report on the CCPR nor the observations of the Social Committee dated November 1998 on the 1st State Reports to the International Covenant on Economic, Social and Cultural Rights (CESCR) were published or taken note of by the legislative and executive. They are mentioned nowhere in the first reports on the CEDAW and on the CRC, although the Human Rights Committee was moved to make several comments on the very subject of women's and children's statuses.
- Art. 2 of the CCPR obliges the signatory states to undertake to take the necessary steps, in accordance with its constitutional processes, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the Covenant. Like the first report, the present report focuses primarily on the legal measures undertaken. Indications of their practical implementation are few. Yet major discrepancies have been identified in the way in which individual cantons and communities implement such legal measures. The government lacks an appropriate set of instruments for any efficient control on legal application and legal efficiency. Finally, due to the *federal state structure* of Switzerland,

the government has no power to influence the areas which lie within the sphere of competence of cantons or communities. There are major differences in the approach taken by individual cantons and communities to their human rights obligations. Many areas (civil and criminal trial right,[1] child protection, welfare, education, health etc.) are under the jurisdiction of cantons or even communities. The examples of individual cantons and communities listed in no way attempt to provide a conclusive picture of the measures performed and to be implemented by cantons and communities in compliance with the Covenant. It is not possible to deduce from the report whether or not the cantons and communities have truly committed themselves to implementing the Covenant systematically and efficiently.

In summary, human rights policy in Switzerland gives the impression of being rather uncoordinated and arbitrary. Too many departments and offices are charged with its implementation. As a result, various Swiss human rights organisations have pooled their resources to initiate a national Human Rights Committee which monitors the implementation and observation of human rights obligations. No official statement of position has yet been made, however.

III. Comments of Individual Provisions

Article 2: Prohibition of Discrimination in Exercising the Rights Recognised by the Covenant (Paras. 15 *et seq.* State Report)

According to CCPR Art. 2 Par. 1 each state party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without distinction of any kind. The same undertaking is already enshrined in Article 8 of the new federal constitution which also forbids discrimination on the grounds of origin, race, sex, age, life form, creed, political or world views and irrespective of any physical or mental disability. This article protects nationals and aliens living within Swiss borders. The awareness of this fundamental principle of human rights is poorly developed in Switzerland. Above all, scant attention is paid to the civil and political human rights of particularly disadvantaged groups. The disabled, the poor, single mothers, children and young people, travellers (gypsies) and above all foreigners continually encounter problems when laying claim to their rights. The situation of foreign persons, who account for one fifth of the resident population in Switzerland, gives rise to special concern. Swiss NGOs are concerned that the current revision of the law on aliens devotes too little attention to any discriminating effects of individual provisions. Various provisions in the draft law entail the risk of discrimination, particularly against aliens from countries outside the EU. One current development[2] points to the particularly difficult situation of the „Sans Papiers“, i.e. persons who for various reasons have no residence permit and are illegally domiciled in Switzerland, and have been in some cases for years.[3] These persons, whom the Swiss economy depends on

[1] In this context, efforts to standardise are in progress.

[2] This summer, paperless persons drew attention to their plight by occupying churches in various locations throughout Switzerland.

[3] According to a study conducted among trade unions and institutions by the Swiss Forum for Migration Policy, their number is estimated to be at least 150,000 (e.g. based on the number of women without residence permits giving birth in hospitals). See DENISE EFIONAYI-MÄDER/SANDRO CATTACIN, Illegal in der Schweiz. Eine Übersicht zum Wissenstand, Schweizerisches Forum für Migrationsstudien/Swiss Forum for Migration Studies, Discussion Paper 9/2001.

and who largely work here to the knowledge of the authorities and in some cases even pay taxes, are subjected to various forms of discrimination (see .comments on Article 8).

- Discrimination on grounds of nationality: lifting of the 3-circle model (Para. 39 State Report)

Para. 39 of the Swiss Report states that the 3-circle model should be lifted. It should, however, be noted that the authorities continue to make use of this model in practice and in their documentation. For instance, the 1997 report on aliens published in 1999 by the Federal Aliens Office still explicitly refers to this classification system.[4] Increasingly, however, the term „third circle" is being replaced by the equivalent label „non-EU states". The concepts of „cultural exoticism" and „relative inability to integrate" of people from non-EU states have not disappeared from the official discourse. In principle, non-EU nationals are desirable in Switzerland only where no suitable labour resources can be found in EU and EFTA member states, with permits granted only to managers, specialists or otherwise qualified persons from third states."[5] According to the draft law, a residence and short-stay permit for gainful employment may be granted first and foremost to members of EU and EFTA member states.

Article 3: Equal Rights for Men and Women

- *General remarks*

Under the terms of Article 8 Par. 2 and 3 of the new constitution, Switzerland undertakes to forbid any conduct which constitutes discrimination and simultaneously to take positive mesures to ensure equality between the sexes.

To date Switzerland has felt obliged to practice a relatively restrictive model of equality. It limits the obligation to observe equal rights to imposing a broad-based prohibition on discrimination which, particularly in the jurisdiction of the Federal Court, is ultimately equivalent to inequality of treatment. As a result, equal rights for men and women are rather formally recognised and it is primarily men who have made successful claims with respect to the constitutional prohibition on discrimination. In the process the true purpose of the prohibition on discrimination – to protect disadvantaged groups against degrading legal and material treatment and to provide for positive measures to ensure equal rights – has been lost. Only recently has the Federal Court ruled to support this narrow interpretation of the prohibition on discrimination.[6]

- *Plan of Action (Para. 43 State Report)*

The action plan for Switzerland defined in para. 43 „Follow-up work on the 4th UN World Conference of Women, Beijing" was published on 11.6.1999. Two years after its publication and six years after the 4th World Conference of Women it has made virtually no impact as a „working basis for the improvement of the situation of women". The action plan merely comprised a set of recommendations and envisaged no binding objectives; it has hardly been acknowledged by the addressees. Consequently the task of promoting equality between men and women has essentially remained the remit of equal rights agencies, which in many instances are obliged to struggle with reduced funds and general cost-cutting.

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[4] At various times in the Federal Aliens Office report on aliens (Berne 1999) the term „third circle" is still in use, e.g. on P. 27 and P. 29;

[5] Supplementary report to the draft law on aliens, Berne, June 2000, P. 10

[6] BGE 126 II 377, E. 6.

We regret that Switzerland, unlike other European countries, has still not committed itself to a *binding* policy on equal rights for men and women. Gender mainstreaming is still not a prime concern of the Swiss government.

- *Political participation, quotas (Paras. 45 et seq. State Report)*

From a statistical standpoint, the right of women to equal participation in public, political and administrative life has improved only minimally since the first State Report:[7] In 1999 the proportion of women in the National Council was 23.5 % (1991: 17.5 %); 19.5 % in the State Council (1991: 8.7 %); on average 24% in cantonal parliaments (1993: 19.3 %); 20% in cantonal governments (1995: 11 %); in 2001 the Federal Court had 7 serving female judges (1995: 4); and only 6.5% of persons in the top civil service salary ranks were women (1996: 5,3 %). The federal quota initiative mentioned in the State Report (Para. 46) was rejected by voters, as were similar proposals for cantonal and community quotas. A proposal by the Federal Council to introduce quotas of 30% on party lists during three elections for National Council members was rejected by parliament. Since the first State Report virtually no efforts have been made by the authorities to guarantee women their right of co-determination in all public duties.[8] Yet equal political participation appears to be an essential precondition for driving forward the equal rights process as a whole. Indeed, the discussion on rules to promote ways of breaking through the automatic bias in favour of men demonstrates how low the awareness of gender discrimination continues to be.

- *Implementation of the 1986 legislative programme / equal rights to choose a family name (Paras. 54 et seq. State Report)*

To date the equal rights mandate enshrined in the federal constitution has primarily brought about a change in the law on inequalities and promoted equal legal rights for men and women. One of the remaining areas where legal inequality exists, namely the right of men and women to choose a family name, has recently suffered a setback because the two chambers of Swiss Parliament could not come to an agreement. Opinions differed with respect to the new Civil Code provision on family names which permits double-barrelled names and the provision whereby custodial authorities may decide on a name when parents of the marriage cannot agree on their children's family name.

Indirect discrimination is less widely addressed in Switzerland. In this context there is a need to raise awareness, especially among the ranks of legislative authorities. No systematic examination of the gender-specific effects of new regulations is made, as the following examples show:

- *Equal rights to social security: the OASI (Old Age and Survivors' Insurance) (Paras. 57 et seq. State Report)*

The 10th revision of the OASI addressed several equal rights requirements, in particular by creating an independent right to a pension for women based on the „splitting" system, which divides the family income earned during the marriage equally between the spouses' individual accounts, and through the introduction of child rearing and care benefits which are included in the reasonable income when calculating the pension. On the other hand, the retirement age was brought closer to the retirement age for men. The current (11th) revision of the OASI, primarily prompted by the need to consolidate finances, now envisages raising the retirement

[7] Statistics compiled from the draft on the 1st and 2nd State Report on implementation of the Covenant on Elimination of Discrimination Against Women (CEDAW), which was submitted for public hearing at the end of 2000.

[8] With the exception of awareness and educational campaigns of the kind launched by the federal and cantonal offices for equal rights and by the Federal Women's Commission.

age of women to 65 by 2009, to bring it fully into line with the retirement age for men. The millions of francs to be saved by this move will go towards instruments to make the retirement age flexible: from age 62, men and women will have the option of early retirement with a correspondingly lower pension. However, early retirement is precisely what many women cannot afford: Women work for lower wages and under insecure terms of employment such as part-time work, temporary (fixed-term) positions or work on call. In Switzerland women account for 44% of the working population, are responsible for 37 % of gainful employment, but receive only 31 % of the overall wage total. 42 % of working women have a monthly wage of CHF 3,000 or less (only partially due to their low full-time equivalent). Among men the proportion is only 10 %. This situation has a marked impact on pensions, particularly in terms of the second pillar: Since employees who earn less than CHF 24,000 per year are not obliged to pay into occupational pension funds, it is assumed that around 50% of all women have no pension plan. [9]

Equal rights are also to be formalised for widows‘ and widowers‘ pensions by adjusting widows‘ pensions to widowers‘ pensions, i.e. massively reducing them. The general impression is that the drive to improve the financial situation of the OASI is to be funded primarily at the cost of women’s right to equality.

- *Permanent and temporary residence (Para 62 State Report)*

According to the current law governing foreigners (Art. 7 and 17 Federal Act on the Permanent and Temporary Residence of Foreigners, ARF), foreign spouses of Swiss citizens lose their residence permit on dissolution of a marriage of less than five years‘ standing, and foreign spouses of foreigners with residence permits lose their residence permit on dissolution of the shared household. The same applies to foreign wives who join their husbands in Switzerland under the terms of the articles on family reunification (Art. 38 and 39 of the limitation ordnance). The above-mentioned provisions discriminate first and foremost against foreign women who are forced to remain with their husbands even in a violent relationship in order to avoid being expelled from Switzerland. The „cohabitation with spouse“ rule implies a systematic dependency of foreign spouses on their partner.

The „independent right to residence“ for foreign spouses mentioned in para. 62 and long urged by women’s and foreigners‘ associations was not incorporated in the draft of the new law on foreigners. The only option it covers is the possibility of waiving withdrawal or non-extension of the residence permit in hardship cases. However, it is up to the authorities to decide what constitutes a hardship case (see also comments on Art. 17 CCPR).

- *Asylum law (Paras 63-4 State Report*)

In 1995 the Federal Office for Refugees approved procedural guidelines governing applications for asylum from female refugees who have been victims of sexual violence. For instance, female interviewers must be called in to interrogate such persons. In practice, however, not all female asylum seekers are questioned by a woman whenever there are indications of gender-specific persecution. The interpretation of such „indications“ varies greatly depending on the interviewer or person in charge of the case. Asylum seekers cannot be expected to make a frank disclosure of their gender-specific persecution immediately after arrival. Moreover, some female interviewers are insufficiently aware of sexual persecution or insufficiently trained in identifying obstacles to expulsion. The guidelines and the new Par. 2 in Art. 3 of the asylum law (consideration to specific female grounds for escape) must be

[9] ANNE-CATHERINE MENÉTREY, Den realen Benachteiligungen der Frauen Rechnung tragen, FemCo, March 2001 –Nr.1, Zukunft der AHV – Perspektiven aus feministischer Sicht, P. 113ff.; esp. P. 17.

more sustainably put in practice. In the case of the *accelerated* procedure, the specific situation of traumatised refugees must be given due consideration and external psychiatric assistance should be called in. Free legal assistance is essential, as is free access by proxy holders and legal advisors to reception centres and airport transit areas.

The totally revised Federal Asylum Act which came into force in October 1999 supplemented the definition of „refugee“ by stipulating that consideration must be given to specific female grounds for escape.[10] The fact that consideration to female persecution is contained at all in para.2 of Art. 3 of the asylum law must be attributable to broad-based lobbying by affiliated women's organisations who invoked the action platform defined in Beijing. However, this new rule met strong resistance of male parliamentarians. Just how far this supplement will effectively raise awareness of a gender-specific definition of the term "refugee" remains to be seen. If grounds for escape specific to women (forced marriage, punishment for overstepping the marriage code and customs applicable to women, blood feud, risk of female circumcision etc.) are cited by women seeking asylum, there is always the risk that these are qualified as private persecution and hence not seen as relevant from a refugee standpoint, and that insufficient enquiries are made as to whether the state of origin has pursued its *protective duties* and was effectively able to offer the woman in question adequate protection against infringement by private individuals.

Moreover it is essential to question those who have been exposed to trafficking in women on the possibility or viability of return, since they often run the risk of falling victim to inhumane treatment on their return (see also comments on Art. 8 CCPR).

- *Equality in professional life (Para. 69 et seq. State Report)*

The situation of women in the workplace has not improved substantially since the first report. Women's wages are still some 25% less than men's. Most women work part time (women accounted for over 82 % of part-time workers in 1999), particularly those with young children. On the other hand, there is no link between the presence of children and part-time work for men. Women are far more likely to work under precarious, unprotected employment conditions than men. As a result they are more likely to be poorly insured, if at all, since social security (as already discussed in the case of the OASI) is dependent on employment forms which meet specific minimum formal and full-time equivalent criteria.

The main measure discussed by the 2nd State Report is the law on equal opportunities (Para. 69). The federal court has developed a complex practice to implement this, which has invited criticism from various sources[11]. To date the impact of the law has been essentially limited to employment conditions in the public sector. On its own, the Federal Equalitiy Act is unable to do much against the low wages offered by private companies, particularly in sectors with a predominantly female labour force. Moreover, the way in which the law on equal opportunities is applied differs widely from canton to canton. It is therefore to be hoped that the government will initiate steps in the area of further education in order to familiarise all courts throughout Switzerland with the law.

Generally speaking, Switzerland has done little since the first report to facilitate integration in the workplace for women, who still perform the majority of caregiving tasks within the family. Admittedly the improved economic climate has now lent currency to long-standing

[10] See Art. 3 para 1 and 2 asylum law, definition of a refugee.

[11] For example BGE 126 II 219 E. 6-9. In the case of male teachers at vocational schools being ranked higher than female teachers of psychiatric care.

calls for childcare, a standardised and increased family allowance, tax benefits for families etc. To what extent these will be implemented in the future remains to be seen. In view of the major differences in the institutional services offered by individual cantons and communities, the situation may not improve for some time yet. At present the major reluctance to define new duties is attributable to a lack of funds, and the last proposal to introduce a maternity insurance – as defined by the Covenant on Economic, Social and Cultural Rights as well as the Covenant on Elimination of Any Form of Discrimination Against Women – was rejected by voters in 1999. The latest proposals by the Federal Council regarding a minimum variant of maternity insurance were broadly rejected during their passage through parliament.

Article 6: Right to Life

The new federal constitution now explicitly acknowledges the right to life in Art. 10 Par. 1. In the same provision the death penalty is forbidden in absolute terms. By extension, no person may be extradited or expelled to a country where the death penalty is assumed to be imposed or enforced[12]. Furthermore, this article of the constitution stipulates that repatriation or expulsion must be refrained from if essential medical care is not guaranteed for the person in the destination country[13].

- *Right to aid in distress (Paras. 81-83 State Report*)

The fact that paras. 82-84 of the State report also subsume positive measures to protect minimum subsistence under Article 6 is to be welcomed. These undertakings are now incorporated in Art. 12 of the federal constitution, which grants constitutional rights to „means which are indispensable for leading a life in human dignity" under the title „Right to aid in distress". Due to lack of case studies, the exact extent of this right has not yet been fully determined.

In this context we envisage problems in terms of welfare benefits for asylum seekers. Again, different cantons adopt very different approaches to paying benefits to cover minimum subsistence needs. Under the terms of Chapter 6 of the Federal Asylum Act, cantons receive federal contributions for welfare costs, and the cost of care and administration. However, individual cantons benefit from these lump-sum contributions *at the cost of asylum seekers*. Added to this, the government currently has no control mechanism in this respect. While the new asylum law envisages state supervision and financial controls, its implementation to date is rather intransparent.

Moreover, in recent years government cuts in spending in the asylum and refugee area have resulted in reductions in social assistance packages. To address this drop in funds, the cantons introduced various benefit levels which distinguished between so-called „co-operative" and „uncooperative" asylum seekers.[14] There are known cases where, for example, the allowance for a family of four (single mother and three sons, the youngest of whom was only four years old) was reduced to the lowest „uncooperative" level due to misconduct against which no legal action was taken. This practice affects all asylum seekers even if, as in this particular case, they have been living in Switzerland for 9 years as an asylum seeker.

[12] BGE 123 II 511 and Art. 37 para. 3 Federal Law on International Legal Aid in Criminal Matters (IRSG).

[13] BGE 123 II 513.

[14] In particular, the interpretation of „uncooperativeness" appears to be highly problematic in the absence of any legal definition.

Art. 6 of the CCPR is also violated under certain circumstances in the medical area, particularly in the treatment of traumatised and mentally ill persons, who are frequently referred for medical care at a very late stage of the procedure. We believe it is important for medical care to be provided early i.e. at the reception centre, if signs of traumatisation are exhibited during the interview. From a legal procedure standpoint it must be added that, although general traumatisation is of substantive relevance for any decisions, official psychiatric assessments are very rarely requested. On the other hand, private assessments are scarcely affordable for asylum seekers and are generally brought in as expensive evidence only at the appeal stage. It is our belief that a brief official psychiatric assessment should be ordered at the request of the traumatised person (proof of credibility). In some instances the Swiss Asylum Appeals Commission also pursues a somewhat questionable practice, by refusing, from the outset, to ascribe any evidential value to psychiatric witnesses in particular.[15] While the Swiss Asylum Appeals Commission has made public its official policy of appraising private medical assessments (EMARK 1999/ No. 5), the fact that medical assessments are accorded too little importance in substantiating grounds for asylum cannot be ruled out. Medical reasons, particularly risk of suicide, should therefore be taken seriously before deciding on the expulsion of an asylum seeker. The authorities should base their decision on such medical assessments and not overrule them without good reason.

- *Use of firearms by the police*

Many cantons still lack a clear legal basis for the use of firearms by police forces. Rather, their deployment is based on service directives or administrative ordinances[16]. Nevertheless, the Committee clearly stated in its General Comment on Art. 6 that the States parties to the CCPR must safeguard against active violation of this right by their police forces. The law must therefore accurately prescribe and restrict the circumstances under which a person may be robbed of his life. Hence any „shoot-to-kill" policy supported merely by a service directive is in violation of the Covenant. Indeed, the Committee made it clear in 1979, in the case of Suarez de Guerrero v. Columbia[17], that at least foreseeable cases of the use of firearms by the police must be formally governed by legal provisions.

- *Police campaign to introduce dumdum bullets*

In June 2001 the Police Commanders' Conference of Switzerland (KKPKS) submitted a recommendation to cantonal governments that so-called deformation ammunition be used for police firearms. This ammunition, also referred to as dumdum bullets, differs from normal ammunition in that the bullets „fragment" on entering the body and thus cause a much larger wound i.e. significantly more serious injuries, and hence poses a greater risk of fatal injury than conventional ammunition. For this reason its use during war and conflicts is forbidden under national law[18]. The police commanders justify the use of such ammunition by citing its greater „man-stopping impact" and the fact that it is less likely to endanger third parties.

In a press release dated 23.7.2001, even the Federal Department for Foreign Affairs doubted the legality of such ammunition being used by police forces. Since, as mentioned above, the only instance in which the use of firearms by the police does not constitute an arbitrary violation of the right to life as defined in Art. 6 CCPR is where such use is deemed absolutely

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[15] Cf. Jurisdiction commentary in ASYL 1998/No. 3, P. 75.

[16] ALBERTO ACHERMANN, MARINA CARONI, WALTER KÄLIN, Die Bedeutung des UNO-Paktes über bürgerliche und politische Rechte für das schweizerische Recht, in Kälin/Malinverni/Nowak, Die Schweiz und die UNO-Menschenrechtspakte, 2nd edition, Basle/Brusells 1997, 163-165.

[17] Communication 45/1979.

[18] Hague protocol of 1899.

essential to achieve a legitimate objective i.e. to save a human life, it follows that the use of ammunition which carries a much higher risk of fatal injury can never be appropriate. Moreover, using ammunition whose deployment even during times of armed conflict violates humanitarian law, must all the more be prohibited in times of peace! The very use of this ammunition by the police, far less its fatal consequences, therefore in our view represents a violation of the right to life under the terms of Art. 6 CCPR.

- *Death during violent expulsions*

See also Art 7.

Article. 7: Prohibition of Torture

In light of the prohibition on torture, inhumane and degrading treatment as defined under Art. 7 CCPR, the following practices which may entail a violation of Art. 7 should be noted:

- *Use of coercive measures for the purposes of expulsion*

The methods used for so-called „Level 3" expulsions (tying into a wheelchair, helmet, taping the mouth, straw to facilitate breathing, plastic bag to catch excreta, urine bottle, physical injuries) as well as cases of forced medication [19] entail serious breaches of personal freedom and physical integrity. At the very least it is questionable whether these are compatible with Art. 7 CCPR. Such serious breaches of personal freedom must be formally supportable under law, and in our opinion no such basis exists at the national level. The use of coercive measures to expel persons must be tempered by its appropriateness, and methods which are inhumane, life-threatening or potentially damaging to the health must be prohibited. In May this year a Nigerian, Samson Chukwu, died in the asylum prison in the Canton of Valais during a night-time attempt to remove him from the country. An initial investigation showed that the death was partly attributable to the coercive measures used on him, which restricted his air flow.[20] If the authorities cannot prove that every conceivable precaution was taken during the forced removal, such cases must also be assumed to be violations of Art. 6 CCPR.

- *Non-Refoulement (Para. 87 State Report)*

In terms of Art. 7 on the principle of non-refoulement, the State Report also discusses the grounds for rejection and the „persons in need of protection" status which at the time of writing were new (Paras. 90-1 State Report). The failure of the authorities to provide medical witness as mentioned under Art. 6 also entails a risk of violation of the principle of non-refoulement.

The grounds for rejection were introduced as an emergency measure and have now been incorporated in the law since the asylum law reform came into force on 1 October 1999. At this juncture, two significant points should be addressed in favour of non-refoulement.

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[19] See for this problem AMNESTY INTERNATIONAL, March 2000, „Switzerland, external documents containing information relevant to forcible deportation, concerns July-December 1999", AI Index EUR 01/01/00

[20] Cf. Report by the Institut de médecine légale de Lausanne (IUML) published in Le Temps of 27 July 01: La mort du Nigérian „ peut être attribuée à une asphyxie par la mise en position de contention, et ceci après que la victime a fourni un effort important. D'autre part, le stress a pu jouer aussi un rôle important dans l'enchaînement fatal".

Paperless persons: Art. 32 para. 2 Federal Asylum Act stipulates that asylum applications will not be considered, if the person is unable to submit travel papers or other documents by which he or she can be identified. If mitigating reasons for the lack of papers can be made credible or when there is a certain evidence of persecution, the application may go ahead. In our opinion this provision entails the risk that applications may not be considered from persons who have suffered or fear torture as defined by Art. 7 CCPR. Persecuted persons often have no possibility of obtaining valid travel papers. Victims of torture, moreover, often show difficulties to provide evidence of torture in the initial stages of the procedure. In practice the Federal Office for Refugees recognises only papers which contain a photograph. This contravenes an expert opinion issued for the UNHCR[21] not to impose excessive demands for identity papers and to regard birth certificates as sufficient proof. First instance procedures repeatedly favour an actual credibility test as defined by Art. 7 of the asylum law over any non extensive evidence of persecution (cf. EMARK 1999/Nr. 16, 17). The provisions and their interpretation entail the risk of violation of Art. 7 CCPR.

False identity: Art. 32 para. 2 lit. b of the Federal Asylum Act stipulates that asylum applications are not considered, when the applicants have lied to the authorities about their identity and the change of identity is proven by relevant investigations or other evidence. Other methods of determining identity are the „Lingua" language identification method and analysis of bone age. According to the law, change of identity must be proven by „other evidence" i.e. a high degree of proof is called for. The Swiss Asylum Appeals Commission has accorded high evidential value to Lingua analyses while „adhering to specific minimum requirements to guarantee reliability, objectivity and neutrality".[22] However, in the same resolution it states: „Since various aspects of the procedure implemented by the Federal Office for Refugees' „Lingua" agency to provide proof of origin based on a linguistic analysis fall short of the legal requirements of the federal civilian procedure for judicial expertise, these analyses do not constitute a substantive assessment in the legal sense."[23] Whether or not Lingua analyses meet the requirements for evidence in the present context very much on their evidential value. The criteria of the Lingua analysis are as strict as those of the investigative procedure: in both cases a false identity must be established. Even before the emergency measures came into force the Federal Office for Refugees assumed false identity based on other evidence. The Swiss Asylum Appeals Commission has decided that concealment of identity must be proven „with certainty".[24] Whether this is possible using a Lingua analysis depends very much on the individual circumstances. However, documents from the Federal Office for Refugees indicate that this is not always the case.

Appeal period: As a rule, a person's return is immediately enforced if their application is not considered. An application to postpone return may be submitted in writing to the Swiss Asylum Appeals Commission within 24 hours. Since an application to postpone return may only be submitted together with an appeal, this effectively constitutes a reduction of the appeal deadline by 24 hours. For the asylum seeker who at this stage is still in a government reception centre, it is often impossible to compile legal input or organise a legal representative within this short time frame. It is worth noting the decision of the Austrian constitutional

[21] WALTER KÄLIN, Nichteintreten auf Asylgesuche bei fehlenden Ausweispapieren oder illegalem Aufenthalt, Legal expertise to the UNHCR (reprinted in ASYL 1998/2, S. 28).

[22] EMARK 1998/No. 34.

[23] EMARK 1998/No. 34.

[24] EMARK 1996/No. 15, P. 125.

court which stipulates a period of 10 days as the minimum permissible in terms of human rights and constitutional law.[25]

„Persons in need of protection" status: During the temporary protection period the asylum procedure is suspended, exception made if there is clear evidence of „persecution under the terms of Article 3"[26]. Note in this respect that it is often precisely those severely traumatised victims of persecution who find it difficult to relate their experiences. Persons in need of protection can request a review of their asylum application only five years after the suspension decision. If temporary protection is lifted, the Federal Office grants the persons affected the right to a legal hearing. If no statement of position is submitted by the asylum seeker, their return is enforced and simultaneously any pending application for asylum is declared null and void. In view of the principle of investigation, any obstacles to refoulement must be officially examined. Wherever possible, a suspended asylum application has to be ruled in the substance when it cannot be taken form the role under the terms of Art. 35 Federal Asylum Act.[27] It is also worth mentioning in this context that in spring this year the European Parliament recommended that guidelines be drawn up for „temporary protection" whereby persons could submit an application for asylum at any point during their „temporary protection" and applications be dealt with at the latest after such protection is lifted, if not during the protection period.[28]

Art. 71 Par. 1 lit. b Section 2 of the draft Federal Act on Aliens envisages extending the detention criterias to include grounds, when asylum applications will not be considered. It is conceivable that the Federal Office for Refugees' denial-of-entry decisions are already having a major legal impact even before they are legally enforceable. Among those affected by these decisions may be persons who are genuinely persecuted but were unable to submit their grounds for asylum in the initial procedure. In this respect the rejection of paperless persons is a particularly sensitive area.

Article 8: Prohibition of Slavery and Forced Labour

- *Exploitation of women (Paras. 102-3 State Report)*

We have fundamental reservations with respect to the report's mention of a specific category of residence accorded to cabaret dancers. It is scarcely in keeping with CCPR Art. 8 in conjunction with CCPR Art. 2 that women working in the sex industry receive a permit - restricted to this type of work - but women who wish to practice another profession do not. The measures proposed in the report merely address the symptoms and as such are unsuited to eradicating the degrading dependency on others which these women often have to endure.

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[25] Ruling by the Austrian constitutional court on 24 June 1998, commented on in ASYL 1998/4, P. 110ff.

[26] Art. 69 Abs. 2 Federal asylum Act.

[27] Art. 35 Federal Asylum Act stipulates that no consideration be given to applications for asylum once temporary protection is lifted. In our opinion this rule must also be applied to cases where a person makes no objection to extradition or to a suspended application for asylum during the legal hearing. See SFH statement of position on the ordnances, P. 16.

[28] Council of the European Union, JHA Council, Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Brussels, 23. May 2001. Art. 17 para. 1: Persons enjoying temporary protection must be able to lodge an application for asylum at any time. para. 2: The examination of any asylum application not processed before the end of the period of temporary protection, shall be completed after the end of that period.

Here it should be noted that Switzerland still operates no specific victim protection programme of the type long discussed and promoted internationally. Only by implementing such a programme can trafficking in women and slavery be effectively combated.

Moreover, the exploitation of women for the purposes of prostitution represents only one aspect of the prohibition on slavery and conditions akin to slavery. NGOs which specialise in this area are concerned at the increasing number of instances of massive exploitation of labour, particularly of (female) migrants[29] without any legal residence or work permit. Like the women who work (or are forced to work) as prostitutes, such persons have no access to most of the basic rights and human rights unless they risk being expelled from Switzerland. Their precarious position dissuades them from seeking protection against infringements of labour law and defending themselves against punishable infringements of the law. Added to this, they are also largely denied access to social security benefits.[30]

It is worth noting that the Swiss law on aliens aids and abets the exploitation of labour, particularly in the case of persons outside the EU and EFTA. Such persons are only permitted to immigrate into Switzerland if they are specially qualified (see para. 39 State Report). Increasingly, this rule is preventing the type of unskilled labour and household helps which businesses and private households require, from obtaining a legal work permit. The number of persons working under precarious conditions is set to rise further in future.

To date the government has not addressed the plight of these persons. Only in the wake of protest campaigns in recent months have certain investigations been initiated and initial measures been tabled for discussion – for example by the Federal Commission for Foreigners (e.g. cantonal Ombudspersons offices which could be called in to clarify permits). Political organs have yet to tackle the issue.

- *Conscientious objection to military service (Para. 108 State Report)*

Persons eligible for military service who can demonstrably prove that they cannot reconcile military service with their conscience, must do alternative civilian service.[31] Persons who wish to do this service must undergo a lengthy investigative procedure to determine their grounds for objection. In practice, however, not all grounds for objection are acknowledged. For instance, an explicit political argumentation results in the application being rejected. This practice is also now to be adopted for the civilian service law. Consequently, the Federal Council's draft recognises only religious and philosophical-ethical rationales. If the application is accepted, the person must perform civilian service which is 1.5 times the duration of the military service[32]. Switzerland therefore practices a combined examination of conscience and factual proof, and one might reasonably ask whether the significantly longer

[29] NETZWERK „SOLIDARITÄT MIT ILLGALISIERTEN FRAUEN", Illegal unentbehrlich – Illegalisierte Hausangestellte in der Region Zürich, Zürich 2001. Order from: FIZ, Quellenstrasse 25, 8005 Zurich, Tel. 01 271 82 82, fiz-mail@access.ch. Finally, in this context it is worth mentioning the recurring cases of true slave labour by household employees engaged by foreign diplomats. For instance the Tribune de Genève of 27.2.2001 reported the case of a 32-year-old Filippino who had to work from September 1998 for a Filippino diplomat for no pay and with no days off.

[30] *Ibid*.

[31] Art. 1 Federal Law of 6 October 1995 on Alternative Civilian Service (Civilian Service Law). This law is currently under revision.

[32] Art. 8 Civilian Service Law. However, according the Federal Council's message dated 21 September 2001 on this legal reform, the factor should be lowered to 1.3.

term of civilian service imposed on applicants, despite having proven an inability to reconcile their conscience, may be termed a punishment.

In our opinion this rule contravenes the prohibition on forced labour under the terms of CCPR Art. 8 in association with the accessory prohibition on discrimination in Art. 2 Par. 1. In *Maille, Venier and Nicolas versus France*[33] the judges ruled that introduction of a cilivan service as a substitute for military service did not contravene CCPR Art. 8 if such service was non-discriminatory in nature. However, the opposite would be true if the substitute service were twice as long as the military service. According to the Committee in the above case, this interpretation would be particularly appropriate where the longer term of service was based not on objective grounds such as the necessity to undergo a special course of training, but merely on the seriousness of the conflict of conscience. The Swiss regulations, with their combination of a lengthy investigation into conscience and a "commitment-proof" (the alternative civilian service being 1,5 times as long as military service), is nevertheless scarcely less daunting and hence discriminatory, hence one might justifiably talk of a violation of the Covenant.

According to the ordnance governing the civilian service law,[34] only members of particular religious groups – de facto only members of the Jehovah's Witnesses – are exempt from a personal hearing for the purposes of examining their conscientious grounds for objection. We believe that this provision also violates Art. 8 in conjunction with CCPR Art. 2 Par. 1, since it discriminatingly exempts only specific groups from this obligation. [35]

Article 12: Right to Movement and Freedom to Choose One's Residence, Right to Enter own Country

According to Art. 24 of the Federal Constitution, only Swiss have the right to take up residence anywhere in the country. With respect to freedom of movement of aliens, Switzerland has formulated a reservation. In practice, this right is not even guaranteed for Swiss nationals: gypsies i.e. travellers invoke a violation of the right to choose one's residence freely. For example, a complaint against the Vaud government has recently been filed with the Federal Court due to the fact that the cantonal authorities have limited travellers' settlements to three fixed locations in the canton. If these are occupied, the travellers are expelled. The representative of West Switzerland's travellers claims that for centuries the Canton of Vaud has provided 62 sites, many of which have been now turned into campsites and to which gypsies are now denied access. Generally speaking the existing sites are oversubscribed and are often rented out at excessive prices given their minimal infrastructure. Official and unofficial sites and transit camps are repeatedly subjected to racist attacks (gunshots at caravans, campaigns of persecution and intimidation by authorities and private persons). The approach adopted by certain communities whereby they submit decisions on these sites – and hence Swiss travellers' right to exist and to choose their domicile – to referendums is problematic. In June 2000, voters in the Canton of Geneva rejected a proposal to extend the existing travellers' site, which was at risk from fire.

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[33]Communications 689, 690 and 691/1996.

[34] Art. 27 para. 5 of the Ordnance of 11 September 1996 on Alternative Civilian Service (Civilian Service Ordnance).

[35] See also Committee ruling in Communication 402/1990, Brinkhof v. the Netherlands.

- *The right of foreigners to choose their domicile (Paras. 129 et seq. State Report)*

With the coming into force of the bilateral EU accords (free movement of persons), the prohibition on mobility inside national borders will be lifted, at least for members of EU states (see Art. 8 ARF for changing cantons). According to the draft of the new law on aliens, the restrictions on migrants from non-EU countries are to be slightly relaxed: persons with a residence permit should be entitled to change cantons. Persons with temporary residence permits can only exercise this right if they are not unemployed or not dependent on welfare benefits.

However, migrants who have no residence permits and live in cantons with limited job opportunities and few further education options (e.g. alpine regions and cantons without major cities) are the very persons who depend on the ability to change cantons if they become unemployed. Moreover, couples of mixed marriages where one partner is a non-EU national and has no residence permit are particularly hard hit by this prohibition on changing cantons. Forcing such couples, including Swiss partners, to „cohabit" severely restricts their chances and living options.[36].

Persons with temporary permits (Permit F) are particularly disadvantaged. This permit grants provisional residence status to persons who in practice often stay in Switzerland for a long period. Hence, asylum seekers who have been resident in Switzerland for eight years or more might get a provisional residence permit. They might receive this permit because they have integrated in Switzerland, their children have grown up here and are attending school here.[37] It is becoming increasingly difficult for this group of foreigners to convert their provisional residence permit into a permanent one. They are prohibited not only from changing cantons but also from leaving Switzerland. Even if they have relatives in a neighbouring country, they are not permitted to visit them except if they are severely ill and about to die. To be permitted to travel outside Switzerland for family reasons, persons with provisional permits must submit a medical certificate to prove that their relative is gravely or terminally ill[38].

Para. 210 of the 1st Swiss State Report sets out the restrictions imposed on the freedom of asylum seekers to choose their domicile; the second report merely refers to the first report. Yet since the first report the freedom of asylum seekers to move around and choose their domicile has been severely restricted. Asylum seekers' freedom to choose a place of residence is increasingly being made dependent on compliance with alien police provisions. Asylum-seeking families with many children are frequently forced to live in a single room in shared accommodation, even if they have in fact an alternative option. Often they live separated from relatives who have been assigned to another canton.

- *Art. 12 Par. 4: Right to return to own country*

The practice of the Human Rights Committee[39] stipulates that the term „his own country" used in CCPR Art. 12 Par. 4 must, under certain circumstances, also be interpreted to cover persons who have been resident for many years in the country in question. In this context CCPR Art. 12 Par. 4 implies a prohibition against any arbitrary expulsion from Switzerland except for expulsion due to criminal activity. Switzerland violates this provision of the Covenant to the extent that various cantons practice a policy of expelling long-term foreign

[36] See draft of the new Federal Act on Aliens, Art. 39, 44, 45. 46.

[37] See: Art. 34 of the Asylum Ordnance 1 and Art. 44 para. 3 and 4 Federal Asylum Act.

[38] According to responses to various enquiries made of the Federal Office for Refugees.

[39] Communication 558/1993, G. Canepa v. Canada, UN.Doc. CCPR/C/52/D/558/1993, 20.10.1994; Communication 538/1993, Charles E.. Steward v. Canada.

residents (second-generation immigrants, paperless persons and even those with a residence permit)[40] from Switzerland on the basis of Art. 10 Par. 1 lit. b (inability to integrate) or lit. d Federal Act on the Permanent and Temporary Residence of Foreigners (ARF; dependency on welfare). In this context (albeit not on the basis of CCPR Art. 12 Par. 4) the Federal Court upheld the claim by a Turkish national who had lived in the Canton of Basle City since 1967 and was to be repatriated in 1989 because he had to draw welfare benefits due to an accident.[41] Persons who do not have a residence permit cannot contest a cantonal decision even if they have been living in Switzerland for decades, since according to Art. 18 Par. 1 ARF the cantonal decision to refuse a permit is final. The Swiss authorities must be encouraged to recognise the prohibition against expulsion to a person's own country as defined by CCPR Art. 12 Par. 4, since this would open up a legal channel for filing a complaint with the Federal Court with respect to breach of treaty. This would enable the Federal Court to draw up comprehensive rules governing the expulsion of long-term foreign residents.[42]

Article 17: Right to respect for Privacy and Family Life

- *Family reunification (Paras. 156 et seq. State Report)*

According to Art. 13 of the Federal Constitution, every person is entitled to the protection of their privacy and family life. It follows that, as with CCPR Art. 17 on the right to family reunification, foreigners are also entitled to protection against the arbitrary separation of their family by expulsion or extradition.

In the field of asylum an aliens law, several unreasonable restrictions should be noted with respect to the right to protection of family life:

Recognised refugees with temporary permits (permit F) are only permitted to have their families join them on condition that they cannot travel on to a third-party state within three years of being granted temporary refuge.[43] Moreover, under the terms of Art. 39 Par. 2 (asylum ordinance 1)families may be refused permission to join such persons under certain circumstances.[44] In the public hearing of Art. 39 of asylum ordinance 1, NGO's have already called for equal rights for recognised refugees with temporary permits and refugees who have been granted full asylum. The possibility of travelling on to a third-party state must, in our opinion, be examined at the time when the decision on asylum is made. If this is refused, approval must be given to uniting the family. Taking federal court practice into account, the rule governing the temporary permits of recognised refugees also represents a right to permanent residence. The present rule violates the right to family life. Refusal under the terms of para.2 also represents a violation of the right to family life. Such intervention is justifiable only in the presence of overwhelming public interests as defined by Art. 8 Par. 2 ECHR.

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[40] The residence permit is generally granted after a 10-year stay in Switzerland.

[41] BGE 119 Ib 1ff.

[42] WALTER KÄLIN/GIORGIO MALINVERNIT/MANFRED NOWAK, Die Schweiz und die UNO-Menschenrechtspakte, 2nd ed., Basle/Frankfürt a.M./Brussels 1997, S. 180f.

[43] Art. 39 para. 1 Asylum Ordinance 1.

[44] Art. 39 para. 2: The Federal Office may [...] refuse entry, in particular if persons given temporary refuge in Switzerland openly refuse to improve their situation viz. if they a. do not accept reasonable work assigned to them; b. terminate an employment contract without the consent of the responsible office and hence exacerbate their situation; c. indicate by their general conduct and attitude that they are not willing or able to integrate and subject to Swiss law and order.

Interventions presuppose a case-to-case investigation of the object of legal protection and cannot be generically provided for in the abstract.

Other persons given temporary protection (admission provisoire) still have *no* right to have their families join them. However, for those with „persons in need of protection" status (the statutory successor to the preceding collective temporary protection status), entitlement to bringing families into the country is legally prescribed (Art. 71 asylum law). It is our belief that this constitutes discriminatory treatment, particularly since the temporary refuge usually lasts several years. A striking example is provided by the 12,000-plus persons granted temporary refuge under the 2000 Humanitarian Campaign[45], most of whom have been in Switzerland for over seven years and are still not entitled to bring their families in. Hence this status should be brought into line with the status of persons in need of protection.[46]

If asylum seekers whose application has been rejected are to be expelled along with their families, the family unit must be protected.[47]

Since the law on aliens is currently being revised, Art. 17 CCPR should be implemented for aliens by

granting the right to bring the family into the country not only to persons with residence permits but also persons with temporary permits and short-term residents;

legal provisions governing bringing same-sex partners into the country. Same-sex relationships must be accorded the same rights to privacy (Art. 8 ECHR), equality of treatment and protection against discrimination (Art. 8 Par. 2 of the Federal Constitution, CCPR Art. 2) and respect for human dignity (Art. 7 of the Federal Constitution).

- *Obligation for alien spouses to cohabit*

The provision of Art. 7 Par. 1 and 2 and Art. 17 Par. 2 Federal Act on the Permanent and Temporary Residence of Foreigners (ARF), whereby foreign persons are forced to cohabit, contravene CCPR Art. 17 in conjunction with CCPR Art. 2 Par. 1. This creates inequality between the sexes, promotes a patriarchal model of marriage, and contravenes the basic principles of matrimonial law which are based on a partnership. In its provisions governing marriages between Swiss men and foreign women, the ARF once more restores ancient patriarchal matrimonial rights, which frequently result in acts of violence on female migrants.

In our opinion there is no substantive reason why foreigners and Swiss should be treated differently. Indeed, forced cohabitation may promote violence within a marriage. It is a telling fact that the draft of the new Federal Act on aliens envisages extending the obligation to cohabit to marriages between Swiss nationals and foreign spouses. This move was prompted by the need to prevent marriages of convenience, i.e. marriages contracted with the sole purpose of obtaining a residence permit. Since approximately one quarter of marriages made in Switzerland are binational, this measure appears to be completely inappropriate and an ineffective instrument against marriages of convenience.

[45] Cf. Kreisschreiben dated 14 March 2000, Asyl 52.4.6.

[46] P. 29ff.

[47] Cf. also Art. 7 Prohibition of torture.

Article 18: Freedom of Thought, Conscience and Religion

- *Conscientious objection to military service*

See comments on CCPR Art. 8.

- *Moslem cemeteries*

In 1999[48] the Federal Court ruled that, according to the basic rights of the constitution and CCPR Art. 18, authorities responsible for burials were not obliged to set aside cemeteries for burial according to Islamic rights (eternal rest, graves facing Mecca etc). It stated its opinion that religious communities whose burial rites could not be adequately performed in public cemeteries, could use private funds to lay out their own cemeteries. As many communities who have since set up special sections for Muslim graves in public cemeteries implicitly acknowledge, the refusal to provide such burial options for relatives of a specific non-Christian religion constitutes religious discrimination and hence contravenes Art. 18 in association with Art. 2 Par. 1 of the Covenant.

- *Prohibition on slaughter according to jewish and moslem rites*

Switzerland is one of the few countries which absolutely forbid ritual slaughter i.e. the slaughter of animals without prior anaesthetisation by cutting their throat and draining their blood. This ban was enshrined in the constitution as early as 1893 and has been incorporated in the law on animal protection since 1978. Par. 1, Art. 20 of this law, ‚Obligation to anaesthetise' states: „The slaughter of mammals without anaesthetisation prior to draining the blood is prohibited". In its message concerning this law the Federal Council added that, while this ban contravenes Jewish and Islamic religious rules governing the slaughter of animals, religious freedom is subject to the boundaries drawn by the constitution and „appears justifiable in view of the population's clear rejection of ritual slaughter.[49] Thus the ban on ritual slaughter is a classic case of an provision based on the will of the democratic majority and in the general interest of animal protection, but directed against the practitioners of certain religions. While it primarily affected the slaughtering practices of the Jewish religion until the middle of last century, it has also now increasingly had to deal with Islam.[50]

However, in its draft of a new animal protection law dated 21 September 2001, the Swiss government and Federal Council now envisages relaxing this ban since „the appropriateness of the ban on ritual slaughter does not appear to be given". The slaughtering of animals without anaesthetisation is an important rite for Jews and Muslims".[51] Hence this absolute ban contravenes the constitutional right to religious freedom. Nevertheless, the proposal to relax the ban on ritual slaughter has encountered bitter resistance on the part of certain animal rights organisations as well as right-wing parties and factions. For this reason it is still too early to predict whether, despite the government's intentions, this ban will actually be lifted from Swiss lawbooks.

In our opinion this ban constitutes a clear breach of the guarantee given in Art. 18 of the Covenant, primarily due to the inappropriateness of intervening with religious freedom, but also due to the lack of public interest in such an absolute ban.

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[48] BGE 125 I 300.

[49] Bundesblatt (Official Journal of the Confederation) 1977 I 1092.

[50] WALTER KÄLIN, Grundrechte im Kulturkonflikt, Zurich 2000. 192-198.

[51] See draft of public hearing process dated 5. Oct. 2001 (http://www.bvet.admin.ch/info-service/d/vernehmlassungen/010921tschg_erl.pdf)

Article 23: Right to Marry

- *Right to marry aliens*

Para. 34 of the State Report on „justifiable differences in treatment based on the criterion of nationality" supports extensive discrimination against persons without permanent residence permits. One example of this is the administrative hurdles and tricks to which foreigners without a fixed residence permit are exposed when contracting a marriage. When exercising their rights to family life and to marry, foreigners are often arbitrarily subjected to „abusive circumvention of aliens police provisions". In its 1997 Report on Aliens the Alien Police regretted that „human rights conventions restricted state freedom" and that the „litigiousness" of sanctioned foreigners was too great.[52] In practice it sets up hurdles which impede or prevent persons laying claim to basic rights, viz. when marrying. The Alien Police of the Cantons Basel Stadt, Basel Landschaft, Appenzell, and St. Gallen subject couples to a parallel interview containing specific questions if they suspect the marriage is one of convenience. As part of a total revision of the Federal law on aliens, discussions are being held on the right of registrars to refuse to co-operate in marrying couples whom they suspect of marrying for convenience in order to acquire right of domicile.[53]

Article 24: Rights of the Child

- *Right of the child to nationality*

Switzerland made no reservation to the provision of CCPR Art. 24 Par. 3 CCPR which grants children the right to acquire a nationality. However, in 1997 it formulated an reservation to the equivalent provision of Art. 7 of the Convention on the Rights of the Child as follows: „Subject to the terms and conditions of the Swiss law on civil rights, which grants no right to acquire Swiss nationality." To date, then, the right of the child to nationality has not been implemented in Switzerland. In this respect we ask how the Human Rights Committee assesses this legal intransparency.

CCPR Art. 24 Par. 3 must be taken into account in the current discussions on a revision of the Federal Act on Acquisition and Loss of Swiss Nationality.

Article 25: Political Rights

- *Political rights and the arbitrary rejection of naturalisation applications* (*Paras. 221 – 226 State Report*)

Approximately one fifth of the resident population in Switzerland does not have Swiss nationality and is therefore excluded from the right to vote in accordance with CCPR Art. 25. This is due to the fact that Switzerland imposes very strict naturalisation requirements. But objective criteria such as length of stay and integration in Switzerland are not the only factors

[52] 1997 Report on Aliens, e.g. P. 8, P. 16, P. 23, P. 70, P. 64, Federal Aliens Office, Berne 1999, see also statement of position by Ruth Metzler, Member of the Federal Council, on the postulate of Alex Heim (proposals to combat abuse of marriage contracts) dated 20.3.01.

[53] Supplementary report on the draft of a federal law on aliens, Federal Department of Justice and Police, June 2000, P. 25.

which come into play for naturalisation applications. Rather, it is the custom in many communities to ask voters to decide on individual applications. Thereafter, the decision of the electorate can no longer be reviewed by *any* legal organ. In recent years this has resulted in more and more applications being rejected purely on the grounds of the nationality [54] of the applicants. In our opinion the discriminatory denial of political rights which results from this practice constitutes a breach of CCPR Art. 25 in association with Art. 2 Par. 1.

Article 26: General Equality before the Law

See „General Remarks“, para. II.

Article 27: Rights of Minorities

- Cultural minorities (Para. 242 State Report)

Little is being done to implement the measures mentioned in Section 242 to protect the cultural minority of the gypsies. The problems encountered by travellers remain essentially the same: lack of sites (see comments on CCPR Art. 12), problems in practising their traditional trades, problems with obtaining door-to-door peddling permits, children's schooling. Only in certain communities have some improvements been made.[55]

Switzerland's divided attitude to gypsies and their needs is also highlighted in the discussion on Switzerland's adhesion to ILO Convention No. 169 concerning Indigenous and Tribal Peoples. In autumn 1999, out of fear that gypsies could file claims arising from the ILO Convention, a group of experts from the Department for the Economy, seco, recommended that ILO Convention No. 169 be rejected. Since then a chamber of Parliament (Nationalrat) has voted, albeit closely (78 against 72 votes), for adhesion. The bill must now come before the second chamber (Ständerat).

[54] Naturalisation applications by persons from Turkey and Yugoslavia were overwhelmingly rejected, while the same referendum approved applications by persons of other origins. The best-known example is the votes cast in the community of Emmen.

[55] TANGRAM. Bulletin der Eidgenössischen Kommission gegen Rassismus, No.3/1997; WALTER LEIMGRUBER/ THOMAS MEIER/ROGER SABLONIER Das Hilfswerk für die Kinder der Landstrasse, herausgegeben vom Bundesarchiv, Bern 1998; ST.GALLISCHEN LEHRMITTELVERLAG (Hrsg.), Roma - Ein Volk unterwegs, St.Gallen 1999; THOMAS HUONKER/REGULA LUDI, Roma, Sinti, Jenische, issued by the Swiss Independent Committee of Experts – 2nd World War, Berne 2000.