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Internacional de Conciencia e Impuestos para la Paz
NGO in Special Consultative Status with the Economic and Social Council of the UN

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Submission to the 97th Session of the Human Rights Committee: October 2009
Conscientious Objection to Military Service:
SWITZERLAND

(updated September 2009)

Summary

CPTI wishes to draw three concerns to the attention of the Committee.

The first is that the Law on Civilian Service sets a duration for civilian service which appears to be discriminatory and punitive by comparison with that of military service.

The second is that Switzerland retains a "military exemption tax" which is imposed on male citizens who do not perform military service. As CPTI exists in order to uphold the right of conscientious objection to taxation for military purposes, it follows that we deplore any system which imposes a military service obligation in a financial form. Moreover this provision is discriminatory and impinges on conscientious objectors to military service in their exercise of their freedom of thought, conscience and religion under article 18 of the Covenant.

The third is that revisions to the Asylum Law are currently under consideration which have the explicit intention of debarring from its provisions conscientious objectors and others who are seeking asylum in order to escape military service in countries where there is no provision for conscientious objectors.

Background

As specified in Article 58 of Switzerland's 1999 Constitution "In principle, the armed forces shall be organised as a militia". The previous constitution had explicitly prohibited the maintenance of a standing army.[1] Article 59.1 states "Every Swiss man is required to do military service. Alternative civilian service shall be provided for by law."

In practice this means that male citizens are required to attend an initial period of military training at around the age of 20, followed by service in the mobilisation reserve until at least their mid-30s. The latter usually entails keeping one's uniform and rifle at home[2], and turning out with them to regular target practice and, at approximately two-yearly intervals, on refresher courses, typically of seventeen days' duration. With effect from the beginning of 2004 the combined length of initial and reserve training required of each conscript was reduced from 300 to 260 days; for officers and NCOs the cumulative requirement is greater, and in the case of officers the obligations continue until the age of 50. Fully-paid leave of absence from civilian employment is normal during reserve training. Only some 4,000 training personnel and officers above the rank of brigade commander do not follow this pattern but serve in the armed forces on a continuing basis. At any one time it is estimated that between 20,000 and 25,000 conscripts are in uniform, but a further 225,000 are available for mobilisation at 72 hours notice.[3]

As in many other countries, there has in recent years been some debate about the possible "professionalisation" of the armed forces, but the constitutional changes which this would necessitate mean that, unlike elsewhere, this is seen as a move towards rather than away from militarism.

Another feature which may be explained by the different military ethos was that Switzerland was much later than its neighbours in accepting a right of conscientious objection to military service. This was conceded partially in 1991, when those who satisfied a military tribunal that their refusal to perform military service was the result of a "severe conflict of conscience" were permitted to expunge the relevant criminal convictions by performing compulsory labour of a duration one-and-a-half times that of military service,[4] but it was only with the passage of a Civilian Service Law[5] which took effect at the beginning of 1996 that conscientious objection to military service was effectively decriminalised.

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[1] Haltiner, K.W. "Switzerland: Questioning the Civilian Soldier" in Moskos C.C. & Chambers, J. W., (1993). The New Conscientious Objection, from sacred to secular resistance. Oxford University Press, New York/Oxford, pp135-145, at p136.

[2] But as reported in para. 89 of Switzerland's replies to the List of Issues

[3] The Military Balance 2007 (International Institute for Strategic Studies, London), p

[4] Horeman, B. & Stolwijk, M., Refusing to Bear Arms , War Resisters International, London, 1998.

[5] RS 824.0 *Loi fédérale du 6 octobre 1995 sur le service civil (LSC)*

The Civilian Service Law

The Civilian Service Law of 1995 gave the possibility for those for whom military service would present a "severe conflict of conscience" to apply to a civilian Commission reporting to the Ministry of Economic Affairs for permission to perform a purely civilian alternative service. This was an enlightened piece of legislation in that the civilian nature of the alternative service was guaranteed by placing all aspects of its administration outside the control of the military authorities, and also in that no artificial time limits were placed on application. Those who had already commenced their military service - including those who were subject to reserve obligations - were (and are) able to take advantage of the Law's provisions, receiving credit for the proportion of their military service obligation which they had fulfilled.

An amendment to the Civilian Service Law dated 3rd October 2008 which came into effect on 1st April 2009 abolished the role of the Commission in interviewing those who sought admission to civilian service on the grounds of conscientious objection. Article 16a of the amended law stipulates that the application will be made in writing; a sub-paragraph enables the drawing up of procedures to enable electronic submission. Article 16b stipulates that the applicant must state that he is unable to reconcile military service with his conscience and that he is prepared to undertake the civilian service prescribed in the law. No condition or reservation can be attached to this statement. The implication is that an application made in conformity with this article will be accepted without further enquiry - hence the "clarifications" of the definition referred to in para 264 of the State Report presumably become redundant.

Article 8 retains the stipulation that the duration of alternative service will be 1.5 times that of the military service (or the remaining proportion of such service) which would otherwise be required There is no evidence that this discrepancy is objectively justified,[6] but it will be noted that under Article 16b those who declare themselves unwilling to perform such discriminatory and punitive alternative service cannot be recognised as conscientious objectors.

The Swiss conscientious objectors' organisation BfMZ points out that a number of other details discriminate against those performing civilian service. All 390 days civilian service must be performed by the age of 34 whereas ordinary military conscripts are discharged from all obligations on reaching that age, whether or not they have done the full stipulated quota of 260 days; according to BfMZ thousands each year are discharged – whilst in military not compulsory, resulting in thousands of soldiers being dismissed at 34 "not nearly having completed their 260 days".[7] Also those performing civilian service who are in straitened financial circumstances do not receive the equivalent of support given in such cases by the military to conscripts.

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[6] See the criteria set out in the Human Rights Committee's jurisprudence: *Foin v France* Communication 666/1995, ICCPR, A/55/40 vol II (3rd November 1999)

[7] Comments on draft received 10th March 2009

Moreover, even civilian alternative service laws are not in every individual case "compatible with the reasons for conscientious objection".[8] There is always a small minority who are not prepared to perform even alternative service.
Article 72 stipulates that refusal to perform civilian service, failure to report to the assigned service, leaving such service without authorisation, or failing to return after an authorised absence, is punishable by imprisonment of up to eighteen months or a fine. If the objector is excluded from civilian service, imprisonment may not be commuted into a fine or a period of community service. On the other hand, sentences handed down are usually much shorter than the maximum. The annual total of "absolute objectors" sentenced to imprisonment in Switzerland during the period from 1999 to 2004 varied between 61 and 110.[9] In 2005 a military court in Bern handed down a sentence of seven months' imprisonment on a young Jehovah's Witness, identified as "J", who had failed to report for recruitment the previous November.[10]

Military exemption tax

The antecedents of the military exemption tax (*Wehrpflichtersatzabgabe / taxe d'exemption du service militaire)* date back at least to Article 3 of the military organisation law of 1907;[11] the current arrangements were created by Law 661 of 12th June 1959. Article 2 of that Law defined those subject to the tax as all male citizens of the age group eligible for military service, whether or not resident in Switzerland, who for more than six months of a given tax year have - for whatever reason - not been attached to a military or reserve unit, or who have failed to attend when summoned to perform their military service. This meant primarily the large number - since before 1990 about 50% of those eligible - who were exempted from military service in the year in question on medical grounds, or as clergy, members of the Federal Assembly[12], or essential hospital staff. It also of course applied to conscientious objectors who had persisted in their refusal to perform military service notwithstanding criminal penalties.

Revisions to the Law in 1994 exonerated the most severely handicapped persons, and stipulated that other recognised disabled persons benefit from a 50% reduction in the rate, which, with effect from 2004, was raised from 2% of taxable income, or Fr.150 if greater, to 3% of taxable income, subject to a minimum payment of Fr.200.[13]

With the creation of Civilian Service in the mid-1990s, the Law was redrafted so as to exclude those who fulfilled this alternative to military service (this included the dropping of the word "military" from its French title).[14] With this change, repeated

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[8] Commission on Human Rights Resolution 1998/77, Operative Paragraph 4.

[9] Stolwijk, M., The Right to Conscientious Objection in Europe: A Review of the Current Situation, Quaker Council on European Affairs, Brussels, 2005, p 69

[10] *"Militärdienstverweigerer soll für sieben Monate ins Gefäangnis"* Zivilcourage 6/05 , October 2005. (http://zivildienst.ch/pdf/Zivilcourage/2005/Zivilcourage0605.pdf)

[11] Prasad, D. & Smythe, T. (1968), Conscription -a world survey: compulsory military service and resistance to it, War Resisters International, London, p124

[12] Exempted in the reforms of 4th October 2002, which took effect at the beginning of 2004.

[13] Law 661, Article 13, as revised by the Law of 4th October 2002.

[14] Now "*Loi fédérale sur la taxe d'exemption de l'obligation de servir*"

imprisonment for non-payment of the military tax became less of a focus for the conscientious objection movement in Switzerland than it had previously been..[15] Indeed, it seems that in the process of a substantial redraft of the Law in 2002, as part of the overhaul of the federal taxation system the specific penalties for refusal to pay the tax - between one and ten days imprisonment on each occasion[16] - may have been lost.

The European Court of Human Rights in the case of *Glor v Switzerland*[17], decided in April 2009, found unanimously that the imposition of this tax on a person who had been exempted from military service on medical grounds, despite having been willing to perform such service, constituted a violation of Article 14 (prohibition of discrimination), taken in conjunction with Article 8 (right to respect for private and family life), of the European Convention on Human Rights. The replies to the Committee's question in the list of issues regarding the tax, which are to be found in paragraphs 150 – 153 of Switzerland's responses to the list of issues (CCPR/C/CH3/Q3/Add1) do not fully answer the issues raised by this case.

The *Glor* decision itself did not address the issue of conscientious objection to military service. Nevertheless, the principle that the Government does not have a right to impose military service in a financial form on an unwilling citizen can obviously be applied to conscientious objectors.

Although those who perform alternative service are not liable to the tax it still impinges on conscientious objectors in two ways over and above its general discriminatory nature. First, only those who have been declared fit for military service and do not qualify for any exemption are allowed to apply for recognition as conscientious objectors. The concept is still recognised only in the context of the performance of alternative service. In fact many of those who in practice are not being called into the army would have a conscientious objection to military service and for some this extends to objecting to contribution to military expenditure. Second, it does affect "absolute objectors", including, as the State Party admits in its replies to the List of Issues[18] Jehovah's Witnesses. Jehovah's Witnesses maintain a strict and unvarying interpretation of the biblical exhortation to "render unto Caesar those things which are Caesar's" (coins bearing the emperors head, in the original story), therefore it is not surprising that they have not contested this tax. Absolute objectors from other backgrounds do not necessarily share this viewpoint. Whatever their sentences, all such persons also acquire a criminal record; the liability to a supplementary tax represents yet another penalty resulting from the exercise of the freedom of thought conscience and religion under article 18 of the Covenant. .

<u>Revision of the Asylum Law</u>

It will be recalled that the UN Commission on Human Rights, in Operative Paragraph 7 of its Resolution 1998/77, "encourages States, subject to the circumstances of the

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[15] See Prasad & Smythe, 1968, op cit p127

[16] See Horeman & Stolwijk, 1998, op cit.

[17] Glor v Switzerland, Application No. 13444/04. Chamber Judgment delivered on 30th April 2009

[18] CCPR/C/CH3/Q3/Add1, Para 152.

individual case meeting the other requirements of the definition of a refugee as set out in the 1951 Convention relating to the Status of Refugees, to consider granting asylum to those conscientious objectors compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service when there is no provision, or no adequate provision, for conscientious objection to military service." In this the Commission was reinforcing the principles set out in 1979 by the United Nations High Commissioner for Refugees.[19] The UNHCR has subsequently expanded with specific reference to conscientious objection: "Where military service is compulsory, refugee status may be established if the refusal to serve is based on genuine political, religious, or moral convictions, or valid reasons of conscience... In conscientious objector cases, a law purporting to be of general application may, depending on the circumstances, nonetheless be persecutory where, for instance, it impacts differently on particular groups, where it is applied or enforced in a discriminatory manner, where the punishment itself is excessive or disproportionately severe, *or* where the military service cannot reasonably be expected to be performed by the individual because of his or her genuine beliefs or religious convictions... In addition, the claimant may be able to establish a claim to refugee status where ... the individual has a well-founded fear of serious harassment, discrimination or violence by other individuals (for example, soldiers, local authorities, or neighbours) for his or her refusal to serve."[20]

On 20th December 2005[21], the Swiss Asylum Appeals Commission (*Asylrekurs-kommission - ARK*), ruled in favour of an Eritrean appellant who had shown that he would face the death penalty as a deserter if repatriated - a punishment which was (reasonably) held to be disproportionate. Moreover, the Commission took into account the findings by the European Court of Human Rights[22] and by Immigration Appeals Tribunals in the UK and elsewhere that the treatment of deserters and military service evaders in Eritrea constituted inhuman and degrading punishment contrary to Article 3 of the European Convention on Human Rights.[23]

In October 2007 the Federal Justice and Police Department (EJPD[24]) was instructed to begin work on a redraft of the Asylum Law; the result was released for a public consultation exercise to last from 15th January to 15th April 2009. In the explanatory report to the proposed draft[25] the very first paragraph under the heading "Reasons for

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[19] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees UN Document HCR/IP/4/Eng/REV.1, Chapter V, B. (paras 167 - 174)

[20] GUIDELINES ON INTERNATIONAL PROTECTION: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees HCR/GIP/04/06, (2004), Para 26.

[21] Decision reported in EMARK 2006 No. 3, pp29 et seq.

[22] *Said v Netherlands*, Application No.2345/02, Judgment of 5th July 2005.

[23] Caroni, M. & Hofstatter, S., "*Flüchtlingsrechtliche und rechtsstaatliche Überlegungen zur geplanten Teilrevision des Asylgezetses betreffend Desertion und Dienstverweigerung",* ASYL 3/08 , (Swiss Refugee Council 7th August 2008). (http://www.osar.ch/2008/08/07/eritrea_desertion)

[24] Eidgenössische Justiz- und Polizeidepartement

[25] *Rapport relatif à la modification de la loi sur l'asyl et de la loi fédéral sur les étrangers,* to be found on the website of the Federal Immigration Office at: http://www.bfm.admin.ch/bfm/fr/home/themen/rechtsgrundlagen/laufende_gesetzgebungsprojekte/asyl-_und_auslaendergesetz.html

the new amendments" cites the increase in the number of asylum applications lodged by Eritreans - from 181 in 2005 to 1,207 in 2006 and 1,661 in 2007, and states that this at least in part is to be blamed on the 2005 ruling of the Asylum Appeals Commission. In fact, however, as the report itself confesses, the increasing number of asylum applications from Eritreans is a Europe-wide phenomenon, reflecting the situation in that country, and there is no evidence that following this ruling Switzerland received a disproportionate number of applications.

It is therefore stated that the first purpose of the proposed revision is to excude conscientious objectors, as well as deserters, from refugee status, *unless* they qualify otherwise – by contrast with rather than, as in the UNHCR guidelines, *subject to* them otherwise satisfying the criteria. Further aims include the criminalisation of any act by a person seeking asylum to publish criticisms of the country he has left, and that the rules regarding the safety of return to the country of origin would be reversed, so as to put the onus of proof on the potential deportee.

The first specific proposal in the draft law is the addition of a new Article 3.3, which would read *"Persons who are at severe risk or have a justified fear of being so exposed on the sole ground that they have refused to serve [in the military] or have deserted, are not to be considered refugees."*.[26]

To the general concern that the proposed Law might in various respects be contrary to Switzerland's obligations under the Refugee Convention, CPTI would add that it puts at severe risk many persons who have fled Eritrea where the unusually severe treatment of declared conscientious objectors and others who seek to avoid military service is very well documented; that as reported it seems to make no allowance for the specific protections refugee law gives to conscientious objectors from states where they have no means of claiming such status; and that its effect would appear to fall most heavily, and in a discriminatory fashion, on declared and undeclared conscientious objectors from the very state where they are at present most in need of protection.

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[26] 3 Ne sont pas des réfugiés les personnes qui sont exposées à de sérieux préjudices ou craignent à juste titre de l'être au seul motif qu'elles ont refusé de servir ou déserté