

# **NGO-Report**

**on the second and third periodic reports  
of Switzerland**

**concerning the**

**International Covenant on Economic,  
Social and Cultural Rights**

**(E/C.12/CHE/2-3)**

**Bern, September 2010**

## For this report

**This NGO-Report and the document «Swiss NGO-Coalition: Propositions for the ”List of Issues“ in consideration of the second and third periodic report of Switzerland to the CESCR» is elaborated by a working group through participation of:**

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Pro Juventute	<a href="http://www.pro-juventute.ch">www.pro-juventute.ch</a>
Society of Minorities in Switzerland – GMS	<a href="http://www.gms-minderheiten.ch">www.gms-minderheiten.ch</a>
Swiss federation of trade unions – SGB	<a href="http://www.sgb.ch">www.sgb.ch</a>
Swiss Interchurch Aid – HEKS	<a href="http://www.heks.ch">www.heks.ch</a>
Swiss Labour Assistance – SLA	<a href="http://www.sah.ch">www.sah.ch</a>
Swiss Peace Council – SFR	<a href="http://www.friedensrat.ch">www.friedensrat.ch</a>
Swiss Refugee Council – SRC	<a href="http://www.fluechtlingshilfe.ch">www.fluechtlingshilfe.ch</a>
Swiss union of public services – vpod/ssp	<a href="http://www.vpod-ssp.ch">www.vpod-ssp.ch</a>
Terre des hommes – child relief	<a href="http://www.tdh.ch">www.tdh.ch</a>
Womens network for foreign policy	<a href="http://www.frauenrat.ch">www.frauenrat.ch</a>
Youth resource center on Human Rights – CODAP	<a href="http://www.codap.org">www.codap.org</a>

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## The structure of this report

In the first part of this report we address in order the «List of issues» in terms of those questions from the Committee where we believe observations and suggestions from our perspective to be crucial – with once important difference, however: because alien and asylum policy probably constitutes the most serious complex of problems for Swiss human rights policy, we have summed up the discussion on this in the second part. How questionable Swiss policy is in this field with regard to economic, social and cultural rights can already be seen by virtue of the fact that 18 out of the 35 questions of the Committee relate to alien and asylum policy in whole or in part.

The very detailed «Rapport parallèle au 2ème et 3ème rapports de la Suisse sur la mise en oeuvre du Pacte international relatif aux droits économiques, sociaux et culturels (PIDESC)» of the «Coalition Suisse Romande sur les droits économiques, sociaux et culturels», which can serve as an extension and additional explanation of this report, has also served as the basis for this report:

[https://docs.google.com/fileview?id=0B0YRY\\_9\\_FWaOZmQyNWU1MGEtZWYyNC00NjdILWFIMjEtZDZIZDg5NmM1NDFi&hl=fr](https://docs.google.com/fileview?id=0B0YRY_9_FWaOZmQyNWU1MGEtZWYyNC00NjdILWFIMjEtZDZIZDg5NmM1NDFi&hl=fr)

Passages from three NGO reports were also used for this report, some of which have been updated. We would like to express our gratitude for this to the respective networks:

- NGO Shadow Report. On the 3rd Country Report of Switzerland to the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Published by: NGO Coordination post Beijing Switzerland, Amnesty International, Swiss Section. Bern, April 2008
- NGO Report on the third periodical report of the Swiss Government to the Human Rights Committee of the United Nations regarding the International Covenant on Civil and Political Rights (CCPR). Bern, September 2009
- Submission to the Committee against Torture on the sixth periodic report of Switzerland, submitted by: Swiss Refugee Council, Humanrights.ch, HEKS / EPER, Augenauf, Schweiz. Friedensrat; Bern, April 2010

«The second and third periodic reports of Switzerland concerning the International Covenant on Economic, Social and Cultural Rights» (E/C.12/CHE/2-3; 14 May 2008), the «List of issues» (E/C.12/CHE/Q/2-3; 4 December 2009) and the «Réponses de la Suisse à la liste des points à traiter à l'occasion de l'examen des deuxième et troisième rapports périodiques de la Suisse concernant les articles 1<sup>er</sup> à 15 du Pacte international relatif aux droits économiques, sociaux et culturels» (E/C.12/CHE/Q/2-3/Add.1, undated) can be found under the following link: [www2.ohchr.org/english/bodies/cescr/cescrs45.htm](http://www2.ohchr.org/english/bodies/cescr/cescrs45.htm).

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# Table of contents

For this report .....	2
The structure of this report .....	3
Table of contents .....	4
<b>Part I: Basic deficits in implementation and the implementation of the Covenant provisions .....</b>	<b>5</b>
<b>A Complete implementation of the Covenant rights in the entire state and their justiciability (questions 1 and 2).....</b>	<b>5</b>
<b>B Establishment of an independent institution for human rights (question 3).....</b>	<b>6</b>
<b>C Extraterritorial obligations (question 4).....</b>	<b>6</b>
a) Right to Health .....	6
b) Right to Food .....	7
c) Tax Policy contrary to Covenant .....	7
<b>D Human Rights Education (question 6).....</b>	<b>8</b>
<b>E Law prohibiting discrimination in all spheres (question 7).....</b>	<b>9</b>
<b>F Involvement of women in political life (question 9) .....</b>	<b>10</b>
<b>G Discrimination against women in working life (question 10).....</b>	<b>10</b>
Effective measures are lacking.....	11
<b>H Combating illegal work (question 12) .....</b>	<b>11</b>
<b>I Combating anti-trade union practices: protection against dismissal for members of trade unions (question 15) .....</b>	<b>12</b>
<b>J Restrictions on the right to strike (question 16) .....</b>	<b>12</b>
Prevention of trade union presence at companies, refusal to negotiate .....	12
<b>K Women in rural areas (question 19).....</b>	<b>13</b>
<b>L Violence against and sexual abuse of children (question 22) .....</b>	<b>13</b>
<b>M Prevention of suicide (question 29).....</b>	<b>13</b>
<b>N Integration of handicapped children in schools (question 33) .....</b>	<b>14</b>
<b>O Protection of the rights of Roma and Yeniche (question 34) .....</b>	<b>15</b>
<b>P Culture of tolerance (question 35) .....</b>	<b>15</b>
<b>Part II: Aliens and asylum policy.....</b>	<b>16</b>
<b>Q Aliens law discriminates against “third-state citizens” (questions 5, 7, 11, 13, 17 and 18) .....</b>	<b>16</b>
Question 5: discrimination between EU/EFTA and “third-state citizens” .....	16
1) Access to a residence permit and the labour market .....	16
2) Prerequisites for integration .....	16
3) Family reunion .....	17
4) Wage discrimination (including questions 13 and 14).....	17
<b>R Living situation of persons who do not have any regular residence status in Switzerland (questions 8, 12, 17, 21, 24, 25 and 32) .....</b>	<b>18</b>
Art. 10 Right to family.....	19
• Questions 20 and 21: Violence against women .....	19
• Question 24: Protection of children and adolescents.....	20
• Question 25: marriage .....	20
Art. 12 Right to health (questions 17 and 18) .....	21
Art. 13 Right to education (question 32) .....	21

# Part I

## Basic deficits in implementation and the implementation of the Covenant provisions

### A Complete implementation of the Covenant rights in the entire state and their justiciability (questions 1 and 2)

As we noted in our statement from 30 October 2009 on the drafting of the «List of issues», social rights are secondary within the Swiss legal system.

The completely revised Federal Constitution of 1999 codified non-binding social goals instead of enforceable rights (see Art. 41 of the Federal Constitution, SR 101). And this is not being subsequently “improved”, either. The provisions of the Constitution applying to the educational system were considerably revised in 2006, following years of preliminary work. The Federal Council, the majority of the Federal Assembly and also the EDK (Swiss Conference of Cantonal Ministers of Education), which in lieu of any Federal ministry of education has a coordinating function, have not only refused to take the right of education in accordance with the International Convention on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child as the basis for the revision, but also to include it in the revision in any form whatsoever. That is why the Federal Constitution still only guarantees the right to education in part, nor is human rights education enshrined in the Constitution. The Inter-Cantonal Agreement on the Harmonisation of Obligatory Schools (HarmoS-Konkordat) listed under item 18 of the Swiss reply is not based on the human right to education, nor does it aim at implementing it. And it is demonstrated once again in item 261 of the Swiss reply how very limited the direct applicability of social rights is, in particular with regard to the right to education.

The Federal Court rules out the justiciability of provisions in the ICESCR in de facto terms; a stance which is also confirmed by the Swiss answer under the items 19 and 22-24.

The Federal Council explicitly rejects the accession of Switzerland to the Optional Protocol to the ICESCR because «the ICESCR is not directly applicable in Switzerland and it is considered to have only a programmatic nature in the Federal Council and the Federal Court of Switzerland» (response to the motion 09.3279 «Ratification of the Additional Protocol to the ICESCR on 20 May 2009» by Evi Allemann). The Federal Council refers to the comprehensive scope of the Optional Protocol in this response as «an extreme demand».

The fact that social rights are not a priority for the Federal Council is also demonstrated by the fact that it allowed a whole decade to pass before issuing its second report on the ICESCR without providing any justification for such.

Moreover, Switzerland has still not ratified the European Social Charter. After the Federal Council and the Parliament had mulled over ratification for years now, but then rejected it in 2004, the Council of States nevertheless had another go at it and on 8 March 2010 directed the Federal Council to review a ratification of the revised Social Charter (10.3004 Postulate of the Foreign Policy Commission. Compatibility of the revised European Social Charter with the Swiss legal system).

The Federal Council confirmed its stance that social rights are secondary in its response to question 1. It explicitly emphasised that it had not changed its stance since 1992 and that it considered the ICESCR to only be of a programmatic nature and that it needed explicit statutory foundations for the implementation of guaranteed rights (item 1 in the response).

It lists a series of rulings by the Federal Court rejecting justiciability without drawing the slightest conclusion from this. With regard to the obligation set out in Art. 13, sections 2 b and c on the gradual introduction of tuition-free attendance of schools of higher learning, it even argues that the provision is superfluous and for

this reason does not even intend to implement it (item 21). Switzerland did not forward any such reservation in the ratification of the Convention, however. It is not considering creating the legal foundations for the implementation of social rights in any area. And it is once again hiding behind federalism, which is to say citing the final legislative competence of the cantons in all areas of social rights.

**We therefore recommend the Committee**

- to call upon the Federal Council
  - to ratify the Optional Protocol to the ICESCR and
  - to ratify the European Social Charter;
  - to draft an action plan for the implementation of social rights in cooperation with the cantons, the communes (in particular the cities) and the civil society;
  - to pass a Federal law obligating the cantons to implement human rights;
  - to bindingly codify economic, social and cultural rights – as well as the right to work, education, health and social security in partial revisions of the Federal Constitution;
- to call upon the Federal Court
  - to review its stance regarding the justiciability of the ICESCR in light of the general comments of the Social Rights Committee, in particular nos. 3 and 9.

## **B Establishment of an independent institution for human rights (*question 3*)**

The pilot project for a university center of competence for human rights mentioned in the Swiss reply may be a first specific step in the direction of an independent national human rights organisation. It would be wrong, however, to interpret this step as a pilot project of such an institution. In its recommendations to Switzerland from 27 October 2009 (CCPR/C/CHE/CO/3), the Human Rights Committee recalls in recommendation 7 «that universities can only perform a limited part of the mandate for a human rights institution.»

**We therefore recommend the committee**

- to call upon the Federal Council, not to be content with the pilot project, but rather to jointly initiate with the cantons concrete preparatory work for an independent national human rights institution in accordance with the Paris Principles.

## **C Extraterritorial obligations (*question 4*)**

We are breaking the reply into three parts: in addition to the right to health and the right to food we are adding international tax policy, which also violates international Covenant obligations.

### **a) Right to Health**

While Switzerland applies a human rights approach to health in its development cooperation, it is supporting trade rules that put at risk its obligations with respect to the right to health in other countries. In its response to question 4, Switzerland states that it seeks to promote the realization of economic, social and cultural rights in partner countries in the context of multilateral and bilateral negotiations (Point 27). In reality, this is not the case in economic and trade negotiations – be it bilaterally or multilaterally – where Switzerland exclusively and assertively defends the interests of its main economic players. The area of intellectual property rights provides a key example, where the country pursues the inclusion of intellectual property rules on medicines that go beyond the standards agreed in the World Trade Organization (WTO). While it is true that access to drugs depends on various factors and that an effective protection of intellectual property can have economic benefits (Point 28), Switzerland does not explain why it seeks protection standards that go way beyond what

has been agreed internationally. Switzerland also professes a general belief that trade and investment liberalization contribute to economic development and growth in partner countries (Point 28) without ever having conducted an impact assessment on how its foreign trade policies and agreements affect the enjoyment and realization of human rights in partner countries.

*For details, see 3D → Trade – Human Rights – Equitable Economy's full report on Switzerland's trade policy and the right to health, submitted to the CESCR in November 2009, is available at: [www.3dthree.org/pdf\\_3D/3D\\_CESCRSwitzerland\\_Nov2009.pdf](http://www.3dthree.org/pdf_3D/3D_CESCRSwitzerland_Nov2009.pdf)*

**We therefore recommend the Committee**

- **to call upon the Federal Council to take into account Switzerland's obligation to respect the enjoyment of the right to health in developing countries in all aspects of its trade policy, in particular by**
  - **respecting the right of developing countries to define their own public health priorities and to use the flexibilities afforded by TRIPS, and**
  - **refraining from promoting provisions that go beyond the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) when negotiating FTAs with developing countries.**

## **b) Right to Food**

Strict provisions on the protection of intellectual property in Switzerland's free trade agreements (FTA) with developing countries risk undermining its international obligations regarding the right to adequate food. These so-called "TRIPS-plus" provisions concern the required accession to UPOV 91 and to the Budapest Treaty, and the protection of experimental data for a certain period of time.

UPOV 91 weakens farmers' rights to save, re-sow, exchange or sell seeds and propagation material of protected varieties, makes it harder to realize the right to food. Consequently, the Special Rapporteur on the right to food warns that «[F]ree trade agreements obliging countries to join the 1991 UPOV Convention or to adopt UPOV-compliant legislation (...) are questionable» (*Olivier de Schutter: Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation. 2009. Report presented to the UN General Assembly, UN doc. A/64/170*).

The Budapest Treaty makes it easier to get patents for micro-organisms in multiple countries. This is, on the one hand, likely to increase the number of patents on plants (which these micro-organisms are integrated into) and, on the other hand, to raise the cost of inputs for the food and agricultural industries. The resulting increase in food prices may compromise access to food, particularly for poorer households, and thus threaten the right to food.

The protection of experimental data prevents suppliers of generic versions of agrochemical products from using them. As a result, no generic versions of a herbicide or pesticide can be registered and therefore used for the specified period of protection (10 years in the case of the EFTA-Colombia FTA). Depriving farmers of access to low-priced agrochemical products may well lead to higher food prices, with harmful effects on the right to food.

**We therefore encourage recommend the Committee**

- **to call upon the Federal Council to conduct a human rights impact assessment of the provisions on the protection of intellectual property contained in its FTAs with developing countries in order to avoid undermining the enjoyment of the right to food protected by the ICESCR.**

## **c) Tax Policy contrary to Covenant**

Swiss financial policy stands in crass contradiction to the principles of the Covenant. Although developing countries lose billions every year through tax evasion to Switzerland which they could otherwise use to secure economic, social and cultural human rights, Switzerland has to date failed to take sufficient countermeasures. Although it has made some progress in recent years in combating money laundering and the return of stolen assets, steps have yet to be taken in the much more important area of tax evasion by individuals.

New double-taxation treaties which make it possible to hand over bank data if there is a suspicion of tax evasion have thus far only been negotiated with OECD member states and economic heavyweights such as India. The only exception is the new treaty with Kazakhstan, which had threatened to place Switzerland on a blacklist of tax oases.

Nevertheless the Federal Council announced at the UN Conference on the Financing of Development in Doha in 2008 that it was willing to offer developing countries an interest-taxation agreement similar to the EU. Switzerland would levy a tax on earnings on foreign assets and remit a portion of the revenue to the countries of origin. The Federal Council confirmed this offer once again before the Swiss Parliament in the spring of 2009. It stated that it would not actively pursue the matter, but that it was willing to seriously review requests for negotiation from developing countries.

**We therefore recommend the Committee**

- to call upon the Federal Council to give up its passive, reactive stance in the area of tax evasion and offer the countries involved a fair solution.

## **D Human Rights Education (*question 6*)**

The relatively long Swiss response to question 6 on the status of human rights education (items 36-44) is more than merely sugar-coated – it is misleading. It is nevertheless not really able to conceal the fact that human rights education in Switzerland is generally speaking poor. It is not a key element of primary school education – as is bindingly prescribed in several human rights treaties. And what importance Art. 35 of the Federal Constitution is supposed to have in connection with human rights education remains the secret of the author of the Swiss reply (item 44).

Switzerland does not have any ministry of education at the level of the Federal state, as education is for the most part the domain of the cantons. The EDK (Swiss Conference of Cantonal Ministers of Education), as mentioned under question 1, has a coordinating role in the educational system. It has never even issued a recommendation on human rights education to date.

As the Swiss answer to items 37-39 illustrates, great importance is attached by the government to «Education for Sustainable Development (ESD)» with regard to compulsory primary education. In the present situation, with «curriculum 21» – a joint project of all the cantons in which German is the language of instruction – all social issues are to be comprised together at a ‘multi-disciplinary’ level: ESD+. This also goes for human rights education. It will thus have to vie for a position with, for example, education in health and traffic. And it is to be feared that, in view of the host of possible topics, it will in specific cases lie within the personal latitude of individual teachers whether and with what emphasis human rights education is given attention in their classes.

Nor is the situation any better in secondary schools and schools of higher learning (vocational education, upper level secondary schools, universities of teacher education), which the Swiss reply does not comment on. Thus, not even Cohep (the Swiss Conference of Rectors of Universities of Teacher Education) in its capacity as the coordination and support body of the universities of teacher education has issued a recommendation on human rights education in teachers’ training. There are no minimum requirements for instruction in human rights, which means that every university of teacher education can take human rights education into account to the degree that it sees fit.

**We therefore recommend that the Committee**

- to call upon the Federal Council
  - to establish sufficient human rights education in a binding manner in those areas of the educational system which lie in the Federal domain of responsibility;
  - to organise systematic further human rights education for all public employees in cooperation with the cantons and communes;
  - to offer more intensive further human rights education with special attention to social rights and their justiciability with the offices in charge of judicial staff;

- to provide human rights education a fixed place in the Act on Further Education, which is currently being drafted, and make financial resources available to promote it;
- to call upon the EDK (the Conference of Cantonal Ministers of Education) in their capacity as the persons in charge of elementary schools,
  - to assign human rights education a fixed place at all levels of school education and make this binding.

## **E Law prohibiting discrimination in all spheres (question 7)**

Legal protection against discrimination in Switzerland is not uniform; it is moreover complicated and full of gaps. Different rules apply depending upon the area (labour, services), sphere (public-law sphere, private sphere) and aspects of discrimination (gender, race, ethnic group and religion, disability, etc.). There are only explicit laws against discrimination in the areas of gender discrimination (Gender Equality Act, SR 151.1; limited to the area of labour) and discrimination against people with disabilities (The Federal Act on Equal Rights for People with Disabilities, SR 151.3; for the most part limited to the area of public law). Thus, criminal penalties are explicitly provided for solely in the area of racial discrimination, which must be granted *ex officio* (Art. 261<sup>bis</sup> Criminal Code. SR 311.0). To protect against discrimination by private parties on the area of labour, housing and services, implicit rules under private law generally have to be applied such as, for example, the principle of good faith contained in Art. 2 of the Civil Code (SR 210), general rules on the protection of personality in Art. 28 of the Civil Code and the protection of personality in the area of labour law, Art. 328 Code of Obligations (SR 220) or, for instance, the general protection against dismissal contained in Art. 328 Code of Obligations.

The Federal Council is generally of the opinion that existing instruments are sufficient (repeated in item 49 of the Swiss reply). It has evidently failed to analyse the fact that these do not apply in actual practice especially in cases of discrimination in the areas of labour, housing and services and thus do not offer any efficient protection in the meaning of Art. 2, section 2 CESCR. Only a few scattered rulings in this area are known.

Actual practice pursuant to the Federal Act of 1995 on the Equality of Women and Men in Employment has shown that the creation of specific rules which make it easier to take legal action against discrimination by persons who have been discriminated against has led to women being able to defend successfully themselves against discrimination on the job. The Gender Equality Act provides for a mediation procedure, which is relatively easy to initiate, and a right on the part of organisations to file complaints or take legal action, a procedure in which the court officially has to clear up a substance matter (through an investigatory procedure instead of the administrative procedure common in civil law), and in certain cases the burden of proof has been eased. The stipulation in the law that the procedure is to be free of charge has proven to be decisive. The Federal Council then recognised the positive effects of the Gender Equality Act in its evaluation. In spite of this, it is not willing to expand this protection to all groups affected by discrimination. The Parliament has also refused to attend to the issue down to the present. Thus far there have not been any initiatives to improve protection against discrimination. Two motions along these lines were defeated without being debated in the spring of 2009. One Parliamentary initiative from 2007 calling upon the Parliament to create a general equality act was rejected by the preliminary commission on the following grounds: such a law would go further than the legal status quo and would weaken the freedom to contract. The National Council rejected the initiative by 117 to 55 votes on 21 September 2009. The recommendations of the Human Rights Committee as well as those of the CERD have not been acknowledged either by the Federal Council or by the Parliament in any form whatsoever, nor have they been included in the discussion.

**We therefore recommend the Committee**

- to call upon the Federal Council to expand anti-discrimination legislation and to act to ensure that the right to non-discrimination can be claimed by all groups affected and that they can all be afforded the same rights.

## **F Involvement of women in political life (question 9)**

In spite of progress, women are still extremely underrepresented in public offices – as they are in higher administrative positions or, for example, in the diplomatic service, even if they will probably make up the majority in the Federal Council for the first time following by-elections (more than 160 years after the establishment of the Federal state and four decades after the introduction of women's suffrage at the Federal level).

In elections, the participation of women has declined compared to that of men. It was 8 % lower in 1995, but 16 % in 2003, an unsettling trend. That is why «sustainable measures», «including temporary special measures» are being taken, as recommended by the CEDAW Committee (*recommendations to Switzerland from 7 August 2009, CEDAW/C/CHE/CO/3*).

**We therefore recommend the Committee**

- **to call upon the Federal Council**
  - **to establish quotas in national legislation and thus assign women a certain percentage of seats in Parliament.**
  - **further develop possibilities for child-care outside the family and make it possible for fathers to take care of the children so that women are allowed to engage in politics.**

## **G Discrimination against women in working life (question 10)**

The Swiss answer to this question is very detailed, addressing items 72-95 on more than three pages. In the wealth of information provided, there is a danger of losing sight of the most important developments, which we sum up briefly.

In spite of an express prohibition against wage discrimination under the Constitution and the Federal Act on Equality between Men and Women (Gender Equality Act), wage equality is far from having been achieved in Switzerland. The numerous measures taken at the Federal and canton level listed in the Swiss answer thus appear to not have achieved major success – or would the situation be much worse without them?

Wage differences have even recently begun to widen once again: they declined steadily after the Gender Equality Act came into force in 1996, but have been growing again since 2008, as the Swiss answer to item 93 concedes.

Nor does the statistical difference (the median wage for women in 2008 was 19.3 % below that of men) provide the entire picture. If one takes into account that part-time work is more widespread among women than men (item 91 of the Swiss reply), the difference in absolute figures is 40 percent.

On top of this, women are disproportionately represented in the low-wage sector (68.8 %). Many professions with low wages are typical “women's professions” (e.g. raising and caring for small children). And the Swiss answer fails to mention that, according to the information contained on the website of the EBG (the Federal Office for Gender Equality) there are scarcely any women in executive positions, only three percent of company management positions are held by women and a mere four percent of administrative personnel at publicly quoted Swiss enterprises are female. Especially women in higher professional positions are moreover at a disadvantage, earning a staggering 30 % less than their male counterparts.

Nor has wage equality been achieved in the public sector, as the newest figures of the Federal Statistics Office show (although the situation here has improved slightly):

- Women working for the Federal government earn on average 12.9 % less than men (previous year: 13 %).
- In the cantons women earned 6595 Swiss francs on average in 2006, about 17.4 % (previous year 19 %) less than men.
- The average difference between female and male wages in local governments is around 8.9 % (previous year 9.5 %). Depending upon requirements, however, there are major differences. In particular, differences in the health, social and educational system have widened.

## Effective measures are lacking

Trade unions are demanding that wage structure analyses (wage controlling) be carried out in the various sectors so that discriminating wage differences for which there are no explanation can be identified and eliminated. Some companies have agreed to solutions involving the social partners and are in the process of performing wage controlling or negotiating non-discriminatory wage systems. These remain a minority, however.

At the Federal level, the Department for Human Resources (Personalamt) has rejected comprehensive (obligatory) wage controlling, citing a Parliamentary initiative demanding just this which had been defeated. And this even though there is an appropriate tried-and-proven instrument (LOGIB) which was even introduced by the Federal government for the public procurement system. It is possible to conduct a review at the level of various offices and agencies, however, and in some cases this has even already occurred. In some cantons Parliamentary initiatives calling for the introduction of wage controlling have been rejected.

We therefore recommend the Committee

- to call upon the Federal Council
  - to lead the way and set a good example as an employer and make wage equality binding in its domain;
  - to require cantons, communes and public corporations to also make wage equality binding;
  - to stipulate comprehensive wage controlling by law and
  - carry on its efforts to help combine family and work and promote a partnership-like sharing of household and family work by women and men by among other things creating more day-care centres and introducing paid paternity leave for fathers.

## H Combating illegal work (*question 12*)

Even though it was possible to boost the amount of labour market controls in the course of the introduction of free movement of persons, there are still dumping problems in numerous regions (especially border regions) and sectors (especially those without any minimum wages in collective bargaining agreements). In these sectors (for example domestic work, chemicals, the clock-making industry, the social and health-care system and temporary work) and regions, the wages of migrants who have recently arrived are in decline.

We therefore recommend the Committee

- to call upon the Federal Council to act to ensure that the government authorities in charge take the following measures:
  - Introduce a standard employment agreement with binding minimum wages for the problem sector of domestic work.
  - If the collective bargaining agreement for temporary work fails in the face of opposition from employers, the Federal government should issue a national standard employment agreement for this sector.
  - Criminal penalties (and not only sanctions under civil law) should be introduced for failure to respect the standard employment agreement.
  - More controls need to be performed in problematic regions (especially border regions like Ticino). These controls must among other things focus on combating sham self-employment.
  - Regional reference wages must not be allowed to decline, as has happened, for example, in the canton of St. Gallen.

## **I Combating anti-trade union practices: protection against dismissal for members of trade unions (question 15)**

Switzerland does not respect ILO Convention no. 98. The ILO Committee for Freedom of Trade Unions came to this conclusion with his decision on the claim of Swiss Federation of Trade Unions (SGB) submitted for it. It called upon Switzerland to amend its legislation and introduce effective protection against termination of employment for trade union members and representatives of staff (with the possibility of reinstatement, e.g. in line with the example of Art. 10 Gender Equality Act. The Federal Council refused to do so, however, stating as grounds that cases of anti-trade union dismissals were rare and that there could be no consensus with the employers' organisations because they were clinging to the dogma of freedom of contracting and termination of employment.

This stance is unacceptable: the fact that protection against dismissal is too weak for active members of trade unions is obvious: if persons are dismissed as a result of trade union activity, then it is possible for this termination to be held to be abusive by a court, but it still cannot be reversed. Employers can be ordered to provide compensation amounting to up to 6 months' wages (generally it is less), which does not have any deterrent effect at all. Item 139 of the Swiss reply is outrageous: it makes a blanket assertion that the reinstatement of dismissed trade union representatives does not conform with the Swiss political, social and legal culture and mentality («la réintégration systématique des syndicalistes licenciés n'appartient pas à notre mentalité politique, sociale ni juridique»). The employers' view is thus adopted as exactly the Swiss view and trade union activity stamped as being virtually un-Swiss.

There were several new cases of trade union representatives or members of human resource commissions who were dismissed in several sectors in 2009 (*inter alia* the retail trade, the machine-tool industry and the media) and regions (among others Geneva, St. Gallen and Zurich). This refutes the assertion of the Federal Council that cases of anti-trade union dismissals are "rare".

**We therefore recommend the Committee**

- to call upon the Federal Council to follow the ruling of the ILO and introduce effective protection against termination of employment against anti-trade union terminations of employment and provide for the reinstatement of victims.

## **J Restrictions on the right to strike (question 16)**

Even though it is set out in the Constitution, the right to strike (Art. 28 of the Federal Constitution) is increasingly being undermined by courts on the one hand affirming the lawfulness of strikes, but on the other hand holding them to be «unreasonable». There is not one single word about upholding the principle of reasonableness in the definition contained in the Constitution, and it is a subject of controversy in jurisprudence theory. Trade unionists have been given criminal sentences in many court decisions in the recent past because their involvement in a lawful strike or a trade union campaign did not correspond to the principle of reasonableness in the opinion of the court.

### **Prevention of trade union presence at companies, refusal to negotiate**

Over the last few years there has been an increasing tendency among employers (e.g. in the retail trade or in nursing homes) to vehemently reject the presence of trade unions at companies and sites, even though the right to collective bargaining is recognised in the Constitution (Art. 28 of the Federal Constitution). Frequently they have attempted to succeed in this obstruction by filing criminal charges, although these have rarely been upheld by the courts.

**We therefore recommend the Committee**

- to call upon the Federal Court in its capacity as the supreme judicial institution to act to ensure that the right to strike is guaranteed in practice.

## **K Women in rural areas (*question 19*)**

A female farmer who is not in an employment relationship does not have any claim to maternity leave. In order to have such a claim, she has to be able to demonstrate that she has at least an employment agreement which sets out that she receives an agreed-upon – although also modest – salary from her husband. Women who work in the agricultural sector at present are advised to conclude such employment agreements. This allows them to receive a claim to maternity leave and a claim to benefits under Old-age and survivors' insurance (AHV - Alters- und Hinterbliebenenversicherung) when they reach retirement age.

We therefore recommend the Committee

- to call upon the Federal Council to expand paid maternity leave to all mothers – whether they be working, employed, self-employed or not working.

## **L Violence against and sexual abuse of children (*question 22*)**

An aegis organisation formed upon the commission of the Federal Social Insurance Office and private organisations has been working on the development of a national child-protection strategy since 2008. The results of the project are not to be implemented beginning in July 2010 as originally planned, however, and alternative measures are not yet known.

Parliament rejected a Parliamentary initiative for a law which was aimed at protecting children from corporal punishment and other bad treatment on 2 December 2008. Among other things, the initiative provided for a prohibition against corporal punishment. The Federal Council has not issued any clear declaration of intent in favour of an express prohibition against corporal punishment, whether this be in the Criminal Code or Civil Code.

We therefore recommend the Committee

- to call upon the Federal Council
  - to implement a national child-protection strategy which in particular ensures a basic array of measures to protect children against violence and sexual abuse throughout Switzerland;
  - to support a campaign for an express prohibition against corporal punishment.

## **M Prevention of suicide (*question 29*)**

The situation regarding suicide in Switzerland is very alarming. Aside from traffic accidents, suicide is the most frequent cause of death among young people between 15 and 24. The suicide rate among 15 to 19-year-olds was 10.18 for every 100,000 inhabitants between 1969 and 2004, while the rate for 20 to 24-year-olds was even 23.16. Moreover, at 37.5 % Switzerland has one of the world's highest rates of households possessing firearms. With around 240 suicides per year, firearms are the most frequent means used to commit suicide among men between 15 and 39.

The question of private possession of firearms is very ideologically loaded in Switzerland. Not only is it closely intertwined with notions of masculinity – it is also associated with the stereotype of the “free Swiss” who will defend their fatherland as militiamen with their personal firearms. That is why in Switzerland – similar to the U.S. – the right to personal possession of firearms is almost sacred. Initiatives to increase controls on the possession of firearms have thus been doomed to failure for decades.

If militiamen no longer kept their personal firearms at home, if they turned in their weapons upon completing military service and the possession of weapons was limited to those persons who are able to demonstrate a need for such, the possession of weapons in society would be massively restricted and would thus constitute one of the most effective suicide-prevention measures among men. This is being demanded by a Popular

initiative for protection against firearms-related violence, which is being resisted, however, by the Federal Council and a majority of Parliament (items 247 + 248 of the Swiss reply).

It was only under the pressure of the Schengen Accord and the Popular initiative for protection against firearms-related violence that Switzerland saw itself forced to adopt minimum European standards in the area of firearms and weapons law and basically to introduce voluntary restrictions on army weapons, which is not expressed in the long Swiss answer (items 242-252).

The Swiss answer to this, playing up slight improvements as if this provided an effective protection of society (point 252), verges on cynical. Nor does it mention that, although a weapons permit has actually been required for every weapon since 2010, there are still tens of thousands of weapons lying around in private households beyond the pale of any controls – the legacy of the lack of any control regime until that point.

**We therefore recommend the Committee**

- **to call upon the Federal Council**
  - **to introduce an effective control regime for the possession and carrying of firearms, including a national weapons register;**
  - **to organise or continue cooperation with the cantons in systematic collection campaigns for weapons which have become illegal;**
  - **to create the foundations for a national suicide-prevention programme;**
  - **to jointly initiate suicide-prevention campaigns together with the cantons and civil society without undue delay; and**
  - **perform systematic surveys and scientific studies on the topic of suicide.**

## **N Integration of handicapped children in schools (question 33)**

Triggered by the financial policy project of the new financial compensation scheme, a revision of the educational system for persons with disabilities has been initiated which holds out the potential for the biggest educational reform of the Swiss educational system to move it from being a highly separating and selective system to a system of inclusive schools. This is because the withdrawal of invalidity insurance from the funding of education of persons with disabilities offers an opportunity to depart from the insurance logic of the past and reorganise things in accordance with educational criteria. As a result of the responsibility of the cantons for education, there is a danger, however, that the equal treatment sought to date by the Swiss insurance system will fall victim to the autonomy of the cantons. The EDK wants to counter this with the Concordat on Special Education, whose aim is to assign integrative measures priority over separating ones. The EDK does not want to ascribe to the adoption of targets spelled out in the UN Convention on the Rights of Persons with Disabilities for the educational system as proposed by civil society, however. And Switzerland has not even signed the Convention to date.

In most of the cantons, the implementation of the Concordat on Special Education is taking place in a phase in which the government and a majority of the Parliament are pursuing an “austerity policy” (following tax decreases). In some cantons changes in special education are explicitly being labelled as savings measures. It is obvious that integration cannot succeed in negatively-charged times and with insufficient financial resources. Recently, to take one example, the canton of Zurich had to abandon its integration strategy.

As was also mentioned in item 287 of the Swiss reply, the closure of special classes (in “normal” school buildings) with the aim of integrating these children in regular classes in contrast leads to an increase in the number of children who are placed in special schools (separate institutions, which have not been discontinued). The reason for this, which is not stated in the Swiss answer, is the fears of teachers in the regular classes that integration would overwhelm them with “difficult” children. Thus insufficient framework conditions for a positive intention can sometimes have the opposite effect in the field of practice.

In everyday life this means that for children with handicaps it is not only the canton which they live in, but frequently the commune or even an individual school which determines whether they are able to benefit from properly functioning integration or whether they are excluded even more than they were before.

We therefore recommend the Committee

- to call upon the Federal Council to sign the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol without undue delay; and
- to call upon the EDK
  - to revise the Concordat on Special Education to conform to human rights requirements set out in the Convention on the Rights of Persons with Disabilities and
  - act to ensure adequate implementation of the Concordat on Special Education by the cantons.

## **O Protection of the rights of Roma and Yeniche (question 34)**

As the reply of Switzerland already indicates, the problems faced by the Roma and Yeniche in everyday life are tending to increase more than decrease – and this even in those areas in which government authorities are looking for constructive solutions. In its amending report, the «Coalition Suisse Romande sur les droits économiques, sociaux et culturels» lists a host of examples of discrimination by the canton of Geneva.

Although with its accession to the European Framework Convention for the Protection of National Minorities (SR 0.441.1) Switzerland recognised the Yeniche as a minority and there are also institutionalised measures to promote their culture and way of life, these are, however, in comparison to other Swiss minorities (e.g. Rhaeto-Romanic speakers) vastly more limited, for example in terms of the funding of cultural institutions, language promotion, the fostering of newspapers, radio and television broadcasts. The rights of Yeniche, Sinti and Roma are not explicitly set out in the Federal Constitution – nor are they in most of the cantons' constitutions. The Federal Council once again stated in its answer to an interpellation (07.3624) in December 2007 that it does not intend to become a signatory to ILO 169 Indigenous and Tribal People's Convention. Long-term and short-term caravan sites for travellers continues to be an unresolved problem.

We therefore recommend the Committee

- to call upon the Federal Council
  - to enshrine the rights of the Yeniche, Sinti and Roma in the Federal Constitution;
  - to strengthen measures to promote their culture and way of life;
  - to require the cantons to establish an adequate number of long-term and short-term caravan sites; and
  - to ratify ILO Convention 169.

## **P Culture of tolerance (question 35)**

The population of Switzerland has become significantly more heterogeneous in ethnic, religious and language terms over the last 15 years. At the same time, right-wing populism has managed to expand its influence by playing on xenophobic and racist imagery.

The Federal Commission on Migration Issues (FCM) and the Federal Commission against Racism (FCR) have not been able to stem the right-wing populist tide with its modest resources. It is clear that national human rights institutions are lacking to initiate a rethinking of policy towards foreigners and asylum-seekers from a human rights perspective. This would be a precondition needed in order to develop a culture of mutual respect and tolerance.

We therefore recommend the Committee

- to call upon the Federal Council to jointly initiate with the cantons the creation of an independent national human rights institution and provide it with a clear mission and sufficient resources for continuous work to bring about a culture of mutual respect and tolerance.

# Part II: Aliens and asylum policy

We do not break this second part down according to questions on the «List of issues», but rather according to the structure of migration policy and its effects, which exclude people in ways ranging from having a precarious status all the way to the point of them *de facto* lacking any rights.

As was stated at the outset, the majority of questions in whole or in part relate explicitly to the migration topic; these are the questions 5, 7, 8, 11, 12, 13, 17, 18, 21, 23, 24, 25, 26, 27, 28, 30, 31 and 32.

Switzerland has to date not developed a systematic integration policy which is based on the dignity and recognition of the equality of all people. This is not only indicated by policy towards aliens, which is based on a non-acceptance of non-European origin (with the exception of a few “highly specialised professions”), but rather above all in the area of asylum policy. For some time now the persons in charge have been doggedly insisting on the need for a policy of rigorous deterrence. One never hears from them that Switzerland is pleased to be able to extend the right to asylum to persecuted people. As a result of the increasingly more restrictive asylum legislation and the objective of the Aliens Act of keeping people from non-EU states (“third country nationals”) out of Switzerland, more and more people are being forced into a precarious status and a situation where they have no rights at all, leaving them exposed to people smugglers and traffickers and exploitation as prostitutes, work in households or agriculture. In the area of naturalisation policy, an image of Switzerland is celebrated which has long since ceased to conform to reality. This entire area of policy has been shaped for years by the Swiss People’s Party (Schweizerische Volkspartei – SVP), which is not averse to methods ranging from xenophobic agitation all the way to whipping up racist hate. This was also the party that helped obtain the ban on minarets in 2009.

## **Q Aliens law discriminates against “third-state citizens” (questions 5, 7, 11, 13, 17 and 18)**

The recent revision of the Swiss Asylum Act and the new Swiss Aliens Act in fact creates three different categories of human beings, whose legal status is clearly distinguished from each another:

- EU citizens, whose legal status is regulated by bilateral agreements in accordance with the EU standard,
- Swiss citizens, who are privileged in relation to political rights, but who are subject to restrictive rules which do not apply to EU citizens in other areas, and finally
- So-called “third-state citizens”, whose presence in Switzerland is only welcome in exceptional cases and whose rights are therefore in *de facto* terms drastically curtailed.

**This different status has a major impact on the economic and social rights of stakeholders.**

### **Question 5: discrimination between EU/EFTA and “third-state citizens”**

#### **1) Access to a residence permit and the labour market**

“Third-state citizens” are placed at a disadvantage compared to EU/EFTA citizens in terms of access to the labour market and access to residence permits. If they want to work in Switzerland, they need to have a residence and work permit, but this is not so for migrants from the EU-17 or EFTA countries, for whom complete Free Movement of Persons has applied since 1 June 2007. “Third-country citizens” only receive a work and residence permit – within the framework of an annual contingent (Art. 20-23 of the Aliens Act) – if hiring them would be in the overall economic interest of the country. Switzerland only wants highly qualified labour power from outside the EU/EFTA.

#### **2) Prerequisites for integration**

There are major differences with regard to the prerequisites for integration to extend a residence permit between EU/EFTA citizens and “third-state citizens”, which are based on the Agreement on the Free Movement

of Persons (SR 0.142.112.681) and developments in accordance with the Schengen/Dublin Agreements (SR 0.362.31). After a proper residence of five years without interruption, EU-/EFTA citizens receive a settlement permit. “Third-country citizens” (except for citizens from the U.S. and Canada) can generally only receive a settlement permit after ten years of proper, uninterrupted residence.

With «Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents», the EU aims to provide legal equality for EU/EFTA citizens and “third-country citizens” in its territory. Switzerland has not yet adopted this Directive, however.

At present migrants have the possibility to obtain Swiss nationality if they have lived legally in Switzerland for 12 years and they meet all the other preconditions for naturalisation. Under a revision which is still ongoing, the Federal government intends to require a settlement permit and residency in Switzerland for eight years by applicants as a formal precondition for naturalisation. “Third-state citizens” must demonstrate that they have successfully integrated in order to be able to receive a settlement permit. The standards for successful integration vary depending upon the canton and commune, however, especially for provisional residents. It is usually a long road to a settlement permit for “third-state citizens”. Moreover, only the period with a residence permit, but not with a provisional status, is counted for naturalisation in Switzerland.

In a propaganda newspaper recently sent to all households, the SVP proposes that aliens who are willing to be naturalised be issued citizenship rights on a probationary basis which can be revoked in the event of criminal delinquency.

### **3) Family reunion**

There are also major restrictions on family reunion for “third-state citizens”. While EU citizens can have their children of up to 21 years of age join them without a problem, family reunion for non-EU citizens must in any case take place before the age of 18 and within the first five years. Children over 12 even have to join their families within a period of 12 months. From an integration-policy perspective, it is indeed an advantage if children join their families early on. It is precisely government requirements which often prevent rapid family reunion, however. One has to demonstrate adequate earnings, that “adequate” housing is available, etc..

If a couple is married, it is mandatory that they live together. This applies to marriages between non-EU citizens, and since recently also applies to Swiss who marry a partner from outside the EU as well. Here the Swiss are at a disadvantage compared to EU citizens and their EU partners. The latter are not obligated to live together, i.e. in the same dwelling. Children from binational marriages with a Swiss parent are only granted a legal claim to a settlement permit until they are 12 years old. While EU citizens can have their children join them without any time limitations, Swiss also have to have their foreign children from third states join them by the time they are 12 within a period of five years and after this even within one year.

We provide a detailed discussion on the differences between family reunion in the NGO Report on the Civil Rights Covenant (CCPR) from September 2009:

([www.humanrights.ch/home/upload/pdf/091008\\_PaktII\\_NGO-Report\\_09\\_eng.pdf](http://www.humanrights.ch/home/upload/pdf/091008_PaktII_NGO-Report_09_eng.pdf)).

### **4) Wage discrimination (including questions 13 and 14)**

Although the Agreement on the Free Movement of Persons has meant many improvements in Swiss migration policy, there are still many cases of discrimination with regard to access to work as well as employment and working conditions. Wage discrimination is considered to be one of the biggest challenges to society in protecting the population of migrants against unjust working conditions. Many studies demonstrate wage discrimination between aliens and the domestic population. The cause of discrimination is often related to geographic origin and can only rarely be explained with individual aspects such as qualifications, professional experience, etc.. Studies have also shown that the more insecure the residence status and the greater the geographic distance to the country of origin, the greater the losses in wages are.

An additional problem is recognition of foreign degrees. The Agreement on the Free Movement of Persons has simplified the recognition of degrees from the EU member states. These provisions do not apply to third-state citizens. Tedious, complicated and unequal recognition and review procedures make it possible to assess degrees, qualifications and experience differently. 40 % of working women from non-EU countries have had university training. Very few well-trained migrants are able to put their educational resources to use, however.

*The four areas briefly examined here raise the following question: How great can the objective differences in the legal status of different categories of aliens be in order to constitute discrimination in human rights terms?*

We therefore recommend the Committee

- to call upon the Federal Council
  - to ratify the Convention on the Protection of the Rights of all Migrant Workers and their Family Members from 1990;
  - to seek a total revision of legislation on aliens which aims at extending human rights to all categories of aliens and avoids discrimination against “third-state citizens” compared to EU/EFTA citizens and
  - as an immediate measure, to ensure
    - that the legal claims and rights of migrants are included in integration laws and regulations – such as, for example, the right to language training and continuing education – and not only obligations are imposed;
    - that the complicated arrangements for family reunion are simplified and rendered uniform in order to afford protection of families (Art. 10, section 1 Convention I);
    - that especially employers and not alien workers are penalised in combating illegal work; and
    - that legal protection of alien workers be strengthened.

## **R Living situation of persons who do not have any regular residence status in Switzerland (questions 8, 12, 17, 21, 24, 25 and 32)**

The living situation of persons without a regular residence status in Switzerland (undocumented persons) has deteriorated dramatically since the last Swiss report. Stricter regulations in alien and asylum law have created new categories of “illegal”: persons who have been issued a legal removal order (in the following referred to as “illegalised” persons – in contrast to people without any identification papers, so-called “undocumented persons”, who are not registered with the police). Illegalised persons are subject both to a prohibition against working and are excluded from social aid. Persons who have received a valid negative notification on their application for asylum are not allowed to work even if the removal order cannot be executed (Art. 43, section 2 of the Asylum Act). At the same time, exclusion from social welfare is imposed without even the bare minimum of aid being provided (Art. 80-82a of the Asylum Act) and the daily allowances with which these people have to meet all their needs are only slightly more than enough to buy a pack of cigarettes. In some cantons such as Basel City, excluded persons only receive a roof over their head during the night and have to spend the daytime on the streets – even in the coldest winter. Various cantons restrict their social aid to families with children and additional injured persons to the provision of emergency aid. Medical aid to ill persons is highly restricted. Some cantons annul the health insurance scheme agreement for unsuccessful asylum-seekers or do not conclude any in the first place – in spite of the insurance obligation – and only pay medical benefits in the most severe emergencies of somatic illnesses (*for more on this see below the discussion regarding Art. 12 CESC*R).

Every type of private assistance to undocumented persons (including illegalised persons) is subject to criminal penalty (Art. 116 of the Aliens Act). Moreover, illegalised persons can be penalised with a maximum of one year of imprisonment as a result of illegal residence (Art. 115 of the Aliens Act) and they can be excluded from or ordered to remain in certain territories (Art. 74 of the Aliens Act). Violations of those orders restricting movement are subject to a sentence up to three years imprisonment (Art. 119 of the Aliens Act). This means that illegalised persons are not only punishable up to two years in custody pending extradition (which will be 18 months at the beginning of 2011 after respective modification according to the EU Directive), but altogether they are subject to criminal penalty up to a maximum of four years imprisonment solely because they cannot be expelled due the fact that they do not have any identity papers. The statements made in item

207 of the Swiss reply to the effect that every person is guaranteed with a decent existence («une existence décente») and, thus, is protected against undignified begging, appears to be, according to the given facts, a little more than pure cynicism.

On top of the illegalised persons, whose numbers have not been recorded anywhere, the Swiss report under no. 64 cites 90,000 undocumented persons (an estimate from the Federal Migration Office) who live in Switzerland under very precarious conditions. As a result of a protest movement by undocumented persons in the years 2000-2002, the Minister of Justice at the time allowed about 2,000 undocumented persons to be legalised. Her successor restricted this once again, however, so that only a very minuscule number of extreme cases received residence. In no. 64 the Swiss report fails to state the reason why the Working Group for Undocumented Persons in the Federal Commission for Foreigners set up in 2005 was dissolved. This working group discontinued its efforts because it was forced to realise after only two years that its work had been worthless, as the Federal Migration Office and most migration authorities at the canton level refused to follow its recommendations. The situation at present is much worse than in 2003.

The platform for undocumented persons (which relief agencies, trade unions, churches, members of Parliament and numerous NGOs are affiliated with) invited the Federal and cantonal authorities to numerous round table meetings in order to discuss the problems of health, enrolment in schools, education and marriage of undocumented persons. While the educational and health authorities showed a willingness to accept certain suggestions from the platform, the migration authorities categorically refused to address the concerns of the undocumented persons and systematically excluded the platform from processes for creating its respective regulations.

## **Art. 10 Right to family**

### **Questions 20 and 21: Violence against women**

Cases of sexual violence against women continue to occur frequently in Switzerland. Moreover, immigrant women without valid identification who file charges against an aggressor will be deported even though they have special residence approval as a result of the nature of the legal procedure.

Here is an instructive example: Ms O. entered Switzerland illegally in 2002. She worked illegally as a domestic servant. After being a victim of sexual violence, she filed criminal charges against the aggressor with the support of several organisations. The government authorities then issued her a residence permit for the duration of the procedure, which ultimately allowed her to work legally. The legal procedure began in 2003 and led to the defendant being found guilty. The woman was recognised as a victim of sexual violence at the first court level. The accused did not accept the ruling and appealed. In spite of this, the Geneva Residents' Registration Office notified the woman that she was to be deported. Her attorney thereupon applied to have the order of deportation rescinded and for the woman to be able to remain in Switzerland until the completion of the procedure. His application was denied. Even though the procedure has yet to be concluded, Ms O. has to leave Switzerland.

Thus, not only is she being penalised for defending herself against the aggressor as a victim of sexual violence – his chances of success in the appeals procedure are also greater because she can no longer testify as victim.

#### **We therefore recommend the Committee**

- **to call upon the Federal Council**
  - **to close the gaps in the protection of victims or take comprehensive measures to protect victims;**
  - **to extend a long-term right of residence to all victims of trafficking in women, violence and exploitation regardless of their willingness to testify, and to offer them the required support;**
  - **to require every canton which has not institutionalised interdisciplinary cooperation to combat human trafficking to do so;**
  - **to submit to Parliament the mission pursuant to ratification of the European Convention against Human Trafficking with comprehensive, effective implementation measures as soon as possible; and**
  - **to actively take part in the drafting of the European Convention against Violence against Women.**

## Question 24: Protection of children and adolescents

Swiss legislation enables the detention of foreign minors from age 15 to 18 pending a final decision, enforcement of expulsion or deportation or when they are refusing to cooperate. Such detention can last up to as much as twelve months.

The practice of different cantons for placing minors in deportation custody is not in line with the human rights obligations of Switzerland. According to the Aliens Act in force, adolescents aged 15 can remain in custody pending deportation up to 12 months, as long as there is a reason for the detention, for example as a precautionary measure in case of flight risk. The National Council Control Committee has published a report in 2006 which brought out, that minors are held in detention on average longer than adults; although according to arrangement about the rights of the child the detention of minors may be used only as a last resort and only «for the shortest possible time» ([www.parlament.ch/f/mm/2006/pages/mm\\_2006-11-07\\_999\\_01.aspx](http://www.parlament.ch/f/mm/2006/pages/mm_2006-11-07_999_01.aspx); in French).

The Committee also determined that there are great differences in the executive code of practice between the cantons. While in some cantons detention of minors is forbidden, in other cantons they are treated with same standards than adults. There are glaring discrepancies in the practices of the different cantons. In fact, 162 out of the 355 cases at that time came from the canton of Zurich alone, followed by Basle-Land with 42 and Berne with 39 cases. In contrast with this, the cantons of Geneva, Neuchâtel and Vaud have enacted internal administrative provisions banning detention pending deportation for minors.

The period of detention for minors was during the period of the study generally longer than that of adults. As the deportation of minors is more difficult to organise than that of adults, as accompanying measures are required, some cantons extend the detention until the minors in question have reached eighteen and special measures are no longer required. Furthermore, the majority of the cantons do not separate minors and adults, or, however, they do separate minors from their families, if they are detained as well.

Three years after the report of the National Council Control Committee the Federal Council passed on 16 December 2009 a new survey which comes to the conclusion that the guaranties of the Convention of the rights of the child are respected during their detention pending deportation. The new report reveals following facts: Between 1 January 2008 and 30 June 2009 there were 71 persons from age 15 to 18 in detentions. One minor was detained as long as 376 days, another 297 days; both of them reached the age of 18 during detention. The length of the detention of the remaining 69 minors ranged between 1 and 116 days:

[http://humanrights.ch/home/fr/Suisse/DH-et-politiqueinterieure/Groupes/Enfants/idcatart\\_9527-content.html](http://humanrights.ch/home/fr/Suisse/DH-et-politiqueinterieure/Groupes/Enfants/idcatart_9527-content.html) (in French).

The human rights organisations insist that no child should be detained because of their status in the immigration procedure. Every child has the right to freedom. When it is absolutely necessary to detain a minor, all the safeguards to protect a child has to be fulfilled and the detention of children must be as short as possible. The minors must be separated from adults but not from their families, when the family is also detained. A special support for the minors should be guaranteed during the whole detention. The standards of detention of minors, which take into account the best interest of a child, should apply in every canton similarly.

Almost exclusively the unaccompanied minors, mostly male minors, are detained pending deportation. Normally they do not receive free legal assistance to help their situation. The appointment of a, so called, «trusted third party» is only foreseen by the law and he/she does not necessarily has to be familiar with legal matters.

### We therefore recommend the Committee

- to call upon the Federal Council to put an end to preparatory detention, detention for refusal to cooperate and detention pending deportation for minors.

## Question 25: marriage

The current legal situation allows marriage for people without identification papers as well. There are already cantons and local communities today, however, which require a residents permit. Parliament adopted a law against so-called sham marriages in 2009. Civil Law (ZGB) is being amended so that migrants who want to marry have to possess a residence permit or a valid visa. This is aimed at ensuring that asylum-seekers who have been legally turned away and aliens living in Switzerland whose status has become illegal and who have to leave Switzerland cannot escape expulsion through a marriage-preparation procedure. This revision of the Civil Code will come into force in 2011. In practical terms, this means a prohibition against marriage for couples in which one of the partners does not have any residence permit, even if the pair has been living

together for many years and/or have had children together. The statements made in item 206 of the Swiss reply are more than euphemistic, as if it would suffice for persons rendered illegal to file a plea for their residence status to be regularised. Approvals for hardship cases are only issued if extremely restrictive conditions are met (*see the instruction of the Federal government from 1 July 2009: residency without gainful employment due to important public interests and severe personal hardship*).

**We therefore recommend the Committee**

- to call upon the Federal Council to respect the human right to marry and revoke the revision of the Swiss Civil Code.

## **Art. 12 Right to health (*questions 17 and 18*)**

Art. 12 of the Swiss Federal Constitution guarantees the right to aid in cases of distress and provides «the right to assistance and care, and to the financial means required for a decent standard of living», which is to say medical care. This right also applies undocumented persons and persons seeking asylum. According to an instruction from the Federal Social Insurance Office from 19 December 2002, health insurers are obligated to include undocumented and all other persons subject to insurance obligations in the obligatory part (basic insurance). At the same time, every person whose place of residence is in Switzerland (i.e. including undocumented persons) must be able to be insured for nursing care. In some cantons, however, this rule is not adhered to with people seeking asylum in order to save costs, even though these would be reimbursed by the Federal government.

The health insurance schemes are subject to the confidentiality obligation, which means they are not allowed to notify the migration authorities about undocumented persons who they insure. In spite of this, most undocumented persons cannot obtain sufficient insurance against illness and accidents because they cannot afford the health insurance premiums. In some cantons they are not able to profit from reduced premiums, either. And if they are not able to pay the health insurance premiums, the health insurance schemes will not pay benefits – a vicious circle.

**We therefore recommend the Committee**

- to call upon the Federal Council to act through effective measures to ensure that undocumented persons can also truly be insured by a health insurance scheme.

## **Art. 13 Right to education (*question 32*)**

Switzerland recognised the right to education of all children without reservation by ratifying the UN Convention on the Rights of the Child in 1997. The Federal Constitution (Art. 29 of the Federal Constitution) and provisions under international law (European Convention on Human Rights, Convention on the Rights of the Child, CESCR and CCPR) obligate Switzerland to protect children and minors and to promote their development regardless of whether they have the legal status of aliens. As far back as 1991 the Conference of Cantonal Ministers of Education (EDK) recognised that all children living in Switzerland must be admitted in public schools without any discrimination whatsoever. This basic principle is also increasingly being applied to attendance of post-compulsory (upper secondary) schools. Legally speaking, access to primary school education in Switzerland is thus non-problematic for undocumented. But again and again the contact offices for undocumented persons are informed about cases in which enrolment in schools poses problems and it is only thanks to the intervention of these offices that children can be enrolled. Access to so-called early promotional programmes (day nurseries, play groups) is a problem, even though there is still very little knowledge on Switzerland as a whole.

One major problem is access to vocational education. Foreigners who want to perform a vocational apprenticeship need a permit for such under Art. 11 of the Aliens Act. In the post-compulsory (upper secondary) area, the human rights treaties which Switzerland has signed take on a greater importance. Article 28 of the Convention on the Rights of the Child also explicitly covers secondary schools providing vocational training (which, however, pupils often attend beyond the age of 18). It is unacceptable that vocational apprenticeships do not have the same legal basis as high schools, with labour law applying to one, and school law to the other. This places young people who are weaker in school and unable to get into high schools at an extreme disadvantage.

Refusing vocational education following the end of primary school not only runs counter to the personal interests of the young people involved – it is not in the public interest, either. This is all the less the case because it forces adolescents to opt out and seek precarious jobs with little offer of secure legal status or future prospects (illegal work). Some of these young people have been born in Switzerland and have completed their entire primary and secondary school education in Switzerland and attained a level of integration which should confer upon them a right to be present there from a human rights perspective. The only possibility remains to be regularisation through recognition of humanitarian hardship cases. In certain cantons it is almost impossible to achieve this recognition as a hardship case, while in the French-speaking part of Switzerland it is easier and occurs more frequently. The criteria for hardship cases are extremely restrictive. Young people without identification papers are still minors when they graduate from school and cannot apply for hardship status independently of their family living in Switzerland. Application for hardship status frequently fails to meet all the strict criteria, but this is the precondition for conferment of this status.

The Association for the Rights of Illegalised Children launched a campaign «No child is illegal» in 2008. Thanks to intensive public relations and lobby work, the topic of undocumented children and young people and fostering access to vocational training and internships are becoming topics of broad public discussion and has been taken to the political stage. Access by young undocumented persons to vocational training is being discussed in eleven cantons. The National Council and Council of States have provided their consent to a motion along these lines which issues the Federal Council a binding order against its will to draft a legislative bill for access to vocational training. The specific bill has to be accepted in both chambers of Parliament once again, however.

**We therefore recommend the Committee**

- **to call upon the Federal Council to submit to the Parliament without undue delay a legislative bill which allows everyone living in Switzerland legal access to vocational training.**