

Civil society contribution regarding the Swiss follow-up and implementation of CESCR's concluding observations No. 9, No. 11 and No. 41 (E/C.12/CHE/CO/4) December 2021

This document was prepared by [the working group "Pact I" of the Platform of Swiss NGOs for Human Rights](#) coordinated by FIAN Switzerland.

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3. Centre de conseils et d'appui pour les jeunes en matière de droits humains (CODAP) - www.codap.org
4. Eidgenössische Kommission dini Mueter (EKdM) - ekdm.ch
5. FIAN Switzerland - www.fian-ch.org
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7. humanrights.ch - www.humanrights.ch
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Recommendation No. 9 'National Human Rights Institution'

Introduction

On the issue of a «National Human Rights Institution» (NHRI) in compliance with the Paris Principles, the Committee on Economic, Social and Cultural Rights (CESCR) made the following recommendations to Switzerland

- Ensure effective mechanisms to guarantee the independence of the NHRI;
- Ensure sufficient resources for proper functioning of the NHRI;
- Ensure a broad mandate to protect and promote human rights, including an adequate monitoring authorization to conduct independent investigations into human rights violations, including economic, social and cultural rights, in all cantons;
- Consider the possibility of examining individual complaints and requests.

The Swiss civil society welcomes [the parliamentary decision](#) in favour of the law on the creation of a NHRI of 1 October 2021. It is a great success that all parties except the Swiss People's Party (SVP) have backed the Law. Swiss civil society – above all the Platform of Swiss NGOs for Human Rights (the NGO Platform), has significantly contributed for over 21 years to the success of creating an independent NHRI.

In principle, the NGO Platform evaluates the law as a good basis for the creation of an NHRI that is able to comply with the Paris Principles. However, in order to guarantee its independence, to ensure the implementation of the tasks laid down in the new law with sufficient resources and thus also to bring the accreditation with the A status within reach, **the financing of 1 million Swiss francs so far intended by the government through its dispatch are by no means sufficient.**

During the parliamentary deliberation, members of Parliament also realised this. Whereas originally there was only talk of "financial assistance", parliament has adjusted the expectation with regard to financing. The adopted law now stipulates that the Federal Council will fully finance the core content of the NMRI's "organisation and activities". The government and the cantonal authorities, and ultimately the parliament, are called upon to provide a contribution to the NMRI that is based on a realistic calculation and is substantially higher.

Independence

From the point of view of the NGO Platform, the law itself in principle meets the requirements of the Paris Principles. In the parliamentary debate, the goal of A status was emphasised by various parties.

In the process now underway to establish an NHRI, the responsible Ministry of Foreign Affairs is committed to involve all important stakeholders. However, the Platform is currently asking the question, if enough human and financial resources have been planned for this preparatory process. **A solid and transparent preparatory and founding process is crucial for the establishment of an independent NHRI.** In this process it must be possible to systematically explore and incorporate the experiences of the Swiss Centre of Expertise in Human Rights (SCHR) – the pilot project of the NHRI –, the best practices of similar NHRIs in other countries, the knowledge of the umbrella organisations GANHRI and ENNHRI, and the needs and capacities of all stakeholders (such as various federal departments/ministries, cantons, civil society, business, universities, etc.).

Sufficient resources

By adding a four-year payment framework to the law instead of only annual financial aid, the Parliament has advocated planning security and has essentially changed the funding modality. The possibility of planning security as well as the expectation of comprehensive financing of the core content of the "organisation and activities" of the NHRI is welcomed by the NGO Platform.

However, **the origin of the federal contributions remains problematic.** The Federal Council is planning to cover the contributions exclusively through the Ministry of Foreign Affairs. From the point of view of the NGO Platform, as well as on the basis of various interventions in Parliament, this would be wrong: firstly, it would mean that those departments (Justice, Home Affairs, Economics, Education, etc.) which are essentially responsible for the implementation of human rights in Switzerland would not be held accountable, neither in terms of content nor financially. Secondly, an increased budget for the NHRI could be at the expense of support for human rights projects abroad, which seems absurd.

From the point of view of the NGO Platform (and also numerous interventions in parliament), the amount of the federal contribution of 1 million Swiss franc (plus infrastructure contributions by the cantons) envisaged in **the government's dispatch fundamentally jeopardises the establishment and consolidation of an NHRI from the outset.** It also calls into question if the NHRI will be able to meet the standards for an A status accreditation. The federal funding of the institution and its activities must guarantee the effective fulfilment of

the tasks in a federalist, multilingual country, laid down in the new law. Careful budgeting for these tasks will be necessary. In budget planning, the Federal Council may also be guided by state contributions available to NHRIs in comparable countries such as Denmark, Germany, the Netherlands or Sweden. For the NHRI to be established in Sweden in 2022, a state contribution of approximately 5 million Euros per year is budgeted. A contribution on this scale also corresponds with the calculations of the NGO Platform.

In its [recommendations to Switzerland of 3 December 2021](#), the Committee on the Elimination of Racial Discrimination (CERD) expressed concern about possible insufficient financial resources for the Swiss NHRI and recommended that the institution be provided with sufficient human and financial resources to carry out its mandate. The same [recommendation](#) was also made to Switzerland by the Committee on the Rights of the Child (CRC) on 27 September 2021. Both committees believe that this is the only way to ensure that the monitoring of the implementation of human rights obligations in the relevant areas is possible.

Broad mandate

The NGO Platform evaluates the general mandate of the NHRI, as laid down in the law, as a reasonable basis for the creation of an independent NHRI. However the NGO Platform regrets that the Parliament, by a relatively narrow margin, voted in favour of **the government's proposal for a closed mandate for the NHRI and not for a formulation open to the future**. It remains to be seen whether, despite this restriction, the future institution will be able to operate sufficiently broad and comprehensive to achieve the A status according to the Paris Principles.

In the view of the NGO Platform the fact that the institution must also be able to monitor and accompany the implementation of human rights obligations at the cantonal level, as the Committee emphasises, is crucial. However, **for a good cooperation with the federal structures, a stronger coordination of human rights obligations in the federal administration is necessary; the resources and mechanisms currently available are unsatisfactory for civil society and should be strengthened as a form of state support for the establishment of an NHRI.**

Examination of individual complaints

According to the bill passed by parliament, **the NHRI will not perform any administrative tasks or ombudsman functions, nor will it deal with individual cases.** When preparing the bill, the cantons had made it clear, that they would only approve of the creation of an NHRI if **it would not have any decision-making power in individual cases.**

The NGO Platform considers it very important that state-funded ombudsman institutions be created at all federal levels for a wide variety of sectors (such as children's rights, police work and much more). In their view, they do not necessarily have to be located at the emerging NHRI.

Recommendation No. 11 'Business and Human Rights'

Introduction

On the issue of «Business and Human Rights» the Committee made two recommendations to Switzerland:

- establish effective legal mechanisms to ensure that companies exercise human rights due diligence (including in relation to supply chains and business partners);
- make further efforts to ensure access to grievance mechanisms when corporations are involved in human rights violations abroad.

The Committee also referred to its general comment No. 24.

To inform the Committee about the implementation of these recommendations to date, Switzerland named in its interim report:

- the revised action plans 2020-2023 on [Corporate Social and Environmental Responsibility \(«CSR Action Plan»\)](#) and on [Business and Human Rights](#);
- the indirect counterproposal to the rejected popular initiative «For responsible businesses – protecting human rights and the environment» (Responsible Business Initiative).

For the implementation of recommendation No. 11 of the concluding observations on the fourth periodic report of Switzerland, **the NGO Platform considers both instruments to be completely insufficient.** Instead, **a strong legislation on corporate responsibility and the participation of Switzerland in the elaboration of [an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights](#) is considered appropriate and has been demanded for years.**

Furthermore, the binding corporate responsibility and the liability for transnational corporations are also in line with the will of the people: **In 2020, the majority of voters approved of the «Responsible Business Initiative», which failed only by a majority of the cantons.**

Action plans

The action plans 2020-2023 named by Switzerland in its follow-up report **do not contain any binding measures** and only have the purpose of «encouraging» and «promoting» responsible corporate governance and

«supporting» companies. Therefore, they do not constitute an implementation of recommendation No. 11. This reveals a fundamental misunderstanding of human rights protection that the Swiss government is subject to: The human rights protection as enshrined in the Covenant cannot be implemented and guaranteed by merely encouraging and supporting measures, but only by binding regulations.

Apart from the fact that the «Business and Human Rights» Action Plan is not a legal mechanism, it was strongly criticized by civil society in the analysis «[Business and Human Rights: Switzerland's new yet incomplete action plan](#)» from January 2020. It concluded that «the 2020-2023 NAP [...] does not constitute in the eyes of Swiss civil society organizations a solid framework for ensuring that Swiss companies respect human rights in their activities, and those of their business partners abroad».

Counterproposal

The amendments which the indirect counterproposal to the rejected «Responsible Business Initiative» introduces, include a non-financial reporting obligation as well as due diligence obligations for a few companies in the areas of child labour and conflict minerals. From the perspective of civil society, **the law is ineffective and hardly suitable for preventing human rights abuses or environmental offences by Swiss corporations.**

Firstly, it is incomprehensible why the regulation is limited to child labour and conflict minerals, which – except for gold – are hardly relevant for Switzerland. Furthermore, the regulation does not cover problems that, in accordance with international standards and developments, are at least as significant, such as forced labour, slave labour, forms of labour which are harmful to health, expropriation, deprivation of natural resources and the increasingly urgent issue of environmental destruction. Secondly, **due diligence remains a «duty» without enforcement** as its violation has no legal consequences. It is precisely this model that, based on an in-depth empirical [analysis](#), has been found to be insufficient in the EU. Thirdly, the definition of the personal scope of the law is largely left to the Federal Council. **The implementing decree provides for so many and excessive exemptions that only very few companies will be affected at all.** In view of the popular vote on the «Responsible Business Initiative», civil society urgently calls on the Federal Council to refrain from further diluting the law.

Law of Corporate Responsibility

After France, in 2021 Germany and Norway have also passed a law on corporate responsibility. Furthermore, the EU for its part will present an EU-wide regulation in early 2022. Switzerland is urgently called upon to follow these examples and to present a law that is suitable for implementing the international requirements and for complying with the recommendations of the Committee. A credible and up-to-date regulation contains at least:

- due diligence regarding all human rights (Universal Declaration of Human Rights, UN Covenants, ILO Core Conventions) and the environment (relevant UN Conventions, CO₂ emissions, biodiversity) for all business relationships (upstream + downstream), prioritised according to the level of risk for abuses and in line with the UN Guiding Principles on Business and Human Rights;
- an effective enforcement mechanism through administrative, civil and/or criminal law to ensure that corporations – and the companies they control – comply with due diligence obligations, that injured parties receive reparation and that restoration is provided for damages.

UN Treaty on transnational corporations and human rights

The ICESCR states in Article 23: «The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions [...]».

Furthermore, in its general comment No. 24, paragraph 35, the Committee welcomes «any efforts at the adoption of international instruments that could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases.» Nevertheless, during the previous seven sessions of the [UN intergovernmental working group on transnational corporations and other business enterprises with respect to human rights](#), **Switzerland has only participated as a passive observer and the government has not issued a negotiating mandate.**

In this respect, **Switzerland also refuses to implement the UNGPs** in a way as recommended by several UN human rights experts in the [Joint Statement of 19 October 2021](#): «The UN Guiding Principles on Business and Human Rights expect States to 'consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights' [...]. Negotiating a legally binding international instrument, which builds on the UN Guiding Principles, should thus be seen as part of this 'smart mix'. [...] victims of corporate human rights abuses continue to struggle in securing effective remedies for business-related

human rights abuses. This must change urgently. And this instrument could play a vital role in bringing this change».

Civil society expects the government to give its delegation a well-founded and constructive negotiating mandate for the 8th session of the Intergovernmental Working Group. Switzerland should advocate for a draft text that regulates, with regard to transnational business activities, the prevention of human rights abuses, access to justice, reparations, international legal assistance and judicial cooperation in the best possible way for those affected.

Only under these conditions will Switzerland fulfil its obligation under international law to protect and fulfil human rights in a binding manner (see also general comment No. 24, paragraph 18).

Recommendation No. 41 'Childcare'

Initial situation

In international comparison, **Swiss family policy scores below average**. There is great potential for improvement, particularly with regard to maternity and parental leave as well as with regard to pre-school childcare and childcare for hours not covered by schools. For example, weeks of leave after giving birth must be raised for mothers, a parental leave needs to be implemented, the number of childcare places for pre-school- and school-children needs to be increased, tariffs must be set in such a way that families no longer have to bear the majority of the costs, and quality must be improved. This requires sufficient public funding and improved national coordination.

Maternity and parental leave

Currently a maternity leave of 14 weeks covering 80% of the salaries is in place. In addition fathers can take 2 weeks off, when a child is born. No larger and flexible parental leave is currently in place in Switzerland. This leads to **the very difficult and unsatisfactory situation that over 80% of mothers do not go back to their paid work place after giving birth, but quit or take unpaid time off**. The mother is protected against firing, from the first day of her pregnancy and for only 16 weeks after the birth. The father has no protection. This leads many fathers not to take their paternity leave.

Another problem occurs when the workplace is dangerous or the work too hard for a pregnant woman. As employers often do not have the problem analysed nor measures taken, despite the legal obligation to do so, it is easier for the woman and her doctor to submit a medical certificate not to be obliged to keep working until giving birth. The introduction of prenatal leave could reduce this problem.

Childcare after maternity leave

Currently, **childcare service is organised mainly by the cantons and municipalities, the Confederation plays a minor role**. Part of the offer is provided by municipalities, the rest by private institutions, the ratio varies from canton to canton. **The large share of the costs is covered by parents**, the rest mainly by cantons and municipalities and to a very small extent by the Confederation. As a result, **childcare service is regulated very inconsistently, there are major differences in quality standards and working conditions, and parent fees also vary widely**. Advocates of federalism argue with the federal constitution, but according to a new legal opinion by Pascal Mahon and Batsheba

Huruy¹, the constitution would allow for more federal competences. A coherent national family policy is therefore not only necessary, but also possible.

Supply and demand

There are **no reliable national statistics on childcare** in Switzerland, as childcare is regulated on a cantonal basis and the Federal Statistical Office is not equipped with the necessary resources. It is therefore difficult to make statements about demand, also because parents often organise themselves privately - with the unpaid work of grandparents, neighbours and by the parents' part-time jobs - due to a lack of alternatives.

According to the Jacobs Foundation's publication "Whitepaper zur Vereinbarkeit von Familie und Beruf: Zwischen Wunsch und Realität" (2017)², the demand for pre-school childcare depends strongly on the costs of the services: According to the study, if parental contributions remain at the current level, 7000 daycare places are needed in Switzerland to meet parental demand, but if parents had to pay only 25% of the full costs, there would be a **need for 36'000 additional places**.

Quality and working conditions

Since childcare institutions are subject to strong pressure to save money due to the lack of public funding and since labour costs make up a large part of the full costs for a childcare place, they often **employ unqualified staff and poorly paid interns** (43% in total) and include them in the childcare ratio. The latter are often insufficiently instructed and are used as full-fledged workers, which does not meet the requirements for high-quality childcare.

Even in the case of trained staff, **working conditions are inadequate and regulated differently from canton to canton**. The number of caregivers per child is often insufficient for cost reasons, resulting in high stress levels for workers and reduced quality of care. Collective labour agreements in pre-school childcare exist only in the cantons of Vaud and Geneva. The situation tends to be somewhat better in public-law employment relationships than in private providers without a collective agreement, but these are also subject to cost-cutting pressures.

Financing

The full costs for a pre-school childcare place in Switzerland, adjusted for purchasing power, are comparable to those in other European countries. But

¹ https://ready.swiss/content/news/20210214-neues-gutachten-zeigt-bundeskompetenzen-in-der-fruehen-foerderung-auf/fr_versiondefinitive_avis_jacobsfoundation_18janvier2021.pdf (24.11.21)

² <https://jacobsfoundation.org/publication/whitepaper-zur-vereinbarkeit-von-familie-und-beruf-zwischen-wunsch-und-realitaet/> (24.11.21)

while the parents' share of the full costs in the rest of Europe is a maximum of 25%, it is 38% in Vaud and as high as 66% in the canton of Zurich. As a result, **parents in Switzerland pay a good fifth of their family income for childcare service** for two children for three and a half days per week, while in the rest of Europe it is only a maximum of 10% (BSV/Infras 2015)³.

The high costs for parents are due to the fact that the public sector in Switzerland invests very little in pre-school childcare: According to estimates by Infras/BSV (2015), it is **only about 0.1% of GDP** (CHF 600 million). The OECD average is 0.8%, in Sweden it is even 2%, i.e. twenty times more than in Switzerland.

The Swiss Confederation contributes to the financing of childcare provision through financial aid. The corresponding federal law came into force in 2003 for a limited period and has since been repeatedly amended and extended, most recently until 2023. On the basis of the Financial Assistance Act, the federal government has contributed an average of CHF 50 million to the costs annually since 2003. A parliamentary initiative wants to abolish the time limit of the law in order to enable stronger support of the offers by the federal government. But this also requires an increase in federal funds.

Currently, the full costs for a childcare place in the preschool sector are estimated at about CHF 120 per day. However, this is too little for high-quality care with good working conditions and enough qualified staff per child. In order to guarantee good quality and working conditions while at the same time lowering parental fees, **the public sector must greatly expand its investment in childcare service**. Financing should come mainly from the Confederation, the cantons and municipalities, but not the families.

Action required

The efficiency logic in the childcare sector must be replaced by an investment logic that makes sense from a macroeconomic point of view and forms the prerequisite for reducing the costs passed on to private households and improving working conditions and quality.

- There is an urgent need for an expansion of maternity leave before (currently 0 weeks) and after birth (currently 14 weeks). In addition Switzerland must introduce a prenatal leave of at least two weeks an adequately paid parental leave policy of several months for both parents. It is not acceptable that families have to cover the costs for care for very early childhood as well as for health recovery of mothers privately by taking unpaid weeks of vacation. Also parents need to be protected against any

³ <https://www.bsv.admin.ch/bsv/de/home/publikationen-und-service/forschung/forschungspublikationen.exturl.html?lang=de&lnr=03/15#pubdb> (24.11.21)

risk of dismissal in case of parenthood, from the first day of the mother's pregnancy until six months after the birth at least.

- In the medium term, **the arbitrary separation of education and childcare must be abolished**: Like school education, childcare service for families and schools should be organised and financed as a public service. This means that all children have the right to a place that meets their needs, that the offer is financed by the public sector and that the quality is uniformly regulated.
- In the short term, **Switzerland needs a coherent national family policy**: According to the legal opinion of Pascal Mahon and Batsheba Huruy, the Confederation has more competences in the organisation of supplementary family childcare than those it derives from the family article of the Federal Constitution, and can therefore **regulate financing, quality and employment conditions more uniformly at national level** than is currently the case.
- There is a **need for national childcare statistics** that provide information on the supply, demand, financing and quality of supplementary family childcare provision in the school and pre-school sector. The cantons must provide the corresponding data and the Federal Statistical Office must be provided with the corresponding resources.