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

For this report

This NGO-Report and the «Propositions of Swiss NGOs for the "list of issues" to be considered by the Human Rights Committee on its survey of the Swiss third periodic report of the Government to CCPR» is elaborated by a working group through participation of:

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Introduction

Our report follows the order of the Human Rights Committee's list of issues from 20 May 2009 (CCPR/C/CHE/Q/3). Due to time and space restrictions, we will limit ourselves to commenting on the issues where we feel extra or corrective information would be of use to the Human Rights Committee when evaluating the third periodic report of Switzerland or where we believe the perspective of civil society to be of particular importance.

Subsequently we will address the issue of the unequal legal status of foreign nationals, which we also believe to be of fundamental importance in the evaluation of the third periodic report of Switzerland.

Our report also contains some updated passages from three NGO-reports. We would like to thank the respective NGO networks for these updated passages.

- **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 Switzerland's fourth, fifth and sixth periodic report to the UN-Committee on the Elimination of Racial Discrimination (CERD), June 2008
- **Second NGO-Report** to the Committee on the Rights of the Child (CRC). Child Rights Network Switzerland, May 2009

Bern, September 2009

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Part I: List of issues

Constitutional and legal framework within which the Covenant is implemented (art. 2)

Question 1: Withdrawal of reservations

Here we will confine our comments to the *reservation to article 26 CCPR* (full protection of the law). There are no evident efforts to indicate that the reservation will be withdrawn. The Federal Council still argues that it is important to avoid the scope of application of article 26 going beyond that of article 14 of the European Convention on Human Rights (fig. 353 Third Periodic Report of Switzerland)[1]. Switzerland has, therefore, neither ratified nor signed the additional protocol no. 12 to the European Convention on Human Rights (ECHR) of 4 November 2000, which sets forth a general, unconditional prohibition of discrimination. In terms of steps to combat contraventions of the prohibition of discrimination, the situation thus remains unchanged to the present day and an "effective" remedy in the meaning of article 2 paragraph 3 CCPR is not possible either nationally (due to article 191 of the Federal Constitution[2], which states that Federal Acts are authoritative for law-enforcing bodies) or at international level for all Federal Acts which contravene the Covenant.

Question 2: Accession to the first Optional Protocol

Although the Federal Council has described the *individual complaints procedure* as desirable on several occasions and its ratification was still included in the legislative program 1999-2003, the topic has disappeared from the political and administrative agenda over the last few years. Switzerland did however ratify the optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 29 September 2008. The NGOs fail to understand why the optional protocol to the CCPR is not being acceded at the same time. Switzerland is one of the few States in Europe, which does not guarantee the right to the individual complaints procedure according to the CCPR.

Question 4: National human rights plan / Requirements for the cantons and communes / National human rights institution

With regard to the problem that Switzerland does not have any *proper mechanisms to ensure the implementation of human rights in all cantons and communes*, no progress has been made since the last review. Respect for the autonomy of the cantons and communes is often cited as the reason by the Confederation for not assuming its responsibility in this area. Information on the obligations arising from the CCPR scarcely reaches the public or the cantonal or communal bodies. The concern the Committee voiced in number 6 of its recommendations of November 2001 with regard to the federal structure of Switzerland is therefore still legitimate.

In conjunction with this it is important to mention that in many areas *no data is available* to be able to judge the implementation of the rights of the Covenant.

The *lack of a national human rights institution* (NHRI) is particularly lamentable in this regard. A decision from the Federal Assembly on the demands for such an institution has been pending for around 8 years now (see fig. 367 of the Third Periodic Report of Switzerland). In July 2009 the Federal Council came to the conclusion that the creation of a NHRI would be «premature»; it simply intends to contract selected university institutes to provide certain services in the field of human rights for a pilot period of five years.

Question 5: Application of art. 50 of the Covenant

As already mentioned in question 4, the Confederation is largely shirking its responsibility of encouraging cantons and communes to implement the Covenant. Accordingly, there is virtually *no institutionalised mechanism to coordinate activities and exchange information between the Confederation and cantons* on the recommendations of the Committee (which applies in a similar way to all the convention committees). The recommendations were not translated into the official Swiss languages, although French happens to be a UN language (see also the comments on question 22). Switzerland also did not issue a mandate to the German translation service of the UN for the translation of the recommendations concerning it.

Principle of non-discrimination and equality between men and women (arts. 2, 3 and 26)

Question 6: Federal law prohibiting discrimination in all spheres

Switzerland faced criticism not only from the Human Rights Commission but also on occasion from the CERD and the Human Rights Council during the UPR process because of the lack of legal protection against discrimination – especially against discrimination by private actors. *Legal protection against discrimination* in Switzerland is therefore *inconsistent, complicated and incomplete*. Different rules apply depending on the area (work, services), sphere (public or private) and grounds for discrimination (gender, race, ethnicity and religion, disability, etc.). Explicit discrimination laws only exist in the areas of gender discrimination[3] (confined to the field of work) and discrimination against persons with disabilities[4] (largely confined to the public sphere). In the area of racial discrimination, criminal law does guarantee explicit protection, which will be provided *ex officio*[5] (article 261[bis] of the Criminal Code). For protection against discrimination by private actors in the areas of work, housing and services, however, people have to rely on implicit rules under private law (for example, the principle of good faith in article 2 of the Civil Code - *ZGB*[6], general rules for the protection of personal dignity and rights in article 28 *ZGB* and the protection of personal dignity and rights in labour law in article 328 Code of Obligations - *OR*[7] or general protection against dismissal in article 328 *OR*).

The Federal Council often asserts that the existing instruments are sufficient. The fact that these are not applied in practice, above all with regard to discrimination in the fields of work, housing and services and that they consequently do not provide the effective protection according to article 2 of the CCPR, for all we can see, received no attention from the Council at all. Only a handful of relevant judgements are known, two of which stretch all the way back to the nineteen-eighties or nineties. As proof of the suitability of the existing laws, it is generally two more recent judgements that are cited, in which a Lausanne and Zurich court ruled that there had been discrimination during recruitment processes. In one of these cases a woman was not recruited by a private old people's home because of her skin colour; in the other case a woman was refused the job as a cleaner because of her origin or because she wore a headscarf. But there is no known case, for example, in which someone successfully invoked the general protection of personal dignity and rights of article 28 *ZGB* to protest discrimination for example due to sexual orientation, ethnic origin, religion or on the grounds of age. But also the protection provided for in the Code of Obligations, for example in case of labour law-related disputes, where certain simplified proceedings are set forth for a litigation sum of up to CHF 30,000 (as per article 343 *OR*), has, to our knowledge, yet to be successfully invoked in discrimination cases.

The Federal Act of 1995 on the equality of women and men at work, on the other hand, showed that in practice, the creation of specific rules which make it easier for victims of discrimination to take legal action, led to women successfully standing up to discrimination at the workplace. The Equality Act provides for a – low-threshold – arbitration procedure, a right of complaint and action for organisations, a procedure according to which the court is officially obliged to clarify the facts of a case (investigative procedure instead of the principle of free disposition usually applied in civil law) and, in some cases, an easing of the burden of proof. What proved to be decisive was the cost-free nature of the proceedings provided for in the Act. The Federal Council did then recognize the positive effects of the Equality Act when it was evaluated. Nonetheless it is not willing to extend this protection to all groups subject to discrimination. The Parliament also continues to this

day to refuse to attend to the issue. It has yet to respond to a single initiative to improve protection against discrimination. It dismissed two motions in this vein in the spring of 2009 without discussing them.[8] A parliamentary initiative submitted in 2007 calling upon the Parliament to create a General Equality Act was rejected by the preliminary commission without detailed discussion on the following grounds: «Even though it [the Commission for Legal Matters] considers legal equality and the constitutional prohibition of discrimination to be central, in this area the majority of the commission does not see a need for further legislation. (…) If the demanded act is not intended to go substantively beyond existing law but simply be symbolic or serve only prevention purposes, then it must, on principle, be rejected as superfluous. If the act is to go further – for example, by introducing a reversal of the burden of proof, then this can lead to real difficulties in practice, for example in labour law or in tenancy law. The principle of contractual freedom would be undermined. On these grounds the majority proposes not to pursue the initiative.» On 21 September 2009 the National Council voted not to pursue the initiative by 117 to 55.[9] The recommendations of the Human Rights Committee and those of the CERD have not been acknowledged in any official way and included in the discussion by either the Federal Council or the Parliament.

Question 7: Strategy to combat racism

Switzerland acceded to the UN Convention on the Elimination of All Forms of Racial Discrimination in 1994 and created the Federal Commission against Racism for this purpose, later going on to create the Service for Combating Racism (SCRA) to support it. This did not, however, lead to a joint strategy by the Confederation, cantons and communes for combating racism. In relation to the question of what Switzerland has done to counter stigmatisation of foreigners, we would refer to the recommendations of the Committee on the Elimination of Racial Discrimination on the third periodic report of Switzerland of 15 August 2008 (CERD/C/CHE/CO/6) [10]:

7. The Committee notes with regret the lack of substantial progress made by the State party in combating racist and xenophobic attitudes towards some minorities, including Black persons, Muslims, Travellers, immigrants and asylum seekers. It is particularly concerned at the hostility resulting from the negative perception by part of the population of foreigners and certain minorities, which has resulted in popular initiatives questioning the principle of non-discrimination. The Committee regrets that in the period covered by the report, the prohibition against racial discrimination had to be defended against repeated attacks in the political arena, including demands for its abolition or restriction.
   The Committee urges the State party to further intensify its efforts in education and awareness raising campaigns to combat prejudices against ethnic minorities and promote inter-ethnic dialogue and tolerance within society, in particular at the cantonal and communal level. The State party should consider implementing the recommendations made by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance following his visit to Switzerland in 2006, as well as the relevant recommendations made by the Working Group on the Universal Periodic Review in 2008.
9. While noting that the Convention forms an integral part of the Swiss legal system and that some of its provisions may be directly invoked before the Swiss courts, the Committee remains concerned at the lack of comprehensive civil and administrative legislation and policies to prevent and combat racial discrimination in all areas, and at the fact that only ten cantons, out of 26, have enacted anti-discrimination laws.
   The Committee invites the State party to adopt a national plan of action and legislation at all levels of government against racial discrimination, xenophobia and other forms of intolerance. The State party should devote adequate financial resources for the implementation of the Convention, and ensure that the plan of action is integrated with other mechanisms for the implementation of human rights in Switzerland.
10. The Committee (...) notes that the Federal Commission against Racism (FCR), which is responsible for preventing racial discrimination and promoting inter-ethnic dialogue, has not been provided with adequate funds.
    The Committee (...) reiterates its recommendation that the means of the Federal Commission against Racism should be strengthened and recommends more regular dialogue with the FCR.

Question 8: Immigrant women who are the victims of domestic violence

Abused women whose residence status is uncertain or depends on their husband continue to find themselves *in a particularly vulnerable situation* because they have to fear the loss of their right of residence in Switzerland should they separate from their husband. Consequently, because of that fear these women often do not make use of the support services available at all, or the option of filing a complaint and they certainly do not press charges.

Political endeavours to create a residency entitlement for abused migrant women enshrined in federal law failed. In the new Aliens Act (AuG)[11] as well, only a "can" provision was introduced. Furthermore, this law makes the right of abode dependent on the degree of "integration". This is measured in terms of integration in the labour market (generally not fulfilled by women who take care of the home and the children), integration within the community and in society as a whole. Often, Swiss children are also forced to leave the country, as the foreign mother is refused residency in Switzerland and the children under the age of majority follow the mother abroad.

- In the field of residency stipulations for female foreign nationals, clear, openaccess criteria and monitoring mechanisms need to be introduced so that abused migrant women do then actually receive right of residency. Cantonal foreign nationals departments must be better sensitised to the issue of domestic violence and better trained in this area. Special strategies to protect abused migrant women must however in no way be linked to culturalistic, racist argumentation strategies and measures.
- The cantons absolutely must use their discretionary freedom in implementing these legal stipulations on foreign nationals to the advantage of the women concerned to as large an extent as possible.
- In order to maintain a clear overview in the federal system, the Federal Statistical Office in cooperation with the Federal Office of Police must regularly compile meaningful data for the legal institutions, other public authorities and the parliaments on all levels.

Right to life (art. 6)

Question 9: Inadequate regulation of firearm possession

The strong firearms lobby in Switzerland has prevented strict legislation on firearms for many years. It was not until the accession to the EU Schengen Agreement that Switzerland was practically forced to adapt its firearms law to fall in line with European minimum standards. Regardless of this legislation, members of the army are still obliged to store their weapon at home until they have completed their military service. In response to pressure from a Popular initiative for more restrictive firearms legislation, this is now meant to be improved by allowing members of the army to voluntarily hand over their firearms to an armoury for storage, which, however – above all due to the inconvenience associated with this – will only be made use of by a small minority. In addition, members of the army still have the right to keep their service weapon upon completion of military service. As a result, the army distributes hundreds of assault rifles amongst the population every year. Amongst young men, firearms are the most frequent means to commit suicide as they are easily accessible and have generally deadly effects. Stricter firearms legislation would be a simple way of reducing a relatively high suicide rate by international standards.

Prohibition of torture and of cruel, inhuman and degrading treatment (art. 7)

Question 13: Members of minorities / Independent observers

Only a few cantons (as far as is known these are Basel-Stadt, Schwyz, Geneva, Bern and Neuchâtel) hire *police officers from minority groups*. There are legal obstacles to hiring people with a migration background in many cantons. The cantons require Swiss citizenship as well as a low maximum age. Basel-Stadt's policies can

be mentioned positively, as the police law has allowed the possibility of recruiting migrants without Swiss nationality for some time now. Additionally, the recruitment age was raised to 40 years old and part-time employment will be permitted.

Question 14: Stun guns and police dogs

Back in its consultation phase it was possible to persuade the Federal Council that the use of «Taser» weapons during deportations is inappropriate. Not the majority of Parliament, however, which definitively incorporated the use of stun guns into the Federal Law on the use of coercion and police measures in March 2008[12].

Although stun guns are described as «non-lethal weapons», in the USA and in Canada, according to an investigation by Amnesty International between 2002 and late 2007, around 300 people died of the direct or indirect consequences of the use of a «Taser». To date there has been no full and independent study on the use and effects of stun guns. This applies in particular to use against people suffering from heart conditions, under the influence of drugs or exposed to a special stress situation, as are those who are to be forcibly repatriated.

The use of stun guns («Tasers») is therefore completely excessive as part of coercive measures to repatriate foreign nationals. As part of a campaign «Menschenrechte gelten auch im Polizeieinsatz» (human rights also apply during police work), the Swiss Section of Amnesty International spoke with many police commanders who spoke out clearly against acquiring Taser guns for their police force. And even various chiefs of police who have introduced the use of Tasers in their forces viewed their use during forcible removal as completely excessive.

The use of dogs as an aid during coercive measures is also totally excessive. All the more so because, in the majority of cases, they are not used on criminals or dangerous people but on foreign men and women whose only offence is to be on Swiss soil illegally. Although the dogs may be a useful aid to police, especially for drugs searches, they are equally a tool of intimidation or even humiliation. This fear can cause additional tension and result in panic and escalation when coercive measures are being applied.

Rights of aliens and right to privacy, protection of the family and protection of minors (arts. 13, 17, 23 and 24)

Question 16: Free legal assistance to asylum-seekers

Free legal assistance is fundamentally guaranteed by the Federal Constitution (article 29) under certain conditions (the party's lack of necessary means, that the case appears to have a chance of success, the need for legal representation). In the case of asylum seekers, this guarantee is interpreted restrictively and requests in this vein fail regularly at the hurdle of the case's likelihood of success and the need for legal counsel. So before this guarantee can be made use of, it is first necessary to enable asylum seekers to access initial legal advice in the first place.

In accordance with the Asylum Act or the Asylum Ordinance 1[13] on procedural matters, consequently *access to legal advice and legal representation* must also be ensured.[14] The "cost-free nature" of this advice, however, is guaranteed by charities and other non-governmental organizations, which exercise their activities for the most part without public funding and which they attempt – as a result of the increasingly xenophobic atmosphere in society and politics in recent years – with ever greater difficulty, to finance through donations.

In practice access is not always guaranteed, for example, because advice centres are too far away from the reception and procedure centres (legal advice is not permitted in the centres) or the asylum seekers are not permitted to leave the centres in the first place or because the charities cannot staff the advice centres round the clock due to a lack of resources.

For asylum seekers, as for other foreign nationals (for example those in detention awaiting deportation) even just access to legal counsel thus proves to be very difficult in many cases.

The Swiss Refugee Council, *Schweizerische Flüchtlingshilfe*, and other relevant NGOs have therefore, for a long time, called for free legal advice for asylum seekers, especially for asylum seekers who are affected by a non-admission decision and only have a period of 5 days to appeal the decision. Authorities often cite the lack of a legal foundation to set up free legal advice. With the power structures that currently prevail in the Federal Parliament, extending legal and human rights protection does indeed prove extremely difficult.

Question 17: Living conditions of asylum seekers

The NGOs are concerned about the *treatment of asylum seekers who are excluded from social benefits* on account of a rejection decision or a negative asylum decision.[15] The authorities as well as a part of the population are only partly aware that human rights count for all people, thus also for the rejected asylum seekers. According to article 12 of the Federal Constitution, these people have a right to be helped, to be cared for and to the means that are essential to a humane existence. Nevertheless, the assistance provided in many cases, does not allow for a life in dignity. In some cantons *the money allocated* for everyday survival *is barely enough for sufficient food* (e.g., Solothurn canton pays 24 CHF per day for a 5-member family). Above all families and children suffer from the minimum everyday support and *the often very precarious lodgings* assigned to them, e.g. small, or remote and difficult to reach. Nevertheless, it is alarming that the legally introduced possibility to exclude asylum seekers from the social benefits has led to the fact that these persons are generally treated as *without any rights*. They are looked at as burdensome, controlled and moved around by the authorities. A string of cantons (Solothurn, Zurich, Vaud, Bern, Grisons) have gone over – as another example – to *refusing the basic services of the health insurance schemes* to rejected asylum seekers and they have asked hospitals and doctors to assist legally rejected asylum seekers only in emergencies.[16] As the Federal Office for Health also confirmed, this practise stands in contradiction to the health insurance law that requires insurance obligation for all persons resident in Switzerland.[17]

Swiss legislation provides for the *detention of foreign minors* between the ages of 15 and 18 during the preparation of the decision regarding their residence entitlement, for the enforcement of expulsion or deportation or for refusal to cooperate. Such detention *can last up to as many as twelve months*.[18]

355 cases of detention of foreign nationals aged between 15 and 17 were recorded from 2002 to 2004.[19] Detention pending deportation concerns almost exclusively unaccompanied, for the most part male, minors. The period of detention for minors is generally longer than that of adults.[20] 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.

There are glaring discrepancies in the practices of the different cantons. In fact, 162 out of the 355 cases come from the canton of Zurich alone, followed by Basle-Land with 42 and Bern 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.

No child should be placed in detention because their only crime is to be unaccompanied, nor because of their status from the perspective of immigration or residence legislation, nor due to such regulations. Every child has the right to freedom. Moreover, the stipulated period of detention is too long and minors are not systematically separated from adults. This contravenes articles 9 and 10 of the CCPR.

Protection of minors (Art. 24)

Question 20: Prevention of sexual abuse

Switzerland *lacks a national, representative database on cases of child cruelty and abuse*. Data from the child protection group of Zurich Children's Hospital shows an increase in 2008 in the suspected cases reported or discovered there. The Swiss children's clinics now want to coordinate the statistical analysis of their

experiences nationwide. There are still gaps in the data on child cruelty and abuse which does not come to light in paediatric clinics.

Switzerland lacks national, representative studies on the prevalence of sexual violence against children. The experts of the «Detailed concept for a national child protection program» project[21] assume that a third of all *sexual assaults on children* are carried out by – mainly male – minors. Violent behaviour at an early age is considered an early warning sign and early sexual delinquency as a risk factor for re-offending. Early detection backed up by prevention for sexually conspicuous minors is therefore an important approach in a strategy to combat sexual violence against children.

The civil-law child protection measures in Swiss legislation (article 307ff of the Civil Code - *ZGB*) set forth staggered intervention possibilities, which range from support for parents to removal from parental custody or care. As part of the National Research Program 52[22], the actual practices of the cantons regarding these provisions were investigated. The study showed, *inter alia*, worrying differences from a rule of law perspective in the type and frequency of measures between the different cantons and authorities, with direct harmful effects on the children concerned. For example, for children living in places where authorities lack experience, regardless of the severity of the case, more drastic measures are ordered than in places with authorities with experience of such cases.[23]

The revised law on guardianship now contains the new provision in article 440 para. 1 *ZGB* that the child protection authority must be a specialist authority. Unfortunately there are no further stipulations regarding cantons' organisation of authorities. We therefore fear that at least in individual cantons, even basic prerequisites for an authority to act competently, such as interdisciplinary organisation or the size of their catchment area, are not in place.

A *study* was compiled for the National Research Program 52 *on domestic violence* from the perspective of children and adolescents.[24] It shows that measures and intervention practices against domestic violence are strongly geared towards victims and offenders, whilst the degree to which children are also affected is underestimated. In the framework of this study and the «Detailed concept for a national child protection program» project, measures have been developed. These include guidelines on when to involve the child protection authorities or on how to proceed when police intervention is required in domestic violence cases (use of trained police or the involvement of trained youth workers). Further measures are a timely and independent clarification of the children's situation and the development of easy-access information, advice and specific support services for children who grow up in the context of domestic violence.

Thus the following appeal to Switzerland; it should

- compile a representative set of statistics on reported cases of children at risk, suspected and proven cases of cruelty and abuse from all child protection centres and authorities and conduct a representative study on the prevalence of sexual violence against children.
- take steps for the early detection of sexually deviant minors accompanied by appropriate prevention.
- ensure, when implementing the new guardianship law, that competent specialist child protection authorities are used, with a territorial catchment area of between 50,000 and 100,000 inhabitants.
- develop concepts for school prevention of domestic violence and specific forms of intervention and take nationally coordinated measures to support children growing up in a situation of domestic violence.

Rights of minorities (art. 27)

Question 21: Travellers

For over 30 years now, the representatives of the travellers point to *the shortage of stopping places and transit sites* as well as to the increasing restriction of the customary law on spontaneous stopping in most regions in Switzerland. Task forces, various foundations as well as cantons have confirmed this lack and also the report of the Federal Council on the situation of the travellers of 2006 recognises the problems.[25] Nevertheless, neither the Federal Council nor the Swiss legislator show a consistent will to confront this situation with

effective measures. The Federal Council promised to clarify whether earlier military areas of the Federal Department of Defence, Civil Protection and Sport (DDPS) cannot be used as stopping places and transit sites in the next few years. However, otherwise it refers to the fact that measures in the area of spatial planning are the responsibility of the cantons.

Barring a few exceptions, the cantons and municipalities lack the will to leverage according to the Federal Court decision of 2003 the rights of the travellers. It is partly stated that there is not enough space available for travellers, what is unequal in this respect is that space is made available for the leisure facilities of other groups, such as golfers, glider pilots and campers. Partly the municipalities explain their idleness with the fact that it is difficult to persuade the population to make zoning and building adjustments, so that travellers have a stopping place and transit site. Also financial arguments are brought forward and demands that the creation of places must be cost-neutral. There are, however, positive examples, such as the Canton of Grisons or the City of Zurich. They established and are establishing these places generally without the polarising referendums about whether the settled majority of the travelling minority should concede a place in the whole territory or not. Majority votes about the rights of minorities can probably help lead to a better legal status, as in the case of the Jura people who went from a minority in a canton to establishing their own canton. On the other hand, such votes run the risk of affecting the fundamental rights of minorities and possibly equal and free religious practice (cp. kosher ban, minaret ban). Where the non-transient majority votes on the right of the transient minority to stay in the municipal, regional or whole-state territory, the existence right of this minority is questioned and negated by a negative vote. In most regions where a satisfying regulation of the claim of the transient minority to minimum spatial resources could be found, this was reached without referendum. There was a case in 2006 in the Canton of Aargau, Municipality of Spreitenbach, where a Yenish family had to give up a pitch to a department store. But with the help of the Radgenossenschaft and the canton, they were able to find a new place, although two municipal votes had rejected a zone for such a pitch before. It was helpful that there was a passage concerning transient ethnic minorities in the Canton of Aargau's Constitution (as mentioned in the official report).[26] A similar passage is found only in the Constitution of Basel-Land. For the new Canton of Zurich's Constitution, it was rejected by the Constitutional Council in December 2002. The mention is also absent in the current Federal Constitution of 1999. It would be desirable for the existence and the rights of the transient to be explicitly mentioned in all cantons' as well as in the Federal Constitution.

Dissemination of information regarding the Covenant and the Optional Protocol (art. 2)

Question 22

The *importance of the International Covenant on Civil and Political Rights* (CCPR) – and that of the International Covenant on Economic, Social and Cultural Rights (CESCR) – for the Swiss public is *still very low*. This is connected with the fact that the authorities responsible are making no effort whatsoever to publicize the Covenants: neither the Concluding Observations of the Committees nor the periodic reports are widely publicized. The current, third report of Switzerland on the CCPR was submitted to the Committee without informing the public[27]. The report was compiled without any contact whatsoever with civil society. The recommendations of the Human Rights Committee from 1996 and 2001 were not translated into German, Italian and Rhaeto-Romanic.

Part II: Revised Asylum Act and new Aliens Act

In addition to the questions raised in the «list of issues», we would also like to draw the Human Rights Committee's attention to the following issue:

Unequal legal status of foreign citizens (Art. 2, 7, 12, 13, 17, 23, 24, 26)

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 one another:

- EU-citizens, whose legal status is regulated by the *bilateral agreements* between Switzerland and the EU.
- Swiss citizens, who are privileged in relation to political rights, but who are subject to *restrictive rules*, which do not apply to EU-citizens, and finally
- So-called "Third-State citizens", whose presence in Switzerland is welcome only in exceptional cases and *whose rights are therefore drastically restricted.*

We would like to demonstrate this using the example of the legal stipulations governing family reunion for foreign nationals.

1. EU Citizens

The legal stipulations governing family reunion for foreign nationals from EU countries and non-EU countries differ in Switzerland. Due to the Agreement on the Free Movement of Persons between Switzerland and the EU[28], the rules are as follows for family reunion for family members from EU countries:

Art. 7 lit. b of the Agreement on the Free Movement of Persons governs the residency right of family members regardless of their nationality in accordance with appendix 1 of the Agreement. In accordance with article 3 para. 2 appendix 1, spouses and relatives in the line of descent who are younger than 21 years old and relatives of the spouses in the line of ascent being provided for qualify as family members. In addition to this, art. 3 sets forth preferential family reunion for other family members being provided for or who live in the same household in the country of origin.

On the basis of this provision EU citizens and their spouses (irrespective of their nationality) have an entitlement to family reunion for:

- spouses,
- children up to the age of 21,
- parents, grandparents of the spouses, if they are being provided for.

2. Nationals of non-EU countries

Family reunion for foreign nationals from non-EU countries is governed by the Aliens Act that entered into force on 1 January 2008. The provisions of the Aliens Act primarily apply only to non-EU citizens. The provisions of the Agreement on the Freedom of Movement of Persons also apply for the spouses of EU citizens who have the nationality of a third country, not those of the Aliens Act. Family reunion in the Aliens Act is governed by art. 42ff. The provisions can be resumed essentially as follows:

a) For family members of Swiss nationals and persons with a settlement permit

Foreign-national spouses and unmarried children under 18 of Swiss nationals and those of foreign nationals with a settlement permit are entitled to family reunion and consequently the issue of a residence permit.[29]

b) Family members of persons with a residence permit or short-term residence permit

Foreign-national spouses and unmarried children under 18 of persons with a residence or short-term residence permit can be permitted to join them, if they a) live together, b) a suitable apartment is available and c) they are not depended on social welfare benefits.[30]

c) Time-limits for family reunion

Pursuant to art. 47 Aliens Act, the claim to family reunion must be asserted within five years; for children over the age of twelve within 12 months. These time-limits begin

- for family members of Swiss nationals upon their entry into Switzerland or the beginning of the family relationship,
- for family members of foreign nationals with the issue of the residence or settlement permit or the start of the family relationship.

Family reunion is only permitted after these time-limits if important family reasons exist.[31] Article 75 of the Ordinance on admission, residence and employment[32] restricts the important family reasons to protecting the well-being of children.

3. Recognised refugees

In Switzerland there are both recognised refugees with asylum and recognised refugees who are temporarily protected. This is a unique characteristic of the Swiss Asylum Act, whose articles 53 to 55 stipulate that refugees can be excluded from the provision of asylum under certain circumstances (e.g., if they are a risk to internal or external security, if their behaviour abroad, e.g., exile activities, led to persecution or in the event of an exceptional influx of refugees to Switzerland). Both categories are refugees in the meaning of the Geneva Refugee Convention[33]. For those who have been granted asylum, the legal provision for residence is a B or C permit, for those excluded from asylum status, the legal provision for residence is temporary admission (F permit).[34]

a) Family reunion for family members of refugees with asylum

Family reunion for recognised refugees with asylum can take place on the one hand on the basis of article 51 para. 1 Asylum Act: spouses and children under 18 of refugees are likewise recognised as refugees and granted asylum. If the spouses or children under 18 of these persons do not wish to be recognised as refugees then family reunion is possible on the legal basis of the provisions of the Aliens Act described above.

b) Family reunion for family members of refugees with temporary protection

Family reunion for family members of refugees with temporary protection is set forth in article 85 para. 7 Aliens Act. The provision states that spouses and unmarried children under 18 years of age of temporarily protected refugees can join them in Switzerland no sooner than three years after the temporary admission order, if they live together, a suitable apartment is available and the family is not dependent on social benefits. Temporarily protected refugees must therefore not only fulfil the same conditions for family reunion as foreign nationals with a residence or short-term residence permit, but are also subject to a three-year “waiting period” for family reunion.[35]

4. Discriminatory interference with family life

The following example is intended to illustrate the arbitrary and discriminatory rules of the Aliens Act:

A female German national living in Switzerland with an annual residence permit B, married to a male Turkish national living in Germany can have her children up to the age of 21 join her in Switzerland based on the Agreement on the Free Movement of Persons. Even the children of her husband from his first marriage who share the same home in Germany can join her. Spouse and children can move to Switzerland regardless of whether the family requires the financial support of social welfare, as long as one family member works.

a) Discrimination against Swiss nationals in family reunion

If the wife were a Swiss national married to a Turkish man, moving, for example, from Istanbul to Switzerland, then on the basis of art. 42 para. 1 Aliens Act, only her children up to the age of 18 would be able to join her. The Aliens Act thus discriminates against Swiss nationals compared to EU nationals.

If the spouses were two Turkish nationals living in Switzerland with an annual residence permit B, they would not even be entitled to family reunion (art. 44 is a "can-provision"). The family would not only have to live together and have a suitable apartment at their disposal, they would also have to not require social assistance. The children would have to have joined them by their 18th birthday and the claim to family reunion would have to be asserted within 5 years of being granted the annual residence permit; in the case of children abroad in the space of 12 months.

In a judgment on 17 January 2003[36], still under the old law, the Federal Appeal Court tolerated this discrimination against Swiss nationals compared to EU citizens: a Swiss national (of Turkish origin) was denied permission for his daughter, born outside of marriage, to join him, although according to Turkish law – and with the consent of the mother – he had been appointed the guardian of the child and the father filed for family reunion whilst the child was still 12 ¾ years old. The Federal Appeal Court noted that potentially this could mean unequal treatment. But it could not verify this due to the stipulation of article 190 of the Federal Constitution, stating that it is bound by federal legislation. Lawmakers had the opportunity with the new Aliens Act to do away with this discrimination against their own citizens compared to EU citizens, but failed to do so.

b) Discrimination in family reunion on financial grounds

Art. 44 Aliens Act states that family reunion can only be granted to persons with a residence and short-term residence permit if the family does not require social welfare benefits. This stipulation means that families with a modest income, for example, those who work in low-wage sectors, have to live apart from their children, as they are denied family reunion.[37] For families with several children in particular (or for single parents) it is often the case that the parents work 100 % but that their income is not sufficient to provide for their family (working poor). Denying the right to family reunion seems to us in these cases to be irreconcilable with the prohibition of discrimination in art. 2 para. 1 CCPR because the wealthy are legally privileged over the poor in the right to family life.

In combination with the time-limits for family reunion (children over the age of twelve must join their family within twelve months, art. 47 Aliens Act) this can lead to serious interference with family life: people with a lack of education often work in low-wage sectors at the start of their stay in Switzerland; they cannot bring about the family reunion due to the financial criterion (no social benefits). If they change jobs after a few years in the country and earn more, they risk having exceeded the time-limit for family reunion.

c) Restriction of family life due to time-limits

The time-limits for family reunion in article 47 Aliens Act severely impinge upon the right to family life for certain foreign nationals, as illustrated above. The lawmakers introduced these time-limits with the argument that if children join their parents early on, it improves their integration chances. This argument does not stand up to closer inspection: it may be true that for some children integration is easier if they come to Switzerland at an early age and are socialized here. But apart from the fact that integration processes are individual and for that reason alone should not be categorized, it is also important to point out that for children from EU countries

these measures do not apply. First and foremost, however, it seems disproportionate to put the fundamental interest of the state in the quick integration of the individual before the interest of the family in a family life in Switzerland.

When one considers the solution for family reunion for temporarily protected refugees, there is good reason to question whether Switzerland really did intend first and foremost to promote integration with the time-limit for family reunion: here a "waiting list" has actually been introduced for children, which means that for the children of temporarily protected refugees, family reunion cannot be permitted, even if the conditions of art. 85 para. 7 lit. a – c Aliens Act (living together, suitable apartment, no social assistance) are met. The parents have to wait three years before their children under eighteen can join them! So this residence category of foreign nationals is expected to hang fire with the family reunion first of all (thus hindering integration?), for the family then to join them as quickly as possible?

In our opinion, the time-limits for family reunion[38] are irreconcilable with the right to family life in the meaning of art. 17 CCPR. The waiting period in particular in art. 85 para. 7 Aliens Act is shaped in such a way that there is no discretionary freedom for the authority applying the law. In other words, recognized refugees are by law denied a family life for three years! Here it is important to note that temporarily protected refugees de facto have a more secured residence in Switzerland than, for instance, foreign people with a settlement permit: recognised refugees cannot be expelled from Switzerland – in contrast to foreign nationals with a settlement permit – due to a criminal offence or for claiming social assistance because of the prohibition of refoulement in art. 33 of the Refugee Convention and art. 3 ECHR. Refugees are therefore unable to live their family life in their country of origin.

In comparison with the other issues addressed in this report, we have devoted a great deal of space to the regulations governing family reunion. We believe that it was justified and indeed necessary to illustrate this example in such detail – which is not an exception, but rather typical of the revised Asylum Act and the new Aliens Act – in order to show just how blatantly discriminatory these two acts are and that they contravene the civil rights covenant (CCPR).

Since these two acts came into force, the UPR of the Human Rights Committee on Switzerland has taken place and two convention committees have examined Swiss reports. On each occasion, great concern was voiced over the discriminatory effect of the Asylum and Aliens Acts.

Universal Periodic Review (UPR)

The following *UPR recommendations* will be examined by Switzerland (the country the recommendation originates from is in brackets):[39]

2. To foster internal analysis on the recently adopted law on asylum and its compatibility with international human rights law (Brazil);
8. To ensure that the revocation of the resident permits of married women who are victims of domestic violence is subject to a review and done only after a full evaluation of the impact on those women and their children (Canada);
16. To further address and enhance combating the root causes of discrimination, particularly of foreign migrant women, by removing legal and systemic obstacles to equal rights (Slovenia);
17. To take measures to prevent migrant women who are victims of sexual and domestic violence or trafficking from being at risk of deportation if such incidents are reported (Slovenia);

Committee on the Elimination of Racial Discrimination (CERD)

The *Committee on the Elimination of Racial Discrimination (CERD)* notes in its concluding observations of 15 August 2008:[40]

17. The Committee notes with concern that the State party's legislation on aliens and asylum seekers may not guarantee them equal rights in accordance with the Convention. For instance, pursuant to

the Alien law which entered into force on 1 January 2008, asylum seekers whose requests are rejected are excluded from the welfare system with resulting marginalization and vulnerability.
The Committee urges the State party to take effective and adequate measures to guarantee the rights under the Convention to aliens and asylum seekers. It invites the State party to harmonize its domestic legislation on aliens and asylum seekers with the Convention, and to take into account the recommendations made in this area by different bodies and organizations dealing with racial discrimination issues.

Committee on the Elimination of Discrimination against Women (CEDAW)

And the Committee on the Elimination of Discrimination against Women notes in its concluding observations of 7 August 2009:[41]

43. The Committee is concerned about the situation of vulnerable groups of women, including women of ethnic and minority communities and migrant women, who may be more vulnerable to poverty and violence and are at risk of multiple forms of discrimination with respect to education, health, social and political participation and employment, including as a result of the non-recognition of foreign university degrees and diplomas. The Committee is also concerned about the difference in treatment of migrant women from countries in the European Union or from the United States of America and Canada as compared with women from other parts of the world. Additionally, the Committee is concerned that requirements under the new Foreign National Act, such as proof of integration after at least three years of marriage or of difficulties in social integration in the country of origin, may pose difficulties for victims of violence to acquire or renew residency permits and may continue to prevent victims from leaving abusive relationships and from seeking assistance.
44. (...)Additionally, the Committee urges the State party to keep under review and carefully monitor the impact of its laws and policies on women of ethnic and minority communities and on migrant women, with a view to taking remedial measures that effectively respond to the needs of those women.

Committee Against Torture (CAT)

Even prior to the entry into force of the Asylum and Aliens Acts, the Committee Against Torture expressed concern at the developments in asylum law during the discussion of the fourth Swiss report on 21 June 2005:[42]

4. The Committee expresses concern regarding the following:
(h) Changes have been introduced by the revised law on asylum which restrict or aggravate asylum-seekers' access to legal counsel and the length and conditions of detention in "preparatory" or pre-deportation detention. The Committee is also concerned that in cases of non-entry decisions (*décision de non-entrée en matière*) the social benefits of asylum-seekers are being curtailed significantly.
5. The Committee recommends that the State party:
(h) Ensure that asylum-seekers are granted full respect of their right to a fair hearing, to an effective remedy and to social and economic rights during all procedures established by the revised law on asylum.

In the section ***Rights of aliens and right to privacy, protection of the family and protection of minors (arts. 13, 17, 23 and 24)*** *the Committee posed specific questions on asylum policy (see part I of this report). The NGOs would very much welcome a stance by the Committee on the generally discriminatory nature of the revised Asylum Act and the new Aliens Act.*

Explanatory notes

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 (CETS 005; SR 0.101)

[2] Federal Constitution of the Swiss Confederation, of 18 April 1999 (SR 101) *Bundesverfassung der Schweizerischen Eidgenossenschaft (BV)*

[3] Federal Act on equality between women and men (GIG) of 24 March 1995 (SR 151.1) *Bundesgesetz über die Gleichstellung von Frau und Mann (Gleichstellungsgesetz*

[4] Federal Act on Elimination of inequalities affecting persons with disabilities (BehiG) of 13 December 2002 (SR 151.3) *Bundesgesetz über die Beseitigung von Benachteiligungen von Menschen mit Behinderungen (Behindertengleichstellungsgesetz,)*

[5] Swiss Criminal Code (StGB) of 21 December 1937 (SR 311.0) *Schweizerisches Strafgesetzbuch*

[6] Swiss Civil Code (ZGB) of 10 December 1907 (SR 210), *Schweizerisches Zivilgesetzbuch*

[7] Federal Act regarding the Amendment of Swiss Civil Code, (Fifth Section: Swiss Federal Code of Obligations; OR) of 30 March 1911 (SR 220) *Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, (Fünfter Teil: Obligationenrecht)*

[8] Motion 04.3791 Law against racial discrimination in the world of work *(Gesetz gegen die rassistische Diskriminierung in der Arbeitswelt)* and Motion 06.3082, Federal Act aganst Discrimination (*Bundesgesetz gegen Diskriminierung)*

[9] 07.422 – Parliamentary Initiative Paul Rechsteiner General Equality Act *Allgemeines Gleichbehandlungsgesetz*

[10] Concluding observations of the Committee on the Elimination of Racial Discrimination, 15 August 2008 (CERD/C/CHE/CO/6)

[11] Federal Aliens Act (AuG) of 16 Dezember 2005 (SR 142.20) *Bundesgesetz über die Ausländerinnen und Ausländer*

[12] Federal Law on the use of coercion and police measures in spheres within the jurisdiction of the Confederation (ZAG) of 20 March 2008 (SR 364) *Bundesgesetz über die Anwendung polizeilichen Zwangs und polizeilicher Massnahmen im Zuständigkeitsbereich des Bundes (Zwangsanwendungsgesetz)*

[13] Federal Asylum Act (AsylG) of 26 June 1998 (SR 142.31) *Asylgesetz*; Ordinance No. 1 on asylum Procedures (AsylV 1) of 11 August 1999 (SR 142.311) *Asylverordnung 1 über Verfahrensfragen*

[14] According to Art. 17 para. 4 AsylG in connection with Art. 7a AsylV 1.

[15] Art. 82 para. 1 AsylG

[16] NZZ on Sunday (NZZ am Sonntag), 25. May 2008

[17] Art. 3 Federal Act on Health Insurance (KVG) of 18 march 1994 (SR 832.10) *Bundesgesetz über die Krankenversicherung*. See document «Krankenkassenobligatorium gilt auch für abgewiesene Asylsuchende» at www.humanrights.ch.

[18] Art. 75 to 79 AuG

[19] «Kinderschutz im Rahmen der Zwangsmassnahmen im Ausländerrecht.» Report of the Corporate Audit Committee of the National Council of 7 November 2006, BBl 2007 2521 *(Geschäftsprüfungskommission des Nationalrates)*

[20] In almost 60 % of the cases it is more than 4 days. The percentage of the minors who have been detained more than three months is up to 14 and 18 % in comparison with the number of all detainees which goes up to 8 %. 5 % of the minors who were detained were held in detention more than nine months.

[21] www.kinderschutz.ch

[22] www.nfp52.ch

[23] Voll Peter et al. (Hrsg): «Zivilrechtlicher Kindesschutz: Akteure, Prozesse, Strukturen», Verlag Interact Luzern, 2008 (Protection under Civil law: Actors, Procedure, Structures)

[24] Seith, Corinna: «Kinder und häusliche Gewalt – Herausforderung für Behörden und Fachstellen», CHSS 5/2006, S. 249ff (Children and domestic violence – a challenge for government officers and centres for competence)

[25] Report of the Federal Council concerning the situation of travellers in Switzerland. (October 2006) at www.bak.admin.ch (see part II of the report).

[26] § 48 Canton of Aargau's Constitution (SR 131.277)

[27] See the following website of Humanrights.ch: http://humanrights.ch/home/en/Switzerland/Policy/National/idart_5849-content.html.

[28] Agreement on the Free Movement of Persons between the European Community and its Member States between the Member States of EU and Switzerland of 21 June 1999 (SR 0.142.112.681) *Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit (Freizügigkeitsabkommen)*

[29] Art. 42 para. 1, resp. Art. 43 para. 1 AuG

[30] Art. 44 resp. 45 AuG

[31] Art. 47 para. 4 AuG

[32] Ordinance on Admittance, Residence and Working Permits, (VZAE) of 24 October 2007 (SR 142.201) *Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit*

[33] Convention relating to the Status of Refugees, 28 July 1951 (SR 0.142.30)

[34] «The various residence permits for nationals of other countries» are described on a website of the «Federal Office for Migration»: www.ejpd.admin.ch/ejpd/en/home/themen/migration/ref_aufenthalt/ref_die_verschiedenen.html

[35] Whether it is possible analocigally to apply family reunion to temporarily protected refugees according to Asylum Act Art. 51 para. 1 has not yet been decided by the Federal Administrative Court of Switzerland. It has solely considered that an application for family reunion on behalf of a temporarily protected refugee, where a personal threat to family members living abroad has been shown, can be understood according to the principle of good faith as an application for asylum from abroad. (Decision of the Federal Administrative Court of 6 July 2007, BVGE 2007/19). *Bundesverwaltungsgericht*

[36] BGE 129 II 249

[37] See for example the decisions of the Judiciary and Security Department of the Canton Luzern of 20/6/2006 (JSD 2006/5) or of 13/1/2004 (JSD 2004/1). *Justiz- und Sicherheitsdepartements des Kantons Luzern*

[38] This concerns the time limits under Art. 47 AsylG as well as the waiting period under Art. 85 para. 7 AuG.

[39] Universal Periodic Review. Report of the Working Group on the Universal Periodic Review: Switzerland, 28 May 2008 (A/HRC/8/41)

[40] Concluding observations of the Committee on the Elimination of Racial Discrimination, 15 August 2008 (CERD/C/CHE/CO/6)

[41] Concluding observations of the Committee on the Elimination of Discrimination against Women, 7 August 2009 (CEDAW/C/CHE/CO/3)

[42] Conclusions and recommendations of the Committee against Torture: Switzerland. 21/06/2005 (CAT/C/CR/34/CHE)