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# **Racial discrimination and violence against foreigners and asylum seekers in Switzerland**

**Report prepared by the  
World Organisation Against Torture (OMCT) for the 60<sup>th</sup> Session of  
the Committee on the Elimination of Racial Discrimination**

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Geneva, February 2002

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## I. Introduction : racial discrimination and degrading treatment

The most widespread violations of human rights are related to intolerance, racism and xenophobia, and frequently accompanied by discrimination and ostracism.

The World Organisation Against Torture<sup>1</sup> puts emphasis on the causes and consequences of torture and other forms of violence against vulnerable groups carried out on the basis of racial discrimination, in particular under the criminal justice system.

Minorities, indigenous people, migrants, asylum seekers, refugees and other non nationals are often victims of violent acts. For this reason, special efforts must be made to remedy this situation and to better protect their specific rights.

Racism and racial discrimination occur in multiple forms. These are not simply social-cultural inequalities or racist behaviour. In certain circumstances, discrimination is institutionalised. It is set down in law, is part of the methods employed by judicial and penitential authorities, and can lead to serious violations of fundamental rights, in the form of inhuman or degrading treatment. Both relevant United Nations Treaty monitoring bodies and regional human rights mechanisms have come to the conclusion that certain categories of person deprived of their liberty by the police (and in particular minority groups, asylum seekers and migrants) run a significant risk of being ill-treated.

The Sub-Commission on the Promotion and the Protection of Human Rights, in its resolution of 18 August 2000, recommended that States “*safeguard and give effect to the right of everyone to seek and enjoy in other countries asylum from persecution and to take practical measures to ensure that refugees and asylum-seekers are treated with dignity and with full respect for their fundamental human rights (...) to intensify their efforts, including educational and other programmes, to combat racism, racial discrimination, xenophobia and related intolerance against non-nationals and, in particular, asylum-seekers and refugees*”<sup>2</sup>.

In his annual report, the United Nations Special Rapporteur on Torture noted that “*while there is no evidence to suggest that members of racial or ethnic groups are generally subjected to particular forms of torture or ill-treatment applied uniquely to them in their status as members of these groups, it must be noted that they are particularly vulnerable to torture in various contexts and their status may also affect the consequences of their ill treatment. It would appear that members of racial or ethnic groups are disproportionately subjected to torture and other forms of ill-treatment. Indeed, ethnic differences may often contribute to the process of dehumanisation of the victims, which is often a necessary condition for torture and ill-treatment to take place*”<sup>3</sup>.

In its contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), the United Nations Committee Against Torture stated that “*discrimination of any kind can create a climate in which torture and ill-treatment of the « other » group subjected to intolerance and discriminatory treatment can more easily be accepted, and that discrimination undermines the achievement of the realization of equality of all persons before the law*”.

Degrading treatment can be defined as any treatment which creates within the victim a feeling of fear and humiliation, which might lead to a mental breakdown. In this context, OMCT considers that racial discrimination can amount to degrading treatment. Furthermore, some institutions have accepted that,

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<sup>1</sup> Hereafter OMCT.

<sup>2</sup> E/CN/SUB.2/RES/2000/20, 18/08/2000, “*The right to seek and enjoy asylum*”.

<sup>3</sup> E/C.N.4/2001/66, 25/01/2001.

in certain circumstances, discriminatory treatment based on racial grounds, can be considered as degrading treatment.<sup>4</sup>

Based on these above-mentioned observations, OMCT, in issuing this alternative report, intends to highlight the phenomenon of racism, racial discrimination and xenophobia as a concrete and systematic cause of torture, inhuman treatment, arbitrary detention and other forms of violence. Switzerland submitted its initial report to the Committee for the Elimination of Racial Discrimination<sup>5</sup> on the 14 March 1997, in conformity with article 9 of the Convention on the Elimination of Racial Discrimination. On the occasion of the new session of the CERD, OMCT has decided to submit an alternative report on the situation of how foreigners and asylum seekers in Switzerland are treated in the criminal justice system.

OMCT notes that during the last few years, Switzerland has taken several measures aimed at putting in place a framework to fight against the problem of racism and acts of ill-treatment.

Nevertheless, despite the efforts undertaken by Switzerland, OMCT maintains that feelings of racism persist, notably against the presence on the territory of foreigners (almost 20% of the population<sup>6</sup>). These feelings are reflected in the adoption by the authorities of strict rules concerning the rights of non-nationals.

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<sup>4</sup> The European Commission on Human Rights allowed in the East African Asians affair, that a discriminatory treatment based on racial grounds can be considered as a degrading treatment in terms of the article 3 of the European Convention on Human Rights. Patel Affair and others, Decision of the Commission 10/10/71, request 4403/70, A 13, page 929. *“The fact of imposing publicly on one group of people a special rule based on race can under certain conditions, constitute a specialised form of attack on human dignity”*.

<sup>5</sup> Thereafter CERD. CERD/C/270/Add.1.

<sup>6</sup> Source : Federal Aliens Office (OFE).

## II. Preliminary observations

OMCT is pleased to note, that federal authorities attach special importance to the adhesion by Switzerland to the United Nations Organisation. Switzerland is due to vote on this question on 3 March 2002.

Since the proclamation of the Universal Declaration of Human Rights in 1948, States have worked on a number of conventions of both a worldwide and a regional basis. In adhering to these conventions, a State commits itself to protect and implement the rights enunciated in these instruments. This is particularly the case for those treaties which have a monitoring mechanism to ensure this respect.

Switzerland is party to most of the universal human rights treaties: the two International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (18/06/1992), the Convention on the Rights of the Child (24/02/1997), the Convention Against Torture (2/12/1986), and the Convention on the Elimination of all Forms of Discrimination Against Women (27/03/1997). Switzerland became party to the International Convention on the Elimination of Racial Discrimination on 29/11/1994. The Convention entered into force for Switzerland on 29 December 1994.

OMCT hopes that Switzerland will honour its commitment to make the declaration foreseen in article 14 of the Convention, which allows individuals and groups to lodge petition with the Committee on the Elimination of Racial Discrimination.

At the European level, Switzerland ratified the European Convention on Human Rights (28/11/1974) and most of its protocols, as well as the Convention for the Prevention of Torture (7/10/1988), and the Framework Convention for the Protection of National Minorities (21/10/1998).

The Swiss legal system is of monist tradition. International treaties become an integral part of this system on entry into force and their provisions are enforced without there being any need to incorporate them into the domestic legal system with a specific law. Moreover, there exist in internal law, numerous texts, which ensure the implementation of international norms.

In line with its mandate, OMCT examines the situation of foreigners and asylum seekers with respect to three articles of the Convention for Elimination of the Racial Discrimination: article 2 (prohibition of racial discrimination), article 5 a and b (implementation of this right in the criminal justice system) and article 6 (right to an effective remedy and reparation).

### **III. Prohibition of racial discrimination**

Article 2 of the Convention states that : “*States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races*”.

OMCT notes with satisfaction that Switzerland has modified its legislation in line with that of the Convention, according to the recommendations of the CERD, expressed in 1998, following the submission by Switzerland of its preliminary report<sup>7</sup>.

#### **3.1. Constitutional and legal basis for the fight against racism**

##### **3.1.1. Constitutional provisions**

According to article 8 of the new Federal Constitution :

*“All human beings are equal before the law.*

*Nobody shall suffer discrimination, particularly on grounds of origin, race, sex, age, language, social position, lifestyle, religious, philosophical or political conviction, or because of a corporal or mental disability.*

*Men and women have equal rights. Legislation shall ensure equality in law and in fact, particularly in family, education and work. Men and women shall have the right to equal pay for work of equal value. Legislation shall provide measures to eliminate disadvantages affecting disabled people.”*

OMCT welcomes the adoption of the new Federal Constitution on 18 March 1999, which establishes as a federal constitutional principle the prohibition of the racial discrimination and the equality before the law of all human beings.<sup>8</sup>

##### **3.1.2. Penal provision**

At the time of its adhesion to the Convention, Switzerland introduced a new article 261 bis in its penal code. According to this article, the law is infringed by:

1. « *Celui qui, publiquement, aura incité à la haine ou à la discrimination envers une personne ou un groupe de personnes en raison de leur appartenance raciale, ethnique ou religieuse;*
2. *celui qui, publiquement, aura propagé une idéologie visant à rabaisser ou à dénigrer de façon systématique les membres d'une race, d'une ethnie ou d'une religion;*
3. *celui qui, dans le même dessein, aura organisé ou encouragé des actions de propagande ou y aura pris part;*
4. *celui qui aura publiquement, par la parole, l'écriture, l'image, le geste, par des voies de fait ou de toute autre manière, abaissé ou discriminé d'une façon qui porte atteinte à la dignité humaine une personne ou un groupe de personnes en raison de leur race, de leur appartenance ethnique ou de leur religion ou qui, pour la même raison, niera, minimisera grossièrement ou cherchera à justifier un génocide ou d'autres crimes contre l'humanité;*

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<sup>7</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination : Switzerland. 30/03/98. CERD/C/304/Add.44. Fifty-second session.

<sup>8</sup> The new Federal Constitution came put into force on 1<sup>st</sup> January 2000.

*5. celui qui aura refusé à une personne ou à un groupe de personne, en raison de leur appartenance raciale, ethnique ou religieuse, une prestation destinée à l'usage publique, sera puni de l'emprisonnement ou de l'amende ».*

OMCT is pleased to note that Switzerland, in order to adhere to the Convention of the Elimination of Racial Discrimination, undertook a revision of its legal framework.

Nevertheless, OMCT ascertains that, with respect to the subject it is concerned with, Swiss legislation still includes provisions, which discriminate against the right of foreigners.

The provision related to the admission of foreigners and asylum seekers are turning out to be more and more restrictive. The result is that, from the time that an asylum seekers request is refused or that a foreigner is refused entry to Switzerland, he or she goes to underground without official papers and becomes liable to the application of coercion measures. The latter have been the object of several modification tending towards ever greater restrictions.

The aim of the present report is to highlight the discriminatory nature of Swiss legislation insofar as the right of foreigners is concerned.

### **3.2. Racial discrimination and the right of foreigners: legal framework**

#### **3.2.1. The law of temporary and permanent residence of foreigners in Switzerland<sup>9</sup>**

At the time of its adhesion to the Convention, Switzerland made the following reservation to the article 2 §1 a). Based on the latter, Switzerland reserves the right to apply its legal provisions concerning the admission of foreigners to the Swiss market.

This reservation makes direct reference to the 1931 law concerning the temporary and permanent residence of foreigners.

The policy governing the entry of foreigners on the Swiss territory is based on the rule of three circles. This mean recruitment of persons, first within the EU/EFTA area, second in the traditional recruitment countries outside EU/EFTA, and third in all the other countries, but also exceptionally and for special qualifications or for further training of people within the framework of Swiss aid and development organisations.

OMCT recalls that the three-circle model, introduced in 1991, is in contradiction to the Convention of 1965 and to the article 8 of the new Federal Constitution.<sup>10</sup>

In its recommendations concerning the initial report of Switzerland, CERD suggested to the authorities to modify their policy and to re-examine the reservation about article 2 §1 a) of the Convention.

On the 1<sup>st</sup> November 1998, the Federal Council decided to modify this part of legislation and by introducing a binary system for admission of foreigners to Switzerland, witch makes as a proviso to

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<sup>9</sup> In french, Loi sur le séjour et l'établissement des étrangers en Suisse, LSEE 26 mars 1931, RS 142.20.

<sup>10</sup> The Committee considers the conception and effect of this policy to be stigmatising and discriminatory, and therefore contrary to the principles and provisions of the Convention. CERD/C/304/Add.44.

the granting of any residence permit both the national origin of the applicant and the needs of the Swiss labour market.<sup>11</sup>

OMCT regrets that, even though the three-circle-model has been abolished, Switzerland still maintains a discriminatory system for the recruitment of foreign workers. Despite the recommendations of the CERD, OMCT notes that Switzerland has no intention of withdrawing its reservation concerning the article 2 §1 a), since the future draft bill concerning foreigners<sup>12</sup> perpetuates this binary system of recruitment<sup>13</sup>.

OMCT strongly condemns this legislation, which contains a such discriminatory provision in contradiction with article 8 of Constitution and article 2 of Convention for Elimination of Racial Discrimination. It recommends to federal authorities to review this legislation and make it conform to international law.

While admitting that the LSEE is in need of modernization, OMCT objects to certain modifications which run counter to the rights guaranteed by the CERD. In reality, these modifications clearly reinforce the legislative arsenal at the disposal of the authorities in charge of establishing Swiss immigration policy, and more particularly concerning coercion measures and deportation measures.

### **3.2.2. The federal draft bill on aliens**

The draft revision of the LSEE includes provisions which aggravate penal sanctions and coercion measures.

#### **i. Reinforcement of penal sanctions**

Switzerland ratified the Geneva Convention on the refugee statute on 21 January 1955.

Article 31 of the Convention related to refugees unlawfully in the country of refuge stipulates that:

1) *“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence;*

2) *The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country”.*

Article 23 LSEE:

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<sup>11</sup> Article 8 of the Ordinance concerning the Limitation of the Number of Foreigners (OLE - RS 823.21), Une autorisation initiale peut être accordée aux travailleurs ressortissants d’Etats de l’Association Européenne de Libre-Echange (AELE) et de l’Union Européenne (UE).

<sup>12</sup> Press release of the Aliens Federal Office, 15/06/2001. The consultative procedure relative to the draft bill on aliens finished at the end of 2001. The Federal Council took knowledge of it in June 2001 and charged the Federal Department of Justice and Police to elaborate a message. For the moment, as OMCT does not know the exact text, it takes account the proposition such as submit to the consultative procedure.

<sup>13</sup> Article 24 of the draft bill : *« L'étranger ne peut être admis en vue de l'exercice d'une activité lucrative que s'il est démontré qu'aucun travailleur ou ressortissant de l'UE et de l'AELE, correspondant au profil requis, ne peuvent être recrutés en Suisse ».*

(1) : « *Celui qui se réfugie en Suisse n'est pas punissable si le genre et la gravité des poursuites auxquelles il est exposé justifient le passage illégal de la frontière* ».

(3) « *Celui qui entre ou qui réside illégalement en Suisse sera puni de l'emprisonnement jusqu'à six mois. A cette peine pourra être ajoutée une amende de 10 000 francs au plus* ».

The draft bill on aliens, article 101 states that : « *Sera puni de l'emprisonnement jusqu'à une année ou d'une amende de 20.000 francs au plus quiconque aura enfreint les prescriptions sur l'entrée en Suisse, notamment sera entré en suisse en dépit d'une interdiction d'entrée (...)* ».

## ii. Reinforcement of coercion measures<sup>14</sup>

Coercion measures related to the law of aliens are regulated by the law of 18 March 1994, which came into force on 1<sup>st</sup> February 1995<sup>15</sup>. This law puts into effect a series of modifications to the LSEE. Subsequently, each canton enacted his own legislation with respect to its application.

The law currently applicable foresees several measures for the deprivation of liberty of aliens living in unlawful situation.<sup>16</sup>

The first measure is one of preparatory detention. This allows the imprisonment of an alien without the necessary regular authorisation for a period up to 3 months maximum (art.13 a).

The second measure is the detention with a view of expulsion, which can be applied as soon as the notification is made concerning the decision on expulsion or deportation, if it still within the expiry date allowed for appeal and this for a period of 9 months.

It can be pronounced for the same reasons as those justifying detention on a preparatory basis (art.13 b).

Finally, the 1994 law admits the possibility to arrest, for a period of to 72 hours an alien, whose deportation could be enacted immediately and who has submitted a request to have the *suspensive effect* reinstalled. This administrative measure is not in principle the object of any judiciary control (art.13 e).

The law makes the distinction between asylum seekers, whose request is pending, and who have the right to stay until the end of the procedure, and those applicants whose request had been refused and who are the object of a decision of deportation. Both categories are subject to restraining measures, being preventative detention in the first case and detention with a view to deportation in the second case. Such assimilation does not conform to article 8 of the Federal Constitution and to article 2 of the Convention of Racial Discrimination.

It implies a deprivation of liberty for aliens of to as much as one year under certain circumstances<sup>17</sup>, thereby constituting a serious restriction on personal liberty.

Furthermore, it allows the detention of aliens who have not committed any crime. It therefore puts into the same category foreigners particularly asylum seekers and criminal offenders.

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<sup>14</sup> GRANT Philip, « *Mesures de contraintes, vers quels durcissements ?* », Summary of an analyse realised for Organisation suisse d'aide aux réfugiés (OSAR), and whom the title is « *Mesures de contraintes : quelles évolutions ? réflexions sur les différents projets en cours d'élaboration* », OSAR, Berne, September 2001.

<sup>15</sup> Law on coercion measures, en français loi sur les mesures de contraintes (LMC).

<sup>16</sup> AUER Andreas, « *La Constitution fédérale, les droits de l'homme et les mesures de contraintes à l'égard des étrangers* », 20 pages. In this article, the author analyses modifications introduced by the law of 18/03/1995.

<sup>17</sup> Art 13 a and b LSEE : the length of detention may not exceed 3 months. However, if the person concerned is the object of a deportation decision, he can be held in detention for 3 months and in agreement with the judicial authority. The period can be prolonged for 6 months (3+3+6).

OMCT considers that restraining measures applied in Switzerland do not hold up against both constitutional and conventional constraints with respect to equality of treatment and human rights.

A first reinforcement of the coercion measures could occur with the parliament draft bill. On the 13 December 2000, the upper Chamber of Parliament decided to take up the question of the detention decided on against an individual waiting a decision on his right to stay, when all the indications lead to believe that he intends to avoid being deported<sup>18</sup>. This bill would therefore admit a new article 13 a letter f.<sup>19</sup>

OMCT regrets that the legislative modifications envisaged by the federal authorities on this subject, further reinforce the arsenal at the disposal of the authorities, who have to responsibility for applying the decision on expulsion or deportation.

Another issue is the introduction of three new grounds for detention with a view of expulsion in the overall draft revision of the LSEE.

Subject to modification, the article 71 al.1 of the draft bill provides the possibility to detain asylum seekers whose request has been rejected following a decision of not to consider the question of the Federal Aliens Office.

This clause admits the possibility of inequality of treatment between asylum seekers whose request has been refused following a decision by the Swiss Asylum Appeal Commission, and those applicants penalised by decision of the ODR refusing not to entry in matters, which is incompatible with the article 8 of the Federal Constitution and article 2 of the International Convention on Racial Discrimination. In this conditions, the right of appeal is simply an illusion<sup>20</sup>.

Furthermore, the detention period can be decided for a maximum of 20 days (art.71 al.3), when the authorities have to obtain themselves the travel documents. This measure enables authorities to prevent anyone unwilling to cooperate from disappearing and so ensuring deportation as soon as the authorities are in possession of the necessary papers.

Finally, article 60 Letr allows detention for up to 5 days of an alien, who is refused entry to the country, at an airport. During this period, he can lodge a protest against the decision refusing entry, and has 15 days more, if the expulsion can not be carried out immediately.

This stay can quickly take on a character of detention. This so because the law does not allow for the possibility of an appeal to judicial authority against a decision to maintain someone forcibly at an airport. This measure, however, does not concern aliens who have come to request the Switzerland protection, and for whom the provisions of the asylum law apply.

OMCT considers that the current legislation on coercion measures is discriminatory. The draft bill introduces new restrictions contrary to the interest of asylum seekers and aliens.

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<sup>18</sup> This initiative follows a judgement of the Federal Tribunal, that the legislation related to preventive detention, does not cover a decision on detention in this circumstances. On 12 June 2001, the State Council adopted this modification. The dossier has still to pass before the National Council. Cf note 13.

<sup>19</sup> The detention of an alien is allowed if he or she « ...séjourne illégalement en suisse et dépose une demande d'asile dans l'intention manifeste de se soustraire à l'exécution imminente d'un renvoi ou d'une expulsion. Une telle intention est présumée lorsque la personne concernée aurait pu, de manière raisonnablement exigible, déposer sa demande plus tôt et si le dépôt de cette demande précède ou suit de peu une arrestation, une procédure pénale, l'exécution d'une peine ou une décision de renvoi ».

<sup>20</sup> Cf. § 5.3.2. on the right of an effective remedy).

### 3.2.3. The Federal Law on Asylum of 1998<sup>21</sup>

According to article 121 of the Federal Constitution, the law governing asylum comes under the competence of the Confederation. Insofar, as its application is concerned this becomes the responsibility of the Cantons.

Swiss policy on asylum is based on the law of 26 June 1998, which came into force on 1<sup>st</sup> October 1999. This law modifies the law on asylum of 5 October 1979.

The law on asylum includes some negatives provisions. Certain provisions contained within this law serve to limit access to legal proceedings, with serious consequences for applicants.

The law abolishes judicial vacations : it cancels the possibility to carry over procedural delays during officials holidays.

Furthermore, with respect to asylum requests lodged at an airport, the rule, which imposed the notification of decisions taken to the applicant's legal represent, has been cancelled. The asylum seekers who arrived by plane and are held in the transit zone, will now receive the decision directly. His legal represent will be informed with considerable delay. Thus, if the person concerned is the object of an immediate expulsion order, the time limit to appeal is 24 hours. Article 112 gives only 24 hours to lodge the with the Swiss Asylum Appeal Commission a request to reinstall the delaying mechanism.

Finally, the wording of the judicial acts is written in the official language of the Confederation.

The law on asylum also need to be considered with a view to substantial modifications. The draft bill under consideration by the Federal Administration<sup>22</sup> foresees in addition to the various clauses which allow the authorities to hold aliens at their disposal when carrying out an expulsion measure, a further two innovations changes to article 13 Lasi.

*d) Detention (20 days more) if the length of stay at the airport has run out and if expulsion is imminent.*

*§2 The detention period should be less than three months; prolongation for a further period of six months possible if the expulsion or deportment is impossible in accordance with the judicial authorities.*

OMCT considers that Switzerland is about to bestow upon itself new legislation on aliens rights, which is incompatible with constitutional and international norms of human rights. This legislation is discriminatory et does not allow the assurance of real protection to aliens in need of it.

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<sup>21</sup> Law on Asylum (Lasi, RS 142.31)

<sup>22</sup> The consultative procedure was opened on 15 June 2001.

## IV. Implementation of rights and liberties without discrimination

According to article 5 of the Convention on the Elimination of Racial Discrimination, “*In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights :*

- (a) *The right to equal treatment before the tribunals and all other organs administering justice;*
- (b) *The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;”*

The right to protection and to personal liberty is guaranteed by article 10 al.2 et 3 of the Federal Constitution.<sup>23</sup>

Neither the European Committee for the Prevention of Torture (CPT)<sup>24</sup>, nor the United Nations Committee Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT)<sup>25</sup>, made any observations, which would permit the conclusion that torture and inhuman or degrading treatment was being perpetrated in any of the establishments visited in Switzerland<sup>26</sup>. Nevertheless, OMCT is deeply concerned by information to hand concerning police brutality against non-nationals and asylum seekers. The OMCT recalls to attention that the CERD in its conclusions, had already advised Switzerland of its concerns on the subject of “*the extensive system of police control of foreigners as well as the incidents of police brutality in dealings with persons of foreign ethnic or national origin*”<sup>27</sup>.

### 4.1. Coercion measures and resort to force

OMCT is preoccupied by the fact that, during expulsion or deportation of aliens, there been cases of inhuman or degrading treatment and of resort to the use of excessive force, leading in some cases to the death of the person involved.

The violence which seems to accompany the deportation procedures can be explained because the law has become more and more restrictive and against foreigners.<sup>28</sup>

According to article 121 of the Federal Constitution, the law governing asylum comes under the competency of the Confederation. The actual enforcement of decisions concerning the expulsion of foreigners comes under the responsibility of the cantons (art.46 Lasi).

The use of coercion measures during deportation and in particular the use of force is governed quite differently through cantonal laws, police ordinances or internal directives. This variation in how the law is applied, leads to insecurity and confusion in its overall implementation.<sup>29</sup>

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<sup>23</sup> Al. 2 : “*every person has the right to personal liberty, particularly to corporal and mental integrity and to freedom of movement*”;

al. 3: “*torture and any other cruel, inhuman or degrading treatment or punishment are prohibited*”.

<sup>24</sup> Press release, European Committee for the Prevention of Torture in Switzerland, Strasbourg, 20 February 2001, European Council.

<sup>25</sup> CAT/53/44, 27 November 1997, 19 Session, §80 à 100.

<sup>26</sup> Press release, Confoederatio Helvetica, February 2001, « *Pas d’indices de torture ou de mauvais traitements dans les établissements suisses de détention* ».

<sup>27</sup> CERD/C/304/Add.44, 30 March 1998, point 6.

<sup>28</sup> Cf. § 3.2.2. on the hardening of restraining measures.

<sup>29</sup> Press release of the OSAR, Berne, 3 July 2001.

In actual practice, the authorities make distinction amongst three categories: in category 1, the person is escorted to the plane and travels unaccompanied; in category 2, the person can be hand cuffed and accompanied by two policemen; category 3 permits a whole range of restraining techniques (sedatives, gags, hoods, handcuffs, wheelchairs, belts...) under an escort of four policemen, who might possibly be disguised.

a) OMCT denounces the discriminatory treatment introduced by this practice, which has no strict legal basis and which according to information to hand based on an internal ruling between the airport police and the repatriation division of the Federal Office for Refugees (OFR)<sup>30</sup>. In one case in 1999, Khaled Abuzarifah a Palestinian died during a deportation operation through Zurich-Kloten Airport. While awaiting deportation, he was administered a sedative and gagged with an adhesive tape. According to the autopsy report, he died of suffocation as a result of having been submitted to such coercion measures. Similarly, in the Canton of Valais in May 2001, a Nigerian citizen Samson Chukwu, an asylum seeker, died at the beginning of an deportation procedure in the administrative detention centre. Medical and legal investigations are continuing, and the possibility of a traumatic asphyxiation cannot be excluded.<sup>31</sup>

b) In the Canton of Geneva, several cases of both police and medico-social violence affecting aliens under expulsion orders have been reported. Such ill-treatment are often accompanied by racist insults.<sup>32</sup> In one case, in 2001, a citizen of Georgia under legal detention, while awaiting his deportation, had to go to Geneva for administration purposes. On being escorted by train to Geneva, he was handcuffed and gagged. Although the authorities were aware that he is epileptic and he suffered an attack during the journey transport, the policemen nevertheless kept him bound and gagged. OMCT has also noted the case of a Syrian who was treated in a more professional manner in that he was subjected to several blows to his thorax, but without causing any fractures, on 7<sup>th</sup> November 2000, at Geneva airport. As a result, he suffered from respiratory insufficiency resulting from paralysis of his respiratory muscles. Nevertheless, this person was still deported in a sanitary aircraft.

Two complaints were lodged by the Swiss League for Human Rights namely a penal complaint which was immediately rejected by the cantonal Public Prosecutor and an administrative one lodged in the Canton of Vaud but also rejected by the authorities.<sup>33</sup>

c) The violence to which foreigners are subjected is not only the result of police brutality. There is also the question of medico-social violence. In fact, based on information available, foreigners undergoing serious in some cases medical treatment, have been sent back to their home country without the authorities taking into consideration the state of their health.

Mr. G.A, a citizen of Kosovo, had worked in Switzerland since 1984 as a tile layer. In 1994, he underwent an hernia operation. Since this operation, Mr G.A has not been able to work and has had a relapse. Although the importance of a new operation in Switzerland has been pointed out, he has been placed under threat of deportation. His doctor had to send a letter indicating that his patient was not in condition to travel. In the Canton of Vaud, at the end of the year 2001, a Kosovar of around thirty placed under detention, complained of chest plains. A consultation at the hospital was judged to be necessary. However, due to the lack of transportation, it was difficult to fix an appointment and it was to be rescheduled twice. Despite a letter indicating the importance of a examination, this person was

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<sup>30</sup> Source : Augenauf, NGO's protection of the human rights of aliens (Zurich).

<sup>31</sup> Swiss League of Human Rights.

<sup>32</sup> Information received from the doctor responsible of consultations at the administrative detention centre of Favra.

<sup>33</sup> Swiss League of Human Rights. Le Courrier of 18 November 2000, « *Un détenu syrien accuse cinq gendarmes de l'avoir tabassé* ». Le Courrier of 4 December 2000, « *La police cantonale vaudoise mise en cause à tort* ».

deported without having had his consultation. Nevertheless, for fear of being beaten, he did not consider it worthwhile to lodge a complaint.

OMCT condemns these police practices, which are disproportionate and incompatible with the constitutional and international commitments taken by Switzerland not to inflict inhuman or degrading treatment based on discrimination.

OMCT notes, however, since mid 2001, a decrease in the incidence of police brutality during deportation procedure and more notably since the death of Khaled Abuzarifah and as the result of the intercession of certain doctors. The police commanders of the Cantons of Geneva and Neuchatel have put a stop to forceful expulsions in the three category. They have been followed in their action by the Canton of Basle<sup>34</sup>. Gagging and injections are now officially forbidden since the Khaled Abuzarifah affair<sup>35</sup>. In the Canton of Zurich, adhesive tape will no longer be used as a gag during deportation, but a new type of accessory which might restrict breathing (a modified boxers helmet) was to be used in its place<sup>36</sup>.

OMCT considers nevertheless that the resort to such methods is incompatible with the right to human dignity such as it is guaranteed by international instruments of human rights and article 7 of the Federal Constitution.<sup>37</sup>

Furthermore, over and above the risk that such methods can provoke, OMCT underlines that some of them, such as putting handcuffs on asylum seekers, are also used by the police to arrest ordinary criminals. OMCT condemns thus the risk of criminalisation of aliens, asylum seekers, asylum seekers whose request have been rejected and the putting of criminals and asylum seekers into the same bracket.

In 2001, the Federal Office for Refugees created a new department SwissREPAT<sup>38</sup> with responsibility for helping the Cantons to implement deportation decisions.

This is a new decentralised and organisational unity of the Confederation responsible for the coordination and organisation at Zurich airport, in cooperation with the cantonal police, the airport police and the travel centre of the Swiss Foreign Affairs.

This special service of SwissREPAT aims at coordinating cantonal police agreements thereby contributing to a more professional repatriation process by air. The service is not yet operational, but certain Swiss NGO's believe that this system can only speed up the rhythm of expulsions, which is already well underway.<sup>39</sup>

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<sup>34</sup> Commission des migrations, des réfugiés et de la démographie, Report of 10 September 2001, « *Procédures d'expulsion conformes aux droits de l'homme et exécutées dans le respect de la sécurité et de la dignité* », European Council, Parliamentary Assembly.

<sup>35</sup> « *Expulsions* » n° 8, 24 February 2000.

<sup>36</sup> Sources : Augenauf. Report Amnesty International, IOR/80/001/01, page 70.

<sup>37</sup> « *Human dignity shall be respected and protected* ».

<sup>38</sup> Federal Aliens Office, « *Activités principales de swissREPAT* », Bern, 8 January 2002.

<sup>39</sup> AGORA, (Aumônerie genevoise œcuménique auprès des requérants d'asile). AGORA is a centre to help asylum seekers . Augenauf.

## **4.2. Policy brutality outside of any deportation procedure**

In several cantons, information has been made revealed concerning police brutality against aliens.

The Committee Against Torture<sup>40</sup>, as well as the Committee for Human Rights<sup>41</sup> have been in a position to note certain violations committed by police officers during arrest and interrogation procedures.

In this respect, in the Canton of Geneva, Clement Nwankwo, a Nigerian jurist and human rights activist, was the object of ill-treatment during his arrest on 5 April 1997<sup>42</sup>. The government responded to the allegations, that an administrative inquiry had concluded that the treatment which Clement Nwankwo was subjected to, did not conform to the rule of conduct which the police should follow. The policemen concerned appealed the decision sanctioning them for lack of discipline (two warnings and one reprimand). The Special Commission for Police Affairs, provided by Geneva law, decided to cancel the sanctions against the three policemen concerned. Clement Nwankwo was not informed of this decision and did not obtain redress for the prejudice suffered. By decision of 9 January 1998, the Public Prosecutor rejected the complaint lodged by Clement Nwankwo.<sup>43</sup>

In the Canton of Bern, in May 2001, Kemal Gömec, a Kurd, was under psychiatric treatment in Switzerland, mainly as a result of acts of torture he was submitted to in Turkey. On the occasion of a temporary seizure during which he was screaming and threatening on his relatives, his psychiatrist (who was on the spot to try to calm his patient) refused to sanction which he believed might lead to a worsening of the situation, especially when taking into account his patient's inherent fear of the police. Despite the psychiatrist being in attendance, the police did intervene and mortally wounded Mr. Kemal Gömec.

Elsewhere, the United Nations Special Rapporteur Against Torture, in his last report<sup>44</sup> mentioned three cases of aliens residing in Switzerland, who were victims of ill-treatments and racial slurs:

In the Canton of Geneva, a 17 years old college student, of Angolan origin, was the object of ill-treatment and racial insults by three police officers in November 1999. Suspected of aggression against an individual he was arrested in the street with two of his friends.

The student was pushed to the ground, beaten with truncheon and called a "dirty nigger", during his transfer to the Carouge police station. The enquiry concerning the allegations of ill-treatment opened up at the request of the chief Prosecutor of the Geneva Canton was rejected due to lack of proof. The student has appealed this decision.<sup>45</sup> Also in the Canton of Geneva, a young 14 year old boy of Kosovar origin was bitten by a police dog and was the object of racial slurs.<sup>46</sup> In the Canton of Zurich, Rashid Abdul-Ackah, an economics student and Swiss national of Ghanaian origin, was ill-treated and subjected to insults by the Zurich municipal police on 23 November 1999, during a police identity control in the street. He lodged a complaint with the Zurich prosecuting magistrate.

OMCT has made note of several other affairs worthy of being brought to the attention of the Committee.

In the Canton of Bern, in December 1997, Mamadou Sidibé from the Ivory Coast on a visit here with his family, was stopped for an identity control in an area where the police habitually make controls of

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<sup>40</sup> Final Observations of the Committee Against Torture, Switzerland, 27/11/1997, A/53/44, §80-100, Session 19.

<sup>41</sup> Final Observations of the Committee for Human Rights, Switzerland, 12/11/2001, CCPR/CO/73/CH, Session 73.

<sup>42</sup> E/CN.4/1998/38/Add.1 - § 413.

<sup>43</sup> E/CN.4/1999/61 - 12/01/1999 - Session 55 - § 998 et 999.

<sup>44</sup> E/CN.4/2001/66 - 25/01/2001 - Session 57 - § 1025 à 1032.

<sup>45</sup> Cf. page 20 for judicial following.

<sup>46</sup> Cf. page 20 for judicial following.

Africans and Albanians drug dealers. Handcuffed, insulted and threatened with imprisonment and deportation for traffic in drugs, Mr Sidibe was not allowed to contact his family. According to the Bernese authorities, the judicial procedure investigating the allegations of ill-treatment did not reveal sufficient evidence to initiate penal proceedings or to open up a disciplinary procedure against the police officers.<sup>47</sup>

In the Canton of Geneva, in June 1998, Felipe Lourenço of Brasil, lodged a complaint against a prison worker in Champ-Dollon Prison, accusing him of inflicting ill-treatment causing serious body injuries on the day of his admission. He asked for help from the worker who beat him, but medical help was administrated only two hours later.

Taken to hospital, the doctors noted that he was suffering from irreversible damage to his spinal column and from respiratory problems due to a perforated lung.

In conclusion, given the weight of these information, OMCT condemns the abusive and disproportionate use of force by the police against foreigners and asylum seekers who have seen their request refused. This action is contrary to the provisions of article 5 b) of the CERD and to article 10 al. 2 et 3 of the Federal Constitution, which guarantees the right to life and personal liberty.

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<sup>47</sup> Federal Commission Against Racism (CFR), press release 1998, 1<sup>st</sup> semester.

## V. Right to effective remedies and redress

According to article 6, “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination”.

Any discriminatory practice within the judicial body directed against people of different race, origin, religion or colour should be opposed in conformity with article 6 of the Convention for the Elimination of Racial Discrimination.

However, information at hand would indicate several miscarriages in the Swiss judicial system related to discrimination by legal representatives in the implementation of the law on aliens.

### 5.1. Impunity

Inquiries looking into accusations against police officers are conducted by policemen. Their defence is assigned to lawyers, paid by the police and such lawyers are very intransigent.

According to some reports the goal of the lawyer first of all consists in trying to obtain an acquittal for the accused foreigners in most of the cases<sup>48</sup>, then to contest official decisions of the authorities and only in the last instance to lodge a complaint for ill-treatment.

Much information has been obtained to demonstrate the difficulties which exist in reaching a resolution complaints lodged. The same reports talk about it as being “mission impossible”. Penal and administrative complaints are rarely if ever<sup>49</sup> resolved. Reasons given are one, insufficient proof, two, that the resort to force by the police is legitimate when, for example, it is necessary to restrain an alien who puts up a fight and lastly that medical certificates do not provide evidence of injury resulting from ill-treatments. Moreover, whenever such incidents occur, there are rarely any eye witnesses.

Again, according to the same information, judges are reticent to open up official inquiries against police officers.

Such impunity, which would seem to surround these allegations of ill-treatment, is furthermore condemned as much by the Committee for Human Rights<sup>50</sup>, as by the Special Rapporteur for the Commission on People Migration, Refugees and Demography<sup>51</sup>, and the Federal Commission Against Racism.

Thus, the Zurich Supreme Court dismissed the charges concerning a police officer, condemned by a lower court for violent acts against a black detainee. Thanks to the casting vote of the President, the Tribunal came out in favour of the policeman due to lack of proof, despite the medical report and the presence of suspicious circumstances.<sup>52</sup>

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<sup>48</sup> Young Angolan and Kosovar Cases. Augenauf.

<sup>49</sup> Swiss League of Human Rights, Augenauf.

<sup>50</sup> Observations of the Committee for Human Rights, Switzerland, 12/11/2001, CCPR/CO/73/CH, Session 73.

<sup>51</sup> Commission on People Migration, Refugees and Demography, Report of 10 September 2001, « *Procédures d'expulsion conformes aux droits de l'homme et exécutées dans le respect de la sécurité et de la dignité* », European Council, Parliamentary Assembly. Following this report, the Assembly adopted, on 22 January 2002 (third seance), the recommendation 1547 relative to « *Procédures d'expulsions conformes aux droits de l'homme et exécutées dans le respect de la sécurité et de la dignité* ».

<sup>52</sup> Federal Commission Against Racism (CFR), press release 2000, 2<sup>nd</sup> semester. Limmattaler Tagblatt du 6 September 2000.

In another case, a Zurich cantonal policeman, who had intentionally over-tightened the handcuffs put on a prisoner during transportation, beat him up and tied him to his seat was condemned to pay a fine of 800 Swiss francs. The insult of “nigger” was not held against him in the final judgement.<sup>53</sup>

In the affair of the young 17 year old Angolan boy, his parents filed a complaint against the three policemen, for over-abuse of authority and for first degree bodily injuries on the 21 January 2000. The Public Prosecutor ordered the police to open an inquiry. The affair was closed in the first instance by the Public Prosecutor, on 11 April 2000. The plaintiff’s lawyer filed an appeal with the courts which ordered the opening of a penal inquiry. According to information available the inquiry was only partially conducted: the victim and his friends were not called to give evidence, there was no confrontation between the parties concerned and no examination of the victim’s clothes. On 13 September 2001, the examining magistrate brought the enquiry to an end without any charges being brought against the policemen in question. On the 11 October 2001, the Public Prosecutor closed the affair for a second time. Following this decision, the victim’s lawyer lodged a new appeal with the Court of Indictment, and a decision is now awaited.<sup>54</sup>

In the case of the young Kosovar bitten by a police dog, an administrative appeal was filed by the father of the victim with the Chief of the Police on 13 October 1999. the terms of which cited ill-treatment, breach of police law and racist behaviour. As a result of this complaint, two legal procedures were set in motion by the Chief of the police. The policeman responsible for the dog were accused of abuse of authority and first degree bodily injuries on 18 January 2001. Concerning the policeman who handcuffed the young boy who was lying injured on the ground, at the end of the year 2001, the lawyer requested, that he be charged with abuse of power. The inquiry being now completed the Public Prosecutor must render a decision on any further action to be taken in this affair.<sup>55</sup>

Finally, concerning the Felipe Lourenço case, the affair was rejected on the ground that this individual had inflicted the injuries on himself. His lawyer has lodged a new appeal which is now in Court of Indictment.

In these three cases, the allegations of racial insults were not upheld<sup>56</sup>. According to the same reports, they are hardly ever upheld in the majority of cases.

Concerning the allegations of ill-treatments committed during expulsion or deportation operations, the information to hand describes the same judicial defects.

In the Khaled Abuzarifah case, in July 2001, the Tribunal of the Bulach District condemned a doctor to five months deferred imprisonment, for homicide by negligence, whereas the two policemen present with Mr Abuzarifah at the time of his death were exonerated<sup>57</sup>. His family did not receive any reparation.

OMCT strongly condemns the lack of transparency, the partiality and the impunity which surround the allegations of ill-treatment and racial discrimination. Such deficiencies with respect to the protection of aliens indicate the existence of an institutionalised racism in the judicial system which does not conform to the provisions of the International Convention on the Elimination of Racial Discrimination.

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<sup>53</sup> Federal Commission Against Racism (CFR), press release 2000, 1<sup>st</sup> semester. NZZ of 2 April 2000.

<sup>54</sup> Federal Commission Against Racism, Mr Michel Membrez (lawyer).

<sup>55</sup> Idem.

<sup>56</sup> Idem.

<sup>57</sup> Organisation Suisse d’aide aux réfugiés (OSAR)

## **5.2. Absence of redress**

In the majority of cases, whenever the cases are rejected by the courts, the victims do not receive any reparation for the damages they have been subjected to.

Such was the case in both the Khaled Abuzarifah and Ms I.<sup>58</sup> Affairs. Concerning the deportation of aliens and also in the case of Clement Nwankwo, who had been subjected to inhuman treatment.

In its annual report 2000, the Special Rapporteur of the United Nations for the Independence of Judges and Lawyers<sup>59</sup> regrets the decision of the police officer Appeal Commission cancelling the sanctions imposed on the four officers who applied excessive force on Mr Nwankwo, when he was in police custody. The Rapporteur notes that this judgement should not have prevented the victim from obtaining adequate redress.

## **5.3. Procedural guarantees**

### **5.3.1. Right to contact a lawyer and relatives**

Article 31 al.2 of the Federal Constitution provides that persons deprived of their liberty have the right to be informed immediately and in a language that they understand, the reason for their detention and what their rights are. They must have the opportunity to assert their rights. In particular, they have the right to have their close relatives informed.

However, in certain cantons it turns out that this right to contact a lawyer or a family member is not foreseen. By the same token, the right to contact a lawyer can vary from one canton to another: with case law handed down by the Federal Tribunal imposing only the minimum requirement, which is access to a lawyer after a detention period of three months<sup>60</sup>.

Thus, the canton of Geneva allows a detainee to contact a lawyer on being detained, whereas in the canton of Valais this right is made available to the detainee only after the three months period of detention foreseen by the LSEE of 1931.

In the canton of Zurich, in January 2002, an asylum seeker, whose demand had been rejected, as well as her request to have the delaying mechanism lifted, had her telephone card taken away and her telephone number withdrawn. She was not able to contact a legal representative. On her refusal to board a plane at the airport she was slapped in the face, kicked, insulted and isolated in a police cell. Today she is in detention under restraining measures<sup>61</sup>.

Based on information available, the withdrawal of means of communication is “systematic” and police officers, notably in the canton of Zurich do not advise legal representatives of detention so that the latter are obliged to determine the situation on their own. Rejected asylum seekers and aliens prevented in this way from contacting their lawyers are unable to formulate an effective remedy against an expulsion decision.<sup>62</sup>

The same conclusion can be drawn in the case of aliens arrested and placed in police custody. The Committee Against Torture regrets that in certain cantons, there is a total lack of legal guarantees such as the possibility to contact a lawyer or family member from the time of arrest or to a medical

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<sup>58</sup> The Ms I case is in detail on page 22.

<sup>59</sup> E/CN.4/2000/61 – 21 February 2000 – Session 56 – Suisse, §270 to 272.

<sup>60</sup> Swiss League of Human Rights, report 1999 on the restraining measures.

<sup>61</sup> Augenauf.

<sup>62</sup> Augenauf, Swiss League for Human Rights.

examination as soon as they are taken into police custody or before appearance in front of the examining magistrate.<sup>63</sup>

OMCT denounces the absence of uniformity in Swiss law with respect to access to a legal representative. Every individual deprived of liberty should have at his disposal the right to legal assistance.

### 5.3.2. Right to effective remedies

The legislative modifications envisaged by the federal authorities make the formulation of effective remedies illusory.

Anyone arriving illegally or without official papers, will be confronted by a decision not to consider the case followed by immediate deportation. In this case, the time allowed to appeal will be limited to 24 hours from the time notification is made of the decision by the Federal Office for Refugees.

For decisions of not to consider the case, expulsion to a third country, or from an airport, the law contains a clause providing for immediate expulsion. In practical terms, this means that the delaying mechanism, which puts the decision on hold for the duration of the usual time period allowed to appeal (30 days) and the deliberation on the latter, if it has been lodged, is abolished. Article 112 allows for only 24 hours to file with the Appeal Commission a request to reinstate the delaying mechanism. As soon as this time limit is exceeded the police can carry out the deportation. In practice, according to certain information sources the withdrawal of the delaying mechanism has a tendency to be generalised.<sup>64</sup> Thus, whenever a person has physically been deported, lawyers find themselves discouraged from drafting a new appeal.

With respect to preventative detention with a view to deportation at the airport: according to article 60 of the draft law on aliens, the person under deportation does not have a right to know what his rights are as is required by article 31 al.2 of the Federal Constitution, and there is nothing specified concerning access to a legal representative. Over and above this, it is doubtful that the time limit of 24 hours accorded to lodge an appeal respects the requirements of article 6 of the CERD and article 13 of the CEDH.<sup>65</sup>

In a situation where being placed in detention prevents the proper preparation of an appeal, the risk that the principle of non-repatriation be violated cannot be excluded. The measure should not be applied to those persons who are in need of true protection. The new law on aliens, if it is adopted, should imply serious limitations to the right of effective remedies.

OMCT considers that a time delay of 24 hours to lodge an appeal is insufficient and that the absence of the delaying mechanism constitute an obstacle to an efficient appeal process.

OMCT also believes that the lack of information available and the requirement to make an advance payment to cover the expenses required to prepare an asylum appeal<sup>66</sup> constitute obstacles to an efficient remedies process, and is incompatible with international demands concerning human rights.

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<sup>63</sup> Final Observations of the Committee Against Torture, Switzerland, 27/11/1997, A/53/44, §80-100, Session 19.

<sup>64</sup> ELISA (*Asile en français et à l'envers*)

<sup>65</sup> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

<sup>66</sup> The Third Room of the Swiss Asylum Appeal Commission requests an advanced payment of 600 Swiss francs, whereas asylum seekers can not afford paying. If lawyers do not pay, the applicant can not do it.

The case of Ms. I is a perfect example of the non respect of the rights of aliens who are under restraining measures.

Ms. I, an asylum seeker from Kosovo, refused entry in 1999, was arrested at the Population Service Centre of the canton of Vaud, where she was applying to prolong her residence permit. She was placed in administrative detention from 21 – 23 March 2001 for not taking her repatriation flight. She regained her liberty through the intervention of the Legal Help Service for Deportees (SAJE), a complaint was lodged by SOS Asile and the person concerned was able to condemn the humiliations to which she was victim, to the State Council. Following her testimony, an administrative inquiry<sup>67</sup> was set up. The report of the Département des Institutions et des Relations Extérieures (DIRE) admitted that certain guarantees had not been respected (access to a telephone after 40 hours of detention, lack of information on her right to contact a third person concerning her detention, confiscation of personal belongings, inappropriate body searches, unjustified handcuffing). SOS Asile filed a complaint with the cantonal tribunal, but the procedure was rejected on the grounds that the information was incomplete and inexact.

With no lawyer willing to take the case, Ms. I did not obtain redress and only excuses of the State Council. However, this did not prevent six police officers turning up at her home without notice and taking her directly to the airport where she was forced to board a private charter flight with other six other Kosovar nationals on the 30 January 2002. Today, she is living in Pristina.<sup>68</sup>

In addition, Ahmad Kamal, the European editor of the Arab satellite network Al Jazera, was arrested at Geneva Cointrin airport in early October 2001. His personal belongings were immediately confiscated, he spent the night in a police cell and was expelled to Brussels, where he was met by the police.<sup>69</sup>

### **5.3.3. Appeal to the CERD for individual complaints**

During the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the lead of the Swiss delegation, Ms Claudia Kaufmann proclaimed the Swiss government's decision to make the declaration provided for in article 14, which recognises the competence of the CERD to receive and examine individual communications.<sup>70</sup>

On the 29 August 2001, the Federal Council adopted the Message relative to the recognition of this competence on the part of the CERD. The National Council, on the 10 December 2001 adopted the planned recognition of the competence of the CERD. The implementation of this plan will be entrusted to the Federal Department of Home Affairs.

OMCT is pleased with this acceptance and hopes that the State Council will adopt the project.

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« *Commission de recours : grosse fatigue* », in *Vivre ensemble*, Bulletin de liaison pour la défense de droit d'asile, N°8, Juin 2001, page 8. Information confirmed by Augenauf.

<sup>67</sup> Report of the Procurer Substitute, Bertrand Sauterel : "Report on an administrative inquiry concerning the detention of Ms I and the implementation of restraining measures", 7 September 2001. [www.dire.vd.ch](http://www.dire.vd.ch).

<sup>68</sup> AGORA, Fraternité et SOS Asile (NGO's of defense of person without official papers, Lausanne), Département des Institutions et des Relations Extérieures (DIRE).

<sup>69</sup> ELISA, International Federation of Journalists.

<sup>70</sup> Ms Claudia Kaufmann intervention, Secrétaire general of the Federal Department of Home Affairs, State Secretary, Chief of Swiss Delegation, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, 31 August to 7 September 2001.

## VI. Conclusions and recommendations

### 6.1. Conclusions

The International Secretariat of the OMCT expresses its anxiety concerning the treatment to which asylum seekers and aliens are victims as a result of discrimination.

OMCT deplores the fact that, since the last recommendations of the CERD in 1997, there has been no evolution in this situation. Asylum seekers and aliens are still the butt of racial discrimination. In certain circumstances this discrimination is the source of human or degrading treatment, which can lead up to the death of the victim.

OMCT is deeply concerned by the manner in which deportations are carried out by police officers. The use of dangerous methods such as injection of sedatives and gags in certain cantons should not be allowed. Moreover, some of these methods, such as handcuffing of refused asylum seekers, are disproportionate and create a phenomenon of criminalisation of asylum seekers. OMCT points out that the use of force should be proportionate to the aims pursued and in conformity with the relevant international norms on the subject, and that all methods which might put in danger the life, health and physical integrity of the deportee, should be prohibited.

Likewise, the intervention of doctors or other medical specialists during the deportation process appear to be a pure formality. A practice has been instituted in Switzerland, requiring police officers to obtain a medical certificate, before carrying out expulsion procedures. Nevertheless, the doctor who examined Kahled Abuzarifah did not discover the defect in his nasal passage, which made any blockage of his respiratory tract dangerous. Besides, the police, in an abusive and deceitful manner, often resort to false medical certificates. *“Doctors are often requested to give injections of tranquillizers, whereas their professional code of ethics states that a doctor should not be involved in activities which run counter to the well being of the patient if he or she refuses any medical intervention”*.<sup>71</sup>

OMCT is deeply disturbed by the increasing evidence of institutionalised racism. The discriminatory nature of the on aliens, especially concerning the restraining measures, can have serious consequences for the person concerned. It limits the right to seek and enjoy asylum.

OMCT takes note that there are serious shortcomings, which exist in certain penal and administrative inquiries related to racial incidents. The lack of transparency in the inquiry proceedings, the non-respect of certain procedural guarantees, impunity, and the absence of redress for wrongs committed are so many of the elements, which demonstrate that a discriminatory policy towards aliens is practised in the judicial and penitential systems.

A direct link exist between racism and inhuman treatment on the part of the representative of public power. As a result, it is of the greatest importance to give notice to all those responsible for the implementation of the law, that racism will not be tolerated, that every allegation of brutality or any other violations of human rights formulated by a victim of a such acts or racists behaviour, will be the object of a thorough and independent inquiry, and that the author of these acts will be prosecuted.

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<sup>71</sup> « *Expulsions* », n°8, 24 February 2000.

## 6.2. Recommendations

In light of these observations and conclusions, OMCT would recommend that :

- Clear rules should be issued for all those working in the police and those who are involved in carrying out the sentence, with the intention of reducing the risk of violence to a minimum. The training of such personal is both truly necessary and a priority.

OMCT notes, nevertheless that certain cantons, notably Geneva and Neuchatel, programs have been set up on prevention and awareness, as well as training programs directed at the police force and which deal with the police, aliens and human rights.

In the same way, there are reflections workshops held in the framework of the “*Passagers 2*” Project, which aim to bring improvements to the process of carrying and the deportation decisions by the cantonal police, by instituting fixed rules for restraining measures.<sup>72</sup>

Given the need to ensure non-discrimination in access to asylum and in treatment afforded asylum seekers, refugees and migrants by police, immigration and other law enforcement officers, OMCT recommends:

- The setting up of a system for accompanying deportees, by an independent organ of the federal authorities. Such a system should be set up in the country of origin.
- The establish a common policy with respect to expulsion procedures. OMCT recommends the prohibition of all restraining methods whose effect is to offend mental and physical integrity as well as the human dignity of the alien.
- The creation of an independent organ responsible for receiving and examining complaints describing ill-treatments or any other abuse of power on the part of the police, and to lead efficient inquiry proceedings. This body should have the necessary means to guarantee on the one hand, that responsible will be prosecuted and punished, and on the other hand, a satisfactory reparation to the victim, in conformity with article 6 of the International Convention on the Elimination of Racial Discrimination.

OMCT however, is pleased with the creation in the canton of Geneva, of an authority, the “*Commissaire à la déontologie*”, with responsibility to examine complaints, reports and statements of allegations of ill-treatment.

OMCT, nevertheless, raises questions concerning the independence of this organ. It recommends that each canton should avail itself of an independent mechanism having such competence.

- The federal authorities should guarantee a maximum of transparency with regard to the functioning of detention centres, by acknowledging in all of the cantons, the right of access to a legal representative and to close relatives. The latter should be informed of the situation of their clients.
- OMCT recalls that it is indispensable to ensure in practice the right to effective remedies as spelt out in article 6 of the CERD. This right must be guaranteed to anyone who opposes a decision of deportation or expulsion from the territory. The time within which to appeal should be reasonable and the remedy should be suspensive to the execution of the deportation or expulsion decision.

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<sup>72</sup> OSAR.

- The current practice of the judicial and penitential authorities stems from an immigration policy which is discriminatory and repressive. OMCT considers that this policy should take on a new orientation, centred on the protection and respect of fundamental human rights such as they are guaranteed by the Federal Constitution and International law.
- Given the outcomes of the Third World Conference Against Racism, Racial discrimination, Xenophobia and Related intolerance, OMCT recommends the Committee to urge Switzerland to facilitate for victims of racial discrimination, including victims of ill-treatment or any kind of violence, access to all appropriate legal procedures and free legal assistance in a manner adapted to their specific needs and vulnerability, including through legal representation<sup>73</sup>.
- In its next periodic report to the Committee on the Elimination of Racial Discrimination, the Government should provide further information on the connection between violence and racial discrimination in general and , in particular, on violence perpetrated against vulnerable groups, including migrants and asylum seekers.
- The CERD should recommend the government of Switzerland to provide and widely circulate print versions of concluding observations.

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<sup>73</sup> WACR Programme of Action, para. 161.