Human Rights Committee

International Commission of Jurists submission on the 3rd Periodic Report of Switzerland

September 2009

The International Commission of Jurists (ICJ) wishes to provide its views to the Human Rights Committee for the consideration of the 3rd Periodic Report of Switzerland. In this submission, the ICJ highlights several issues which it considers should be of particular concern to the Committee in its consideration of the Swiss report.

In particular, the ICJ is concerned at certain provisions of the Swiss legislation on asylum-seekers and migrants that affect adversely the principle of *non-refoulement*, their right to a fair expulsion procedure (Article 13 ICCPR) and their right not to be detained arbitrarily (Article 9 ICCPR).

1. An overview of the situation of migrants in Switzerland

According to the latest Report on Migration (2008) of the Federal Office of Migration,[1] the number of migrants resident in the Swiss Confederation amounts to 1,638,949, constituting 21.4 percent of the Swiss population (7,669,074 inhabitants). Out of this total, 612,454 (or eight percent of the general population) come from countries which are not part of the European Union (EU). EU citizens enjoy particular guarantees due to freedom of movement bilateral agreements between the EU and the Swiss Confederation.

In 2008, of the 16,606 applications for asylum, 11,062 reached a decision of first-instance. While 2,261 of these were granted asylum, 3,073 were rejected without a disposition on the merits of the application, 4,483 were rejected on the merits, and 1,245 were withdrawn or closed. The principal countries of origin of these

[1] *Rapport sur la migration 2008*, Office federal des migrations ODM, April 2009.

asylum-seekers were Eritrea (2849 applications), Somalia (2014), Iraq (1440), Serbia including Kosovo (1301), Sri Lanka (1262), Nigeria (988), Turkey (519), Georgia (481), Afghanistan (405) and Iran (393).

During 2008, 2544 people were ordered subject to administrative detention, 93 percent of them with the aim of the execution of the expulsion. Some 4928 people left Switzerland by plane, 45.5 percent of them under the framework of the Asylum Law and 54.5 of them under the Aliens Law. Some 27.7 percent left the country of their own volition, while the 72.3 percent were either escorted by law enforcement agents to the country of origin (288) or to the airport (3724).

2. Legislation concerning irregular migrants and asylum-seekers

The domestic regulation of asylum procedures and admission or expulsion of migrants is one of federal competence, according to Article 121(1) of the Swiss Constitution. Nevertheless, the implementation of some legislative provisions in this area is left to the cantons. The Asylum Act of 1998[2] sets out the regime applicable to asylum-seekers in the Swiss Confederation. The Aliens Act of 2005[3] regulates the entry and expulsion of migrants and administrative detention in order to prevent unauthorised entry on the territory or to facilitate deportation.

The recent reforms of these two pieces of legislation have served to further restrict the rights of irregular migrants and asylum-seekers. Below, the ICJ analyses the provisions of the two Acts in light of relevant international human rights law on the principle of *non-refoulement* and administrative detention of migrants.

2.1. Respect for the principle of non-refoulement

The Swiss Constitution includes the prohibition of *non-refoulement* both in its international refugee law context (Article 25(2)) and its human rights law context, in the form of the absolute prohibition to transfer persons "to a state in which they face the threat of torture or any other form of cruel or inhumane treatment or punishment" (Article 25(3)). Such guarantee is reinforced by the primacy granted to international law in the Swiss legal system, which directly incorporates Article 7 ICCPR, Article 3 Convention against Torture (CAT)[4] and Article 3 European Convention on Human Rights (ECHR).[5]

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[2] Official Translation in english: http://www.admin.ch/ch/e/rs/142_31/index.html

[3] Available only in French, German and Italian. French version at http://www.admin.ch/ch/f/rs/142_20/index.html

[4] Article 3, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*: "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

[5] Article 3, *European Convention for the Protection of Human Rights and Fundamental Freedoms*: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

This Committee in its General Comment 31 has affirmed that "the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[6] Under international human rights law the obligation in respect of *non-refoulement* applies where there are substantial grounds for believing that an individual faces a real risk, following removal, of torture and cruel, inhuman or degrading treatment or punishment or other violations of the most fundamental human rights, including arbitrary detention and flagrant denial of the right to a fair trial.[7]

The ICJ calls on the Committee to recommend that the State Party ensure that its domestic law concerning grounds for prohibition of *refoulement* covers situations where there are substantial grounds for believing that there is a real risk of irreparable harm including extrajudicial, summary and arbitrary executions, death penalty, arbitrary detention and flagrant denial of the right to a fair trial.

2.1.1. Expulsion on security grounds and non-refoulement

The second paragraph of Article 121 of the Constitution provides that "[f]oreign nationals may be expelled from Switzerland if they pose a risk to the security of the country". Switzerland explained in its third periodic report to the Human Rights Committee that "[t]his measure is ordered by the Federal Council when there exists a danger to Switzerland's internal or external security, when the matter in question is of great political importance, or when reasons of internal or external policy justify the measure."[8] Switzerland also indicated that "[t]here is no right of appeal against the decision of the Federal Council, and the procedural

[6] Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), paragraph 12.
[7] Human Rights Committee, *Kindler v. Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993), § 13.2; HRC, *General Comment No. 31*, cit., § 12. ECHR Article 6: ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 113, *Drozd and Janousek v. France and Spain*, Judgment of 26 June 1992, § 110; Article 5 and Article 6: *MAR v. UK*, Judgment of 19 September 1997; *Tomic v. UK*, Admissibility decision of 14 October 2003, §3. In relation to *refoulement* regarding Article 2 see *Bader and Kanbor v. Sweden* App no.13284/04; and flagrant denial of fair trial contrary to article 6 see *Al-Moayad v. Germany* app no.35865/03. See also, ***R v. Special Adjudicator, ex parte Ullah***, [2004] UKHL 26, *per* Lord Bingham, § 21. The ICJ recalls that principle 10 of the *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* affirms that "States may not expel, return, transferor extradite, a person suspected or convicted of acts of terrorism to a state where there is a real risk that the person would be subjected to a serious violation of human rights, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearance, extrajudicial execution, or a manifestly unfair trial; or be subject to the death penalty."
[8] *Third Periodic Report of Switzerland before the Human Rights Committee*, 17 December 2007, UN Doc. CCPR/C/CHE/3, English official translation, paragraph 210.

provisions may be applied restrictively for reasons of official secrecy."[9]

Therefore, this provision, arising directly under the Constitution, carries an express lack of any remedy where its implementation would contravene rights guaranteed under the Covenant. Such implementation could result in denial of the right to an effective remedy in breach of article 2(3) ICCPR, as well as a violation of the principle of *non-refoulement* , in potential breach of Articles, 6, 7, 9 and/or 14 ICCPR. **The ICJ urges the Committee to recommend that Switzerland ensure an effective remedy before a judicial authority in order to assess the respect of the principle of *non-refoulement* including in cases of expulsions under Article 121 of the Swiss Constitution (Articles 2(3), 6 and 7, 9 and 14 ICCPR).**

In federal law, despite the guarantees provided for under constitutional and international law, the relationship between the ban on *refoulement* in Article 5 of the Asylum Act, and the power to expel refugees on security grounds under Article 65 of the Act,[10] is unclear. Indeed, Article 5 does not include an absolute prohibition on *non-refoulement* as understood in international human rights law, and expressly provides for an exception to it for security reasons.[11] Although, according to the Federal Tribunal jurisprudence,[12] conflicting provisions in federal law and international law should be resolved in favour of the latter, this does not assure strong guarantees of the respect of the principle of *non-refoulement*. The Aliens Act 2005 provides in its Article 64 that "when an alien seriously or repeatedly threatens the security and the public order, puts them in danger or represents a threat for the internal or external security, the expulsion is immediately executive" and without formal decision.[13] Any expulsion decision which is executive is carried out by the competent canton.[14] Since the security grounds trigger an accelerated procedure, there is a risk that, where the competent authorities take into account only the federal law at first instance, without considering Switzerland's international law obligations, the person

[9] *Third Periodic Report of Switzerland before the Human Rights Committee*, 17 December 2007, UN Doc. CCPR/C/CHE/3, English official translation, paragraph 210.
[10] Article 65, Asylum Act (Official translation): "Refugees may be expelled only if they endanger Switzerland's internal or external security or have seriously violated public order, subject to Article 5."
[11] See, Article 5 Asylum Act (official translation):
""1 No person may be forced in any way to return to a country where their life, physical integrity or freedom are threatened on any of the grounds stated in Article 3 paragraph 1 or where they would be at risk of being forced to return to such a country. 2 The ban on refoulement may not be invoked if there are substantial grounds for the assumption that, because the person invoking it has been convicted with full legal effect of a particularly serious felony or misdemeanour, they represent a threat to Switzerland's security or are to be considered dangerous to the public."
[12] In the recent decision *Segretariato di Stato dell'economia contro C. nonché Tribunale delle assicurazioni del Cantone Ticino*, the Federal Tribunal reconfirmed earlier its precedent according to which "in case of conflict public international law prevails, in general, on domestic law […], especially when the international law provision is aimed at the protection of human rights", ATF 133 V 367, 387, *Segretariato di Stato dell'economia contro C. nonché Tribunale delle assicurazioni del Cantone Ticino*, 9 May 2007 (unofficial translation).
[13] Article 64(3), Aliens Act (unofficial translation), read it together with its paragraph 1. See also, Article 66(3).
[14] Article 69, Aliens Act.

subject to expulsion may lack the opportunity to mount a meaningful judicial challenge.

Furthermore, under Article 68 of the Aliens Act, the Federal Police have the power, after consultations with the internal intelligence services (*Service d'analyse et de prevention – SAP*), to expel a migrant in order to maintain the internal or external security of Switzerland. While the expulsion is generally granted a stay of execution, it can be immediately executed when a migrant seriously or repeatedly threatens or endangers security and public order or represents a threat to internal or external security.[15] Considering that the condition for immediate execution is the same as the condition for ordering the expulsion, there seems little scope to apply a stay of execution.

The right to *non-refoulement* cannot be overridden by considerations of national security or on grounds of the offences committed by the concerned person.[16] People subject to removal and deportation or similar transfer orders have the right to contest such measures, in the light of this principle, before an independent and effective judicial mechanism, which shall have suspensive effect on the application of the expulsion measure until a final decision is reached.[17] In particular, the duty to ensure the respect of these principles, and in particular of the principle of *non-refoulement*, rests with the State's authorities, irrespective of whether there has been an initiative or application of the migrant. As a consequence, the authorities must evaluate, in the light all information available, including from non-governmental and United Nations sources, the risk of breach of the principle of *non-refoulement* before the issuance of the expulsion order. [18]

Regarding security threats, the Committee has already expressed its concern "that in cases of alleged threat to the State, the implementation of the decision to remove a foreigner may not be suspended prior to consideration of an appeal, which may have the effect of denying that individual a remedy under article 2."[19]

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[15] Article 68, Aliens Act.

[16] See, *inter alia, Soering v. UK*, Judgment of 7 July 1989; *Chahal v. UK*, Judgment of 25 October 1996; *Saadi vs. Italy*, Judgment of 28 February 2008, Application no. 37201/06.

[17] Human Rights Committee, *Mohammed Alzery vs. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11(8). HRC, *Zhakhongir Maksudov and others vs. Kyrgyzstan*, CCPR/C/93/D/1461 and others, 31 July 2008, para. 12.7 (also on article 6); and, CPT/Inf (2005) 15, para. 30. See also, *Report of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène: Mission to Italy*, UN Doc. A/HRC/4/19/Add.4, 15 February 2007, paragraph 72; *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guidelines 5(1) and 5(3). CERD, *General Comment no. 30, Discrimination against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 25.

[18] *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guideline 2(1) and 2(4); *Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004*, CPT/Inf (2006) 16, Strasbourg, 27 April 2006, paragraph 167.

[19] Lithuania, ICCPR, A/59/40 vol. I (2004) 52 at para. 71(7).

The ICJ is concerned that the immediate executive nature of the security-grounded expulsions provided for in Articles 64 and 68 of the Aliens Act may lead to breaches of the migrant's right to contest such measures before an independent and effective judicial body able to suspend the execution of the expulsion measure.

As the ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights concluded in its final report, *Assessing Damage, Urging Action*, there is " no doubt that, particularly when a deportation decision affects a long-term or permanent resident, and where there is a serious risk of the deportee being subjected to serious human rights violations upon return, only a hearing by an independent judicial body, constitutes an acceptable process. Such an appeal should have a suspensive effect, particularly where irreparable harm is at stake."[20]

The ICJ considers that the limitations on the principle of *non-refoulement* as currently set out in Article 5 of the Asylum Act could lead to violations of Articles 6, 7, 9, 14 and 2(3) of the ICCPR. The ICJ urges the Committee:

- **to recommend that Switzerland amend Article 5 of the Asylum Act to accord with international human rights law standards on *non-refoulement*.**
- **to recommend that Switzerland provide for suspensive judicial review mechanisms for security-based expulsion procedures (Articles 2(3), 6, 7, 9 and 14 ICCPR).**

2.1.2. Accelerated procedures of rejection and expulsion

Article 32 of the Asylum Act provides the grounds for dismissing an asylum application. Where one of these grounds is met, the authorities reject the application with a declaration of *non entrée en matière* (NEM) and do not proceed to assess the merit of the application. Article 32(2)(a) applies such procedures when asylum-seekers "fail to hand over travel documents or identity papers to the authorities within 48 hours of filing the application." The application of such procedure in this case is excluded when the asylum-seekers can "credibly demonstrate that they are justifiably unable to provide travel or identity papers within 48 hours of filing the application",[21] or when on the basis of the first hearing there are some elements which establish refugee status or suggest that further investigations are necessary to establish refugee status or an obstacle to the removal, i.e. the prohibition of *non-refoulement* or the respect of the right to family unity.[22] The travel documents are "any official document authorizing the

[20] *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, International Commission of Jurists, Geneva, 2009, p. 119. The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, composed of eight distinguished jurists from different parts of the world, is an independent panel commissioned by the ICJ to report on the global impact of terrorism on human rights. The report *Assessing Damage, Urging Action* is based on a process of sixteen Hearings around the world covering more than forty countries in different parts of the world.
[21] Article 32(3)(a), Asylum Act (official translation).
[22] See, Article 32(3)(b) and (c), Asylum Act.

entry in the State of origin or in other States, such as a passport or a travel document in substitution of it".[23] Identity papers are "any official document with a picture delivered with the aim of proving the keeper's identity",[24] which includes "the surnames, the names and nationalities, the ethnicity, the date and place of birth, and the gender".[25] The *Observatoire romand du droit d'asile e des étrangers* reported that the application closed as NEM were 1,834 in 2006 and 2,644 in 2007, with an increase of 44 percent.[26] As highlighted above, in 2008 they were 3,073 with an increase of 16 percent.[27]

Furthermore, the asylum application is dismissed if "it is manifestly aimed at avoiding the imminent enforcement of a removal or expulsion order,"[28] a purpose which is presumed "if the application is filed in a close temporal relationship with an arrest, criminal proceedings, or the execution of a sentence or the issue of a removal order."[29] The first part does not apply when "an earlier filing of the application was not possible or could not reasonably be expected; or there are indications of persecution."[30] It is not clear whether such exception is applicable also to the presumption in the second paragraph of the article or it is excluded when it enters into play.

Finally, article 65 of the Aliens Act provides that, when a migrant enters Swiss territory through an airport, and entry is rejected, he or she must immediately leave the country. The reasoned decision of rejection is given within 48 hours. The migrant is granted appeal before a judicial authority against the decision within 48 hours from the notification of the decision, and the appeal will be decided within the following 72 hours. Nevertheless, the appeal does not have suspensive effect.

This Committee advised in respect of its review of another State party to the Covenant that it "should ensure that persons whose applications for asylum are declared inadmissible are not forcibly returned to countries where there are substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of life or torture or ill-treatment, and provide effective remedies in domestic law in this regard."[31]

The Committee expressed its concern at "decisions for expulsion or denial of immigration or asylum status without the affected individuals having been given

[23] Ordonnance 1 sur l'asile relative à la procedure, 11 august 1999, no. 142.311, Article 1a(b) (unofficial translation).
[24] Ordonnance 1 sur l'asile relative à la procedure, 11 august 1999, no. 142.311, Article 1a(c) (unofficial translation).
[25] Ordonnance 1 sur l'asile relative à la procedure, 11 august 1999, no. 142.311, Article 1a(a) (unofficial translation).
[26] *Premiére Rapport Annuel d'Observation*, Observatoire romand du droit d'asile e des étrangers, 24 September 2008, p. 7
[27] *Rapport sur la migration 2008*, Office federal des migrations ODM, April 2009, p. 16.
[28] Article 33(1), Asylum Act (official translation).
[29] Article 33(2), Asylum Act (official translation).
[30] Article 33(3) (a) and (b), Asylum Act (official translation).
[31] Portugal, ICCPR, A/58/40 vol. I (2003) 56 at paras. 83(12).

an appropriate hearing,"[32] as incompatible with the requirements of Article 13 ICCPR. In many asylum and expulsion cases, the Committee has stated that "it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice."[33] It is clear that, when courts do not grant an effective hearing in order to evaluate on the merits the particular case of *non-refoulement*, this may lead to the violation of Articles 6, 7 or 14 ICCPR.

The ICJ recalls that, concerning the access to an effective remedy with sufficient procedural guarantees, the Committee of Ministers of the Council of Europe has declared that "time-limits for exercising the remedy shall not be unreasonably short; [34] the remedy shall be accessible "with sufficient free legal assistance in case of need, and "when the returnee claims that the removal will result in a violation of his or her human rights [to *non-refoulement*], the remedy shall provide rigorous scrutiny of such a claim."[35]

The ICJ considers that the current NEM procedures as designed by the Asylum Act risks failing to guarantee to the applicant a proper hearing and, consequently, to violate the prohibition of *non-refoulement* protecting Articles 6, 7 and 14 ICCPR. In particular, the strict requirement of travel documents and identity papers by Article 32 of the Act ignores the difficult reality faced by most of refugees, who are necessarily at risk, in obtaining necessary documentation. Article 33 also presents problems as it applies the NEM procedure based on criminal and security evaluations, ignoring the fact that the principle of *non-refoulement* cannot be overridden by such considerations. Finally, the procedure for the rejection of a migrant at the airport applies very short time-limits, which risk impeding a proper examination of the *non-refoulement* implications of the repatriation decision. The fact that the review of such a decision does not carry suspensive effect runs counter to the migrant's right to contest such measures before an independent and effective judicial mechanism, which shall have suspensive effect on the application of the expulsion measure until a final decision is reached.[36] These measures risk violations of the prohibition of *non-*

[32] Concluding Observations on Sweden, 1997, A/51/40, Vol. I, p. 19, paragraph 88.
[33]Mahmoud Walid Nakrash and Liu Qifen v. Sweden, CCPR/C/94/D/1540/2007, 19 November 2008, paragraph 7.3. See also, Arusjak Chadzjian v. Netherlands, CCPR/C/93/D/1494/2006, 5 August 2008, para. 8.4, Surinder Kaur v. Canada, CCPR/C/94/D/1455/2006, 18 November2008, para. 7.3, Daljit Singh v. Canada, CCPR/C/86/D/1315/2004, 28 April 2006, para 6.3, Jonny Rubin Byahuranga v. Denmark, CCPR/C/82/D/1222/2003, 9 December 2004, paras. 11.3-11.4.
[34] *Case of Jabari vs Turkey*, ECtHR, Application no. 40035/98, 11 July 2000, paragraph 40.
[35] *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guideline 5(2).
[36] Human Rights Committee, *Mohammed Alzery vs. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11(8). HRC, *Zhakhongir Maksudov and others vs. Kyrgyzstan*, CCPR/C/93/D/1461 and others, 31 July 2008, para. 12.7 (also on article 6); and, CPT/Inf (2005) 15, para. 30. See also, *Report of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène: Mission to Italy*, UN Doc. A/HRC/4/19/Add.4, 15 February 2007, paragraph 72; *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guidelines 5(1) and 5(3). CERD, *General Comment no. 30, Discrimination against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 25.

refoulement (Articles 6, 7 and 14 ICCPR) and also to problems with the respect of the procedures mandated by Article 13 ICCPR.

The ICJ calls on the Human Rights Committee:

- **to recommend that Switzerland remove the grounds relating "travel documents and identity papers" for rejecting at the admissibility stage an asylum application (*non entrée en matière*);**
- **to recommend that Switzerland abrogate the presumption of abuse of the asylum procedure with the consequence of rejecting at the admissibility stage an asylum application (*non entrée en matière*) included in Article 33(2) of the Asylum Act;**
- **to recommend that Switzerland provide longer time limits for the procedure of review of the order of refusal of entry in the airports and to assure that the appeal mechanism will have a suspensive effect on the expulsion.**

2.1.3. Safe Countries List

According to Article 34(1) and (2) of the Asylum Act, the competent authority is to reject an asylum application with a NEM decision whenever the person comes from a country included in a "Safe Countries List."[37] The list is compiled by the Federal Government and includes countries where there is no presence of persecution and safe third countries which fully apply the principle of *non-refoulement*.[38] The presumption of non-asylum status may be rebutted, but the burden of proof on the applicant is increased. Where an asylum seeker's home country is situated on a "Safe Country List", the disposition of a claim on the merits may well be prejudiced as a presumptive characterization of safety in the home country is posited in eyes of the decision making authority.

The Human Rights Committee has concluded that "in order to afford effective protection under articles 6 and 7 of the Covenant, applications for refugee status should always be assessed on an individual basis and that a decision declaring an application inadmissible should not have restrictive procedural effects such as the denial of suspensive effect of appeal (articles 6, 7 and 13 of the Covenant)."[39]

Furthermore, the Committee against Torture has previously expressed its concern "about the absence of sufficient legal protection of the rights of persons who are denied asylum through the use of a list of safe countries in which those persons could be sent back"[40]

The ICJ calls on the Human Rights Committee to recommend that Switzerland abolish the use of the Safe Countries List in respect of asylum cases and that it

[37] Our expression.
[38] See, Article 6a(2), Asylum Act.
[39] Concluding observations of the Human Rights Committee : Estonia. 15/04/2003, CCPR/CO/77/EST, paragraph 13.
[40] Concluding observations of the Committee against Torture: Finland. 09/07/96. A/51/44,paras.120-137, paragraph 131.

conduct the examination of asylum and other *non-refoulement* claims on an individualised case-by-case basis.

2.2. Detention of irregular migrants and asylum-seekers

The Aliens Act provides for a variety of forms of detention for migrants and asylum-seekers. These include: provisional detention (*rétention*), preparatory detention (*détention en phase préparatoire*), detention in order to undertake the expulsion, detention to ensure expulsion, and detention for insubordination. All forms of detention, apart form the *rétention*, cannot exceed 24 months for adults and 12 months for minors between 15 and 18 years.[41] The legality of the different forms of detention must be examined by a judicial authority after an oral hearing within 96 hours. Only Article 77 detention provides for a written procedure.[42] Nevertheless, the judicial authority can waive the oral procedure in cases when it is plausible that the expulsion will take place after eight days from the detention order issuance and only if the person concerned has agreed in writing to the suspension of the oral procedure. If the expulsion cannot be executed within this time, the oral hearing takes place within twelve days from the detention order.[43]

Article 73 provides for detention for the purposes of notifying a decision or in order to establish the migrant's nationality and identity (*rétention*). This detention can last no more than three days and is reviewed only *a posteriori* by the competent judicial authority. Article 75 provides for a maximum term of six months of detention during the preparatory phase of expulsion (*détention en phase préparatoire*). Its purpose is to ensure the execution of the expulsion. It is aimed at migrants who have refused to declare their identity during the procedures; have submitted several asylum applications under different identities; do not observe prescriptions of the asylum procedure; illegally enter the national territory and cannot be immediately expelled; are alleged to have abused the asylum proceeding in order to avoid or delay the expulsion; infringed orders of restriction of movement by the authorities; are considered to represent a threat to internal or external security or are convicted for a criminal offence.

Article 76 provides for detention in order to carry out expulsion. It can be ordered after a first-instance decision of expulsion is notified. It targets most of the people who can be placed in preparatory detention (Article 75), those whose asylum application have been rejected for formal reasons (NEMs), and those who are suspected to escape from the expulsion procedure. Such detention can last up to 18 months for adults and 12 for minors between 15 and 18 years of age.

Article 77 provides the cantonal authorities with the power to order an additional detention of up to 60 days for any migrant against whom an expulsion executive decision has been ordered, the migrant did not leave Swiss territory within the time ordered, and where the authorities have themselves procured the necessary travel documents.

[41] Article 79, Aliens Act.
[42] Article 80(2), Aliens Act.
[43] Article 80(3), Aliens Act.

Finally, Article 78 provides for detention for "insubordination". Such detention is ordered when the migrant has not obeyed an order to leave Switzerland within a certain time and the executive decision of expulsion cannot be executed because of the migrant's behaviour. This detention can be ordered when the other forms of detention are not possible. It can last up to 18 months for adults and nine months for minors between 15 and 18 years of age. The renewals of immigration detentions provided by articles 76 and 78 are ordered with the agreement of the canton's judicial authority at different intervals. The Article 78 detention must be approved by a judicial authority in an oral hearing within 96 hours from when it is ordered.

Article 9 ICCPR and Article 5 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* (ECHR) prohibit any kind of arbitrary detention, and provide for a right to judicial review of the detention. The ICJ recalls that, in particular, administrative detention to prevent unauthorised entry on the territory or to facilitate deportation must not be automatic, but should be provided for only if no less intrusive measures are available, in accordance with the principle of proportionality.[44] Moreover, the length of administrative detention must be provided for in primary legislation,[45] be proportional to the purposes of the individual case,[46] and subject to periodic review of its grounds by independent and impartial courts.[47] In particular, "justification for the ["irregular immigrant's"] detention [based on the country's] general experience that asylum seekers abscond if not retained in custody"[48] is not sufficient.

Administrative detention must be subject to judicial review both as regards the procedure that led to it and to the merit of the detention itself in light of domestic

[44] Human Rights Committee (HRC), *Omar Sharif Baban vs, Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para. 7.2. See also, HRC, *Saed Shams and others vs. Australia*, CCPR/C/90/D/1255 and others, 11 September 2007, 7.2; HRC, *C vs. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, para. 8.2; HRC, *D and E and their two children vs. Australia*, CCPR/C/87/D/1050/2002, 9 August 2006, para. 7.2; HRC, *A vs. Australia*, CCPR/C/59/D/560/1993, 30 April 1997, paras 9.2 and 9.3; HRC, *Danyal Shafiq vs. Australia*, CCPR/C/88/D/1234/2004, para. 7.2; ECHR Article 5.1.f, ECtHR, *Amuur vs. France*, Case no. 17/1995/523/609, 20 May 1996, para. 43 (relative to ECHR); ECtHR, *Saadi vs, United Kingdom*, Application no. 13229/03, 29 January 2008, para. 67. UN Working Group on Arbitrary Detention (WGAD), *Annual Report*, E/CN.4/1999/69, 18 December 1998, para. 69, guarantee 13; *Report of the UN Special Rapporteur human rights of migrants, MS Gabriela Rodríguez Pizarro*, UN Doc. E/CN.4/2003/85, 30 December 2002, paragraph 75(f); *Report of the Working Group on Arbitrary Detention: Mission to Italy*, United Nations, 26 January 2009, UN Doc. A/HRC/10/21/Add.5, paragraph 116 and 121.

[45] ECtHR, *Amuur v France*, Case no. 17/1995/523/609, 20 May 1996, para. 50. UN Working Group on Arbitrary Detention (WGAD), *Annual Report*, E/CN.4/1999/69, 18 December 1998, para. 69, guarantee 10.

[46] See, UN Working Group on Arbitrary Detention (WGAD), *Annual Report*, E/CN.4/1999/69, 18 December 1998, para. 69, guarantee 3; ECtHR, *Saadi v United Kingdom*, Application no. 13229/03, 29 January 2008, para. 72, 74; Resolution 1521(2006) on Mass Arrival of Irregular Migrants on Europe's Southern Shores, Parliamentary Assembly of the Council of Europe, 5 October 2006, para. 16.4.

[47] HRC, *A v Australia*, CCPR/C/59/D/560/1993, 30 April 1997, para. 9.4.

[48] HRC, *Danyal Shafiq v Australia*, CCPR/C/88/D/1234/2004, para. 7.3.

and international law.[49] The judicial review on the lawfulness of detention must be provided to the person subjected to administrative detention "without delay"[50] and "speedily."[51]

The length of administrative detention of irregular migrants should not be extended because of the failure of the host State's authorities to implement and expedite an efficient procedure with due diligence aimed at accomplishing removal. In other words, the State cannot claim justification of administrative detention on grounds of its own acts and/or omissions.[52]

The European Committee for the Prevention of Torture has stated that "in cases of deprivation of liberty, the personal appearance of the concerned alien before the judicial authority should be considered as mandatory, and not as a right that the concerned person can give up."[53] In the same report, the Committee recommended Swiss authorities to take measures in this direction.

In 1996, this Committee considered "that the time-limit of 96 hours for the judicial review of the detention decision or the decision to extend detention is also excessive and discriminatory, particularly in the light of the fact that in penal matters this review is guaranteed after 24 or 48 hours depending on the [Swiss] canton concerned."[54] The Committee was directly referring to detention pending expulsion in Switzerland.

The ICJ underscores the Committee's view that 96 hours before an oral hearing for the review of the detention is excessive and discriminatory, considering the regime applied to penal matters, and entails a violation of Article 9(4) ICCPR. Furthermore, the procedure of optional oral hearing may heighten risks of ill-

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[49] HRC, *Omar Sharif Baban vs, Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para. 7.2. See also, HRC, *Saed Shams and others vs. Australia*, CCPR/C/90/D/1255 and others, 11 September 2007, paras. 7.2 and 7.3; HRC, *C vs. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, paras. 8.2 and 8.3; HRC, *D and E and their two children vs. Australia*, CCPR/C/87/D/1050/2002, 9 August 2006, para. 7.2; HRC, *A vs. Australia*, CCPR/C/59/D/560/1993, 30 April 1997, paras 9.2, 9.3 and 9.5; HRC, *Danyal Shafiq vs. Australia*, CCPR/C/88/D/1234/2004, paras. 7.2 and 7.4; ECHR Article 5.4; ECtHR, *Amuur vs. France*, Case no. 17/1995/523/609, 20 May 1996, para. 43; ECtHR, *Saadi vs, United Kingdom*, Application no. 13229/03, 29 January 2008, para.67. See also, Sahed Shams and others vs. Australia, HRC, 11 September 2007,CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004, paragraphs 7.2 and 7.3. See also, HRC, Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari vs. Australia, 6 November 2003, CCPR/C/79/D/1069/2002, paragraphs 9.2 and 9.4.

[50] Article 9(4), International Covenant on Civil and Political Rights (ICCPR).

[51] Article 5(4), European Convention on Human Rights (ECHR). See also, *Report of the UN Special Rapporteur human rights of migrants, MS Gabriela Rodríguez Pizarro*, UN Doc. E/CN.4/2003/85, 30 December 2002, paragraph 75(c); *Report of the UN Special Rapporteur human rights of migrants, Jorge Bustamante*, UN Doc. A/HRC/7/12, 25 February 2008, paragraph 65.

[52] *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guideline 7.

[53] *Rapport au Conseil fédéral Suisse relatif à la visite effectué en Suisse par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants du 24 septembre au 5 octobre 2007*, Strasbourg, 13 November 2008, CPT/Inf (2008) 33, paragraph 65 (unofficial translation from the original French).

[54] *Concluding Observations of the Human Rights Committee : Switzerland*, CCPR/C/79/Add.70, para. 15.

treatment (Article 7 ICCPR), as pointed out by the European Committee for the Prevention of Torture. Finally, the ICJ considers the maximum terms of detention, 24 months for adults and 12 months for minors between 15 and 18 years, to be excessive and disproportionate. The ICJ considers that in no case should a period of detention of 12, 18 or 24 months be ordered in order to prevent unauthorised entry on the territory or to facilitate a transfer.

In light of the above, the ICJ urges the Committee to recommend that:

- **Switzerland provide for oral hearing for judicial review of any administrative detention of migrants or asylum-seekers within 48 hours from the beginning of the detention for all kinds of detention;**
- **Switzerland eliminate the optional character of the hearings for judicial review of the detention and to make them mandatory in all circumstances;**
- **Switzerland substantially reduce the maximum duration of administrative detention of migrants and asylum-seekers in accordance with the principle of proportionality.**