



**Convention against Torture  
and Other Cruel, Inhuman  
or Degrading Treatment  
or Punishment**

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COMMITTEE AGAINST TORTURE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES  
UNDER ARTICLE 19 OF THE CONVENTION**

**Sixth periodic report of States parties due in 2000**

**Addendum**

**SWITZERLAND<sup>\*,\*\*</sup>**

[2 July 2008]

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\* The fourth periodic report, submitted by Switzerland on 18 December 2002 (CAT/C/55/Add.9), covers the period from 1 July 1996 to 30 June 2000; it was considered by the Committee on 21 June 2005. The third periodic report of Switzerland (CAT/C/34/Add.6), submitted by Switzerland on 7 November 1996, covered the period from 1 July 1992 to 30 June 1996 ; it was considered by the Committee on 14 November 1997.

\*\* In accordance with the information transmitted to State parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

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## List of abbreviations

### Legal texts<sup>a</sup>

aCP	Former Swiss Criminal Code of 21 December 1937
CEDH	European Convention for the Protection of Human Rights and Fundamental Freedoms of 1 November 1950
CP	Swiss Criminal Code of 21 December 1937
CPP	Swiss Code of Criminal Procedure of 5 October 2007
Cst.	Federal Constitution of the Swiss Confederation 29 May 1874
DPMIn	Federal Act on Juvenile Criminal Law of 20 June 2003
LAsi	Federal Asylum Act of 26 June 1998
LAVI	Federal Act on Assistance to Crime Victims of 4 October 1991
LEtr	Federal Foreign Nationals Act of 16 December 2005
LFIS	Federal Act on Secret Investigations of 20 June 2003
LMSI	Federal Act introducing measures for the maintenance of internal security of 21 March 1997
LSCPT	Federal Act on Surveillance of Correspondence by Post or Telecommunication of 6 October 2000
LSEE	Federal Act on the temporary and permanent residence of foreigners of 26 March 1931
LUsC	Federal Act on the Use of Force and Police Measures in Spheres within the Jurisdiction of the Confederation of 20 March 2008
LTAF	Federal Act on the Federal Administrative Tribunal of 17 June 2005
LTF	Federal Act on the Federal Court of 17 June 2005
LTPF	Federal Act on the Federal Criminal Court of 4 October 2002
OIE	Ordinance on the integration of foreigners of 13 September 2000
OP-CAT	Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 18 December 2002
PPF	Federal Act on Criminal Procedure of 15 June 1934
PPMin	Federal Act on Juvenile Criminal Procedure

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<sup>a</sup> The Federal Constitution and all the legal texts and documents cited or mentioned in this report may be obtained from the Office fédéral de la justice, Domaine de direction Droit pénal, Unité Droit pénal et procédure pénale, Bundesrain 20, 3003 Bern.

**List of abbreviations (*cont.*)**

**Repertories of legislation and case law, messages of the Federal Council<sup>a</sup>**

ATF	Recueil des arrêts du Tribunal fédéral Suisse
FF	Feuille fédérale
RO	Recueil officiel des lois fédérales
RS	Recueil systématique du droit federal

**Federal bodies, international organizations, committees and commissions**

EFTA	European Free Trade Association
CAT	United Nations Committee against Torture
CCDJP	Conference of directors of cantonal justice and police departments
Cour EDH	European Court of Human Rights
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRA	Swiss Asylum Appeals Commission
DDPS	Federal Department for the Defence and Protection of the Population and of Sport
DFAE	Federal Department of Foreign Affairs
DFE	Federal Department of Public Finance
DFI	Federal Department of the Interior
DFJP	Federal Department of Justice and the Police
UNHCR	Office of the United Nations High Commissioner for Refugees
ODM	Federal Office for Migration
UN	United Nations
TAF	Federal Administrative Tribunal
EU	European Union

## **I. GENERAL INFORMATION**

### **A. Preliminary remarks**

1. Switzerland's fourth and most recent report, dated 18 December 2002 (CAT/C/55/Add.9) covered the period from 1 July 1996 to 30 June 2000, although it contained some more recent information on specific points. It was considered by the Committee on 21 June 2005 and the Committee's concluding observations were issued in document CAT/C/CR/34/CHE. In that document, Switzerland was asked to provide supplementary information, which it did by postal communications dated 15 June 2005, 10 May 2007 and 27 November 2007 (see documents CAT/C/CHE/CO/4/Add. 1 and 2). This report covers the period from 1 July 2000 to 30 April 2008.

### **B. Switzerland's accession to the United Nations**

2. On 3 March 2002, following an intense democratic debate, both the people (54.6 per cent) and the majority of cantons (by 11 2/2 votes to 9 4/2) approved the popular initiative "For Switzerland's accession to the United Nations".<sup>1</sup>

3. On 10 September 2002, Switzerland became a member of the United Nations. This accession was one of the priorities of the Federal Council for the 1999-2003 legislature.<sup>2</sup>

### **C. Switzerland in the Human Rights Council**

4. Switzerland was elected to the Human Rights Council on 9 May 2006 by 140 votes out of 191 and took an active, constructive part in the work leading to the adoption of General Assembly resolution 60/251. Under that resolution:

(a) Switzerland undertakes to cooperate fully with the Human Rights Council in order to make it a strong, effective and equitable United Nations organ for the promotion and protection of human rights, notably by committing itself firmly to working for the attainment of civil, political, economic, social and cultural rights, including the right to development, on an equal footing;

(b) Switzerland also reaffirms its support for the Office of the United Nations High Commissioner for Human Rights and the other funds, programmes and agencies of the United Nations, inter alia by contributing to current efforts to reform the treaty monitoring system and in particular by weighing the appropriateness of a common basic document, supplemented by specific reports to be submitted to each treaty monitoring body.

(c) Switzerland also undertakes to promote human rights internationally, inter alia by helping States fulfil their human rights obligations through human rights dialogues, exchanges of experts, technical cooperation and advice.

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<sup>(1)</sup> Under article 140, paragraph 1(b), of the Federal Constitution, accession to collective security organizations or supranational communities must be submitted to the people and the cantons for a vote.

<sup>(2)</sup> FF 2000 2168.

(d) Lastly, Switzerland recognizes its commitment to promote human rights at the national level, inter alia by envisaging ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which it signed in June 2004.

5. On 8 May 2009, Switzerland was one of the first countries to be the subject of a review by the Human Rights Council in the context of the Universal Periodic Review. Switzerland's report (A/HRC/WG.6/2/CHE/1) was defended by, inter alia, the Head of the Federal Department of Foreign Affairs. On 13 May 2008, the Human Rights Council adopted its report on Switzerland (A/HRC/8/41). Of the 30 recommendations made, Switzerland accepted five, rejected two and will consider 23 (see A/HRC/8/41/Add.1).

#### **D. Ratifications and signatures of international instruments**

6. Since the updating of its fourth report, Switzerland has ratified or signed the following universal instruments on protection against torture:

(a) The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which was ratified on 26 June 2002 and entered into force for Switzerland on 26 July 2002;<sup>3</sup>

(b) The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed on 25 June 2004;

(c) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which was ratified on 19 September 2006 and entered into force for Switzerland on 19 October 2006;<sup>4</sup>

(d) The United Nations Convention against Transnational Organized Crime, signed on 12 December 2000, the Additional Protocol to prevent, suppress and punish trafficking in persons, especially women and children, and the Additional Protocol against the smuggling of migrants by land, sea and air, which were ratified on 27 October 2006 and entered into force on 26 November 2006;<sup>5</sup>

(e) The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, signed on 15 February 2007.

7. In addition, mention should be made of the signature, ratification and/or entry into force of the following regional instruments on the protection of human rights:

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<sup>(3)</sup> RS 0.107.1.

<sup>(4)</sup> RS 0.107.2.

<sup>(5)</sup> RS O.311.54; RS 0.311.541; RS 0.311.542.

- (a) Protocols 1 and 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which entered into force on 1 March 2002;<sup>6</sup>
- (b) The Additional Protocol of 18 December 1997 to the Convention on the Transfer of Sentenced Persons, which entered into force for Switzerland on 1 October 2004;<sup>7</sup>
- (c) Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (STE 187), which entered into force for Switzerland on 1 July 2003;<sup>8</sup>
- (d) Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which was ratified on 25 April 2006 but has not yet entered into force;
- (e) The Convention on Cybercrime (STE 185), signed on 23 November 2001 (sect. 169);
- (f) The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (STE 189), signed on 9 October 2003.

#### **E. The Swiss Constitution**

8. The new Federal Constitution of the Swiss Confederation entered into force on 1 January 2000. Among the major changes introduced, mention should be made of the reform of the justice system.

9. The reform of the justice system is intended to safeguard the operational capacity of the Federal Court, to improve legal protection and to pave the way for the standardization of Swiss criminal procedure. It is being carried out in stages and work is ongoing. The following have entered into force:

- (a) On 1 April 2003: the constitutional bases necessary for the standardization of criminal procedure (art. 123 of the Constitution) and for the creation of the Federal Criminal Court (art. 191a, para.1, of the Constitution);
- (b) On 1 September 2005: the constitutional basis for the creation of the Federal Administrative Tribunal (art. 191a, para.2, of the Constitution);
- (c) On 1 January 2007: inter alia, guarantee of access to a judge (arts. 29a and 191b of the Constitution) and guarantee of independence of the judiciary (art. 191c).

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<sup>6</sup>) RO 2003 2581 and 2584.

<sup>7</sup>) RS 343.1.

<sup>8</sup>) RS 0.101.093.



10. On 8 February 2004, the people and the cantons accepted the federal popular initiative “Life imprisonment for extremely dangerous, non-reformable criminals”. A new article 123a of the Constitution thus entered into force immediately, which reads as follows:

**Article 123a**

1. A sex offender or violent criminal whom the necessary expert evaluation has classified as extremely dangerous and non-reformable shall be imprisoned for life because of the high risk of recidivism and shall not be eligible for early release or time off.
2. A further expert evaluation shall be conducted only if new scientific knowledge shows that the criminal can be reformed and is thus no longer a danger to the community. The authority which rules that life imprisonment shall be lifted in the light of this expert evaluation shall be liable in the event of recidivism.
- 3 Any expert evaluation concerning the criminal shall be produced by at least two independent experts, taking into account all relevant information.

**F. Principal bills finalized (overview)**

11. Since the updating of the fourth report, Switzerland has adopted the following principal bills:

(a) 24 March 2006 revision of the Federal Act introducing measures for the maintenance of internal security (incitement to violence and violence at sports events, LMSI I), which entered into force on 1 January 2007 (sections 189 and 251);<sup>9</sup>

(b) Federal Foreign Nationals Act (Foreign Nationals Act), which entered into force on 1 January 2008;<sup>10</sup>

(c) Revision of several provisions of the 26 June 1998 Federal Asylum Act (Asylum Act<sup>11</sup>), which entered into force on 1 April 2004 in the context of the Federal Act of 19 December 2003 on the 2003 budget reduction programme;<sup>12</sup>

(d) 16 December 2005 partial revision of the Federal Asylum Act of 26 June 1998,<sup>13</sup> part of which entered into force on 1 January 2007 and part on 1 January 2008;<sup>14</sup>

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<sup>9</sup>) RO 2006 3703.

<sup>10</sup>) RO 2007 5437.

<sup>11</sup>) RS 142.31.

<sup>12</sup>) RO 2004 1647; FF 2003 5091.

<sup>13</sup>) RS 142.31

<sup>14</sup>) RO 2006 4745; FF 2002 6359.

(e) Federal Act of 17 June 2005 on the Federal Court, which entered into force on 1 January 2007;<sup>15</sup>

(f) Federal Act of 4 October 2002 on the Federal Criminal Court, entered into force on 1 April 2004;<sup>16</sup>

(g) Swiss Criminal Code of 21 December 1937:<sup>17</sup>

- Revised general section of the Criminal Code, entered into force on 1 January 2007;
- Revision concerning the life imprisonment of extremely dangerous criminals,<sup>18</sup> entry into force scheduled for 1 July 2008;
- articles 123, 189 and 190, entered into force on 1 April 2004;
- article 182, entered into force on 1 December 2006;
- article 386, entered into force on 1 January 2006;

(h) Federal Act of 20 June 2003 governing the criminal status of juveniles (Juvenile Criminal Law), which entered into force on 1 January 2007;<sup>19</sup>

(i) Partial revision of the Federal Act of 4 October 1991 on Assistance to Crime Victims, which entered into force on 1 October 2002;<sup>20</sup>

(j) Comprehensive revision of the Federal Act of 4 October 1991 on Assistance to Crime Victims, which entered into force on 1 January 2009;<sup>21</sup>

(k) Swiss Code of Criminal Procedure of 5 October 2007 (Code of Criminal Procedure), scheduled to enter into force in 2010.<sup>22</sup>

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<sup>(15)</sup> RS 173.110.

<sup>(16)</sup> RS 173.71.

<sup>(17)</sup> RS 311.0.

<sup>(18)</sup> RO 2007 5437.

<sup>(19)</sup> RS 311.1.

<sup>(20)</sup> RS.312.5.

<sup>(21)</sup> RO 2008 1607.

<sup>(22)</sup> FF 2007 6583: the referendum period expired without being used.

## **G. Current bills**

### **1. Procedural law**

12. On 22 August 2007, the Federal Council approved a reworked version of the Federal Act on Juvenile Criminal Procedure. It had been decided that the original bill should be re-discussed with cantonal practitioners in order to make better provision for the requirements of its implementation. This new version was discussed by the Federal Council of States on 11 December 2007 and some amendments were made. The debates in the national Council are due to take place during the summer 2008 session. The aim is to have the Act enter into force at the same time as the Code of Criminal Procedure.

### **2. Criminal law**

13. On 23 April 2008, the Federal Council adopted the message on the amendment of federal laws with a view to implementing the Rome Statute of the International Criminal Court.<sup>23</sup> This bill envisages the incorporation in the Criminal Code of a new offence of crimes against humanity and the express enumeration of the most serious war crimes. A new distribution of powers between the civil and military criminal prosecution authorities is also envisaged with regard to the prosecution of genocide, crimes against humanity and war crimes. The power to prosecute perpetrators of such acts would thus be regulated as follows: the Swiss civil justice system would have jurisdiction to prosecute and try Swiss civilians and foreigners (civilian or military), while the military authorities would have jurisdiction only to prosecute and try acts committed by members of the Swiss army and persons (Swiss or foreign, civilian or military) having committed one of the above crimes against a member of the Swiss army. If the Switzerland is at war, only the military authorities have jurisdiction. The message will be discussed by Parliament in the course of 2008.

14. On 27 June 2007, the Federal Court adopted the Message concerning the popular initiative “Making acts of child pornography imprescriptible” and the Federal Act on the prescription of criminal proceedings in the case of offences against children.<sup>24</sup> The Federal Council rejects the solution advocated by the authors of the initiative, which would make sexual acts with children imprescriptible, but nevertheless proposes extending the current deadline for statute of limitations by making it run only from the date on which the victim of a violation of physical or sexual integrity reaches his/her majority, if the victim was under 16 at the time of the events. In so doing it is copying the provisions of not only the majority of European legal systems but also the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted by the Committee of Ministers on 12 July 2007.<sup>25</sup> On 6 March 2008, the national Council rejected the popular initiative and accepted the Federal Council’s indirect counter-proposal. On 13 May 2008, the Legal Affairs Commission of the Council of States unanimously proposed the rejection of the popular initiative and the adoption

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<sup>(23)</sup> FF 2008...

<sup>(24)</sup> FF 2007 5099.

<sup>(25)</sup> The Convention and its explanatory report are available at:  
[http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/fight\\_against\\_sexual\\_exploitation\\_of\\_children/](http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_sexual_exploitation_of_children/)

of the Federal Council's indirect counter-proposal. The issue will be taken up by the Council of States at the summer 2008 session.

### 3. Public law

15. On 24 June 2004, Switzerland signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. On 8 December 2006, the Federal Council adopted the message on the Protocol's approval and implementation,<sup>26</sup> in which it proposed, in agreement with the cantons, to set up a federal commission for the prevention of torture as the national prevention machinery. After careful consideration, decentralized solutions were rejected. The commission is to be composed of 12 members, appointed for four years. Its functions and powers are largely determined by the provisions of the Optional Protocol. It will, inter alia, have the unconditional right to visit any place, including its facilities and equipment, where there may be persons who have been deprived of their liberty. The bill is before Parliament, which could approve it in the course of 2008.

16. On 20 March 2008, Parliament adopted in final voting the Federal Act on the Use of Force and Police Measures in Spheres within the Jurisdiction of the Confederation (LUsc).<sup>27</sup> The aim of the Act is to standardize the regulation of the use of police force in spheres within the jurisdiction of the Confederation, particularly in the context of the repatriation of foreigners, and to ensure that any use of force is proportionate. The use of physical force, auxiliary means and weapons must be proportionate to the circumstances and, to the maximum extent possible, preserve the integrity of the person concerned. Following a particularly protracted procedure to iron out differences of opinion, the use of incapacitating devices (Tasers) was allowed, subject to strict conditions. Conversely, techniques involving the use of physical force in a way that could block the airways or seriously damage the health of the persons concerned are not authorized. Medicines can be administered or prescribed only if medically indicated and cannot be used, in the place of auxiliary means, to calm or sedate the person. Only specially trained persons may be recruited by the authorities for operations necessitating the use of force. The Act applies to any federal authority that may use force or police measures in the performance of its functions.

17. For some time now, there has been a debate on whether information needs can still be met, in order not only to assess a situation and take the necessary decisions, but also to detect hidden dangers in time. The current revision of the Act introducing measures for the maintenance of internal security (LMSI II) must take account of the growing threat in Western Europe. It aims to expand information gathering by the information services in a targeted manner in order to bring it closer into line with European standards. The use of new measures will be subject to stringent controls. The Federal Council adopted its message to Parliament on 15 June 2007.<sup>28</sup>

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<sup>(26)</sup> FF 2007 261.

<sup>(27)</sup> FF 2008 2095; the referendum period expires on 10 July 2008.

<sup>(28)</sup> FF 2007 4773.

## **H. Visit to Switzerland by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

18. The fourth, follow-up visit to Switzerland by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) took place from 20 to 24 October 2003 and comprised a visit to the section of the prison at Zurich-Kloten airport where persons are held pending removal (prison No. 2) and to the airport transit zone. At the end of its visit, the delegation told representatives of the Confederation and of the canton of Zurich that it had not found anything to suggest the infliction of torture or of severe ill treatment. In its report to the Federal Council in March 2004, the Committee gave a detailed opinion on the situation prevailing in prison No. 2 and in the transit zone at Zurich airport and addressed a number of recommendations, comments and requests for information to the Swiss authorities. In its position papers of 27 February 2002 and 27 October 2004 respectively, the Federal Council described the measures taken and responded to the Committee's comments and requests for information.<sup>29</sup>

19. From 24 September to 5 October 2007, the Committee made its fifth visit to Switzerland. During this visit, the delegation paid particular attention to the conditions of detention of persons against whom an internment measure or institutional therapeutic measures have been ordered, as well as to conditions in security units. It also looked into the situation of minors and young adults placed in reform schools. If the Federal Council so decides, the Committee's report will be published at the same time as Switzerland's position paper, in the last quarter of 2009.

## **I. Case law of the Committee against Torture and the European Court of Human Rights relating to the Convention**

20. During the period in question, 29 new individual communications were lodged against Switzerland. At the same time, three communications were declared inadmissible and six were removed from the roll. A violation of article 3 of the Convention was confirmed in three cases where individuals had been returned to their own country, and denied in seven others. Where the Committee found a violation of article 3 of the Convention, the author of the communication was granted temporary admission (two cases) or awarded refugee status (one case).

21. In the period in question, the European Court of Human Rights transmitted only one individual petition, requesting further information on the alleged violation of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In a case in which this allegation had been made, the Court found a violation of article 2 of the European Convention (right to life) because the authorities had failed to conduct an effective investigation into the circumstances surrounding the death of the petitioners' son. In connection with an alleged violation of article 3, it found that there had been no material violation of that article and that there was no separate issue of a procedural violation of article 3, the circumstances being identical to those of the complaint based on article 2 (Scavuzzo-Hager decision of 7 February 2006, petition No. 41773/98). In another case, it declared the petition inadmissible

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<sup>(29)</sup> The Committee's report and the Federal Council's position papers are published on the home page of the Federal Office of Justice at:

[http://www.bj.admin.ch/bj/fr/home/themen/staat\\_und\\_buerger/menschenrechte2/europaeische\\_antifolterkonvention.html](http://www.bj.admin.ch/bj/fr/home/themen/staat_und_buerger/menschenrechte2/europaeische_antifolterkonvention.html).

because domestic remedies had not been exhausted (Cheridjian vs. Switzerland decision of 14 June 2005, application No. 13791/02).

## **II. COMMENTARY BY ARTICLE**

### **A. Article 1: Definition of torture**

22. Reference can be made here to paragraph 8 of the initial report (CAT/C/5/Add.17), paragraphs 6 to 12 of the third periodic report (CAT/C/34/Add.6) and paragraphs 9 to 13 of the fourth periodic report (CAT/C/55/Add.9).

### **B. Article 2: Absolute prohibition of torture**

23. The information provided in paragraphs 34 to 37 of the initial report remains valid, subject to the following clarifications.

24. Article 32 of the former Criminal Code, which provided that an act which is ordered by the law or which is a matter of official or professional duty does not constitute an offence, has been replaced by article 14 of the new Criminal Code, which reads as follows: “Anyone who acts as the law orders or authorizes is behaving lawfully [...]” This new article “limits the sources of justification to legal obligation and legal authorization. It no longer mentions official or professional duty, which, in the unanimous opinion of legal doctrine, can only mislead by creating the belief that the fulfilment of these duties can justify an offence, even if it is not based on the law”<sup>30</sup>.

25. The unified Code of Criminal Procedure also contains an absolute prohibition on the use of torture or ill treatment in the context of a criminal procedure. Article 3, paragraph 2 (c) and (d), of the Code requires the criminal authorities to conform, inter alia, to the “maxim that fair treatment and the right to be heard should be guaranteed to all persons affected by the procedure” and to “the prohibition on the use of investigation methods that violate human dignity”. Article 140 of the Code of Criminal Procedure also prohibits the obtaining of evidence by means of constraint, the use of force, threats, promises, deception and means likely to restrict the person’s ability to think or free will, even if the person concerned agrees to the use of such evidence. The admission of evidence obtained in violation of these principles shall be prohibited in all cases (article 141).

### **C. Article 3: Principle of non-refoulement**

26. By way of introduction, reference should be made to paragraphs 38 to 41 and 43 and 44 of the initial report, paragraphs 8 to 16 of the second periodic report (CAT/C/17/Add.12), paragraphs 15 and 16 of the third periodic report and paragraphs 16 and 17 of the fourth periodic report.

#### **1. Extradition**

27. During the period in question, only one petition contesting a Swiss decision authorizing extradition was filed, on 18 October 2002. By decision of 7 May 2003, the Committee concluded

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<sup>(30)</sup> Message of the Federal Council concerning the amendment of the Swiss Criminal Code of 21 September 1998, FF 1999 1787.

that the petitioner's extradition to Spain did not constitute a violation of articles 3 and 15 of the Convention.

## **2. Partial revision of the Asylum Act and comprehensive revision of the Foreign Nationals Act**

28. The new Asylum Act, which entered into force in October 1999, was partially revised in 2005. The revisions were accepted by the people in September 2006, with 67 per cent of voters in favour. The main elements of the revision of the Asylum Act are the provisions concerning the principle of a safe third State, a full asylum procedure at registration centres and airports, including the possibility of appeal, the new status of persons admitted on a temporary basis and new funding models.

29. Some provisions of the partial revision of the Asylum Act already entered into force on 1 January 2007. These include the reformulation of the grounds for dismissal (NEM) in cases where the person has no travel or identity documents. New regulations governing hardship cases have also entered into force. The remaining new legal provisions entered into force in January 2008. The asylum procedure at airports is now similar to that applied at borders.

30. In December 2005, the Swiss Parliament adopted a draft comprehensive revision of the 1931 Federal Act on the temporary and permanent residence of foreigners. A successful popular referendum was held on 24 September 2006, in which the Act was accepted by 68 per cent of voters. The new Foreign Nationals Act entered into force in January 2008. Its main aims are the following:

- (a) To continue the policy of restricting the admission of workers from non-European Union States to skilled workers;
- (b) To enhance the legal status of non-nationals and strengthen integration policy;
- (c) To strengthen the provisions for combating abuse of the law.

31. The Act is designed to relax the legislation governing foreigners in some spheres but tighten it in others. For instance, it provides accelerated family reunification for children aged under 12 in order to help them integrate rapidly. It allows the residence permit to be retained in cases of separation or divorce when the non-Swiss partner has resided in Switzerland for three years and has integrated successfully. Domestic violence has also become grounds for allowing a victim to stay in Switzerland following divorce or separation. The cantons are able to grant permission to reside or to stay for a short time in Switzerland, but only in the case of participation in a language course, for instance. A civil registry official may invoke the new Act as grounds for withholding assistance in a case involving what is manifestly a marriage of convenience.

32. The status of persons admitted on a temporary basis has also been enhanced, while measures of constraint to ensure the removal of persons have been strengthened.

### 3. New features of the Asylum Act

(a) *Unaccompanied minors*

33. The partial revision of the Asylum Act makes improvements in the protection of under-age asylum seekers. Henceforth, unaccompanied minors will benefit from the assistance of a person of trust, appointed to help them complete all the steps crucial to the outcome of the decision on their case.

34. Under the Convention on the Rights of the Child, unaccompanied minors are entitled to special protection. Under the old Swiss Asylum Act, the competent cantonal authorities were already required to take protective measures in their favour. When it was not possible to appoint a guardian immediately, a person of trust had to be made responsible for defending the minor's interests during the asylum procedure. However, under that law, the adoption of protective measures and the appointment of a person of trust presupposed the minor's assignment to a canton.

35. Under the new Act, protective measures must be taken and a person of trust appointed immediately when procedural acts decisive for the outcome of the asylum decision, going beyond a summary hearing, take place as part of a procedure at the airport or registration centre. This ensures that the child's interests are represented from the outset of the procedure (art. 17 (3) of the Act). The person of trust guides and supports the unaccompanied minor throughout the asylum and removal procedure. His or her responsibility ends, however, with the appointment of a guardian as defined in the Civil Code or when the minor comes of age. As was the case until now, the competent services at the airport (for instance, the airport police) or at the registration centre inform the cantonal authorities if an unaccompanied minor requests asylum, so that they can immediately appoint the person of trust and institute the other necessary protective measures. The cantonal authorities, for their part, immediately communicate to the Federal Office for Migration (ODM) or the Federal Administrative Tribunal and to the minor the name of the appointed person of trust and all the protective measures taken.

(b) *Hardship cases*

36. Under article 14 (2), the canton may lodge with the Federal Office for Migration an application for recognition of a case of serious hardship, in favour of asylum seekers who have been assigned to it, on the grounds that the person concerned has integrated rapidly. Such a procedure is possible regardless of the stage reached in the asylum procedure, provided that the person has resided in Switzerland for at least five years since his/her asylum application was lodged, that the authorities have always known where the person is staying and that the person's identity is known. This covers asylum seekers with an ongoing ordinary or special procedure, those subject to a dismissal decision (NEM) and non-suited asylum seekers who have to leave Switzerland. Such persons cannot, however, institute this procedure and can be parties to it only if ODM has been seized by the canton of an application for recognition of a case of serious hardship.

37. New article 14(2) of the Asylum Act entered into force on 1 January 2007. In the course of 2007, 948 applications for recognition of a case of hardship were lodged with ODM, of which 800 received positive treatment, 40 were rejected and 108 were still pending on 1 January 2008.



(c) *Airport asylum procedure*

38. Since 1 January 2008, asylum procedure at Zurich-Kloten and Geneva-Cointrin airports has taken the same form as a border asylum procedure or a procedure instituted at a Confederation registration and procedure centre. Under the old Act, the return of an asylum seeker to a third State or to the country of origin was envisaged only if the person's allegations were manifestly untrue or unsubstantiated and there was no obstacle to removal. Before giving notification of the removal decision, ODM would consult the Office of the United Nations High Commissioner for Refugees (UNHCR), which had a right of veto (art. 23(3) of the Asylum Act). In the case of entry to Switzerland, the person would be directed to a Confederation registration and procedure centre, where the procedure would continue. Currently, article 23(1) envisages the possibility of issuing a negative material decision or an NEM decision at the airport itself. In the cases envisaged in the Act, a hearing on the grounds for asylum takes place in the presence of a representative of a refugee aid agency. Notice of the decision must be given within the 20 days (previously 15 days) following the lodging of the application. If a decision cannot be taken within this time, the office assigns the applicant to a canton (article 23(2)). The applicant may appeal to the Federal Administrative Tribunal, within five working days from notification of the decision, against either a negative material asylum decision accompanied by a removal decision or an NEM decision not to proceed. The maximum stay in accommodation in an airport transit zone is now 60 days (25 days previously). Pursuant to article 22(3) and (4) of the Asylum Act, an asylum seeker may at any time request a review of the legality and the appropriateness of compulsory residence at the airport or other suitable place. An appeal against detention may also be lodged on the same conditions (under article 76(1)(b), section 5, of the Foreign Nationals Act).

(d) *Legal counsel at registration centres and airports*

39. In accordance with article 17(4) of the Asylum Act, the Federal Council has regulated the question of access to legal counsel at registration centres and airports. ODM informs asylum seekers who lodge an application at an airport or registration centre, in writing or other appropriate manner and in a language that they can understand, that they can avail themselves of legal counsel or a legal representative. It provides them with appropriate means of communication and also useful addresses. Contacts between the legal counsel or legal representative and the asylum seeker may take place at registration centres during visiting hours. Applicants are free to look for legal information outside the place where they are being housed. At the Zurich-Kloten and Geneva-Cointrin international airports, legal counsel is provided on the spot by aid charities.

(e) *Appeal channels*

40. The revision of the Asylum Act included provisions for standardizing and accelerating the appeal procedure before the Federal Administrative Tribunal, the body that replaced the Swiss Asylum Appeals Commission on 1 January 2007. In asylum matters, the Tribunal rules in final instance on appeals against ODM decisions.

41. Any negative decision or dismissal decision taken by ODM can be appealed before the Tribunal. The appeal is generally directed against the refusal to grant asylum or temporary protection and the removal order. Article 108 of the Asylum Act also provides the possibility of appealing against a decision refusing temporary entry or compelling the person to reside at the

airport (arts. 22 and 23). Under article 108(1) the appeal must be lodged within 30 days from notification of the decision. The deadline for appealing against an NEM decision or a return decision as part of an accelerated procedure at the airport is five working days following notification. In theory, any appeal, even appeals against NEM decisions and decisions taken as part of a procedure at the airport, has the effect of suspending enforcement of the decision. Conversely, the use of a legal channel or an extraordinary legal measure does not suspend enforcement of removal, unless the competent authority decides otherwise (art. 112), which would happen, for instance, if the application for review seemed to have some chance of success.

#### **4. Other new provisions in the sphere of asylum**

##### *(a) Fees*

42. It has been found that most applications for review filed with ODM are manifestly unfounded, if not abusive. That is the case, for instance, when it is clear that the sole purpose of filing an application for review is to prevent the imminent enforcement of a removal decision. Given this situation, the revised Act introduced a provision whereby applications for a review at first instance will be subject to payment of a fee (art. 17(b)). If, at the final conclusion of the asylum and removal procedure, a person lodges files an application for review, ODM will henceforth receive a fee, unless the request is partly or fully upheld. Indigent persons whose application seems to have some chance of success are exempted from paying the fee, provided that they request such exemption. The amount of the fee payable by the person lodging the application is indicated in the operative part of the decision on the application for review.

43. When a person lodges an application for review, ODM may also charge an advance on costs, equal to the expected cost of the procedure. Since applications for review must be processed within exceptionally short deadlines, ODM can weigh the consequences of charging an advance on costs. In fact, given the lengthy procedural delays caused by charging an advance and the fact that this can prove very costly, it may be preferable for ODM to waive the advance. If a person does not pay the stipulated advance, the application for review is dismissed, a decision which may then be appealed to the Tribunal. ODM waives payment of an advance on costs if the person is indigent and the application for review seems to have some chance of success. It also waives payment of an advance in procedures involving an unaccompanied minor, if the latter's application seems to have a chance of succeeding.

44. The amount of the fees charged for the review procedure and of the advance on costs is generally 1,200 Swiss francs.

45. The new provision on fees also applies when a person lodges a new asylum application after final conclusion of the procedure or after withdrawal of an earlier application, provided that the applicant has not returned to his/her State of origin in the meantime.

##### *(b) Concept of safe third State*

46. Since 1 January 2008, asylum seekers who, prior to lodging their asylum application, have lived in a safe third State to which they can return may be removed to that country without their application being proceeded upon (art. 34 (2) of the Asylum Act). The Federal Council has the power to designate safe third States.

47. Certain conditions must, in theory, be met in order to apply this ground for dismissal: first of all, the parties concerned must have lived in the country in question and, secondly, they must be able to find protection there. The concept of safe third State also covers countries where the applicant has already obtained asylum or a comparable measure of protection (first countries of asylum) before arriving in Switzerland. Since one priority of the principle of safe third State is to permit the effective enforcement of removal decisions, a guarantee of readmission is required from the third State.

48. These new rules make a clear distinction between safe States in general and States which the Federal Council designates as safe. With the former, the competent asylum authorities must, for any return, prove on a case-by-case basis that the country in question is safe, namely, that it respects the principle of non-refoulement. With the latter, there is no longer any need to prove that the country is safe, since this is assumed. Nevertheless, the applicant may contest this assumption.

49. On 14 December 2007, the Federal Council designated all the States of the European Union and the European Free Trade Association (EFTA) (Norway, Iceland and Liechtenstein) as safe third States.

50. The new provision replaces the preventive removal to a third State that applied up until 31 December 2007. Thus, the decision not to proceed and to return a person to a third State puts a definitive end to the procedure in Switzerland. That procedure provides the following guarantees: immediate return to a third State is no longer possible and the applicant can stay in Switzerland until the dismissal decision comes into effect, and the appeal process suspends enforcement. The appeal deadline is five working days.

51. The different ways in which the new provision can be applied are the following:

(a) The applicant can return to a safe third State designated by the Federal Council, in which he/she has resided previously;

(b) The applicant can return to a third State in which he/she has resided previously and which, in the case in question, respects the principle of non-refoulement;

(c) The applicant can travel on to a third State for which he/she already has a visa and in which he/she can request protection;

(d) The applicant can go to a third State which, by virtue of an international agreement, is competent to conduct the asylum and removal procedure; this will cover the Dublin procedure, which enters into force in Switzerland on 1 November 2008;

(e) The applicant may travel on to a third State where close relatives or persons with whom he/she has close ties are living.

52. However, the Act provides three exceptions: dismissal and removal to a third State shall not apply when:

(a) Close relatives of the applicant or persons with whom he/she has close ties are living in Switzerland;

(b) The applicant is clearly a refugee;

(c) ODM has evidence that the third State does not offer effective protection with regard to the principle of non-refoulement.

(c) *Dismissals for lack of identity documents*

53. The Asylum Act already had a provision on dismissal (NEM), applicable since 1998 to asylum applications lodged by persons who failed to submit, within 48 hours after lodging the application, travel or other documents enabling the authorities to identify them. Practice had shown, however, that this provision had not achieved the desired results and had not encouraged more asylum seekers to submit the documents in their possession.

54. In the light of this situation, the revised Act reformulated the ground for dismissal (art. 32 (2)(a) and (3)) so that it could be applied more systematically, in order to increase the number of documents produced and thereby guarantee the identification of asylum seekers.

55. To this end, only travel documents and identity documents *strictu sensu* are now accepted as adequate documentation, to the exclusion of other documents.

56. The proposed formulation conforms to international law with regard to the exceptions provided to NEM: when the absence of documents is justified on excusable grounds, the person is manifestly a refugee or further investigations are needed. It thus takes account of the situation of refugees who can invoke relevant and credible grounds, in that applications from such refugees are allowed to proceed, even if they have no papers, either because their refugee status was established at the end of the hearing or because it is not possible to rule on their application at the end of the hearing and the introduction of other investigative measures proves necessary in order to establish their refugee status. The prohibition of refoulement is also respected, in that applications for which it is not possible to issue a removal decision are allowed to proceed, the introduction of other investigative measures having first proved necessary in order to determine the existence of possible impediments to the enforcement of removal.

57. Furthermore, the dismissal decision also inapplicable, like the former law, when the applicant demonstrates convincingly that he/she is unable, for excusable reasons, to submit his/her documents within 48 hours. In all cases, a hearing on the grounds for asylum takes place in the presence of a representative of an aid charity. Moreover, since 1 April 2004, immediate enforcement of removal is no longer possible and an appeal against any NEM decision has the effect of automatically suspending enforcement. The appeal deadline is five working days.

## **5. New elements in the Foreign Nationals Act**

(a) *Removal from Switzerland*

58. As in the old law, the competent authorities may remove a foreign national from Switzerland without a formal decision (arts. 64(1) and 65(1) of the Act). According to the new Act, however, the competent authority must take a decision upon immediate request (arts. 64 (2) and 65 (2)). At the border, the decision can be appealed within three days after its notification. The appeal does not have the effect of suspending enforcement. The appeal authority must decide within 10 days whether such suspension can be restored (art. 64 (2)). At the airport, the

decision can be appealed within 48 hours after its notification. The appeal authority must take a decision within 72 hours (art. 65 (2)). The appeal has the effect of suspending enforcement.

59. With a view to Switzerland's operational participation in the Schengen Agreement (scheduled for 1 November 2008), a removal decision issued at Schengen external borders, that is, for Switzerland, at airports from which travellers outside the Schengen area depart, must always be notified by means of a standard form indicating the legal channels. Any appeal does not have the effect of suspending enforcement and removal is, in theory, immediately enforceable.

(b) *Family reunification of persons admitted temporarily*

60. Article 85 (7) of the Foreign Nationals Act allows spouses and unmarried children aged under 18 admitted temporarily to Switzerland to benefit from family reunification and thus the same status as the person who is already in Switzerland, on the following cumulative conditions:

- The person admitted temporarily to Switzerland may lodge an application for family reunification no earlier than three years after his/her temporary admission;
- The person will live in the same household in Switzerland as the persons benefiting from family reunification;
- The whole family will have appropriate housing;
- None of the family will be dependent on social assistance.

61. No statistics are available. However, it can be reported that very few cases were considered by ODM during the first year of application of this legal provision.

(c) *Residence permit for persons admitted temporarily*

62. Any foreign national who has been in Switzerland for over five years and has been granted temporary admission can apply to the canton in which he/she is residing for a residence permit, in accordance with article 84 (5) of the Foreign Nationals Act. The canton can accept or reject this application. If the application is rejected, a procedure can be instituted at cantonal level. If the canton agrees to grant a residence permit, it must transmit the case to ODM, with a positive opinion. If ODM agrees to recognize a case of serious hardship (following detailed consideration based on the information provided by the canton and on the federal dossier, taking account, inter alia, of the foreign national's degree of integration in Switzerland, family situation and the possibility of requiring the person to return to the country of provenance), it will allow the canton to grant a residence permit and will terminate the temporary admission. In 2007, 3,395 people benefited from these provisions.

## **6. Assistance**

(a) *Social assistance and emergency assistance in the sphere of asylum*

63. One of the central amendments in the revision of the Asylum Act is the extension of the exclusion from social assistance to persons who are the subject of a decision denying them

asylum and ordering their removal that has gone into effect. These rules had already applied since April 2004 to persons subject to an NEM decision.

64. The exclusion from social assistance means that persons who are the subject of a decision denying them asylum and ordering their removal that has gone into effect and persons subject to a dismissal decision accompanied by a removal decision that has gone into effect are excluded from the Asylum Act's social assistance scheme. Such persons are required to organize their own departure from Switzerland. In case of need, they can receive emergency assistance on request. Cantons have the power to provide emergency assistance. The aim is to establish a cut-off point for non-suited persons to make them aware of their obligation to leave Switzerland (a disadvantage by comparison with persons whose asylum procedure has been suspended, who can await a decision in Switzerland).

65. Emergency assistance, which is guaranteed by article 12 of the Constitution, means in practice the provision of basic accommodation (emergency accommodation, emergency shelter for unsuccessful asylum seekers, etc.), food through the distribution of meals in accommodation structures, meal vouchers or daily allowances, and emergency medical care if needed. In each case, emergency assistance is tailored to the needs of the person concerned. The current situation of vulnerable persons (for instance, unaccompanied minors or people who are ill) may be taken into account (for instance, housing in a flat rather than emergency accommodation). The person concerned can avail himself/herself of ordinary legal channels (from cantonal bodies up to the Federal Court) to appeal against the denial of emergency assistance or against inadequate emergency assistance.

(b) *Integration of foreigners*

66. Under the Foreign Nationals Act and the ordinance on the integration of foreigners, persons admitted temporarily can also benefit from integration measures. Cantons are responsible for integration. The Confederation allocates them a fixed contribution towards integration costs. Social and occupational integration are given priority.

(c) *Assistance with return (EAR)*

67. The new Foreign Nationals Act and the revised Asylum Act have brought about some changes in the area of assistance with return. For the first time, return advisory services (art. 93 of the Asylum Act) and return counselling in registration centres are expressly mentioned in the legal provisions, showing that the legislative branch is fully aware of their importance. After the termination of social assistance, persons subject to a dismissal decision that has already taken effect are no longer excluded from assistance with their return and benefits may now be paid to them even if the deadline for them to leave Switzerland has passed. Since 2008, all asylum seekers receive all the benefits of return assistance. The only grounds for exclusion from such assistance are criminality, breach of the obligation to cooperate or having sufficient financial means or substantial assets.

68. A pilot project is being developed under which certain groups of people covered by the legislation on non-nationals will be allowed to benefit from return assistance since, for the first time, the entry into force of article 60 of the Non-Nationals Act makes it possible to assist particularly vulnerable people in need of protection who, pursuant to the regulations, leave Switzerland voluntarily. Scheduled to last two years, this pilot project is aimed at victims and

witnesses of human trafficking and persons who are at particular risk of being exploited in the exercise of their money-making activity.

69. Henceforth, in accordance with article 92 (2) of the Asylum Act, programmes carried out abroad can also be used to prevent illegal migration. Prevention of such migration helps to reduce in the short term the risk of primary or secondary migration to Switzerland. The message on the partial revision of the Asylum Act states in this regard that as a matter of priority, persons fleeing a conflict or disaster should be advised to seek other places to live in their region of origin and information and awareness-raising campaigns should be organized. In addition to the structural assistance projects thus far implemented in specific programmes for some countries with the assistance of the Department of Development and Cooperation, the prevention of illegal migration will become increasingly important in the future.

### **7. Data protection in the sphere of asylum**

70. Under article 97 (1) of the Asylum Act, the communication of personal data to the State of origin or provenance is prohibited if it endangers the person concerned or those close to him/her. The disclosure to the State of origin or provenance of information on the lodging of an application for asylum is likewise prohibited (art. 97(1) *in fine*).

71. When preparations are being made for departure, the competent authority will simply specify, where necessary, that the person concerned does not have a valid permit to reside in Switzerland. It should be explained that the authority may, once a negative decision or dismissal decision has been issued at first instance, contact the State of origin or provenance to obtain the necessary travel documents for enforcing return. In other words, these steps may be taken even before the decision in first instance has formally taken effect. Besides, steps to obtain travel documents are not interrupted by the lodging of an appeal or an extraordinary legal measure.

72. With a view to enforcing a removal decision, the authorities have to communicate a number of personal data (as well as biometric data) to the State of origin or provenance. The partial revision of the Asylum Act allowed the list of data to be supplemented in order to fulfil practical requirements more thoroughly. In particular, provision was made for extending communication to information on a criminal proceeding pending in Switzerland. However, such communication should not be systematic. In fact, under article 97 (3) (g) of the Act, the communication of information on criminal proceedings should take place in such cases only if the readmission procedure and the maintenance of public security and law and order in the State of origin so demand and provided that this does not in any way endanger the person concerned. It should be recalled that the communication of data in criminal matters is governed by the Federal Act on International Mutual Judicial Assistance in Criminal Matters.

### **8. Measures of constraint**

73. When the Foreign Nationals Act was revised, the provisions on measures of constraint were tightened. New grounds for detention were introduced (retention, detention with a view to enforcement of return or expulsion from registration centres, detention with a view to return or expulsion in the event of failure to cooperate in obtaining travel documents, detention for insubordination, compulsory residence and ban on entering a specific area if the person concerned is subject to a decision on enforcement of return or expulsion and has failed to observe the deadline for leaving the country) and the maximum duration of detention was

extended from 12 to 24 months. Since 1 January 2007, the Non-Nationals Act has made provision for the following constraint measures:

(a) *Retention (art. 73)*

74. Retention may be ordered by the federal and cantonal authorities. Its purpose is to allow notice to be served of a decision on residence status, for instance, an asylum decision. Its other, main, purpose is to establish the identity of a person whose cooperation is required in this regard. Retention lasts for the time needed to make the necessary investigations or to serve notice of the decision (including transport time), but may not exceed three days.

(b) *Compulsory residence and ban on entering a specific area (art. 74)*

75. Compulsory residence combined with a ban on entering a specific area performs two functions. It provides an instrument against foreign nationals who disturb or threaten public security and law and order (for instance, in the case of breaches of the Act on Narcotic Drugs) but cannot be removed immediately from Switzerland. It is also applicable to persons whose removal or expulsion cannot be enforced but whom the authorities nevertheless want to keep away from a specific place. Since 1 January 2007, compulsory residence may be ordered if the foreign national is subject to a decision for enforcement of removal or expulsion and has failed to observe the deadline set for leaving the country.

(c) *Detention in the preparatory stage (art. 75)*

76. Detention in the preparatory stage is designed to ensure the enforcement of a removal procedure or to prepare the decision on a person's residence. It may be ordered when the person concerned is residing in Switzerland illegally and fulfils one of the grounds for detention provided for in article 75 (a) to (h) of the Foreign Nationals Act (refusing to give one's identity at the time of the asylum or removal procedure, lodging several asylum applications under different identities, entering an area from which one is barred, seriously threatening other people, etc.). On 1 January 2007, the maximum duration of detention in the preparatory stage was increased from three to six months.

(d) *Detention with a view to return or expulsion (art. 76)*

77. Detention with a view to return or expulsion is ordered when notice has been given of a decision – not necessarily enforceable – to return or expel, when the enforcement of removal is imminent and when a ground for detention is given (the person concerned leaves the area in which he/she is compelled to reside, enters an area from which he/she is barred, crosses the border despite a prohibition on entering Switzerland and cannot be returned immediately, seriously threatens other people, etc.). Enforcement of removal must be objectively possible and applicable even against the wishes of the person concerned. The competent authority is required to undertake without delay the steps necessary for removal (principle of speed). On 1 January 2007, the maximum duration of detention was increased from nine to 18 months. For minors aged 15 to 18 years, detention cannot exceed 12 months. Since 1 January 2008, it has also been possible to place a person in detention when notice of a removal decision taken pursuant to a dismissal decision is given at a registration centre and the enforcement of removal is imminent. The duration of this kind of detention cannot exceed 20 days.



- (e) *Detention with a view to return or expulsion in the event of failure to cooperate in obtaining travel documents (art. 77)*

78. This special situation in regard to detention with a view to return or expulsion was only recently added to the Act and has been applicable since 1 January 2007. Such detention may be ordered to ensure enforcement of return or expulsion, subject to the following conditions: an enforcement decision has been issued, the person concerned has not left Switzerland by the set deadline and the authority itself has to obtain the person's travel documents. This measure comes into play, inter alia, when there is a risk that the foreigner will go underground as soon as the authority receives the travel documents. The duration of detention may not exceed 60 days.

- (f) *Detention for insubordination (art. 78)*

79. Introduced on 1 January 2007, detention for insubordination is intended to make a foreigner required to leave Switzerland change his/her behaviour when, despite the authorities' best efforts, the person's enforceable return or expulsion cannot be carried out without his/her cooperation. Detention for insubordination is used as a last resort when there is no other measure of constraint available to convince a person residing in Switzerland illegally to return, against his/her will, to the country of origin or provenance. Such detention may be ordered, inter alia, when a foreigner with the necessary travel documents cannot be repatriated to the country concerned without his/her consent. However, this kind of detention may also be used to force a foreign national to cooperate in obtaining the necessary travel documents or establishing his/her identity. Detention for subordination may be ordered for an initial period of one month, then extended by two months, then by a further two months every other month. The maximum duration of such detention is 18 months, reduced to nine months for minors aged 15 to 18.

- (g) *Statistics*

80. There are as yet no detailed federal statistics on measures of constraint, given that these measures fall within the jurisdiction of the cantons. However, with the entry into force of article 15a of the ordinance on enforcement of the return and expulsion of foreigners<sup>31</sup> (OERE; RS 142.281) on 1 January 2008, the competent cantonal authorities are required to transmit to ODM the following statistics on constraint measures:

- (a) Number of detentions ordered and duration of detention on a case-by-case basis;
- (b) Number of direct removals of detainees;
- (c) Number of releases;
- (d) Nationality of detained persons;
- (e) Sex and age of detained persons.

81. The transmission of these data makes it possible to evaluate the effectiveness of constraint measures, under the Foreign Nationals Act, for instance, in the case of administrative detention with a view to removal.

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<sup>(31)</sup> RS 142.281.

82. ODM plans to have these data inputted directly into the central migration database (SYMIC), which is currently being set up. It taking the necessary steps to this end in cooperation with the cantons. In all probability, the programming work for a computerized system will be completed towards the end of 2009.

## **9. Case law of the asylum appeals body**

### *(a) Non-State persecution: protection theory*

83. In a decision of principle dated 8 June 2006, the former Asylum Appeals Commission (CRA) marked a turnaround in its case law on the relevance of non-State persecution for granting a person refugee status, by deciding to adopt the theory of protection in place of that of attribution of responsibility. Since then, the central question has been whether the person who has suffered or fears persecution can find adequate protection in his/her country of origin. The decisive element for granting refugee status is no longer the author of the persecution but the absence of protection from persecution or the fear of persecution, regardless of whether the absence of protection can be attributed to a deliberate intention on the part of the State. Henceforth, the situation will have to be viewed from the standpoint of the victim of persecution and a determination made as to whether the victim can receive protection from the authorities of his/her country of origin. This new approach renders obsolete the distinction between direct and indirect State persecution.

84. This turnaround in case law has, in particular, an impact on applications lodged by persons who are victims of third-party persecution and come from States unable to ensure their protection or from de facto failed States. Under the old system, such persons were generally not granted refugee status, but their return was replaced by another measure (temporary admission). Now, they can be granted refugee status, provided that all other asylum conditions are met.

### *(b) Persecution specific to women*

85. In a 2006 decision, the Asylum Appeals Commission ruled that there are also relevant grounds of persecution in asylum law when such persecution is motivated solely by gender. In the case under consideration, that of abduction for marriage in Ethiopia, women, especially those living in rural areas, do not in theory receive adequate protection from the State. There is a possibility of internal refuge, particularly in Addis Ababa, but it depends on the specific circumstances of each case and must be discarded in all cases where protection is required against a person who is powerful and well connected nationally.

### *(c) Victims of torture and rape: credibility of belated allegations*

86. In two decisions, the asylum appeals body has ruled on the credibility of belated allegations. For one probable victim of ill treatment, the fact that she was too ashamed to mention details of torture (burns on intimate parts of her body) at hearings and described them thoroughly only at the appeal stage does not necessarily affect her credibility. Likewise, the fact that another victim made an allegation of rape only at the extraordinary procedure stage can be explained by her feelings of shame and guilt, as well as by the defence mechanisms that she had developed. In such a case and provided that other elements of the case file confirm the likelihood of all the facts in relation to the new allegation, the application for review or reconsideration

cannot be rejected simply because the allegation could have been made in the course of an ordinary procedure.

(d) *Insubordination and desertion: relevance in matters of asylum*

87. A possible punishment for insubordination or desertion constitutes persecution decisive in asylum matters only if, for one of the reasons set forth in article 3 of the Asylum Act, the person concerned is punished more severely than another person in the same situation would be (malus), the penalty is disproportionately severe or the performance of military service would expose the person to harm arising out of that provision or would involve his/her participation in actions prohibited by international law.

88. Pursuant to this interpretation, the appeal body ruled that, in Eritrea, the penalty for refusing to serve or for desertion is disproportionately severe and must be classed among those motivated by political reasons (malus absolutus). Persons who have a justified fear of being exposed to such a penalty must be recognized as refugees.

(e) *Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms*

89. Basing itself on the case law of the European Court of Human Rights, the appeal body has ruled on several occasions on the question of the compatibility with article 3 of the European Convention of enforcing the removal of a person whose health is impaired. For instance, the expulsion of a person dying of AIDS can, in very special circumstances, cause a violation of article 3 of that Convention. However, the expulsion of a person with AIDS is lawful vis-à-vis article 3 as long as the disease is not yet in its final stages. Likewise, in certain very special circumstances, enforcement of the removal of a non-suited asylum seeker whose physical or mental health is impaired or who is at risk of suicide may constitute a violation of article 3 of the European Convention.

(f) *Minors*

90. In considering whether enforcement of removal can reasonably be required, the higher interest of the child is a factor that must be taken into account. The fact that the minor's possibilities of integration (or reintegration) in the country of origin are made more difficult by his/her advanced degree of integration in Switzerland may result in enforcement of the entire family's removal not being required.

91. The person of trust, who has a legal background, must defend the interests of the unaccompanied minor during the asylum procedure. Certain requirements are attached to this key function, in terms of the qualifications and training of the person of trust and the way in which the person discharges his/her responsibilities. If the person of trust has manifestly acted against the interests of the unaccompanied minor or has manifestly refrained from performing the actions required for the defence of the minor's interests, he/she must be considered to have failed in his/her task and to have behaved in a manner that violated the minor's right to be heard. If the ODM decision reveals irregularities that make it likely that an appeal would have some chance of success, defence of the unaccompanied minor's interests requires that those irregularities be explained to him/her and that he/she be assisted in lodging an appeal: it is not enough to simply direct the minor to a legal advice office.

(g) *Right to be heard*

92. The right to be heard comprises various powers, including that of the party concerned to speak before the pronouncement of a decision unfavourable to him/her and the power to produce evidence about facts that could influence the decision and to demand that such evidence be admitted. The right to be heard does not prevent the decision-making authority from weighing the evidence in advance and refusing to admit it, when it can be admitted that this evidence is manifestly unlikely to result in a decision more favourable to the applicant.

93. There is a violation of the right to be heard when, in particular, the authority does not allow the party concerned to speak fully about the relevance of the evidence that he/she has produced and does not give the reason for its refusal to admit the evidence.

94. In another decision, the Asylum Appeals Commission stated the following: the right of the party to be heard before a decision is pronounced is indissociably linked to the obligation of the authority concerned to take the party's allegations into account and to substantiate in the grounds for the decision its reasons for rejecting the allegations. The obligation to state grounds means, for the authority, that it must indicate the grounds on which it based its decision, so that the party can appeal in full knowledge of the facts and the appeal authority can rule on the legality of the appealed decision.

(h) *Remedies*

95. The right to an effective remedy provided for in article 13 of CEDH is not violated simply because the appeal against a dismissal decision must be lodged within five working days. However, the fact that a person has been unable to appeal in time because of an accumulation of unfavourable factors (very short appeal deadline, contested decision requiring translation, impossibility of finding a legal representative) may constitute an impediment for which he/she is not to blame and thereby justify the restoration of the appeal deadline. Because the deadline for appealing against dismissal decisions is so short, the authority of first instance must comply especially strictly with the applicable procedural provisions.

## **10. Enforcement of returns**

96. Switzerland has signed the nine re-admission agreements over the past four years, in order to formalise its cooperation with the countries to which returnees are sent. At present, 42 readmission agreements concluded by Switzerland are in force. These agreements establish, in a document, framework conditions for the removed person's return in dignity and safety.

97. Even though the number of asylum applications has dropped sharply since 2002, cantons' requests to the Confederation for assistance in the enforcement of returns have not decreased. The Repatriation Division, established in 1997 to assist cantons in the identification and return of foreign national living illegally in Switzerland, has become increasingly professionalized, as have the cantonal police forces that operate on special flights. In this context, on 11 April 2002, the Conference of directors of cantonal justice and police departments (CCDJP) adopted a number of measures on the harmonization of forcible returns (directives on forcible repatriation by air). Since 1 July 2003, cantonal and federal authorities involved in the enforcement of returns have worked on the basis of the agreement between CCDJP and the Federal Department of Justice and Police (DFJPP) on the conduct of repatriations effected under escort and by air

(Agreement on the creation of escort teams), concluded as a means of optimizing cooperation and reciprocal administrative assistance in the enforcement of decisions on return and expulsion by air. As a result, Switzerland now has a pool of over 200 police officers specifically trained in forcible repatriation.

98. At its autumn 2003 assembly, CCDJP approved the establishment of an expert committee on return and enforcement of removals to replace the working group on enforcement of returns. On 2 February 2004, the head of the Federal Department of Justice and Police and the president of CCDJP signed the terms of reference of the new expert committee, whose function is to pursue, at the operational level, the implementation of measures to achieve institutional and organizational optimization in the enforcement of returns. Its tasks include the following:

- (a) Adapt existing instruments on enforcement of returns, notably by pursuing their development;
- (b) Analyse developments in the sphere of returns and the enforcement of removals;
- (c) Identify the measures and improvements to be undertaken.

99. With a view to the proper functioning of special flights, in autumn 2004 the expert committee, inter alia, set up a working group on the organization of the necessary ground-based system to draw up, for Bern-Belp, Geneva-Cointrin and Zurich-Kloten airports, minimum uniform rules to regulate specific services provided in situ. Having drawn up these uniform rules for Switzerland's main airports, the working group is now being used for exchanges of experience among the different cantonal police forces in charge of the different airports and for discussing problems that have arisen or could arise during embarkation, in flight or on readmission to the country of origin. It then proposes solutions to the expert committee.

100. Since September 2005, the ODM airport service responsible for organizing departures (SwissREPAT) has also been providing at Geneva-Cointrin airport all the services related to independent or forcible departure by air (for instance, organization of return, payment of travel expenses and other contributions as part of return assistance) for all cantons.

101. Since 1 July 2006, only police officers having completed compulsory training as police escorts or team leaders can take part in repatriations by air. If a canton is unable to provide the necessary number of escorts, additional police must be requested from other police forces, on the basis of reciprocal administrative assistance.

102. On 18 August 2006, Unique (Zurich airport Ltd) and ODM concluded an agreement on the provision of a medical team (a qualified emergency doctor and a certified IAS/CRS first aid worker) for forcible repatriations by air of non-suited persons. This new concept serves as a basis for ensuring the centralized management of such medical teams for the benefit of cantons. Since cantons are responsible for the enforcement of returns, a medical team is provided at the canton's request and on medical orders.

103. With a view to the entry into force of the new Asylum Act on 1 January 2008 and the longer periods to be spent in airport transit zones, the expert committee has pledged to ensure that asylum seekers in the international zones at Zurich-Kloten and Geneva-Cointrin airports are

given appropriate accommodation that meets the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

104. With regard to the number of forcible repatriations carried out, around 13 per cent of persons who left Switzerland in 2007 were repatriated forcibly (10 per cent returned voluntarily to their country of origin). The whereabouts of a far larger proportion – 44 per cent of those who left the country – are unknown.

#### **D. Article 4: Punishability of acts of torture**

105. The information provided in paragraphs 46 to 50 of the initial report and the additions and amendments described in paragraphs 18 to 28 of the second report, 55 to 57 of the third report and 62 of the fourth periodic report can be as follows.

106. The entry into force for Switzerland of the Convention for the Prevention and Punishment of the Crime of Genocide necessitated some amendments to the Criminal Code. A new article 264 of the Code, expressly punishing genocide, was introduced. The punishment imposed for this crime is life imprisonment or imprisonment for a minimum term of 10 years. Genocide is also now included among the criminal preparatory acts provided for in article 260*bis*, paragraph 1, of the Criminal Code. Given its seriousness, genocide is subject to federal jurisdiction (art. 336 (2)). If a person is accused of several offences, some of which are subject to military jurisdiction and others to ordinary jurisdiction, the Federal Council may refer trial of all these offences to either the military courts or the ordinary courts (art. 221 of the Military Criminal Code).<sup>32</sup>

107. The provisions on the statute of limitations for criminal proceedings have also been amended. Since 1 October 2001, article 97 of the Criminal Code (art. 70 of the old Criminal Code) provides that, for serious offences against the sexual integrity of children, the statute of limitations takes effect in all cases only on the victim's twenty-fifth birthday. This change is intended to enable young victims to free themselves from the bond of psychological and/or economic dependence that ties them to the abuser and to undergo psychotherapy before deciding to denounce the crime. As already mentioned, a bill is currently pending before Parliament which would make the period after which the statute of limitations takes effect begin on the date when the victim comes of age.<sup>33</sup>

#### **E. Universal jurisdiction**

108. The information provided by Switzerland in paragraph 52 of its initial report can be supplemented by the following paragraphs.

109. Since the entry into force of the new Criminal Code on 1 January 2007, the conditions of territorial application are governed by articles 3 to 7 of the Code. This new system broadly reproduces the old one, but with a number of differences. Article 3 corresponds in substance to article 3 of the old Criminal Code and stipulates that the Code is applicable to anyone who commits a crime or offence in Switzerland (principle of territoriality). When the act is committed

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<sup>(32)</sup> RS 321.0.

<sup>(33)</sup> Cf. section 15 above.

aboard a ship flying the Swiss flag, article 4 (2) of the Maritime Navigation Act<sup>34</sup> stipulates that Swiss law is applicable. A similar provision for aircraft can be found in article 97 (1) of the Aviation Act.<sup>35</sup> Article 4 of the new Code reproduces article 4 of the old Code and stipulates that the Criminal Code is applicable to anyone who commits abroad a crime or offence against the State and national defence. Article 5 of the Criminal Code is new and allows for the prosecution in Switzerland, independently of foreign law (double incrimination not required), of the authors of serious sexual crimes committed abroad against minors. The alleged offender will be prosecuted in Switzerland regardless of his/her nationality, provided that his/her domicile or customary residence is in Switzerland. Article 6 of the Criminal Code reproduces article 6*bis* of the old Code and provides for Swiss jurisdiction when an offence has been committed abroad and Switzerland has undertaken to prosecute it by virtue of an international agreement (universal jurisdiction). Two notable amendments should, however, be mentioned with regard to the application of the most favourable law: (1) the Swiss court is required to evaluate and compare the overall consequences of the penalties that it imposes; and (2) it is no longer obliged to apply the foreign law. Lastly, article 7 of the new Code reproduces the content of articles 5 and 6 of the old Code in providing that Switzerland has jurisdiction over offences committed abroad if the perpetrator or victim is Swiss (principle of active personality, passive responsibility) or, if that is not the case, if the perpetrator is not extradited and has committed a particularly serious crime that is outlawed by the international community (principle of delegated jurisdiction). In all these cases, the Criminal Code will be applicable only if the act is also criminalized in the State where it was committed (requirement of double incrimination), if the perpetrator is in Switzerland or is handed over to Switzerland because of this act and if, under Swiss law, the act may give rise to extradition but the perpetrator is not extradited. As a result, Switzerland has jurisdiction in all the hypothetical situations envisaged in article 5 of the Convention.

110. The military justice system has had occasion, on the basis of article 3 (1), sect. 9, and articles 108 to 114 of the Military Criminal Code, to prosecute and try alleged war criminals (violation of the Geneva Conventions of 12 August 1949). During the reporting period, the military courts handled 25 such cases. Of the 14 cases concerning the former Yugoslavia, 11 were filed, one was dropped for lack of evidence, one went to trial and resulted in an acquittal in 1997 and one is still pending. Of the six cases concerning Rwanda, three were filed, two were transferred to the International Criminal Tribunal for Rwanda and one ended in a conviction. Of the two cases concerning Sierra Leone, one was filed and the other was the subject of reciprocal judicial assistance. Three other cases concern two more countries (Congo and Côte d'Ivoire).

#### **F. Article 6: Measures to ensure the presence of the suspect**

111. Paragraph 53 of the initial report must to be supplemented by the paragraphs that follow.

112. The new Code of Criminal Procedure provides different possibilities for ensuring the presence of a person suspected of having committed one of the offences covered by article 4 of the Convention.

113. Provisional arrest under articles 217 et seq. of the Code allows the police to detain, without a warrant, a person who is strongly suspected of having committed an offence (in

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<sup>(34)</sup> Federal Act of 23 September 1953 on maritime navigation under the Swiss flag; RS 747.30.

<sup>(35)</sup> Federal Aviation Act of 21 December 1948; RS 748.0.

flagrante delicto, arrest immediately after the act, reliable information, etc.). The aim of this measure is to allow the police to make preliminary investigations to determine whether the person must be released immediately or brought before the public prosecutor. If the suspicions and grounds for detention are confirmed by the preliminary investigations, the person is brought before the public prosecutor. Article 219 (1) of the Code stipulates that the police must inform the person of his/her rights within the meaning of article 158 (1) of the Code (notably the right to remain silent and the right to legal counsel). Provisional arrest may not exceed 24 hours.

114. Once the person has been handed over to the public prosecutor, the latter must question the accused without delay and immediately examine any readily available evidence (art. 224 (1)). The prosecutor then proposes to the court either measures of constraint, pre-trial detention or a substitute measure. Under article 221, pre-trial detention is admissible only when the person is strongly suspected of having committed a crime or offence and there is a serious risk that he/she may evade criminal proceedings or the envisaged penalty by fleeing, compromise the search for the truth or seriously compromise the safety of others by committing serious crimes or offences. During the detention proceedings, the defence counsel may be present at the accused's hearings and the examination of other evidence. The accused may communicate with defence counsel at any time and without supervision, either orally or in writing (art. 223).

115. Less severe measures than pre-trial detention may be ordered by the judge if they allow the same ends to be achieved (art. 237). Such measures include the provision of bail, the seizure of identity papers and other official documents, house arrest or the obligation to report regularly to an administrative department.

## **G. Article 7: To try or to extradite and guarantee of fair treatment**

### **1. Introduction**

116. The information provided by Switzerland in paragraphs 55 to 59 of its initial report, paragraph 32 of its second periodic report, paragraphs 63 to 69 of its third periodic report and paragraphs 64 to 74 of its fourth periodic report can be supplemented by that provided below.

### **2. Federal law**

117. Since the entry into force of the new revised general part of the Criminal Code on 1 January 2007, the principle *aut dedere aut judicare* is governed by articles 5 to 7 of the Code. The Swiss Criminal Code is thus applicable to persons having committed abroad the crimes or offences referred to in those articles, as long as they are not extradited.

118. The amendment of the Military Criminal Code and the Code of Military Criminal Procedure<sup>36</sup> mentioned in paragraph 64 of the fourth periodic report entered into force on 1 March 2004<sup>37</sup>. Article 190 of the Military Criminal Code provides that the duration of

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<sup>(36)</sup> RS 322.1.

<sup>(37)</sup> RS 2004 921.



disciplinary arrests shall not exceed 10 days, while article 55a of the Code of Military Criminal Procedure stipulates that provisional arrest may not exceed 24 hours from the moment of arrest.<sup>38</sup>

119. The amendment of the Code of Military Criminal Procedure concerning protection of witnesses, mentioned in paragraph 64 of the fourth report, entered into force on 1 June 2004.<sup>39</sup> Articles 98a et seq. henceforth permit the examining magistrate or president of the court, with the approval of the military appeal court, to take a series of measures to safeguard the anonymity of the person called to testify.

120. The new Code of Criminal Procedure provides for the adoption of a uniform criminal prosecution model (“public prosecutor’s office” model), a uniform definition of the material jurisdiction of criminal courts and standardization of the appeals system.

121. In order to further strengthen the guarantee of fair treatment, the Code of Criminal Procedure substantially expands the rights of the defence and hence the procedural guarantees of persons suspected of having committed offences, as required by article 7 (3) of the Convention. Among new elements, the following may be mentioned:

(a) Article 3 (1) of the Code: the criminal authorities shall respect the dignity of persons involved in the procedure at all stages thereof. In particular, they shall comply with the prohibition not to use investigation methods that infringe human dignity.

(b) Article 4 (1) of the Code: the criminal authorities shall act independently in applying the law and shall be subject only to the rules of law and equity.

(c) Article 129 of the Code: in all criminal proceedings and at any stage thereof, the accused has the right to entrust his/her defence to a defence counsel.

(d) Article 140: means of constraint, use of force, threats, promises, deception and means likely to restrict a person’s ability to think or free will shall be prohibited in obtaining evidence.

(e) Article 141: evidence obtained in violation of article 140 shall in no case be admissible.

(f) Article 149: if there is reason to fear that an [...] accused [...] [may], by reason of [his/her] participation in the procedure, be [exposed] to serious risk threatening [his/her] life or physical integrity or to another serious drawback, those directing the procedure shall, on request or automatically, take appropriate measures of protection.

(g) Article 158: at the beginning of the first hearing, the police or the public prosecutor’s office shall inform the accused in a language that he/she understands: (i) that he/she may refuse to make a statement or to cooperate; (ii) that he/she has the right to call on defence counsel or to request official defence counsel.

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<sup>(38)</sup> For more details, see the explanations in paragraphs 114 et seq. of this report.

<sup>(39)</sup> RO 2004 2691.

(h) Article 159: at a hearing conducted by the police, the accused has the right to have defence counsel present and able to ask questions;

(i) Article 200: force may be used only as a last resort to enforce measures of constraint and must conform to the principle of proportionality;

(j) Article 219: immediately after the arrest, the police shall establish the identity of the arrested person, inform the person in a language that he/she understands of the reasons for the arrest and inform him/her of his/her rights within the meaning of article 158. They shall then inform the public prosecutor's office of the arrest without delay.

122. It should also be noted that the unified Code of Criminal Procedure incorporates the key provisions of the recent Federal Act on Secret Investigations<sup>40</sup> and Federal Act on Surveillance of Correspondence by Post and Telecommunication.<sup>41</sup>

123. The Federal Act on Secret Investigations entered into force on 1 January 2005. Secret investigations involve members of the police, who are not identifiable as such, infiltrating criminal circles under a false identity to investigate certain offences. The Act takes account of the requirements of effective criminal prosecution while ensuring that it is conducted correctly from the standpoint of the rule of law. Recourse to police infiltrators is limited to the investigation of particularly serious crimes, which are listed exhaustively. Operations involving police infiltrators must also be proportional to the crimes committed and have been approved by the judge.

124. The Federal Act on Surveillance of Correspondence entered into force on 1 January 2002. The conditions under which such surveillance may be authorized are now the same throughout Swiss territory: there must be grave suspicions that the person concerned has committed one of the criminal offences listed exhaustively in the Act. Moreover, the act must be sufficiently serious to justify such surveillance, which must be ordered by a judicial authority.

125. On 24 March 2006, the Federal Chambers adopted the revision of the Federal Act of 21 March 1997 introducing measures for the maintenance of internal security (incitement to violence and hooliganism at sports events, LMSI I). The new provisions, which entered into force on 1 January 2007, lay the bases for curbing hooliganism at sports events and enhance the possibilities of sequestering propaganda materials that incite violence. The Act provides, inter alia, for the centralized inputting of data on known sports hooligans into a national database (HOOLIGAN). The new preventive measures (barring from the perimeter of the event, prohibition on travel to a given country, obligation to report to the police, police custody for a maximum of 24 hours) are also designed to prevent people behaving violently at sports events. The period of validity of the legal bases of three measures (barring from the perimeter, obligation to report to the police, police custody for a maximum of 24 hours) expires at the end of 2009. On 30 August 2006, the Federal Council decided to implement the amendments to the Act and to the ordinance for its enforcement as from 1 January 2007. At the end of August 2007, it adopted a message on a constitutional provision on hooliganism, with a view to extending the

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<sup>(40)</sup> RS 312.8.

<sup>(41)</sup> RS 780.1.

three temporary measures.<sup>42</sup> At the same time, the cantons are considering whether the option of a voluntary agreement would be advisable. If a decision is taken to this effect, the Federal Council plans to withdraw its message.

126. Another revision to the Federal Act introducing measures for the maintenance of internal security (LMSI II, section 23) is designed to expand information gathering by the investigation services. In the areas of terrorism, prohibited political or military investigation services and illicit trade in radioactive substances, it will be possible, in the event of specific threats, to monitor correspondence by post and telecommunication on a preventive basis, to observe dangerous individuals in places that are not freely accessible, including by means of technical equipment, and to secretly search computer systems. The proposal gave rise to specific criticisms during the consultation procedure. The Federal Council's message to Parliament was adopted on 15 June 2007.<sup>43</sup>

### 3. Cantonal law

127. Until the new Federal Code of Criminal Procedure enters into force, criminal procedure continues to be regulated by the cantons. During the reporting period, some Swiss cantons revised provisions of their Code of Criminal Procedure, inter alia by incorporating the latest case law of the European Court of Human Rights.

128. In the canton of Aargau, new article 62 (1) of the cantonal code of criminal procedure provides that the accused must be informed, when first arrested, of his/her rights to remain silent, to be represented by defence counsel, to have a lawyer appointed officially and to demand the presence of a translator. New article 67 of the ordinance on enforcement of penalties provides that detainees shall receive adequate medical assistance and special supplementary care if medically indicated. It also provides that detainees have the right to take a daily walk in the open air and the duty to observe appropriate personal hygiene. Lastly, the canton must ensure that detainees are insured against accidents and illness.

129. The code of criminal procedure of the canton of Lucerne was revised twice in earlier years. The first revision involved transferring the ordinance on the arresting magistrate (Hafttrichterverordnung) to the Code of Criminal Procedure. It then put into effect the Federal Act on Secret Investigations, the Federal Act on DNA Profiles<sup>44</sup> and the Federal Act of Surveillance of Correspondence. This second revision was intended to ensure the implementation of the new general part of the Criminal Code.

130. The canton of Schwyz introduced in article 23 of the cantonal code of criminal procedure the right of the accused to remain silent upon arrest (the amendment entered into force on 1 January 2003). Moreover, the ordinance on enforcement of measures was amended (entered into force on 1 January 2007) and provides, inter alia, that detainees have the right to consult a lawyer and a doctor and to communicate with next of kin.

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<sup>(42)</sup> FF 2007 6111.

<sup>(43)</sup> FF 2007 4773.

<sup>(44)</sup> RS 363.

131. In the canton of Soleure, new article 41<sup>quater</sup> of the canton's code of criminal procedure provides that the next of kin of an arrested person must be informed immediately. Moreover, new article 93 (1) of the cantonal code give the arrested person the right to remain silent, it being understand that his/her attention must be drawn to this fact before he/she is questioned. Article 15 of the rules of procedure of the Soleure and Olten preventive detention centre gives detainees the right to demand medical assistance.

132. In the canton of Thurgau, the code of criminal procedure has been revised twice since Switzerland's previous periodic report. The first revision, which entered into force on 7 October 2006, facilitates the procedure of verifying conditions of pre-trial or security detention before the criminal appeal court. The second revision was undertaken in order to take account of the new elements introduced by the new revised general part of the Criminal Code and the Federal Act on Juvenile Criminal Law. It completely amended the law introducing the Criminal Code and the ordinance on the enforcement of penalties and measures (Justizvollzugsverordnung). This ordinance provides, inter alia, that the detainee shall be informed of his/her rights and obligations upon entry to the detention centre and regulates the procedures for medical examinations and for leave and contacts with the outside.

133. The canton of Ticino amended its cantonal regulations on enforcement of penalties and measures for adults, which entered into force on 9 March 2007. Article 37 of the regulations gives detainees the right to medical assistance; more specifically, the detainee must undergo a medical visit no later than seven days after the beginning of detention and during the second week prior to release.

134. In the canton of Vaud, an amendment of the canton's code of criminal procedure, which entered into force on 1 January 2006, states that, prior to the initial hearing, the accused must be informed not only that he/she is a party to the proceedings and of the offence of which he/she is accused, but also of his/her rights as a party, particularly the right to remain silent (art. 190 (1) of the Vaudois code of criminal procedure).

135. With regard to the canton of Zurich, new article 11 of the canton's code of criminal procedure expressly gives any person who has been arrested the right to remain silent and to request the services of a lawyer. Article 63 of the code provides that the arrested person has the right to contact next of kin, as long of the goal of the investigation is not jeopardized. The ordinance on enforcement of penalties and measures, which entered into force on 1 January 2007, provides, inter alia, that all detainees shall be informed of their rights and obligations and undergo a medical examination as soon as they enter the detention centre. During detention, the establishment must ensure that detainees remain in good physical and mental health. These principles also apply to persons in pre-trial or security detention and those detained awaiting expulsion. Correspondence with next of kin is guaranteed and detainees may receive visits at least once a week.

136. The canton of Zug provides for the right to remain silent in article 25 (1) of the canton's code of criminal procedure. The right to consult a lawyer is enshrined in article 10<sup>bis</sup> (since 1 January 2008 in article 12 (3)) and the right to contact next of kin is enshrined in article 19 of the code.

## **H. International cooperation in extradition matters**

137. The information provided by Switzerland in its initial report remains valid (paras. 60 to 63).

### **I. Article 9: international mutual judicial assistance in criminal matters**

138. The information provided by Switzerland in its initial report remains valid (paras. 60 to 63), subject to the clarification given in the following paragraph.

139. On 1 February 2005, the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters entered into force for Switzerland.<sup>45</sup> The aim of the second protocol is to adapt judicial assistance instruments to new circumstances (globalization of markets, technological developments, etc.). Accession to this new instrument is not, however, a real innovation for Switzerland, since most of its provisions are already to be found in bilateral agreements concluded with neighbouring States or in the Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (EIMP).<sup>46</sup>

### **J. Article 10: training of personnel and staff working with persons deprived of their liberty**

140. Reference should be made to the information provided by Switzerland in paragraphs 69 and 70 of its initial report and in paragraphs 36 of the supplementary report, 72 to 74 of the third periodic report and 77 to 81 of the fourth periodic report of Switzerland.

141. On 21 November 2002, the head of the Federal Department of the Interior approved the new regulations concerning the vocational examination for prison officers. This examination follows three years of practical and theoretical training and leads to federal certification as a prison officer. Advanced training is provided that concentrates primarily on the following four branches: psychology, the prison system, law and psychiatry/medicine.

142. On 11 January 2006, the Committee of Ministers of the Council of Europe adopted a new recommendation on the European Prison Rules.<sup>47</sup> This recommendation takes account of the work done by the European Committee for the Prevention of Torture and of developments in the penal area in Europe and updates the earlier Committee of Ministers Recommendation No. R (87) 3 of 12 February 1987. It will be recalled that the Federal Court often bases itself on these rules, which reflect the known juridical traditions of member States.<sup>48</sup>

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<sup>(45)</sup> RS 0.351.12.

<sup>(46)</sup> RS 351.1. For more information, see the Federal Council's message on the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters, FF 2003 2873.

<sup>(47)</sup> Rec(2006)2E, available at:  
[https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2006\)2&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2006)2&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

<sup>(48)</sup> ATF 124 I 231, preambular paragraph 2b/aa and the case law cited above.

143. The agreement among the north-western and central cantons of Switzerland and that among the eastern cantons require the cantons to ensure that they have sufficient staff and offer them appropriate initial, advanced and in-service training (arts. 12 and 8 respectively), while the agreement among the French-speaking cantons provides that the Conference must issue recommendations on security, staffing, assistance, training and work within the different types of establishments or sections of establishment assigned to the enforcement of measures and of penalties involving deprivation of liberty (art. 12).

144. Based on the demands of the cantonal agreement, the canton of Aargau has amended its ordinance on enforcement of penalties and measures, which entered into force on 1 January 2007. Article 3 (c) of the ordinance provides that the Council of State shall encourage initial, advanced and in-service training in keeping with the agreement's guidelines. The latter refer expressly to the United Nations Convention against Torture.

145. In the canton of Bern, most prison staff have been trained at the Swiss Prison Staff Training Centre, in Fribourg. They have followed both the two-year basic training (for which a federal diploma is awarded) and advanced and in-service training, including courses on "care of detainees with mental problems" (seven weeks), "management of violent situations" and "management of situations of intercultural conflict".

146. As part of the introduction of a new concept of enforcement of penalties and measures, based on "agogic" principles in the Witzwil prison, staff members are trained specifically in this field (agogics = theory of the administration and support of persons in working life).

147. In all detention centres, internal courses are taught regularly, on topics such as "proximity – distance", "management of persons with mental disorders", "prevention of violence", "suicide prevention" and "crisis intervention".

148. Lastly, a number of staff members receive in-service training in social pedagogy or social work.

149. In regard to the canton of Fribourg, the employment rate of prison nurses has been increased (from 50 to 70 per cent) to accommodate increased needs in the health area. An internal staff training programme has also been set up to provide all staff with in-service training adapted to current needs.

150. In Glaris canton, prison staff receive continuous training, with medical and psychological aspects an integral part of the training programme. Apart from this, spiritual support and social assistance are guaranteed by law.

151. In Jura canton, prison warders regularly attend training courses set up by the Swiss Prison Staff Training Centre in Fribourg. Enforcement personnel also attend ongoing training seminars organized under the agreement among French-speaking cantons. With regard to medical personnel, Porrentruy prison is served by a doctor who is in contact with his French-speaking counterparts.

152. In Soleure canton, staff training is provided by the Fribourg training centre. Prison medical staff are independent doctors operating out of their own offices, so that care is provided in a completely independent manner.

153. In Valais canton, every air escort officer has received specific training in Geneva (officers from the lower Valais area) or Zurich (those from the upper Valais). The following criteria governing the selection of such officers have always been respected:

- a) Have several years' experience in the police force;
- b) Have a higher than average ability to relate to people and be tactful; have proven psychological skills; be able to cope with stress and feelings of frustration;
- c) Be in good physical condition.

154. Team leaders must also possess negotiating skills and be able to command obedience. To keep their skills constantly updated, an internal refresher course is provided annually for air escort officers from Valais canton.

155. In Zurich canton, each new staff member of the enforcement office must attend compulsory classes during which he/she is made aware of the general principles of enforcement (respect for human dignity, prohibition of torture, prohibition of arbitrary treatment, right to equality) and of the conditions to be met in restricting a fundamental right. With regard to police custody, it should be mentioned that surveillance staff must undergo a selection procedure and receive three months' training. During this training, all necessary information to ensure respect for the dignity of the human person is imparted.

#### **K. Article 11: exercise of surveillance over the treatment of detainees**

156. The information provided by Switzerland in its initial report (para.71) remains valid.

157. In Zurich canton, a secure section for persons who are the subject of criminal proceedings (*forensische Sicherheitsstation*) came into operation in the summer of 2007 within the Rheinau psychiatric clinic. This section has three units, each with nine places, for emergency treatment and crisis intervention and for in-patient treatment of accused persons with mental problems, and one reception unit for patients subject to enforcement measures. The new Limmattal prison is also in the process of construction; it will have 72 places and is scheduled to open in 2009.

158. In Bern, changes have taken place with regard to prisons and the surveillance section at Inselspital hospital. With the exception of the small Fraubrunnen prison, all district prisons have been closed and places distributed among five regional prisons (Bern, Biel, Burgdorf with the Fraubrunnen district prison, Thun and Moutier). The new regional prison in Thun went into operation in 2001. The renovation of the Burgdorf regional prison was postponed for financial reasons, although planning has since resumed and the prison is scheduled to reopen in 2011. The Fraubrunnen prison is scheduled to close that same year at the latest. The new Inselspital surveillance section came into operation in 2004.

159. Changes have also taken place with regard to residential centres and reform schools for young offenders. The high-security and integration sections of the Hindelbank residential centre were renovated and reopened in 2002. The Steinhof open school was completely overhauled in 2006. The closed observation and triage section at the St. Jean residential centre opened in 2001. In the two centres mentioned, the supply of work placements was substantially diversified in the reporting period. In 2004, all the communities of the Lory reform schools were

comprehensively upgraded and a new semi-open community was opened. The Prêles reform school is to be completed overhauled and redesigned and it will reopen in stages between 2009 and 2011.

160. In Schwyz canton, the Biberbrugg secure section (*Sicherheitsstützpunkt*) went into operation at the beginning of 2007. It is used for pre-trial detention, enforcement of short custodial sentences and for LMC establishments.

161. Zug canton opened its new cantonal prison in 2003. The Bostadel inter-cantonal establishment in Menzingen resumed full operations in 2006 after being extended to accommodate two more highly-secured sections.

162. In Fribourg canton, a centre for the early enforcement of penalties is currently being built near the Bellechasse establishments. The centre, which is being built on the basis of the new Criminal Code, is scheduled to open in 2009.

163. In St.-Gallen, the Saxerriet centre has been completely renovated, while the Bitzi centre has been transformed into an enforcement establishment. The recent building of the Altstätten regional prison has permitted the closure of small prisons that no longer, or only just, met the requirements of detention in conditions of human dignity. Work to expand and rehabilitate the Platanenhof reform school for young people at Oberuzwil was also completed in 2006. The school has new infrastructure for the enforcement of custodial measures.

164. In Grisons canton, five years of work to overhaul the Realta cantonal prison in Cazis were completed in 2006.

165. In Thurgau canton, the annex to the Frauenfeld cantonal prison came into operation in 2007, permitting the closure of various small district prisons whose infrastructure was no longer up to standard.

166. In Ticino, the 57-place La Farera cantonal preventive prison is now in operation. Overhaul of La Stampa prison is currently at the planning stage.

167. On 18 January 2008, Geneva canton opened La Brenaz, a new 68-place prison in the immediate vicinity of Champ-Dollon prison, where it will help reduce overcrowding in the latter prison.

#### **L. Article 12: prompt and impartial investigation in cases of torture**

168. The information provided in paragraphs 72 and 73 of the initial report must be clarified in the light of the new Code of Criminal Procedure.

169. Under article 5 of the Code of Criminal Procedure, the criminal authorities must institute criminal proceedings immediately and must complete them without undue delay. When an accused is placed in detention, proceedings must be conducted as a matter of priority. Prosecution is mandatory, meaning that the criminal prosecution authorities must institute and conduct proceedings when they know that offences have been committed or they have evidence suggesting that offences may have been committed (art. 7 of the Code).



170. In order to avoid any risk of bias in the investigation of the case or in the trial proceedings, the Code of Criminal Procedure establishes different grounds for recusal. Thus, any person working in a criminal authority must recuse himself/herself when he/she has a personal interest in the case or has acted in another capacity in the same case, for instance as a member of an authority, as legal counsel for one of the parties or as an expert or witness, or when there are other grounds that could make the person suspect of bias (art. 56 of the Code). Although recusal is, in theory, compulsory (art. 57), article 58 of the Code gives the parties the possibility of lodging an application for recusal. Article 59 also stipulates that operations in which a person required to recuse himself/herself has participated shall be nullified and repeated if a party so demands no later than five days after learning of the recusal.

171. Under article 302 of the Code of Criminal Procedure, the criminal authorities are required to report to the competent authorities any offences that they have observed or that have been reported to them in the exercise of their functions, if they themselves do not have jurisdiction to prosecute those offences.

172. The Code does not make the institution of criminal proceedings dependent on knowledge of the identity of the perpetrator or on the latter's presence on Swiss territory. One purpose of pretrial investigations is in fact to determine who committed the offence. Nevertheless, when the necessary investigations fail to identify and/or locate the perpetrator, the public prosecutor's office may suspend the pre-trial investigation (art. 314), but must resume it if the reason for the suspension disappears (art. 315). If the perpetrator has been identified but does not appear at the hearing in first instance after having been summoned twice, the hearing may be conducted in his/her absence (default proceeding under arts. 366 et seq.).

173. In the canton of Appenzell Ausserrhoden, the public prosecutor's office dealt with four complaints of ill treatment (blamed on the police). Two cases, dating back more than six years, concerned incidents that had taken place in the course of an arrest and proved to be unfounded. The third concerned a dispute between a police officer and a relative of a person charged with homicide. This proceeding was entrusted to a special investigating magistrate from outside the canton and ended in a settlement between the parties. The last case, still ongoing, concerns a complaint filed by a suspect following a police intervention. However, the case file shows that the complaint was filed for purely petty reasons.

174. In the canton of Basel-City, the courts have handled several complaints against police conduct in the performance of police functions:

(a) The appeal court acquitted two police officers convicted in first instance of abuse of authority and, in the case of one of them, bodily injury, giving them the benefit of the doubt. According to the Court, the statements by the parties (alleged perpetrators, victims) and the testimony of witnesses did not make it possible to identify the perpetrators of the offence with certainty.

(b) The president of Basel-City criminal court gave a police officer a sentence, suspended for two years, of 30 days' imprisonment for abuse of authority within the meaning of article 312 of the Criminal Code. The officer had insulted, threatened and manhandled a Russian national while arresting him for theft.

(c) The president of Basel-City criminal court acquitted two police officers who had led a police operation to verify the identity of some 100 people belonging to a nationalist organization, in which all of them had been held for around an hour on the pavement outside a restaurant. Explaining his decision, the president said that the operation had been justified, in that its purpose had been to prevent the people concerned from committing possible acts of violence.

(d) In a case where a citizen was accusing two police officers of having handcuffed him tightly, thereby injuring his shoulder, the appeal chamber referred the case file to the public prosecutor's office for further evidence. The prosecutor's office had in fact closed the case on the grounds that the two officers' rather heavy-handed intervention during a police check was lawful. It had not conducted any additional investigations, which the appeal chamber, however, judged were necessary.

175. In Fribourg canton, the investigating magistrates' office registered 22 proceedings concerning one or more members of the cantonal police force. There were complaints that cantonal police officers had committed the following offences: bodily injury, assault, endangering the life of others, defamation, slander and/or forcible entry. Of the 22 cases, 15 were closed by an order of lack of evidence, five by an order of refusal to institute criminal proceedings and one by a decision to shelve the case. The remaining case is still ongoing. Outside the criminal law system, a number of complaints were sent directly to the Department of Security and Justice, notably concerning conditions of detention of persons in semi-detention and excessively high temperatures in police vans when detainees were being transported. The Department examined these complaints and took appropriate action (new inspection procedures for persons in semi-detention, improved ventilation in police vans).

176. Neuchâtel canton mentions five cases:

(a) The plaintiff's appeal, accusing police officers of violence against him, was rejected and the appeals by two police officers, convicted in first instance of abuse of authority, were upheld by the Federal Court, on the grounds that their right to be heard had not been respected throughout the proceeding. At the beginning of this case, a decision to shelve the complaint had been overturned by the pre-trial chamber. The proceeding is ongoing.

(b) A defendant appealed against his sentence of four months' imprisonment and against the suspension of that penalty to allow his return to hospital. He invoked a United Nations declaration of 9 December 1975 (resolution 3452(XXX)) and article 2 thereof prohibiting any act of torture or other cruel, inhuman or degrading treatment or punishment, maintaining that given his current state of health, his confinement in a psychiatric hospital amounted to torture. In its decision, the appeal court noted that the measure of treatment was validly based on the law and did not constitute an act prohibited by article 7 of the International Covenant on Civil and Political Rights (a provision implemented, inter alia, by the Convention against Torture of 10 December 1984).

(c) Although one cannot speak of torture in this case, a treatment contrary to law can be discerned in a case where police were allowed to help a cantonal office that had decided to remove a foreign national and her minor child who were living illegally in Switzerland. This was the determination made by the appeal court in its decision. At the same time, the court informed the head of the cantonal department in charge of the police that it shared the concern of the

appellant's lawyer that the necessary measures should be taken to ensure than such unfair methods, truly unworthy of a State governed by the rule of law, could not be used in future.

(d) In two other cases, the police's heavy-handed intervention, denounced by the plaintiffs, was ruled proportionate to the situation. The first of these cases also shows that, once again, the order to shelve a complaint against police officers was overturned by a decision of the pre-trial chamber.

177. In Ticino canton, 20 cases were opened following complaints of ill treatment committed by the authorities. Five cases are still pending, while 15 were dismissed by the prosecutor for lack of evidence. The decisions to close these cases, taken after serious, thorough examination of the complaints, were motivated by the absence of one or more constituent elements of the offence and by the complainant's lack of interest. Generally speaking, these cases concern cantonal or communal police officers accused of offences ranging from assault to bodily injury, offences against honour and abuse of authority.

178. It should also be mentioned that criminal proceedings against two cantonal police officers were instituted in 2005. The police had robbed and, in one case, even illegally confined and beaten asylum seekers. On 19 June 2007, the Lugano assize court fully confirmed the indictment drawn up by the public prosecutor, thereby acknowledging that the two police officers, who had already spent several weeks in pre-trial detention at the outset of the investigation, were guilty of repeated robberies, illegal confinement and abduction of persons, and repeated abuses of authority and assaults. One of them was also indicted for the offence of racial discrimination. As a result, the court imposed a sentence of 20 months' imprisonment, suspended for four years, on one police officer and a sentence of 15 months' imprisonment, suspended for three years, on the other.

179. In Zurich, in recent years, some criminal complaints have been filed against police officers by asylum seekers. The public prosecutor's office has handed down an order or instituted criminal proceedings only in very rare cases, however. Generally speaking, the investigations carried out have only succeeded in interrupting the procedure. These considerations seem to suggest that, in most cases, criminal complaints are filed only as a means of defence or as a final attempt to escape expulsion.

180. The following three cases should, however, be mentioned:

(a) In the first case, an arrestee accused a police officer of having handcuffed him so tightly that the handcuffs hurt. The official then took him into pre-trial detention, still handcuffed, and called him a "dirty foreigner" and a "dirty nigger". After being fined SwFr 800 for assault in first instance, the police official was finally acquitted by the pre-trial chamber on the benefit of the doubt.

(b) In a second case, a police officer was convicted of having forced an asylum seeker to have sex with him, first in his office and then in the dormitory in Terminal A of the Zurich airport transit zone. The district court sentenced the police officer to six months' imprisonment, suspended for two years, for infringing article 189 (1) of the Criminal Code. On appeal, the pre-trial chamber confirmed the guilty verdict but reduced the prison term to five months, suspended for two years.

(c) The last case concerns two police officers who allegedly used disproportionate force while searching a person suspected of involvement in a drug case. Upon appeal by the plaintiff, the pre-trial chamber upheld the district court's acquittal of the police. It was found that the police officers' actions had not in fact exceeded the limits of the violence necessary for questioning the person, who had moreover behaved aggressively during questioning.

181. With regard to complaints lodged by detainees, Zurich canton mentions the following:

(a) A detainee at the Zurich airport prison lodged a criminal complaint against several police officers, as well as the prison governor, after being taken out of his cell with a view to his expulsion. He claimed that he had been the victim of bodily injuries and abuse of authority. The Bulach district court rejected the plaintiff's appeal against the decision by the public prosecutor's office not to proceed for lack of evidence.

(b) An internal investigation was carried out into an attack by an employee working in the security area of Pfäffikon prison. At the outcome of the investigation, the employee in question was given a warning and was moved to the Zurich airport prison.

(c) A number of detainees also complained of ill treatment by prison staff. The investigations conducted by the hierarchically superior authority (prison governor, office manager, departmental manager) showed that these complaints were, in theory, unfounded.

(d) In 2006, a petition was filed by detainees at Pöschwies prison, containing 17 points criticizing the prison rules and the behaviour of the staff. The Departments of Justice and the Interior responded to each of the criticisms and to the suggestions made by the detainees, by way of a comprehensive position paper of the office of enforcement of penalties and measures. This position paper was also published on the internet. While some demands had to be rejected for legal, security, technical or economic reasons, others were followed up immediately (for instance, those concerning clothing and visits in family rooms).

182. The Ombudman's office, for its part, has not received any complaints of ill treatment committed by members of an authority.

#### **M. Article 13: Right of complaint and protection of the complainant and witnesses**

183. The information provided in previous reports must be supplemented by the following paragraphs.

184. Concerning witness protection, article 149 of the Code of Criminal Procedure provides that the person in charge of the procedure may take appropriate measures when there is reason to fear that a witness, a person called to give information, an expert, a translator or an interpreter may be exposed to serious danger threatening their life or physical integrity. Such measures include ensuring the anonymity of the person concerned, holding the hearing without the parties being present or behind closed doors, or altering the appearance and voice of or disguising the person to be protected.

185. The Federal Act on Assistance to Crime Victims (LAVI) contains the most important provisions concerning witness protection. According to the Act, the authorities must protect the

personality of the victim at all stages of the criminal procedure (art. 5 of the Act). Moreover, the victim's identity can be revealed outside the public hearing in a court only if that is necessary in the interests of criminal prosecution or if the victim consents. A closed hearing may be ordered when the overwhelming interests of the victim so require. Lastly, the authorities must avoid the accused and the victim being present at the same time if the victim so requests. The victim may be accompanied by a person of trust when he/she is questioned as a witness or called to provide information. The victim may refuse to testify concerning intimate facts (art. 7).

186. A partial revision of the Federal Act entered into force on 1 October 2002, aimed at strengthening the protection of children during criminal proceedings, inter alia, by prohibiting any confrontation between the accused and the victim in the case of violations of sexual integrity or if this could cause the child psychological trauma (art. 10b). The revision also provides that the child shall be present at two hearings at most, the first to take place as soon as possible after the event (art. 10c). The authority responsible for the administration of criminal justice may also decide to end the proceeding if the interest of the child so demands and manifestly takes precedence over the interest of the State in prosecuting the crime. In such a case, the competent authorities shall ensure that measures to protect the child are ordered, if necessary (art. 10d).

187. The Federal Act is also the subject of a comprehensive revision that will enter into force on 1 January 2009. Its provisions on the position and protection of the victim in criminal proceedings are largely identical to those under the current law, but are henceforth contained in section 6 (arts. 34 to 40 of the Act). When the Code of Criminal Procedure enters into force, this section 6 will be repealed, since its provisions will have been incorporated directly into the Code (arts. 116 et seq. and 152 et seq.). This transfer has not involved any major material change in the provisions in question. Just like the Act, the Code enables the victim to be accompanied by a person of trust throughout all stages of the procedure. Moreover, the Code provides that the criminal authorities must ensure that the victim does not come face to face with the accused. The victim of an offence against sexual integrity may demand to be heard by a person of the same sex. It should be noted that the Code makes a distinction between a victim and an injured party. The term "victim" is applied only to a person who has suffered a direct violation of psychological, physical or sexual integrity (art. 116 of the Code). In other cases, the term "injured party" is used (art. 115). The distinction is important because a victim has additional rights in criminal procedure, such as the right to protection of personality, the aforementioned rights set forth in articles 152 et seq., the right to refuse to testify, the right to information and the right to have the court composed in a particular way (art. 117 of the Code). An injured party, as long as he/she takes parts in the procedure, is eligible for the measures of protection under articles 149 et seq. of the Code mentioned in paragraph 185 above. As has always been the case until now, the victim may bring an independent action for damages and thereby assert his/her civil claims against the perpetrator.

#### **N. Article 14: Right of the victim to fair compensation**

188. Reference should be made to the information provided by Switzerland in paragraphs 76 to 78 of its initial report and paragraphs 52 to 57 of its second periodic report, which remains valid, subject to the clarifications that follow.

189. The comprehensive revision of the Federal Act on Assistance to Crime Victims, mentioned in paragraph 187 above, substantially modified the victim compensation scheme. The purpose of the revision was to fill various gaps in and improve the structure of the Act. The principal material changes include extending from two to five years the time limit for filing a request for compensation and reparation for moral damage. Underage victims of serious offences, notably offences against sexual integrity, have the benefit of a special scheme: they may file a request at any time before their twenty-fifth birthday. Moreover, a clearer distinction is made between the longer-term assistance provided by counselling centres and actual compensation. Longer-term assistance will be provided until the victim's state of health has stabilized and the other consequences of the offence have, to the extent possible, been eliminated or compensated (art. 13). Compensation, for its part, will cover medical and health care costs once the victim's health has stabilized, as well as loss of earnings, loss of support and funeral costs (arts. 19 et seq.). Victims of offences will continue to receive reparation for moral damage, but there will henceforth be a ceiling on the amount paid (arts. 22 et seq.). Lastly, the revision abolishes any right to compensation and reparation for moral damage for offences committed abroad (art. 3), victims and their next of kin residing in Switzerland being entitled, as in the past, to the services provided by counselling centres (art. 17).

#### **O. Article 15: Fate of unlawful evidence**

190. Paragraphs 79 to 82 of the initial report must be supplemented by the following paragraph.

191. As mentioned earlier,<sup>49</sup> the use of evidence obtained by means of constraint, the use of force, threats, promises, deception or other means likely to restrict the person's intellectual faculties or free will is prohibited in all cases (art. 140 in conjunction with art. 141 (1) of the Code of Criminal Procedure).

#### **P. Article 16: Prohibition of acts constituting cruel, inhuman or degrading treatment or punishment**

192. Reference is made to paragraph 82 of the initial report, which remains valid.

### **III. Replies to the concerns and recommendations of the Committee contained in its conclusions and recommendations (CAT/C/CR/34/CHE)**

#### **Preliminary remarks**

193. On 15 June 2005 and 27 November 2007, Switzerland stated its position on a number of the concerns and on the recommendations (see documents CAT/C/CHE/CO/4/Add. 1 and 2). As a result, the remarks that follow concern only those points not already addressed in the earlier statements of position or else simply update those statements.

#### **A. Absence of a definition of torture**

194. As Switzerland has had occasion to state on several occasions, the creation of a criminal law provision expressly criminalizing torture does not appear necessary, given that the criminal

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<sup>(49)</sup> See para. 25 above.

provisions in force in our country cover and severely punish all behaviour that could be described as acts of torture (such as offences against life and physical integrity, offences against liberty, offences against sexual integrity, offences against honour, abuse of authority, etc.).

195. Switzerland is convinced that this system permits a fundamentally more effective prevention and detection of acts of torture and that, in the opposite case, the aim of the Convention would be less effectively safeguarded.

196. As a matter of interest, when the perpetrator's behaviour constitutes several offences, there is what is called a combination of offences. In the event of such a combination, the judge may, under article 49 of the Criminal Code, impose the penalty stipulated for the most serious offence and increase it by a reasonable proportion. The penalty may not, however, exceed by more than half the maximum penalty stipulated for the most serious offence.

#### **B. Federal bill on the use of force**

197. As mentioned in paragraph 16 of this report. The Act on the Use of Force was adopted by Parliament on 20 March 2008. The referendum deadline is 10 July 2008.

198. Concerning the presence of an independent person at the time of expulsion, we would refer to our statement of position dated 27 November 2007, where this issue is discussed at length.

#### **C. Committee's findings as grounds for reviewing a case**

199. While it is true that federal law does not provide expressly that the admission of an individual complaint by the Committee is grounds for review per se, it should be clarified that the institution of review is relevant only to the appeal body (the Federal Administrative Tribunal in matters of asylum). Where asylum is concerned, in the absence of grounds for a review, it is up to the authority of first instance, ODM, to take account of the Committee's findings. Thus, when the applicant's forcible removal would infringe article 3 of the Convention, enforcement of removal is unlawful and ODM consequently orders at least temporary admission.

#### **D. Guarantee of the right to a fair hearing and to the exercise of social and economic rights for asylum seekers**

200. Reference can be made here to the comprehensive information provided in paragraphs 27 et seq. of this report, especially paragraphs 32 to 42 and 72 to 77.

#### **E. Abuse of "diplomatic assurances"**

201. Switzerland has always condemned resorting to diplomatic assurances to circumvent the absolute prohibition of torture, including in the current context of counterterrorism efforts. It has defended this position in the Council of Europe and at the United Nations.

202. In practice, a distinction is made between cases of return and those of extradition. Diplomatic assurances can be an appropriate means only in cases of extradition, since the State demanding extradition has a crucial interest in honouring the assurances it has given. Recourse is

had to such safeguards only in cases of return, in accordance with the Asylum Act or the Foreign Nationals Act.

203. Before extraditing a person, Switzerland makes a careful risk analysis whenever the person concerned invokes the danger of being subjected to torture or to inhuman or degrading treatment or if particular circumstances or the overall human rights situation in the country concerned so require. If this analysis leads it to conclude that the risk of a human rights violation cannot be ruled out, it examines the possibility of removing this risk by obtaining diplomatic assurances.

204. Switzerland demands formal diplomatic guarantees, which may include an oversight mechanism allowing its representatives to attend the proceedings against the extradited person and to visit the person in detention at any time and without prior notice. If necessary, the guarantees also include a requirement to inform the Swiss authorities of any change in the person's place of detention or state of health and the person's right to communicate freely and without oversight with defence counsel or his/her choosing and to contact Switzerland's representatives at any time (cf. Decision 1C\_205/2007 of the Federal Court of 18 December 2007, the publication of which is imminent and which refers to numerous earlier decisions). The guarantees are given, where appropriate, in a binding legal form in keeping with international law.

205. Thus far, there has been only one known case in which the assurances demanded by Switzerland have not been honoured. This was the 1997 extradition of two Turkish nationals to India. The violation did not, however, concern the prohibition of torture but the principle of promptness. Since those events, Switzerland has no longer accepted requests for extradition coming from India.

#### **F. Continue to contribute to the United Nations Voluntary Trust Fund**

206. Between 2002 and 2004, Switzerland contributed Sw Fr 80,000 annually to the United Nations Voluntary Trust Fund for Victims of Torture. This amount was increased to Sw Fr 50,000 in 2005 and 2006 and Sw Fr 100,000 in 2007.

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