



**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**

**Fourth periodic report due in 2000**

**Addendum**

**SWITZERLAND\***

[18 December 2002]

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

The information submitted by Switzerland in accordance with the consolidated guidelines for the initial part of reports of States parties is contained in core document HRI/CORE/1/Add.29/Rev.1.

For the initial report of Switzerland, see document CAT/C/5/Add.17; for its consideration by the Committee, see CAT/C/SR.28 and 29 and *Official Records of the General Assembly, Forty-fifth session, Supplement No. 44 (A/45/44)*, paras. 87-114.

For the second periodic report, see document CAT/C/17/Add.12; for its consideration, see CAT/C/SR.177, 178 and 178/Add.2 and *Official Records of the General Assembly, Forty-ninth session, Supplement No. 44 (A/49/44)*, paras. 128-137.

For the third periodic report, see document CAT/C/34/Add.6; for its consideration, see CAT/C/SR.307 and 308 and *Official Records of the General Assembly, Fifty-third session, Supplement No. 44 (A/53/44)*, paras. 80-100.

The annexes to the present report may be consulted in the Secretariat files.

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## Introduction

1. On 2 December 1986, Switzerland ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention entered into force for Switzerland on 26 June 1987. Switzerland submitted its initial report (CAT/C/5/Add.17) on 14 April 1989. The report was considered by the Committee against Torture on 15 November 1989 (CAT/C/SR.28 and 29).
2. Switzerland submitted its second periodic report (CAT/C/17/Add.12) on 24 September 1993. It covers the period from 1 July 1988 to 30 June 1992 and was considered by the Committee on 20 April 1994. Following the submission of that report, the Committee asked Switzerland to provide additional information, which it did by mail on 18 November 1994.
3. The third periodic report of Switzerland (CAT/C/34/Add.6), which was submitted on 7 November 1996, covers the period from 1 July 1992 to 30 June 1996 and was considered by the Committee on 14 November 1997.
4. For the most part, the present report covers the period from 1 July 1996 to 30 June 2000; however, it also contains more recent information in paragraphs 5, 6, 8, 13, 32, 41, 42, 49, 50, 51, 52, 56, 61, 63, 68, 88, 101, 117, 121, 128, concerning paragraph 15 of the recommendations, and in paragraph 152.
5. On 17 September 1998, Switzerland submitted its second periodic report on the implementation of the International Covenant on Civil and Political Rights. The report was introduced at a public meeting of the Human Rights Committee on 19 October 2001.
6. Switzerland submitted its initial report on the implementation of the Convention on the Rights of the Child to the Committee on the Rights of the Child on 19 January 2001 and made an oral presentation of it on 29 May 2002; the Committee adopted its concluding observations on 7 June 2002. Switzerland submitted its combined initial and second periodic reports on the Convention on the Elimination of All Forms of Discrimination against Women in early 2002. On 4 and 5 March 2002, Switzerland's second and third periodic reports on the International Convention on the Elimination of All Forms of Racial Discrimination were introduced at a public meeting of the Committee on the Elimination of Racial Discrimination; the Committee adopted its concluding observations on 21 March 2002.
7. Following a visit to Switzerland between 11 and 23 February 1996 (see third periodic report, paragraph 5), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) presented a report to the Swiss Government on 30 September 1996. The report gave a detailed account of the points observed during that Committee's visit and put to the Swiss authorities a number of recommendations, comments and requests for information; these formed the basis of the Federal Council's interim report and subsequent follow-up report. CPT received no allegations of torture during its visit. The points made related mainly to the circumstances surrounding apprehension by the police, the provision made for prisoners with serious mental problems, the opportunities for exercise and leisure activity during preventive detention, medical examinations carried out in inappropriate surroundings and, particularly, the conditions for the transfer of prisoners by train. CPT also

recalled certain matters of principle raised in its first report, in particular the rights - which, in CPT's view, anyone held in police custody should enjoy from the start of their detention - to be assisted by "early counsel", consult a doctor of their choice and inform a close friend or relative of their arrest. On the basis of follow-up visits to institutions previously visited in 1991, CPT noted that material conditions in prisons had improved.

8. CPT carried out its third periodic visit to Switzerland from 5 to 15 February 2001. The delegation spent 10 days visiting reform schools and prisons, police stations, a psychiatric hospital, a border post and a centre for detention pending expulsion, in the cantons of Basle, Berne, Fribourg, Saint-Gallen, Thurgau and Zurich; it also showed particular interest in the expulsion procedure. The delegation stated that it found nothing during its visit that would lead it to believe that torture or serious ill-treatment took place. It noted the introduction on 1 January 2001, as a result of its previous visit, of a new system of prisoner transport applicable throughout Switzerland and known as "Train Street" (see below, paragraph 88). As in 1996, CPT prepared a report for the Federal Council on the main elements of the situation it found in the establishments it visited; the Swiss Government replied to that report on 27 February 2002.

9. As regards the legal provisions and remedies which in Switzerland protect the individual against torture and other cruel, inhuman or degrading treatment or punishment, it should be noted that the Swiss Federal Constitution underwent a thorough reform in 1999,<sup>1</sup> but that this did not entail any substantial changes by comparison with what is said in paragraphs 1 to 6 of the initial report.

10. Some clarification is nevertheless needed in respect of paragraph 3 of the initial report. Article 10, paragraph 2, of the Federal Constitution guarantees personal freedom in the following terms: "Every human being has the right to personal freedom, and in particular to physical and mental integrity, and to freedom of movement". For many years the Federal Tribunal - Switzerland's Supreme Court - recognized personal freedom as an unwritten constitutional right. This freedom pertains to any individual, Swiss or foreign, and is imprescriptible and inalienable. With respect to paragraph 5 of the initial report, it should be noted that it is by virtue not only of legal doctrine and case law, but also of article 36 of the Constitution that personal freedom, like any fundamental right, contains a core of elementary protection that must not be violated at any price. Lastly, article 10, paragraph 3, of the Constitution explicitly prohibits "torture and any other form of cruel, inhuman or degrading treatment or punishment".

11. It must also be stressed that, while Swiss criminal law does not contain any provisions specifically against torture, it does cover all aspects of the definition of torture given in article 1 of the Convention and fully meets the stipulations of article 4.

12. Acts constituting torture or other cruel, inhuman or degrading treatment are covered by special provisions of the Swiss Criminal Code and Military Criminal Code, which also apply to persons who perform administrative functions. Persons committing such acts are liable to disciplinary sanctions that in some cases have more profound effects than criminal penalties (e.g. dismissal on disciplinary grounds) and may be applied even without a criminal conviction. For more information on these provisions of the Criminal Code, see paragraphs 8 to 12 of the third periodic report.

13. Since 15 December 2000, article 264 of the Swiss Criminal Code has included a provision explicitly punishing genocide. This is in consequence of Switzerland's accession to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

## **I. INFORMATION ON NEW MEASURES AND NEW DEVELOPMENTS OF RELEVANCE TO THE IMPLEMENTATION OF THE CONVENTION**

### **Article 2**

14. During the period under consideration, nine petitions, only two of which were transmitted to the Swiss Government for comment, were lodged with the European Commission of Human Rights or the European Court of Human Rights for violation of article 3 of the European Convention on Human Rights. Eight of them were declared inadmissible by the European Convention bodies. The ninth was declared admissible, but an amicable settlement was subsequently reached (see below, paragraph 55).

15. For the rest, the information provided in paragraphs 34 to 37 of the initial report still applies.

### **Article 3**

16. By way of introduction, reference should be made to paragraphs 38 to 41 and 43 to 44 of the initial report, paragraphs 8 to 16 of the second periodic report and paragraphs 15 and 16 of the third periodic report.

17. During the period under consideration, there have been no extradition decisions in violation of the principles of the Convention. However, when extraditions entailing a risk of violation of human rights have been effected, they have been made subject to a guarantee by the requesting State that the rights of the person to be extradited will be respected.

18. The new law on asylum (LAsi) of 26 June 1998 entered into force on 1 October 1999. In a complete overhaul of the existing legislation, amendments made under an urgent federal decree, whose main effect had been to considerably speed up asylum proceedings at first instance, were incorporated more or less unchanged into the new law. However, a number of new elements, as well as other amendments, were also included in order to fill gaps and address shortcomings brought to light by new subjects of concern, such as refugees from violence, the need to combat abuse, problems relating to forced returns and the deterioration of the Confederation's financial situation.

19. The new law on asylum obligates the Federal Council to supplement it by rules to protect unaccompanied minors during the asylum procedure.<sup>2</sup> The canton to which an unaccompanied minor is sent must, if it has not already appointed a tutor or guardian, promptly appoint a trustworthy person<sup>3</sup> to represent the child's legal interests during the procedure.

20. The new law requires the authorities to take account of women's specific reasons for flight.<sup>4</sup> The asylum procedure<sup>5</sup> makes provision for women's special concerns in the following

way: in cases involving couples and families, all members capable of forming their own views have, as a matter of principle, the right to be heard on their own reasons for seeking asylum and, as appropriate, to be given asylum. Where there is evidence of gender-based persecution, the interview must be conducted by a person of the same sex as the applicant, unless the applicant objects. If the applicant alleges gender-based persecution, the interpreter, the report-writer and the aid agency representative must, to the extent possible, also be of the same sex as the asylum-seeker. The Federal Office for Refugees (ODR) has a standing working group made up of experts on the reasons for gender-based persecution, one of whose tasks is to raise new colleagues' awareness of this problem during their training.

21. As in the past, the aid agencies accredited by the Federal Department of Justice and Police send a representative to the interview with the asylum-seeker, unless the latter objects. The representative attends the interview as an observer, not a participant, but may call for certain questions to be asked, make suggestions for further clarifications or raise objections concerning the interview report.<sup>6</sup>

22. Under the old law, cantons could, subject to the approval of the Federal Office for Foreigners (OFE, etc.), issue a class B temporary residence permit to an asylum-seeker whose application had been pending for four years. Under the new law,<sup>7</sup> it is for ODR (the Swiss Asylum Appeals Commission (CRA)) to determine whether there are grounds for granting temporary admission in situations of serious personal distress; such a decision may be taken only after at least four years of residence in Switzerland and provided the procedure is still ongoing. Further, in such cases, temporary admission is in effect an alternative measure to expulsion. The cantonal authorities nevertheless retain the right to a say in the decision and may request temporary admission or, conversely, expulsion. If ODR denies its request, the canton may appeal to CRA, whose decision is final. Since under the new law hardship cases no longer give rise to B (temporary residence) permits but to temporary admission, financial responsibility in cases where applicants are dependent on welfare passes from the cantons to the Confederation. The new rules reflect a standardization of practice at the federal level. They also reduce the workload of the Federal Tribunal, the appeals service of the Federal Department of Justice and Police (DFJP), and OFE.

23. The main principles of the procedure to be followed at airports, which was previously governed by legislative decree, were incorporated into the new law because of their human rights implications.<sup>8</sup> The European Convention on Human Rights requires that legal bases be established for holding asylum-seekers at airports, and that the first-instance decisions communicated to such persons there be subject to judicial supervision. The new law meets the first of these requirements.<sup>9</sup> In addition, it is now possible to challenge separately an ODR decision denying an asylum-seeker temporary admission to Switzerland and confining him or her to the airport:<sup>10</sup> the asylum-seeker may appeal such a preliminary ruling to CRA.

24. Article 13 of the European Convention on Human Rights provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. The law on asylum takes this requirement into account, particularly as regards articles 3 and 8 of the European Convention. Thus it guarantees that persons subject to an expulsion order may at any time request a review by an independent authority, if such expulsion raises the question of inhuman treatment within the meaning of article 3 of the

European Convention. When the possibility of a stay of execution of an expulsion order has been set aside, the person subject to the order may in all cases submit a request to CRA for restoration of the suspensory effect.

25. The fact that ever-increasing numbers of people applying for asylum in Switzerland are not refugees within the meaning of the Convention relating to the Status of Refugees or of the Asylum Act has prompted the introduction of new regulations governing the granting of temporary protection. Such persons, who may be in need of protection or at grave risk of violence, are forced to flee their countries of origin to escape the consequences of war or civil war, situations of widespread violence or serious human rights violations. "Persons in need of protection" are thus not, as individuals, subject to persecution and so do not qualify for refugee status; yet, given the situation of war prevailing in their State of origin, they must be afforded protection.

26. These regulations apply to persons with a compelling need for the reasons outlined above for temporary admission to a State other than their own. It is up to the Federal Council to determine whether there are grounds for granting temporary protection, and if so, to how many persons. The Council first consults other authorities and relevant national and international organizations.<sup>11</sup> Once a decision has been taken, the persons concerned must be admitted to Switzerland without complications or excessive formalities. Unlike the old regulations on temporary admission of groups, the procedure is designed to spare the authorities from having to undertake lengthy and laborious individual procedures and therefore helps to keep down costs.

27. The legal status of persons in need of protection lies somewhere between that of asylum-seekers and that of recognized refugees. Although on admission persons in need of protection receive broadly similar treatment to asylum-seekers, they are in the longer term granted certain rights that bring them closer in status to refugees. In principle, they are entitled to family reunification<sup>12</sup> from the beginning of their stay in Switzerland. If they are likely to have to stay in the country for some time, the Federal Council may grant them more favourable conditions with regard to gainful employment.<sup>13</sup> Five years after the granting of temporary protection, persons in need of protection receive a temporary residence permit (B permit) from the immigration authorities, which is valid until temporary protection is withdrawn and confers all associated rights;<sup>14</sup> if the conflict continues, they may obtain a permanent residence permit (C permit) 10 years after the granting of temporary protection.<sup>15</sup> During the first five years of temporary protection, the Confederation has sole responsibility for the financing of welfare benefits; after that, welfare costs are shared equally between the Confederation and the cantons.<sup>16</sup>

28. No one may claim temporary protection. The right to apply for asylum, however, remains. Persons in need of protection may also avail themselves of the right to consideration of their grounds for asylum, in accordance with the Convention relating to the Status of Refugees.<sup>17</sup> In principle, the granting of temporary protection entails suspension, for the duration of such protection, of consideration of applications for refugee status already submitted.<sup>18</sup> Persons in need of protection who have submitted a claim for refugee status may not request resumption of examination of their claim until at least five years have elapsed from the time of the decision to suspend.<sup>19</sup> However, ODR withdraws temporary protection upon resumption of the asylum-determination procedure. If the Federal Council unanimously lifts temporary protection, asylum proceedings resume. Refugee-status determination procedures also resume if evidence

of persecution emerges in the course of the hearing granted to applicants as part of their right to be heard.<sup>20</sup> The first thing to establish is whether the applicant would, if returned, be at serious risk of harm through prompt persecution.

29. Since temporary protection is by definition of limited duration, beneficiaries are expected to return to their country of origin as soon as the situation allows. In admitting persons in need of protection, Switzerland does not envisage a long-term stay but rather a return to the country of origin or departure. Return, therefore, is to be encouraged and facilitated, to which end the Confederation may fund projects to be carried out in Switzerland or abroad (counselling services in preparation for return; training projects; etc.).<sup>21</sup> The setting of a date for the withdrawal of temporary protection is a matter for the Federal Council, which takes its decision after having consulted other authorities and relevant national or international organizations.<sup>22</sup>

30. Another crucial point is the communication of applicants' personal details to States of origin or departure. The law states quite clearly that such communication is not permitted if it places those concerned, or their families, in danger.<sup>23</sup> The principle applies during asylum proceedings, for example, and not to federal and cantonal asylum authorities alone, but to all the authorities and services that handle asylum-seekers' personal details. However, if the asylum procedures have been completed and an enforceable decision on return has been handed down, the person concerned is clearly not at risk in their State of origin or departure. Consequently, after that date, it will be permissible to contact the foreigner's State of origin or departure if necessary, for example, in order to obtain travel documents.<sup>24</sup>

31. In recent years, forced returns have become increasingly difficult and complex. There are various reasons for this, which complicate the task of the cantons responsible for expulsion: States of origin may refuse to readmit their nationals, foreign authorities may be slow to prepare the necessary documents, the persons to be returned may refuse to reveal their identity or nationality, etc. The new law therefore requires the Confederation must provide additional assistance to those cantons responsible for effecting forced returns.<sup>25</sup> This requirement applies in relation not only to asylum, but to foreigners in general. On 1 July 1999, therefore, DFJP established a new division, the Repatriation Division, whose chief task is to obtain, in coordination with the cantons and the Federal Department of Foreign Affairs (DFAE), the travel documents required for repatriation. This task cannot, of course, be undertaken until the asylum proceedings have been completed and there is no threat to the person's life or physical integrity in the State of origin.

32. The following are some of the decisions CRA has handed down during the period under consideration. In the first place, it noted that certain areas of northern Iraq had all the characteristics of quasi-States and that expulsion of asylum-seekers to that region was not, generally speaking, unreasonable. In several decisions concerning the situation in northern Iraq - one part of which is controlled by the Kurdistan Democratic Party (KDP) and the other by the Patriotic Union of Kurdistan (PUK) - CRA, unlike ODR, found that neither of the two quasi-States was in a position to provide protection to persons persecuted elsewhere in Iraq and that neither constituted an internal flight alternative for the victims of persecution by the central Government or the authorities of the other quasi-State. In the opinion of CRA, however, there is nothing to suggest that, in general, forced return to these de facto autonomous areas of persons not subject to persecution is unreasonable: as ODR has also noted, forced return does not imply



a specific risk to the individuals concerned. The question whether such return is reasonable must, however, be considered on a case-by-case basis. In addition, where voluntary return to northern Iraq remains possible, temporary admission to Switzerland is precluded. CRA has also made certain adjustments to its case law in respect of Iraqi nationals who apply for asylum in Switzerland after leaving one or other of the autonomous zones illegally: it takes the view that, if they return to those areas, such persons are not at risk of persecution as a result of their illegal exit. CRA recently issued a further update of its case law (JICRA 2002, No. 16, p. 129 ff) to the effect that, since the Islamic movement in Kurdistan had lost control of Halabja to PUK, which brooks no abuse, persecution by the said Islamic movement could not be considered quasi-State or indirect persecution.

33. In other changes to its case law, CRA ruled in 1998 that, if juvenile asylum-seekers are in Switzerland without their parents or other person responsible for their upbringing and no tutor or guardian has yet been appointed (see above, paragraph 19), ODR must provide them, before their initial hearing on their grounds for asylum, with legal aid for the duration of the asylum proceedings. It also ruled that, even though the authorities have no obligation under the Convention on the Rights of the Child to establish the whereabouts of such minors' families, due weight must be given to the interests of the child in considering the reasonableness of expulsion following rejection of an asylum application [decision of 31 July 1998, S.K., Sri Lanka (JICRA 1998, No. 13, p. 84 ff)].

34. The Committee's finding in respect of an individual complaint concerning Switzerland that the forced return of the complainant constituted a violation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, does not in itself constitute grounds for a review. The Federal Act on Administrative Procedure establishes a full range of possible grounds for review and cannot be said to be deficient in that regard. However, where new facts or evidence are adduced during proceedings before the Committee, these may provide the basis for reappraisal when considering a request for review or reconsideration of the case or a fresh application for asylum. A finding by the Committee that forced return to the country of origin is unlawful should then be taken into consideration [decision of 31 July 1998, X., Turkey (JICRA 1998, No. 14, p. 101 ff)].

35. The praxis according to which asylum-seekers may not be sent to a third country unless they are guaranteed more than temporary residence there has been confirmed in substance and clarified in respect of precautionary refusal of entry for the duration of the proceedings. No guarantee of a "long-term stay" in the third State is required for precautionary refusal of entry if the person concerned has already been through asylum proceedings in that third State which meet the general standards set by domestic and international law. If, however, in a given case, that general rule is outweighed by concrete evidence that the third State is likely to violate the principle of non-refoulement, precautionary refusal of entry is unlawful [decision of 2 September 1998, A.Y., Turkey (JICRA, 1998, No. 24, p. 203 ff)].

36. According to case law on the question of review (see JICRA 1995, No. 9) - which by analogy may be applied to the question of reconsideration - a ruling that has already taken effect can be challenged on the grounds of evidence that should properly have been submitted in the initial proceedings, provided such belated evidence clearly demonstrates the existence of a

danger of persecution or of treatment that would violate human rights and, under international law, constitute an impediment to the appellant's return [decision of 12 November 1997, I.T., Turkey (JICRA 1998, No. 3, p. 19 ff)].

37. A Federal Tribunal ruling of 1997 on the holding of asylum-seekers at an airport has been instrumental in improving legal protection and extending the competence of CRA. The decision (ATF 123 II 193 ff, of 27 May 1997) was based on the European Court of Human Rights decision of 25 June 1996 in the case of *Amuur v. France*. The Court found that the holding of asylum-seekers in the transit zone of an airport pending leave to enter the country constitutes a deprivation of liberty within the meaning of article 5, paragraph 1, of the European Convention on Human Rights, and should thus be subject to court supervision in accordance with article 5, paragraph 4, of that Convention. In order to make good this deficiency in the law, the Federal Tribunal applied "creative jurisprudence", i.e. a temporary solution until the issue could be addressed in law. It established rules of procedure governing the holding of asylum-seekers at airports and designated CRA as the judicial body competent to supervise this type of "application for release" (see above, paragraph 23). On the basis of the Federal Tribunal ruling, CRA established clear guidelines on this issue in a leading decision, viz., the detention of an asylum-seeker in the transit zone of a Swiss airport is an impairment of liberty which, depending on the duration and circumstances, may constitute a deprivation of liberty. The designation of the transit zone as the place of residence may be contested in CRA, before a single judge sitting as detention judge. This judge may not take part in the substantive appeal proceedings [decision of 15 October 1997, A.K.O., Democratic Republic of the Congo (JICRA 1997, No. 19, p. 158 ff)].

38. The fact that the prohibition on torture and inhuman (or degrading) treatment or punishment applies regardless of the granting of refugee status does not imply that forced return or extradition is prohibited simply because violations of article 3 of the European Convention on Human Rights have been found to have occurred in the country concerned: the mere possibility of being subjected to ill-treatment is not sufficient. On the contrary, anyone invoking this provision must satisfactorily demonstrate that there is, beyond all reasonable doubt, *a genuine, specific and serious risk* that they would be subjected to torture or inhuman or degrading treatment if returned to their country. Consequently, situations of war, civil war, serious internal disturbance or severe tension during which human rights are violated are not sufficient to warrant the granting of protection under article 3 of the European Convention on Human Rights unless the individual concerned can show that there is a high probability that he or she will be targeted personally - and not merely affected by mischance - by actions incompatible with that article [(cf. JICRA 1996, No. 18, paragraph 14b (22), p. 186) decision of 22 July 1997, J.S.-T. and M.S., Croatia (JICRA 1997, No. 26, p. 202 ff)].

39. In 1996, CRA found that an asylum applicant could be argued to have an internal flight alternative if effective protection against State persecution, whether direct or indirect, was obtainable in the place of refuge. The criterion is that a high degree of effective protection must be available. If it is clear that effective protection from persecution is available in the place of refuge, the internal flight alternative may be held to exist; in such cases, refugee status may not be granted, notwithstanding the existence of inferior living conditions (in terms of cultural or religious integration or of employment). The question of the reasonableness of remaining in the

place of refuge should be considered only in the light of impediments to forced return referred to in article 14 (a), paragraph 4, of the Federal Act on the Temporary and Permanent Residence of Foreigners (LSEE) (decision of 28 November 1995, Ö.C., Turkey, JICRA 1996, No. 1).

40. CRA also found in 1996 that article 3 of the European Convention on Human Rights is a fundamental rule of public international law that binds any State party to the Convention in its making of decisions on forced return. The risk of prohibited treatment should be assessed objectively, regardless of any responsibility on the part of the State to which the foreigner concerned would be returned, and without distinction as regards the source of that risk (decision of 14 May 1996, X. and family, Somalia, JICRA 1996, No. 18, p. 182).

41. A number of more recent decisions of CRA are also of relevance. As regards refugee status, for example, CRA has found that, in principle, the internal protection alternative in the country of origin does not exist where there is armed conflict between the two constituent parts of the same country. This was the case during the civil war in Bosnia and Herzegovina. According to a CRA decision of 28 May 2001 (JICRA No. 13), it is also the case as regards persons from Kosovo. In the specific case of Bosnia and Herzegovina, however, victims of persecution who left the country after the adoption of United Nations Security Council resolution 1088 (1996) of 12 December 1996 may not, in principle, claim refugee status. In addition, victims of persecution who left Bosnia and Herzegovina between 14 December 1995, the date of the Dayton Peace Agreement, and 12 December 1996, may not invoke the Convention relating to the Status of Refugees if the internal protection alternative was available to them in a quasi-State entity under the control of authorities drawn principally from their own ethnic group (JICRA 2000, No. 2 and clarification of case law JICRA 2000, No. 21).

42. As regards the situation in asylum-seekers' countries of origin, it was held in two decisions (JICRA 1998, Nos. 25 and 26) that Algeria is not in a situation of civil war or widespread violence such that the return of its nationals is precluded on those general grounds. Similarly, forced return was held to be reasonable *prima facie* in the cases of Liberia (JICRA 1999, Nos. 13 and 14), Nigeria (JICRA 1997, No. 27) and Sierra Leone (JICRA 1999, No. 28). On the other hand, CRA found in a decision of 8 December 2000 that the forced return of certain minorities to Kosovo was unreasonable (JICRA 2001, Nos. 1 and 2). The same applies, under certain conditions, to single Tamil women from Sri Lanka (JICRA 2001, No. 16). The criteria for considering expulsion to Bosnia and Herzegovina, are set out in a number of rulings and show that the conclusion can vary from case to case, depending on the prevailing political, economic, social and medical situation in the country (JICRA 1999, Nos. 6 and 8). CRA has also partially revised its case law regarding the situation in the various provinces of south-eastern Turkey (JICRA 1999, No. 9; and 2000, No. 13), and confirmed its case law in respect of the so-called quasi-State entities in northern Iraq (JICRA 2000, No. 15; clarifications JICRA 2000, Nos. 17 and 18).

43. CRA has taken decisions on a number of other subjects. It found, for example, that, except under special circumstances, refugee status should be revoked when someone takes steps leading to the obtention of a passport from the authorities of their country of origin, since in so doing they avail themselves of the protection of that country (JICRA 1998, No. 29). More specifically, it decided that article 1, section C, paragraph 5, of the Convention relating to the Status of Refugees should apply to nationals of Bulgaria (JICRA 2000, No. 20).

44. With regard to families, CRA recalled that account must be taken of the overall situation of a family living in Switzerland, both in determining refugee status and in considering the grounds for non-expulsion (JICRA 1999, No. 1; see also clarifications of case law where family members were separated by flight (JICRA 2000, No. 11) or, in the case of children, where parents were granted refugee status by secondary entitlement (JICRA 2000, No. 22) or primary entitlement (JICRA 2000, No. 23) or where the applicant is abroad (JICRA 2001, No. 24). However, the conditions for family reunification may vary widely depending on whether the spouse in Switzerland has been granted asylum or temporary admission (JICRA 1999, No. 10). In the case of rejected unaccompanied minors, the authorities must also consider whether a family member or a specialized institution will be able to take them in upon their return (JICRA 1999, No. 2).

45. Under the new asylum legislation, the Confederation must order forced return where an asylum application is denied, provided that implementation of that decision is lawful, reasonable and practicable. It is up to the canton of residence of the person concerned to execute the decision. While making every effort not to encroach upon cantonal sovereignty, the Confederation nevertheless assists cantons with forced returns by providing services in areas such as organization, training and coordination. However, it is at times necessary to call on the police to compel return by physical constraint. The decision to call in the police is a matter solely for the cantonal authorities; the Confederation has no power to institute police constraint measures either by law or by directive. When applying constraint measures, the cantonal authorities are subject, as with all sovereign decisions, to the principles of the rule of law, i.e. legality and proportionality. Where these principles are violated, proceedings in ordinary law may be instituted.

46. In late 1997, DFJP and the Conference of Heads of Cantonal Departments of Justice and Police (CCDJP) set up a joint working group to look into the serious problems regarding the division of labour and decision-making in general and to produce some concrete suggestions for improvement. The group comprised specialists from the Confederation and the cantons, as well as three Councillors of State - all of them heads of justice and police departments - from the cantons of Zurich, Solothurn and Geneva. The working group's final report was unanimously adopted by CCDJP on 29 June 1998.

47. The key component of this set of 70 measures is support by the Confederation to the cantons in the enforcement of decisions. The support covers personnel, organization, logistics, technology and information. A noteworthy example of the measures has been the creation by DFJP of the new Repatriation Division (see above, paragraph 31), a new administrative unit established, for structural and organizational reasons, within ODR.

48. The Repatriation Division has the task of obtaining travel documents for the major countries of origin on the ODR list of more than 85 States. It is also responsible for departure assistance in connection with asylum and foreigners generally and for establishing foreigners' identity and nationality where it has not been possible to do that during the first or the second phase of the proceedings. It works with the relevant services of DFAE to assess and devise new routes for returns. It is also responsible for coordinating the cantons, or working with them, in regular returns or forced repatriations, for example by organizing special joint flights to particular States of origin.

49. As part of a project set up by the joint working group on forced returns with the aim of coordinating and training police escorts involved in forced returns by air under constraint, the Division will take on additional coordination functions in the future (see below, paragraph 52).
50. In return, the cantons are expected to move towards greater standardization in their practice as regards the enforcement of decisions and ensure consistency in their implementation of Federal Council policy. The Confederation and the cantons have all agreed to increase staff numbers in the cantonal bodies responsible for executing these decisions, and to enhance staff members' language and technical skills, with help from the Confederation. The cantons are also to review their structural arrangements for enforcing decisions and regularly adapt them to the prevailing circumstances.
51. As well as establishing the Repatriation Division, the Confederation has recently put in place a number of other organizational measures. For example, a new federal organ called SwissREPAT came into operation at Zurich airport in August 2001. SwissREPAT is responsible for advising the cantonal enforcement authorities on all aspects of air departures from Switzerland, researching the best routes and providing a centralized booking service; it will also be called upon to coordinate recruitment and training of repatriation escorts. Although the Confederation's task is confined to helping the cantons identify people who are to be returned or expelled, obtaining travel documents, arranging special flights, booking tickets and providing other services in relation to air departures (LSEE, art. 22a), the federal authorities also wish to ensure that the procedure for repatriation under constraint is dignified and in compliance with the law.
52. To that end, "*Passagers 2*", a project group set up under the aegis of CCDJP and comprising representatives of the competent bodies at the cantonal and federal levels, was asked to consider further practical improvements that could be made to the cantonal police approach to forced returns under constraint. In a report dated 25 February 2002, the project team suggested a series of measures, all of which were accepted by the competent cantonal authorities. They included the adoption by all cantons of an instruction on repatriation by air under constraint and the creation - probably in early 2003 - of an intercantonal pool of escort officials who have been through a special training course with the Swiss Police Institute in Neuchâtel. The instruction specifically prohibits the use of any method of constraint that might restrict the breathing of the person to be repatriated or in any other way endanger their health.
53. In practice few people are actually returned under constraint. In 2000, only 115 out of the 13,545 persons expelled via Kloten airport in Zurich - i.e. 0.8 per cent - had to be provided with police escorts.
54. As regards Committee members' concerns (see below, paragraphs 137 ff) about the possibility that persons to be repatriated may be subjected to medical examinations without their consent, it should be noted that, in case of doubt, a medical examination must be carried out prior to return in order to avoid any risk to the health of those involved. Medication may be prescribed only by a health professional and for medical reasons. If the doctor considers it necessary, a person under medical treatment must be accompanied by a health professional during the flight.

55. Of the nine complaints lodged with the old European Commission of Human Rights or the European Court of Human Rights (see above, paragraph 14), six concerned forced returns, while a seventh challenged a decision to extradite. One of these seven complaints was removed from the list following an amicable settlement suggested for humanitarian - and not legal - reasons, the complainant having claimed that, in view of the advanced stage of her illness and the fact that she would be unable to obtain adequate treatment in her country of origin, repatriation would contravene articles 2 and 3 of the Convention. Six of the complaints were declared inadmissible.

56. From 1 July 1996 to 6 November 2002 the Committee against Torture received 30 complaints concerning Switzerland. In 17 of those cases (including 3 relating to communications submitted before 1 July 1996), the Committee found that the decision to expel the author did not contravene article 3 of the Convention. Eight communications, including three submitted before 1 July 1996, were struck off the list. Six cases are now pending before the Committee. The Committee also dealt with two other communications submitted before 1 July 1996: one was declared inadmissible, the other was admitted.

57. It is apparent from this description of the provisions governing asylum procedure in Switzerland that any decision to return an asylum-seeker gives due consideration to the applicant's rights to an equitable decision, through, on the one hand, the procedural safeguards available at every stage of the procedure and, on the other, the consideration given to all the circumstances militating in favour of observance of the principle of non-refoulement. Taken as a whole, the asylum procedure thus ensures as comprehensive and detailed an examination as possible of applications for asylum. Moreover, the bodies set up by the European Convention on Human Rights have never found any violation by Switzerland of article 3 of the European Convention, which is the counterpart to article 3 of the United Nations Convention against Torture.

58. The Swiss Government wishes to emphasize once again the importance it attaches to the Committee's findings. They should provide the various national bodies with guidance in interpreting and implementing the Convention. Consequently, in taking its decisions, the Committee should conduct a properly reasoned evaluation of the various arguments at hand and explain in detail why the elements taken into consideration by the national authorities may or may not appear relevant. The Government finds it regrettable that the Committee publishes complainants' names in its judgements, since that may itself in certain cases constitute an objective post-flight reason for persecution.

59. The Swiss Government is also concerned about the practice of requesting stays of decision, since this allows appellants to remain in Switzerland during the time required by the Committee to consider the admissibility and merits of the communication. During the period covered by the present report, the Committee received 19 individual communications concerning Switzerland, all of which were transmitted to the Government for comment. In 15 cases, or 78.9 per cent, the Committee requested Switzerland to suspend refoulement, whereas the percentage in the preceding period was 53.8 per cent (7 cases out of 13). Despite the fact that the possibility of requesting a stay of decision is provided for, not by the Convention, but by the Committee's rules of procedure, in each case the Committee's recommendations have been fully complied with by the Swiss authorities.

#### **Article 4**

60. The information provided in paragraphs 46 to 50 of Switzerland's initial report and the additions and amendments reported in paragraphs 18 to 28 of its second periodic report and paragraphs 55 to 57 of its third periodic report can be supplemented as follows.

61. The Convention on the Rights of the Child of 20 November 1989 entered into force for Switzerland on 26 March 1997. The Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 entered into force on 26 April 1997. The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 entered into force for Switzerland on 7 September 2000.

#### **Articles 5 and 6**

62. The following information supplements that provided by Switzerland in paragraph 52 of its initial report.

63. In 2001, Switzerland ratified the Rome Statute of the International Criminal Court, which entered into force on 1 July 2002. The Court has jurisdiction to try the perpetrators of particularly serious crimes affecting the international community as a whole.

64. On the basis of articles 2.9 and 108 to 114 of the Military Criminal Code (CPM), the military courts have been called on to prosecute and try presumed war criminals (violation of the Geneva Conventions). During the period under review, military courts heard 19 cases of this type. Of the 12 cases concerning the former Yugoslavia, charges were dropped in nine, two were pending at the end of the period under review and one was the subject of an acquittal in 1997. Of the six cases concerning Rwanda, charges were dropped in two, three were pending at the end of period under review and one case was transferred to the International Criminal Tribunal for Rwanda (Arusha) in May 1997.

#### **Article 7**

65. The information given below supplements, firstly as regards developments at the federal level, the information provided by Switzerland in paragraphs 52 to 59 of its initial report, paragraph 32 of its second periodic report and paragraphs 63 to 69 of its third periodic report.

66. As regards the prohibition of torture in military criminal law, a revision of disciplinary law is currently in progress. It is planned to reduce the length of disciplinary arrests from the current maximum of 20 days (CPM, art. 186), to 10 days (new article 190) to bring it into line with the case law of the European Commission of Human Rights. Likewise, the duration of custodial arrest has been revised downwards (cf. article 54 of the Code of Military Criminal Procedure (PPM) and article 5, paragraph 3, of the European Convention on Human Rights).

67. The current revision of military criminal procedure (PPM) with reference to the protection of witnesses should also be mentioned. The aim is to prevent disclosure of witnesses' identity so that their statements and depositions cannot cause them or his friends and family any serious harm - a problem frequently found in trials by military courts of persons suspected of war crimes (see paragraph 117).

68. In response to the Committee's concern to see harmonization of cantonal criminal procedure, the Federal Department of Justice and Police has prepared a draft federal code of criminal procedure which is intended to replace all the relevant cantonal laws. The Federal Council initiated a consultation procedure in this regard on 27 June 2001; it involves, inter alia, the cantons, political parties and concerned organizations. The proposed code is detailed and modern; it provides for an efficient procedural system, a clear distribution of roles among the parties and improved protection of the rights of individuals remanded in custody, particularly during custodial arrest (by the police).

69. It does not provide for incommunicado detention. It should be noted that to date only the codes of criminal procedure of the cantons of Geneva, Vaud and Valais contain provisions relating to "solitary confinement", (*mise au secret*) and that the sole purpose of such confinement is to reduce the risk of collusion in serious cases.

70. In addition, the draft code reinforces the rights of the accused by providing for early access to counsel.

71. During the period under review, a number of Swiss cantons revised their codes of criminal procedure, notably by incorporating the most recent case law of the European Court of Human Rights.

72. In Basel-Land a fully revised code of criminal procedure entered into force on 1 January 2000. It prohibits all methods of coercion, including threats, promises etc., intended to influence a statement and more particularly a confession. It provides for the possibility of a lawyer's assistance at all times, including in the event of arrest, and for family or friends to be informed of the arrest if the arrestee agrees and the purpose of the investigation does not prohibit it.

73. In Basel-Stadt, the totally revised code of criminal procedure of 8 January 1997 contains a number of innovations. These include an extension of the rights of the defence in preliminary proceedings before the public prosecutor by giving the defendant the right to counsel following the first recorded hearing of the case, the unrestricted right to consult the case file at all stages of proceedings and the extension of defendants' right of appeal.

74. On 14 November 1996, the canton of Fribourg adopted a new code of criminal procedure; this entered into force on 1 December 1998. This code strengthens the rights of the defence and in particular expressly guarantees the defendant's right to remain silent. This right is mentioned in a summary of their main rights that is given to defendants on their first appearance. Furthermore, in the event of police custody or detention, the police or the examining magistrate must, if the defendant so requests, inform a relative or employer and, in the case of a foreigner, the consulate; such notification may be postponed if there is a risk of collusion.

75. As regards medical assistance, persons held in pre-trial detention may, if their state of health so requires, be transferred to a hospital or some other appropriate establishment. Detainees in pre-trial detention have the right to medical assistance.



76. In the canton of Geneva, the new article 107 A of the code of criminal procedure which entered into force on 27 June 1998 establishes a number of rights for persons undergoing police questioning (see below, chapter II).

77. In the canton of Glarus, the new draft code of criminal procedure provides that a person placed in pre-trial detention by an examining magistrate must be able to receive assistance from counsel of his choice within 24 hours at the latest.

78. In the canton of Graubünden, the latest revision of the code of criminal procedure has instituted the office of custodial magistrate (*Haftrichter*). Every case of pre-trial detention must be submitted to this official within 48 hours and, as a general rule, he must hand down a decision on the detention within 48 hours. He also has jurisdiction to monitor detention.

79. In its revised code of criminal procedure of 1 July 1999 which entered into force on 1 July 2000 the canton of St. Gallen, has brought out-of-date provisions of its former code into line with the case law of the Federal Tribunal and the Strasbourg bodies. The new code provides that defendants must be informed before their first hearing that they are not obliged to give a statement (this is relevant to paragraphs 13 and 20 of the Committee's concluding observations) and that they may request the assistance of a lawyer (relevant to paragraphs 12 and 17 of the concluding observations). When someone is arrested, the examining magistrate must give them the opportunity of being assisted by a lawyer. At the defendant's request, the examining magistrate must inform a relative or any other person indicated by the defendant as soon as possible, provided that the purpose of the arrest is not thereby compromised.

80. In the canton of Ticino, article 49, paragraph 1, of the code of criminal procedure provides that the defendant may at all stages of the proceedings be assisted by a lawyer, and that he must be informed of this when the charge is read; moreover, according to article 49, paragraph 2, the defendant must in all cases be assisted by a lawyer during preventive detention or, detention for the preparation of an expert psychiatric report and once the charge has been brought.

81. In the canton of Thurgau, a revised law on criminal procedure came into force on 1 January 2000. It includes new features as regards evidence, in particular, including more specific rules on procedure and rights during the hearing of defendants.

82. On 27 June 2000, the canton of Valais adopted a partial revision of its code of criminal procedure. Innovations in it concern, inter alia the reinforcement of the rights of the defence, arrest, pre-trial detention ill-treatment during arrest and police hearings, and protective measures that may be taken by a court to ensure the anonymity of an undercover agent.

### **Article 10**

83. Information concerning this article can be found in paragraphs 69 and 70 of Switzerland's initial report, in paragraph 36 of the additional report, and paragraphs 72 to 74 of the third periodic report. As regards paragraph 72, the Swiss Prison Staff Training Centre has, since the year 2000, been providing refresher courses for prison personnel in order to improve conditions of detention for prisoners suffering from mental problems.

84. In the canton of Bern, the question of the treatment of foreigners deprived of their liberty is becoming increasingly important as their numbers rise. Training courses and various in-prison events have therefore been held to improve relations with contacts with inmates, particularly foreigners (for example, the “*Balkanwoche*” (Balkan week) in Hindelbank Prison, during which inmates had the opportunity of explaining various aspects of their culture to staff and fellow inmates). Early in the summer of 2000, after the strike in Thorberg prison, mainly by Albanian prisoners, contact was made with specialists in various scientific disciplines and representatives of interest groups in Switzerland.

85. The personnel of prisons in the canton of Fribourg attend classes at the Swiss Prison Staff Training Centre in the city of Fribourg. More than 80 per cent of the personnel of Bellechasse Prison hold a diploma awarded by this institution. Before undergoing this specialized training, staff must already have taken internal training in the prison where they work.

86. In Ticino, the prison warders and medical staff of the cantonal prison have been informed about the Convention.

87. In the canton of Zurich, a high-level post with responsibility for initial and advanced level training of prison personnel has been set up within the Prisons Department. The canton has offered supplementary training since 1 January 2001. As regards the police detention facilities, the training of operational staff has been reorganized with effect from 1 July 2000 and includes instruction in the European Convention on Human Rights and contacts with representatives of the Association for the Prevention of Torture.

### **Article 11**

88. A new system for the transport of prisoners, applicable throughout Switzerland and called “Train Street” was introduced on 1 January 2001. Prisoners are now carried in spacious individual cells (unlike before) and to discreet disembarkation points; they are accompanied and supervised by persons who have been specifically trained in prisoner transport and in behaviour towards detainees. Following the complaints made about this system of transport during the early months, the shortcomings have been eliminated and the conditions of transport have been further improved, for example, by the provision of mineral water for all prisoners.

89. In the canton of Appenzell Ausserrhoden, the upgrading of Gmünden prison in Niederteufen has resulted in various improvements for the inmates.

90. In the canton of Aargau, a new master plan for the cantonal prisons provides for the construction of a new central prison to replace seven outdated district prisons: the new prison will include a special section for prisoners with mental problems and a maximum security section. Its opening, probably in 2005, will bring about numerous improvements in keeping with the Convention.

91. Since the end of October 2000, Basel-Stadt has been using the new Bässlergut prison to hold persons under detention pending expulsion.

92. The canton of Bern has depending on the project, started or completed alteration, renovation or construction of prison facilities (for example, the opening at Witzwil prison of a section for pre-expulsion detention).
93. In the canton of Graubünden, Realta prison is being renovated.
94. In the canton of Luzern, the new pre-trial and short-term prison Grosshof in Kriens meets all modern standards.
95. The canton of St. Gallen has carried out a variety of prison rehabilitation, renovation and alteration work and closed small district prisons that were no longer capable of housing prisoners safely and decently.
96. In the canton of Schwyz, an act of 17 March 1999 governs the construction, financing and operation of a security facility at Biberbrugg; 30 cells with the necessary infrastructure will be available in 2004.
97. On 16 December 1997, the Grand Council of Ticino approved by legislative decree a 15-million franc credit for the first phase of reorganization of the canton's prisons. The reorganization will, inter alia, ensure better treatment for persons in pre-trial detention as called for by CPT. Work began in March 2000.
98. In the canton of Thurgau, new district prisons were brought into service in 1996 in Frauenfeld and in 1998 in Bischofszell; other district prisons were renovated or partially closed down. Inmates of the cantonal and district prisons are given a fact sheet translated into 11 languages informing them of their rights and duties.
99. In December 1998, the canton of Valais opened a completely new detention centre, the Iles prison. This pre-trial detention facility provides detainees with excellent conditions, since it has large cells of 12 m<sup>2</sup> and also a number of workshops where prisoners can work if their detention is prolonged. The canton of Valais has also made notable efforts as regards the care and welfare of prisoners, either by fitting out medical centres in the canton's main prisons in line with the recommendations of prison doctors or by increasing the numbers of prison staff.
100. The canton of Zurich has taken a first step towards the specialization of district prisons, which were formerly used indiscriminately for, pre-trial detention and short-term sentences and towards establishing a facility for women prisoners only and creating a section for prisoners with mental problems.

## Article 12

101. The information contained in paragraphs 72 and 23 of the initial report is still valid. The information contained in paragraphs 102 to paragraph 113 below relates in principle to the period under review in this report, i.e. up to mid-2000.
102. However, in view of the time of submission of this report, more recent information is available. For example, such information can be found in the statement made by the director of the Federal Office of Justice on 19 October 2001 in orally introducing before the United Nations

Human Rights Committee Switzerland's second periodic report under the International Covenant on Civil and Political Rights, and the reply to the Committee's question No. 9 is given in the annex to the present report (see annex 1).

103. With reference to the cases of the death during repatriation operations of Mr. Khaled Abuzarifa and Mr. Samson Chukwu, an extract from the CPT report of 9 August 2001 is attached (annex 2, see paragraphs 55 to 57), along with an extract from the reply from the Federal Council of 27 February 2002 (annex 3).

104. Proceedings for the ill-treatment of a person held in pre-trial detention were brought in the canton of Appenzell Ausserrhoden, but as the charges could not be proved the case was officially closed.

105. The canton of Aargau has had no cases of torture within the meaning of article 1.1 of the Convention. The 15 complaints submitted against the police authorities for excessive behaviour were examined and heard by the competent authorities. In three cases the police command carried out an administrative inquiry.

106. In Basel-Land, there has been one instance of proceedings for degrading treatment during pre-trial detention. The charge was dismissed.

107. The canton of Fribourg reports that no administrative complaints concerning torture and other cruel, inhuman or degrading treatment or punishment by the cantonal police were pending at the conclusion of the period under review. During the period, an administrative complaint that X submitted against police officers for assault in 1993 was dismissed in 1998. The same matter had previously come before a criminal court with the result that, on 8 April 1997, the police officer concerned was acquitted but X received a criminal sentence for libel.

108. A formal complaints procedure has been introduced for matters concerning imprisonment and pre-trial detention. The canton reports that no such complaints were pending at the end of or were handled during the period under review. Prison personnel, however, are subject to physical and verbal abuse from inmates; these attacks have been increasing because of changes in the prison population.

109. A formalized procedure exists for the filing of complaints about the use of coercive measures by officers of the cantonal police (see article 38 of the cantonal police act of 15 November 1990); or prison staff (see article 26, paragraph 1, of the act of 2 October 1996 on the Bellechasse prison and article 80 of the Regulations of 9 December 1998 for the detainees and inmates of the Bellechasse prison).

110. In Geneva, in the period 1997-1999, no complaints of ill-treatment led to the handing down of a criminal sentence and there were no administrative sanctions against police officers for ill-treatment. The increase in the number of complaints against police officers in 1998 can be explained by the large-scale anti-WTO demonstrations in Geneva in May 1998; 43 criminal complaints (or 61 per cent of all complaints registered in 1998) were filed following those demonstrations.

111. In the canton of Vaud, an inspector who had gone alone to interview a detainee in Bois-Mermet Prison was accused of assaulting him and in particular of having caused him a burst eardrum. The inspector appeared before the Criminal Court of Lausanne charged with bodily harm and with involuntary serious bodily harm but in June 1999 the court cleared him of those charges and of that of abuse of authority; the judgement was upheld on appeal.

112. Generally speaking, the institutions established by the canton of Vaud provide full guarantees for persons who have complaints about police action. When such complaints are addressed to the cantonal examining magistrate or the public prosecutor, an inquiry is systematically opened if it appears that a criminal offence may have been committed. Any complaint transmitted to the commissioner of the cantonal police concerning conduct that appears to constitute a prosecutable offence is systematically transmitted to the examining magistrate under the code of criminal procedure. There is no exception to this principle, which also applies to the prison authorities.

113. Since 1996 the canton of Zurich has registered 42 complaints relating to the use of police detention premises and transport of detainees; for the most part they concerned requests that were not compatible with prison rules (the right to telephone freely, the right to eat at any time of day or night, etc.). They also included complaints about staff which subsequently proved groundless.

### Article 13

114. The following information supplements that provided in the earlier reports.

115. The canton of Bern incorporated provisions on witness protection in its code of criminal procedure of 15 March 1995, which entered into force on 1 January 1997. Article 124 (“Witness protection”) of this code reads as follows:

*<sup>1</sup> If an undercover agent (art. 214) is heard as a witness, it shall be permissible for him or her to reveal his or her identity (art. 103, para. 1) only to the court and for the identity not to be recorded in the case file. The police officer responsible for the mission shall confirm in writing that the undercover agent in question was acting in the context of a duly authorized operation.*

*<sup>2</sup> Steps may be taken to hear the undercover agent without him or her being seen by the parties or the public.*

*<sup>3</sup> Similar protective measures may be taken in respect of other witnesses when they can show it to be likely that revealing the truth might jeopardize their person or their life or that of a person close to them.*

116. Similarly, on 27 June 2000, the canton of Valais adopted amendments to its code of criminal procedure as a result of which article 130a sets out the protective measures that courts may take to ensure the anonymity of undercover agents. The same measures may be taken to protect other witnesses when they can show it to be likely that their statements could seriously jeopardize their persons or lives or those of persons close to them.

117. The draft federal code of criminal procedure provides for protective measures during proceedings, in particular for witnesses and persons heard for purposes of information who, because of their participation in the proceedings, are under serious threat to their life and person or exposed to some other serious problem (see article 160 ff.). In addition, article 162 provides for a guarantee of anonymity, this being the most efficient protective measure; anonymity will, however, be permissible only if no other protective measure is possible and the importance of what is at stake and the role of the person to be protected warrant it.

#### **Article 14**

118. Please refer to the information provided by Switzerland in paragraphs 76 to 78 of its initial report and paragraphs 52 to 57 of the second periodic report.

#### **Articles 15 and 16**

119. Please refer to paragraphs 79 to 82 of the initial report, which are still valid. It should be noted regarding paragraph 81 that no State based on the rule of law can tolerate methods of obtaining evidence that are contrary to personal freedom.

### **II. ADDITIONAL INFORMATION CONCERNING THE RECOMMENDATIONS AND OBSERVATIONS MADE BY THE COMMITTEE ON 14 NOVEMBER 1997**

120. The above-mentioned concluding observations were transmitted to all the cantons, some of which responded, reporting on their legislation or practices concerning the following points:

**Re. point 12:** *The Committee regrets the non-existence in some cantons of legal guarantees, such as the possibility for a detainee to contact a family member or lawyer immediately after his or her arrest and to be examined by an independent doctor at the commencement of police custody or when he or she is brought before an examining magistrate.*

121. The draft federal code of criminal procedure (see paragraph 68 above) provides that, when a person is deprived of liberty by a measure of constraint, his or her relatives must be informed immediately unless the person in question expressly objects or the purpose of the investigation prohibits it (art. 225).

122. Although the draft code does not address the issue of medical examination, which does not concern criminal procedure proper but rather the right to personal freedom, suspects have the right, as hitherto, to be examined by an independent doctor on their arrest and each time thereafter that they so request. The detainee's choice of doctor will be taken into account as far as possible, the obvious exceptions being when the doctor selected is unavailable or there is a manifest risk of collusion.

123. In the canton of Appenzell Ausserrhoden, suspects have the right to contact their lawyer or their relatives immediately following their arrest. Detainees have the right to inform the prison doctor about their medical concerns at any time.

124. In Aargau, defendants may contact a lawyer or a family member after their first substantive examination. Their rights are safeguarded since they are not obliged to give a statement during the hearing.

125. In Bern, the law on criminal procedure provides that a person under custodial arrest may notify his or her family or have them notified as soon as possible and inform a defense lawyer of the arrest and the grounds for it.<sup>26</sup>

126. In the canton of Geneva, the right to contact a relative or a lawyer is ensured by article 107A, paragraph 3 (e), of the code of criminal procedure (“*When an individual is heard as the alleged perpetrator of an offence, he or she shall be notified immediately, by being given a copy of this article, in a language he or she understands, that ... (e) he or she may inform a relative, a family member or an employer of his or her arrest, unless there is a risk of collusion or the course of the investigation is jeopardized, and may also have his or her lawyer notified*”). The right to see a lawyer is ensured by article 107A, paragraph 3 (g) of the code (“*... he or she has the right to be visited by and to confer freely with a lawyer as soon as he or she has been questioned by the police officer, but at the latest in the first working hour after 24 hours have elapsed from the start of his or her hearing by the police ...*”) (CPP). The right to examination by a doctor is ensured by article 107A, paragraph 3 (b) of the code (“*... he or she may request a medical examination at any time during questioning and on leaving police premises and that a medical examination may also be conducted at the request of the police*”).

127. In the canton of Solothurn, all persons have the right to be informed immediately of the grounds for their arrest. They are expressly notified that they may at any time be assisted by a lawyer, who may, on request, be consulted immediately by telephone. In addition, an express offer is made to them to notify the person or persons of their choice.

**Re. points 13 and 20:** *The Committee is concerned about the non-existence of a suspect’s right to remain silent. The Committee recommends the adoption of legislative measures granting suspects this right.*

128. The draft federal code of criminal procedure embodies the right to remain silent. Before their first hearing by the police and subsequently by the examining magistrate, suspects must be informed that they may refuse to give a statement (art. 167, para. 1 (b)).

129. The European Court of Human Rights describes the “right to remain silent” as an essential feature of a “fair trial”, deducing it from article 6, paragraphs 1 and 2, of the European Convention on Human Rights (*John Murray v. the United Kingdom*, judgement of 8 February 1996, Reports 1996-I, p. 30 ff., § 45ff.; *Condron v. the United Kingdom*, application No. 357/18/97, dated 2 May 2000, §§ 55 f. and 72). The Swiss Government recalls that the European Convention on Human Rights is an integral part of Swiss law and that any person subject to the jurisdiction of the Swiss courts may invoke it directly before them.

130. The right to remain silent is also embodied in article 14.3 (g) of the United Nations International Covenant on Civil and Political Rights and is directly applicable under Swiss law.

131. The Federal Tribunal recognizes the right of the accused to remain silent as a general and inviolable principle of criminal procedure (ATF 106 Ia 7). All judicial authorities are required to comply with this case law.

132. In addition, the law of several Swiss cantons recognizes the right of the accused not to incriminate themselves and to remain silent (Aargau, code of criminal procedure (CPP), art. 5.2.2; Appenzell Innerrhoden, CPP, art. 27.2; Schaffhausen, CPP, art. 38.2; Uri, CPP, art. 4.2.2; Schwyz, CPP, art. 17a.2).

133. The codes of criminal procedure of the cantons of Bern (art. 105, para. 1.2), Fribourg (art. 156) and Zurich (art. 11, para. 1) provide in addition for the obligation to notify accused persons of their right to remain silent before the first interrogation by the judge. The codes of criminal procedure of the cantons of Bern (art. 208, para. 2) and Jura (art. 83, para. 3), this obligation also applies when a suspect is questioned by the police. The Bernese code permits the police to question any person holding important knowledge that may elucidate a punishable act (art. 208, para. 1), providing (art. 208, para. 2) that they comply in their questioning with article 56 (this prohibits in particular use of means of coercion, force, threats, promises, deceit or misleading questions to obtain statements and information) and respect the right to remain silent of persons requested to provide information (art. 125) and of persons who exercise their right to refuse to testify or to provide information. Persons suspected of having committed a punishable act must be made aware of their right not to reply. In addition, persons to be questioned may state that they will only make a deposition before the examining magistrate. Anyone to be questioned must be informed of these rights before they are questioned. The cantonal police has also included the above information in a form. The Committee's requirements are therefore taken fully into account.

134. In the canton of Geneva, the right to remain silent is ensured by CPP, article 107A, paragraph 3.

135. In Ticino, the new CPP expressly embodies the right of the suspect or the accused to remain silent. Article 118, paragraph 2 of the code states that suspects and accused persons must be informed of their right not to reply and their right to be assisted by counsel, to be noted in the account of proceedings.

136. In criminal proceedings in Vaud, the accused incurs no penalty if he remains silent or if he lies. Remaining silent is not, however, a right referred to as such in the code of criminal procedure.

**Point 14:** *The Committee is concerned about allegations made by non-governmental organizations that, during the expulsion of certain foreigners, doctors have engaged in medical treatment of those persons without their consent.*

137. In the canton of Geneva, the authorities responsible for the expulsion of foreigners have never resorted to medical treatment of a coercive nature.

138. In Graubünden, there was no medical involvement in the total of 316 expulsions carried out in 1998 and 1999.



139. The canton of Vaud has no reports of such practices in connection with the expulsions it has carried out.

140. In the canton of Zurich, coercive medical treatment has never been used on individuals held in the airport prison and no complaints on the subject have ever been made concerning this prison.

**Question 15:** *The Committee recommends that machinery should be set up in all cantons to receive complaints against members of the police regarding ill-treatment during arrest, questioning and police custody.*

141. The information contained in paragraphs 145 to 147 above refers in principle to the period covered by this report, namely, up to mid-2000. The statement made by the Director of the Federal Office of Justice on 19 October 2001 during the oral presentation of the second periodic report on the International Covenant on Civil and Political Rights to the United Nations Human Rights Committee provides some more recent details; the reply to question No. 10 is attached to this report (see annex 4).

142. In addition to the information concerning cases in the canton of Vaud given in paragraphs 111 and 112 above, it should be noted that persons held in administrative detention in Vaud may file complaints about their detention or about searches. They may address a complaint to the cantonal court through the district court. Detainees may file complaints concerning their conditions of detention or the restrictive measures applied to them with any cantonal or Concordat authority.

143. The Concordat of 4 July 2000 on the execution of administrative detention of foreigners established a mechanism to monitor detention conditions, namely a committee of inspectors of between three and nine members selected for their professional qualifications in the sphere of detention, their independence and their neutrality. This committee is charged with visiting places of detention, where it may interview in private the detainees it chooses, and reporting to the supervisory body of the Concordat.

144. A similar committee of inspectors has been established for prisons.

145. The canton of Geneva established a post of police ethics commissioner some years ago. This person is independent of the administration and responsible for advising the head of the Department of Justice and Police and Transport on the need or otherwise for an administrative inquiry, particularly in cases of allegations of ill-treatment. The commissioner not only receives all claims and complaints concerning ill-treatment but also all police reports referring to the use of coercion, even if the person taken in for questioning does not raise particular complaints. The post of commissioner has existed since 1993 and was legally recognized in article 38 of the Police Act, which came into force on 22 July 1996.

146. In the canton of Solothurn, a committee to monitor the execution of sentences and measures exists independently of the administration and acts as “ombudsman” within the meaning of the United Nations recommendations; it also deals with pre-trial detention.

**Point 17:** *The Committee emphasizes the need to allow suspects to contact a lawyer or a family member or friend and to be examined by an independent doctor immediately upon their arrest, or after each session of questioning, and before they are brought before an examining magistrate or released.*

147. In all prisons in Aargau, medical care is provided by a doctor who is independent of the institution.

148. In the canton of Solothurn, medical examinations of detainees are carried out by an independent doctor trusted by and under contract to the prison. This doctor decides whether there is any need to consult other medical practitioners. When grounds exist for exceptions, the detainee's wishes are taken into account.

149. In the canton of Vaud, detained persons may, in most cases, make rapid contact with their families. They can always request a doctor.

150. In the canton of Zug, arrestees must be given a hearing within 36 hours and must be informed of the grounds for their arrest. In accordance with the regular practice of the office of the examining magistrate, they are then expressly asked whether family or third persons are to be informed. In the case of persons speaking a foreign language, a check is made that they have understood the explanation of their rights. Once a formal investigation is opened, the accused has the right to a defence lawyer; the lawyer has the right to consult the case file and to have contact with the accused, insofar as this is possible without compromising the purpose of the investigation.

151. In the canton of Zurich, accused persons' right to be made aware of their rights from the first hearing by the police remains to be made statutory through revision of the cantonal code of criminal procedure; it is, however, observed in practice, since the cantonal and municipal police have issued internal guidelines to that end. According to these guidelines, accused persons must be informed when questioned by the police of their right to refuse to make a deposition and of their right to request a defence lawyer at any time after having being brought before the examining magistrate.

### **III. CONCLUDING REMARKS**

152. Note may be taken of a number of other instruments in the sphere of discrimination that have entered into force for Switzerland; they include the Framework Convention for the Protection of National Minorities adopted by the Council of Europe on 1 February 1995, which entered into force on 1 February 1999, and the European Charter for Regional or Minority Languages of 5 November 1992, which entered into force for Switzerland on 1 April 1998 (see, for more information on the issue of discrimination, the reply by the Federal Council to the Teuscher motion of 13 December 2000 on the ratification of Protocol No. 12 to the European Convention on Human Rights concerning prohibition of discrimination, annex 5). The Swiss Government transmitted its initial report on the implementation of the Framework Convention in April 2001.

### Notes

- <sup>1</sup> RS 101, FF, RO 1999 2556 ff , FF 1997 1 ff, 1999 176, 5306.
- <sup>2</sup> LAsi, art. 17, para. 2.
- <sup>3</sup> LAsi, art. 17, para. 3.
- <sup>4</sup> LAsi, art. 3, para. 2.2.
- <sup>5</sup> LAsi, article 17, paragraph 2, provides that the Federal Council shall enact, by legislative decree, provisions for the taking into account in the asylum procedure of the special situation of women.
- <sup>6</sup> LAsi, art. 30, paras. 1, 4.
- <sup>7</sup> LAsi, arts. 44, paras. 3-5, and 105, para. 2.
- <sup>8</sup> See, inter alia, LAsi, arts. 22, 23, para. 4, 107, para. 3, 108, and 111, para. 2 (c).
- <sup>9</sup> LAsi, art. 22, para. 2.
- <sup>10</sup> LAsi, arts. 107, para. 3, and 108, para. 1.
- <sup>11</sup> LAsi, art. 66.
- <sup>12</sup> LAsi, art. 71.
- <sup>13</sup> LAsi, art. 75, para. 2.
- <sup>14</sup> LAsi, art. 74, para. 2.
- <sup>15</sup> LAsi, art. 74, para. 3.
- <sup>16</sup> LAsi, art. 88, paras. 1-2.
- <sup>17</sup> LAsi, art. 69, para. 2.
- <sup>18</sup> LAsi, art. 69, para. 3.
- <sup>19</sup> LAsi, art. 70.
- <sup>20</sup> LAsi, art. 76, paras. 2-3.
- <sup>21</sup> LAsi, art. 93.

<sup>22</sup> LAsi, art. 76, para. 1.

<sup>23</sup> LAsi, art. 97, para. 1.

<sup>24</sup> LAsi, art. 97, paras. 2-3.

<sup>25</sup> LSEE, art. 22 (a).

<sup>26</sup> See the Bern code of criminal procedure, article 174, paragraph 3, of 15 March 1995, canton of Bern; RSB 321.1.

**Annex**

**Re. article 12**

1. Reply to question No. 9 during the oral presentation of the second periodic report of the Swiss Government to the United Nations Human Rights Committee.
2. Extract from the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 9 August 2002.
3. Extract from Switzerland's report of 27 February 2002 in response to the CPT report of 9 August 2001.

**Re. point 15**

4. Reply to question No. 10 during the oral presentation of the second periodic report of the Swiss Government to the United Nations Human Rights Committee.

**Re. final considerations**

5. Teuscher motion No. 00.3674 of 13 December 2000 on the ratification of Protocol No. 12 to the European Convention on Human Rights concerning prohibition of discrimination.

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