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FOR HUMAN RIGHTS**

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**REPORT OF  
MR ALVARO GIL-ROBLES,  
COMMISSIONER FOR HUMAN RIGHTS,  
ON HIS VISIT TO SWITZERLAND**

**29 November - 3 December 2004**

**for the attention of the Committee of Ministers  
and the Parliamentary Assembly**

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## INTRODUCTION

*In accordance with Article 3 e. of Committee of Ministers Resolution (99) 50, which sets out the duties of the Commissioner for Human Rights and instructs me to “ identify possible shortcomings in the law and practice of member States concerning the compliance with human rights” and “assist them, with their agreement, in their efforts to remedy such shortcomings”, I decided to make an official visit to Switzerland from 29 November to 3 December 2004. I was accompanied on my visit by Mr Markus Jaeger, Deputy Director of my Office, and Mr Javier Cabrera, member of the Office. I should like to thank all my hosts – and particularly Mr Claude Altermatt and the “Council of Europe” Section of the Federal Department of Foreign Affairs - for their efficiency and the efforts they made and means they used to ensure that the visit proceeded satisfactorily. My thanks also go, naturally, to Ambassador Jean-Claude Joseph, Permanent Representative of Switzerland to the Council of Europe, who did me the honour of accompanying me when I met the Federal Councillors. Lastly, I should like to express my gratitude to the Swiss authorities for their excellent reception, their open-mindedness and their co-operativeness.*

*I was able, during my visit, to talk to Federal Councillor Micheline Calmy-Rey, Head of the Swiss Department of Foreign Affairs, Federal Councillor Pascal Couchepin, Head of the Federal Department of the Interior, and Federal Councillor Christoph Blocher, Head of the Federal Justice and Police Department.*

*I also talked to the President of the Federal Court (Mr Heinz Aemisegger, in the company of Judge Gilbert Kolly), the Attorney General of the Confederation (Mr Valentin Roschacher) and other members of the judiciary. I met the Ambassador in charge of Political Division IV of the Federal Department of Foreign Affairs (Mr Thomas Greminger) and the Head of the Human Rights Section of that Division (Mr Wolfgang A. Bruelhart), the Director of the Federal Justice Office (Mr Heinrich Koller), the Director of the Federal Police Office (FEDPOL) (Mr Jean-Luc Vez), the Director of the Federal Immigration, Integration and Emigration Office (IMES) (Mr Eduard Gnesa), the Director of the Federal Bureau for Equality between Women and Men (Ms Patricia Schulz), the Head of the Anti-Racism Department (Mr Michele Galizia), the Vice-President of the Federal Commission against Racism (Ms Boël Sambuc) and the Head of the Commission’s Secretariat (Ms Doris Angst).*

*As regards the cantonal authorities, I talked to the State Councillor from the Canton of Vaud responsible for the integration of foreigners, combating racism and co-ordination in respect of asylum (Mr Jean-Claude Mermoud) and to the Director of the Malley Prairie reception centre in Lausanne.*

*In the canton of Geneva I was received by the State Councillor responsible for the Justice and Police Department (Ms Micheline Spoerry) and the Director of the Prison Office (Mr Constantin Franziskakis) .*

*In the canton of Zurich, I was able to meet the Kloten airport Chief of Police (Major Thomas Würgler), the Head of the Special Airport Unit (Police Lieutenant Ulrich Neracher) and the people responsible for the centres for asylum-seekers, before visiting one of the centres, the Durchgangszentrum Juchstrasse (run by Mr Thomas Kunz).*

*In the canton of Ticino I talked to the State Councillor responsible for Health and Social Affairs (Ms Patrizia Pesenti) and the State Councillor responsible for the Institutions Department (Mr Luigi Pedrazzini), and I visited the asylum-seeker registration centre (CERA) in Chiasso and the Casa delle donne run by the Associazione Consultorio delle Donne in Lugano (Ms Sonny Buletti). I then met the members of the Cantonal Commission for the Integration of Foreigners and for Combating Racism (Mr Moreno Bernasconi, Mr Fabrizio Comandini, Mr Ermete Gauro, Mr Fulvio Pezzati and Vreni Müller-Hemmi).*

*I was also keen to form my own impression of the situation by visiting the prison cells of the Zurich and Bellinzona cantonal police headquarters and to make lengthier visits to the Champ-Dollon prison in Geneva and the La Stampa Prison in Lugano. I should like to thank the governors of these prisons (Mr L. Beausoleil and Mr Armando Ardia respectively) and their staff for being so willing to help and ready to discuss matters, whatever the time of our visit. I should also like to thank the prisoners for giving me a warm reception, despite the late hour of my visit.*

*The discussions with Swiss Members of Parliament, including members of the Swiss delegation to the Council of Europe Parliamentary Assembly (Ms Vreni Müller-Hemmi, Ms Ruth-Gaby Vermot-Mangold, Ms Rosmarie Zapfl-Helbling, Mr John Dupraz, Mr Andreas Gross and Mr Dick Marty), the cantonal and municipal ombudspersons (Ms Véronique Jobin, Ms Claudia Kaufmann, Mr Franz Bloch, Mr Mario Flückiger, Mr Beat Gsell, Mr Markus Kägi, Mr Andreas Nabholz, Mr Karl Stengel and Mr Werner Moser) and, of course, representatives of Swiss civil society from a very wide variety of organisations and associations were also very important to me, as was the meeting with the member of the Office of the United Nations High Commissioner for Refugees responsible for Switzerland (Mr Olivier Delarue, whom I met in the company of Mr Beck).*

## **GENERAL COMMENTS**

1. Switzerland is a country that has great prestige on the world stage, not least because of its civil and social stability and the prosperity and quality of life its inhabitants enjoy. The Swiss are considered to be pragmatic, educated, welcoming and wary of excesses, to mention but a few of the qualities attributed to them. The same is true of the Swiss authorities. In the international arena, Switzerland's actions bear the stamp of neutrality, a concern for appeasement, balance and justice, and a willingness to enter into dialogue. Switzerland is home to many of the United Nations agencies and willingly plays host to all sorts of peace initiatives, while its diplomacy stands out, *inter alia*, on account of Switzerland's action, initiatives and programmes to promote human rights worldwide, with a constant concern for respect for others.

2. Internally, the particular set-up of the Swiss Confederation, made up as it is of four linguistic regions divided into 26 cantons with wide-ranging powers, is such that its distinctive regional and local features are well respected. At federal level a broad coalition ensures that power is permanently shared among representatives of all the main political leanings.

Furthermore, it is significant that Switzerland's political set-up makes ample provision for public consultation by means of frequent referendums, in which citizens are called on to take political decisions themselves, including, in some cases, decisions rejecting those taken by their elected representatives.

3. Switzerland has been a member of the Council of Europe since 1963. It ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and recognised the right of individual petition in 1974, then gradually ratified most of the Council of Europe legal instruments concerning human rights, in particular the Framework Convention for the Protection of National Minorities and Protocols Nos. 6, 7 and 13 to the ECHR. In order to extend its contractual undertakings in the area of human rights protection, Switzerland could ratify the European Social Charter<sup>1</sup> and the Additional Protocol to it providing for a system of collective complaints, and Protocols Nos. 1<sup>2</sup>, 4 and 12 to the ECHR, which, *inter alia*, safeguard the protection of property, prohibit the collective expulsion of aliens and ban discrimination.

4. Switzerland's exemplary attitude towards the execution of judgments of the European Court of Human Rights deserves to be highlighted<sup>3</sup>. The Swiss authorities concerned by these judgments, and particularly the courts, apply the European Court's case-law direct. Moreover, Switzerland does not hesitate to adapt its legislation to the requirements of the ECHR, as they emerge from the Court's judgments.

5. In the light of my visit, I feel bound to say that I was satisfied to find that Switzerland is a country that ensures a very high degree of respect for human rights within its borders, while actively and persuasively promoting respect for human rights throughout the world.

6. I did, however, feel concerned about certain new developments that I observed, which I think could tarnish Switzerland's good reputation as a country that is anxious to honour its international obligations and that safeguards the fundamental rights of people from all over the world who find themselves on its territory. I am referring to attitudes of rejection towards foreign nationals who have come to Switzerland, driven by political persecution or the hope of escaping poverty in their own countries, or taken in by the promises of traffickers. This rejection is sometimes reflected in measures that can overstep the limits of what is acceptable in the light of the obligation to respect human rights. I am aware that this is currently a divisive issue as far as the Swiss public are concerned: there are those who are in favour of deporting foreigners present illegally on the territory of the Confederation and those who consider some of the means used in their country to deal with such people to be shameful and inhuman. As Council of Europe Commissioner for Human Rights, I have a duty to assess to

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<sup>1</sup> Switzerland signed the European Social Charter on 6 May 1976.

<sup>2</sup> Switzerland signed the Protocol to the ECHR on 19 May 1976.

<sup>3</sup> E.L., R.L. and J.O.-L. (20919/92), A.P., M.P. and T.P. (19958/92), Kopp (23224/94) and Autronic AG (12726/87) (adoption of a relevant order with retrospective effect the day after the European Court judgment) and Burghartz (16213/90) (amendment of the order on civil status).  
Belilos (10328/83): judgment of 29 April 1988, Final Resolution DH (89) 24.

what extent certain laws, bills or practices on the part of the Swiss authorities are likely to undermine human rights and fundamental freedoms. During my visit I was also concerned about certain extremist attitudes and hostility towards the recognition of foreigners' rights, which are spreading in the shadow of the confrontation to which I have just referred.

## I. ASYLUM IN SWITZERLAND

### A. Aliens in Switzerland

7. Before it became a country with net immigration, Switzerland was, for a long time, a country with net emigration. It was not until the late 19<sup>th</sup> century that Switzerland's net migration became positive. Since the Second World War its migration policy has been dictated by the need for unskilled labour. This has led to the introduction of a system of "quotas" (officially known as "contingents" or "maximum numbers of authorisations") that depend on labour market demand.

8. Since 1998 Switzerland has applied a policy of regulating the number of foreign workers, on the basis of a division of the world into two groups of countries: industrialised countries (European Union/EFTA/Canada/the United States) and the others<sup>4</sup>. When there is a demand for labour, nationals of the first group of countries take priority over those of the second group. As Canada and the United States are geographically remote, this system gives workers from the European Union and EFTA countries priority access to the Swiss labour market.

9. The quota system does not, however, fully reflect immigration in Switzerland in practice. Changing migration patterns, family reunification and the growing number of asylum-seekers have transformed the breakdown of the foreign population.

10. The Swiss Confederation now has 7,320,000 inhabitants, 20% of whom are of foreign nationality<sup>5</sup>. This high figure – which includes only aliens lawfully resident on Swiss territory – can be explained by the relatively strict policy on access to citizenship. Switzerland applies the legal principle of *jus sanguinis* to the award of citizenship, which makes it difficult to obtain Swiss nationality, even for children born in the country. The criteria for naturalisation are likewise strict. The foreign population comes partly from neighbouring countries: Italians account for 20.9% (they made up the first influx of immigrants), Germans for 8.9% and French people for 4.4%. In addition to this immigration from neighbouring countries, there are immigrants from a number of European countries that at one time or another provided a pool of labour, such as Portugal (10%), Turkey (5.4%) and Spain (5.3%). Lastly, there are 350,000 citizens of former Yugoslavia, who account for nearly a quarter of the foreign population<sup>6</sup>.

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<sup>4</sup> The system of "zones" was introduced in 1991. At the time it comprised three zones: European Union, United States/Canada, Eastern Europe/rest of the world.

<sup>5</sup> The figures in this paragraph are based on official Federal Justice and Police Department statistics dating from August 2003.

<sup>6</sup> 13.7% from Serbia and Montenegro, 4.1% from "the former Yugoslav Republic of Macedonia", 3.1% from Bosnia and Herzegovina and 2.9% from Croatia.

11. Several factors account for the large number of nationals of the Balkan states. First, since the 1970s Switzerland has taken in Yugoslav workers, mainly seasonal workers, who have gradually settled in the country and then brought members of their families to join them under the family reunification scheme. More importantly, Switzerland opened its borders to citizens of countries of the former Yugoslavia in the 1990s. The war in Croatia and Bosnia and Herzegovina, followed by the ethnic tension in Kosovo, led to a massive influx of refugees. The end of these conflicts, along with the relatively precarious status of the protection afforded to these people, gradually prompted many of them to return home.

12. It is, of course, difficult to estimate the number of foreigners living in Switzerland without residence permits. At the time of my visit, the figure of some 300,000 was mentioned, 80,000 to 120,000 of whom were thought to be working illegally, but a recent study commissioned by the Federal Migration Office (ODM) puts the current figure at 90,000<sup>7</sup>. The number who tries to obtain legal status by applying for asylum or another form of protection<sup>8</sup> is falling sharply. The number of asylum applications fell from 41,302 in 1998 to 26,125 in 2002, 20,806 in 2003 and 14,248 in 2004. According to information from the Office of the United Nations High Commissioner for Refugees (UNHCR), 8.5% of applications are accepted. In this respect the situation in Switzerland is similar to that in many western European countries.

### **B. Arrival of potential asylum-seekers in airports**

13. Since the start of this century, the number of asylum-seekers arriving in Swiss airports and applying for asylum on the spot has not been very high in relation to the total number of asylum applications, and the figure is falling steadily. There were 1,593 such applications in 1998, 420 in 2003 and 304 in 2004 in the only two Swiss airports concerned: Geneva-Cointrin (39 applications) and Zurich-Kloten (265 applications). These figures should be compared with the total number of applications at frontiers (399 in 2004) and applications to Swiss embassies and consulates abroad (969 in 2004)<sup>9</sup>.

14. The States Parties to the European Convention on Human Rights (ECHR) have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens<sup>10</sup>. The decision to refuse to allow an alien to enter Swiss territory is therefore a decision in respect of which the Swiss authorities have sovereign power, which is outside the Commissioner's jurisdiction provided it does not breach another provision of international human rights law.

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<sup>7</sup> *Nombre de sans-papiers en Suisse*, Study by the GFS Research Institute, Bern, April 2005.

<sup>8</sup> Under Swiss law, people do not have to apply for a particular form of asylum. It is sufficient for them to state that they intend to apply for protection. The single application covers all the grounds provided for in Swiss law (asylum, temporary humanitarian protection, etc): the person concerned does not have to specify the law in question or the exact status sought.

<sup>9</sup> In 1998 there were 1,659 applications at frontiers, including 1,593 at airports, and 610 to Swiss embassies and consulates abroad.

<sup>10</sup> European Court of Human Rights, *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, paragraph 102.



15. Alongside all those who enter Switzerland without any problems, non-nationals may, on arriving at a Swiss airport, be subject to one of the following three types of decision:<sup>11</sup>

- The foreign national is immediately declared “INAD” (“not eligible for admission to Swiss territory”) and returned, where possible, to his or her country of origin or a third country at the expense of the airline that brought him or her to Switzerland, in accordance with Annex 9 of the ICAO Convention. There were apparently some 2,000 “INADS” in 2002, 1,223 in 2003 and 1,075 in 2004.
- The foreign national submits an asylum application at the airport, which is rejected by means of a decision taken within 15 days by the Federal Migration Office (ODM)<sup>12</sup> and confirmed in response to an appeal from the applicant by the Swiss Asylum Appeals Board (CRA). In 2004, five applications were rejected out of 39 in Geneva, and 132 out of 265 in Zurich<sup>13</sup>.
- The foreign national who has submitted an application for asylum is authorised to enter Swiss territory and go to one of the four asylum-seeker registration centres (CERAs, see next section), where the asylum application is processed<sup>14</sup>. In 2004, 34 out of 39 applicants were authorised to do so in Geneva, and 133 out of 265 in Zurich.

16. Foreign nationals subject to one or other of the decisions referred to above are usually from a country that is not a member of the European Union. Throughout the airport procedure, the people concerned are held in the airport transit area for a total period which, by law, ought not to exceed 15 days. The procedure takes place as described below.

17. In the case of flights from certain countries, staff from the private company Check Port or border police officers check people’s identity papers at the arrival gate. They may consider someone “INAD” straight away. According to certain NGOs, they even, very occasionally, refuse to allow someone to leave the aircraft. The most common practice is apparently to escort the person declared “INAD” to another aircraft leaving for his or her country of origin or for a safe country or to place him or her in detention<sup>15</sup> until such a flight is found. There is no formal written decision and no reasons are given. Little is known about the details of this practice that takes place at the arrival gate.

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<sup>11</sup> No decisions rejecting asylum applications out of hand as manifestly ill-founded (“NEM” decisions) are taken at airports; such decisions are taken only by the CERAs (asylum-seeker registration centres). See next section.

<sup>12</sup> Until the Federal Refugee Office (OFR) and the Federal Immigration, Integration and Emigration Office (IMES) merged to form the ODM on 1 January 2005, the OFR was competent.

<sup>13</sup> In 2002, out of 514 applications at Zurich airport, 54% were rejected, while in 2003, 48% of the 350 applications were rejected.

<sup>14</sup> Those allowed to enter Switzerland to continue with the asylum procedure are given a train ticket enabling them to travel to one of the CERAs. These are spread around Switzerland and are to be found in Vallorbe, Basle, Kreuzlingen and Chiasso.

<sup>15</sup> I visited the airport police cells. They can be used to hold someone for only a few hours.

18. Foreign nationals who are not immediately detained at the arrival gate go to the border police counter, where they have to submit their papers, passport and visa. In such cases, one of three decisions may be taken:

- Authorisation to enter Swiss territory, if the applicant's papers are in order. Even if he or she does not apply for asylum at this stage, there is nothing to prevent him or her doing so subsequently by going to one of the four asylum-seeker registration centres.
- Notification that the foreigner has been classified as "INAD", even if his or her papers, including the visa, are in order. There is no possibility of appeal. The foreigner is sent back in the way referred to above, possibly after being held in a police cell in the transit area for the time necessary to organise his or her departure. In theory, such a person should be able to apply for asylum – and contact Red Cross representatives – even after being notified of his or her "INAD" status.
- The foreign national informs the border police that he or she wishes to apply for asylum. In this case, a form is filled in with information about the applicant's declared identity and the route taken and it is specified that he or she wants to request asylum in Switzerland. At the point when the border police officer takes the applicant's statement, the latter is not assisted by anyone, not even an interpreter, and there are no witnesses. I was assured that the form in question is not included in the file if an asylum application is actually filed: it is replaced by another form establishing the applicant's identity, which is filled out in the applicant's presence and then checked point by point during the hearing with the help of an interpreter before being included in the file.

19. In Zurich the asylum-seeker is taken to the airport police asylum office, a special unit of the cantonal police force, whereas in Geneva he or she is referred to an official from the Cantonal Population Bureau. These people inform the Federal Migration Office, which in turn authorises them to hear the applicant. The hearing normally lasts a few hours (up to 12 hours by some accounts). An NGO or Red Cross representative may be present<sup>16</sup>. In theory a lawyer paid by the applicant could also be present but in practice this is difficult because of the time-limits, the lack of availability and, in particular, financial considerations<sup>17</sup>.

20. The Federal Migration Office must deliver a reasoned decision on the application within 48 hours on the basis of the information obtained during the hearing. If it is not possible to determine within that time whether the conditions for entry are fulfilled, entry is temporarily refused. At the same time, the applicant is assigned residence at the airport for a maximum period of 15 days. The ODM then considers, on the basis of the record of the hearing drawn up at the airport, whether the applicant should be authorised to enter the country or whether it is

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<sup>16</sup> In Geneva asylum-seekers are assisted by the ELISA association and by chaplains, while in Zurich they are assisted by the legal advisors of the ZBA (*Zürcher Beratungstelle für Asylsuchende*), who work in conjunction with the Swiss Red Cross.

<sup>17</sup> In fact, the legal assistance provided by the ZBA seems appropriate and sufficient.

possible to send him or her to a third country, back to his or her country of origin or to the country he or she has just come from. Pending its decision, the asylum-seeker is provided with accommodation in a place within the transit area, where he or she can move about freely<sup>18</sup>. In the event of a favourable decision, the asylum-seeker enters Swiss territory and may go to an asylum-seeker registration centre, where the “normal” procedure takes place.

21. If the Federal Migration Office delivers a negative decision, reasons are given for it and it is communicated to the Office of the United Nations High Commissioner for Refugees (UNHCR).

22. In this case, there are two options:

- the UNHCR objects to the decision taken by the Federal Migration Office to send the person back to his or her country of origin, in which case he or she is either authorised to enter Swiss territory or, further to a separate decision against which it is possible to appeal within ten days, sent to a country other than his or her country of origin<sup>19</sup>.
- the UNHCR does not object to the Federal Migration Office's decision to send the applicant back to his or her country of origin. The applicant may nevertheless appeal against the Federal Migration Office decision, even though the fact that the UNHCR has accepted the decision considerably lessens his or her chances. The applicant has 24 hours in which to apply for "restoration of suspension of the execution of the decision" and 30 days in which to appeal. In practice, however, it is the 24-hour time-limit that is crucial, for the Appeals Board requires a full set of arguments concerning the merits even to restore the suspensive effect. NGOs or legal representatives help asylum-seekers, as far as possible, to submit their appeals within this very short time-limit.

23. The Asylum Appeals Board (CRA) hands down a decision on the appeal for restoration of the suspensive effect within 48 hours. If the appeal is rejected, the applicant is sent back within seven days if possible. If it is upheld, the applicant enters Swiss territory and is able to continue with the procedure in an asylum-seeker registration centre.

24. The Swiss airport procedures described above call for a number of comments on my behalf. It is, of course, in the interests of both the host country and the persons concerned that asylum procedures should be fair, quick and effective. It should, however, be borne in mind that the right to apply for political asylum in another country is a fundamental right recognised by international law.

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<sup>18</sup> At Zurich airport I visited this area, where asylum-seekers can be put up in dormitories for a maximum of 15 days. Apart from the fact that it is impossible to go outdoors, efforts are made to make the place humane, without prejudice to what the European Committee for the Prevention of Torture (CPT), which specialises in this field, may have to say about the conformity of this area with international standards. Throughout this procedure and the time spent in the transit area, medical assistance is theoretically available to the asylum-seeker but difficult to obtain in practice. Unaccompanied minors are assigned a guardian by the Swiss Government.

<sup>19</sup> The UNCHR opinion concerns only repatriation to the country of origin. If another country can be found to which the asylum-seeker can be sent, the latter's departure is not affected by the UNHCR “veto” and may take place without further application to the UNHCR.

25. As I said in my 2001 opinion on the human rights standards applicable to this question<sup>20</sup>, immediate *refoulement* at the arrival gate is unacceptable, for it is not in keeping with international law. It is a measure that does away with the possibility, provided for in the 1951 Convention relating to the Status of Refugees, of applying for asylum in appropriate circumstances and obtaining a reasoned decision if the application is rejected, with the possibility of appealing.

26. In addition, the fact that it is possible to declare someone “INAD” without a proper procedure, assistance, an interpreter or witnesses raises serious difficulties as regards the right of asylum. The problem is that, in such circumstances, there is no means of ensuring that a foreign national declared “INAD” did not actually want to apply for asylum, as is his or her internationally recognised right.

27. It is also necessary to ensure that even “INADs” have been duly heard and understood as regards their possible intention of applying for asylum. To this end, it is desirable that a member of an NGO or a legal adviser independent of the authorities should have contact with foreign nationals declared “INAD” before they are deported from Swiss territory. In fact, according to information from various sources, there are some cases in which the border police did not actually understand that people classified as “INAD” actually wanted to apply for asylum. That is why it is important to have appropriate interpretation services so it is possible to understand what foreign nationals want and what they say.

28. I am not unaware of the importance of ensuring that the procedure is quick, speed being one aspect of effectiveness. Unduly short time-limits may, however, undermine asylum-seekers’ rights. This is particularly true of the time-limits for appealing against an initial decision rejecting an application for asylum. In Switzerland, the time-limit is 24 hours, in which it is necessary to make full submissions that are procedurally correct and set out all the merits of the appeal, and the people concerned often need assistance, including linguistic assistance. Such a short time-limit is unreasonable.

29. Lastly, I was informed that the practice whereby the UNHCR intervenes quickly and effectively in the asylum procedure at airports could shortly be abolished by the authorities. I would earnestly urge the Swiss authorities not to take such a step, which would prevent universally recognised specialists in the law governing refugees from being involved in decisions to deport asylum-seekers to their countries of origin. There seems to be no valid reason for this backward step, except if one were to reorganise the complex procedures completely in order to introduce a single procedure applicable wherever the asylum application is submitted and providing for the systematic intervention of an independent legal assistant and an interpreter and for reasonable time-limits.

30. The conditions under which people declared “INAD” and those sent back after a final rejection of their asylum application are detained and deported will be dealt with in the section on “Means employed by the police when deporting aliens”.

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<sup>20</sup> Recommendation (2001)1 of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders (paragraph I.2).

### C. Rejection of asylum applications out of hand (“Non-entrée en matière” or “NEM”)

31. In Switzerland the right of asylum is governed by the Asylum Act of 26 June 1989 (“LAsi”), which provides for a summary procedure (“non-entrée en matière” or “NEM”) whereby manifestly ill-founded applications are rejected out of hand. An NEM decision may be taken in the asylum-seeker registration centre (CERA) or when the case is processed at the ODM headquarters, once responsibility for the applicant has been assigned to a canton. Since 1997 the number of applications rejected out of hand has been between 5,000 and 8,000 a year, and the cumulative total from 1995 to the end of 2004 was some 55,000. In 2004, 19,157 asylum decisions were taken in Switzerland, including 5,193 NEM decisions, 10,080 rejection decisions resulting from the normal procedure and 1,555 favourable decisions. In addition, a number of applications were struck off the list or withdrawn.

32. The status of people whose applications are rejected out of hand and the treatment afforded to them changed on 1 April 2004, with the entry into force of legislative amendments adopted on 19 December 2003. Moreover, Parliament is considering further changes, which have been incorporated in a draft revised version of the Asylum Act dated 4 September 2002 (the draft itself was being revised at the time when this report was written) and in a draft amendment to certain provisions of the Aliens Act (“LEtr”). The additional changes envisaged are designed, firstly, to extend still further the legal grounds for rejecting applications out of hand and, secondly, to bring the social status of people whose asylum applications have been definitively rejected by the normal procedure into line with that of people whose applications have been rejected out of hand.

33. The federal measures that came into force in April 2004 bear the title “2003 budgetary reduction programme in the area of asylum”. This is a telling indication of the budgetary/financial approach to dealing with the issue of asylum-seekers. The right of asylum and the status of aliens on Swiss soil are governed by federal laws, and it is therefore a federal authority (the Federal Migration Office or ODM) that rules on asylum applications. It follows that the Confederation is financially responsible for an asylum-seeker as long as a decision has not been taken on his or her application.

34. At some point in the procedure, responsibility for each asylum-seeker is assigned to a canton until a final decision on the asylum application is delivered. The cantons receive money from the Confederation to cover the costs entailed<sup>21</sup>. It was alleged that some cantons did not spend all of the lump sums transferred to them by the Confederation on those concerned and had made – and were still making – a profit thanks to this system<sup>22</sup>.

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<sup>21</sup> The Confederation compensates cantons for providing accommodation for, and supervising, asylum-seekers until their departure or until they obtain a residence permit. This also applies to asylum-seekers whose deportation has been ordered but who have not been deported, either because the order has not been enforced or because they refuse to co-operate. Since 1 April 2004, asylum-seekers whose applications have been rejected out of hand by means of an enforceable NEM decision have not been entitled to social welfare, but receive emergency assistance from the cantons in case of need, under Article 12 of the Federal Constitution. In this case, the Confederation compensates the cantons with a single lump sum of CHF 600. When such persons are deported, a lump sum of CHF 1,000 is paid to the cantons (Article 15b and 15c of the Order on the execution of the deportation of aliens; RS 142.281).

<sup>22</sup> See Federal Court, X v. Verwaltungsgericht des Kantons Solothurn.

35. On the other hand, once a final decision on the asylum application has been taken, financial responsibility for the asylum-seeker is transferred from the Confederation to the canton. From then on it is cantonal authorities that are responsible for foreign nationals admitted to Switzerland and for those who have not been granted asylum (those whose applications have been rejected out of hand or by the normal procedure). The cantonal authorities are, in particular, responsible for their detention prior to their deportation from Swiss territory, for providing the assistance needed until they are deported and for organising the actual deportation procedure.

36. The amount of assistance afforded to foreign nationals whose applications have been rejected out of hand can vary greatly from one canton to another, although Article 12 of the Swiss Constitution guarantees the “right to aid in distress”<sup>23</sup> to everyone on Swiss soil. The interpretation of this constitutional provision is currently being hotly debated in Switzerland. Initially, there were two antagonistic interpretations of Article 12 of the Swiss Constitution. The authorities of one canton<sup>24</sup> interpreted it as meaning that persons who were themselves responsible for finding themselves in an emergency situation were not entitled to emergency assistance, taking the view that this applied to people whose applications had been rejected out of hand but refused to return to their own country. The canton’s administrative court upheld the authorities’ view. At the same time, the administrative court of another canton<sup>25</sup> reached the opposite conclusion, holding that no one could be denied emergency aid, regardless of status. The case then went before the Federal Court, which recently handed down its judgment, dated 18 March 2005, stating that the first of these cantonal administrative court decisions is not in keeping with the Constitution. A large political grouping in the country reacted to this by suggesting tabling a constitutional amendment that would clearly do away with the obligation to provide emergency assistance to foreigners who did not co-operate when it came to their deportation.

37. The above-mentioned money-saving measures led to four main changes in the legal situation of asylum-seeker in Switzerland as from 1 April 2004:

- Extension of the grounds on which an NEM decision rejecting their application out of hand could be taken<sup>26</sup>;
- reduction of the time-limit for appealing against an NEM decision from 30 days to 5 days;
- extension of the time for which they were held in CERAs until the end of the appeal procedure;

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<sup>23</sup> Article 12 of the Swiss Constitution: “Right to aid in distress – Persons in distress and incapable of looking after themselves have the right to be helped and assisted, and to receive the means that are indispensable for leading a life in human dignity.”

<sup>24</sup> Solothurn.

<sup>25</sup> Bern.

<sup>26</sup> The Swiss authorities stressed that the extension of these grounds as a result of the partial revision of 1 April 2004 had a relatively marginal impact since it concerned only applicants whose applications had already been rejected in a European Union country (Section 32.2.f LAsi). I was assured that in practice this provision is rarely applied, for want of proof.

- immediate transfer of anyone whose application had just been rejected out of hand or by means of the normal procedure to the regime applicable to irregular-status aliens (commonly known in Switzerland as “*sans papiers*”), which is governed by the Aliens Act and makes it possible to place them in detention at any time.

38. During the first six months following the entry into force of the amendments of 1 April 2004, there were 2,973 decisions rejecting applications out of hand. 131 of these NEM decisions concerned unaccompanied minors, two of whom were under the age of 16. Moreover, as at 1 April 2004, there were 4,800 people whose applications had already been rejected out of hand but who were still on cantonal lists of people receiving social welfare. The cantons were given a time-limit – 31 December 2004 – to apply the new legislation and exclude these people from the social protection system.

- **Grounds for rejecting an asylum application out of hand: presumption that it is abusive or manifestly ill-founded**

39. The “NEM” procedure<sup>27</sup> is a summary procedure whereby the Federal Migration Office merely carries out a *prima facie* examination of the asylum application before it and refuses to consider the merits on a number of grounds provided for by law<sup>28</sup>, which create a presumption that the application is abusive or manifestly ill-founded. The procedure is designed to take a maximum of 30 days, including the processing of an appeal, if any<sup>29</sup>.

40. Since 1 April 2004 it has been possible under Swiss law to conclude that an asylum application is abusive or ill-founded on a number of grounds:

- the applicant has declared a false identity to the authorities;
- the applicant has failed to provide the authorities, within 48 hours after being requested to do so, with documents proving his or her identity (although a number of excuses are accepted);
- the applicant is guilty of another serious breach of the duty to co-operate (for example, having made statements deemed contradictory);
- the applicant is able to go to another country where an asylum procedure is still pending;
- the applicant has previously made an unsuccessful asylum application in Switzerland;
- the applicant is illegally resident in Switzerland at the time of submission of the asylum application;
- the applicant comes from a country that has been declared by the Federal Council to be free from persecution (on the list of countries declared “safe”).

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<sup>27</sup> LAsi, Sections 27, paragraph 4, 32 to 37, 44a, 108a and 109.

<sup>28</sup> Sections 32 to 35.

<sup>29</sup> Sections 37, 108a and 109, paragraph 2.

41. I feel bound to comment on several of the grounds provided for in Swiss law for the adoption of an NEM decision. I believe there are two legitimate interests here, which have to be reconciled. On the one hand, that of the authorities, which want to restrict the granting of asylum to people who are genuinely being politically persecuted, that is, those covered by the Geneva Convention relating to the Status of Refugees. On the other hand, there is the interest of asylum-seekers who genuinely suffer political persecution in their own country. The crux of the problem is the true identity of the applicant and the plausibility of his or her story.

42. The main difficulty faced by all countries that take in asylum-seekers today stems from the strategy adopted by many would-be immigrants of not presenting identity papers. These people can be well informed by traffickers or simply individuals trying their luck. Some 80% of asylum-seekers do not have identity papers on them at the time when they apply to the authorities. There can be two very different reasons for this. The asylum-seeker may, admittedly, deliberately be concealing his or her true identity (and often his or her nationality or ethnic group) in order to be able to claim to have fled a place where the existence of persecution is not open to discussion or is widely accepted. The lack of papers may also, however, be the result of the persecution itself or the fact of having had to flee the country. In such cases, it often happens that identity documents are confiscated by the authorities responsible for persecution or lost as the person concerned hastens to flee, or that false papers are prepared precisely in order to make it easier to flee. The second scenario is a classic one, with which people who have suffered political persecution are, with a few rare exceptions, very familiar.

43. It follows that one cannot, as Swiss law does, allow the mere lack of identity documents or failure to present them to have adverse consequences for the asylum-seeker. Neither international law nor common sense allows one to conclude, simply because the strategy of not presenting papers is widespread, that failure to present identity papers indicates uncooperativeness on the part of the asylum-seeker or means that his or her application is ill-founded. Similarly, it cannot be inferred from the fact that documents are not presented – particularly if the asylum-seeker is given only 48 hours in which to do so – that the asylum-seeker is being uncooperative in any way, and the application cannot be rejected out of hand on these grounds. Someone who has been persecuted can obviously not obtain assistance with seeking refuge in Switzerland from his or her national authorities – which are precisely those responsible for the persecution. Moreover, this is a problem also faced by other would-be immigrants, who are not necessarily being persecuted in their country but who are often unable to obtain, from a distance, identity papers from the authorities of the country of which they are nationals, for these authorities may be slow, disorganised, difficult to contact or even corrupt, and basically uninterested in making things easier for someone seeking to settle in Switzerland.

44. Accordingly, I consider that an outright refusal to consider the merits of asylum applications that are deemed abusive or ill-founded simply because the foreign national in question did not present identity documents on entering the country or within the stipulated 48-hour time-limit is an obstacle to the exercise of the right of asylum, as guaranteed by international law.



45. Furthermore, an NEM decision based on the fact that the foreign national applying for asylum was previously unlawfully resident in Switzerland also raises a problem as far as I am concerned. To my mind, a presumption that the application is unjustified or ill-founded on this ground ignores an obvious fact: it is increasingly difficult lawfully to enter the territory of the country in which one wants to apply for asylum. Accordingly, unlawful entry is becoming more common, even among those covered by international rules governing asylum. The first concern of those under threat is to seek shelter; it is only then that they try to regularise their situation. Such a situation should not be used to draw conclusions on the merits of requests for protection.

46. I also consider that contradictions in statements by asylum-seekers should not be considered of crucial importance when the merits of their applications are examined. Genuine victims of persecution are often in a vulnerable psychological state and have serious problems in relating to people in positions of authority. Moreover, nowadays airport procedures, with arrests at the arrival gate and questioning that can last seven or eight hours or even longer, are such that they do nothing to inspire serenity and trust, but rather elicit surprise, tension and fear. In such a climate, quite apart from the difficulties that may arise because of the lack of adequate assistance, it is hardly surprising that it should be difficult to persuade applicants to co-operate. In any event, it seems unreasonable to expect their statements to be totally consistent and perfectly clear.

47. Lastly, I should like to address the ground for an NEM decision that relates to the fact that the applicant comes from a country on the list of countries considered safe. I would incline to the view that there is merely a strong presumption that the application is ill-founded if it is submitted by someone from a country on the list. I must, however, stress the importance of an individual examination of the merits of the application. The fact that a list of countries considered safe exists should not be used to deprive an applicant of the right to be heard and to put forward any special circumstances that might go to show that the application is founded.

48. The Swiss authorities specified that in order to for one of the grounds for rejecting the application out of hand to apply, it had to be proved that the applicant had declared a false identity. Lack of identity papers did not cause an application to be rejected out of hand unless both of two conditions were fulfilled: firstly, the applicant had no plausible explanation for being unable to produce papers and, secondly, the grounds on which the applicant was applying for asylum did not contain circumstantial evidence of persecution. The Swiss authorities stressed, in this connection, that a hearing systematically took place in the presence of a representative of a self-help organisation and, if necessary, an interpreter, and took the view that the case law of the authority to which it was possible to appeal in respect of the concept of circumstantial evidence of persecution ruled out any restrictive interpretation on the part of the ODM. It was also pointed out that any contradictions on the part of the applicant elicited a negative decision only if they concerned key factors (cf LAsi, Section 7). I was assured that account was taken of the applicant's personality and of all the circumstances. Lastly, I was told that the fact of coming from a safe country was grounds for rejecting the application out of hand only if there was no circumstantial evidence of persecution in the file and no such evidence was provided at the hearing. For my part, I am delighted to find that these precautions, which I consider necessary, are taken and that the "NEM" procedure would not therefore, in practice, prevent a detailed individual examination of every asylum application.

- **Time-limit for appealing against a NEM decision and assistance provided**

49. Since 1 April 2004 applicants whose applications have been rejected out of hand have, under the Asylum Act (“LAsi”), a time-limit that has been reduced to five working days in which to submit an appeal, while having to stay in one of the asylum-seeker registration centres (CERA).

50. I was informed that notification of NEM decisions taken while the applicant is staying in the CERA takes place orally and that, on that occasion, the applicant is informed of the grounds for the rejection of the decision in a language he or she understands, if necessary in the presence of an interpreter.

51. It is important to be aware of the difficulties facing applicants who are informed that their applications have been rejected in the circumstances described above. They often have no knowledge of the law, still less of Swiss law, and, in addition, are likely not to have a good command of any of the country’s official languages. Being confined to one of the registration centres which, in the best of cases, they may leave only from 9 am to 5 pm<sup>30</sup>, and often without financial resources, they will often have no possibility of obtaining assistance other than the voluntary legal aid available at the CERA<sup>31</sup>. In Vallorbe, for instance, a small municipality of 3,200 inhabitants, the self-help legal unit attached to the centre operates with a single part-time professional and a few volunteers, whereas official statistics for 2004 show that 20 to 25 applicants turn up to be registered every working day and that the centre takes from 6 to 10 NEM decisions a day. In these circumstances, I am not sure that the right of every individual to a fair procedure and an effective means of appeal is respected.

52. To ensure that the conditions for appealing against NEM decisions respect the fundamental right safeguarded, inter alia, by Article 13 of the ECHR, I recommend that the Swiss authorities extend the time-limit for appealing against NEM decisions or provide automatic legal aid to applicants as soon as they are notified of an NEM decision, and provide them with the services of a translator as necessary.

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<sup>30</sup> Applicants who lunch in the centre must return by noon and cannot leave again until 2 pm: see Order 142.311.23 of the Federal Justice and Police Department concerning the running of the CERAs.

<sup>31</sup> The difficulties facing asylum-seekers have been compounded by an anti-terrorism measure taken by the Swiss authorities on 23 June 2004, in the form of an order making the sale of SIM cards for mobile telephones (including those with prepaid subscriptions) subject to the presentation of an identity document that is valid for crossing borders. As a result, 60,000 people in Switzerland, including those with N cards (asylum-seekers) and F cards (those admitted temporarily or on humanitarian grounds), are unable to communicate by mobile telephone. Yet mobiles are particularly important for these people, who have no fixed abode in Switzerland and are virtually impossible to contact by any other means, for they need to stay in contact with people in Switzerland or abroad who can help them.

- **Advancement of procedural costs**

53. When the Asylum Appeals Board considers that, on the face of it, an appeal against an NEM decision is bound to fail, it normally asks the applicant to advance CHF 600, or €400, for costs. If the applicant cannot pay this sum, the appeal is declared inadmissible, without consideration of the merits. This practice strikes me as particularly inappropriate in view of the above observations on the genuine difficulties faced by asylum-seekers in preparing and providing evidence in support of their appeal under Swiss law.

- **The fact that people whose applications are rejected out of hand immediately find themselves in an illegal situation, and its consequences**

54. It should be remembered that, since the entry into force of budget-cutting measures on 1 April 2004, applicants whose asylum applications have been rejected out of hand have become illegal aliens covered by the Residence and Settlement of Aliens Act (LSEE). This sudden, not to say immediate, transition to illegal status has several consequences.

55. Firstly, the person concerned may be incarcerated at any time for deportation from the country and may be detained for up to nine months. I would point out in this connection that, as the Court has stated<sup>32</sup>, any deprivation of liberty under the above-mentioned provision is justified only for the purpose of deportation proceedings and only as long as those proceedings are conducted sufficiently quickly.

56. In addition, asylum-seekers whose applications have been rejected out of hand are denied welfare assistance. Admittedly, any foreign asylum-seeker whose application has been rejected out of hand can receive emergency assistance under Article 12 of the Swiss Constitution. This assistance is, as we have seen above, provided by the cantons, and there are very substantial disparities between cantons in this respect. At the time of my visit, some cantons were refusing to grant assistance to asylum-seekers whose applications had been rejected, on the grounds that, in refusing to leave Swiss territory, they were responsible for their indigence. I welcome the Federal Court's decision of 18 March 2005 specifying that asylum-seekers are entitled to emergency assistance even if the cantonal authorities consider them uncooperative. In some cantons, asylum-seekers asking for help were being almost systematically arrested. In others, I was told that it was difficult in practice to obtain medical treatment, even in an emergency. In yet others, conditions of accommodation left much to be desired and food vouchers were inadequate. I note that the Conference of Cantonal Directors responsible for Social Welfare has drawn up recommendations for the organisation of emergency assistance, but I do not know whether these have solved the problems mentioned.

57. Clearly, foreigners whose applications have been rejected out of hand will try to avoid places where they are liable to be arrested by the police. Moreover, an illegal alien who has been attacked will not ask for police protection or report crimes and misdemeanours, which will therefore go unrecorded and unpunished, and indeed will not come to the notice of the

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<sup>32</sup> European Court of Human Rights, *Chahal v. the United Kingdom* judgment of 15 November 1996, paragraph 113.

public. This also applies to any unlawful police action. Their distrust of the police is bound to prompt people whose applications have been rejected out of hand to avoid the cantonal reception centres – in cantons where such centres exist<sup>33</sup> – even if it means doing without the emergency assistance on offer. Indeed, this is exactly what happens: very few people whose applications have been rejected out of hand turn up at the centres<sup>34</sup>. It is true that, as soon as the NEM decision is issued, asylum-seekers are entrusted to a canton, whose police force is responsible for deporting them. It is only in that canton that the person concerned can obtain emergency assistance.

58. As a result, these people, being denied public welfare, are dependent on aid and assistance offered by numerous private individuals and associations. Yet private individuals who assist illegal aliens are themselves at risk of prosecution<sup>35</sup> and other problems.

59. Asylum-seekers whose applications have been rejected out of hand – including vulnerable people (pregnant women, families with small children, elderly people and people requiring medical care, for whom the law makes no exception) – are liable to find themselves on the very fringe of Swiss society, in conditions that are hardly compatible with human dignity. There are documents indicating that the authorities are aware of the consequences of the measures taken and that extreme marginalisation is known to exist<sup>36</sup>. The aim is apparently to put pressure on the people concerned to agree to leave the country voluntarily.

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<sup>33</sup> See, above, the dispute over the cantons' obligation to provide emergency assistance.

<sup>34</sup> The ODM reports that only 16% of people whose applications were rejected out of hand between 1 April and 30 September 2004 turned up at one point or another in a reception centre to obtain emergency assistance (2<sup>nd</sup> NEM Monitoring Report, ODM, 14.1.2005). The centre we visited near Lugano was huge, but empty. The statistics for the centre showed that only a handful of people had turned up over the previous few months. It has to be said that it was a civil defence underground air-raid shelter, as lacking in human warmth as could be imagined. It was in the middle of the countryside, far outside Lugano, right next to a large police barracks. Of the few people who had gone there, two had been arrested by the police and repatriated. The others had been told that they were allowed to come five times a month at most for shelter, food and clothing. For the other 25 days and nights of the month they were supposed to survive outdoors without emergency assistance, even during the Swiss winter.

<sup>35</sup> For helping someone to stay in the country illegally.

<sup>36</sup> The final report of the Working Party on Asylum Funding for the Federal Justice and Police Department entitled "*Incitations individuelles et institutionnelles dans le domaine de l'asile*" ("Individual and institutional incentives with regard to asylum" (Bern, 9.3.2000 – all the quotations are taken from the report by the anti-racist association IGA SOS Racisme on the survival conditions of applicants whose asylum applications have been rejected out of hand, dated 2 October 2004) is instructive here: "in the case of [all those against whom a deportation order has been issued but whom it is impossible to deport], the aim is to deport them as soon as possible, particularly by means of individual disincentives" (page 17); "these proposals are designed in particular to ensure that asylum-seekers are treated differently according to the extent to which they co-operate with the Swiss authorities and how responsible they show themselves to be for themselves and towards others [...]. People who co-operate with the authorities during the asylum procedure and behave responsibly, both individually and socially, are to enjoy appreciably better conditions than those offered to people who abuse the right of asylum and refuse to take responsibility for themselves or to act responsibly towards others or in their dealings with the authorities [...]. The cantonal and federal authorities should likewise be (financially) penalised in the light of the effectiveness of their support for or hindrance of the implementation of the Federal Council's asylum policy" (page 2). "People who refuse to co-operate with the authorities over the establishment of travel documents would be excluded from collective accommodation centres and would therefore no longer have any fixed abode" (page 12). "All asylum-seekers whom it is impossible to deport should be subject to this regime once the time-limit for their final departure has been set, except applicants who have clearly stated their identity" (page 9). "[...] putting an end to personalised assistance would make it possible to execute, directly or indirectly, deportation orders that are procedurally irreproachable. People who are not prepared to accept these verdicts [...] would be forced to choose

60. I am prepared to acknowledge that the Swiss authorities have a right to take steps, with due regard for the international law applicable, to expel or deport from Swiss territory illegal aliens, asylum-seekers whose applications have been rejected by means of an NEM decision and other asylum-seekers. It is not, however, for me to give an opinion here on any expulsion or deportation measures, but rather to express my views on the progressive marginalisation processes resulting from the application of the rules in force and the refusal to grant the aid necessary for survival in decent conditions, which is designed in the long term to prompt foreigners whose asylum applications have been rejected to leave voluntarily. This approach of not deporting the foreign nationals concerned and yet not providing them with the necessary assistance takes no account, from the outset, of the unsurmountable problems some of them may face in trying to return home. Moreover, it completely ignores the distinction between those who can be deported and those whose deportation is, for various reasons, impossible.

61. I consider that this system causes a number of foreign nationals who find themselves on Swiss territory to be plunged into poverty and demeans them in their own eyes and other people's eyes, and that this may give rise to a problem of compatibility with the prohibition of inhuman or degrading treatment enshrined in Article 3 of the ECHR. As the Court has stated, the intention to cause suffering is not crucial to a finding of inhuman or degrading treatment<sup>37</sup>, which is prohibited in absolute terms, irrespective of the victim's conduct<sup>38</sup>. International human rights instruments contain absolute bans on endangering the physical and mental health of human beings and, even more so, their lives, the safeguard of which may impose positive obligations on the State<sup>39</sup>. The right to social and medical assistance is expressly secured by Article 13, paragraph 1, of the European Social Charter to everyone who is without adequate resources and who is unable to secure such resources either by his or her own efforts or from other sources. Admittedly, Switzerland is not a party to the European Social Charter.

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more quickly than is currently the case between returning to their country in dignity [...] and a precarious social situation in Switzerland or abroad. The likely direct effect of enforced anonymity would be an increase in the number of unmonitored departures and people going missing. A very large number of people currently go missing (the figure was some 12,000 in 1999), and the number will probably increase by a few hundred a year. The large number of people who become illegal aliens every year would not therefore be fundamentally changed" (page 11). "The establishment of a network of emergency centres that could take in people who have been excluded from collective accommodation would indisputably incur additional capital expenditure and upkeep costs for the community [...]. If all the people reduced to anonymity made use of this form of accommodation, these measures could have adverse consequences. Judging by experience in recent years, however, [...] only a minority of the people concerned are likely to make systematic use, for a long period, of the facilities and services available in emergency centres. A large majority of them would disappear and seek new opportunities while living illegally or across the frontier. [...]. The former Director of the ODR and Co-Chair of the working party that drafted the report quoted above concluded at the press conference he gave before leaving: "At the ODR, the application of the right of asylum is under control. [...] More NEM decisions are being issued and the savings are there to see. [...] There were 14,739 rejections and 7,818 NEM decisions (with a deterrent effect expected in 2004)." (ATS press release in *Le Courrier*: "Jean Daniel Gerber leaves the Refugee Office in order" by Jean François Nussbaum, 17.1.2004).

<sup>37</sup> European Court of Human Rights, *Ireland v. the United Kingdom* judgment of 18 January 1978, paragraph 167.

<sup>38</sup> European Court of Human Rights, *H.L.R. v. France* judgment of 29 April 1997, paragraph 35.

<sup>39</sup> European Commission of Human Rights, Decision in the *Dujardin v. France* case, Application N° 16734/90, DR 72, page 243.

62. I also have doubts as to the effectiveness of the system for deporting asylum-seekers who have been rejected from Swiss territory. Despite the optimism of some of the people to whom I talked, who assured me that the foreigners whose applications had been rejected out of hand had quietly returned to their own countries, I have every reason to believe that most of these people, who become illegal aliens as soon as the Swiss authorities have taken their decision, do not return to their own countries, for a multitude of reasons, including, naturally, a lack of resources. It is true that some people leave Switzerland, but it is usually for neighbouring countries, and in doing so they join the “European circuit”. Others react by leaving the countryside and small towns, where they feel too conspicuous and exposed, to merge into Switzerland’s biggest cities. It is likely that some of them feel forced to commit “survival crimes”, for want of any legitimate means of survival<sup>40</sup>. In any event, I find it hard to accept the Swiss authorities’ positive view of the fact that “94% [of persons whose applications had been rejected out of hand] left the asylum circuit in an unmonitored manner”. The report in question explicitly adds that “the system is designed to bring about this high proportion of unmonitored departures”<sup>41</sup>. On the contrary, I am inclined to think that the fact that a section of the population that has been knowingly reduced to an illegal existence is no longer monitored in any way is liable to have adverse consequences for law and order, public health and individual rights.

- **Further measures under discussion**

63. A number of proposed amendments to the legislation are being discussed in Switzerland. As my mandate includes action to prevent breaches of human rights, it would have been useful to have been able to express my views on the measures envisaged. Having said that, I see that heated discussion is continuing and that it is difficult to know at this stage what the content of the reform will be. I therefore consider it premature to express my views in detail on the measures likely to be included in the new legislation and will simply make a few brief preliminary remarks which can, if necessary, be supplemented at a later date by a legal opinion of the Commissioner at the request of the Swiss authorities or on my own initiative.

64. One of the measures recommended in the reform under discussion would be to introduce the concept of temporary admission on humanitarian grounds<sup>42</sup> of people who, because of civil wars or ethnic or religious persecution, cannot return to their country of origin. To my mind, such a measure would constitute significant progress for the protection of human rights in Switzerland and I therefore warmly welcome the proposal. On the other hand, the idea of restricting it to applicants who are able to present documents seems much less justified, and I would be sorry to see this condition included.

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<sup>40</sup> The 2<sup>nd</sup> NEM Monitoring Report states that for the period from July to September 2004, “while there was an increase in the number of offences against the Drugs Act and against property in comparison with the first three months [of NEM observation], the number was still small”, affecting “5% of the NEM population”. The Swiss authorities have since provided me with confirmation that offences by the NEM population are not on the increase.

<sup>41</sup> ODR, 1<sup>st</sup> NEM Monitoring Report, page 8.

<sup>42</sup> Admission could be matched by the right to bring one’s family into the country and the right of access to the labour market.

65. Another measure contemplated is to accept non-governmental persecution as grounds for fleeing the country when it comes to affording temporary protection in Switzerland. This new feature would take account of the situation on the ground where many conflicts are concerned and I fully endorse it.

66. I am, however, concerned to find that there are a number of other proposals under discussion which do not strike me as steps in the right direction. Firstly, there is that designed to treat asylum-seekers whose applications have been rejected by means of the normal procedure in the same way as those whose applications have been rejected out of hand in respect of the cessation of eligibility for social welfare. I have already expressed my views above on the unacceptable consequence of the current system for aliens whose applications have been rejected out of hand. Extending this system to people whose asylum applications have been rejected by the normal procedure can only make the situation even more unacceptable<sup>43</sup>.

67. The same is true of the proposals to extend still further the periods for which non-nationals may be detained with a view to their deportation. I should like to make it clear, in connection with the duration of detention for the purposes of deportation, that I consider periods such as are being contemplated for foreign minors – up to 12 months in the case of minors aged 15 to 18<sup>44</sup> – to be incompatible with international child protection standards. Requiring asylum-seekers to advance procedural costs if they appeal against a decision rejecting their application would also – it seems to me – be at variance with the right of every individual to apply for asylum, which includes the possibility of lodging an appeal<sup>45</sup>.

#### **D. Repatriation of irregular-status migrants (“*sans papiers*”) who have been resident in Switzerland for a long time**

68. The term “*sans papiers*” (“without papers”) is commonly used in Switzerland, mainly to designate seasonal or other immigrant workers who have lost their legal status, and members of their families. It also covers rejected asylum-seekers who have not left but have merged into the population, often working more or less illegally. Some have belonged to each category in turn, as is the case with most of the nationals of former Yugoslavia<sup>46</sup> still on Swiss territory. They arrived as seasonal workers with proper permits, and then the war in their country deterred them from returning – if they were living in Switzerland at the time – or prompted

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<sup>43</sup> For 2004, such a decision would have trebled the number of vagrant people in Switzerland, adding 10,080 foreigners whose applications had been rejected by the normal procedure to the 5,193 foreigners whose applications had been rejected out of hand.

<sup>44</sup> As the bill stands, it will not be possible to place minors under the age of 15 in detention; detention will be regularly reviewed by an independent judge and the people concerned will have to be released as soon as the execution of the deportation order is no longer deemed to be “in suspense”.

<sup>45</sup> See my above-mentioned Resolution (2001)1, section II, paragraph 11: “It is essential that the right of judicial remedy within the meaning of Article 13 of the ECHR be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the ECHR. The right of effective remedy must be guaranteed to anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 and 3 of the ECHR is alleged.”

<sup>46</sup> See also the introduction to Section I of this report, above.

them to take refuge in Switzerland. Their asylum applications were regularly rejected and they remained as illegal immigrants. The total number of irregular-status migrants is between 90,000 and 300,000, some of whom have been in Switzerland for ten years or more.

69. It was the situation of nationals of former Yugoslavia, and particularly Kosovars, that sparked off debate on the “*sans papiers*” in Switzerland in the late 1990s. The prospect of repatriation led to their being provided with shelter in churches, first in Lausanne and then in other Swiss cities. Following a big demonstration in Bern in late 2001, the Federal Parliament launched a major debate on the issue and the federal authorities were called on to explain the stand they had taken.

70. The federal authorities’ attitude was to refuse to allow any collective regularisation, but to express a willingness to consider the possibility of issuing residence permits in cases of hardship. The Bern authorities demanded to be allowed to exercise their discretion, while providing information about the practices they followed in the so-called “Metzler” circular<sup>47</sup>.

71. The way in which decision-making powers and financial burdens are divided between the Confederation and the cantons partly accounts for the problem. As I have said, decisions on allowing aliens to reside in Switzerland are taken by the Confederation, while the canton of residence deals with social aspects, and also executes deportation orders issued in Bern. This leads to what some people call “financial and political ping-pong” between the Confederation and the cantons, with each playing up to the electorate. As a result, different cantons adopt very different approaches. Some ask Bern to regularise nearly all “their” aliens, while others, it appears, never do: I was told that applications from five cantons amounted to 90% of the total. The canton of Vaud is said to be “exceptional”, both in its attitude to regularisation, which is the most favourable of all the cantons, and in its “conciliatory” – some say “lax” – attitude to aliens unlawfully resident for an extended period. As a heated argument had blown up, at the time of my visit, over the deportation of 523 asylum-seekers in the canton of Vaud” (including 150 Bosnians and 100 Kosovans), whose applications had been rejected, I went to the Vaud to talk to local officials, having already talked to those in Bern.

72. I appreciated the cantonal officials’ efforts to solve the difficult problem of reconciling humanity with respect for the decisions taken in Bern. The difficulty is compounded by the fact that the persons concerned inevitably relied on the appearance of “regularisation by time” owing to the fact that they found themselves accepted for many years in the canton, where many of their families are now well integrated. In fact, however, their status remained irregular. Offering aid (financial and other) to help them return to their countries of origin (having first tried to establish what the situation in those countries is) is certainly useful - but, if

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<sup>47</sup> Circular signed by Federal Councillor Ruth Metzler on 21 December 2001 issuing instructions for establishing criteria for the regularisation of the status of foreign residents in cases of hardship. The circular sought to reconcile a Federal Court decision according to which years spent illegally in Switzerland could not be taken into account for the purpose of obtaining advantages with the need to bear in mind the implications of a long stay in Switzerland for a foreign national.



they refuse to leave, injustices can only be avoided by carefully examining the individual circumstances of each and every case. Coldly insisting on compliance with the regulations would mean taking no account of the expectations raised by the authorities' previous *laissez-faire* approach. I was assured both in Bern and in the cantons I visited that the attitude adopted would be understanding and flexible<sup>48</sup>.

### **E. Means employed by the police when deporting aliens**

73. The cantonal police in Switzerland are responsible, among other things, for deporting aliens whose applications for asylum have been rejected out of hand, or examined and then rejected. For this purpose, they are informed of the deportees' identities. Their tasks include arresting them, detaining them briefly and conveying them to the frontier or an airport. My information indicates that police officers' respect for the rights of individuals, including their dignity, varies greatly between cantons – and so the following comments do not apply equally to all the cantonal police forces.

- **Methods of enquiry used to trace unlawfully resident aliens**

74. National laws on residence must obviously be respected by everyone, and there is nothing wrong in seeking to identify persons who violate them. In the case of unlawfully resident aliens, this involves tracing them for the purpose of verifying their identity, checking their residence papers and, if appropriate, taking them to court or - if this is possible – deporting or removing them from the country.

75. I would, however, like to emphasise that unlawful residence is an offence, and not a crime. This is why, in accordance with the principle of proportionality, which must govern all action taken by the authorities, the police should be forbidden to use certain methods to trace unlawfully resident aliens. I am thinking, for example, of cases in which police officers follow children suspected of belonging to unlawfully resident families on their way from school, and of other subterfuges involving children. During my visit, I heard allegations that now, at a time when attitudes to illegal immigrants are hardening, methods like these are being used in Switzerland. I regard this as harmful to the children concerned, and also to the community, since parents who know that they face problems under the laws on residence eventually stop sending their children to school, to avert the danger. Using children in this way is unworthy and unacceptable, and also violates the right to education guaranteed them by the first Protocol to the ECHR. It may also prove counter-productive, since children with time on their hands may engage in anti-social, or even delinquent, behaviour.

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<sup>48</sup> There would thus be none of those terrible cases, like the ones I was told about, where people are arrested at work and deported at once, without even being able to draw their last wages, or the case in Basel in November 2004, when girls aged between 13 and 17 were apparently taken into custody and sent back to Ecuador without their mothers.

- **Allegations of ill-treatment**

76. During my visit, I heard a number of reports and allegations that unlawfully resident aliens had been subjected to various kinds of violence, ranging from verbal abuse to the arbitrary use of force. Verbal abuse was most frequently associated with identity and other checks, and physical violence with deportation against the deportee's will. Unsurprisingly, violence is also a risk when an attempt to deport a person (eg by plane) fails.

77. I think it important to make the point here that the use of force should be a last resort when judicial or administrative decisions are being enforced, and must always respect the principle of proportionality. It may be justified when an unlawfully resident alien is being deported, if he/she refuses to co-operate<sup>49</sup>. The main problems occur just before deportees are taken to the airport, or put aboard the plane. To avert all danger of the excessive use of force, I feel that the presence of a representative of a specialised and respected organisation – eg the Red Cross, as in other countries – at sensitive moments like these might help to ensure that asylum-seekers (both those whose applications are rejected out of hand and those whose applications are rejected after examination) are not subjected to ill-treatment, and also that no unfounded accusations are levelled at the police. I realise that introducing this practice will require a new approach and considerable effort on the part of the authorities. Nonetheless, it will certainly do much to prevent violence of a particularly shameful kind, and protect police officers against false accusations.

78. In this connection, I venture to refer to Chapter III of the recommendations, referred to above, which I made in 2001 on the execution of deportation orders.

- **The bill on the use of force**

79. I was told that a “Federal Act on the Use of Force in Connection with the Law on Aliens and Transport of Persons Ordered by a Federal Authority” existed in draft form. During my visit, I had occasion to discuss its content with the people I met. However, I think it would be premature to offer any detailed comment at this stage on this text, which may well undergo other changes. As I did above, in the case of the projected changes in the law on asylum, I shall therefore restrict myself to a few brief observations, to which I may later add a detailed legal opinion, which Article 8 of my terms of reference authorises me to prepare, at the Swiss authorities' request or on my own initiative.

80. I am aware that the police officers responsible for enforcing deportation orders are armed. The bill sets out to introduce clear and uniform regulations on the use of force by the police when aliens are being sent back to their countries. I welcome its aim, which is to substitute legal rules on the use of arms and force by the police for mere directives aimed at the enforcing authorities. This will create greater legal security, both for aliens subject to deportation orders, and for the police officers responsible for enforcing those orders. Such initiative merits support.

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<sup>49</sup> The vast majority agree to return voluntarily. In 2004, for example, 2,994 were repatriated voluntarily, and 280 under police escort.

81. As for the substance of the bill, I note, in the list of authorised weapons, that the use of stun guns (the famous “Tasers”), is being discussed in Switzerland. I made enquiries concerning the utility and necessity of using these weapons, and was told that they removed the need for firearms, which are far more dangerous. They can be used anywhere, even on board aircraft, and may make humiliating and uncomfortable means of restraint, such as handcuffing or tying, unnecessary. I see the force of these arguments, but remain somewhat sceptical regarding the need for these weapons. I have actually heard of fatal accidents with Tasers in other countries. I would accordingly ask the Swiss authorities to weigh the possible consequences carefully before including stun guns on the list of authorised weapons. I must admit that I found no great interest among the professionals, when I asked which police unit or senior police officer had asked for them.

82. There is one other aspect of the bill to which I have objections: its scope extends “to private services which carry out certain tasks for the authorities”, since the Swiss Constitution does not forbid the State to delegate its monopoly on the use of force to private entities. In fact, private agencies are used when prisoners are being transported by rail. For my part, the possibility that stun guns may be used by persons employed by private agencies can only strengthen my objections to this provision in the bill.

## **II. TRAFFICKING IN HUMAN BEINGS**

### **A. Victim protection measures**

83. In 2002, the Federal Office of Police estimated that there were between 1,500 and 3,000 victims of trafficking in Switzerland, compared with roughly 120,000 for western Europe as a whole. The Office does not have more up-to-date figures. Combating and preventing trafficking in human beings and the smuggling of migrants are among the stated objectives of the Federal Council.

84. Switzerland has begun contributing to the international effort to combat this problem by signing the relevant UN conventions, which have not yet been ratified<sup>50</sup>.

85. On the domestic front, an Interdepartmental Working Group was set up in September 2000 by the Federal Justice and Police Department (DFJP) to consider whether the government should introduce further measures, in particular new statutory provisions, to combat trafficking in human beings<sup>51</sup>. The Swiss Co-ordination Unit against Trafficking in Human Beings and the Smuggling of Migrants (SCOTT), attached to the DFJP’s Federal Office of Police, began

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<sup>50</sup> In April 2002, Switzerland signed the additional protocols to the UN Convention against Transnational Organized Crime regarding trafficking in persons and the smuggling of migrants, as well as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

<sup>51</sup> More specifically, the Interdepartmental Working Group was meant to ascertain whether the definition of human trafficking given in Article 196 of the Criminal Code needed to be brought into line with international conventions and the legislation of neighbouring states and whether there were any gaps in other federal laws dealing with human trafficking, in particular the LAVI. It was also asked to look into the possibility of setting up an officially recognised body to counsel victims of human trafficking.

operating in January 2003<sup>52</sup>. Effectively a follow-up to the Interdepartmental Working Group mentioned above, the SCOTT encompasses all the relevant authorities, at both federal and cantonal level, and has a permanent secretariat which is attached to the DFJP's Federal Office of Police. The SCOTT is charged with co-ordinating action in the field of prevention, criminal prosecution and victim protection, although the operational tasks remain the responsibility of the competent departments of the Confederation and the cantons, which are themselves members of the SCOTT. The unit is also responsible for ensuring co-operation between the authorities and the relevant organisations, including NGOs.

86. In addition, a new Commissariat to combat paedophilia, human trafficking and the smuggling of migrants (PMM) came into operation on 1 November 2003. Attached to FEDPOL, its task is to deal with current cases and to co-ordinate complex operations related to investigations conducted across several cantons or abroad. In complex cases involving child pornography, one of the tasks of the PMM Commissariat is to convince all its Swiss and foreign partners of the need to pursue a common approach and prepare comprehensive dossiers. This same Commissariat makes proposals on police tactics aimed at developing an overall strategy and joint initiatives so as to ensure unified action and effective co-ordination of the measures to be taken in the event of operations. It also provides back-up for the cantonal police during the operational phase and in the field of analysis. It is Interpol's contact in Switzerland for child pornography cases and is represented on Interpol's specialised permanent body on crimes against children.

87. On the normative side, the section of the Criminal Code on human trafficking (Article 196) is currently being revised. The definition of the offence is being extended to include not only trafficking for the purpose of sexual exploitation but also trafficking for the purpose of exploitation of labour (forced labour or services and slavery-like practices) and trafficking in organs. This is in keeping with the international definition of trafficking in human beings and is a welcome move in my view.

88. There have also been a number of notable developments in Switzerland as regards protecting the victims of trafficking.

- In its decision dated 29 April 2002, the Federal Court ruled that someone who knowingly entered Switzerland to work as a prostitute, but whose precarious economic situation had been exploited and who had been deceived about the working conditions and opportunities for earning money, should be regarded as a victim of human trafficking.

- As part of the overhaul of the Federal Act on Assistance for Crime Victims (LAVI) and the federal criminal procedure bill, lawmakers are currently looking at ways of facilitating access to victim support and improving existing arrangements for the protection of witnesses who give evidence in criminal proceedings.

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<sup>52</sup> Notable examples of the SCOTT's achievements include an improvement in the state of awareness concerning the smuggling of migrants in Switzerland and an increase in the penalty for professional smuggling of migrants to five years' imprisonment in the new Federal Aliens Act (LFEE), which reclassifies the smuggling of migrants as a crime.

- The draft version of the new Federal Aliens Act expressly provides for exceptions to the conditions governing eligibility for residence permits to enable human trafficking victims to remain in the country, and also includes provision for assistance with return. In August 2004 the Federal Migration Office issued a circular to the cantons to regulate practice based on the current Residence and Settlement of Aliens Act (LSEE). The circular provides for a 30-day “cooling-off” period and introduces the possibility of issuing short-stay or residence permits for the duration of the criminal proceedings or in very grave personal circumstances.

- In the cantons, “round table discussions” are working on models for co-operation between the prosecution authorities and the victim advice centres set up under the Federal Act on Assistance for Crime Victims<sup>53</sup> to deal with the victims of human trafficking. The purpose of this co-operation is to identify cases of human trafficking and protect the victims<sup>54</sup>. The governing bureau of the SCOTT is actively encouraging the setting-up of cantonal “round tables” and is supporting their activities by publishing a practical guide entitled “Co-operation arrangements for combating trafficking in human beings”.

89. Some recommendations made by the Interdepartmental Working Group are still being debated. Examples include the recommendation to incorporate a fully fledged right of residence for human trafficking victims in the legislation on aliens, to exempt trafficking victims from punishment for any violations they may have committed in respect of orders issued by the Aliens Police<sup>55</sup>, the recommendation to review the case for introducing a witness protection programme beyond the criminal proceedings in order to help victims of trafficking, the introduction of an official duty to prosecute, the need to provide victim support as from the initial hearing rather than leaving it up to the individuals themselves to find protection, calls for a crackdown on undeclared employment and more funding for centres for battered women, which take in trafficking victims<sup>56</sup>. The Group has also called for ratification of the relevant international conventions (see above) and the setting-up of a free helpline to provide round-the-clock assistance for trafficking victims throughout Switzerland.

90. The Federal Council basically agrees with the Working Group’s assessment and acknowledges the validity of its recommendations.

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<sup>53</sup> Under the LAVI, foreign nationals who are the victims of a crime in Switzerland are entitled to counselling at an LAVI advice centre, emergency help and other services prescribed by law. Under the LAVI and cantonal criminal procedure laws, crime victims who give evidence in criminal proceedings also have a number of procedural rights related to witness and victim protection.

<sup>54</sup> In 2000 official advice centres dealt with 62 human trafficking cases and 45 in 2001. Victims of human trafficking often have difficulty obtaining assistance due to ignorance and insecurity and the fact that, in many cases, they are in Switzerland illegally.

<sup>55</sup> Under existing legislation, the authorities can waive criminal prosecution only if the persons who entered Switzerland illegally are sent back immediately, or if they are refugees and “the seriousness of the action to which they are liable justifies crossing the border illegally”.

<sup>56</sup> As regards setting up agencies specifically designed to protect women victims of trafficking, this is considered unnecessary, the Swiss umbrella organisation for centres for battered women taking the view that such tasks can be performed by existing agencies.

91. It has not, however, taken up the recommendation to introduce arrangements that would grant victims a right of residence in certain circumstances. The argument being that the draft legislation on aliens expressly allows the authorities, as an exception to the general rules governing admission, to authorise short stays or issue residence permits in the case of victims of trafficking in human beings. According to the Federal Council, the idea is rather to find tailored solutions by proceeding on a case-by-case basis, bearing in mind any new provision for assistance with return and reintegration that might be available to victims of human trafficking.

92. The Federal Council has also chosen to disregard the recommendation to grant trafficking victims a statutory exemption from punishment for violations of the legislation on aliens, taking the view that if the victim was coerced into committing an offence, they can already claim exemption under the general provisions of the Criminal Code.

93. Given the appalling problem of human trafficking in many countries of Europe, I welcome the focused and serious debate that has taken place in Switzerland on this issue and the introduction of various measures to combat trafficking and protect the victims. I am confident that the concerted efforts of the various federal, cantonal and local agencies – in both the state and private sector – will bring about an improvement in the situation in the years ahead. There are, however, a number of points that need emphasising here.

94. It is important to note that the dual role of human trafficking victims really does call for two different types of protection: effective protection of their human rights and effective criminal action against the traffickers. It follows from this that victim protection – the victims being in many cases the only available witnesses – needs to go further than merely not punishing people for crimes in which they are also the victims. Victims of trafficking in human beings face a combination of problems when it comes to seeking protection from those who have abused and deceived them: they have little or no money; returning to their own country or fleeing to a third country in an effort to escape the traffickers is usually not an option open to them; they know that they are in Switzerland illegally and, if only for this reason, do not trust the host-country authorities who are meant to protect them. Most importantly, though, they are at serious risk from the perpetrators of the crime or crimes of which they are the victims. Hence the difficulty of placing victims/witnesses in a position where they can file a complaint and give evidence to the investigating officers and later in court. If Switzerland seriously wants to help these victims and deter and punish the traffickers, however, it must acquire the appropriate means. Police experts and others in Switzerland and elsewhere confirm that long-term protection in the host country or another safe country is an effective way of achieving this end.

95. I can only urge Switzerland to sign, ratify and implement as early as possible the future Council of Europe convention on action against trafficking in human beings, which provides a solid legal framework for protecting the victims of trafficking and prosecuting the traffickers. Once this convention comes into force, it will provide, in Article 12, a full range of measures to

protect the victims of trafficking, while also introducing, in Article 14, paragraph 1, a duty to issue victims with a residence permit<sup>57</sup> in cases where this is necessary, either because of the victim's personal situation or because they are co-operating in investigation or criminal proceedings. I urge Switzerland to be generous by introducing provisions in its domestic law to enable a residence permit to be issued in the two instances specified in the aforementioned Article 14, paragraph 1. Under Article 26 of the convention, moreover, states are required to provide in their domestic law for the possibility of not imposing penalties on victims for their involvement in unlawful activities in cases where they have been coerced, something that should help secure approval and implementation of the proposal made by the Swiss Interdepartmental Working Group referred to above<sup>58</sup>.

## **B. “Cabaret dancers”**

96. The Federal Bureau for Equality between Women and Men has produced a leaflet for foreign women arriving in Switzerland with a permit to work as a “cabaret dancer” (permit L). The leaflet explains what cabaret dancing involves and makes it clear that employers cannot force dancers to engage in sexual intercourse with clients or perform acts of a sexual nature if they do not wish to. Nor do employers have the right to force dancers to consume alcohol with clients or engage in any other behaviour harmful to their health or dignity.

97. Permit L holders are further advised that this permit does not entitle them to work as prostitutes. Should inspectors find that a dancer is engaging in prostitution, she is liable to be deported.

98. Cabaret dancers are not permitted to engage in other types of employment. The permit is valid for 8 months per calendar year maximum, it being understood that this time-limit covers the total stay in Switzerland, irrespective of other reasons for remaining in the country (stay without gainful employment, accident or illness). Dancers cannot remain for longer than one month in Switzerland if they are not working as a cabaret dancer. This means that they must leave Switzerland at the end of the 8-month period and must spend at least 4 months in another country before re-applying for a cabaret dancer permit in Switzerland.

99. If the dancer comes from an EU country, the eligibility requirements for the permit are different (minimum age: 18 years instead of 20, 3-month, rather than 1-month, stay permitted after the contract of employment has expired in order to find a new job, possibility of changing jobs, right to family reunion if the individual concerned has suitable accommodation).

100. The arrangements described above have been examined by the Interdepartmental Working Group on Trafficking set up by the Federal Justice and Police Department in September 2000 (see above). The Group advised the Federal Council to keep the special status

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<sup>57</sup> Once the residence permit has been issued, the victim will be entitled, under Article 12, paragraph 4 of the Convention, to receive a work permit, vocational training and education.

<sup>58</sup> Switzerland should not have any difficulty in signing and ratifying the said convention, particularly as the Swiss authorities have assured me that both the existing law (thanks to an ODM circular dated 25 August 2004) and the draft version of the new Aliens Act meet the requirements of the Convention with regard to migration.

enjoyed by cabaret dancers, arguing that to abolish it would effectively drive the women underground, where they could not be monitored. The Federal Council has taken up this recommendation.

101. The publication of a leaflet for holders of the work permit for cabaret dancers, informing them in detail of their status, rights and obligations is in my view a positive move *per se*. It is, however, important to ensure that the status of cabaret dancer is not, as has been suggested to me, merely a front for prostitution, using women supplied by traffickers. It is precisely in order to prevent these activities from being carried on illegally that the cabaret dancer status has been maintained. The Swiss authorities can thus take steps to ensure that the dancers' activities, which are entirely legal, do not infringe the right to human dignity, Swiss law and the professional rules and regulations. I would therefore urge the Swiss authorities to conduct thorough, routine inspections of establishments where cabaret dancers operate. This would help to detect any instances of forced prostitution or trafficking, in which case the authorities should offer the victims adequate protection and institute the necessary investigations and criminal proceedings against those responsible for the illegal activities, be they employers, pimps or traffickers.

102. My attention has also been drawn to the fact that the insurance arrangements for cabaret dancers place them at a disadvantage in that they are obliged to contribute to unemployment insurance, invalidity and old age pension schemes even though their status prevents them from claiming the relevant benefits when the time comes<sup>59</sup>.

### **III. THE SITUATION AS REGARDS VICTIMS OF DOMESTIC ABUSE**

103. I was pleased to note the major efforts that have been made in Switzerland over the past few years to prevent and punish violence between partners and violence committed within the family. Under an amendment to the Criminal Code introduced on 1<sup>st</sup> April 2004, for example, sexual coercion and rape are now classed as an offence subject to automatic prosecution, as too are physical injury, repeated assault and threats made between spouses or between homosexual or heterosexual partners. This reform will undoubtedly have a deterrent effect and the fact that in future, such offences are to be prosecuted automatically will come as a relief to the victims, who are often at serious risk from the abusive partner. I also welcome the decision in some cantons to systematically evict perpetrators of domestic violence from the family home, an arrangement that, under a parliamentary initiative, could be incorporated in the Swiss Civil Code<sup>60</sup>. Although standards of police training vary from canton to canton, it would appear that

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<sup>59</sup> Thus, if a dancer loses her job, she will be entitled to unemployment benefit only if she has worked in Switzerland and paid contributions for at least 12 months in the previous two years. Because of the eligibility requirements for permit L, the dancer will be unable to meet this condition. If she becomes incapacitated during her stay in Switzerland, she will not necessarily be entitled to invalidity benefit, even if she has paid contributions because in order to qualify, she must have contributed for one year and be resident in Switzerland. As regards old-age and invalidity pension (AVS), she will not be able to claim that either because if she leaves Switzerland to return to her country of origin when her contract ends, she will not be resident in Switzerland at the time of retiring and will therefore not be entitled to an old-age pension.

<sup>60</sup> Initiative by Ruth Gaby Vermot-Mangold (Socialist Party, Bern) to introduce a new rule on protection against violence, to be included in Article 28 of the Civil Code.



serious efforts have been made in this area pretty much everywhere in Switzerland. As well as the commendable action taken by the authorities, it is also important to recognise the tremendous work done by associations and foundations, such as those which I visited in Lugano and Lausanne.

104. The case of non-EU nationals once again poses problems when it comes to combating domestic abuse. The reason lies in two statutory provisions which have adverse effects on the individuals concerned. Both provisions have to do with the conditions governing the issue and withdrawal of residence permit B. This permit, which is valid for one year, is issued to persons who marry a Swiss national or an EU national living in Switzerland. Among other things, it entitles them to freely seek employment and to bring to Switzerland any children under the age of 18 who were born out of wedlock, or who are the children of a previous marriage. In an effort to combat marriages of convenience (marriage solely for the purpose of obtaining a Swiss residence permit), permit B is withdrawn if the marriage lasts less than five years, no matter what the reasons for the divorce.

105. Common sense, which is unfortunately borne out by comments from those working the field, suggests that this rule leaves foreign victims terribly vulnerable to abusive Swiss partners, because if they end the relationship they must leave the country as well. In practice, the situation is even worse, because merely by applying for social assistance – such as refuge in a centre for battered women, for example – permit B holders are liable to have their permits withdrawn. This state of affairs has long been explicitly condemned by organisations and professionals working in the field. I therefore strongly urge the Swiss authorities to swiftly introduce changes to existing law and practice in order to prevent victims of domestic violence from being deprived of their residence permits and so free them from the clutches of abusive spouses.

106. The Swiss authorities have assured me that residence permits can be extended even after the marriage has ended in order to avoid cases of unduly harsh treatment and that the relevant bodies have a wide measure of discretion in making their decisions, under the statutes and treaties with foreign countries (Art. 4 LSEE). Consideration, it would seem, is given to the following factors: length of stay, personal ties with Switzerland (especially if there are children), occupational status, economic situation and state of the employment market, personal conduct, degree of integration. Consideration is apparently also given to the circumstances that led to the breakdown of the marriage or partnership. If it appears from this examination that the authorities cannot reasonably insist that the person who came to Switzerland for family reunion purposes remain in the relationship, not least because of the ill-treatment they have suffered, due account will be taken of this fact when making the decision. The Swiss authorities agree, however, that the cantonal authorities normally apply these rules, which can prevent spouses from being deprived of their residence permits, only to a very limited extent. This state of affairs has long been condemned by associations and professionals as well as by members of Parliament. In this context, the Goll parliamentary initiative (96.461) on the specific rights granted to migrants drew my attention. It seeks to amend the federal laws

on the acquisition and loss of Swiss nationality and on the residence and settlement of aliens. It is proposed that women migrants be given an independent right of residence and right to work, by granting them this right in person, irrespective of their marital status. I welcome this move and wish it every success.

#### **IV. RACISM AND XENOPHOBIA**

##### **A. Public attitudes**

107. It is not my intention here to list examples of shameful racist or xenophobic acts committed by private citizens against foreigners, especially foreigners with dark skin. The fact is that Swiss newspapers, the reports published by Swiss and other NGOs and the information received from the Council of Europe's European Commission against Racism and Intolerance (ECRI) and other international authorities all point to a worrying level of xenophobia, intolerance and racism among the Swiss population. The ways in which these attitudes are expressed range from verbal abuse to physical attacks on foreigners, including children.

108. During my visit and from interviews with the heads of the agencies responsible for combating these problems, I sensed just how seriously the Swiss are taking the situation and how hard they are trying to stem the rising tide of racism. Unfortunately, their voices often go unheard, as in the case of the warnings issued by the Federal Commission against Racism (CRF) and the Federal Commission for Refugees concerning the impact of NEM decisions which, in their view, increase racism by marginalising the foreign nationals concerned.

##### **B. Certain political campaigns**

109. If we are to avoid an upsurge in discrimination or out-and-out racism in a particular country, it is up to the authorities, politicians and their parties to set an example. The Federal Commission against Racism (CFR) and other sources have drawn my attention to a poster used by one of the main Swiss parties in its campaign for the referendum held on 26 September 2004 on proposals to relax the naturalisation rules. The poster shows different-coloured hands grabbing Swiss passports. Quite apart from the question of taste, I must caution against propaganda of this kind, which instead of contributing to the democratic debate about a particular political project, merely fuels xenophobic sentiment.

110. The same applies, albeit to a lesser extent, to citizens' associations across the political spectrum. An advertisement published before my visit by the "Committee against mass naturalisation" in Zurich canton claimed that Muslims posed a threat to Switzerland because of their high birth rate. The supposedly objective nature of this advertisement should not disguise the fact that an entire section of the population, whose only common feature is that they belong to the same religious community, have had their image publicly tarnished.

##### **C. Allegations against the police**

111. Another complaint – which I hear increasingly frequently in Council of Europe member states – concerns unacceptable behaviour on the part of the police against persons of foreign appearance. In the case of Switzerland, the most common complaint about police behaviour

concerns the practice of tossing a person's papers at their feet rather than handing them back; when challenged about their behaviour, the officers involved claim the papers simply slipped out of their hands. There have also, however, been allegations of verbal and even physical abuse, involving patently wrongful or disproportionate use of force<sup>61</sup>. Such behaviour, which is directed mainly against dark-skinned people, has been reported to me not only by the victims but also by Swiss "natives" – of all ages, backgrounds and political beliefs – who said they were deeply shocked by what they had seen. It appears, too, that no firm action is taken when complaints of racism are made against the police. According to NGOs, none of the 134 complaints filed in 2004 in the canton of Geneva concerning racist abuse was properly investigated and all of the files have been closed<sup>62</sup>.

112. It is true that when dealing with cases involving foreign nationals, the police often come up against the problem of "culture shock". Likewise, the behaviour of certain foreigners towards the police may be quite normal in their country of origin, but entirely inappropriate for Swiss officials who are liable to "misinterpret" it, with regrettable consequences. I was very pleased, therefore, to hear about initiatives such as that described to me in Bellinzona and which involves organising regular contact meetings between police officers and the "heads" of immigrant groups. Explaining each other's "codes", their responsibilities, fears and expectations makes for a better understanding of situations involving the police and foreigners and helps prevent people from overreacting in a way that everyone will later regret.

113. As well as schemes of this kind, I believe there is also an urgent need to review the procedures available to individuals who suffer or witness racist violence on the part of police officers (or other officials), so that they can file a complaint quickly without risk of reprisals. This complaints route would be in addition to the option of going to court, which victims and witnesses are often loath to do because they are afraid or because of the difficulty of proving allegations against sworn public servants. The kind of arrangements that I have in mind are non-judicial ones, involving persons who are independent from the authorities and who enjoy considerable moral authority among the public at large as well as the authorities. One option would be to have ombudspersons, whose job would thus be to notify the competent authorities of any abuse which they might find to have been committed, based on the information received.

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<sup>61</sup> I was shocked to hear reports of cantonal police taking individuals who are the subject of NEM decisions into the woods, beating them and leaving them there. Obviously I have no way of verifying these claims but they are too numerous for me not to take notice.

<sup>62</sup> In one instance, it was the court which forced the prosecution service to reopen the case after finding that the complaint, even though it was supported by a medical certificate, had been dismissed without any investigatory measures being taken. The Geneva cantonal authorities have provided the following statistics for 2004: in total, 52 criminal complaints were filed against the police; of these, 17 cases were closed with no further action being taken, 33 are still pending, one complaint was withdrawn and one resulted in a conviction. These 52 complaints concern all kinds of allegations against the police, and not just complaints about racial discrimination. I note that this information only partially refutes the NGO reports, since there is no indication of how the complaints about racist acts were dealt with. In these circumstances, I am pleased to see that in Geneva canton there is a person chosen by the State Council from outside the administration, who is responsible for examining reports of ill-treatment. Where appropriate, this person institutes preliminary administrative inquiries and gives his opinion to the head of department (cf. Section 38 of the Geneva Police Act – Procedure in case of allegations of ill-treatment).

## V. INDEPENDENCE OF THE JUDICIARY

### A. Status of the Attorney General of the Confederation

114. The Attorney General of the Confederation heads the Swiss prosecution service, a federal public agency that both investigates and prosecutes crimes and offences committed against the federal government or the community and cases involving organised or economic crime of an international or supra-cantonal nature<sup>63</sup>. In this last instance, the jurisdiction of the Attorney General is subsidiary to that of the cantons. The Attorney General's Office is further required to comment on any draft conventions, treaties, laws and ordinances of the Confederation which contain criminal law or criminal procedure law provisions, to conduct the procedure for obtaining the necessary approval to institute proceedings against Confederation officials accused of offences in connection with their work or their official position<sup>64</sup> and to respond to any parliamentary questions pertaining to its sphere of activity.

115. In its criminal prosecution work, the Attorney General's Office is assisted mainly by the Federal Criminal Police, attached to the Federal Office of Police (FEDPOL) and, to a lesser extent, by the cantonal police. In most cases, responsibility for conducting enquiries into and prosecuting cases is delegated to the cantonal criminal authorities, either at the start of the investigation or afterwards, with the Attorney General's Office retaining the right to appeal against any decisions taken at cantonal level. Only in cases which are of particular importance in terms of the alleged offences or in terms of policy are criminal proceedings conducted entirely at federal level – i.e. criminal police investigation, preliminary judicial inquiries and prosecution by the Attorney General before the Federal Criminal Court. Indeed, back in 1999, as part of an “efficiency measure”, the Swiss parliament transferred organised crime, money laundering and corruption cases from cantonal to federal jurisdiction. In the case of “conventional” economic crime (obtaining by false pretences, document fraud, etc), the principle of subsidiarity comes into play and the Confederation may conduct the investigation only if no canton has been assigned the case or if a canton asks the Confederation to take over the case.

116. If I seem to be dwelling in some detail on the powers and responsibilities of the Attorney General of the Swiss Confederation, it is because I wish to stress how important it is that these be exercised without interference from the political authorities. During my visit, I was told that proposals had been made, which sought to reduce the independence of the Attorney General,

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<sup>63</sup> Among the offences which come under federal jurisdiction are offences committed on board an aircraft, offences committed by means of explosives, electoral fraud, offences against public authority and against the administration of justice.

<sup>64</sup> In order to institute criminal proceedings against a government official (offences committed by federal employees in the performance of their duties), authorisation is needed. This authorisation may be refused if the official's behaviour is clearly not punishable or if the offence is a minor one, requiring merely disciplinary action. The purpose of this prior authorisation is to protect federal employees from wrongful accusations. Depending on the circumstances, the Attorney General's Office will either decide the case itself or prepare the decision of the Federal Justice and Police Department (DFJP).

giving the Federal Justice and Police Department (DFJP) more control over the office. This heightened scrutiny would apply not only to the Attorney General's budget, but also to the appointment of his prosecutors and would go so far as to include an element of "technical supervision" of his work.

117. Certainly, a comparative look at the status of prosecutors in Europe offers little evidence that prosecutorial independence is the norm, with many systems continuing to maintain more or less close ties between the prosecution service and the executive. The fact is, however, that when it comes to protecting individuals in their dealings with the administration, it is best if prosecutors maintain a certain distance from the latter. It will be recalled here that under Recommendation Rec (2000) 19 of the Committee of Ministers to member States on the role of prosecution in the criminal justice system, States are required to take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference (cf. Article 11). Article 16 of the same Recommendation further states that public prosecutors should be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law. Under Article 13, paragraph f of this instrument, individual instructions not to prosecute should, in principle, be prohibited. This doubtless explains why there is a growing trend in Council of Europe member States towards a more independent prosecution service, contrary to what seems to be happening in Switzerland at present.

## **B. The Federal Court**

118. In Switzerland, the function of Supreme Court is performed by the Federal Court in Lausanne and the Federal Insurance Court in Lucerne. In 2004, the Federal Criminal Court was set up in Bellinzona.

119. Federal judges are elected by the Federal Assembly on the basis of linguistic, regional and political criteria. Their term of office is six years and is renewable. In theory, the office of federal judge is open to all Swiss citizens. Legal training is not essential but in practice, it is the norm. Federal judges cannot be removed from office, the only avenue open to members of parliament is not to re-elect them. Candidates for the office of federal judge are, in practice, nominated by a political party<sup>65</sup>, but once in office, they are required to be completely independent and neutral. The breakdown of judges along party lines has traditionally reflected, to a greater or lesser extent, the breakdown of parties in the Federal Parliament. Given the small number of judges in the Federal Court, only the larger parties are represented there among the ordinary judges.

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<sup>65</sup> Since December 2002 (Parliament Act of 13 December 2002, RS 171.110, Article 40a), it has been for a parliamentary committee (the Judicial Committee) to invite applications for vacant judges' posts through a public competition and to present parliament with its proposals for electing federal judges. The candidates are no longer officially nominated by the parties, therefore.

120. One of the functions of the Federal Court is to rule on the conformity of rules and acts adopted by cantonal authorities in relation to higher norms, ie federal law, the Constitution and directly applicable international treaties. It is in this way that any conflicts of rules in the Swiss Confederation are resolved and the Federal Court performs a constitutional role.

121. Such was the background to the ruling of 9 July 2003 on popular votes organised in the municipalities concerning the naturalisation of various applicants for Swiss nationality<sup>66</sup>, in which the Federal Court held that the conflict between the fundamental rights of the applicants (in particular the prohibition of discrimination, the right to be heard and respect for private life) and the political rights of citizens (in particular the right to be fully and accurately informed about the subject of the poll in order to safeguard the freedom to vote) should be settled in favour of the fundamental rights of the applicants. The judges noted that decisions not to grant naturalisation must be duly justified, which was not possible in the case of decisions made through the ballot box.

122. The Federal Court's role as a Constitutional Court is limited, however, by Article 191 of the Swiss Constitution which prohibits it from reviewing (*in abstracto*) the constitutionality of any rules laid down by the federal agencies. This was a conscious decision by the authors of the Constitution to favour the federal popular will over any unconstitutionality of federal rules, an unconstitutionality that might even result in a violation of the fundamental rights of individuals. From this point of view, the legislature clearly has primacy over the judiciary. In the Swiss constitutional system, fundamental rights take precedence over political ones at cantonal and municipal level – in the name of federalism and respect for higher law – but this primacy is reversed at federal level. The Federal Court cannot therefore be called on to assess the validity of a “popular initiative”, which, under the current rules, may be launched only for the purpose of revising the Constitution. Instead, this is a task for Parliament, which must consider whether the unity of form, content and *jus cogens* have been respected.

123. For the past ten years or so, however, the Federal Court has been constructing, in the human rights field, a case-law that draws on international law to examine any decisions based on federal laws which might violate directly applicable international treaties. In choosing to interpret its role in this way, the Federal Court has incurred the wrath of various sections of the political community who point to the danger of “rule by judges” and insist that the popular will and democracy must come first, even if expressing them leads to a violation of human rights.

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<sup>66</sup> Official Collection of Federal Court Judgments, 129 I 217 and 129 I 232. It will be noted that the five members of the 1<sup>st</sup> Public-Law Division of the Federal Court, representing the main political parties, took this decision unanimously. In judgment ATF 129 I 217, the Federal Court set aside the decision of the cantonal government which had dismissed an appeal against a popular vote; under the terms of the Federal Court judgment, it was subsequently for the cantonal government to determine what action should be taken on the applicant's naturalisation procedure. In the other judgment (AFT 129 I 232), the Court dismissed an appeal against a cantonal government decision which declared invalid a municipal popular initiative calling for naturalisation decisions to be made by the electorate through the ballot box.

124. In addition to these political discussions and the aforementioned decisions of the Federal Court, there have been a few other decisions where the Federal Court has recently sought to protect the human rights of foreign nationals, thus bucking a certain trend in public opinion. Examples include a judgment handed down in May 2004, which found that racist remarks made at a gathering of an association were not, strictly speaking, in the private sphere and so came under the definition of public discourse as covered by Article 261 bis of the Criminal Code<sup>67</sup>. This provision was adopted by the Federal Parliament and the people in 1994 to take account of Switzerland's obligation, having ratified the UN Convention on the Elimination of All Forms of Racial Discrimination, to introduce criminal penalties for racist behaviour. At the time of the parliamentary debates leading up to the adoption of the provision, and in the referendum campaign that preceded the popular vote, one political party claimed that the new rule violated freedom of expression, in seeking to sanction speeches made in public places, ie outside the private sphere as constituted by the family and friends. Speaking through one of its MPs and a press release, this same party reacted to the Federal Court's verdict by saying that the court decisions made since 1994 had caused the law to move in a direction that was out of step with the popular will of the day.

125. Since the aforementioned judgments of July 2003, some federal, cantonal and municipal parliamentarians have protested against what they see as unacceptable encroachments on the popular will by federal judges. The judges of the First Division which delivered the two judgments have been threatened with non-re-election. I have also been told that Federal Court judges have been warned that the rules guaranteeing them a pension in the event of non-re-election could be abolished. To my knowledge, such conduct was hitherto unheard of in Swiss political life. It amounts to a defiance of the judiciary that goes beyond respectful dissent and could be seen as an unacceptable attack on the independence of judges, which in turn guarantees impartial treatment of the cases before them, which often have a human rights element.

126. In my opinion, the debate that pits citizens' democratic rights against human rights is an artificial one in that all rights are exercised within the constitutional framework which stipulates how they are to be exercised and to what extent. I must also express my concern over the confrontation that seems to be developing between the highest Swiss judicial authority and leading members of the executive and legislature. It is very rare for the President of the Supreme Court of a Council of Europe member state to openly share such concerns with me. I urge Swiss politicians to respect their country's Supreme Court judges and their decisions, including the ones they do not like. In a law-governed state, it cannot be otherwise.

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<sup>67</sup> Judgment 6S.318/2003 of 27 May 2004, the grounds for which were published in August 2004.

## **VI. LIFE-LONG DETENTION FOR SEX OFFENDERS OR VIOLENT OFFENDERS REGARDED AS DANGEROUS AND BEYOND REHABILITATION**

127. In a referendum held on 8 February 2004, 56.2% of the voters approved the popular initiative calling for “life-long detention for sex offenders or violent offenders regarded as highly dangerous and beyond rehabilitation”, and amendment of the Federal Constitution (new Article 123a) to authorise such detention, with only limited possibilities of appeal. While understanding the legitimate aims of this initiative, the Federal Council had recommended that Parliament reject it, without itself proposing any alternative measure. It made the point that changes in the Criminal Code already under consideration included a series of new measures to protect society against dangerous criminals more effectively.

128. The initiative’s compatibility with the ECHR had been hotly debated in Parliament, where several members had questioned its validity. In fact, all popular initiatives must respect the mandatory rules of international law – of which the main provisions of the ECHR are part – on pain of nullity (Article 139, para. 3 of the Constitution). Among other things, the ECHR guarantees that the lawfulness of any measure which deprives a person of liberty may be reviewed at any time (Article 5, para. 4). To get around this “obstacle”, one federal councillor had publicly suggested that Switzerland denounce the ECHR, and then ratify it afresh, adding a reservation. Finally, Parliament also decided to reject the initiative.

129. Following the referendum, which overrode the decisions of the Federal Council and of Parliament, the Federal Justice and Police Department set up a working party to prepare for implementation of the new constitutional provision<sup>68</sup>. This working party comprised representatives of the prosecution service, the service responsible for execution of sentences and other measures, legal experts and forensic psychiatrists, as well as representatives of the committee behind the initiative. Its draft amended version of the general section of the Criminal Code provides for a several-stage procedure, which excludes automatic review, as called for in the initiative, but also attempts to respect the principles of the ECHR. I discussed details of the draft with the Director of the Federal Justice Department, who chairs the working party, and several of its members.

130. I was told that the decision to detain an offender for life, after serving a criminal sentence, would be taken by the judge during the trial, on the basis of an opinion given by a committee of psychiatrists and other specialists. It would be based less on the offence committed than on the offender’s presumed future conduct. It would not be reviewed automatically at regular intervals, but the detainee would be entitled to refer the matter to a specialised federal commission, which would then have to decide whether “new scientific knowledge” was available, making it possible to establish that the offender could be rehabilitated. If treatment

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<sup>68</sup> The Swiss criminal courts already have authority to apply the relevant article of the Constitution (Article 123a), if they wish to do so, regardless of any implementing legislation. They are not therefore bound by the Government’s declarations that this article must be implemented via specific legislation. But those declarations are clearly one of the elements which must be considered in interpreting the provision.



showed that the danger presented by the offender had decreased substantially, and might decrease further, the court would annul life-long detention and order ordinary detention or a therapeutic measure. The offender would then be launched on a process which might ultimately lead to his/her release.

131. Although life-long detention is not presented as a criminal sanction in the strict sense, I still have doubts concerning the true nature of this measure, which will - after all - be imposed or annulled by a criminal court judge, in criminal proceedings brought against a person accused of a crime or offence. If the measure's punitive character is confirmed, I shall also have doubts concerning its compatibility with the ECHR. It must be remembered that the Court does not rule out the possibility that sentencing a person to life-long detention, with no prospect of release, may raise problems under Article 3 of the ECHR<sup>69</sup>. Following the same approach, the revised European Convention on the Suppression of Terrorism<sup>70</sup> provided, in Article 5, para. 3, that a state might refuse to extradite a person who faced the risk of being imprisoned for life, without possibility of remission, in the requesting state.

132. Going further than the original initiative, the draft provides that life-long detention may also be imposed, after the trial, on a person who has already been judged. This would apply when new facts or evidence showed that the conditions for life-long detention had existed, unknown to the court, at the time when the judgment was given. It would ensure that offenders found to be dangerous only while serving their sentences would not be released. The question here is whether the adoption of a life-long detention measure, while a convicted person is already serving sentence, does not amount to imposition of a second sentence for offences covered by a final judgment, thus violating the *ne bis in idem* principle of Article 4 of Protocol No. 7 to the ECHR<sup>71</sup>. I personally fear that the answer may well be affirmative.

133. Having said that, I shall offer no verdict here as to whether the Criminal Code provisions which Switzerland is preparing to adopt are compatible with the ECHR. That is a general, abstract question, which lies beyond the scope of this report, and will have to be decided in each case by the Swiss Courts, particularly the Federal Court and, at a second stage, by the European Court of Human Rights.

134. I should nonetheless like to make one comment which runs counter to the views of some of the authors of the amended Criminal Code, who believe that only a very small fraction of convicted persons would be detained for life in practice. The ones I have spoken to suggest that the psychiatrists and other specialists concerned would be slow to accept the heavy responsibility of deciding, during a trial, that a person should be detained for life, in addition to

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<sup>69</sup> European Court of Human Rights, final decision on the admissibility of application No. 71555/01, *Einhorn v. France*, of 16 October 2001, para. 27. See also European Court of Human Rights, decision of 14 December 2000 on application No. 44190/98, in *Nivette v. France*. The judgment which the Court will be giving in *Leger v. France* (application No. 19324/02), on which the hearing took place on 26 April 2005, may well clarify the case-law in this area.

<sup>70</sup> ETS No. 90, as amended by its Protocol, ETS No. 190.

<sup>71</sup> ETS No. 117, which came into force for Switzerland on 1 November 1995.

servicing a criminal sentence. I do not agree. In fact, unlike them, I believe that those specialists would find it hard to decide otherwise in a trial which would inevitably inflame public indignation. Public reactions also seem likely to influence any subsequent debate on maintaining life-long detention.

135. This is why - even supposing that life-long detention for certain crimes or offences committed after the coming into force of the new Swiss Criminal Code may be compatible with the ECHR - I think it essential to provide for appeal against any decision to impose or maintain such a measure. If life-long detention is – as the working party members I spoke to assured me – a non-criminal measure, then it will be lawful only if it is compatible with Article 5, para. 1 e. of the ECHR. This being so, it seems to me that Article 5, para. 4 of the ECHR makes it necessary to provide for the possibility of appealing against a decision to maintain life-long detention.

## **VII. THE SITUATION IN PLACES OF DETENTION INSPECTED**

136. Having visited the cantonal police prison in Zurich only once and very briefly, I prefer to say nothing about that facility in this report.

### **A. The Champ-Dollon Prison (State of Geneva)**

137. The Governor and staff of this prison kindly agreed to admit us at a late hour and provide us with some general information, before allowing us to inspect all the areas we asked to see, and talk to the inmates who were willing to talk to us (my thanks to them here for their help). By chance, the prison had broken its own overcrowding record the day before we arrived, with occupation running at 150% of capacity, and cells being shared by two, and sometimes even three, prisoners. This, indeed, is the prison's main problem and it leads to others - for both staff and inmates.

138. During my visit, I noted a number of things which seemed hard to reconcile with respect for the fundamental rights of prisoners (awaiting trial or sentenced), as derived from the case-law of the European Court of Human Rights and the standards laid down by the Council of Europe (Recommendations of the Committee of Ministers and the European Committee for the Prevention of Torture – CPT). For one thing, extreme overcrowding creates a risk that the space allowed prisoners may no longer suffice to ensure that their right to privacy, guaranteed by Article 8 of the ECHR, is respected. Not to mention other serious problems, such as the difficulty of arranging visits or meals which are always cold on arrival – a complaint I heard from several prisoners. I also share the concern of the governor and his staff that limited space makes it impossible to separate prisoners with psychiatric problems – some of them serious - from the others. Obviously, when prisoners in normal mental health have to share a small space with others who are mentally ill, violence, aggression and damage to their physical and mental health become very serious risks. Finally, under-age inmates in Champ-Dollon (who are separated from the adults) lack proper educational support, and this may violate their right

to education. I would urge the authorities to lose no time in completing current building and renovation projects, and judges to take account of the situation in prisons when they pass sentence. As for the prison staff I talked to, I would like to thank them for their frankness, their awareness of the problems and their valiant efforts to cope with a situation which is hardly manageable.

#### **B. The “La Stampa” Prison (Canton of Ticino)**

139. The “La Stampa” prison near Lugano struck us as being a sound facility, with a well-equipped infirmary, workshops for prisoners and, above all, no overcrowding. However, I was surprised and sorry to find that conditions for under-age remand prisoners were markedly inferior to those for adults – in terms of both premises and staff. I find it particularly hard to understand why these young people are supervised by police officers and not prison warders, or indeed educators. I recommend that this anomalous situation, which reflects a serious failure to grasp the right of children to protection, be rectified without delay. I was assured that these arrangements for detention on remand at “La Stampa” were provisional and transitional, and would be dropped for good when the new prison was opened in the first quarter of 2006. I am pleased to hear this, but cannot see why the present situation concerning supervision of minors should last until then.

#### **C. The cells in the Central Police Station at Bellinzona**

140. Having been told that a prisoner had committed suicide in one of the cells at the Central Police Station in Bellinzona shortly before we arrived, I asked to see the premises, including the cell where the tragedy occurred. There is no need to detail my impressions, but I was relieved to hear that an alternative facility was being built, and that the cells I saw could then be closed forthwith. This was the right decision, and I urge the authorities to lose no time in implementing it.

### **VIII. THE SITUATION OF TRAVELLERS**

141. Travellers in Switzerland are divided into two ethnic groups - the Yenish (the majority) and the Manouche/Sinti. About 5,000 are still on the roads part or all of the year, and another 30,000 are sedentary. The two groups have different problems. According to their representatives, the travellers’ chief problems are the following.

142. Travellers are not recognised as an ethnic group in Swiss law, which lacks the concept of collective rights, and so does not recognise – let alone protect – specific lifestyles, such as that of travellers. The travellers emphasise that this creates numerous problems for them in everyday life. I would urge the authorities to take note of some of those problems, and would ask them, not only to ensure that the anti-discrimination laws are respected, but also to apply the ordinary laws to travellers in a spirit of tolerance and understanding.

143. Travelling by caravan is permitted in Switzerland, but there are no general parking rights - which is why one of the main problems is a lack of short-term (transit) and longer-term (winter) camp-sites. Some sites have been established, but these are not sufficient. The Regional Planning Act, which took effect in 1980, seems to have taken no account of the nomadic minority's lifestyle in regulating land use.

144. Nor is it easy for travellers to purchase sites for their own use, as a case at Céligny in the Canton of Geneva has shown. A traveller family bought an agricultural site there, intending to live on it in caravans and other types of mobile home. This use of the site was not covered by the Regional Planning Act, and the State of Geneva refused to allow it. The travellers had to apply to the highest court in the land, the Federal Court, for recognition of the principle that the regional planning authorities must allow for the needs of travellers in planning at cantonal, and indeed intercantonal level, and in land-use plans. However, the Federal Court upheld the Administrative Court's decision that the travellers' building project in this case (a "new Gypsy church" made of containers and a wooden chalet) was too extensive to warrant the granting of a special permit on land not approved for building purposes. The situation in Céligny itself remains undecided. The family have been allowed to remain temporarily on the site - which actually belongs to them - with their caravans.

145. Some landlords refuse to rent accommodation to travellers who want to spend the winter, or a certain period of time, indoors. There have been several such cases in Switzerland. Here again, I would like to point out that there are no anti-discrimination laws applying to contractual relations.

## **IX. INSTITUTIONS FOR THE DEFENCE OF HUMAN RIGHTS**

146. The Committee of Ministers of the Council of Europe has expressly given me the task of promoting "human rights structures" in the member states. This term covers national human rights institutions responsible for ensuring that national laws and practices are compatible with national and international human rights standards, and also ombudspersons and non-judicial institutions working to protect the rights of individuals<sup>72</sup>. My own experience has also convinced me deeply of the usefulness of a cohesive network of national, regional and indeed local ombudspersons.

### **A. Cantonal and local ombudspersons**

147. During my visit, I met Switzerland's eight regional and local ombudspersons, seven of them in German-speaking Switzerland (Canton of Basel City, Canton of Basel Region, City of Zurich, Canton of Zurich, City of Bern, City of Winterthur, Canton of Zug) and one in French-speaking Switzerland (Canton of Vaud). Together, they constitute the Swiss Association of

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<sup>72</sup> For my terms of reference, see: Council of Europe, Committee of Ministers, Resolution (99) 50, Article 3 c. For the position of the Council of Europe, and also the European Union, on the usefulness of ombudsmen, see: National, regional and local ombudspersons and independent national institutions for the promotion and protection of human rights: non-judicial institutions for the protection of human rights in Council of Europe member states. Collection of texts. CommDH/OMB(2005)3, Office of the Commissioner for Human Rights, 29 March 2005.

Parliamentary Ombudsmen. Their powers are varied, and their financial and human resources mostly limited. We talked about their experience, and they gave me their views on respect for human rights in the areas they serve. Given Switzerland's confederal structure, regional and local ombudsmen can play a very useful part in protecting human rights - provided they are given adequate powers and resources. At all events, and judging by what I have seen of ombudspersons in other countries, I very much hope that Switzerland will appoint more regional and local ombudspersons, who - I am profoundly convinced - play a valuable non-judicial role in protecting fundamental rights, alongside the courts<sup>73</sup>.

## **B. The question of a federal ombudsperson**

148. I looked closely at the question of appointing a federal ombudsperson. Since the early 1970s, there have been several initiatives at federal level for the establishment of a Federal Ombudsperson's Office. The Federal Council again considered the matter in autumn 2002, but concluded that the counter-arguments were too strong. It accordingly decided not to legislate, but a sub-committee of the National Council's Committee on Political Institutions (CIP-CN) adopted a preliminary federal bill on the Federal Ombudsperson's Office in July 2003. Under this bill, the ombudsperson was to be an independent and nationally known figure. He/she was to be assisted by a deputy and a permanent secretariat, the whole forming the Federal Ombudsman's Office. He/she was to advise individuals and corporations in their dealings with the federal authorities, and mediate in disputes. He/she was to forestall costly first-instance and appeal proceedings, and help to spot particularly thorny situations well in advance, and defuse them before they degenerated into conflicts. On the Committee's instructions, the Federal Justice and Police Department put the bill up for consultation until the end of November 2003.

149. After the consultation process, in February 2004, the CIP-CN decided to pass no federal legislation on the Federal Ombudsperson's Office, for the following reasons: consultation had not been sufficiently conclusive, and the Federation's finances were too precarious (establishing the office would have meant creating new posts in the federal administration, at additional cost, which would have been hard to justify); disputes between individuals and the authorities were commoner at local and cantonal than at federal level, and setting up an ombudsperson's office would probably do little to reduce the number of administrative proceedings; the projected law on transparency would make the authorities' activities more transparent; on the strength of their office, and thanks to their often close contacts with the public, the country's 246 federal parliamentarians already acted as ombudspersons.

150. A minority within the Committee thought that a Federal Ombudsperson's Office had been needed for a long time, and would usefully supplement the existing federal institutions. They were convinced that it could do much to eliminate bureaucratic hurdles, close the gap between the authorities and public, and forestall costly proceedings.

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<sup>73</sup> For the position of regional ombudsmen in Europe themselves, see CommDH(2004)14, Conclusions of the first Round Table of European Regional Ombudsmen, Barcelona, 2-3 July 2004, and CommDH(2004)15, Conclusions of the seminar "Human Rights and Regional and Local Administration", Barcelona, 5-6 July 2004.

151. I prefer not to get involved in this dense and complex national debate. It turns on technical issues and questions of financial feasibility with which I am not sufficiently conversant – and which are a matter for the Swiss authorities and people to decide. I would simply venture to recall the general position of the Council of Europe (see above), and that of the European National Ombudspersons at their very recent meeting in Copenhagen, as well as my own<sup>74</sup>. I would also like to point out that, at present, 37 of the Council of Europe's 46 member states have national ombudspersons.

### **C. Establishment of an independent national institution to protect and promote human rights**

152. Since 1997, the Council of Europe has been urging its member states to establish independent national institutions to promote and protect human rights<sup>75</sup>. This recommendation was the European transposition of a UN General Assembly Resolution of 1993 – the so-called “Paris Principles”<sup>76</sup> – covering the membership and tasks of such an institution, as well as guarantees to protect its independence and pluralism. The tasks included:

- examining existing laws and administrative texts, as well as bills and proposed legislation, and making recommendations to ensure that national texts were consistent with basic human rights principles; when necessary, it was to recommend the adoption of new laws, the adjustment of existing ones, and the adoption or amendment of administrative measures;
- drawing the government's attention to human rights violations committed anywhere in the country, proposing ways of putting a stop to them and, when necessary, issuing opinions on the government's attitudes and reactions.

153. The institution is an advisory body, and sends government, parliament and other authorities – either at their request or using its power of independent referral – opinions, recommendations, proposals or reports, which it may also make public.

154. In addition to promoting the appointment of national, regional and local ombudspersons, the Committee of Ministers of the Council of Europe has given me the task of promoting the establishment of institutions like this in all the countries of Europe. Switzerland has no such instrument, and I recommend that it seriously consider acquiring one. An independent pluralist institution, reflecting all aspects of the nation's life - political, linguistic, philosophical, religious and association-based – would command respect, and its voice would certainly help to channel and calm the current heated debate concerning the treatment of foreigners.

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<sup>74</sup> 9<sup>th</sup> Round Table of European National Ombudspersons, jointly organised by the Commissioner for Human Rights of the Council of Europe and the Danish ombudsperson, Copenhagen, 31 March – 1 April 2005, Conclusions, CommDH/OMB(2005)4, Office of the Commissioner for Human Rights, Strasbourg, 12 April 2005.

<sup>75</sup> Recommendation (97) 14 of the Committee of Ministers of the Council of Europe.

<sup>76</sup> Resolution 48/134 of the General Assembly of the United Nations.

## FINAL COMMENTS AND RECOMMENDATIONS

155. Switzerland undoubtedly guarantees a very high level of human rights protection for native Swiss and also people who have chosen to live in the country, whether or not they have acquired Swiss nationality and residential status in a canton.

156. The shadows on the picture concern the “others” – foreign nationals who, entering legally or illegally, come to Switzerland for essentially humanitarian reasons - whose right to live there has not yet been determined or has been denied. The vast majority of the comments made by the Commissioner for Human Rights concern, directly or indirectly, respect for the human rights of these persons, whose proper reception at all times is at least partly responsible for the reputation Switzerland has long enjoyed in this area. To support the Swiss authorities’ efforts to respect the rules on human rights protection which their country has accepted, and in pursuance of his terms of reference (Article 3, e of Resolution (99) 50), the Commissioner for Human Rights recommends that the federal, cantonal and local authorities:

### Treatment of asylum-seekers

- Asylum procedure at airports: make sure there are no cases of *refoulement* or return on arrival; stop using private services to control or interview passengers; issue no non-admission (“INAD”) order unless a witness has confirmed that the person concerned does not wish to apply for asylum; extend the 24-hour time limit for applying for suspension of the decision to deport following rejection of an asylum application, and continue to involve the UNHCR in asylum procedure at airports, unless that procedure is modified to include systematic assistance and adequate time limits;
- Out of hand rejection (“NEM”) and its consequences, present situation: stop rejecting applications out of hand when people are unable to produce identity papers within 48 hours of being asked to do so, and take all decisions on entitlement to reside in Switzerland on the basis of a series of cumulative indications, having first conducted a personal interview with the applicant, at which he/she has legal and linguistic assistance; extend the five-day period currently allowed for appealing against a decision to reject an application out of hand, and provide the applicant, from the time that period starts, with legal assistance and an interpreter, if needed; abolish the possibility of demanding procedural costs; give people whose applications have been rejected out of hand reasonable time to leave the country (with the Swiss authorities’ assistance and possibly positive incentives) before treating them as illegally resident, with all the effects which that entails; restore entitlement to social assistance for people whose applications are rejected out of hand;

- Out of hand rejection (“NEM”) and its consequences, measures under discussion: bring humanitarian protection, and also the concept of persecution by non-state protagonists, into the laws on asylum; not give asylum-seekers whose applications have been considered and rejected the status currently assigned to those whose applications are rejected out of hand; reduce, instead of increasing, the maximum period of detention prior to deportation;
- Deportation of illegal immigrants resident in Switzerland for a long time: in decisions giving reasons and open to appeal before a court, determine the situation of long-term illegal residents, taking due account, among other things, of their individual and family situations, and of any efforts they have made to find work and integrate;
- Means employed by the police when deporting aliens: forbid the use of stun guns during deportation operations; do not employ private firms on such operations; suggest that relevant NGOs accompany police officers effecting deportations, particularly collective deportations by charter flight; avoid using children to trace unlawfully resident aliens; provide continued training and supervision to ensure that police officers responsible for deportation measures always respect the rights and dignity of aliens;

### **Trafficking in human beings**

- ratify and implement the Council of Europe’s Convention on Trafficking in Human Beings, ensuring that the victims of trafficking benefit from all the protective measures advocated in that text, issuing them with residence permits for humanitarian reasons and also to allow them to co-operate with the police, and making it possible to waive punishment for those forced to take part in unlawful activities; supervise the real working and living conditions of “cabaret dancers” more closely;

### **Domestic violence**

- abolish the rule that an alien who leaves the home of a violent Swiss spouse, or turns to the social services for help, forfeits the B permit;

### **Racism and xenophobia**

- sign and ratify the relevant international instruments; adopt laws to prohibit and punish racial discrimination in the private sphere; give the authorities responsible for combating xenophobia and racism adequate resources; establish an effective system to monitor and punish racist incidents; repress racist and offensive publicity campaigns; teach police to respect foreigners, and set up independent and effective bodies, which can be asked, without fear of reprisal, to investigate allegations of maltreatment and misconduct by police officers;



### **Independence of the judiciary**

- maintain the independence of the Attorney General of the Confederation; scrupulously respect the authority and independence of the Federal Court and its judges;

### **Life-long detention of sex offenders or violent offenders regarded as dangerous and beyond rehabilitation**

- scrutinise cases in which life-long detention, as provided for in the new Criminal Code, is ordered, and examine judicial practice - particularly that of the Federal Court and the European Court of Human Rights – to establish whether such detention is compatible with the ECHR and its Protocols; provide for judicial appeal against decisions to maintain life-long detention;

### **The situation in certain places of detention**

- take all appropriate measures, including the use of alternative sanctions, to reduce the population of the Champ-Delon prison to an acceptable level very rapidly; immediately entrust the supervision of under-age prisoners in the “La Stampa” prison to properly trained warders and educators, and improve the premises in which these young people are held; stop using the cells in the Central Police Station at Bellinzona for detention purposes;

### **Travellers**

- allow, in regional planning programmes and decisions, for the special needs and traditions of travellers, and attempt to provide them with more long-term and short-term camp-sites in all parts of Switzerland;

### **Institutions for the defence of human rights**

- promote the appointment of ombudspersons in cantons (and towns) and give them the powers and resources they need, among other things, to assist prison inmates and asylum-seekers (both those whose applications are rejected out of hand, and those whose applications are processed and then rejected); reconsider favourably, within a reasonable time, the appointment of a federal ombudsperson; set up an independent national institution for the protection and promotion of human rights.



## APPENDIX TO THE REPORT

### **COMMENTS AND OBSERVATIONS BY THE SWISS AUTHORITIES ON THE REPORT OF THE COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS FOLLOWING HIS VISIT TO SWITZERLAND**

*[in French only]*

*The Commissioner for Human Rights has decided to append to his report the following comments submitted by the government of Switzerland when the report was presented to the Committee of Ministers of the Council of Europe on 8 June 2005.*

*Le gouvernement suisse remercie le Commissaire de son rapport et pour les expressions de gratitude aux différentes autorités suisses rencontrées au cours de sa visite. Il salue le travail sérieux et approfondi que le Commissaire a effectué durant sa visite en Suisse. Il prend connaissance avec satisfaction que, selon le Commissaire, la Suisse garantit un très haut niveau de respect des droits de l'homme à l'intérieur de ses frontières, tout en promouvant activement et de manière convaincante le respect des droits de l'homme partout dans le monde. Le Conseil fédéral réitère son engagement en faveur du respect des droits de l'homme. C'est dans cet esprit qu'il prend les observations et les critiques au sérieux tout en constatant qu'il existe, dans certains domaines, des divergences.*

Les présents commentaires et observations sont présentés en suivant la systématique du rapport du Commissaire.

#### **I. L'ASILE EN SUISSE**

##### **B. L'arrivée des demandeurs d'asile potentiels dans les aéroports**

**Ad 17:** Il convient de préciser le rôle de « check port ». A l'aéroport de Kloten, les employés de « check port » ont pour tâche de vérifier si les voyageurs en partance sont munis des documents requis. Les employés « check port » n'exercent aucune fonction en ce qui concerne le contrôle des avions arrivants (contrôle préalable à la frontière). Il s'agit en l'occurrence d'une tâche policière, qui est remplie par les fonctionnaires compétents. Lorsqu'il ressort du contrôle, à la sortie de l'avion, que les passagers n'ont pas (ou n'ont plus) les documents de voyage requis, il arrive fréquemment qu'ils soient renvoyés. Si la personne concernée demande l'asile, une procédure est engagée. Par ailleurs, il sied de relever que le rôle de « check port » consiste également à veiller à ce que les compagnies aériennes respectent leurs obligations internationales.

**Ad 22:** Ce paragraphe mérite d'être précisé dans la mesure où le renvoi à destination d'un pays tiers n'est pas soumis à l'appréciation du HCR et est examiné séparément. Par ailleurs, en cas de renvoi à destination du pays d'origine, la restitution de l'effet suspensif peut être demandée à la Commission de recours en matière d'asile (CRA) dans un délai de 24 heures. A cet égard, il est important de préciser que si une telle demande doit certes être motivée, il ne doit pas s'agir d'une « argumentation complète sur le fond ». Par ailleurs, l'autorité de recours ne fait pas preuve de formalisme dans ce genre de cas (p. ex. demande présentée dans une langue qui n'est pas officielle). Contre la décision de renvoi proprement dite, le délai de recours est de 30 jours à partir de la notification. Si le renvoi est prononcé à destination d'un pays tiers, le délai de recours est de 10 jours.

**Ad 29:** La formulation retenue dans le rapport pourrait laisser croire que le HCR a un rôle d'assistance juridique dans la procédure actuelle à l'aéroport. Or, tel n'est pas le cas, même si cette organisation est appelée à intervenir dans ce cadre : son mandat est clairement défini par la loi et ne se substitue pas à celui d'un représentant légal désigné par le requérant, ni à celui d'un conseiller juridique mis à disposition du requérant.

Conformément à l'article 23, al. 3, de la Loi fédérale sur l'asile (LAsi), l'exécution immédiate du renvoi à destination du pays d'origine ou de séjour peut être ordonnée si le requérant n'y est manifestement pas exposé à des risques de persécution et pour autant que l'avis du HCR concorde avec celui de l'Office fédéral des migrations (ODM). Jusqu'à l'entrée en vigueur du nouveau droit, cette disposition restera pleinement applicable. Quant au déroulement de la procédure à l'aéroport prévue par le nouveau droit, il est comparable à celui de la procédure menée à l'intérieur du pays et dans laquelle le HCR n'est pas appelé à intervenir.

### **C. La « non-entrée en matière » (« NEM »)**

#### **Ad 57, note 34:**

#### **Centre de Rivera pour les requérants d'asile définitivement renvoyés avec une décision NEM**

A la suite de l'entrée en vigueur au 1er avril 2004 des mesures d'économie de la Confédération, les requérants d'asile définitivement renvoyés à la suite d'une décision NEM sont exclus du bénéfice des prestations de l'assistance dérivant de l'asile. Conformément aux articles 12 et 115 de la Constitution fédérale (Cst. féd.), les cantons sont obligés de faire face aux nécessités de ceux qui se trouvent dans une situation d'indigence. Selon le Tribunal fédéral, l'article 12 susmentionné assure l'aide de l'assistance strictement indispensable pour satisfaire les besoins de base, afin de garantir une existence digne et empêcher le requérant de tomber dans l'indigence (Arrêt du Tribunal Fédéral/ATF 130 I 71; 121 I 367). Dans la même perspective, on doit satisfaire les besoins existentiels minimaux de survivance : la nourriture, les vêtements, le logement provisoire et les soins médicaux absolument indispensables (ATF 2P. 318/2004). Les cantons sont libres de décider de quelle manière ils doivent fournir ces prestations (ATF 2P. 318/2004), en nature ou en espèces. Le canton du Tessin a décidé de le faire sous forme de

prestations en nature. Pour ce motif, on a établi une structure qui garantit le logement, la nourriture et les vêtements nécessaires. De surcroît, l'assistance sanitaire est assurée par un service permanent, qui garantit l'intervention d'un médecin sur place et, si nécessaire, l'hospitalisation immédiate du requérant. Le canton du Tessin affirme respecter ainsi l'article 12 de la Cst. féd.

**Ad 59-61:** La situation des personnes vulnérables est évaluée – contrairement à ce qui est décrit dans le paragraphe 57 – au regard de la licéité, de l'exigibilité et de la possibilité du renvoi. Les personnes frappées de NEM, qui ne reçoivent pas d'admission provisoire, doivent quitter la Suisse par leurs propres moyens. Leurs démarches en vue du retour seront soutenues par les cantons et les frais de voyage pris en charge, de cas en cas. Dans les cas de départ différé, l'aide d'urgence est octroyée par les cantons. Celle-ci comprend nourriture, logement et prestations médicales. Les effets de la suspension de l'aide sociale aux cas de NEM sont évalués par un monitoring effectué par les autorités fédérales sur la base des données fournies par les cantons. L'assertion selon laquelle les personnes frappées de NEM seraient traitées de façon inhumaine au sens de l'article 3 de la CEDH (par. 59) ne reflète ainsi pas la réalité.

**Ad 62 :** Entre le 1er avril et le 31 décembre 2004, 3804 décisions de non-entrée en matière ont été prononcées. Un peu moins de 20% des personnes concernées ont eu recours à l'aide d'urgence. Le monitoring mené par l'ODM laisse à penser que, après quelques mois au moins, la grande majorité de ces personnes a quitté la Suisse. Comme précisé dans le rapport, on ne constate en effet actuellement pas à une hausse de la délinquance. De surcroît, on ne peut pas parler non plus d'une „perte de tout contrôle“ en ce qui concerne les personnes frappées de NEM. En effet, comme ces personnes frappées de NEM doivent quitter la Suisse, elles peuvent y être contraintes et être maintenues en détention pour garantir l'exécution du renvoi. La Confédération désigne un canton responsable de l'exécution du renvoi de chaque personne.

#### **D. Le renvoi des « sans papiers » résidant en Suisse depuis longtemps**

**Ad 68–72:** "La notion de « sans-papiers » telle que décrite dans le rapport est imprécise. Dans le contexte suisse, les «sans-papiers» sont des étrangers résidant illégalement en Suisse; ces personnes ne possèdent donc pas d'autorisation de séjour. Le nombre des étrangers en situation irrégulière mentionné dans ledit rapport est imprécis, selon une étude récente menée à la demande de l'Office fédéral des migrations (ODM) ce nombre est actuellement estimé à 90.000 (voir Chiffre 12)".

La solution adoptée par le Conseil fédéral et le parlement ne prévoit pas d'amnistie générale, mais un examen individuel sérieux.

#### **E. Les moyens employés par la police pour renvoyer les étrangers**

**Ad 76:** Afin de remédier à de tels faits (insultes et usage arbitraire de la force), les autorités suisses ont pris des mesures, dont voici quelques exemples:

- une loi fédérale sur les mesures de contrainte policière est en cours d'élaboration et se trouve en phase de consultation;

- la Conférence des directrices et directeurs des départements cantonaux de justice et police (CCDJP) a adopté une directive relatives aux rapatriements sous contrainte par voie aérienne le 11 avril 2002 ([www.kkjpd.ch](http://www.kkjpd.ch));
- chaque année, plusieurs cours de formation pour escortes policières sont donnés en Suisse. Plus de 200 policiers ont été formés à cet effet.

**Ad 77:** Le principe de proportionnalité est respecté. Lors des cours donnés aux agents d'escorte, ce principe est développé et des directives sont données aux agents pour leur expliquer comment agir en fonction de ce principe lors de rapatriements. La proposition de requérir «*la présence d'un représentant d'une organisation compétente et respectée dans ce domaine*» lors de la procédure d'expulsion paraît problématique, car toute action de police, quelle qu'elle soit, est susceptible de conduire à de telles critiques.

**Ad 81:** Les services responsables sont parfaitement conscients des problèmes liés à l'utilisation d'appareils à électrochoc. L'admissibilité de leur utilisation fait actuellement l'objet d'une évaluation très sérieuse. Les décisions définitives n'ont pas encore été prises. Quoiqu'il en soit, il appartiendra finalement au Parlement, seul organe législatif compétent, de trancher cette question.

## II. LA TRAITE DES ETRES HUMAINS

**Ad 89:** Il convient de nuancer l'affirmation selon laquelle les mesures ou recommandations énumérées sont contestées. Les éléments suivants le confirment :

- « L'introduction d'une obligation de poursuite pour les autorités » n'est nullement contestée. La traite d'êtres humains est un crime qui selon le code pénal suisse (CP) doit être poursuivi d'office et les nouvelles mesures prises récemment, notamment par l'adoption d'un nouvel article 182 CP vont dans le sens d'un renforcement notable.

- « La nécessité de proposer une assistance à la victime dès sa première audition au lieu de la laisser chercher par elle-même une protection » n'est elle non plus contestée. Bien au contraire: la Loi fédérale sur l'aide aux victimes d'infractions(LAVI) prévoit qu'à l'occasion de la première audition, les victimes sont informées de leurs droits et des possibilités d'assistance auxquelles elles peuvent recourir. Il n'y a donc pas de réticences à venir en aide aux victimes et à leurs proches.

- « Des appels à des contrôles nettement renforcés contre le travail au noir et à un soutien financier accru des centres pour femmes battues ... ». Là aussi, ces mesures ne sont pas contestées en tant que telles. Si des lacunes peuvent encore être constatées, cela est dû aux ressources limitées de certains cantons et aux priorités que leur budget respectif leur impose de fixer.

**Ad 95:** S'agissant de la convention citée dans ce paragraphe, il sied de relever que le droit interne en vigueur prévoit déjà une réglementation du séjour des victimes de la traite des êtres humains. L'ODM a précisé la pratique correspondante dans sa circulaire du 25 août 2004. Cette circulaire est disponible sous le lien suivant:

([http://www.weisungen.bfm.admin.ch/rechtsgrundlagen/rechtsquellen/weitere/opfer\\_menschenhandel/25\\_08\\_04\\_f.asp](http://www.weisungen.bfm.admin.ch/rechtsgrundlagen/rechtsquellen/weitere/opfer_menschenhandel/25_08_04_f.asp)). Par conséquent, tant le droit en vigueur que le projet de nouvelle loi sur les étrangers remplissent dans le domaine de la migration les exigences de la Convention. Le gouvernement suisse examinera la possibilité de signer cette convention.

#### **IV. RACISME ET XENOPHOBIE**

##### **C. Allégations concernant la police**

**Ad 111-113:** La police est bien consciente que parmi les nombreuses opérations policières effectuées tous les jours, 24 heures sur 24, il peut y avoir des bavures. C'est la raison pour laquelle les thèmes comme la xénophobie et le racisme ou la violence policière sont systématiquement pris en compte dans la formation de base et la formation continue des forces de police. Ils sont traités de manière approfondie et avec diligence dans les cours de formation et de perfectionnement destinés à la police cantonale. Dans certains cantons, on fait des efforts particuliers pour mieux préparer les agents de police aux situations difficiles auxquelles ils sont confrontés toujours plus souvent dans l'exercice de leur fonction.

Des recours administratifs et judiciaires peuvent être engagés contre des actes de violence infondés ou discriminatoires de la police. Les victimes de mauvais traitements de la part de la police disposent en effet de plusieurs moyens pour se défendre:

- a) la justice (procédure d'enquête de droit pénal)
- b) l'autorité de surveillance politique de la police
- c) les services de médiation
- d) l'organe de contrôle<sup>77</sup>

Il sied enfin de noter qu'en 2003 une formation centralisée a été mise en place sur le plan suisse. Depuis, sont délivrés des certificats nationaux d'aptitude reconnaissant la profession de policier/policière. Il s'agit ici d'une innovation à relever et le "Règlement concernant l'examen professionnel de policier/policière", reconnu par l'Office fédéral de la formation professionnelle et de la technologie (OFFT), prévoit expressément comme branches d'examen obligatoires celle consacrée à l'Éthique policière et aux Droits de l'homme (art. 19 dudit règlement). Ce point précis mérite d'être relevé, car il s'agit là d'une nouvelle étape consacrant l'institutionnalisation de l'enseignement de l'éthique aux futurs représentants des forces de police.

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<sup>77</sup> Cf. Art. 38 de la loi sur la police du canton de Genève (Procédure en cas d'allégations de mauvais traitements): une personne choisie par le Conseil d'Etat hors de l'administration est chargée d'examiner les dénonciations, rapports et constats en matière d'allégations de mauvais traitements. Elle procède, le cas échéant, à des enquêtes administratives préalables et donne son avis au chef du département).

## V. L'INDEPENDANCE DE LA JUSTICE

### A. Le statut du Procureur général de la Confédération

#### Ad 114-117 : Remarque générale

En ce qui concerne les buts du projet sur la surveillance du Ministère public, tels que décrits dans le rapport, ils donnent lieu à un certain malentendu. Le but du projet n'est pas d'introduire un contrôle renforcé sur cette institution mais de clarifier les compétences de surveillance, actuellement partagées entre le Conseil fédéral, le Département fédéral de justice et police (DFJP) et le Tribunal pénal fédéral. Les bases du contrôle budgétaire comme telles ne seront pas modifiées, ni les modalités de la nomination. Le changement le plus important consisterait en un transfert des compétences de surveillance du Tribunal pénal au DFJP. Cela permettrait une meilleure gestion de la compétence budgétaire par le département et séparerait mieux les voies de recours (qui demeurent inchangées) de la surveillance hiérarchique. La surveillance hiérarchique trop étroite d'un tribunal sur une partie au procès pourrait compromettre l'impartialité de ce tribunal. Pour garantir l'indépendance de la procédure pénale, il est prévu d'interdire explicitement que l'exécutif donne des instructions dans un cas particulier au procureur fédéral. Il convient enfin de mentionner que ce projet législatif respecte la Recommandation du Comité des Ministres à l'intention des Etats membres au sujet du rôle du procureur dans le contexte de la juridiction pénale (Rec[2000] 19 du 6 octobre 2000).

## VI. L'INTERNEMENT A VIE POUR LES DELINQUANTS SEXUELS OU VIOLENTS JUGES DANGEREUX ET NON AMENDABLES

**Ad 132:** L'internement prononcé ultérieurement tel que proposé par le Groupe de travail ne s'analyse pas en une violation du principe *ne bis in idem* puisque cette mesure ne peut être infligée que s'il existe un titre de révision. Les deux dernières phrases de ce paragraphe devraient donc se lire ainsi: "*Il sied de constater que, selon toute vraisemblance, les exigences découlant notamment de l'article 4 du Protocole no. 7 à la CEDH sont respectées.*"

**Ad 134:** Ce paragraphe ne se base pas sur des éléments factuels, mais sur de simples hypothèses non vérifiées.

## VII. LA SITUATION DANS LES LIEUX DE DETENTION VISITES

### B. La Prison "La Stampa" (Canton de Tessin)

**Ad 139 :** En attendant l'ouverture de la prison judiciaire, au cours du premier trimestre 2006, les mineurs, pendant le temps bref de leur détention (deux à trois semaines), sont surveillés par des fonctionnaires spécialement formés pour s'occuper des mineurs provisoirement en prison.



## **IX. LES INSTITUTIONS DE DEFENSE DES DROITS DE L'HOMME**

### **C. Création d'une institution nationale indépendante pour la protection et la promotion des droits de l'homme**

**Ad 152:** En Suisse, la question de savoir s'il est utile de créer une nouvelle institution nationale pour la protection des droits de l'homme a été débattue au cours de ces dernières années. Ainsi, une centaine d'organisations non gouvernementales, de syndicats, d'institutions ecclésiastiques et de personnalités ont demandé en juillet 2001 la création d'une telle commission. Le 10 décembre 2001, une initiative parlementaire visant à créer une commission fédérale des droits de l'homme a été déposée.

La Commission de politique extérieure du Conseil des Etats a demandé au plénum de ne pas donner suite à l'initiative. Cependant, elle a proposé de transmettre un postulat réclamant un rapport du Conseil fédéral sur ce sujet. Le projet d'initiative a donc été retiré et le Conseil des Etats a transmis le postulat au Conseil national. Mais ce dernier à la demande de sa Commission de politique extérieure, a décidé le 19 juin 2003, par 101 voix contre 74, de donner suite à l'initiative parlementaire. La Commission des institutions politiques décidera le 24/25 juin 2005 si elle veut élaborer un projet de loi ou classer l'initiative parlementaire. Le Conseil fédéral a chargé le DFAE de préparer le rapport demandé par le postulat du Conseil des Etats. Actuellement, le DFAE rédige le rapport à l'attention du Conseil fédéral.

### **Ad Observations finales et recommandations**

Le gouvernement suisse remercie le Commissaire de ses observations finales et de ses recommandations. Il en a pris acte et en tiendra compte, dans toute la mesure du possible, à la lumière des observations formulées ci-dessus. Il assure le Commissaire qu'il transmettra le rapport aux membres du Parlement ainsi qu'aux services concernés de la Confédération et des cantons.