INTERNATIONAL
COMMISSION
OF JURISTS

International Commission of Jurists submission
to the Committee against Torture
on the 6th Periodic Report of Switzerland

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The International Commission of Jurists (ICJ) welcomes the opportunity to provide its views to the Committee against Torture for the consideration of the 6th Periodic Report of Switzerland. In this submission, the ICJ highlights several issues which it considers should be of particular concern to the Committee in its consideration of the report of Switzerland.

In particular, the ICJ is concerned at certain provisions of the Swiss legislation on asylum-seekers and migrants that may give rise to the violations of the principle of *non-refoulement* (Article 3 CAT) and of the obligations to prevent torture and cruel, inhuman or degrading treatment or punishment (Articles 11 and 16 CAT).

1. An overview of the situation of migrants and asylum seekers in Switzerland

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

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were rejected without a disposition on the merits of the application, 4,483 were rejected on the merits, and 1,245 were withdrawn or closed.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

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

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

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

2. Legislation concerning irregular migrants and asylum-seekers

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

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

2.1. Respect for the principle of non-refoulement

The Swiss Constitution includes the prohibition of *refoulement* both in its international refugee law context (Article 25(2)) and its human rights law context, in the form of the absolute prohibition of a transfer of persons "to a state in which they face the threat of torture or any other form of cruel or inhumane treatment or punishment" (Article 25(3)).[4] Such guarantee is reinforced by the

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

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

[4] In addition to the specific obligation contained in article 3 of the CAT, under international human rights law the obligation of *non-refoulement* applies generally where there are substantial grounds for believing that an individual faces a real risk, following the expulsion, removal or extradition, of torture and cruel, inhuman or degrading treatment or punishment or other violations of the most fundamental human rights, including arbitrary detention and flagrant denial of the right to a fair trial. See, Human Rights Committee, *Kindler v. Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993), § 13.2; HRC, *General Comment No. 31*, cit., § 12. ECHR Article 6: ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 113, *Drozd and Janousek v. France and Spain,* Judgment of 26 June 1992, § 110; Article 5 and Article 6: *MAR v. UK*, Judgment of 19 September 1997; *Tomic v. UK*, Admissibility decision of 14 October 2003, §3. In relation to *refoulement* regarding Article 2 see *Bader and Kanbor v. Sweden* App no.13284/04; and flagrant denial of fair trial contrary to article 6 see *Al-Moayad v. Germany* app no.35865/03. See also, *R v. Special Adjudicator, ex parte Ullah,* [2004] UKHL 26, *per* Lord Bingham, § 21. The ICJ recalls that principle 10 of the *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* affirms that "States

primacy granted to international law in the Swiss legal system, which directly incorporates Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR), and Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR).

2.1.1. Expulsion on security grounds and the principle of non-refoulement

The second paragraph of Article 121 of the Constitution provides that "[f]oreign nationals may be expelled from Switzerland if they pose a risk to the security of the country." Although the scope of this provision is not clarified in the State Party report to the Committee, Switzerland explained in its third periodic report to the Human Rights Committee that "[t]his measure is ordered by the Federal Council[5] when there exists a danger to Switzerland's internal or external security, when the matter in question is of great political importance, or when reasons of internal or external policy justify the measure."[6] Switzerland also indicated that "[t]here is no right of appeal against the decision of the Federal Council, and the procedural provisions may be applied restrictively for reasons of official secrecy."[7]

Therefore, this provision, arising directly under the Constitution, carries an express lack of any remedy where its implementation would contravene rights guaranteed under the Convention. This Committee has clearly stated that "the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise."[8] Such implementation could result in denial of the right to an effective remedy as well as a violation of the principle of *non-refoulement*, in potential breach of Article 3 of the CAT.

The ICJ recalls that the Committee's jurisprudence also provides that "the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasise the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism

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may not expel, return, transfer or extradite, a person suspected or convicted of acts of terrorism to a state where there is a real risk that the person would be subjected to a serious violation of human rights, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearance, extrajudicial execution, or a manifestly unfair trial; or be subject to the death penalty."

[5] The Federal Council is the executive organ in the Swiss Legal system (our footnote).

[6] *Third Periodic Report of Switzerland to the Human Rights Committee*, 17 December 2007, UN Doc. CCPR/C/CHE/3, English official translation, paragraph 210.

[7] *Third Periodic Report of Switzerland to the Human Rights Committee*, 17 December 2007, UN Doc. CCPR/C/CHE/3, English official translation, paragraph 210.

[8] Views of the Committee against Torture, *Mr. Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003*, CAT/C/34/D/233/2003, 24 May 2005, paragraph 13.7.

chosen must continue to satisfy article 3 's requirements of effective, independent and impartial review."[9]

The ICJ requests the Committee to recommend that Switzerland ensure an effective, independent and impartial judicial review of the decisions to expel or remove persons to another State to ensure respect for the principle of *non-refoulement* pursuant to Article 3 of the CAT, including in cases of expulsions under Article 121(2) of the Swiss Constitution.

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

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[9] Views of the Committee against Torture, *Mr. Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003*, CAT/C/34/D/233/2003, 24 May 2005, paragraph 13.8.

[10] Article 65, Asylum Act (Official translation): "Refugees may be expelled only if they endanger Switzerland's internal or external security or have seriously violated public order, subject to Article 5."

[11] See, Article 5 Asylum Act (official translation):

"1 No person may be forced in any way to return to a country where their life, physical integrity or freedom are threatened on any of the grounds stated in Article 3 paragraph 1 or where they would be at risk of being forced to return to such a country. 2 The ban on refoulement may not be invoked if there are substantial grounds for the assumption that, because the person invoking it has been convicted with full legal effect of a particularly serious felony or misdemeanour, they represent a threat to Switzerland's security or are to be considered dangerous to the public."

[12] In the recent decision *Segretariato di Stato dell'economia contro C. nonché Tribunale delle assicurazioni del Cantone Ticino*, the Federal Tribunal reconfirmed its earlier precedent according to which "in case of conflict public international law prevails, in general, on domestic law […], especially when the international law provision is aimed at the protection of human rights", ATF 133 V 367, 387, *Segretariato di Stato dell'economia contro C. nonché Tribunale delle assicurazioni del Cantone Ticino*, 9 May 2007 (unofficial translation). However, the Swiss system does not know strong binding precedent rules and this position might be overturned, as it had already occurred in Swiss legal history.

[13] Article 64(3), Aliens Act (unofficial translation), read it together with its paragraph 1. See also, Article 66(3).

[14] Article 69, Aliens Act.

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

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

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

The Human Rights Committee has also addressed the question of security threats in relation to States Parties' obligations arising under article 2 of the

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[15] Article 68, Aliens Act.

[16] See, *inter alia*, Views of the Committee against Torture, *Mr. Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003*, CAT/C/34/D/233/2003, 24 May 2005, paragraph 13.8; *Soering v. UK*, ECtHR, Judgment of 7 July 1989; *Chahal v. UK*, ECtHR, Judgment of 25 October 1996; *Saadi vs. Italy*, ECtHR, Judgment of 28 February 2008, Application no. 37201/06.

[17] Views of the Committee against Torture, *Mr. Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003*, CAT/C/34/D/233/2003, 24 May 2005, paragraph 13.7. See also, Human Rights Committee, *Mohammed Alzery vs. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11(8). HRC, *Zhakhongir Maksudov and others vs. Kyrgyzstan*, CCPR/C/93/D/1461 and others, 31 July 2008, para. 12.7 (also on article 6); and, CPT/Inf (2005) 15, para. 30. See also, *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guidelines 5(1) and 5(3). CERD, *General Comment no. 30, Discrimination against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 25.

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

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

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

The ICJ considers that the provisions of Asylum Act (Article 5) and Aliens Act (Articles 64 and 68) could lead to the limitations of the principle of *non-refoulement* in breach of Article 3 of the CAT, and therefore it requests the Committee:

- **to recommend that Switzerland amend Article 5 of the Asylum Act and Article 64 of the Aliens Act 2005 to comply with international human rights law standards on *non-refoulement*.**
- **to recommend that Switzerland ensure that the expulsion decisions justified by the security-based concerns are subject to a judicial review with a suspensive effect for the execution of expulsion.**

2.1.2. Accelerated procedures of rejection and expulsion

Although the obligations under international refugee law and international human rights law, particularly those arising under article 3 of the CAT, are not coterminous, there is considerable overlap in respect of their normative dimension as well as their manner of implementation. In practical terms, the decision as to whether a *non-refoulment* concern arises within the meaning of article 3 CAT will often be made pursuant to review of a claim of asylum or refugee status. In this respect, it is important that the Committee consider the elements of Switzerland's Asylum Act, including its application in relation to the *non-refoulment* principle.

Article 32 of the Asylum Act provides the grounds for dismissing an asylum application. Where one of these grounds is met, the authorities reject the application with a declaration of *non entrée en matière* (NEM) and do not proceed

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

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

to assess the merit of the application. Article 32(2)(a) applies such procedures when asylum-seekers "fail to hand over travel documents or identity papers to the authorities within 48 hours of filing the application." The application of such procedure in this case is excluded when the asylum-seekers can "credibly demonstrate that they are justifiably unable to provide travel or identity papers within 48 hours of filing the application",[21] or when on the basis of the first hearing there are some elements which establish refugee status or suggest that further investigations are necessary to establish refugee status or an obstacle to the removal, i.e. the prohibition of *non-refoulement* or the respect of the right to family unity.[22] The travel documents are "any official document authorizing the entry in the State of origin or in other States, such as a passport or a travel document in substitution of it".[23] Identity papers are "any official document with a picture delivered with the aim of proving the keeper's identity",[24] which includes "the surnames, the names and nationalities, the ethnicity, the date and place of birth, and the gender".[25] The *Observatoire romand du droit d'asile e des étrangers* reported that the applications closed as NEM were 1,834 in 2006 and 2,644 in 2007, with an increase of 44 percent.[26] As highlighted above, in 2008 they were 3,073 with an increase of 16 percent.[27]

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

Finally, article 65 of the Aliens Act provides that, when a migrant enters Swiss territory through an airport, and entry is rejected, he or she must immediately leave the country. The reasoned decision of rejection is given within 48 hours. The migrant is granted appeal before a judicial authority against the decision within 48 hours from the notification of the decision, and the appeal will be

[21] Article 32(3)(a), Asylum Act (official translation).
[22] See, Article 32(3)(b) and (c), Asylum Act.
[23] Ordonnance 1 sur l'asile relative à la procedure, 11 august 1999, no. 142.311, Article 1a(b) (unofficial translation).
[24] Ordonnance 1 sur l'asile relative à la procedure, 11 august 1999, no. 142.311, Article 1a(c) (unofficial translation).
[25] Ordonnance 1 sur l'asile relative à la procedure, 11 august 1999, no. 142.311, Article 1a(a) (unofficial translation).
[26] *Premiére Rapport Annuel d'Observation*, Observatoire romand du droit d'asile e des étrangers, 24 September 2008, p. 7
[27] *Rapport sur la migration 2008*, Office federal des migrations ODM, April 2009, p. 16.
[28] Article 33(1), Asylum Act (official translation).
[29] Article 33(2), Asylum Act (official translation).
[30] Article 33(3) (a) and (b), Asylum Act (official translation).

decided within the following 72 hours. Nevertheless, the appeal does not have suspensive effect.

The ICJ recalls the Committee against Torture Communication no. 299/2006 in the case *Jean Patrick Iya v. Switzerland*. In this case the Committee found that the non-consideration of a request of international protection by the Swiss authorities and tribunals based only on non-compliance with the formal requirement of submission of identity documents would have led to a breach of Switzerland's obligations according to Article 3 CAT, had the expulsion been carried out.[31]

This Committee has previously examined accelerated procedures for asylum in other countries. In respect of one such review, it concluded that the State party "should ensure that a thorough review of each individual case is provided for asylum claims. In this respect, the State party should ensure that effective remedies are available to challenge the decision not to grant asylum, especially when the claim is channeled through an accelerated procedure. Such remedies should have in any case the effect of suspending the execution of the above decision, i.e. the expulsion or deportation."[32]

In particular, this Committee has observed in its jurisprudence that "complete accuracy is seldom to be expected by victims of torture, especially when the victim suffers from post-traumatic stress syndrome; it also note[d] that the principle of strict accuracy does not necessarily apply when the inconsistencies are of a material nature."[33]

In its Concluding Observations, this Committee has expressed concern at legislation which provided that the refusal by the State of a residence permit to an applicant entailed an automatic obligation of the applicant to leave the country immediately,[34] and stressed that suspensive effect must be granted not only to emergency remedies but also "to appeals filed by any foreigner against whom an expulsion order is issued and who claims that he or she faces the risk of being subjected to torture in the country to which he or she is to be returned".[35] Suspensive effect must take effect the moment the appeal is filed.[36]

This Committee has also affirmed that a State should "provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an

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[31] Views of the Committee against Torture, *Jean Patrick Iya v. Switzerland*, Communication no. 299/2006, UN Doc. CAT/C/39/D/299/2006, 26 November 2007.
[32] *Concluding Observations of the Committee against Torture: Macedonia*, UN Doc. CAT/C/MKD/CO/2, 21 May 2008, paragraph 8.
[33] Views of the Committee against Torture, *Halil Haydin v. Sweden*, Communication No. 101/1997, CAT/C/21/D/101/1997, 16 December 1998, paragraph 6.7.
[34] *Concluding Observations of the Committee against Torture: Denmark,* Annual Report 2002, UN Doc. CAT A/57/44 (2002), paragraph 73(c).
[35] *Concluding Observations of the Committee against Torture: Belgium*, Annual Report 2003, UN Doc. CAT A/58/44 (2003), paragraph 131(d).
[36] *Concluding Observations of the Committee against Torture: France,* UN Doc.CAT/C/FRA/CO/3, 3 April 2006, paragraph 7.

individual where there are substantial grounds for believing that the person faces a risk of torture."[37]

The Human Rights Committee has also advised in respect of its review of a State party to the ICCPR that it "should ensure that persons whose applications for asylum are declared inadmissible are not forcibly returned to countries where there are substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of life or torture or ill-treatment, and provide effective remedies in domestic law in this regard."[38]

The Human Rights Committee has expressed its concern at "decisions for expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing,"[39] as incompatible with the requirements of Article 13 ICCPR. In respect of a number of asylum and expulsion cases, the Human Rights Committee has expressed the view that "it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice."[40] It is clear that, when courts do not grant an effective hearing in order to evaluate on the merits the particular case of *non-refoulement*, this deficiency may lead not only to the violation of Articles 6, 7 or 14 ICCPR, and, but also Article 3 CAT.

The ICJ recalls that, concerning the access to an effective remedy with adequate procedural guarantees, the Committee of Ministers of the Council of Europe, of which Switzerland is a Member State, has declared that "time-limits for exercising the remedy shall not be unreasonably short; [41] the remedy shall be accessible "with sufficient free legal assistance in case of need, and "when the returnee claims that the removal will result in a violation of his or her human rights [to *non-refoulement*], the remedy shall provide rigorous scrutiny of such a claim."[42]

The ICJ considers that the current NEM procedures as designed by the Asylum Act risks failing to guarantee to the applicant a proper hearing and, consequently, to violate the prohibition of *non-refoulement* protecting Article 3 CAT. In particular, the strict requirement of travel documents and identity papers by Article 32 of the Act ignores the difficult reality faced by most

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[37] *Concluding Observations of the Committee against Torture: Canada***,** UN Doc. CAT/C/CR/34/CAN, 7 July 2005, paragraph 5(c).

[38] Portugal, ICCPR, A/58/40 vol. I (2003) 56 at paras. 83(12).

[39] Human Rights Committee Concluding Observations on Sweden, 1997, A/51/40, Vol. I, p. 19, paragraph 88.

[40] *Mahmoud Walid Nakrash and Liu Qifen v. Sweden*, CCPR/C/94/D/1540/2007, 19 November 2008, paragraph 7.3. See also, Arusjak Chadzjian v. Netherlands, CCPR/C/93/D/1494/2006, 5 August 2008, para. 8.4, Surinder Kaur v. Canada, CCPR/C/94/D/1455/2006, 18 November2008, para. 7.3, Daljit Singh v. Canada, CCPR/C/86/D/1315/2004, 28 April 2006, para 6.3, Jonny Rubin Byahuranga v. Denmark, CCPR/C/82/D/1222/2003, 9 December 2004, paras. 11.3-11.4.

[41] *Case of Jabari vs Turkey*, ECtHR, Application no. 40035/98, 11 July 2000, paragraph 40.

[42] *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guideline 5(2).

refugees, who are necessarily at risk, in obtaining necessary documentation. Article 33 also presents problems as it applies the NEM procedure based on criminal and security evaluations, ignoring the fact that the principle of *non-refoulement* cannot be overridden by such considerations. Finally, the procedure for the rejection of a migrant at the airport applies very short time-limits, which risk impeding a full and adequate examination of the *non-refoulement* implications of the repatriation decision. The fact that the review of such a decision does not carry suspensive effect runs counter to the migrant's right to contest such measures before an independent and effective judicial mechanism, which should have suspensive effect on the application of the expulsion measure until a final decision is reached.[43] These measures risk violations of the prohibition of *non-refoulement*.

The ICJ is aware that the Federal Department of Justice and Police is studying a modification to the NEM procedure in order, also, to reduce the grounds for which such procedure could apply. Nonetheless, the ICJ is also aware that this project, submitted now to public consultations, does not reform the reliance on lists of safe third countries, a concern which is discussed below (2.1.4).[44]

The ICJ calls on the Committee against Torture:

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

2.1.3. Referendum initiative "Pour le renvoi des étrangers criminels"

The ICJ is particularly concerned at the progression of the popular initiative on the expulsion of foreigners (*Initiative populaire "Pour le renvoi des étrangers criminels (initiative sur le renvoi)"*).[45] On 18 March, the Council of States let the

[43] Human Rights Committee, *Mohammed Alzery vs. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11(8). HRC, *Zhakhongir Maksudov and others vs. Kyrgyzstan*, CCPR/C/93/D/1461 and others, 31 July 2008, para. 12.7 (also on article 6); and, CPT/Inf (2005) 15, para. 30. See also, *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guidelines 5(1) and 5(3). CERD, *General Comment no. 30, Discrimination against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 25.

[44] See, *Rapport explicatif relatif à la modification de la loi sur l'asile et de la loi fédérale sur les étrangers concernant le remplacement des decisions de non-entrée en matière*, Department federal de justice et police DFJP, Swiss Confederation, 16 December 2009.

[45] For a complete analysis of the initiative and of the Government's counter-proposal, see *Message concernant l'initiative populaire "Pour le renvoi des étrangers criminels (initiative sur le renvoi)" et la*

initiative pass for consideration by the National Council after determining that it would not be contrary to imperative norms of international law.[46] If approved by the National Council, the initiative might go to popular referendum. The initiative is aimed at supplementing Article 121 of the Swiss Constitution by automatically depriving of any residency right or permit all non-nationals convicted with final judgment for murder, rape or any other serious sex crime, or for another violent act such as *brigandage*, for human trafficking, drug trafficking, theft with trespass, or obtaining social benefits by abusive means. The initiative will provide for automatic expulsion of such persons and forbid them entry to Switzerland from 5 to 15 years, or 20 years if the person is determined to be a recidivist.

The Swiss Federal Council has not supported this initiative and has put forward a counter-proposal which is also likely to be submitted to popular vote. If approved, the counter-proposal will introduce into the federal Aliens Act two main novelties.[47] The first is the necessary respect of "good integration" as requirement for granting long-term residence permits. "Good integration" will entail respect of the Swiss legal order, adhesion to the fundamental values of the Constitution, willingness to take part in work and educational systems and knowledge of a national language. The second pillar of the counter-proposal concerns the revokation of the residence permit, which will occur when the foreigner has been convicted of a crime carrying a sentence of detention of no less than one year for a serious offence,[48] or, for any offence, tdetention of no less than two years. The fact that the counter-proposal leaves the Constitution unchanged will make clear to judges and public officers that no derogation to the principle of *non-refoulement* will be possible even when these two new conditions are not met.

The Federal Council suggested that the referendum initiative *"Pour le renvoi des étrangers criminels"* does not infringe imperative norms of international law, as the respect of the principle of *non-refoulement* will be assured by the direct reference to it provided by the Constitution and that, therefore, a systematic interpretation of the constitutional provisions will not allow for expulsion executed in defiance of this principle.

The ICJ is concerned that the initiative will insert such provision in the Constitution, i.e. the supreme law of the land. While it may well be that Swiss courts will interpret them in conjunction with the constitutional and

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modification de la loi fédérale sur les étrangers, Doc. No. 09.060, 24 June 2009, available at http://www.admin.ch/ch/f/ff/2009/4571.pdf .

[46] See, Council of States deliberations of 18 March 2010 at http://www.parlament.ch/ab/frameset/f/s/4813/324289/f_s_4813_324289_324369.htm .

[47] See, description of the proposal in *Message concernant l'initiative populaire "Pour le renvoi des étrangers criminels (initiative sur le renvoi)" et la modification de la loi fédérale sur les étrangers*, Doc. No. 09.060, 24 June 2009, available at http://www.admin.ch/ch/f/ff/2009/4571.pdf .

[48] In the Government's explanations (see fn. no. 45), "serious offence" has been defined as an offence concerning physical, sexual or psychological integrity of the victim (such as murder, rape, aggravated brigandage, kidnapping, intentional arson, aggravated human trafficking, genocide).

international prohibition of *non-refoulement*, that outcome is not certain, in particular, since law enforcement officers will be in charge of the implementation of such measures. This concern is reinforced by the interpretation given by the Swiss authorities to the expulsion provision contained in Article 121(2) of the Constitution, which, as explained in paragraph 2.1.1. of this submission, leads potentially to a denial of the right to an effective remedy. Moreover, the initiative does not ensure application of the criteria of necessity and proportionality, because the most serious offences included in it may automatically give rise to expulsions and because the equation of serious offences with the abuse of social benefits does not seem reasonable. In conclusion, the ICJ considers that the initiative, should it pass, will increase the risk that the principle of *non-refoulement* will be infringed in practice without recourse to the proper effective remedies, including the possibility to petition the Committee against Torture itself (Article 22 CAT).

In light of the above, the ICJ calls on the Committee against Torture to express its concern to the Swiss authorities that the adoption and implementation of the referendum initiative *"Pour le renvoi des étrangers criminels"* might increase the possibility of violations of the principle of *non-refoulement*, exposing Switzerland to potential breaches of Article 3 and 22 CAT.

2.1.4. Safe Countries List

According to Article 34(1) and (2) of the Asylum Act, the competent authority is to reject an asylum application with a NEM decision whenever the person comes from a country included in a "Safe Countries List."[49] The list is compiled by the Federal Government and includes countries where there is protection against persecution and safe third countries which fully apply the principle of *non-refoulement*.[50] The presumption of non-asylum status may be rebutted, but the burden of proof on the applicant is increased. Where an asylum seeker's home country is situated on a "Safe Countries List", the disposition of a claim on the merits may well be prejudiced as a presumptive characterization of safety in the home country is posited in eyes of the decision making authority.

The Committee against Torture has previously expressed its concern "about the absence of sufficient legal protection of the rights of persons who are denied asylum through the use of a list of safe countries in which those persons could be sent back".[51] This Committee clearly recommended that a State party "should always assess its non-refoulement obligations under article 3 of the Convention **on an individual basis** and provide, in practice, all procedural guarantees to the person expelled, returned or extradited."[52]

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[49] Our expression.
[50] See, Article 6a(2), Asylum Act.
[51] *Concluding observations of the Committee against Torture: Finland*. 09/07/96. A/51/44,paras.120-137, paragraph 131.
[52] *Concluding Observations of the Committee against Torture: Estonia*, UN Doc. CAT/C/EST/CO/4, 19 February 2008, paragraph 12 (**our emphasis**). See also, *Concluding Observations of the Committee against*

In a similar vein, the Human Rights Committee has concluded that "in order to afford effective protection under articles 6 and 7 of the Covenant, applications for refugee status should always be assessed on an individual basis and that a decision declaring an application inadmissible should not have restrictive procedural effects such as the denial of suspensive effect of appeal (articles 6, 7 and 13 of the Covenant)."[53]

The ICJ calls on the Committee to recommend that Switzerland abolish the use of the Safe Countries List in respect of asylum cases and other instances where *non-refoulement* considerations may arise and that it conduct the examination of asylum and other *non-refoulement* claims on an individualised case-by-case basis.

2.2. Detention of irregular migrants and asylum-seekers

The Aliens Act provides for a variety of forms of detention for migrants, including asylum-seekers. These include, under articles 73-78 of the Aliens Act: provisional detention (*rétention*), preparatory detention (*détention en phase préparatoire*), detention in order to undertake the expulsion, detention to ensure expulsion, and detention for insubordination. All forms of detention, apart from the *rétention*, cannot exceed 24 months for adults and 12 months for minors between 15 and 18 years.[54] The legality of the different forms of detention must be examined by a judicial authority after an oral hearing within 96 hours. Only Article 77 detention (see below) provides for a written procedure.[55] Nevertheless, the judicial authority can waive the oral procedure in cases when it is plausible that the expulsion will take place after eight days from the detention order issuance and only if the person concerned has agreed in writing to the suspension of the oral procedure. If the expulsion cannot be executed within this time, the oral hearing takes place within twelve days from the detention order.[56]

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

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Torture: France, UN Doc.CAT/C/FRA/CO/3, 3 April 2006, paragraph 9.

[53] Concluding observations of the Human Rights Committee : Estonia. 15/04/2003, CCPR/CO/77/EST, paragraph 13.

[54] Article 79, Aliens Act.

[55] Article 80(2), Aliens Act.

[56] Article 80(3), Aliens Act.

asylum proceeding in order to avoid or delay the expulsion; have infringed orders of restriction of movement by the authorities; are considered to represent a threat to internal or external security or have been convicted of a criminal offence.

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

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

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

International human rights law prohibits any kind of arbitrary detention, and provides for a right to judicial review of the detention.[57] The ICJ recalls that, in particular, administrative detention to prevent unauthorised entry on the territory or to facilitate deportation must not be automatic, but should be provided for only if no less intrusive measures are available, in accordance with the principle of proportionality.[58] Moreover, the length of administrative

[57] See, Article 9 ICCPR and Article 5 of the ECHR.

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

detention must be provided for in primary legislation,[59] be proportional to the purposes of the individual case,[60] and subject to periodic review of its grounds by independent and impartial courts.[61] In particular, "justification for the ["irregular immigrant's"] detention [based on the country's] general experience that asylum seekers abscond if not retained in custody"[62] is not sufficient.

Administrative detention must be subject to judicial review both as regards the procedure that led to it and to the merit of the detention itself in light of domestic and international law.[63] The judicial review on the lawfulness of detention must be provided to the person subjected to administrative detention "without delay"[64] and "speedily."[65]

The length of administrative detention of irregular migrants should not be extended because of the failure of the host State's authorities to implement and expedite an efficient procedure with due diligence aimed at accomplishing removal. In other words, the State cannot claim justification of administrative detention on grounds of its own acts and/or omissions.[66]

This Committee has previously criticised administrative detention lengths of up to 12 months, and has stressed that a State party "should take measures to ensure that detention of asylum-seekers and other non-citizens is used only in exceptional circumstances or as a last resort, and then only for the shortest possible time."[67] In particular, the Committee stressed that "non-custodial

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

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

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

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

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

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

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

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

[67] *Concluding Observations of the Committee against Torture: Hungary*, UN Doc. CAT/C/HUN/CO/4: 6 February 2007, paragraph 9. See also, *Concluding Observations of the Committee against Torture: Italy*,

measures and alternatives to detention should be made available to persons in immigration detention."[68]

This Committee has also considered that a "State party should ensure that such asylum-seekers are brought before a judge so that he or she may rule on the legality of their detention. The State party should also guarantee that they have a right to effective remedies."[69]

The European Committee for the Prevention of Torture has also emphasised that "in cases of deprivation of liberty, the personal appearance of the concerned alien before the judicial authority should be considered as mandatory, and not as a right that the concerned person can give up."[70] In the same report, the Committee recommended that Swiss authorities take measures to implement this standard.

The Human Rights Committee has also expressed the view "that the time-limit of 96 hours for the judicial review of the detention decision or the decision to extend detention is also excessive and discriminatory, particularly in the light of the fact that in penal matters this review is guaranteed after 24 or 48 hours depending on the [Swiss] canton concerned."[71] The Committee was directly referring to detention pending expulsion in Switzerland.

The ICJ similarly considers that the limit of 96 hours before an oral hearing for the review of the detention is excessive and discriminatory, considering the regime applied to penal matters, and entails a violation of Article 9(4) ICCPR, and a potential violation of Articles 11 and 16 CAT. Furthermore, the procedure of optional oral hearing may heighten risks of ill-treatment (Article 11 and 16 CAT), as pointed out by the European Committee for the Prevention of Torture. Finally, the ICJ considers the maximum terms of detention, 24 months for adults and 12 months for minors between 15 and 18 years, to be excessive and disproportionate. The ICJ considers that in no case should a period of detention of 12, 18 or 24 months be ordered in order to prevent unauthorised entry on the territory or to facilitate a transfer.

In light of the above, the ICJ requests that the Committee recommend that:

UN Doc. CAT/C/ITA/CO/4, 16 July 2007, paragraph 9; *Concluding Observations of the Committee against Torture: Greece*, Annual Report 2001, UN Doc. CAT A/56/44 (2001), paragraph 88(a); *Concluding Observations of the Committee against Torture: Croatia*, UN Doc. CAT/C/CR/32/3, 11 June 2004, paragraph 8(g).

[68] *Concluding Observations of the Committee against Torture: Australia*, UN Doc. CAT/C/AUS/CO/3, 22 May 2008, paragraph 11(a). See also, *Concluding Observations of the Committee against Torture: Hungary*, UN Doc. CAT/C/HUN/CO/4: 6 February 2007, paragraph 9; *Concluding Observations of the Committee against Torture: Italy*, UN Doc. CAT/C/ITA/CO/4, 16 July 2007, paragraph 9**.**

[69] *Concluding Observations of the Committee against Torture: Luxembourg*, UN Doc. CAT/C/LUX/CO/5, 16 July 2007, paragraph 5.

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

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

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