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Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Comments of Switzerland on the recommendations and observations addressed to it in connection with the Subcommittee visit undertaken from 27 January to 7 February 2019*, **

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* The present document is being issued without formal editing.

** On 5 March 2021, the State party requested the Subcommittee to publish its replies, in accordance with article 16 (2) of the Optional Protocol.

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I. Preliminary remarks

1. From 27 January to 7 February 2019, a delegation of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment carried out a visit to Switzerland for the first time.

2. On 26 May 2020, the Subcommittee sent Switzerland a confidential report on its visit (CAT/OP/CHE/ROSP/1/R.1). The Subcommittee invited the State party to respond directly to the recommendations and requests for further information made in the report and to give an account of action already taken or planned in order to implement the recommendations.

3. The Federal Council thus has the honour to submit its comments to the Subcommittee. These comments follow the structure of the Subcommittee's report. They are grouped by subject matter and are preceded by the relevant recommendation or request for additional information.

4. The Subcommittee's report and these comments will be forwarded to the cantons and the National Commission for the Prevention of Torture so that they may take note of the Subcommittee's recommendations.

5. The Federal Council thanks the Subcommittee for its report and recommendations. It appreciated the excellent cooperation between the Swiss representatives and the Subcommittee delegation during the Subcommittee's visit in winter 2019 and it welcomes the continuation of the constructive dialogue through these comments.

II. Cooperation

6. Paragraph 14: The Subcommittee recommends that official statistics be collected systematically by canton, then centralized and published by the Federal Statistical Office. These statistics should be analysed and made available to all stakeholders.

7. The Federal Statistical Office already collects essential data and publishes them on its website. However, the cantons have recognized the need for a better database and are therefore studying the possibility of setting up a system for the management of information on the enforcement of criminal penalties, in cooperation with the Office. A preliminary project was completed last year and a feasibility study is planned for this year.

8. More specifically, the Federal Statistical Office collects statistics on therapeutic measures under article 59 of the Criminal Code and indefinite detention under article 64 of the Code,[1] while various studies[2] provide information on trends in the application of these measures.

9. The cantons are responsible for dealing with complaints; statistics on complaints are therefore recorded at the cantonal level. In this regard, it is hard to see the need for a centralized system or the added value that such a system might provide.

[1] See the various tables on the enforcement of penalties on the Office's website: https://www.bfs.admin.ch/bfs/en/home/statistics/crime-criminal-justice/execution-penal-sentences-justice/detained-adults.html.

[2] Jonas Weber, Jann Schaub, Corinna Bumann and Kevin Sacher, "Anordnung und Vollzug stationärer therapeutischer Massnahmen gemäss Art. 59 StGB mit Fokus auf geschlossene Strafanstalten bzw. geschlossene Massnahmeneinrichtungen – Studie zuhanden der Nationalen Kommission zur Verhütung von Folter (NKVF)" (2015): https://www.krim.unibe.ch/unibe/portal/fak_rechtwis/d_dep_krim/inst_krim/content/e62772/e62774/e62778/e558121/Weber-Schaub-Bumann-Sacher_Studie_Art.-59_2016.05.31_ger.pdf and Thomas Freytag and Aimée H. Zermatten, "Bedingte Entlassung aus dem Straf- versus Massnahmenvollzug: Sind die Praktiken gleich?", in *Kriminalität, Strafrecht und Föderalismus/Criminalité, justice pénale et fédéralisme*, D. Fink, J. Arnold, F. Genillod-Villard and N. Oberholzer, eds. (Bern, Stämpfli, 2019), p. 219 ff.

III. National preventive mechanism

A. Structure and independence

10. Paragraph 24: The Subcommittee recommends that the State party sever the links between the National Commission for the Prevention of Torture and the Federal Department of Justice and Police so that the Commission can function with complete independence, both institutional and operational, and carry out all its activities and tasks separately from those of the Federal Department of Justice and Police, by having its own structure.

11. Federal Act No. 150.1 on the Commission for the Prevention of Torture provides that the Commission will carry out its tasks independently, will appoint its own members and will establish rules on its organization and working methods. The Act also states that the Commission must have at its disposal the necessary financial resources to carry out its work, for which it may have a permanent secretariat. The Federal Act thus gives effect to two essential aspects of the Optional Protocol.

12. The Act leaves open the question of the Commission's institutional structure. Given that national implementation of human rights obligations is largely the responsibility of the Federal Department of Justice and Police, it seemed sensible that the Commission should be administratively attached to the Department.

13. In recent years, the issue of independence has been raised with the Commission on several occasions. The administrative attachment to the Federal Department of Justice and Police is financially advantageous for the Commission, since it is able to avail itself of existing administrative and human resources at no cost. If the Commission were to sever links with the federal administration, it would have to bear these administrative and personnel costs itself.

14. In its last activity report,[3] the Commission stated that, in the absence of a national human rights institution, it could not envisage any other institutional attachment that would make it independent of the federal administration.

15. Furthermore, the authors of the legal opinion of 31 July 2017 on "legal aspects of the independence of the National Commission for the Prevention of Torture", mentioned in paragraph 19 of the Subcommittee's report, state that the Commission's administrative attachment to the General Secretariat of the Federal Department of Justice and Police has not led to any problems of misapplication of the law. Nor has the General Secretariat received any indication from the Commission that its financial independence is compromised by its administrative attachment to the Department. Consequently, the Federal Council sees no need to alter the current arrangements.

B. Budget and financial resources

16. Paragraphs 27 and 32: The Subcommittee therefore recommends that the State party provide the National Commission for the Prevention of Torture with a budget separate from that of the Federal Department of Justice and Police so that it can be financially autonomous and, as a result, operationally independent.

17. The Subcommittee recommends that the State party provide the National Commission for the Prevention of Torture with a budget sufficient to guarantee its operational independence and the proper exercise of its functions, in accordance with articles 17 to 20 of the Optional Protocol. In this regard, it encourages the State party to review the budget allocated to the national preventive mechanism, giving due consideration to the needs expressed by the members of the mechanism itself, so that it can: carry out, in a satisfactory manner, its annual programme of visits throughout the country; enlist, as needed, the services

[3] National Commission for the Prevention of Torture, 2019 activity report: https://www.nkvf.admin.ch/dam/nkvf/fr/data/Berichte/taetigkeitsberichte/taetigkeitsbericht-2019.pdf.download.pdf/taetigkeitsbericht-2019-f.pdf.

of external experts and interpreters working into various languages; conduct its follow-up activities; work in partnership with actors involved in torture prevention; and satisfy all the logistical requirements for its proper functioning.

18. The Federal Council dispatch regarding the Federal Act on the Commission for the Prevention of Torture stated that the Commission was expected to make 20 to 30 visits a year to places of deprivation of liberty. At the time, the Federal Council estimated that the cost of these visits would come to 184,000 Swiss francs (SwF) at most. When it was established, the Commission was assigned a permanent secretariat with 1.3 full-time equivalent posts and a budget of SwF 360,000 a year until 2012.

19. In the years that followed, the Commission's budget was increased as it was tasked with new functions such as monitoring deportations under the law on foreign nationals, monitoring federal asylum centres and conducting a project to review human rights standards and medical care for persons held in places of deprivation of liberty. As at 1 September 2020, the secretariat has 3.4 posts and an overall budget of SwF 960,600. In addition, the General Secretariat of the Federal Department of Justice and Police provides funding for a university student to undertake an internship in the Commission's secretariat. The Commission is not billed for rent or computer support. Should the Commission be separated from the federal administration, it would have to cover these costs from its existing budget.

20. The Commission decides autonomously how to use its financial resources and how many visits it can carry out within its budget. Since the introduction of the new management model of the federal administration, the Commission's budget must be managed as part of the overall budget of the General Secretariat of the Federal Department of Justice and Police.

21. The Commission has thus far been exempted from any requirement to make savings but, like all federal administrative units, must organize its financial planning so as to respect the financial framework. When the Federal Finance Administration was consulted on whether an individual appropriation within the meaning of article 30a (5) of the Finance Act[4], as an alternative to funding from the overall budget of the General Secretariat of the Federal Department of Justice and Police, would afford the Commission greater autonomy, it stated its opposition to the creation of an individual appropriation. Under article 30a (5), such appropriations may be used only to fund major individual measures and projects.

22. In 2019, the Commission conducted 23 monitoring visits to places of deprivation of liberty. The Federal Council believes that the Commission and its secretariat currently have sufficient financial and human resources to fulfil the mandate laid down in the Federal Act. The Commission has the necessary flexibility to use its resources as it sees fit, but it is also required to set priorities.

C. Members and secretariat

23. Paragraphs 35, 39 and 40: The Subcommittee recommends that the State party review the working conditions of the Commission's members to enable them to devote themselves fully to the activities of the national preventive mechanism, including by making it possible for some of them to work full-time and by allocating the financial resources necessary for their remuneration.

24. The Subcommittee recommends that the State party guarantee the independence of its national preventive mechanism, in accordance with article 18 (1) of the Optional Protocol, and its effectiveness, by significantly increasing the staff of the Commission secretariat and ensuring that all members of the Commission's staff work exclusively for it, under its direct oversight.

25. More generally, the Subcommittee is of the view that an expanded permanent secretariat entirely devoted to carrying out the mandate of the national preventive mechanism, with staff working full-time, would be better able to define and implement an effective operational strategy.

[4] RS 611.0.

26. Under article 7 (1) and (2) of the Federal Act on the Commission for the Prevention of Torture, the Commission is responsible for appointing its own members and for its organization and working methods. It is therefore free to decide how it operates and how it uses its funds. The Commission is composed of 12 members who are experts in human rights, justice, enforcement of sentences and measures, medicine, psychiatry and law enforcement. Working for the Commission on a part-time basis allows members to maintain their expertise through other activities. Members receive a daily allowance for their work. The Act also provides for the Commission to call on external experts with experience in more specific subject areas, if needed.

27. The number of posts in the Commission's secretariat has increased in recent years and currently stands at 3.4 (as at 1 September 2020).

28. The Federal Council believes that the manner in which the Commission is organized has proved effective, since it gives the Commission the flexibility to appoint members and experts appropriate to the type of monitoring visit being conducted. The Federal Council is also of the view that the current model, with 12 members working part-time, has proved effective.

IV. Legal and institutional framework: federal jurisdiction over criminal procedure and legal safeguards

A. Definition and criminalization of torture

29. Paragraph 43: Recalling the recommendations of the Committee against Torture and the Human Rights Committee, and in order to give effect to article 4 of the Convention against Torture, the Subcommittee recommends that the State party introduce in its Criminal Code a specific offence of torture, defined in accordance with article 1 of the Convention.

30. As article 4 (1) of the Convention rightly states: "Each State party shall ensure that all acts of torture are offences under its criminal law." Article 1 of the Convention defines the term "torture" as any act, inflicted by or at the instigation of a public body, by which severe pain or suffering, whether physical or mental, is intentionally inflicted on persons for such purposes as obtaining from them information or a confession, punishing them or intimidating them. Thus, States are required not to establish a specific offence of torture but to ensure that all acts covered by these two articles are criminal offences, as is the case in Switzerland.

31. Firstly, in the context of crimes against humanity, torture is explicitly prohibited under article 264a of the Swiss Criminal Code. Paragraph 1 (f) of this article establishes a custodial sentence of not less than 5 years for any person who, as part of a widespread or systematic attack directed against a civilian population, inflicts severe pain or suffering or serious injury, whether physical or mental, on a person in his or her custody or under his or her control.

32. Attacks against life, physical, sexual and psychological integrity and freedom (threats, coercion, false imprisonment and kidnapping), abuse of authority and obstruction of criminal proceedings are all penalized as ordinary offences. Acts that endanger life or health are also severely punished. Anyone committing such an offence, including public officials and authorities, is held criminally liable. Aiding and abetting a criminal offence is also punishable under Swiss law (Criminal Code, arts. 24 and 25), as is attempting to aid and abet (Criminal Code, art. 22), meaning that it is possible to prosecute not only direct perpetrators, but also their superiors, for example. Thus, the Subcommittee's assertion that "acts of torture committed during arrest, police custody or enforcement of a penalty, or during any other kind of deprivation of liberty ... would not be punished" is inaccurate.

33. The penalties established for the above-mentioned offences are proportionate, act as a deterrent and are fully in line with all other penalties established under the Criminal Code. If more than one offence is committed at the same time, the sentence for the most serious offence may be increased by half of the maximum penalty prescribed for that offence (Criminal Code, art. 49). Moreover, the statutes of limitation are sufficiently long to allow the criminal investigation authorities to carry out their work without undue haste, while

complying with the principle of expeditiousness (Code of Criminal Procedure, art. 5). These time limits, which vary between 7 and 30 years depending on the seriousness of the offence, were in fact extended during the revision of the general section of the Criminal Code, and they cease to accrue once the first-instance judgment has been handed down (Criminal Code, art. 97). In the context of crimes against humanity, offences of torture cannot be time-barred (Criminal Code, art. 101).

34. In order to highlight the extent to which Switzerland takes a zero-tolerance approach to acts of torture, it should be noted that the use of coercion, force, threats, promises, deception and other methods that may compromise a person's ability to think or decide freely are prohibited when taking evidence (Code of Criminal Procedure, art. 140). Any evidence obtained using such methods is completely inadmissible (Code of Criminal Procedure, art. 141 (1)).

35. In the light of these factors, the Subcommittee's assertion that "the only acts of torture punishable ... are those committed as part of a widespread or systematic attack directed against a civilian population" is untrue. In Switzerland, all acts that may amount to torture are punished, regardless of the context in which they are committed. Switzerland thus fulfils its commitments under articles 1 and 4 of the Convention, which do not require the creation of a criminal law provision specifically prohibiting torture.

B. Fundamental safeguards

36. Paragraph 45: The Subcommittee invites the State party to ensure that all persons who are deprived of their liberty have the benefit from the very outset of the deprivation of liberty – that is, from the time that they are deprived of freedom of movement by the police – of all the fundamental legal safeguards, namely, the right of access to a lawyer, the right to contact family members and the right to an independent medical examination by a doctor of their choice.

37. Contrary to the Subcommittee's assertion, the legal system provides for detained persons to have access to legal safeguards not from the start of their interrogation but from the time of their custodial arrest (Code of Criminal Procedure, art. 219). Indeed, as soon as a person is suspected of an offence, the police must immediately inform the suspect of his or her right to legal counsel (Code of Criminal Procedure, art. 219 (1), read in conjunction with art. 158). The Code of Criminal Procedure makes no reference to a three-hour period during which the suspect has no right to legal counsel.[5] In fact, Swiss legislation goes beyond the principle developed by the European Court of Human Rights that "access to a lawyer should be provided, as a rule, from the first police interview of a suspect".[6] If, however, the person arrested does not speak an official language, it is possible that he or she may not have immediate access to legal safeguards, as it will be necessary to provide translated information or an interpreter.

38. Similarly, for reasons of safety, legislation guarantees persons under custodial arrest or in pretrial detention the right immediately to inform their next of kin, their employer or the relevant embassy or consulate of their arrest (Code of Criminal Procedure, art. 214).

39. With regard to medical examinations, the Swiss legal system guarantees all persons arrested by the police the right to be examined by an independent doctor of their choice immediately following their arrest and whenever they so request, subject to the availability of the chosen doctor and as long as there is no risk of collusion.[7]

40. The right to information is of key importance in Switzerland. Informing suspects of their rights goes beyond mere prescriptive formality and is essential to ensuring the validity of actions and decisions taken. Thus, pursuant to article 158 (2) of the Code of Criminal

[5] Article 219 (5) of the Code of Criminal Procedure merely states that persons under arrest may only be held for more than three hours if a corresponding order is given by a police officer authorized to do so by the Confederation or the canton.

[6] European Court of Human Rights, *Salduz v. Turkey*, Judgment, 27 November 2008, para. 55.

[7] *Feuille fédérale* (Official Gazette) 2006 1371.

Procedure, any evidence obtained without this information having been provided would be inadmissible, regardless of the offence concerned and its seriousness.[8]

41. Lastly, suspects are generally able to verify compliance with due process by lodging an objection with the competent appeals authority against the decisions and procedural acts of the police and the public prosecutor's office (Code of Criminal Procedure, art. 393 et seq.). They may also contest the manner in which they were treated during the first-instance proceedings and, subsequently, during an appeal to a higher court (Code of Criminal Procedure, art. 398). All of these measures guarantee the accused a fair trial.

C. Internal and external complaints mechanisms

42. Paragraphs 47 and 48: The Subcommittee recommends that the State party guarantee that mechanisms are in place for the filing by persons deprived of their liberty of complaints concerning acts or omissions by the authorities responsible for their treatment. Such mechanisms should be available within all places of deprivation of liberty, and information about them should be transparent and disseminated widely in several languages. The State party should also ensure that all allegations or complaints concerning acts of torture or ill-treatment are transmitted without delay and in an impartial manner to the competent authorities, that they are investigated and, if necessary, that dissuasive penalties are imposed.

43. Article 301 of the Code of Criminal Procedure provides that everyone is entitled to report an offence to a prosecution authority, either in writing or orally. Prosecution authorities include the public prosecutor's office and the police (Code of Criminal Procedure, art. 12). These authorities are independent (Code of Criminal Procedure, art. 4), are subject to the principle of substantive truth (Code of Criminal Procedure, art. 6) and are required to initiate and conduct proceedings without delay when they become aware or have grounds for suspecting that an offence has been committed (Code of Criminal Procedure, arts. 5 and 7). In addition, the injured party may apply to the director of proceedings for the recusal of a person acting for a criminal justice authority if there are grounds to suspect that he or she may not be impartial (Code of Criminal Procedure, art. 56 et seq.). If the request for recusal is opposed, it is referred to the public prosecutor's office for a final decision if the matter relates to the police (Code of Criminal Procedure, art. 59 (1) (a)). The injured party may file his or her complaint with the public prosecutor's office directly (Code of Criminal Procedure, art. 301); reports do not therefore have to be made through the police. In other cases where a complaint is lodged against an authority involved in a case, the rules on the recusal procedure apply (Code of Criminal Procedure, art. 59). The criminal justice authorities, including police officers, are required to report any offences that come to light in the course of their official activities to the competent authorities (Code of Criminal Procedure, art. 302). The parties may appeal against decisions and procedural acts of the police and the public prosecutor's office (Code of Criminal Procedure, art. 393). Taken together, these provisions guarantee that any person claiming injury by a public official will receive a fair hearing by an independent authority. Moreover, the Federal Supreme Court has confirmed that any person who makes an arguable claim of inhuman or degrading treatment by a police officer is entitled to an effective and thorough official investigation.[9]

44. While most of the cantons leave the prosecution of public officials who have committed offences, including police officers, to the public prosecutor's office, some have adopted additional measures to strengthen the (already strong) guarantees provided by the Code of Criminal Procedure. These measures include, for example, stipulating that interviews in such cases may be conducted only by representatives of the public prosecutor's office, by an officer of a police force not involved in the case or, as in Geneva, by a special police unit dedicated to cases of this kind (the Inspectorate General of Services). Certain other cantons have established alternative mechanisms to those envisaged under the Code of Criminal Procedure for managing complaints against police officers. For example, the

[8] Jean-Marc Verniory, art. 158 N 26, in *Commentaire romand – Code de procédure pénale*, A. Kuhn and Y. Jeanneret, eds. (Basel, 2009). This author also argues that providing partial information on rights is equivalent to providing none at all.

[9] Federal Supreme Court decisions 138 IV 86, para. 3.1.1, and 131 I 455, para. 1.2.5.

Cantons of Zurich, Vaud, Basel-Stadt, Basel-Landschaft and Zug have an ombudsman's office. Similarly, in the cities of Bern, Lucerne, St. Gallen, Rapperswil-Jona, Wallisellen, Winterthur and Zurich, there are municipal ombudsman's services.

V. Visits to places of deprivation of liberty

A. Overview of the situation

45. Paragraph 52: The Subcommittee reiterates that deprivation of liberty pending trial should be a last resort, used only in exceptional circumstances and for limited periods, taking account of the principles of necessity and proportionality.

46. Switzerland takes note of the Subcommittee's recommendation, while pointing out that the Code of Criminal Procedure does not provide otherwise. Indeed, it is clear from articles 197 (1) and 237 (1) of the Code that pretrial detention is to be used only when no other measure is available. Furthermore, article 221 (1) provides that pretrial detention is permitted only if certain conditions are met (if there is a risk of absconding, reoffending or collusion) and if there is a strong suspicion that the accused has committed an ordinary or a serious offence within the meaning of article 10 of the Criminal Code. It is therefore a measure of last resort under Swiss law.

B. Police facilities

1. Allegations of ill-treatment

47. Paragraph 55: The Subcommittee recommends that police officers and, first and foremost, private guards carrying out, under contract, supervision-related tasks delegated by the authorities, be firmly reminded to respect at all times the rights and dignity of the persons deprived of liberty in their custody.

48. According to information from the Canton of Zurich, persons detained in the Zurich police prison are looked after mainly by security assistants assigned to a section of the prison, sometimes aided by officers from the cantonal police. They receive regular training on how to treat detainees properly and with respect. This subject is given a great deal of importance in in-service and other training courses. It is made clear to private service providers, especially when they are involved in transferring detainees between cantons, that the treatment of detainees must be respectful and consistent with the law.

49. The authorities of the Canton of Vaud report that police officers and employees of private security companies are regularly reminded of the rights and dignity of persons deprived of their liberty. The Vaud authorities will continue to issue such reminders and will not tolerate any abuse.

50. The authorities of the Canton of Geneva report that all instances of use of force by the Geneva police are detailed under the appropriate heading in police reports and are scrupulously monitored and analysed by the competent authorities to make sure that they are legal. The results of these analyses are systematically forwarded to the office of the Geneva chief of police. Police officers receive basic theoretical and practical training in the use of force and in-service training is organized on a regular basis. As for the company Securitas, whose activities are essentially limited to cantonal and inter-cantonal transfers and hospital security, no complaints were reported to the commissioners' department, which entrusts various surveillance tasks to this company. Any instance of non-compliance observed by the police would, depending on its seriousness, be reported to the hierarchy or referred to the Inspectorate General of Services.

2. Fundamental safeguards

51. Paragraph 60: The Subcommittee recommends that all detained persons be duly informed of their rights in a language they understand, be provided with interpretation services, as needed, and be assigned a lawyer with whom they can communicate.

52. See the reply to the recommendation contained in paragraph 45 of the Subcommittee's report.

53. The authorities of the Canton of Zurich report that detainees are informed of the reason for their detention during questioning after their arrest. They also receive a booklet, available in 31 languages, describing their rights and obligations and the subsequent procedure. If the detainee does not speak German, an interpreter is provided for all interviews with the police and the public prosecutor's office. If the accused so wishes, immediate access to counsel will be provided before initial questioning.

54. The Law Clinic on the Rights of Vulnerable Persons of the University of Geneva has published a detailed brochure on the rights of persons on remand in Champ-Dollon prison.[10] Law clinics comprised of university students and faculty members do pro bono legal work in the public interest, particularly in the area of social justice.

55. Paragraph 62: The Subcommittee reiterates its recommendation that all persons deprived of their liberty should be granted access to fundamental safeguards from the moment of deprivation of liberty. The State party should, moreover, ensure that information on the rights of persons deprived of their liberty is displayed at police stations in a position where it can be read easily and in the appropriate languages.

56. See the reply to the recommendation contained in paragraph 45 of the Subcommittee's report.

57. The authorities of the Canton of Geneva state that stopping and questioning of suspects is regulated at the cantonal level by directive D4, issued by the Geneva public prosecutor's office. It should be noted that this phase is intended to be as brief as possible and that the subsequent procedure is based on the evidence gathered. Thus, at present the Canton does not plan to provide persons with information on their rights at the time at which they are stopped and questioned. As for the format, it seems more appropriate to communicate this information in person during the interview.

58. Paragraph 67: The Subcommittee recommends that the State party transfer without delay pretrial detainees and prisoners serving sentences to institutions suitable for longer-term incarceration; it is imperative that police stations revert to their role as custody facilities for periods not exceeding 48 hours, as envisaged in the Code of Criminal Procedure.

59. The Vaud authorities point out that three of the Canton's six pretrial detention facilities are overcrowded. These three sites have occupancy rates ranging from 120 to 170 per cent, while facilities for prisoners serving sentences are operating at full capacity. The Canton has taken all the necessary measures to address this problem and has made plans to create new prison infrastructure with about 400 extra places by 2030, thus allowing for the implementation of the Subcommittee's recommendation. However, building a prison of this size takes time, owing to the process of securing loans and completing construction. While waiting for the new cells, the prison service has made extensive use of alternatives to detention. For example, the number of community service sentences carried out rose from 29 in 2017 to 249 in 2019. Moreover, the occupancy rate of police cells has declined sharply since June 2019. The average time spent in detention in cells fell from about 215 hours in 2019 to about 41 hours as at 2 July 2020.

3. Physical conditions

60. Paragraph 73: As previously stated, the Subcommittee recommends that the State party transfer without delay persons currently detained pending trial or serving sentences in police stations in Lausanne to suitable penitentiary institutions.

61. See the Vaud authorities' reply to the recommendation contained in paragraph 67 of the Subcommittee's report.

[10] https://www.unige.ch/droit/lawclinic/files/3515/6827/7741/droits-personnes-detention-provisoire.pdf.

62. Paragraph 75: The Subcommittee recommends that appropriate measures be taken to improve the physical conditions at the Zurich police station, particularly the introduction of natural lighting systems, heating, hot water and adequate ventilation.

63. Each cell in the police prison has a toilet and a washbasin with cold running drinking water. The showers have hot water. All cells are equipped with a large radiator whose temperature can be adjusted. Since the windows do not open, each cell has a ventilation system that brings in fresh air. Cell lighting has now been optimized by replacing the existing energy-saving lamps with brighter LED lamps. Major alterations are no longer economically viable because the current facility is due to be replaced, in April 2022, by a new prison located within the Zurich Police and Justice Centre.

4. Medical examinations

64. Paragraph 77: The Subcommittee recommends that all persons who are stopped and detained or subjected to custodial arrest have the right in practice, from the outset of the deprivation of liberty, to be examined by an independent doctor, of their own choosing if they so request. The findings of such medical examinations should be recorded and made available to the detainee and his or her lawyer.

65. The Federal Council takes the view that the right to be examined by a doctor, including a doctor of the detainee's choosing, does not need to be formally guaranteed at the very outset of deprivation of liberty. It should be pointed out that this issue is not, strictly speaking, a matter of criminal procedure but rather an aspect of the right to personal liberty enshrined in article 10 (2) of the Constitution.[11] Consequently, it does not seem appropriate to introduce a specific provision in the Code of Criminal Procedure or elsewhere. The free choice of a doctor cannot be absolutely guaranteed and is subject to the doctor's agreement and availability and the requirement that there be no risk of collusion. In this regard, see also the reply to the recommendation contained in paragraph 45 of the Subcommittee's report.

66. Paragraph 81: The Subcommittee is of the view that medication should, as far as possible, be prepared and distributed by qualified medical personnel.

67. In general and to the extent that resources permit, medication is prepared and distributed by specialized personnel, usually members of the medical service of the place of deprivation of liberty.

68. The authorities of the Canton of Vaud report that health personnel are responsible for the preparation of medication and the management of pharmacy stocks. They also entrust non-medical staff of police custody facilities with the distribution of medications; nurses make sure that non-medical staff have information on the name of the medication, general instructions, expected effects and possible side effects. Nurses also ensure that medications are accurately labelled with the patient's name and cell number. The procedure is precisely regulated in a delegation document drawn up by the Correctional Medicine and Psychiatry Service.

69. Paragraph 83: The State party should ensure that the holding cell set aside for sick inmates at the Zurich police station, particularly those passing through on a regular and thus a predictable basis, is equipped with an armchair and a bed and has sufficient lighting and an adequate ambient temperature.

70. The authorities of the Canton of Zurich report that this recommendation has already been implemented. The police prison has two separate rooms designed as holding cells.

[11] Federal Supreme Court decision 102 Ia 302, para. 2.

C. Prisons

1. Institutions for the enforcement of sentences

Living arrangements

71. Paragraph 89: Recalling the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), the Subcommittee invites the State party to reconsider its position that refusal to work should lead to disciplinary measures.

72. The Federal Council would first like to point out that the obligation to work is restricted by law to convicted prisoners serving a sentence or undergoing a measure involving deprivation of liberty (Criminal Code, arts. 81 and 90 (3)) and to persons serving a sentence or undergoing a measure in advance (Code of Criminal Procedure, art. 236). Persons in pretrial detention (Code of Criminal Procedure, art. 226), in detention pending extradition (Federal Act No. 351.1 on International Mutual Assistance in Criminal Matters, art. 47 et seq.) or in administrative detention (Federal Act No. 142.20 on Foreign Nationals and Integration, arts. 75, 76 and 78) are not required to work.[12]

73. The general aim of a custodial sentence is to improve the prisoner's social behaviour, particularly his or her ability to abide by the law (Criminal Code, art. 75 (1)). More specifically, the requirement to work helps to strengthen the prisoner's ability to reintegrate into society, particularly into working life, after he or she is released. By working, prisoners can acquire specific knowledge that may be useful in a professional setting. The requirement to work also allows a programme of activities to be offered, imparts structure to daily life and ensures that the establishment runs smoothly.[13] Pursuant to article 81 of the Criminal Code, the work must correspond, as far as possible, to the prisoner's abilities, training and interests. A person is thus required to work only if work suited to his or her physical and intellectual capacities is available.[14] Prisoners with a physical or mental disability may be offered a tailored occupational activity.

74. The purpose of work in detention is thus not to punish convicted persons but rather to facilitate their reintegration in a manner suited to their interests and abilities, in accordance with rules 96 and 97 of the Nelson Mandela Rules. There are various types of disciplinary measure, starting with warnings (Criminal Code, art. 91 (2)). In this context, and bearing in mind that competence in this area lies with the cantons (Criminal Code, art. 91 (3),[15] and Constitution, art. 123 (2)), the Federal Council does not intend to incorporate a specific provision on this subject in the Criminal Code.

Contact with the outside world

75. Paragraph 91: The Subcommittee would like to be informed of the measures taken to improve access to the telephone.

76. As far as telephone access at Pöschwies Prison is concerned, the 10-minute time limit, implemented according to a rota system, was established to ensure fair access to the sole telephone available in each residential unit (comprising 24 to 30 inmates). Under a new arrangement, the number of telephones will be increased to three per residential unit. As a result, inmates will have access to the telephone for longer periods of time. This project is expected to be completed by the first quarter of 2021.

High-security wings

77. Paragraph 94: The Subcommittee recommends that the State party consider harmonizing the procedure for placement in solitary confinement, if possible through

[12] Federal Supreme Court decision 123 I 221, para. II.3.

[13] Federal Supreme Court decision 139 I 180, para. 1.6

[14] Federal Supreme Court decision 139 I 180, para. 1.6

[15] Article 91 (3) of the Criminal Code provides that the cantons must enact disciplinary regulations governing the enforcement of sentences and measures. These regulations must define the constituent elements of disciplinary offences, the nature of the penalties, the criteria by which penalties are determined and the applicable procedure.

legislation. It further recommends that the State party ensure that any decision on placement in solitary confinement is legal, necessary, proportionate and non-discriminatory. There should also be legal safeguards, including the possibility to appeal and periodic review.

78. Solitary confinement is used in three cases: for a period of up to one week at the start of a sentence, to prepare for its enforcement; to protect a prisoner or third parties; or as a disciplinary measure (Criminal Code, art. 78). Where solitary confinement is imposed for security reasons (Criminal Code, art. 78 (b)) or as a disciplinary measure (Criminal Code, art. 78 (c)), it is subject to appeal. As decisions to impose solitary confinement entail the restriction of fundamental rights, they must meet the criteria set out in article 36 of the Constitution, that is, existence of a clear legal basis and of an overriding public interest or a need to protect the fundamental rights of others, respect for the principle of proportionality, and inviolability of the essence of fundamental rights.

79. The information sheet issued by the cantons of central and north-western Switzerland mentions the procedure and the legal safeguards (including the right to be heard and to seek legal remedies) applicable when a person is placed in a secure unit.[16]

80. In view of the powers conferred on the cantons in connection with the enforcement of penalties and measures (Constitution, art. 123 (2)), the Federal Council does not intend to enact specific legislation on this matter.

Discipline

81. Paragraph 96: The Subcommittee recalls that disciplinary isolation should not exceed 14 days and should be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to authorization by a competent authority. Furthermore, disciplinary measures should not include restrictions on family contact, except in case of breaches involving such persons.

82. The authorities of the Canton of Zurich state that, under cantonal legislation and the relevant intercantonal agreement (*concordat*),[17] confinement may not last longer than 20 days. In practice, confinement of up to 20 days is ordered only after much thought and only where very serious and/or repeated disciplinary offences have been committed. This being the case, and given the clear legal bases in place, the Canton of Zurich does not intend to change its practice. The purpose of confinement is to ensure that the persons concerned cannot leave their cells (except to take their daily exercise), receive visits, take leave or have any other form of contact with the outside world. The right to engage with the authorities and legal counsel is safeguarded. Similarly, medical and social care are guaranteed. If necessary, relief from confinement may be granted in specific cases.

83. The authorities of the Canton of Vaud are aware that disciplinary isolation is subject to a 14-day limit and that such isolation has an impact on inmates' mental health. The disciplinary regulations in the Canton of Vaud provide for the medical service to be consulted to determine whether a person is fit to undergo this punishment. It should be noted, however, that the issue of the maximum duration of disciplinary isolation is widely discussed within the European Committee on Crime Problems and the Council for Penological Cooperation. In any case, disciplinary measures lasting more than 14 days have been imposed only very rarely after very serious incidents have occurred. Such measures are imposed only after a comprehensive review has been conducted. Moreover, the rare cases in which they have been applied have never involved persons with pre-existing mental disorders.

[16] Placement in a secure unit may occur in order to ensure the person's own protection or that of others, because there is a substantial risk of escape or because there has been a serious disturbance of the peace and order within the establishment. See *Merkblatt Einweisung in die Sicherheitsabteilungen*: https://www.konkordate.ch/download/pictures/55/vlsy8sad27n02m456hynd4fdc3ldan/30.3_merkbaltt_einweisung_i_sicherheitsabteilungen_november_2013.pdf.

[17] § 23 (c) (1) (I) of the *Straf- und Justizvollzugsgesetzes* (law on penalties and enforcement) and No. 3 (1) (g) of the Guidelines on disciplinary regulations in facilities falling under the Concordat established by the cantons of eastern Switzerland of 7 April 2006.

84. Paragraphs 99 and 100: The Subcommittee recommends the establishment, in every prison, of a register of disciplinary measures, a register of the use of protective solitary confinement and a register of inmate complaints indicating the follow-up given thereto.

85. The Subcommittee further recommends the setting up of a system of statistical analysis based on the existing digital registers, to allow for monitoring and systematic analysis of the measures taken.

86. Most cantons keep a register of disciplinary measures (see also the eighth periodic report of Switzerland to the Committee against Torture (CAT/C/CHE/8, para. 121)).

Inmates subject to therapeutic measures (Criminal Code, art. 59)

87. Paragraph 102: The Subcommittee is of the view that a person with a psychiatric disorder who has been ordered to undergo inpatient treatment should be placed and cared for in a suitable medical facility staffed by qualified personnel.

88. Generally speaking, persons sentenced to inpatient therapeutic measures under article 59 of the Criminal Code are placed in specialized settings, that is, centres for the enforcement of measures, forensic psychiatric clinics, specialized prison units, or specialized institutions or residential facilities. In view of the lack of places, several plans to enlarge forensic clinics and institutions able to accommodate persons subject to measures are under consideration, including projects at the facilities in Rheinau in Zurich, Wil in St. Gallen, Königsfelden in Aargau, Realta in Graubünden and Basel. There are plans to create additional places for persons sentenced to undergo treatment in closed settings (under article 59 (3) of the Criminal Code) at Cery in Vaud, at the Curabilis facility in Geneva and in Valais (as part of the "Vision 2030" project). Plans have also been made to create 39 places in minimum security settings at Münsterlingen in Thurgau (19 places) and at the clinic in Wil, St. Gallen (20 places).

89. Over 100 places are expected to be created by 2024 or 2025. Once these projects are completed, Switzerland will have more than 400 places reserved exclusively for the needs of persons with mental disorders.

90. When persons subject to a particular measure under article 59 of the Criminal Code are placed in the specialized unit of a closed institution (owing to a risk of their absconding or reoffending), the Criminal Code expressly provides that the necessary therapeutic treatment must be provided by qualified staff (Criminal Code, art. 59 (3)).

2. Combined facilities for the enforcement of sentences and pretrial detention

Physical conditions

91. Paragraph 106: The Subcommittee recommends that the State party ensure that:

- There is adequate ventilation in all cells
- All disciplinary cells are provided with running water, and inmates' privacy is protected by training the security cameras away from the toilet areas

92. With regard to the physical conditions of detention in the Bern regional prison, the authorities of the Canton of Bern state that new facilities will be constructed and renovations will be carried out as part of a comprehensive strategy to be implemented over the next 15 years. The Canton intends to invest a total of SwF 580 million to modernize the infrastructure of the prison system. The Bern regional prison will undergo maintenance and adaptation work, reducing the number of prison places from 126 to 70. This work, the estimated cost of which is around SwF 13 million, will be carried out in phase two. No major changes will be made to the structure of the building until the maintenance work has been undertaken.

93. Various alterations have been made to enhance air quality. For instance, the ventilation system has been supplemented with a humidification system and all the ventilation valves have been replaced in order to improve air circulation. In addition, the situation is monitored by prison officials and is continually assessed to determine whether short-term measures need to be taken.

94. No changes will be made to remedy the lack of direct access to running water or the lack of privacy in the disciplinary cells until the planned maintenance work is complete. The current arrangements are in place for security reasons. For instance, lockable areas in cells might prevent staff from responding expeditiously to suicide attempts. However, the video images of the toilet areas in disciplinary cells in the Bern regional prison are pixelated. Similarly, the presence of running water in cells would create a substantial risk of pipes becoming blocked and cells flooding, which could endanger the inmates. However, persons in disciplinary cells may request and receive sufficient water at any time.

Living arrangements

Persons detained under criminal law

95. Paragraph 108: The Subcommittee recommends that pretrial detainees be able to receive visitors and be authorized to communicate with their families and other persons under the same conditions as convicted prisoners, unless a judicial authority has imposed, in an individual case and in keeping with the principles of necessity and proportionality, a specific prohibition for a given period. The Subcommittee is of the view that respect for the right to family contact is particularly important for pretrial detainees, in the light of the principle of presumption of innocence and the rights to privacy and family life.

96. The contact that pretrial detainees may have with the outside world is governed by article 235 of the Code of Criminal Procedure. This provision stipulates that the liberty of pretrial detainees may be restricted only to the extent required by the purpose of the detention and the need to maintain the order and security of the detention facility (para. 1). Paragraph 2 states that any contact between pretrial detainees and third parties is subject to the authorization of the persons overseeing the proceedings and that visits may be supervised if necessary. Unless a pretrial detainee fails to respect the order and security of the place of detention or there is a risk to the proceedings (in particular, the risk of collusion), he or she may generally receive visits or communicate with relatives by telephone, Skype or letter. According to the case law of the Federal Supreme Court, persons in pretrial detention are entitled to receive such visits to the extent permitted by the circumstances (for example, provided that there is no risk of collusion, which may be ensured by means of supervised visits if necessary).[18]

Persons detained under administrative law (law on foreign nationals)

97. Paragraph 109: The Subcommittee is deeply concerned about the detention in prisons for relatively long periods of foreign nationals subject to coercive measures.

98. From 2017 to 2019, the average duration of administrative detention imposed under the law on foreign nationals was less than one month (28 days). Persons detained for six months or more were the exception, accounting for less than 3 per cent of cases.

99. Paragraph 110: In the Bern regional prison, administrative detainees were in principle to be accommodated solely on the floor set aside for them, but some had been placed on the floors intended for persons detained under criminal law.

100. The authorities of the Canton of Bern have recognized the need for action in the area of administrative detention and have planned, or have already taken, appropriate measures in cooperation with the responsible authorities. Since 1 July 2018, the Office for Judicial Enforcement has been running the Moutier regional prison, which has 28 places, as a specialized facility for the enforcement of coercive measures under the law on foreign nationals. Administrative detainees have been admitted to the Bern regional prison solely for reception and transit since 1 September 2019. Stays are limited to four days. The 11 administrative detention places in the Bern prison make up a residential unit, where cells remain open for longer periods.

101. Paragraph 111: The administrative detainees had an open-door regime, which, however, was applied only from 7.30 a.m. to 11 a.m. and from 6.30 p.m. to 8 p.m., and they

[18] Federal Supreme Court decision 143 I 241, paras. 3.6 and 4.2.

had just one hour's exercise per day. Those held in the area intended for criminal detention were subjected to a closed-door regime. They were offered work (packing, helping in the kitchen and carrying out various tasks within the prison).

102. For the authorities of the Canton of Bern, it is a priority to separate inmates subject to different types of detention. The Canton established the necessary coordination mechanism, in the form of the Central Office for the Coordination of Detention, in early 2019. The separation of inmates subject to different types of detention in all regional prisons in the Canton of Bern will create new options for the Bern regional prison, which will be able to extend the hours during which cells are open and consequently reduce the duration of the closed-door regime and increase the inmates' freedom of movement.

103. Paragraph 112: In the prison at Zurich airport, administrative detainees, mainly foreign nationals awaiting removal, enjoyed an open-door regime from 8 a.m. to 5 p.m. on Mondays, Tuesdays, Thursdays and Fridays, but only from 9.30 a.m. to 11.30 a.m. and from 1.30 p.m. to 3.30 p.m. at weekends and on public holidays. On Wednesdays, the doors remained closed. Only 60 work places were available, in the laundry, and were filled in rotation. Inmates had access to a sports hall twice per week for one hour. No visitors could be received at weekends or on public holidays.

104. At the airport prison, the unit for the enforcement of coercive measures under the law on foreign nationals admits only persons subject to such measures. Persons in this unit do not mix with inmates serving sentences, pretrial detainees or persons detained for security reasons, who are held in a completely separate unit.

105. At the time of the Subcommittee's visit, one floor of the administrative detention unit was occupied by persons serving sentences because major alteration work was being carried out in the sentence enforcement unit. However, persons subject to different forms of detention were well separated (for example, convicted inmates took their exercise in the yard of the sentence enforcement unit). The work in question was completed some time ago and there are now separate buildings for the different forms of detention, as in the past.

106. As persons subject to different forms of detention are clearly separated, persons in administrative detention under the law on foreign nationals enjoy a much more liberal regime than other inmates. However, the authorities of the Canton of Zurich recognize that there is room for further improvement and are giving serious consideration to the request to establish a special facility for administrative detention. As a result, the Zurich Cantonal Council has approved an implementation strategy that involves abolishing the sentence enforcement unit and establishing a centre reserved exclusively for administrative detention. Using the Zurich airport prison solely for administrative detention will increase the number of places available for that purpose and make it possible to further liberalize and refine the detention regime. The centre reserved exclusively for administrative detention under the law on foreign nationals is expected to be completed in the first half of 2021.

107. Paragraph 113: The Subcommittee reminds the State party that:

- Detention pending removal is a last resort and should be proportionate
- Persons subject to coercive measures under the law on foreign nationals should be accommodated not in prisons but in centres designed specifically for that purpose
- Persons placed in administrative detention should not be subjected to restrictions that are more encompassing than those warranted by their status. Article 81 (2) of the Federal Act on Foreign Nationals and Integration states that persons placed in administrative detention must not, as far as possible, be grouped with persons in pretrial detention or persons incarcerated because they have committed a crime

108. With regard to the first point, the cantons are responsible for coercive measures ordered under the law on foreign nationals. It is they who decide, on a case-by-case basis, on the suitability, necessity and enforceability of the measures in question. When such decisions are taken, detention must be considered a last resort and it must be proportionate. The competent cantonal courts for coercive measures examine the lawfulness and appropriateness of administrative detention under the law on foreign nationals, in accordance with articles 80 and 80a of the Federal Act on Foreign Nationals and Integration.

109. With regard to the second and third points, article 81 (2) of the Federal Act on Foreign Nationals and Integration was amended on 1 June 2019 and now provides that detention is to take place in a facility for administrative detention under the law on foreign nationals. In those exceptional cases where this is not possible, for example, for reasons of capacity, foreign nationals must be held separately from pretrial detainees or persons serving a sentence. Article 82 (1) of the Federal Act on Foreign Nationals and Integration provides that the Confederation may finance all or part of the construction and alteration of cantonal detention facilities, provided that they are used exclusively for the enforcement of administrative measures under the law on foreign nationals.

3. Health care in prisons

110. Paragraph 119: The Subcommittee recommends that:

- A register of bodily injuries and allegations of violence is kept to facilitate systematic analysis of the phenomenon
- Medication is distributed by medical personnel, as far as possible
- Individualized treatment and psychosocial rehabilitation plans are drawn up for inmates suffering from mental disorders, particularly those placed in solitary confinement

111. With regard to registers, practices may vary from canton to canton, as already stated in paragraphs 99 and 100. Generally speaking, if an allegation of ill-treatment or violence is made, the inmate concerned may undergo a medical examination, the results of which will be documented. If an act of violence is found to have occurred, a complaint will be made.

112. With regard to the distribution of medication, the Federal Council refers to its reply to the recommendation contained in paragraph 81 of the Subcommittee's report.

113. A criminal penalty enforcement plan (Criminal Code, arts. 75 (3) and 90 (2)) is drawn up for each prisoner, including persons suffering from mental disorders, whether they are serving a sentence or are subject to a measure of some kind or if they have been placed in solitary confinement. Plans are drawn up in collaboration with the person concerned and cover a number of points related to the enforcement of the penalty, including assistance, therapeutic care, training opportunities and preparation for release. Such plans also set out the objectives of and conditions applicable to the different stages as the detention regime is gradually relaxed ahead of the prisoner's release. Plans are adapted on a regular basis in accordance with the person's progress. In addition, the Criminal Code provides that the situation of persons sentenced to inpatient therapeutic measures or indefinite detention (arts. 59, 60, 61, 63 and 64) must be assessed at least once a year to determine whether they are eligible for conditional release or the lifting of the measures (arts. 62d (1), 63a (1) and 64b (1)). Criminal penalty enforcement plans and assessments to determine eligibility for conditional release or the lifting of measures allow for changes in inmates to be taken into account.

4. Administrative detention facilities (migrant detention centres): Frambois facility (Concordat) and Favra secure facility (Canton of Geneva)

Safeguards

114. Paragraph 125: The Subcommittee wishes to receive clarification from the State party as to whether previous periods of detention under administrative or criminal law are taken into account when prison sentences are imposed. It also wishes to receive clarification from the State party concerning any measures taken to avoid cumulative detention.

115. The maximum duration of administrative detention under the law on foreign nationals is six months, pursuant to article 79 (1) of the Federal Act on Foreign Nationals and Integration. Article 79 (2) of the Act provides that this period may be extended by up to 12 months under certain conditions and with the agreement of the cantonal judicial authority

concerned. This practice is in line with the European return directive.[19] The 18-month maximum relates exclusively to administrative detention under the law on foreign nationals. It does not apply to inmates serving a sentence, for example, following a conviction for an offence under article 115 of the Federal Act on Foreign Nationals and Integration. This is because the purpose of a criminal conviction is different from that of administrative detention. Criminal law is aimed at protecting society from offenders, while administrative detention under the law on foreign nationals is ordered in view of removal proceedings or to ensure that removal or expulsion orders are carried out. Swiss law does not, in principle, preclude cumulative detention – under administrative law and for the purpose of serving a sentence.

116. Paragraph 126: The Subcommittee recalls that detention of migrants in an irregular situation should be a last resort.

117. Article 115 of the Federal Act on Foreign Nationals and Integration was amended on 1 June 2019 to ensure that custodial sentences may no longer be imposed or enforced solely on the basis of illegal stay where removal proceedings are pending or are to be initiated. This amendment was made in accordance with the case law of the Federal Supreme Court on the criminal prosecution for illegal stay of foreign nationals in respect of whom removal proceedings are under way.[20] The case law of the Federal Supreme Court is based on the decisions of the Court of Justice of the European Union in connection with the return directive. According to these decisions, the return directive precludes national legislation imposing a prison sentence on an illegally staying third-country national during the return procedure. A pending removal procedure may not be prevented by a custodial sentence imposed and enforced solely on the basis of an illegal stay.[21] The competent authority is thus entitled to waive criminal proceedings, referral to a court or sentencing of persons who have entered or left Switzerland or are staying there illegally when removal or expulsion proceedings are pending (Federal Act on Foreign Nationals and Integration, art. 115 (4)). In accordance with the decisions of the Court of Justice of the European Union,[22] a custodial sentence may be imposed and enforced only if the person concerned has re-entered Switzerland in breach of a prohibition on entry or if his or her conduct has prevented the enforcement of a removal or expulsion order (Federal Act on Foreign Nationals and Integration, art. 115 (6)). Imprisonment under article 115 of the Federal Act on Foreign Nationals and Integration may thus be imposed only in exceptional cases.

Living arrangements

118. Paragraph 131: The Subcommittee recommends that detainees be given more access to outside space and that a wider range of activities be offered.

119. According to the authorities of the Canton of Geneva, detainees have a minimum of one hour's exercise per day. However, this period is often extended, if the weather allows and enough staff are available. It was precisely the shortage of staff at Favra that led the authorities to limit stays at the facility to 30 days, to the extent possible (the average stay in 2019 was 18 days).

Health care

120. Paragraph 136: The Subcommittee is of the view that the regular presence of a psychologist in each establishment would provide valuable psychological support.

121. According to the authorities of the Canton of Geneva, detainees are provided with psychological support at their request or on the recommendation of a member of staff and/or a doctor. However, demand for support of that kind remains sporadic. Without minimizing

[19] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[20] Federal Supreme Court decision 6B 196/2012 of 24 January 2013.

[21] See Court of Justice of the European Union, Case C-329/11 (*Achughbabian*); Case C-61/11 PPU (*El Dridi*).

[22] See Court of Justice of the European Union, Case C-329/11 (*Achughbabian*); Case C-61/11 PPU (*El Dridi*); Case C-290-14 (*Celaj*).

the seriousness of the issue, it should also be pointed out that members of staff do all they can to prevent acts of self-harm, including by maintaining good relations with detainees, as noted by the Subcommittee. Moreover, the occurrence and the seriousness of some acts of self-harm must be considered in the light of the determination of several detainees to avoid deportation from Switzerland.

Staffing

122. Paragraph 138: The Subcommittee reminds the State party that the process for the selection of custodial staff in administrative detention centres must be particularly rigorous and that they must have appropriate training, given the sensitive nature of the tasks they are called on to perform.

123. The Directorate General of the Office for Detention of the Canton of Geneva has been carrying out an ambitious medium- and long-term policy on recruitment and training, including in-service training. In addition, the guards at Frambois are gradually being integrated into the initial basic training programme, with the aim that they complete the training needed to obtain the federal diploma for prison officers. The Subcommittee's reminder supports this approach.

124. The aim of the basic training that leads to the federal diploma for prison officers is to equip trainees with the operational skills they need in order to work in places of deprivation of liberty. The cantonal authorities are responsible for decisions relating to recruitment and enrolment in basic training. The basic training is not specific to administrative detention centres but equips trainees with all the skills needed to work in those centres. It is structured around five general themes: working in places of deprivation of liberty (cross-cutting skills); from arrest to release; support and supervision in living and work units; special groups of prisoners with specific needs; security and prevention; and health and prevention.

125. The most relevant international treaties [23] and the national legal framework are discussed frequently in the course of the training. There is a basic training module that deals specifically with the situation of persons in administrative detention, with a particular focus on: specific legal aspects; the specific characteristics, physical and psychological vulnerabilities and corresponding needs of persons in administrative detention; the main causes of stress among persons in administrative detention; offers of support and assistance; the skills needed by prison officers working with persons in administrative detention; and the behaviours and attitudes to adopt when working with persons in administrative detention. The training also covers the topic of foreign persons in detention, which encompasses key issues such as intercultural skills, prejudice, stereotypes, racism and religion.

126. Paragraph 139: The Subcommittee is also of the view that having a social worker present at Favra, as there is at Frambois, would be helpful in keeping detainees informed about their legal and administrative situation.

127. The authorities of the Canton of Geneva report that the Subcommittee's recommendation has been duly noted, adding that the deputy director of the facility at Favra is a qualified social worker and worked as one in the prison sector for many years. The detainees are therefore not without social support.

[23] In particular, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) and Council of Europe texts such as the European Convention on Human Rights, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules and Recommendation CM/Rec(2012)5 of the Committee of Ministers to member States on the European Code of Ethics for Prison Staff.

5. Forcible returns

128. Paragraph 140: Level 4 returns (charter flights) are monitored by the National Commission for the Prevention of Torture. In the Subcommittee's view, this is a good practice that should be maintained.

129. The Federal Council agrees that the monitoring of returns under the law on foreign nationals by the National Commission for the Prevention of Torture and the dialogue between the authorities and the Commission on this subject help greatly to ensure that forced repatriations are carried out in the best possible conditions. In its last public report, dated July 2020, the Commission attested to the professional and respectful behaviour of the executing authorities towards persons being repatriated.

130. Paragraphs 141 and 142: With regard to level 3 returns (forcible returns on scheduled flights), which are not monitored by the Commission, the delegation received several allegations of disproportionate use of force and restraint, particularly involving chains that were too tight, attached at the back, and a technique whereby strong pressure is applied to the Adam's apple of the person being returned to prevent him or her from crying out. It was claimed that individuals were more likely to be subjected to the technique if there had been previous failed attempts to remove them.

131. The Subcommittee considers that the practices reported in connection with level 3 returns, if confirmed, are unacceptable and could amount to ill-treatment.

132. The Federal Council notes that, under article 28 of the Ordinance on the Use of Police Control and Restraint Techniques and Police Measures under Federal Jurisdiction,[24] the means of restraint that may be used during level 3 returns are the same as for level 4 returns (charter flights). The use of restraint in the context of returns on scheduled flights under police escort always depends on the behaviour of the persons being repatriated and the specific circumstances. All techniques that are seriously harmful to the health of the persons concerned, especially those that obstruct their breathing, are prohibited.

133. Paragraph 143: The Subcommittee recommends that the State party consider the monitoring of level 3 returns by observers such as the National Commission for the Prevention of Torture.

134. In October 2019, the National Commission for the Prevention of Torture decided to extend its monitoring to include some returns on scheduled flights under police escort. It intends to focus on transport between cantonal facilities and the airport and organization on the ground at the airport. The Subcommittee's recommendation has therefore already been implemented.

6. Federal asylum centres

135. Paragraph 146: The Subcommittee does not deem it appropriate to give an opinion here as to whether stays in such centres constitute a restriction of freedom of movement, or deprivation of liberty, within the meaning of article 4 (2) of the Optional Protocol. It emphasizes, however, that asylum seekers cannot be accommodated in conditions akin to detention and recommends that the asylum centres be visited periodically by independent mechanisms, including the National Commission for the Prevention of Torture.

136. In order for the asylum procedure to be carried out quickly and fairly, it is essential that asylum seekers are available to the authorities for the various stages of the procedure (such as hearings, for example) throughout their stay in federal asylum centres. These centres are not closed institutions and staying in such a centre does not involve deprivation of liberty. If the presence of asylum seekers is not required for procedural reasons, they are allowed to leave the centres during certain hours (Federal Department of Justice and Police Ordinance on the Running of Federal Centres and Accommodation in Airports, art. 17).[25] These hours must be regulated in order to ensure peaceful cohabitation in the centres and in the communes where they are located. The hours are agreed upon by the parties involved, namely the

[24] RS 364.3.
[25] RS 142.311.23.

relevant communal and cantonal authorities and representatives of civil society. Following the reform of the asylum system under the law that entered into force on 1 March 2019, the Ordinance of the Federal Department of Justice and Police was completely reworked. As a result, the State Secretariat for Migration is now able to authorize longer periods of leave when there are strong reasons to do so. It can also reach an agreement with the relevant communal authorities to extend the hours when asylum seekers are allowed to leave the centres. There have been cases in which it has done so.

137. Lastly, it should be noted that access to spiritual assistance and to legal advice and representation is guaranteed in federal asylum centres. Support of this kind is provided by independent actors who can make critical observations to the State Secretariat for Migration at any time. In addition, the National Commission for the Prevention of Torture makes unannounced visits to the centres on a regular basis in order to ensure that human rights are being respected. The centres also receive regular visits and recommendations from the Office of the United Nations High Commissioner for Refugees.

VI. Therapeutic measures and indefinite detention

A. Legal framework

138. Paragraphs 156 to 159: With regard to article 64 (1) bis of the Criminal Code specifically, the Subcommittee:

- Recalls that, for a life sentence to remain compatible with article 5 of the European Convention on Human Rights, there must be both a real prospect of release and a possibility of thorough review.
- Expresses serious doubts as to the feasibility of establishing a medical prognosis of lifelong untreatability and permanent psychiatric, criminal and social dangerousness. Predictions about a convicted person's future behaviour are, by their very nature, uncertain, with a significant risk of error. Deprivation of liberty for life on such flimsy grounds could raise serious issues of lawfulness.

139. Consequently, the Subcommittee recommends that the State party review article 64 (1) bis of the Criminal Code in the light of these comments and consider the advisability of repealing it.

140. Article 123a of the Constitution and article 64 (1) bis of the Criminal Code give effect to the people's initiative on life imprisonment for persons convicted of sex offences or violent crimes who are considered very dangerous and not responsive to rehabilitation. These two provisions stipulate that only extremely dangerous offenders who are very likely to reoffend and are not responsive to rehabilitation may be placed in lifelong detention. Moreover, the dangerousness of an offender and the assessment that he or she is permanently untreatable must be confirmed by two psychiatric evaluations. Life imprisonment is thus intended for very dangerous offenders. This explains why the law provides for this criminal penalty as a last resort and why only one person is currently serving a life sentence. The recent case law of the Federal Supreme Court on the subject[26] confirms that this penalty can be applied in only a very limited number of cases. The Court ruled that only persons who will remain unreceptive to treatment throughout their lifetime may be imprisoned for life.

B. Field visits: Rheinau psychiatric clinic

141. Paragraph 175: The Subcommittee wishes to emphasize that prisoners suffering from psychiatric disorders should, in all circumstances, be treated by staff who are qualified and sufficiently numerous to provide the requisite assistance and care, in an appropriate setting, be that a specialized hospital unit or a specialized prison unit.

[26] See, in particular, Federal Supreme Court decision 140 IV 1 and decision 6B_35/2017 of 26 February 2018.

142. For information on persons subject to therapeutic measures, in particular under article 59 of the Criminal Code, see the reply to the recommendation contained in paragraph 102.

143. Persons with mental disorders who are serving a custodial sentence have the same rights as other patients, except the right to be treated by a doctor of their choice. Prisons have an obligation to arrange for the treatment of inmates and to find appropriate solutions in those cases where psychiatric hospitalization proves necessary. In particular, they are advised to ensure that care is provided by specialized staff trained specifically in psychiatry or psychotherapy.

144. Paragraph 177: The Subcommittee encourages the State party to increase the number of places in appropriate facilities for persons sentenced to therapeutic measures and wishes to be informed of the decisions taken in this regard.

145. As indicated in the reply to the recommendation contained in paragraph 102, various steps are being taken to increase the number of places available for persons sentenced to therapeutic measures.

146. Paragraph 179: The Subcommittee, bearing in mind rule 109 (1) of the Nelson Mandela Rules, considers that the State party should conduct an in-depth review of the situation of persons in indefinite detention and amend its legislation and institutional responses accordingly.

147. In the light of rule 109 (1) of the Nelson Mandela Rules, it is worth noting that indefinite detention may also be imposed on persons who do not have a mental disorder and have not been deemed to lack criminal responsibility but are very likely to commit a further, particularly serious offence (Criminal Code, art. 64 (1) (a)). Persons in indefinite detention may receive psychotherapy and serve their sentence in a psychiatric hospital or a specialized institution, pursuant to article 64 (4) of the Criminal Code, provided that public safety is guaranteed.

148. Paragraphs 181 and 182: The Subcommittee recommends that extension of therapeutic measures be based on a detailed examination of the necessity and proportionality of such a step, with due regard for the therapeutic progress made by the person subject to the measures. It further recommends that, for the purposes of the procedure, inmates automatically be heard by the relevant cantonal authorities before the measures are extended and that they have the assistance of counsel.

149. The Subcommittee makes the same recommendation in respect of the review of indefinite detention.

150. In cases that fall under articles 60 and 61 of the Criminal Code, the extension of therapeutic measures is limited. Therapeutic measures imposed under article 59 of the Code can, in theory, be extended indefinitely (Criminal Code, art. 59 (4)). Measures of this kind can be renewed if the convicted person does not meet the requirements for conditional release at the end of the period prescribed by law. The assessment as to whether those requirements have been met is based on a hearing with the person concerned and a treatment report submitted by the relevant therapist; in some cases, a psychiatric evaluation may be required and an interdisciplinary committee of specialists may be consulted (Criminal Code, art. 62d). Any decision to extend such a measure is taken by a court, not by the executing authority. It can be assumed that the person concerned will be heard by the judge in proceedings of this kind.

151. Indefinite detention is not time-limited. It therefore cannot be extended and simply lasts until such time as conditional release is granted or a therapeutic measure is imposed (Criminal Code, arts. 64a–64b). The assessment as to whether conditional release should be granted is based on a hearing of the offender, a report submitted by the institution, the opinion of a committee of specialists and a psychiatric evaluation (Criminal Code, art. 64b (2)). Any decision by the court to impose a new therapeutic measure must be based on a psychiatric evaluation containing a recommendation to that effect. Moreover, the European Court of

Human Rights recently ruled, in a case concerning Switzerland, that such evaluations must be sufficiently recent, although it did not specify a period of validity.[27]

152. It should also be noted that, as part of the package of measures on the enforcement of penalties, on which consultations were completed in autumn 2020, the Federal Council is proposing to strengthen the role of the courts in extending, lifting or changing measures that have been imposed on offenders.[28]

153. Paragraphs 184 and 185: The Subcommittee considers, as a matter of principle, that, as provided in the Civil Code, medication should be administered only with explicit free consent, duly documented, other than in exceptional circumstances.

154. The Subcommittee is of the view that, in application of the principle of equivalence of care, there is no reason to waive all these conditions in the case of prisoners, including those sentenced to therapeutic measures.

155. It is indeed the case that, in accordance with the principle of equivalence, prisoners should enjoy living conditions that are as close as possible to ordinary living conditions (Criminal Code, art. 75 (1)). When it comes to forced medication, for example in cases where prisoners have severe mental disorders, the Swiss Academy of Medical Sciences has noted that the principles governing the use of medically indicated coercive measures in respect of prisoners are the same as those that apply to the rest of the population.[29]

156. Paragraph 187: The Subcommittee is of the view that the rules in the Civil Code governing treatment without consent could also apply, by analogy, to prisoners subject to therapeutic measures. The Subcommittee would be very interested in the State party's comments in this regard.

157. The Federal Council refers to its reply to the recommendations contained in paragraphs 184 and 185. Treatment without consent, inasmuch as it constitutes a restriction on fundamental rights, must satisfy the conditions set out in article 36 of the Constitution (existence of a clear legal basis and of an overriding public interest or a need to protect the fundamental rights of others, respect for the principle of proportionality, and inviolability of the essence of fundamental rights). Article 434 (1) of the Civil Code reiterates these conditions (existence of an overriding interest, respect for the principle of proportionality) and further stipulates that the patient must be unable to exercise judgment in relation to his or her need for treatment.

VII. Other issues

A. Tasks delegated to private companies

158. Paragraph 190: The Subcommittee recalls that, when the supervision or transportation of prisoners under escort is contracted out or otherwise delegated to private actors, the State party remains bound by its obligations under the Optional Protocol and is responsible for any breach of the Protocol committed, at its instigation or with its consent or acquiescence, against persons deprived of their liberty.

159. The cantonal authorities delegate certain tasks relating to the transportation of prisoners to private security service providers. The transportation of prisoners by such service providers is governed by strict rules and is limited to persons who do not pose a known risk to themselves or others. The cantonal authority that contracts out the transportation is responsible for conducting a risk assessment. Persons who pose a potential risk are either accompanied by police officers as part of a special transport operation or transported by the police.

[27] European Court of Human Rights, *Kadusic v. Switzerland*, Judgment, 9 January 2018, para. 55 ff.

[28] https://www.bj.admin.ch/bj/fr/home/sicherheit/gesetzgebung/verbesserungen-smv.html.

[29] Swiss Academy of Medical Sciences, *Medical-ethical guidelines: Coercive measures in medicine* (Bern, 2015), para. 4.6.

160. Private security service providers transport only persons whose liberty has already been restricted by the authorities. They are also prohibited from using violence. In this regard, the State security services continue to exercise the exclusive powers conferred on them; these powers cannot be delegated to a transport service provider.

161. The accommodation of asylum seekers in federal asylum centres and the management of security in those centres are the responsibility of the State Secretariat for Migration. The companies that deal with supervision and security are commissioned by the State Secretariat for Migration and operate under its oversight. In the event that damage occurs, the law on liability applies (causal liability). Third parties (for example, asylum seekers) who have been harmed by employees of the companies providing these services are therefore not disadvantaged by the fact that the State Secretariat for Migration uses such companies, whose employees have the same duties as federal employees.

162. The employees of the companies responsible for supervision and security are trained, supervised and monitored by the State Secretariat for Migration. The use of such companies relies on their staff having the necessary vocational training and experience and attending further in-service training. Furthermore, employees responsible for security cannot be hired without the approval of the State Secretariat for Migration.

163. Lastly, the companies that deal with supervision and security at federal asylum centres (especially the provision of caretaking and surveillance services) do not exercise any State functions. They are authorized to use restraint only in self-defence or in an emergency and in accordance with the internal regulations. The employees of these companies have no more rights than the average person.

B. Health-care costs of prisoners

164. Paragraph 196: The Subcommittee wishes to receive additional information on this issue from the State party and calls on it to guarantee to the prison population throughout the territory access to the necessary health care and services free of charge.

165. Both the Swiss Centre of Expertise in Human Rights and the National Commission for the Prevention of Torture have addressed this issue.[30] Requiring prisoners to make a moderate contribution to their health-care costs is not precluded by the obligations of Switzerland under international law or the Constitution. The required contribution must be reasonable and access to adequate care must not be delayed or rendered impossible. A contribution to health-care costs that is appropriate to the individual's financial circumstances, is not prohibitive and therefore has no bearing on events seems admissible. At the political level, a discussion is currently under way on the advisability of making health insurance compulsory for prisoners and on the way in which their contribution to health-care costs could be defined, with due regard for the principles of standardization and equal treatment.

[30] Jörg Künzli and Florian Weber, *Gesundheit im Freiheitsentzug Rechtsgutachten zur Gesundheitsversorgung von inhaftierten Personen ohne Krankenversicherung* (Bern, 2018), p. 39 (https://www.skmr.ch/de/themenbereiche/justiz/publikationen/gesundheitsversorgung_freiheitsentzug_menschenrechtliche_vorgaben.html); National Commission for the Prevention of Torture, *Gesamtbericht über die schweizweite Überprüfung der Gesundheitsversorgung im Freiheitsentzug durch die Nationale Kommission zur Verhütung von Folter (2018–2019)*, p. 40, para. 122 – a summary is also available in French (https://www.nkvf.admin.ch/nkvf/fr/home/publikationen/newsarchiv/2019/2019-11-14.html).