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COMMITTEE AGAINST TORTURE

Twelfth session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)* OF THE 178th MEETING

Held at the Palais des Nations, Geneva,
on Wednesday, 20 April 1994, at 3.30 p.m.

Chairman: Mr. DIPANDA MOUELLE

CONTENTS

* The summary records of the second part (closed) and the third part (public) of the meeting appear as documents CAT/C/SR.178/Add.1 and 2.

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The meeting was called to order at 3.30 p.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION (agenda item 7) (continued)

Second periodic report of Switzerland (continued) (CAT/C/17/Add.12)

1. At the invitation of the Chairman, Mr. Krafft and Mr. Schneeberger (Switzerland) took seats at the Committee table.

2. Mr. KRAFFT (Switzerland) said that his delegation had endeavoured to return to the Committee table with replies to as many as possible of the questions asked at the previous meeting. However, before giving those replies, he wished to express his appreciation for all the statements that had been made drawing attention to the positive aspects of his country's report. He stressed his Government's concern to respect its international obligations and to accept the international human rights monitoring system, pointing out that Switzerland had made the declarations provided for in articles 21 and 22 of the Convention and had tried to accelerate its ratification of other human rights instruments. His delegation regretted the delay in submitting the report; in that connection, the Committee should bear in mind the very heavy reporting burden placed on States that ratified human rights conventions.

3. The arrangements for protecting human rights in Switzerland must be viewed within the general framework of a federalist structure in which both cantonal and federal authorities were responsible for protecting human rights under a Constitution which, while not including a number of rights in writing, affirmed certain rights implicitly. The Federal Court had guaranteed personal rights through rules that were valid for the whole country, and anyone who considered that his basic rights had been violated could appeal to that Court.

4. The protection of human rights at the cantonal and federal levels was supplemented by protection at the regional and global levels. At the regional level, human rights were protected by the European Convention on Human Rights, which provided for mechanisms permitting anyone to lodge a complaint, after the exhaustion of domestic remedies, to the European Commission of Human Rights and the European Court of Human Rights. The Swiss Federal Court considered that the rights guaranteed by the European Convention on Human Rights had constitutional force. Further protection was given by the European Convention for the Prevention of Torture, and Switzerland had been engaged in a very constructive dialogue with the European Committee for the Prevention of Torture. At the global level, Switzerland was pursuing a positive dialogue with the United Nations Committee against Torture and would also be cooperating with the Human Rights Committee. His Government hoped to be able, in a few years' time, to sign an optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, with its own system of preventive visits.

5. The extraordinary value of those complex mechanisms, under which the prohibition of torture had come to be considered a principle of customary law, provided individuals with the possibility of defending their interests before national, regional and global authorities, including the Committee against

Torture, to which a case had already been submitted. However, difficulties could occur, like the one referred to in the report of Amnesty International, and his Government would take them up in its next periodic report.

6. In reply to the question asked by Mrs. Iliopoulos-Strangas, he confirmed that the primacy of international law was valid also vis-à-vis the Constitution.

7. He was unable to give an exhaustive reply to the many questions asked by Mr. Ben Ammar, since it had not been possible to contact the 26 cantonal governments in the two hours available, but he would do his best. An arrested person was not automatically informed of his rights, as in the common-law system. He was, however, entitled to ask questions about his rights and the authorities had an obligation to reply. An arrested person could therefore obtain all the necessary information on the subject. Cantonal procedural laws were not fixed for all time and there was a trend, under the influence of the European Convention on Human Rights and the United Nations Convention against Torture, to strengthen the rights of the defence.

8. Medical examinations were not guaranteed before or after the questioning of prisoners unless they were expressly requested. At present there was no formal guarantee that a prisoner could have access to a lawyer while in police custody, but cantonal legislation had evolved towards greater protection of prisoners' rights, which increasingly included the right to have access to a lawyer as soon as possible. The maximum length of time for which a person could be held in police custody was generally 24 hours, and 48 hours in certain cases.

9. There was no general register of persons held in custody. The European Committee for the Prevention of Torture had recommended the compilation of a single, complete register, but the Federal Council had seen no need for it. However, it should be noted that the intent of the recommendation was already a reality in most cantons in different degrees and forms. The time and circumstances of the police inquiry and the placing in custody must be recorded in a special register at the police station, in the statement made during questioning or in the report sent to the judicial authorities.

10. There were various kinds of judicial control in the cantons when an arrest was made; in Geneva, for instance, a complaint could be lodged with the Procurator-General. Also, there were supervisory commissions at the administrative level, as well as parliamentary commissions for the supervision of prisons which made regular on-the-spot inspections.

11. Complaints against abuses could be made in a number of official ways. Amnesty International's report was instructive in that respect since it mentioned the fact that, when complaints of maltreatment had been made, they had been brought before the administrative and judicial authorities. Affected persons could apply to the next highest authority, lodge a criminal complaint - which they often refrained from doing out of fear of an action for libel - or initiate civil proceedings.

12. There was no federal code of police ethics, but such codes existed at the cantonal level. In its statement on the report of the European Committee for

the Prevention of Torture, the Federal Council set out in detail the measures taken to improve the awareness and training of prison staff with regard to the protection of individual rights. Training courses were given for prison staff and police officers and information was provided on the international obligations entered into by Switzerland.

13. At the moment he was unable to give any further details of the changes taking place in cantonal criminal procedure. Certain changes made in some cantons were mentioned in the report; a more systematic study of the situation in other cantons would be made, and the findings could be submitted to the Committee in a supplementary note.

14. Emergency federal decrees derogating from the Constitution could be issued, but in no way could they derogate from the provisions concerning the protection of fundamental rights. Moreover, when measures were taken on the basis of the general police authority, they must respect the fundamental rights of the individual. In fact, a judgement of the Federal Court handed down in July 1985 stated that the measures that could be taken by the federal police must be justified by the seriousness and imminence of the danger threatening the property protected and the danger must be such that it could not be prevented by ordinary legal means. The measures taken must also respect the general principles of constitutional and administrative law. Thus the powers of the federal police were subject to strict rules, and recourse to emergency powers did not permit any derogation from the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The exercise of general police authority was controlled by the Federal Court, before which complaints could be lodged.

15. Incommunicado detention was possible in some cantons when it was needed for the purposes of the judicial investigation. It was, however, subject to very strict limitations, and appeals against it could be lodged with the Federal Court.

16. Under the Federal Act on Judicial Cooperation of 20 March 1981, a person could be extradited only if the requesting State guaranteed that the basic rights of the individual, including the prohibition of torture, would be respected and that the person concerned would not be executed or physically maltreated. In only one case had such a guarantee not been respected, but for diplomatic reasons he was unable to name the country involved.

17. Another question had concerned the provision for detaining a foreigner for two years. The pertinent legislation provided for two cases: first, detention with a view to return or expulsion; and secondly, internment. Detention was applicable if the return or expulsion was the result of a final decision and if there was good reason to suppose that the person intended to avoid being returned. It was applied by the cantonal police authorities for a maximum of 48 hours, and could be extended only with the permission of a judicial authority. In no circumstances could the person be detained for longer than 30 days. Internment, on the other hand, was applicable when return or expulsion was neither possible nor reasonably exigible and the foreigner posed a serious threat to security in Switzerland or a threat to public order. It was ordered by the Office Fédéral des Réfugiés, for a maximum period of six months, and could not be extended beyond a total of two

years. The measure was an exceptional one and was very rarely used. Internment in its present form would be abolished in the framework of the revision of the laws on asylum, which was to come into effect in 1996.

18. Having given assurances that his delegation would submit a written report on the situation regarding the cantonal codes of procedure, he turned to the questions put by other members of the Committee. In his capacity as alternate rapporteur, Mr. Lorenzo, referring to paragraph 9 of the second periodic report, had asked whether it was possible for a federal decree to amend a Federal Act. The Swiss constitutional system distinguished between two types of federal legislative act: first, a Federal Act, without limitation in time; and secondly, a federal decree of general scope (a legislative act with the same legal scope, but limited in time). The Federal Act on Asylum had been amended by a decree limited in time, which introduced new provisions, chiefly of a procedural nature.

19. It had been asked whether a pattern of systematic violations of human rights in a country constituted a reason for non-return. In particular, it had been suggested that the provisions of article 3 (2) might conflict with the provision whereby the issue was to be examined from the standpoint of the existence of a personal and specific risk. He could state categorically that there was no conflict between the two provisions, since the general human rights situation in a country was regarded as an extremely important means of gauging the personal and specific risk to which a person might be exposed if returned to the State of origin.

20. Mr. Lorenzo had asked what bodies and authorities were competent to decide on extradition, refusal to admit an asylum-seeker, and expulsion of other persons. In the case of extradition, decisions were taken by the Office Fédéral de la Police, and there was also a possibility of appeal to the Federal Court. In the case of the return of asylum-seekers, the Office Fédéral des Réfugiés was the competent authority, and it was possible for the asylum seeker to appeal to a committee of appeal in refugee matters (an independent committee equivalent to a judicial body). In the case of expulsion of foreigners, the competent body was the Office Fédéral des Etrangers, and there was also the possibility of administrative appeal to the Federal Court.

21. It had been asked whether the various appeal bodies and remedies were suspensive. The answer was in the affirmative: in practice, when the person was in Switzerland, the appeal had a suspensive effect.

22. A number of members of the Committee had asked why, in the interval since the submission of its initial report, Switzerland had not taken steps to include the specific criminal offence of torture, as defined by the Convention, in its criminal legislation. His delegation took note of that important question. Up until the present, the federal authorities had considered that the provisions of the Criminal Code were sufficient to fulfil Switzerland's obligations with regard to the prohibition of torture. In view of the importance and sensitivity of the issue, and so as to provide a full and comprehensive reply, his delegation would in due course submit, in writing, a comparative study of the criminal offences enumerated in the Criminal Code and the corresponding provisions of the Convention.

23. Regarding the length of time for which an individual could be held incommunicado, he stressed that only a minority of criminal legislations permitted such measures. The legislation of the Canton of Vaud, one of the few to which his delegation had been able to refer in the brief time available, provided for a maximum of 10 days, which could be extended on an authorization by the Indictment Division. There was thus significant judicial control in such cases, and the detainee had the right to request his release from such confinement.

24. On the problem of the procedure for complaints, members had been struck by the allegation contained in the report by Amnesty International that persons claiming to be victims of ill-treatment were deterred from lodging a complaint by fear that the police authorities might themselves lodge a complaint against them, on the grounds of defamation or resisting the authorities. The pertinent provisions in that regard were articles 173 et seq. of the Swiss Criminal Code, entitled "Offences against honour". Those provisions did not relate specifically to defamation of police officials and authorities, but were general in scope. Article 173 provided that anyone who, addressing a third party, accused a person, or caused that person to be suspected of behaviour contrary to honour or of any act likely to prejudice his or her reputation would, following a complaint, be liable to a maximum of six months' imprisonment or to a fine. Other relevant provisions were contained in articles 285 and 286 of the Criminal Code, entitled "Offences against the public authorities; opposition to acts of the authorities", which provided that anyone who had prevented an authority from performing an action falling within its competence would be liable to a maximum of one month's imprisonment or to a fine.

25. On article 15, doubts had been expressed as to whether Switzerland complied with the provisions of the Convention regarding evidence. He could state categorically that any evidence obtained under torture was declared null and void by the judge, on the basis of the case law of the Federal Court - one of whose minimum standards was the inadmissibility of such evidence. The initial report of the Federal Council on ratification of the International Covenant on Civil and Political Rights contained a list of the circumstances in which confessions, other testimony or statements obtained under torture were to be declared null and void.

26. Regarding article 16, it had been pointed out that the European Committee for the Prevention of Torture (CPT) had noted a number of cases of ill-treatment in police stations. The Federal Council had already responded to those allegations and would provide a further response in its follow-up report. As previously stated, the federal authorities would reply in due course to the allegations of ill-treatment contained in the report by Amnesty International, which in fact, had come to their attention only the previous day. They could make no pronouncement before the cantonal authorities had been consulted.

27. As to the maximum length of time for which a person could be kept in solitary confinement, the codes of criminal procedure provided for different periods. There was also the possibility of lodging an appeal, and the prisoner could ask to be released from such confinement at any stage in the proceedings.

28. Turning to Mr. Sorensen's questions, he said that Switzerland's failure to ratify the Convention on the Prevention and Punishment of the Crime of Genocide was a lacuna which it envisaged rectifying. With regard to consultation with the Office of the United Nations High Commissioner for Refugees, such consultation was provided for under article 13 (d) (iv) of the Federal Act on Asylum. His delegation shared Mr. Sorensen's concern about the importance of the provisions of article 10 of the Convention, and of the training of prison staff and medical staff. Its documentation included an extract from the next progress report to the CPT, which contained statistics on the proportion of establishments whose staff had received medical training.

29. On article 14, Mr. Sorensen had asked whether it was possible for the victim to apply to another canton if the canton of residence did not have a consultation centre. The Federal Act on Assistance to Victims obliged cantons to provide such a centre; however, it had entered into force only on 1 January 1993, so the centres were still in the process of being set up. The Act also permitted several cantons to set up a joint centre. The victim was entitled to choose which centre to approach.

30. Mr. Gil Lavedra had commented on the lack of statistics in the second periodic report. His delegation took note of that lacuna, and acknowledged that the provision of statistics was an important way of ensuring transparent compliance by a country with its international obligations. His delegation was not currently in a position to furnish precise details regarding the number of complaints lodged in Geneva. As no systematic statistics were available, it envisaged the possibility of submitting a reply in writing in due course. Consideration of the report of Amnesty International would provide an opportunity to engage in dialogue with the cantonal authorities, and would no doubt also involve the compilation of statistics.

31. In his questions, Mr. Burns had stressed the importance of article 3 of the Convention. His delegation was aware of the growing importance of the principle of non-return, especially where the question of asylum was concerned. The Federal Court had recognized that that principle had the character of customary law; and it was taken extremely seriously by all authorities called upon to take decisions in that connection.

32. Mr. Burns had cited an article in the International Herald Tribune concerning new legislation on repressive measures directed against foreigners. The new legislation was subject to a referendum procedure, some non-governmental organizations considering that the legislation did not sufficiently protect the fundamental rights of individuals. The measures envisaged had been studied with great care by a committee of experts, including experts on the European Convention on Human Rights, who had noted that the measures (which included detention for three months, with the possibility of extension) were subject to strict judicial control. Parliament had debated whether the power to decide on the need for repressive measures should be vested in the judge; but it had finally been decided that the decision should be left to the police authorities, with the possibility of judicial control (which, in any case, was a mandatory requirement under article 5 (4) of the European Convention on Human Rights).

33. Mr. El Ibrashi had asked whether the victim was permitted to participate in the criminal proceedings. Article 8 of the Act on Assistance to Victims, dated 1 January 1993, provided for the participation of the victim in criminal proceedings as a claimant for indemnification.

34. The answers which had been given to the specific questions raised by the Committee needed to be considered in the light of certain general problems in the area of asylum and the law governing refugees, problems which had been experienced by other countries as well as Switzerland. His was a country with a long and honourable humanitarian tradition, which had been generous in granting asylum to victims of persecution. However, there was a growing perception among the population that existing laws governing asylum had been abused by certain individuals who, for example, had used their status as refugees as a cover for drug trafficking. As a result, the federal authorities had felt obliged in recent years to amend the legislation in that area in order to prevent such abuses. That had included the measures described in the second periodic report concerning decisions not to consider applications for asylum and the establishment of a list of "safe countries", i.e., countries where, in the view of the Swiss authorities - after careful consideration of all the relevant facts, there was no danger of persecution. Such measures had been criticized, a fact which was reflected in the report. However, the federal Government sincerely believed that those measures were necessary, both to eliminate abuses and to accelerate the process of granting asylum to genuine refugees.

35. He emphasized that every application for asylum was considered very carefully by the Office Fédéral des Réfugiés. The right to a hearing was generally recognized. All individuals applying for asylum had the opportunity to submit evidence that they met the conditions for refugee status under the terms of the Asylum Act. Such individuals might also have the right, where appropriate, to a second hearing. Furthermore, the Office Fédéral had at its disposal a team of specialists who closely monitored the human rights situation in the countries of origin of asylum-seekers. Their information constituted an essential part of each applicant’s file, which was reviewed first by a body of first instance and later, if appropriate, by an independent judicial appeal commission.

36. As to the notion of a "safe country", it meant in practical terms that nationals of such countries applying for asylum could be dealt with under a simplified decision procedure; in other words, it could be decided that the application would not be considered. That decision was subject to a ruling by the appeal commission, and so even nationals of countries on the list of "safe countries" had an opportunity to submit evidence that they would suffer persecution or ill-treatment if sent back to their countries of origin. While the need for the list and the associated simplified procedure had been disputed, there were, in his view, adequate safeguards to protect the rights of asylum-seekers. He also wished to assure the Committee that all officials responsible for conducting hearings in such cases, as well as the appeal bodies, were thoroughly acquainted with the terms of the Convention, and the prohibition of torture was regarded as a fundamental principle in any consideration of individual cases.

37. On the question of the exchange of "notes" between the Swiss and Sri Lankan authorities, it had been entered into by the Swiss Confederation in order to ensure that the fundamental rights of asylum-seekers from Sri Lanka who were sent back would be respected. He pointed out that relatively few persons had been sent back under that arrangement, and all the necessary follow-up measures would be taken in collaboration with the United Nations High Commissioner for Refugees to ensure that the principle of the prohibition of torture and other cruel, inhuman or degrading treatment was respected in all cases. In general, he was confident that the terms of article 3 of the Convention had been fully complied with in that exchange of notes and that there was no possibility of the Swiss Confederation being placed in a situation where it might be considered liable for violations of the Convention.

38. The countries on the "safe" list included the Czech Republic, Slovakia, Poland, Hungary, Bulgaria, India, Romania, Albania, Senegal, Ghana and the Gambia. Angola and Algeria had originally been on the list, but they had been removed as a result of recent developments in those countries. The decision to include a country on the "safe" list was not taken lightly, nor was it a matter solely for an administrative body; it was taken at the highest level by the Federal Council following a set procedure in which the different government departments concerned, such as the Department of Justice and Police and the Department of Foreign Affairs, were able to present their views.

39. In conclusion, he thanked members for their patience in listening to his lengthy replies to their many questions.

40. The CHAIRMAN, on behalf of the Committee thanked the representative of Switzerland for his very detailed and knowledgeable answers to the Committee's questions, and invited members of the Committee to ask any further questions they might have.

41. Mr. BEN AMMAR (Country Rapporteur) asked the Swiss delegation whether, in the case of asylum-seekers from Sri Lanka who had been sent back to their country from Switzerland, the Swiss authorities could contact them at will at any time, without the prior permission of the Sri Lankan authorities.

42. Mr. LORENZO (Alternate Country Rapporteur) said he was still not absolutely clear regarding the maximum possible period of incommunicado detention and the minimum interval between such periods of detention. Another query concerned the extent to which the judiciary was involved in monitoring the situation of asylum-seekers detained in holding centres at airports and other locations on the national border, and the extent to which judges could intervene in the examination of asylum applications. Lastly, he asked if the Swiss delegation could say precisely when it would be possible to reply in writing to questions not answered during the present meeting.

43. Mr. EL IBRASHI, referring to paragraph 56 of the report concerning compensation for victims, asked whether victims of an infringement who had insurance cover were ineligible for compensation from the State. He pointed out that the legal basis for the two types of compensation were quite

different, one existing by virtue of a contract between the victim and the insurance company, the other being based on the notion of the State's responsibility for the actions of its agents.

44. The CHAIRMAN said that he was not absolutely clear about the precedence of the different levels of legislation. In particular, was he correct in understanding that federal decrees had the same scope as federal acts and that a federal decree could amend a federal act? Which body enacted federal decrees? And could a federal act amend a federal decree?

45. Mrs. ILIOPOULOS-STRANGAS asked if asylum law would revert to the status quo ante if the review led to no amendment before the end of 1995.

46. Mr. SCHNEEBERGER (Switzerland), replying to the question concerning asylum seekers sent back to Sri Lanka, said that there was an agreement with Sri Lanka which guaranteed the safety of returnees by means of measures to ensure that persons of Tamil origin had adequate identification papers and proof of their stay in Switzerland and through collaboration with the Sri Lankan authorities and with the UNHCR to ensure that the welfare of returnees was closely monitored after their return. In addition, the Sri Lankan Red Cross ran "temporary holding centres" in various parts of the country where returnees could stay. In general, every possible measure had been taken to ensure that returnees did not disappear from view. In addition, returnees were also given the addresses they might need in order to contact the Swiss authorities if difficulties arose.

47. Mr. KRAFFT (Switzerland) added that the Swiss Embassy was able to make inquiries regarding the situation of any asylum seekers who had been sent back to Sri Lanka.

48. With regard to periods of incommunicado detention, he cited as an example the Criminal Code of the Canton of Vaud, which specified a maximum period of 10 days. That period might be extended, but only with the authority of the Indictment Division. The measure had been criticized, but certain cantons had found it to be a necessary means of preventing collusion between applicants and third parties, which entailed the risk of abuse. He stressed that the measure was now falling into disuse as codes of procedure were modernized to take greater account of detainees' rights.

49. Mr. SCHNEEBERGER (Switzerland), replying to the question about the involvement of the judiciary in monitoring the detention of asylum-seekers said that the judiciary were not involved in monitoring the situation of persons held in airport holding centres; on the other hand, UNHCR was. Only in cases where UNHCR and the federal authorities were in agreement that a person could enter either a third country where he or she would be safe, or return to his or her country of origin without any risk of violation of the principle of "non-return", could that person be deported, and there was still the possibility of appeal against the decision. As to procedures at the border, when asylum applications were made the border officials concerned would call the appropriate department in Bern, where a decision would be taken as to whether or not to allow the applicant to enter the country. That decision was subject to the applicant not having stayed previously in a third country considered to be safe. An applicant with proof of having come

directly to Switzerland would always have the opportunity to enter the country and go through the full asylum procedure. Alternatively, applicants could submit asylum applications to a Swiss embassy and the normal procedure would then be followed.

50. Mr. KRAFFT (Switzerland), replying to the question concerning compensation asked by Mr. El Ibrashi, said that a distinction must be drawn between a situation where an act of torture or ill-treatment was perpetrated by the police, in which case the State bore primary responsibility for compensation, and a situation where the State would intervene by virtue of a secondary liability because the perpetrator or an insurance company had not provided compensation. In accordance with the principle of subsidiarity, the State would intervene to compensate victims only if the perpetrator had insufficient means to provide such compensation himself or was inadequately insured.

51. On the question of the precedence of different kinds of legislation raised by the Chairman, he said that, in all countries, there existed a hierarchy of legislative instruments. In Switzerland, Parliament could enact legislation which fell into two categories: federal acts, which remained in force indefinitely; and federal decrees, which were time-limited. Federal decrees had the same legal force as federal acts, were subject to an optional referendum and could amend a federal act during the period for which they were in force. Thus, the Federal Act on Asylum had been amended by the Federal Decree on Asylum Procedure, which was general in scope and would remain in force until 31 December 1995. A review of asylum legislation was under way, since the Decree would expire on 31 December 1995. In the absence of action on that review the legal situation in 1996 would be that which had existed prior to the enactment of the Decree.

52. As to the time needed by the Swiss delegation to compile written replies to questions which had not been answered, he thought that about six months would be needed.

53. The CHAIRMAN again thanked the delegation of Switzerland for the answers it had given. The rapporteur and his alternate would now be given a short time in which to prepare their draft conclusions.

54. Mr. Krafft and Mr. Schneeberger (Switzerland) withdrew.

The first part (public) of the meeting rose at 5.15 p.m.