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Nineteenth session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)* OF THE 307th MEETING

Held at the Palais des Nations, Geneva,
on Friday, 14 November 1997, at 10 a.m.

Chairman: Mr. DIPANDA MOUELLE

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* The summary record of the second part (closed) of the meeting appears as document CAT/C/SR.307/Add.1.

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The meeting was called to order at 10.00 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION (agenda item 4) (continued)

Third periodic report of Switzerland (CAT/C/34/Add.6; HRI/CORE/1/Add.29)

1. At the invitation of the Chairman, Mr. Müller, Mr. Schürmann, Mrs. von Barnekow Meyer, Mr. Arnold, Mr. Voeffray and Mr. Walpen (Switzerland) took places at the Committee table.

2. Mr. MÜLLER (Switzerland), said that his country had spared no efforts to improve its human rights policy in general and the protection afforded to persons deprived of liberty in particular. Since the consideration by the Committee of its second periodic report (CAT/C/17/Add.12) in 1994, it had acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, which had, in fact, been removed from the Criminal Code in 1942 and from the Military Criminal Code in 1992. In November 1994, it had also adhered to the International Convention on the Elimination of All Forms of Racial Discrimination and the Swiss people had subsequently approved, by referendum, the modification of criminal legislation that the Convention required. In 1997, the Convention on the Elimination of All Forms of Discrimination against Women had also entered into force in Switzerland.

3. His Government had complied with its commitments, made in the second periodic report, to follow up requests from the International Tribunals for the arrest and transfer of wanted persons by having carried out five such arrests and made one such transfer.

4. Recalling his delegation's active role in drafting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in the adoption of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, he remarked that it was anxious to see the speedy adoption of the draft optional protocol, of which it had been a sponsor, which was designed to establish a mechanism for the prevention of torture by a system of visits to places of detention. Additional evidence of Switzerland's efforts to combat torture was to be found in the support given by its federal and cantonal authorities to a centre, established at Bern, where treatment for torture victims and war trauma sufferers was provided by the Swiss Red Cross.

5. A delegation from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) had expressed general satisfaction following its second visit to Switzerland in February 1996 and had noted an improvement in the material conditions of detention. Although it had found no indications of torture, it had reported cases of ill-treatment by the police and had voiced some criticism regarding the arrest of suspects, pre-trial detention and the conditions in which detainees were transported by train. On the last of those points, new measures were being adopted, including the issue of new guidelines to railway staff. The CPT report

remarked that the adoption by all cantons of the steps taken by the Genevan authorities to prevent ill-treatment would be highly desirable and that the cooperation received from the cantons had much improved.

6. Some issues had been raised, however, which coincided with various concerns expressed by the Committee following its consideration of Switzerland's second periodic report, namely, the right of any person held in custody or pre-trial detention to receive early counsel, consult a physician of his choice and alert a close relative or friend to his arrest from the very outset. In that connection, an expert commission, of which he, himself, was a member, would shortly be compiling its report on the possibility of the full or partial unification of criminal procedure, which, given Switzerland's federalist structure, was currently more or less the preserve of the cantons. Accused persons were, however, usually permitted to exercise their right to notify their arrest to close relatives, particularly since a growing number of cantonal codes of criminal procedure currently provided that such persons must be advised of that right, as did the preliminary draft of the code of federal criminal procedure. The expert commission was also moving in the same direction.

7. It was also moving further in the direction of early counsel, as were recent cantonal regulations, a prime example being the Bern Code of Criminal Procedure. In the light of the relative Conventions and the Committee's recommendations, however, the issue still persisted and would be included in the expert commission's discussion of the rights of the defence during custody.

8. The CPT had also confirmed that Switzerland unconditionally recognized the right of access to a physician by a person under arrest, which was also stipulated in a recent draft amendment to the Geneva Code of Criminal Procedure.

9. Concerning the Committee's earlier fears that Switzerland's asylum legislation permitted the return (refoulement) and extradition of asylum-seekers to States where they faced a genuine risk of torture, he said that, in accordance with the draft revision of the entire Federal Act on Asylum currently being debated, Switzerland would afford “provisional protection” to “persons to be protected”, also referred to as “refugees from violence”, who did not fall under the provisions of the Convention relating to the Status of Refugees or those of the existing Federal Act on Asylum. As things stood, however, the overall situation in an asylum-seeker's country of origin was considered only at the stage of expulsion, and although the Federal Office for Refugees could authorize a “provisional admission”, the ensuing procedures were unjustifiably long and complicated. Such procedures would be much shortened, however, if the new draft were adopted and the risk of asylum-seekers being sent back to States where they might face torture and ill-treatment would also be reduced. In addition, the situation of those admitted temporarily would improve due to provisions regarding the possibility of family reunification.

10. Concerning respect for the dignity of asylum-seekers and their protection against any deprivation of liberty, he said the Federal Court had recently found that current legislation on the asylum procedure at airports

fell short of the requirements of the European Convention on Human Rights. Urgent amendments were consequently being made to the relevant ordinances to ensure that asylum-seekers could not be held in the airport transit zone for longer than 15 days and that appeals could be made against a provisional refusal of entry and detention in that zone. In addition, anyone finally refused entry would have 10 days during which to pursue the matter at a Swiss representative office abroad.

11. As for the question of deprivation of liberty, he recalled that the detention of an alien with a view to his expulsion was consistent with the practical needs of Switzerland and other countries and was explicitly stipulated in the European Convention on Human Rights as a legitimate reason for such deprivation. Moreover, his delegation did not think that it was excluded by article 9 of the International Covenant on Civil and Political Rights.

12. Lastly, he wished to refer to the 15 individual communications, submitted to the Committee in connection with Switzerland, which alleged that the Swiss authorities would be in violation of article 3 of the Convention if they returned the asylum-seekers in question to their countries of origin. Three of those asylum seekers had been admitted in response to the Committee's view that they faced a genuine risk of torture or ill-treatment if returned, while a further three had been admitted on reconsideration of their cases. Despite the ensuing difficulties, his country's authorities had raised no objection to the eight requests for suspension made by the Committee.

13. In view of the many thousands of asylum applications received by the Swiss authorities every year, it was essential that they should be informed of the Committee's precise reasons for setting aside or accepting their assessment of the situation and of the genuine risks faced by an asylum-seeker were he returned to his country of origin. In that respect, his Government maintained the concerns expressed in paragraphs 49-52 of its report.

14. The CHAIRMAN, speaking as the Country Rapporteur for Switzerland, commended the representative of Switzerland on his detailed and informative statement, which had answered many of the questions that he, himself, had intended to ask. Having referred to the background information contained in paragraphs 1-4 of the third periodic report, he asked whether the Federal Court had determined the criteria for establishing the threshold of punishability referred to in paragraph 8, and if not, how a decision was reached in each instance as to whether or not that threshold had been crossed. He also asked for examples of the illegal menaces referred to in paragraph 9, as well as for details of two of the petitions mentioned in paragraph 13, namely the one which had been amicably settled and the one which remained pending.

15. In connection with paragraph 31, he wished to know whether the so-called judges of the Federal Commission on Appeals in Asylum Matters were, in fact, professional judges or civil servants.

16. With respect to article 4, he asked what penalties were prescribed by the provision to penalize racial discrimination referred to in paragraph 57 of the report. On article 6, he said that the Committee welcomed the decision to enforce warrants of arrest issued by the International Tribunals on the former Yugoslavia and Rwanda and to transfer persons being prosecuted.

17. With respect to article 10, he asked whether the training referred to in paragraph 72 also applied to doctors. Lastly, paragraph 79 referred to policemen convicted of ill-treatment. He would like to know whether the officers in question had been dismissed following their conviction or whether they were still serving in the police forces.

18. Mrs. ILIOPOULOS-STRANGAS (Alternate Country Rapporteur) said she hoped that the draft law referred to by the representative of Switzerland would be adopted, since Swiss legislation currently made no distinction between the granting of asylum and obligation of non-refoulement where there was a risk of the returnee being tortured. The Government's reasoning seemed to be conducted solely from the standpoint of the right of asylum and the status of refugees.

19. Thus, paragraph 23 of the report stated that any decision to expel a person whose request for asylum had been rejected was considered from the point of view of admissibility, enforceability and feasibility; while paragraph 24 stated that an asylum-seeker would be sent back to his State of origin or nationality or to another State only if he or she could be returned without violating any of Switzerland's obligations under international law. The authorities took account of the legislation on asylum and the status of refugees, but there was no legislation concerning non-return in cases where there was a risk of torture.

20. The Committee was aware of the State party's concern that article 3 might be improperly invoked, and welcomed the fact that recommendations, even those concerning dubious cases, had always been respected by the Swiss authorities. However, article 19 did not confer on States parties the right when presenting their reports, to criticize specific decisions taken by the Committee.

21. In any case, the Committee had no mandate to decide whether national authorities' assessments of the facts were erroneous or lacking in judgement or were tainted with irregularity. Its mandate was to protect a person in danger of being subjected to torture in another State from expulsion, return or extradition. The declaratory nature of its decisions should also be stressed: the State party was not obliged to change its decisions on the granting of asylum in the light of the Committee's comments; it was, however, obliged to seek solutions enabling it to comply with article 3 of the Convention.

22. In that connection, paragraph 48 of the report described article 3 of the European Convention on Human Rights as the counterpart to article 3 of the United Nations Convention against Torture. However, there was a great

difference between the two. The former did not expressly prohibit a return. It was true, however, that the Strasbourg case law had sometimes been influenced by article 3 of the Convention, which established a binding obligation in that regard.

23. In the light of reports received from non-governmental organizations (NGOs), she asked whether there was any truth in the allegation that electrical flex was used to beat persons interrogated. Had the Department of Justice and Police Affairs investigated the case of a detainee found to have suffered a haematoma of the liver and abdomen following his interrogation in the Canton of Valais? What sentences had been imposed on the convicted police officers referred to in paragraph 79, and had they been suspended from their duties?

24. She had also just received some documents alleging that, in a number of cases, persons to be expelled had been sedated. Were doctors' skills used against the patients' consent in order to facilitate their deportation?

25. As for the right of detainees to have access to a lawyer and a doctor and to inform their relatives and others of their detention, the case of Clement Nwankwo showed that there was a vast disparity between theory and practice in that regard, especially where foreigners were concerned. She asked that a full account be given of that case.

26. Mr. BURNS said that, as a national of a federal country, he was aware of some of the administrative problems encountered by a federal authority in committing itself to international obligations requiring the cooperation of and expenditure of resources by other branches of constitutional authority over which it had no actual control. That problem underlay some of the issues he wished to raise. He continued to share the concern of the Human Rights Committee, which, in its concluding observations on Switzerland at its fifty-eighth session (CCPR/C/58/C/SWI/3), had referred to:

> "... the numerous allegations of ill-treatment in the course of arrests or police custody, particularly in respect of foreign nationals or Swiss citizens of foreign origin and, in conjunction with them, reports on the authorities' failure to follow up complaints of ill-treatment by the police and the disproportionate nature, if not absence, of penalties. In this connection, the Committee notes with concern that in the various cantons independent machinery for recording and following up complaints of ill-treatment by the police does not seem to exist and that, on the contrary, complaints must in the first instance be addressed to the superior administrative authority. Furthermore, it regrets that in various cantons detainees may be held incommunicado for periods ranging from 8 to 30 days, or even for indefinite periods in some cases. It also regrets the non-existence in most cantons of legal guarantees, such as the possibility for a detainee to contact a lawyer immediately after his arrest and to be examined by an independent doctor at the commencement of police custody and before he appears before the examining magistrate. The Committee also notes that it seems very difficult in practice for most persons who have been arrested to inform their family or friends as soon as they are arrested."

Later on in its conclusions, that Committee had noted that the earliest moment at which a judicial review of the detention decision could be made was after 96 hours.

27. He asked the delegation whether it agreed with those conclusions and if so, what had been done to improve the situation. If the delegation did not so agree, he would like to know where it considered the conclusions were at fault. In particular, he would like a full explanation of the circumstances of the striking case of Clement Nwankwo, currently before the Geneva courts.

28. The Swiss authorities were to be complimented on the steps they had taken to cooperate with the International Tribunals on the former Yugoslavia and Rwanda, as detailed in paragraphs 60 to 62 of the report. However, he would like clarification of the sentence “In one case, the Tribunal has requested delegation of the criminal proceedings under way in Switzerland” (para. 62). It was unclear to him whether that meant that the Tribunal had agreed to give up its primacy of jurisdiction, and was permitting Switzerland to prosecute, or that it had asserted its primacy of jurisdiction.

29. Paragraph 79 referred to 27 complaints filed in the Canton of Geneva against police officers for wilful violence, 25 of which had been shelved or found to be groundless. What was the precise meaning of the word “shelved”? Lastly, what was the formal relationship between the Prosecutor and the police? Were they employed by the same department, and was the Prosecutor independent in the sense that judges were?

30. Mr. SØRENSEN said he noted that 7 of the report's 18 pages dealt with article 3 of the Convention. It was extremely difficult to ascertain what proportion of asylum-seekers had been tortured. Investigations in Denmark over a three-year period, which had revealed that 51 per cent of asylum-seekers' children had one or more parent who had been tortured, gave some indication of the magnitude of the problem.

31. The question arose why the Swiss authorities and the Committee sometimes disagreed about the interpretation of the various findings. Article 10 dealt, not just with information on the prohibition of torture, but also with education thereon, requiring it to be included in the training of prison, police, law-enforcement and medical personnel. Education should include training in how to deal with the special behaviour of torture survivors. Countries that were generous in their provision of such training were seldom cited in communications under article 22.

32. In Denmark, all police recruits received half a day's training on the prohibition of torture; border police regularly received half a day's special training in dealing with torture survivors; as did the special police official responsible for foreigners in each of the country's 76 police districts. Staff of the Refugee Boards regularly attended seminars on the subject. The objective of ensuring “as comprehensive and detailed an examination as possible of applications for asylum” (para. 48) could be achieved only if those involved had acquired the necessary skills. If Switzerland failed to provide such training, technical assistance could be made available by the United Nations and the Council of Europe.

33. Paragraph 54 of the report expressed concern at the consequences of the Committee's “almost routine requests” for decisions to be stayed. Those requests were, however, inevitable, given that the Committee met only twice a year and that time was of the essence in such matters.

34. He welcomed the remarks in paragraph 72 concerning the training of prison personnel, but noted that there seemed to be little mention of the training of police officers. Doctors, too, needed training in the prohibition of torture and ethical codes, as military, prison, police and forensic doctors - the so-called “doctors at risk” - sometimes played a part in performing torture. The Geneva Forensic Institute offered ideal facilities for the provision of such training.

35. With respect to article 14, he had been pleased to hear the delegation's remarks regarding the Bern Centre. Switzerland was also to be complimented on its contribution to the United Nations Voluntary Fund for Victims of Torture, a contribution that it might consider increasing.

36. Mr. PIKIS, referring to the core document on Switzerland (HRI/CORE/1/Add.29), asked about the role of the examining magistrate mentioned in paragraph 45. He would like some clarification of the magistrate's task, described in the text as being: “to identify the ingredients of the offence”.

37. With respect to paragraph 52 on the remedies available to persons whose fundamental rights had been violated, he asked for an explanation of the “public law remedy” and whether it was supplementary or correlated to other available remedies.

38. He was also interested in knowing the nature of the criminal indemnification proceedings (para. 55) and their relationship to criminal proceedings. He wondered how Switzerland dealt with allegations of violations of human rights and acts amounting to inhuman or degrading treatment such as those made by Amnesty International. Was there a government department which dealt with them? Were such allegations of concern to the Swiss Government, and was it committed to addressing them publicly?

39. He asked the delegation to comment on the principal complaints made by Amnesty International in October 1997 and the previous reports that had come to the attention of the Committee, including those of January and June 1997.

40. With regard to the institutional framework of Switzerland, he asked whether there was a uniform procedure for addressing concerns and recommendations by bodies such as the Committee against Torture and the Human Rights Committee.

41. Mr. REGMI said that the Committee appreciated all the positive steps that had been taken by the Government of Switzerland to prevent acts of torture. In spite of the information provided in paragraphs 1 to 32 of the initial report concerning the implementation of articles 1 to 4 of the Convention, the Committee still thought that the offence of torture should be explicitly defined and incorporated into domestic law as a punishable offence.

42. In connection with paragraph 61 of the third periodic report, he asked for the names and nationalities of the four persons arrested, particularly those who were still being held, and would like to know the status of the legal proceedings related to their cases.

43. The Committee welcomed the legislative and administrative measures adopted by Switzerland, to comply with article 7 of the Convention, but it had some concern with regard to the 1997 Amnesty International report asserting the commission of numerous atrocities, especially against foreign nationals, during arrest and in police custody. Unsatisfactory investigations of complaints of ill-treatment and failure to impose appropriate penalties were among the major defects cited by those allegations.

44. He quoted from the concluding observations of the Human Rights Committee regarding the harmonization of all cantonal criminal codes of procedure in Switzerland, especially those provisions affecting fundamental guarantees for detainees. Widespread police ill-treatment, which clearly infringed some of the rights enshrined in the Convention against Torture, had been supported in the past by the findings of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT). More recently, there had been reports that certain groups of foreigners held on drug-related offences had been subjected to physical and psychological abuse.

45. The failure of the Swiss authorities to allow detainees access to legal and medical attention during investigations flew in the face of the CPT recommendations and the spirit and letter of the Convention against Torture.

46. The supplementary information presented in paragraphs 63 et seq. of the third periodic report, concerning amendments to and the adoption of legislation to improve criminal procedure, was encouraging. Similarly, the Committee welcomed the introduction of training programmes for prison personnel and other officials and, in the case of the canton of Geneva, the increased scrutiny in the screening of applicants for jobs as prison warders and policemen. He asked what was the competent authority to supervise the investigation of acts of torture.

47. With reference to paragraphs 79, it appeared that the existing situation hindered the right of individuals to complain to the authorities and thus damaged the State party's compliance with the provisions of articles 12 and 13 of the Convention. In that connection, he would like to know how many victims of torture had been compensated since the submission of the second periodic report, and what was the maximum compensation payable to such victims.

48. In conclusion, he congratulated the Government of Switzerland on the high standards it had set in the sphere of the promotion and protection of human rights and the progress it had achieved in that regard.

49. Mr. GONZALEZ POBLETE said that the relationship between articles 1 and 4 of the Convention and the link between the offence of torture and fact that the perpetrator was a public official were of great importance. The commission of heinous acts by public employees, whose raison d'être was to serve and protect ordinary citizens, was an integral part of the definition of torture. He was therefore curious to know whether Swiss criminal law punished

agents of the State who were guilty of committing torture and assault leading to serious injuries or death, to the same extent as it punished private persons committing similar offences.

50. Mr. YAKOVLEV said he was well aware of the fact that it was easier to establish legal institutions, standards, rules of procedure etc. than to transform the mentality and behaviour of people, especially if they were based on racial prejudice. He seemed to recall that the Geneva Chief of Police had proposed the establishment of a Police Ethics Commissioner and wondered whether the idea was still under consideration and what the chances were that the ethical standards of the police would be more firmly observed, controlled and influenced.

51. Mr. ZUPANČIČ said that he wished to elaborate on Mr. Regmi's comments regarding paragraphs 7 to 12 of the report, particularly the meaning of bodily harm according to the Swiss Criminal Code. The definition of torture in article 1 of the Convention was a delictum proprium, the entire Convention being geared towards the responsibility of public officials. It was therefore within the spirit of the Convention to consider torture as a qualified or aggravated offence. He was not convinced by the assertion that the offences listed in paragraphs 7 to 12 of the report were tantamount to torture. The purpose of extracting a confession or other information was also an important element in the definition of torture.

52. The Convention specifically excluded justification through the doctrine of the “lesser evil” and, since every State party was expected to incorporate the Convention into its criminal code, the question arose as to whether the justification from the general part of the code would apply to the particular offences cited in paragraphs 7 to 12 of the report. He would thus like to know what the situation in Switzerland was with regard to the incrimination of attempted torture and of complicity or other forms of participation in acts of torture.

53. With respect to article 15 of the Convention, he said that information obtained as a direct or indirect result of torture could not be used as evidence in any proceedings. The origins of torture lay in inquisitorial self-incrimination. The Swiss criminal procedure systems seemed to belong to a semi-inquisitorial tradition, the basic features of which were the so-called Offizialprinzip and Instruktionsmaxime (principles of judicial investigation).

54. Most acts of torture were committed by police officers, but they were implicitly condoned by the legal system if the resultant evidence was used by the courts. Unless the direct or indirect products of torture were excluded from the subsequent criminal proceedings, a criminal case was effectively decided in the police station. Where there was a jury, the members were privy only to the information filtered through the law of evidence, but problems arose where an examining magistrate had access to evidence obtained at the police station. He wished to know, therefore, whether examining magistrates in the Swiss systems of criminal procedure were informed of such evidence or whether they launched the entire evidentiary process de novo. What were the

implications of the exclusionary rule in the trial court? Where a judge had direct or indirect knowledge of evidence given under duress, was he merely precluded from citing it in his judgement? He pointed out, in that connection, that article 15 required that the judge be effectively precluded from learning of the evidence in the first place.

55. The CHAIRMAN invited the delegation of Switzerland to reply at the beginning of the next meeting to the questions asked by the members of the Committee.

56. The delegation of Switzerland withdrew.

The public part of the meeting rose at noon.