

## **Committee against Torture this morning hears response of Switzerland**

3 May 2010

The Committee against Torture this morning heard the response of Switzerland to questions raised by Committee Experts on the sixth periodic report of that country on how it is implementing the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Responding to a series of questions raised by the Committee members on Friday, 30 April, the delegation, which was led by Bernardo Stadelmann, Deputy Director of the Federal Justice Office at the Swiss Federal Department of Justice and Police, said that, with regard to the case of the Nigerian asylum-seeker who was asphyxiated while being repatriated on a special flight, that, as an immediate measure, the Federal Office of Migration had ordered the suspension of special flights until the outcome of the case in question. The investigation into the case was ongoing. Discussions had been held with the cantons to make improvements in the process of such returns to make them safer, and to relaunch the process of special flights. The possibility of establishing independent monitors for such repatriations was being discussed at the federal level, by Parliament, in the context of Switzerland's entry into the European framework of the Schengen agreement. Furthermore the Police was currently drafting a handbook on the repatriation of foreigners. In parallel to that, a working group had been set up and had sent a catalogue to the Police of 28 measures that should be implemented during special flights.

On the issue of "stun guns", the delegation said that 11 cantons, including Geneva, had introduced the use of the Taser gun for specialist intervention groups. The non-lethal nature of the weapon could not be guaranteed, as it depended on the way in which it was used. To date, there had been no deaths attributable to the use of a Taser. In fact, following investigations, any deaths following the use of the Taser guns in Switzerland had been found to have been due rather to the taking of drugs and other exceptional conditions regarding the person on whom they were used. Moreover, those deaths had occurred using an old model of the Taser, and the number of deaths following use of the new Tasers had been reduced by 90 per cent. As an example of how such weapons were actually used, the delegation noted that the canton of Geneva only had three Taser guns, which had only been used twice since 2009. The Tasers were only used when the life of a police officer was in danger, and they were never used in the context of refoulement.

In some additional comments, the Committee Expert serving as Rapporteur for the report of Switzerland, Abdoulaye Gaye, said he was satisfied with the answers provided by Switzerland in large part, but remained firm in his conviction that there was an indispensable need to enshrine torture in Swiss law.

Fernando Mariño Menendez, the Committee Expert serving as Co-Rapporteur for the report, was concerned about the level of proof and evidence that was required under Article 3 of the

Convention (non-refoulement obligations). As he understood it, the level of danger that triggered a right not to be returned to that country was established by case law, and was not set out in statutory law. That led to a number of issues, including whether the changing situation within a country itself was taken into account.

The Committee will submit its conclusions and recommendations on the report of Switzerland towards the end of the session on Friday, 14 May.

As one of the 146 States parties to the Convention against Torture, Switzerland is obliged to provide the Committee with periodic reports on the measures it has undertaken to fight torture.

When the Committee reconvenes this afternoon at 3 p.m. it is scheduled to begin consideration of the initial report of Syria (CAT/C/SYR/1).

### Response of Switzerland

Responding to a series of questions raised by Committee Experts on Friday, 30 April, the delegation of Switzerland said that, despite the lack of a specific criminalization for torture in Swiss law, Switzerland's legal provisions did cover all the acts of torture as set out in the Convention. In addition, those acts were punishable by punishments appropriate to the gravity of those crimes. For the moment, neither doctrine nor jurisprudence nor concrete cases gave rise to a belief that that pragmatic approach left gaps in the Swiss law with regard to torture.

That was true as well for other areas of the Convention, notably article 3 (non-refoulement) obligations, the delegation underscored. By way of example, the Federal Administrative Tribunal had rendered judgements in over 3,000 cases between 2007 and 2009, on the issue of whether there were substantive grounds for believing that the individual in question was under threat of torture as set out in article 3. That question was always reviewed before undertaking an extradition, and therefore Switzerland fulfilled its obligations under that article of the Convention.

Concerning superior orders, the delegation cited the Swiss law to the effect that no justification or exception to the prohibition against torture was possible, in conformity with article 2 of the Convention. Moreover, any order to commit an act of torture was not only illegal, but, if obeyed, would entail the prosecution of both the superior issuing the order and the subordinate who carried it out.

Regarding victims of human trafficking, victims, once they were identified, under Swiss law, and particularly the new Law on Aliens that entered in force on 1 January 2008, were provided with a 30-day period of reflection so that they could receive psychological and other care. The victims could not be returned during that period. The person involved could then decide if they wanted to cooperate in a criminal investigation or not. Whether they chose to do so or not, the person was able to benefit from a stay permit if their personal situation necessitated it. If they agreed to cooperate in an investigation, such witnesses were protected, and were granted anonymity and safe places to live, in accordance with international standards. Specialized training and awareness-raising measures were also regularly organized for those involved in victim services.

In 2008, 26 criminal procedures were opened in human trafficking, primarily cases involving sexual exploitation, and the case load had remained steady between 20 and 30 cases for the

last few years. A new federal statistic showed that 50 persons had been the object of a new investigation in 2009, and that 74 per cent of cases were resolved.

Turning to the issue of expulsions, in the case of the Nigerian who was asphyxiated, the delegation said that the person was a Nigerian asylum-seeker who was being repatriated. As an immediate measure, the Federal Office of Migration had ordered the suspension of special flights until the outcome of the case in question. The other persons on that flight, therefore, had been returned to Switzerland and the various cantons from which they came. The investigation into the case was ongoing. Discussions had been held with the cantons to make improvements in the process of such returns to make them safer, and to relaunch the process of special flights.

As for the establishment of independent observers for such returns, that possibility was being discussed at the federal level, by Parliament, in the context of Switzerland's entry into the European framework of the Schengen agreement, the delegation affirmed.

Regarding the use of coercion for repatriations by air and whether guidelines were in place, there were medical issues that were taken into account in that context. Those who were repatriated had to be in good health and able to travel, and if that was in question a medical examination would be undertaken. Furthermore the Police was currently drafting a handbook on the repatriation of foreigners. In parallel to that, a working group had been set up and had sent a catalogue to the Police of 28 measures that should be implemented during special flights.

In terms of alternatives to refoulement, the delegation said that the 2008 law on foreigners foresaw a number of measures, including detention and repatriation. Each case of detention had to come before an independent judge before 96 hours and then went to a federal judge. In cases where there were difficulties in establishing the identity or if they were involved in petty crime there had been prolonged detentions. However, it was contemplated that the maximum period would be reduced from 24 to 18 months, by taking up the European directive in this area.

With regard to foreign minors, 71 asylum-seeker minors between 15 and 18 were in detention, two of them in prolonged detention. The average for the rest was 19 days.

According to the law applying to foreigners, those trying to entry the country illegally in airports could be sent back, but that decision by the border authorities could be appealed within 48 hours of notification. The remedy had no suspensive effect; however, if the foreigner applied for asylum, all the safeguards and procedures of the asylum procedure would be applied to that case, the delegation noted.

Housing for foreigners in the airports had telephones, access to photocopiers and fax machines, lists of legal advisers, and full access to lawyers. Asylum-seekers were able to circulate freely in the areas of the airport that were open to the public. Moreover, the Government had set up new facilities in the airports in Geneva and Zurich, which were designed to provide natural light and other benefits, and new housing had been built. In Geneva they had 24-hour access to the outside world, whereas in Zurich they had to request permission to do so.

On the issue of "stun guns", the delegation said that 11 cantons, including Geneva, had introduced the use of the Taser gun for specialist intervention groups. The non-lethal nature of

the weapon could not be guaranteed, as it depended on the way in which it was used. To date, there had been no deaths attributable to the use of a Taser. In fact, following investigations, any deaths following the use of the Taser guns in Switzerland had been found to have been due rather to the taking of drugs and other exceptional conditions regarding the person on whom they were used. Moreover, those deaths had occurred using an old model of the Taser, and the number of deaths following use of the new Tasers had been reduced by 90 per cent.

As to how often Tasers were actually used, the delegation gave the example of the canton of Geneva, where the authorities had only three Taser guns that had only been used twice since 2009. The Tasers were only used when the life of a police officer was in danger, and they were never used in the context of refoulement.

Responding to the concerns about the Roma population, the delegation noted that the directive against begging, which had led to arrests of Roma, had been revoked. Indeed, the Police worked with services that ensured that Roma, and particularly Roma minors, benefited from shelter during the cold weather. Moreover, there had been a number of trainings carried out for police, as well as missions to other countries, to encourage a better understanding of the issues applicable to this community.

According to a new Criminal Law minors in provisional detention had to be kept in a unit separate from adults and cared for in an appropriate fashion. Educational and psychological caregivers therefore had regular contact with such detainees, the facilities were regularly monitored, and it was established that such minor detainees were kept in detention for the minimum time possible.

Turning to overcrowding and the present situation in the Champ-Dollon prison, according to the Constitution, the building and management of prisons was the responsibility of the cantons. There was no problem over overcrowding in the German-speaking cantons. While the occupation rate of prisons in French-speaking cantons was high, it did not give rise to an overcrowding problem. Champ-Dollon was an exceptional case, however, the delegation acknowledged, noting that it had suffered from chronic overcrowding for some years now. To deal with that situation, a number of measures had been taken, including the transfer of special units that were taking up an inordinate amount of space and moving them outside the walls of the regular building; the establishment of a special centre for prisoners with psychological problems and the transfer of detainees there; and the establishment of a new pre-trial detention centre, to be attached to Champ-Dollon prison, which was expected to be operational in 2011; among others.

On the issue of the national human rights institution, the Federal Council had decided in 2009 to create a Centre for Human Rights, from which the Federal Government or the Cantonal Governments could "buy" services. The Centre would be set up by a consortium of universities, with funding from the Federal Government. Following a five-year pilot stage, the activities of the Centre would be assessed and continued federal funding decided on. It was hoped that the final form of the Centre would take shape this month, and that it would be able to begin providing services right away.

Regarding compensation for torture victims, according to law they could receive compensation for physical and moral harm. The delegation could not find an example of such compensation for a case of harm inflicted by the authorities, but cited some torture cases in which persons had received compensation for "moral" harm after having been harmed by a third party.

With regard to article 123 (a) of the Criminal Code, which entered into force on 1 August 2008 and which established the penalty of imprisonment for life, the delegation noted that the prior law had not been considered to be clear enough and that this law therefore provided clarification and guidelines for life sentences. According to the new law, the judge's decision in such a case had to be based on two expert reports; the crime had to be of particular gravity and there had to be a high risk of recidivism on the part of the perpetrator; the decision was subject to reconsideration if new scientific evidence subsequently emerged; and the decision was subject to conditional release of the prisoner given a change in their situation (e.g. if they became seriously ill and they therefore no longer presented a danger to the community).

Under the new Federal Code of Criminal Procedure, any detainee had to have access to a lawyer within the first hour of police interrogation, which was an improvement over the prior situation, where such access was not guaranteed for that type of detention by all Swiss Cantons, the delegation said.

#### Additional Questions and Comments by Committee Experts

ABDOULAYE GAYE, the Committee Expert serving as Rapporteur for the Report of Switzerland, in some additional comments, declared that he was satisfied with the answers provided by Switzerland in large part. However, he remained firm in his conviction that there was an indispensable need to enshrine torture in Swiss law. The arguments presented by Switzerland today were not new ones. Where, for example, was the crime of psychological torture, which was established in Article 1 of the Convention, set out in the Swiss Criminal Code and what elements did it contain?

In addition, regarding the establishment of a list of "safe" countries for returns, Mr. Gaye asked if it was possible to appeal the decision to include a country on the list.

FERNANDO MARIÑO MENENDEZ, the Committee Expert serving as Co-Rapporteur for the Report of Switzerland, asked for clarification on a number of points, including whether Swiss practice applied the status granted by another State to an asylum-seeker. For example, if there were a request for a foreigner in Switzerland to be extradited, would Switzerland allow that person to make an application for asylum.

Secondly, there was the issue of expulsion of foreigners deemed to be dangerous, those that had committed a crime of a particular gravity or abused State services, and could be expelled through an administrative process. Could those decisions be appealed on the grounds of non-refoulement?

Mr. Mariño Menendez was further concerned about the level of proof and evidence that was required under Article 3 of the Convention. As he understood it, the level of danger that triggered a right not to be returned to that country was established by case law, and was not set out in statutory law. That led to a number of issues, including whether the changing situation within a country itself was taken into account. Could, for example, a person be returned to a region of a country at war that was deemed to be safe? Moreover, if a person had a specific medical condition and there were not adequate facilities in the country to which he was to be returned, were those grounds for allowing him to stay?

Further clarification was also requested as to whether there were variations in practice in the different cantons regarding the investigation that had to be undertaken following the lodging of a torture complaint.

Other Experts then raised a number of issues and reiterated a number of concerns, including reports of disappearances of minor asylum-seekers; what elements triggered the necessity of arresting someone under the domestic violence law; a continuing concern about Taser guns; and a request for statistics on the number of women that had fled their abusive spouses who had been allowed to stay in Switzerland and did not have their residency permits revoked.

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