

# SWITZERLAND

## I. INTRODUCTION

### 1. The Legal Framework

#### 1.1. The Constitution

Switzerland has a total population of 7,164,444 of which 5,757,814 are Swiss nationals and 1,406,630 foreign nationals and/or stateless persons.<sup>1</sup>

Switzerland is a confederation, composed of 26 federated states, known as cantons. Each canton has its own Constitution, Executive, Parliament, courts and laws. The present Swiss Constitution, having been adopted by the people and cantons on 18 April 1999, entered into force on 1 January 2000. Foreign affairs and the armed forces fall within the sole competence of the Confederation (the central government) while the police sector is exclusively within the competence of the cantons. Criminal and civil law are unified. While the legislation in the field of civil and criminal law and procedure is a federal matter, the organization of the judiciary, criminal justice, and execution of criminal penalties are cantonal matters.<sup>2</sup> The cantons have their own procedural codes but reforms are underway to unify the various procedural laws. There is a federal as well as cantonal administrative law, the applicability of which depends on whether the concerned administrative authority is a federal or cantonal one.

The Federal Constitution contains a chapter on fundamental rights, in which, amongst others, human dignity, the right to life and personal freedom, the protection against expulsion, extradition and *refoulement*, guarantees regarding legal proceedings and deprivation of liberty and the right of petition are guaranteed.<sup>3</sup> There are no express prohibitions of derogations, but according to Article 36, any limitation of a fundamental right requires a legal basis, must be justified by public interest, or serve for the protection of fundamental rights of other persons and must be proportionate to the goals pursued. The essence of fundamental rights is inviolable.

The highest judicial authority is the Federal Supreme Court.<sup>4</sup> Its task is to guarantee respect for all areas of federal law. It also ensures that constitutional public law remedies are available for the violation of constitutional rights by cantonal acts. The Federal Supreme Court is empowered to adjudicate on appeals against final cantonal decisions or judgments on the grounds of violations of citizens' constitutional rights and international treaties, though not in respect to violations of civil or criminal law provisions stemming from a cantonal decision. The Federation also has a Federal Criminal Court and Federal administrative tribunals. The cantons are responsible for the organisation of first instance district courts and appeal courts. On the

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<sup>1</sup> See for general information, Core Document forming part of the reports of States Parties: Switzerland, UN Doc. HRI/CORE/1/Add.29/Rev.1, 22 February 2001.

<sup>2</sup> Article 122 and 123 of the Federal Constitution of the Swiss Confederation, of April 18, 1999.

<sup>3</sup> See Title 2, Chapter 1, Articles 7-36 of the Constitution.

<sup>4</sup> See Article 84 and 191 of the Constitution.

administrative level, appeals against government decisions can be made to an executive body, an independent appeals commission or an administrative tribunal.<sup>5</sup>

### 1.2. Incorporation and Status of International Law in Domestic Law

Switzerland is a party to the following relevant international treaties:

- 1949 Geneva Conventions (31 March 1950) and both additional protocols (17 February 1982);
- Refugee Convention (21 January 1955)
- Convention against Torture (2 December 1986; recognised competence of Committee against Torture under Article 21 and 22);
- European Convention for the Prevention of Torture (CPT) (7 October 1988);
- ICCPR (18 June 1992, ratified the second but not the first optional protocol);
- ICESCR (18 June 1992)
- CERD (29 November 1994);
- CRC (24 February 1997);
- CEDAW (27 March 1997);
- Genocide Convention (7 September 2000)
- Statute of the International Criminal Court (12 October 2001).

Switzerland recognises the monist system of international law. International treaties and general international law therefore automatically become part of Swiss law without the need for a further act of transformation. According to Article 5(4) of the Constitution, the Confederation and the cantons respect international law. Article 191 of the Constitution furthermore stipulates that the Federal Supreme Court shall apply federal and international law. In terms of the status of international law in the Swiss legal order, the Federal Supreme Court has recognized the primacy of public international law over national law, a position that is shared by the Federal Council.<sup>6</sup> International rules might be directly invoked before the administrative authorities or the courts in those cases where the provision or rule in question is self-executing.<sup>7</sup>

## 2. Practice of Torture: Context, Occurrence, Responses

### 2.1. The practice of torture

The regional and international organs charged with monitoring the human rights practice of Switzerland have not reported a single case of torture.<sup>8</sup> However, Switzerland has been found responsible for a breach of the prohibition of *non-*

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<sup>5</sup> See Core Document, *supra*, paras. 40 et seq.

<sup>6</sup> See for further reference Core Document, *supra*, para. 74.

<sup>7</sup> See *ibid.*, para.76, according to which provisions or treaties are self-executing if they have a sufficiently clear and tangible content to form the basis for a decision. According to para.77, it is the courts that decide on the self-executing nature of a provision or treaty in a given case.

<sup>8</sup> See the latest report of the CPT following a visit to Switzerland in 2001, available in French: *Rapport au Conseil federal relatif à la visite effectuée en Suisse par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 5 au 15 Février 2001*, CPT/ Inf (2002) 4, 25 March 2002. See also the 1997 report: *"Rapport au Conseil federal relatif à la visite effectuée en Suisse par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 11 au 23 Février 1996*, CPT/ Inf (97) 7, 27 February 1997, in particular p.13. See moreover the jurisprudence of the Committee against Torture and the European Court of Human Rights.

*refoulement*. There have also been numerous reported cases of ill-treatment.<sup>9</sup> This has mainly taken the form of excessive use of force or so-called police brutality. The main victims of this treatment have been foreigners, in particular asylum seekers when applying for asylum or when being or about to be deported. Persons in charge of enforcing deportations, either police officer or security guards from a private firm, mainly at the international airport Zurich-Kloten, have employed various methods that can be considered to constitute ill-treatment.<sup>10</sup> As a result of such treatment, several persons have died in the process of deportation.<sup>11</sup> Persons arrested or detained as criminal suspects, particularly in relation to drug offences, have also been subjected to ill-treatment.<sup>12</sup>

## 2.2. Domestic responses

Swiss politics are marked by complex dynamics which are due to the system of semi-direct democracy of popular initiative, referendum and parliament on the federal and cantonal level. Thus, it is not only the federal government but also the cantonal governments and local authorities which play a crucial role in influencing and making political decisions impacting on issues relevant to torture and ill-treatment. In this context, the restrictive policy against asylum seekers accompanied by their forcible deportation in numerous cases as well as the way the local authorities, including the police in the major cities are dealing with social outsiders, such as drug addicts, have come under public scrutiny.

Switzerland has, on the level of the Confederation as well as on the cantonal level, over the last years taken several initiatives to address the problem of ill-treatment, especially at the hands of the police or in the course of forcible deportations.<sup>13</sup> There are also several official bodies at the federal and cantonal level with responsibility for guaranteeing respect for human rights, such as Ombudsmen, which have been established in the cities of Bern, Zurich, Winterthur and the cantons of Zurich, Basel-Town and Basel-Country, whose mandate is to provide assistance to individuals vis-à-vis the administration.<sup>14</sup>

## 2.3. International responses

Switzerland has to date submitted three country reports to the Committee against Torture and two country reports to the Human Rights Committee.<sup>15</sup> It has been

<sup>9</sup> See e.g. CPT, 1997 report, supra, p.13.

<sup>10</sup> So-called Level 3 methods, such as tying into a wheelchair, putting on helmets, taping the mouth, inserting straws to facilitate breathing, using plastic bag to catch excreta, using urine bottle, inflicting physical injuries and forced medication have all reportedly been employed. See, in particular, NGO Report on the Second Periodic Report of Switzerland on the International Covenant on Civil and Political Rights (CCPR) to the Human Rights Committee, edited by *Menschenrechte Schweiz (MERS)*, Berne, October 2001, p.13. See also, the overview of various methods employed in CPT, 2001 Report, supra, para.51.

<sup>11</sup> Amnesty International, Switzerland, Compilation of AI Documents concerning alleged ill-treatment by cantonal police, 2001.

<sup>12</sup> Ibid.

<sup>13</sup> See for details the Swiss government's replies to the CPT, *Réponse du Conseil fédéral Suisse au rapport du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) relatif à sa visite effectuée en Suisse du 5 au 15 février 2001*, CPT/Inf (2002) 5, 25 March 2002, pp.20 et seq.

<sup>14</sup> See Core Document, supra, paras. 78, 79.

<sup>15</sup> UN Doc. CAT/C/5/Add.17, 14 April 1989; UN Doc. CAT/C/17/Add.12, 17 December 1993; UN Doc. CAT/C/34/Add.6, 1 June 1997; UN Doc. CCPR/C/81/Add.8, 24 February 1995 and CCPR/C/CH/98/2, 6 September 1999.

visited three times by the Committee for the Prevention of Torture.<sup>16</sup> Moreover, there have been several cases against Switzerland before the European Court of Human Rights and before the Committee against Torture, all of which related to violations of the prohibition of *non-refoulement*.<sup>17</sup>

While all bodies noted that there have been no reported cases of torture and commended several aspects of Switzerland's practice in the protection of human rights, several areas of concern remained. In its concluding observations to the third country report by Switzerland, the Committee against Torture stated that it: "...is concerned at frequent allegations of ill-treatment in the course of arrests or in police custody, particularly in respect of foreign nationals. Independent machinery for recording and following up complaints of ill-treatment does not seem to exist in all the cantons. The Committee is also concerned at the apparent lack of an appropriate reaction on the part of the competent authorities. The Committee regrets the non-existence in some cantons of legal guarantees, such as the possibility for a detainee to contact a family member or lawyer immediately after his or her arrest and to be examined by an independent doctor at the commencement of police custody or when he or she is brought before an examining magistrate. The Committee is concerned at allegations made by non-governmental organizations that, during the expulsion of certain aliens, doctors have engaged in medical treatment of such persons without their consent.<sup>18</sup>" The Human Rights Committee echoed the concerns of the Committee against Torture in 2001 by stating that it is: "... deeply concerned at reported instances of police brutality towards persons being apprehended and detainees, noting that such persons are frequently aliens. It is also concerned that many cantons do not have independent mechanisms for investigation of complaints regarding violence and other forms of misconduct by the police. The possibility of resort to court action cannot serve as a substitute for such mechanisms. The State party should ensure that independent bodies with authority to receive and investigate effectively all complaints of excessive use of force and other abuses of power by the police are established in all cantons. The powers of such bodies should be sufficient to ensure that those responsible are brought to justice or, as appropriate, are subject to disciplinary sanctions sufficient to deter future abuses and that the victims are adequately compensated (article 7 of the Covenant). The Committee is deeply concerned that, in the course of the deportation of aliens, there have been instances of degrading treatment and use of excessive force, resulting on some occasions in the death of the deportee. The State party should ensure that all cases of forcible deportation are carried out in a manner which is compatible with articles 6 and 7 of the Covenant. In particular, it should ensure that restraint methods do not affect the life and physical integrity of the persons concerned.<sup>19</sup>"

The CPT, in its report following its visit to Switzerland in 2001, noted that there have only been a few allegations of ill-treatment by the police, mainly relating to the disproportionate use of force during arrest but rarely during the interrogation itself. The CPT did however voice its concern regarding methods of restraint employed

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<sup>16</sup> In 1991, 1996 and 2001.

<sup>17</sup> See for details the country information on Switzerland in the treaty body database of the UN High Commissioner for Human Rights at [www.unhchr.ch](http://www.unhchr.ch) and the case law of the European Court of Human Rights at [www.echr.coe.int](http://www.echr.coe.int).

<sup>18</sup> Concluding observations of the Committee against Torture: Switzerland, UN Doc. A/53/44, paras.90-90, 10-21 November 1997, paras. 90, 91 and 93.

<sup>19</sup> Concluding observations of the Human Rights Committee: Switzerland, UN Doc. CCPR/CO.73/Ch, 12 November 2001, paras. 11 and 13.

during forcible deportations and stated that the so-called level 3 and 4 measures are of such a nature that there is an inherent risk of ill-treatment when employing them. Consequently, the CPT recommended several changes in the deportation practice to avoid harm to persons subject to deportations.<sup>20</sup>

## **II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW**

The new Swiss Constitution contains an express prohibition of torture. Its Article 10, 2 and 3 reads: "(2) Every person has the right to personal liberty, particularly to corporal and mental integrity and freedom of movement"; 3) Torture and any other form of cruel, inhuman, or degrading treatment or punishment are prohibited." Article 25(3) recognises the principle of *non-refoulement*: "No person shall be removed by force to a state where he or she is threatened by torture, or another means of cruel and inhuman treatment or punishment."

There is no express prohibition of torture in Swiss statutory law. However, criminal law, the various criminal procedural laws as well as laws regulating the conduct of police forces all prohibit either excessive use of force or the use of force to extract confessions.<sup>21</sup>

There is also no express definition of torture in Swiss laws.<sup>22</sup>

## **III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE**

### **1. The substantive law: Criminal offences, punishment and disciplinary sanctions**

While the Swiss Criminal Code does not contain an express offence of torture, there are several criminal offences that could be used to prosecute and punish perpetrators of torture and ill-treatment. The infliction of bodily harm is punishable by imprisonment of three days up to three years.<sup>23</sup> Inflicting grievous bodily harm carries a punishment of ten years penitentiary or imprisonment of a minimum of six months and a maximum of five years.<sup>24</sup> Manslaughter is punishable by penitentiary of at least five years,<sup>25</sup> murder by penitentiary of at least ten years or life imprisonment<sup>26</sup> and involuntary manslaughter by imprisonment or fine.<sup>27</sup> Attacks on

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<sup>20</sup> Supra, pp. 23 et seq.

<sup>21</sup> See Initial Report of Switzerland to CAT, supra, para.81, which notes that the cantonal codes of criminal procedures confirm the principle of the free appraisal of evidence by the Court and that for this reason any evidence obtained illegally is not declared inadmissible *ab initio*.

<sup>22</sup> See CAT, Observations 1997, supra, para.3. In spite of the statements of the Committee against Torture, the Swiss federal government has maintained its position that the Swiss legal system has an arsenal of provisions outlawing torture and allowing for the prosecution of perpetrators of torture and therefore that there is no need for an express prohibition of torture in form of a criminal offence.

<sup>23</sup> Article 123 Criminal Code. See for French, German and Italian versions of the Codes cited the website of the Federal Authorities of the Swiss Confederation [www.admin.ch](http://www.admin.ch).

<sup>24</sup> Article 122 Criminal Code.

<sup>25</sup> Article 111 Criminal Code.

<sup>26</sup> Article 112 Criminal Code

<sup>27</sup> Article 117 Criminal Code.

sexual freedom and sexual harassment and rape carry a punishment of up to ten years penitentiary and a minimum sentence of three years in those cases where the sexual harassment or rape has been perpetrated with particular cruelty.<sup>28</sup> Moreover, exploiting a position of dependency, such as that of a detained person, to carry out sexual acts or to have them carried out is punishable by imprisonment of three days to three years.<sup>29</sup> Abuse of office is punishable by penitentiary of up to five years or imprisonment.<sup>30</sup> There is however, no specific offence for cases in which bodily harm is inflicted by public officials.

The Swiss Military Criminal Code, which is applicable to civilians who are alleged to have committed certain crimes specified in the Code as well as to members of the armed forces stipulates a list of similar crimes, such as murder and grievous bodily harm, as well as a number of war crimes. It also contains a generic clause allowing for the punishment of those who have violated international conventions relating to the conduct of war and the protection of persons and goods.<sup>31</sup> Moreover, it provides for a range of disciplinary sanctions, which might be imposed against those violating the provisions of the code.<sup>32</sup>

The various federal and cantonal laws governing the conduct of public officials contain the full range of available disciplinary sanctions. A public official might be, for instance, recriminated, suspended or dismissed depending on the gravity of the misconduct in question.<sup>33</sup>

## 2. The procedural law

### 2.1. Immunities

There are no express immunity laws for acts of torture or ill-treatment. However, the prosecution of members of the two houses of parliament, the "Nationalrat" and the "Ständerat" (corresponding to the house of representatives and the senate) and of officials and magistrates elected by the Federal Assembly requires prior authorisation by the Federal Councils.<sup>34</sup> Likewise, the prosecution of officials for criminal offences committed in the course of their work requires prior authorisation of the Federal Department of Justice and Police. The authorisation may only be denied in cases of minor offences where disciplinary sanctions are deemed to constitute sufficient punishment.<sup>35</sup> The decision to refuse authorisation is subject to an administrative

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<sup>28</sup> Article 189, 190 Criminal Code.

<sup>29</sup> Articles 192 and 193 Criminal Code.

<sup>30</sup> Article 312 Criminal Code.

<sup>31</sup> See Articles 108 et seq., in particular Article 109(1) Swiss Military Criminal Code.

<sup>32</sup> See e.g. Articles 109(2) and 122(1) Swiss Military Criminal Code.

<sup>33</sup> See for employees of the Confederation, Articles 12(6) and (7) and 26(2) of the Law on Public Officials of the Confederation of 24 March 2000 concerning dismissal and suspension of officials.

<sup>34</sup> Article 14 of the Federal Law of 14 March 1958 on the liability of the Confederation, the members of its authorities and its officials (Liability Act; RS 170.32). See also Article 1 and 4 of the Federal Guarantee Law of 26 March 1934 which stipulates that members of the Federal Council or the chancellor of the Confederation as well as representatives of the Federal Commission can only be prosecuted with their consent or following an authorisation of the Federal Council.

<sup>35</sup> Article 15(3) Liability Act.

appeal, which can be lodged by the victim or the public prosecutor of the canton of the scene of the crime, to the Federal Court.<sup>36</sup>

Finally, Article 366(2) of the Criminal Code allows cantons to prosecute members of its legislative bodies as well as members of its highest administrative and judicial authorities for crimes committed in the course of their work conditional on prior authorisation.<sup>37</sup> None of the aforementioned procedures apply to genocide.<sup>38</sup>

## 2.2. Statutes of Limitation

The prosecution of all crimes is subject to statutes of limitation, with the exception of genocide, war crimes and serious cases of extortion.<sup>39</sup> A statute of limitation of 20 years applies to crimes punishable by life imprisonment, 10 years for crimes punishable by imprisonment of more than 3 years of Penitentiary and 5 years for all other criminal offences.<sup>40</sup> Consequently, the prosecution of manslaughter, infliction of grievous bodily harm, rape and sexual harassment are prescribed after 10 years, inflicting bodily harm and abuse of office after 5 years.

## 2.3. Investigations into torture

### 2.3.1. Criminal Proceedings

Victims of torture and ill-treatment have a general right to lodge complaints with the police and administrative cantonal authorities. There are no specific formalities for doing so.<sup>41</sup>

The competent authority charged with the investigation and prosecution of crimes, including cases of torture and ill-treatment varies from canton to canton, as the organisation and procedure relating to criminal prosecutions fall within the competence of the cantons.<sup>42</sup> Thus, while the prosecuting authority is an independent magistrate in Geneva, it is the *ministère public* in Bale-Ville and an investigating judge in Vaud and Zürich. There is no independent body charged with investigating and prosecuting allegations of torture and ill-treatment.

As a general rule, the competent prosecuting authority is required to investigate crimes *ex officio*,<sup>43</sup> though several minor offences will be prosecuted only upon a complaint by the victim.<sup>44</sup> In these cases, the victim or his/her relatives must lodge a

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<sup>36</sup> Article 15(4) and 15(5) Liability Act.

<sup>37</sup> See Piquerez, Gérard, *Procédure pénale Suisse*, Schulthess, Zurich 2000, p. 255.

<sup>38</sup> This is expressly stipulated in Article 264(3) Criminal Code.

<sup>39</sup> See Article 75(1) of the Criminal Code.

<sup>40</sup> Article 70 Criminal Code.

<sup>41</sup> See Initial Report to CAT, supra, paras. 24 et seq. for details.

<sup>42</sup> This might change with the adoption of a unified Criminal Procedure Code.

<sup>43</sup> Cantons follow different principles in this regard. In some cases the prosecuting agencies have a degree of discretion in opening an investigation.

<sup>44</sup> See Article 28 of the Criminal Code.

complaint with the competent authorities within three months from the day on which the identity of the perpetrator is known.<sup>45</sup> Of the criminal offences relevant in the context of torture, only the investigation of the offence of infliction of bodily harm (Article 123 Criminal Code) is subject to a complaint by the victim.

Criminal investigations are carried out according to the procedural law of the canton in question, subject to the specific authorisation required in relation to proceedings against public officials as outlined above. A suspect can be detained in custody if there is a risk of escape, collusion or re-offending.<sup>46</sup> As far as medical evidence is concerned, there is no mandatory medical examination of victims claiming to have suffered ill-treatment at the hands of the authorities. While the victim does not have a specific right to have his/her health examined, he/she may consult a physician. The treatment will usually be covered by health insurance, and the resulting medical report can later be used as evidence. The rules on nominating an expert to examine the state of health vary from canton to canton.<sup>47</sup> An examination of the state of health of the victim is usually ordered by the investigating magistrate but can also be undertaken by the victim him/herself by consulting a private expert.

The usual basis for not opening or closing an investigation is the lack of evidence. The victim may appeal such a decision according to the applicable cantonal procedural law to the competent cantonal body or court.<sup>48</sup> While victims of certain crimes have a right to appeal such a decision in accordance with the Federal Assistance to Victims of Offences Act (LAVI),<sup>49</sup> such a right is not afforded with respect to decisions concerning the criminal conduct of public officials.<sup>50</sup>

With regard to offences falling within the scope of the Military Criminal Code, complaints are to be lodged to the Military Prosecutor (*Procureur general militaire*). In such cases, an investigating judge, and after the preliminary investigations, the president of the divisional court or the military appellate court are in charge of the investigations. The Military Auditor is competent to indict the suspect on the basis of the files provided by the investigating judge or to close the case. The victim may appeal such a decision to the divisional court.<sup>51</sup>

The victim of a crime enjoys a number of rights under Swiss law. Victims are entitled to receive free legal assistance or representation in pursuing their case.<sup>52</sup> The authorities are, according to LAVI, required to protect victims of crimes during all phases of proceedings.<sup>53</sup> It specifically protects victims of crimes violating their bodily, sexual or mental integrity and, while torture and ill-treatment are not specifically mentioned, the law will generally operate so as to ensure protection to

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<sup>45</sup> See Article 29 of the Criminal Code.

<sup>46</sup> See for example the criminal procedure code of Geneva (CPP-GE), Article 34.

<sup>47</sup> See for example Article 65 ss CPP-GE.

<sup>48</sup> Such as the Geneva *Chambre d'accusation* pursuant to CPP-GE.

<sup>49</sup> Adopted on 4 October 1991 (LAVI; RS 312.5).

<sup>50</sup> See Article 8(1) b LAVI. See also BGE 125 IV, 161.

<sup>51</sup> See Military Procedure Code of 23 March 1979 for details.

<sup>52</sup> See Article 29(3) of the Constitution. Every person lacking the necessary means has the right to free legal assistance, unless the case appears to be without any chance of success. The person has moreover the right to free legal representation, to the extent that this is necessary to protect their rights.

<sup>53</sup> Article 2 LAVI, 4 October 1991.

these classes of victims. The relatives of victims only enjoy some of the rights and entitlements granted to the victims themselves.<sup>54</sup> Cantonal procedural codes also allow investigating authorities and judges to take measures of victim and witnesses protection. Consequently, the authorities are required to respect the privacy and personality of the victim and to inform the victim about the possibility of seeking help and assistance free of charge.<sup>55</sup> Victims also enjoy a number of procedural rights.<sup>56</sup>

### 2.3.2. Role of the Ombudsman

A victim may also complain to the Ombudsman of the canton or one of the major cities. The Ombudsman, who is elected by the Cantonal Council, may intervene on a complaint or on his/her own initiative to determine whether the authorities and offices of the canton and districts have proceeded legally and fairly.<sup>57</sup> The ombudsman may investigate the case and the authorities are obliged to provide information and to hand over files. While the Ombudsman is not authorised to give binding instructions, he/she may give advice to the complainant regarding further action to take, discuss the matter with the authorities and, if necessary, issue a written recommendation for the attention of the authorities under review. The services of the Ombudsman are free of charge.<sup>58</sup>

### 2.4. Trials

In case of an indictment, trials concerning accusations of torture and/or ill-treatment proceed before the cantonal first instance district courts according to the criminal procedure law of the canton concerned. Trials are public, inquisitorial and the accused enjoys the presumption of innocence. He or she is only to be convicted if his/her guilt has been established beyond reasonable doubt. The victim may also take part in proceedings and has the right to present evidence. Judges enjoy discretion in sentencing.<sup>59</sup>

## 3. The Practice

The CPT noted after its latest visit to Switzerland that it had received only few allegations of ill-treatment, mainly in form of disproportionate use of force during arrest but rarely ever during interrogation.<sup>60</sup> Switzerland, in its reply to a request by CPT in March 2002, provided several figures about complaints and legal action against the authorities, which had been compiled from the Cantons.<sup>61</sup> According to this information, only a small percentage of the overall complaints about police conduct concerned their use of force. For example, there were fifty cases when legal

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<sup>54</sup> Article 2(2) LAVI.

<sup>55</sup> Articles 3, 5 and 6 LAVI.

<sup>56</sup> Article 8 LAVI.

<sup>57</sup> See by way of examples Article 87, 89 and 91 of the Canton of Zurich law governing administrative jurisdiction, 24 May 1959.

<sup>58</sup> See e.g. the homepage of the ombudsman of the canton of Zurich for further information [www.ombudsmann.zh.ch](http://www.ombudsmann.zh.ch)

<sup>59</sup> See the cantonal codes of procedure for details.

<sup>60</sup> CPT 2001, p.15, para. 18.

<sup>61</sup> *Supra*, pp.16, 17. The submissions by the individual cantons, including any statistics, have not been published.

action was taken against the police in the canton of Aargau, but these however did not solely relate to the use of force. In the Canton of Geneva, there were 715 incidents of use of force by the police in 1999 and 736 incidents in 2000. In 1999, there were 33 cases in which persons were charged with using force, and in 2000 24 cases. Out of these cases, two resulted in the conviction of the accused and the imposition of disciplinary sanctions against the offenders. Several cantons reported that there had not been a single case of legal action taken against police officers since 1997.

20 out of the 26 cantons provided information to the CPT concerning the number of investigations and trials concerning ill-treatment in the course of forcible deportations by airplane as well as the criminal and disciplinary action taken in these cases. According to cantonal records, there had been seven cases in total. One of these cases resulted in a conviction of a doctor but not the accused police officers (see below), three criminal investigations had been closed without charges being brought or disciplinary action taken and three cases, two concerning criminal and one concerning administrative proceedings, were still pending in March 2002.<sup>62</sup>

There have been a considerable number of cases over the last five years that appear to reveal a similar pattern. Complaints about the ill-treatment of criminal suspects (mainly of non-Swiss nationals or persons of foreign origin, among them juveniles) as well as complaints about ill-treatment in the course of forcible deportations have only in a few cases resulted in an indictment or in disciplinary action taken against the alleged perpetrators. In most cases, complaints were dismissed as being without foundation and the investigation was closed for lack of evidence. A fairly common reaction by the police to such complaints was to open an investigation against the complainant him/herself, alleging that he/she has committed a criminal offence by using threats and violence against the police who had themselves used legitimate force.<sup>63</sup> Victims of ill-treatment, especially during forceful arrests, have apparently for this very reason been reluctant to file complaints against the police.

One of the few cases that resulted in a conviction was decided by a single judge at the Bülach District Court on 3 July 2001. In this case, three police officers and a doctor were charged with involuntary manslaughter. The victim, Khaled Abu Zarifa, died in 1999 when the three police officers attempted to deport him in the presence of the doctor. He had been given medication, had his mouth taped as well as his hands and feet tied and was placed in a wheelchair. As a result of this gagging and of a crooked nasal septum (which at least the doctor present should have noticed), he could only breathe through one nostril and died, according to the judge, from heart failure resulting from suffocation. Two out of the three police officers were acquitted because it was not possible to determine that their disregard of the rules for carrying out deportations had actually caused the death of Khaled Abu Zarifa. The case of the third policeman was sent back for further investigation. The policeman in question was the one who had decided that Khaled Abu Zarifa was to be gagged. The judge in this case stated that in the absence of rules authorising such treatment,

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<sup>62</sup> Ibid., pp. 23-25.

<sup>63</sup> See for a compilation of cases as well as a detailed description of several individual cases and their outcome the following Amnesty International Reports: Switzerland: Compilation of AI documents concerning alleged ill-treatment by cantonal police, 1999-2001; Switzerland: Death during forcible deportation: an exchange of correspondence following the death of Samson Chukwu, May 2001, AI Index: EUR 43/005/2001; Switzerland: Compilation of AI Documents concerning the alleged ill-treatment by Geneva police – of "Visar", a 14-year-old Kosovan refugee; - of "Didier", a 17-year-old Angolan, January 2002, AI Index: EUR 43/001/2002.

the policeman would carry full responsibility. The further investigation was to determine what measures the policeman had taken to ensure that the gagging would not endanger the health of Khaled Abu Zarifa. In the course of the investigation, it became evident that the policeman had not taken any such measures. The policeman died before the case reached the Court and consequently the penal procedure was closed. The doctor who had no formal role in the deportation and intervened on his own accord was however sentenced to five months imprisonment for involuntary manslaughter for having contributed to the death of Khaled Abu Zarifa. Upon appeal by the doctor, the Zurich Appeal Court, on 29 May 2002, confirmed the conviction but reduced the sentence from five to three month's suspended imprisonment.<sup>64</sup>

#### **IV. CLAIMING REPARATION FOR TORTURE**

##### **1. Available remedies**

###### **1.1. Constitution**

There is no express constitutional right to reparation for torture, ill-treatment or the violation of any other fundamental right. The debate about the introduction of a right to reparation has centred on the right to compensation for unlawful detention but not for torture and ill-treatment.

###### **1.2. Public Law**

On the federal level, the Liability Act stipulates vicarious and strict liability of the Confederation to provide reparation in cases of wrongful conduct by its officials. The Confederation is thereby liable for any damage unlawfully inflicted by its public officials (Art.1) in the exercise of their duties regardless of culpability. The victim has no right against the public official him/herself.<sup>65</sup>

Reparation awarded under the Liability Act may take the form of pecuniary and non-pecuniary compensation but the Act does neither provide for punitive damages nor for any other forms of reparation. In case of bodily harm, the injured person may claim compensation for expenses incurred as well as compensation for damages resulting from the reduced ability to work, giving due consideration to loss of opportunities.<sup>66</sup>

In case of death, the relatives of the deceased may claim the costs resulting from the death, particularly funeral costs. If the victim has not died immediately, the costs for any attempted life saving treatment and for any damages resulting from the disability to work are to be compensated. In instances when the victim had provided the livelihood for other persons, the latter are entitled to claim damages for the resulting loss.<sup>67</sup> The competent authority may, taking into consideration the

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<sup>64</sup> See Amnesty International, Case Updates- Deaths during forcible deportation in: AI Concerns in Europe January-June 2002, September 2002, AI Index EUR 01/007/2002.

<sup>65</sup> Article 3 Liability Act.

<sup>66</sup> Article 5(2) Liability Act.

<sup>67</sup> Article 5(1) Liability Act.

particular circumstances, award moral compensation in cases of death or bodily injury to the victim or his relatives provided that the civil servant in question was culpable in causing death or bodily injury.<sup>68</sup>

The Confederation itself may, having paid compensation, have recourse against the responsible public official in those cases where the damage has been caused intentionally or as a result of gross negligence.<sup>69</sup>

A victim of torture or ill-treatment is required to claim compensation from the federal financial department under the Liability Act within one year of learning of the damage and a maximum of ten years after the commission of the wrongful act.<sup>70</sup> The victim may appeal an adverse decision on the claim for compensation to the competent federal recourse commission as provided for in the administrative procedural law.<sup>71</sup> A further and final appeal may be lodged to the Federal Court.<sup>72</sup> The procedure is governed by the Federal Administrative Procedure Law according to which an appeal has to be lodged within 30 days of the decision. The instance charged with ruling on the appeal determines the level of costs for the proceedings. Indigent parties may be exempted from paying costs.<sup>73</sup>

Cantons have legislation in place which sets out similar rules on state responsibility, i.e. providing for strict and vicarious liability of the cantons, the only exception being Geneva where culpability of the public official is required to trigger the responsibility of the canton.<sup>74</sup> The procedure to be followed in the cantons varies according to the relevant cantonal laws. Cases might be heard either before civil tribunals or administrative bodies/tribunals.

As the Confederation and cantons have adopted legislation regarding the obligation of these entities to compensate for the damage caused by civil servants and other persons working in an official capacity in the exercise of their functions, the Code of Obligations is, as stipulated in its Article 61, not applicable in cases of torture or ill-treatment at the hands of public officials.<sup>75</sup>

A victim of torture or ill-treatment is also barred from claiming compensation as part of criminal proceedings since Article 8(1) (a) LAVI, which in principle would allow for such a course of action for a victim of a crime,<sup>76</sup> is only applicable to civil claims

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<sup>68</sup> Article 6(1) Liability Act.

<sup>69</sup> Article 7 Liability Act.

<sup>70</sup> Article 20(1) and (2) Liability Act. Claims under Article 10(2) Liability Act against members of the federal council and others in similar positions are subject to a different procedure.

<sup>71</sup> See Federal Administrative Procedure Law, 20 December 1968.

<sup>72</sup> See Article 10(1) Liability Act. The Federal Court is the sole instance for ruling on claims against members of the national and federal council, the federal chancellor as well as the members of the Federal Court and Insurance Court.

<sup>73</sup> See Article 44 et seq. Administrative Procedure Law of 20 December 1968.

<sup>74</sup> See Tanquerel, Thierry, *La responsabilité de l'Etat sous l'angle de la loi genevoise sur la responsabilité de l'Etat et des communes du 24 février 1989*, in: *Semaine judiciaire* 1997, p.354.

<sup>75</sup> Code of Obligations, 30 March 1911. Article 41 of the Code provides for damages for tort and Articles 45, 46 as well as 47,48 are almost identical to Articles 4, 5, 6(1) and (2) of the Federal Liability Act.

<sup>76</sup> According to Article 9 Liability Act, the criminal court will rule on the civil claims of victims so long as the full determination does not require a disproportionate examination by the court in which case the criminal court will only decide on whether the victim has a right to claim damages. A similar provision can be found in Articles 163-165 Military Criminal Code.

whereas claims against the state for the actions of its officials are of a public law nature.<sup>77</sup> The same reasoning applies to Article 60 of the Federal Criminal Law, which allows the court to award the fine imposed on the convicted person to the victim.

The Federal Law on the enforcement of debts and bankruptcy and the Federal Law on enforcing debts against local authorities and other bodies of the cantons governs the enforcement of compensation awards.<sup>78</sup> According to these acts, debt enforcement authorities are charged with enforcing awards. These must be enforced within one year of the final decision. The Federal Law on the enforcement of debts and bankruptcy is not applicable to enforcements against the cantons in those cases where the canton in question has enacted their own legislation.

## 2. Practice

While there has been no case of reparation for torture committed in Switzerland, victims have claimed compensation for ill-treatment. However, there have apparently been few cases in which compensation has been awarded by Swiss courts for ill-treatment at the hands of the police.<sup>79</sup>

The pending case relating to the death of Khaled Abu Zarifa illustrates how reparation can be claimed for ill-treatment during forcible deportation.<sup>80</sup> In the initial criminal case, the convicted doctor was ordered to pay Swiss Francs 50,000 in tort damages and a not yet specified amount of further damages to relatives of the deceased. The acting lawyer is currently seeking reparation for the relatives of the victim from the canton of Berne (where the police officers were stationed) for the wrongful conduct of the police officers but a final decision is not expected until 2004. Should this case fail and the doctor not be ordered to compensate the relatives of the victim, the lawyer could turn apply to the Canton of Zürich, the place where the death occurred, and claim reparation pursuant to LAVI.

In another legal action, which demonstrates the difficulty of claiming compensation in cases of a possible violation of the prohibition of non-*refoulement*, a Turkish asylum seeker had been allegedly tortured in Turkey after his deportation from Switzerland. After having returned to Switzerland a second time and having been granted asylum, he claimed reparation for the torture suffered in Turkey as a result of his unlawful deportation. The Federal Court held in its judgment<sup>81</sup> that the claim for compensation pursuant to Article 3 Liability Act was unfounded since the decision ordering the deportation had been final and its lawfulness was therefore not subject to further review.<sup>82</sup> Moreover, the Court considered that the fact that the claimant

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<sup>77</sup> See supra and Article 3(3) State Liability Act.

<sup>78</sup> Federal Law on the enforcement of debts and bankruptcy, 11 April 1889.

<sup>79</sup> E.g., in the reply of the Swiss Government to the CPT, supra, most of the 26 cantons asked for information stated in their replies that there have been hardly any suits against the police. Only the Canton of Solothurn (one case pending), the canton of Thurgau (6 compensation claims in 2000, of which two were partly or fully successful) and the canton Aargau (referring to several cases in which compensation was awarded for property damage) reported compensation claims in relation to police action without specifying what kind of wrongful conduct compensation was claimed for.

<sup>80</sup> See supra, III.3.

<sup>81</sup> ATF 119 Ib 208; BGE\_119\_IB\_208.

<sup>82</sup> Article 12 Liability Act.

had been tortured after his return to Turkey and therefore that the prognosis of the competent officials of the likely risk of being subjected to torture turned out to be wrong, did not in itself make the decision to deport him unlawful. The public officials would have, according to the Court, acted unlawfully only had their decision to deport the claimant been based on a violation of their essential duties, i.e. had they misjudged the likelihood of the risk to the claimant in a way that no conscientious judge or civil servant would have done.

Even though a comprehensive legal framework is in place to enable torture survivors to take legal action to claim reparation, victims of ill-treatment often appear to refrain from filing cases against the perpetrators because they deem it extremely difficult, in the light of the prevailing attitude of the authorities, to prove the ill-treatment and obtain reparation from the State. This might also be due to the fact that a lot of victims of police ill-treatment face charges by the police for having violently resisted lawful police action. In those cases where legal action was taken by victims, it proved to be difficult to establish wrongdoing on the part of the public officials, especially in cases concerning the degree of force the police or other public officials are permitted to use when arresting a person, in quashing a riot or other unlawful behaviour and when forcibly deporting rejected asylum-seekers or other persons liable to be deported.<sup>83</sup>

### V. GOVERNMENT REPARATION MEASURES

The victim of a crime that has been committed in Switzerland may also claim "compensation" and "satisfaction" from the cantons in which the crime in question took place according to LAVI.<sup>84</sup> A victim may only claim compensation for the damages suffered if his/her income does not exceed a certain limit.<sup>85</sup> In the latter case, he/she may however be granted satisfaction in form of a non-specified monetary sum if he/she is seriously affected by the crime and the special circumstances warrant satisfaction.<sup>86</sup> The quantum to be awarded will depend on the actual damages and the income of the victim. Full compensation will be paid to those victims whose income does not exceed the minimum income as set by Swiss law.<sup>87</sup> Any compensation provided for by the State under LAVI is subsidiary to any other compensation that the victim might have received from the perpetrator of the crime or the State/cantons according to the respective Liability Acts. Thus, the latter will be deducted from the compensation due under LAVI.<sup>88</sup> Finally, the canton responsible for providing compensation may reclaim the amount from the perpetrator(s).<sup>89</sup>

From 1993 to 1998, 42,000 victims of crime consulted centres set up under LAVI. Contrary to the purported intention of the lawmaker, the bulk of compensation paid

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<sup>83</sup> Information provided by a Swiss lawyer.

<sup>84</sup> Article 11(1) LAVI. The terms used in Article 11 (1) are "Entschädigung oder Genugtuung" in the German version and "Indemnisation ou réparation morale" in the French version of the Law.

<sup>85</sup> See Article 12(1) LAVI for details.

<sup>86</sup> Article 12(2) LAVI.

<sup>87</sup> See Article 13 LAVI for details. The legislation on aid to victims provides for compensation of up to 1,100 Swiss francs for ill-treatment, and an unlimited amount for mental suffering.

<sup>88</sup> See Article 14(1) LAVI for details.

<sup>89</sup> Article 14(2) and (3) LAVI.

has been in the form of satisfaction rather than compensation for the actual loss suffered. The amount of satisfaction paid to victims has ranged from 150 - 345,000 Swiss Francs, amounting to a total of 8 Million Francs in 2001 alone. According to present proposals made in the course of a review of the law, the amount of satisfaction will be limited to the maximum annual income as provided by accident insurance (currently 71,200 Francs) and a victim shall only be entitled to it if he or she has been seriously impaired in his or her capacity to work, extra work activities or personal relationships.<sup>90</sup>

The Swiss Red Cross established a therapy centre for torture victims in Berne in 1995, which receives financial support from the Swiss government. Moreover, pursuant to Article 3(2) of LAVI, consultation centres have been set up in the cantons which offer medical, psychological, social, material and legal assistance and provide information about other assistance for victims.

Switzerland has set up a programme of reparation for human rights violations other than torture. This programme specifically relates to the *Yeniches* children who had been, from 1926 to 1973, victims of a variety of forceful measures, including imprisonment, which were designed to destroy the cultural identity of the Yeniches, a minority leading a nomadic life.

As a form of public reparation, the Swiss government made, in 1995, an apology about the policy towards and treatment of Jewish refugees during the Second World War when these refugees were either refused entry or returned to territories under German control, measures which are now considered to violate the prohibition of *non-refoulement*.<sup>91</sup>

A proposal by a parliamentary initiative is also under consideration, which would provide reparation for the victims of forced sterilisations.<sup>92</sup> Moreover, the establishment of a Swiss Solidarity Foundation, contemplated in the wake of the Swiss Banks settlement<sup>93</sup> to finance through excess gold reserves charitable projects, which would have in principle allowed the provision of assistance to victims, was rejected in a referendum held in September 2002.<sup>94</sup> However, the Confederation, which supported the establishment of the said Foundation, is presently examining alternative ways of financing the Foundation so that a new proposal might be submitted to another referendum in the future.

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<sup>90</sup> See *Feilen an der Opferhilfe, Begrenzung der Genugtuungszahlen*, *Neue Zürcher Zeitung*, 20 December 2002.

<sup>91</sup> See Rapport final de la Commission Indépendante d'Experts: Suisse- Second Guerre Mondiale, Pendo, Zürich, pp. 95ss. See also ATF 126 II 145.

<sup>92</sup> See [http://www.parlament.ch/afs/data/d/gesch/1999/d\\_gesch\\_19990451.htm](http://www.parlament.ch/afs/data/d/gesch/1999/d_gesch_19990451.htm)

<sup>93</sup> Ibid. In this settlement, Swiss Banks agreed to pay billions of dollars of restitution to holocaust survivors. The establishment of the Solidarity Foundation was according to some observers a reaction of the Swiss Government to allay criticism of its failure to participate in the Swiss Banks settlement. See Bazylar, Michael J., *The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, in *Fordham International Law Journal*, Vol. 25, 2001, 64-106, at p.105 and *In re Holocaust Victims Assets Litigation*, Corrected Memorandum and Order of Korman, C.J. E.D.N.Y. 2 August 2000. 96 Civ. 4849 (ERK) (MDG) (Consolidated with 99 Civ. 5161 and 97 Civ. 461). [Accessible at: [http://www.swissbankclaims.com/PDFs\\_Eng/MemorandumOrder.pdf](http://www.swissbankclaims.com/PDFs_Eng/MemorandumOrder.pdf), last visited February 2003].

<sup>94</sup> See *The Law on the Swiss Solidarity Foundation*, 22 March 2002.

## VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

### 1. Prosecution of acts of torture committed in third countries

#### 1.1. The Law

##### 1.1.1. Criminal Law

Swiss law recognises the passive and active personality principle as well as the principle of *aut dedere aut judicare* (extradite or punish). Whoever commits a crime abroad which Switzerland is obliged to prosecute according to an international agreement, is subject to the Swiss criminal code.<sup>95</sup> The Swiss Government has asserted that this provision operates to confer jurisdiction over torture committed abroad.<sup>96</sup> Whoever commits a crime against a Swiss national abroad, is subject to Swiss criminal law if the crime is also recognised in the country where the crime was committed.<sup>97</sup> Equally, a Swiss national who commits a crime abroad is subject to Swiss criminal law if the crime in question is subject to extradition under Swiss law.<sup>98</sup> Moreover, there is an explicit provision stipulating that a Swiss civil servant who commits a crime violating his/her official duties or a crime which is related to the exercise of his/her office that is a recognised crime in the country where it was committed, is subject to Swiss criminal law.<sup>99</sup>

An alleged perpetrator of torture can also be prosecuted if the torture constituted an element of genocide or if the torture constituted a war crime. In the latter case, he/she would be subject to the Swiss military criminal code.<sup>100</sup> This code contains a clause referring to international humanitarian law and the laws and customs of war in international as well as non-international armed conflicts.<sup>101</sup> Swiss laws do not expressly recognise crimes against humanity and it is questionable whether a perpetrator of such a crime could be prosecuted in Switzerland. It is also for this reason that Switzerland is currently considering legislation that would explicitly recognise crimes against humanity and thereby ensure the implementation of the obligations stemming from their ratification of the Statute of the International Criminal Court.

Cantonal prosecution agencies are also competent to prosecute alleged perpetrators of torture, and for crimes covering acts of torture or genocide, provided that the crime is also recognised in the country where it was committed, the alleged perpetrator is present in Switzerland and is not extradited.<sup>102</sup> The alleged perpetrator will not be punished in Switzerland if he/she has been finally acquitted in the country

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<sup>95</sup> Article 6 bis Criminal Code.

<sup>96</sup> Switzerland's Initial Report to the UN Committee against Torture, *supra*, p.8

<sup>97</sup> Article 5 Swiss Criminal Code.

<sup>98</sup> Article 6 Swiss Criminal Code.

<sup>99</sup> Article 16 Liability Act.

<sup>100</sup> See Article 2 et seq., 9, 108 et seq. Swiss Military Criminal Code.

<sup>101</sup> Article 108, 109 Military Criminal Code.

<sup>102</sup> Article 6 bis,(1) Criminal Code.

where the crime was committed or if the punishment that was imposed on him/her abroad has been executed, pardoned or is subject to prescription.<sup>103</sup>

Accordingly, an alleged perpetrator of torture who is present on Swiss territory is subject to Swiss criminal law, regardless of the location of the crime, his/her nationality and the nationality of the victim, since Switzerland has an obligation to prosecute under the Torture Convention. However, as the Swiss criminal code does not recognise a crime of torture as such, the alleged perpetrator will only be prosecuted for any of the other crimes outlined above, if applicable.

Members of the armed forces as well as civilians, who commit war crimes as stipulated in the Swiss military criminal code, may be prosecuted by the competent military prosecutors. There are no preconditions, such as a presence requirement, for such a prosecution. Swiss military tribunals are competent to hear such cases according to the procedures set out in the Military Criminal Procedure Code.<sup>104</sup>

The Swiss judiciary has so far not addressed the question as to whether persons enjoying diplomatic or consular status enjoy immunity for torture and international crimes pursuant to the applicable international conventions.<sup>105</sup> In a case against Ferdinand Marcos, the former head of state of the Philippines and his wife Imelda Marcos, the Swiss Federal Court held that a head of state enjoyed absolute immunity from criminal prosecution for acts committed in the exercise of his/her official functions.<sup>106</sup> However, this case concerned charges of having abused their office to acquire for themselves public funds and works of art, and hence the court was not called upon to decide whether such absolute immunity of heads of state would also apply in cases of a violation of a norm having the status of *jus cogens*, such as torture.

### 1.1.2. Extradition Law

Switzerland is party to the European Convention on Extradition of 1957 and has concluded numerous bilateral treaties of legal assistance. In the absence of the applicability of any of these treaties, the Federal Law on international legal assistance in penal matters governs extraditions.<sup>107</sup> Torture, although not mentioned expressly in the law on extradition, is an extraditable offence.<sup>108</sup> Extradition is to be refused if the request is based on a trial in absentia in which the procedural rights of the defendant were not respected.<sup>109</sup> It is also to be refused if the requesting state does not guarantee that the person whose extradition is requested will not be sentenced to death in the requesting state, that a death penalty will not be executed or that he/she will not be treated in such a way to violate his/her bodily integrity.<sup>110</sup> The

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<sup>103</sup> Article 6 bis, (2) Criminal Code.

<sup>104</sup> Swiss Military Criminal Procedure Code of 23 March 1979.

<sup>105</sup> Switzerland ratified the Vienna Convention on Diplomatic Relations, 1961, on 30 October 1963.

<sup>106</sup> BAP gegen Aguamina Corporation, BGE\_123\_II\_595.

<sup>107</sup> Law on legal assistance and extradition in criminal cases, 20 March 1981.

<sup>108</sup> Article 35 *ibid.*

<sup>109</sup> Article 37 (2) *ibid.*

<sup>110</sup> Article 37 (3) *ibid.*

extradition of Swiss nationals is prohibited.<sup>111</sup> This prohibition does not apply to the transfer of a Swiss national to an international criminal tribunal.<sup>112</sup> The latter is governed by the recently adopted Law on the Co-operation with the International Criminal Court.<sup>113</sup>

### 1.2. The Practice

There has so far only been one case in which Abennacer Naït-Liman, who had allegedly been tortured in the facilities of the Ministry of Interior in Tunisia in 1992, lodged a complaint on 13 February 2001 against the then Tunisian ministry of Interior, Abdallah Kallel. The prosecutor of the Geneva canton opened a preliminary inquiry, stating that the Convention against Torture contained an obligation to prosecute every person, including foreigners, suspected of the crime of torture and that the facts alleged in the complaint appeared to be well-founded. Meanwhile, Abdallah Kallel, who had been in a hospital in Geneva at the time of the complaint, left shortly before the police arrived. Subsequently, no international arrest warrant was requested by the Geneva prosecutor who did however indicate that the complaint could be reactivated should the suspect be found in Switzerland.<sup>114</sup>

The Swiss authorities have dealt with several other cases relating to international crimes committed abroad, of which the first case concerned violations of the laws and customs of war. A former guards at the Serb run detention camp of Omarska and Keraterm in North Western Bosnia was accused, *inter alia*, of beating and injuring civilian prisoners and subjecting them to degrading treatment in violation of the Geneva Conventions and the two Additional Protocols. He was eventually acquitted since the evidence and testimonies did not prove his guilt beyond reasonable doubt.<sup>115</sup> Another trial concerned a Rwandan national who was charged with crimes against humanity, war crimes and genocide but only convicted for violations of the Geneva Convention as the Military Tribunal hearing the case held that, despite of Switzerland's international obligations, the lack of jurisdiction and specific crimes in Swiss law made the prosecution for genocide and crimes against humanity impossible.<sup>116</sup> Further cases are currently under investigation.<sup>117</sup>

There has also been one case in which a Somali asylum-seeker was refused asylum on the basis of Article 1 F of the Refugee Convention since he was found to have committed a crime against humanity in Somalia. He was however allowed to remain in Switzerland as there was a risk of a violation of Article 3 ECHR in case of a return to Somalia. No further action was taken and his current whereabouts are unknown. The Swiss authorities have recognised that there should be an automatic investigation and prosecution of these cases. A reform of the Swiss asylum law is

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<sup>111</sup> Article 25 (2) of the Constitution.

<sup>112</sup> See FF 1997 I 173 + FF 2001 451s.

<sup>113</sup> Adopted on 22 June 2001.

<sup>114</sup> Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation*, September 2001, AI-Index: IOR 53/002-018/2001, Chapter 10.

<sup>115</sup> See REDRESS, *Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, London, 1999, pp. 41-44.

<sup>116</sup> See *ibid.*, pp.42 and 43.

<sup>117</sup> See *Langwierige Vorarbeit vor einer Verhaftung*, *Neue Zürcher Zeitung*, 14 August 2001.

presently under way which would ensure that the Swiss asylum authorities would automatically pass on any information about asylum seekers who appear to have committed an international crime to the competent prosecution agencies.<sup>118</sup>

With regard to the extradition of perpetrators of torture, Switzerland requested the extradition of the former Chilean dictator General Pinochet from the United Kingdom on the basis of the Swiss nationality of one of his victims.<sup>119</sup>

There has apparently been no case of an extradition of a foreign national relating to acts of torture. Switzerland has however transferred persons accused of having committed international crimes to the ICTR in the case of Musema in 1998 and Rukundo in 2001. In the case of Maurice Papon who had been convicted in France for complicity in crimes against humanity, the Swiss authorities used the instrument of political expulsion when handing Papon over to the French authorities in 1999.<sup>120</sup> Finally, in 1994, the Swiss authorities returned Félicien Kabuga, who had openly called for genocide in the public media in Rwanda, to Rwanda in an apparently complete disregard of existing extradition procedures.

The obstacles to prosecuting alleged perpetrators of torture committed abroad are of a legal as well as a factual nature. Firstly, Swiss law does not recognise the crime of torture so that the alleged perpetrator of it cannot be punished for the crime of torture as such but only for other crimes which might be applicable. Secondly, the act of torture also has to be a crime in the country where committed. Thirdly, it might, especially in cases where the public authorities fail to act promptly and decisively, prove difficult, as the case of Abdallah Kallel has demonstrated, to arrest the suspected perpetrator of torture before he/she manages to leave the country. Fourthly, there is an increasing recognition in Switzerland, largely based on the experiences in prosecuting Rwandan war criminals, of the difficulties of establishing the facts and obtaining sufficient evidence to indict and convict a suspected war criminal, a reasoning which will likewise apply to most cases of torture.

## 2. Claiming reparation for acts of torture committed in third countries

### 2.1. Legal action against individual perpetrators

A perpetrator of torture committed abroad can only be sued for tort damages if he/she has his/her domicile or habitual residence in Switzerland. A temporary presence in Switzerland is not sufficient. Failing such domicile or residence, legal action in Switzerland can be taken in those cases where the damage resulted in Switzerland itself.<sup>121</sup>

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<sup>118</sup> See the explanatory report of the Swiss Commission of Recourse in Asylum Matters, p. 62: [www.asyl.admin.ch/Daten/Juengste\\_Entwicklungen/Gesetzesrevision/Teilrevision%20des%20Asylgesetzes\\_f.pdf](http://www.asyl.admin.ch/Daten/Juengste_Entwicklungen/Gesetzesrevision/Teilrevision%20des%20Asylgesetzes_f.pdf).

<sup>119</sup> REDRESS, *supra*, p.44.

<sup>120</sup> See Andreas Auer/Giorgio Malinverni/Michel Hottelier, *Droit constitutionnel Suisse*, Vol.I, L'Etat, Stämpfli, Berne 2000, p.164.

<sup>121</sup> Article 129 Federal Law on International Private Law, 18 December 1987. Moreover, assets of the perpetrator of torture in Switzerland might be arrested/sequestered regardless of the domicile of the defendant if there are sufficient links with Switzerland (Art. 271(1) (4) of the Law on enforcement of debts and bankruptcy of 11 April 1889. This will however only be the case if the cause of action arose in Switzerland.

Finally, Swiss courts have a subsidiary and exceptional competence in those cases where the law does not provide for any competence in Switzerland and legal action in a third country is either not possible or cannot reasonably be expected to be taken. The Swiss courts or authorities which have their seat at a place having a sufficient link with the case are competent to hear it.<sup>122</sup> However, the Court of Appeal, Canton Zürich, held that a Swiss court does not have an exceptional competence in cases where there is no or only a marginal connection with Switzerland, even if this were to result in a denial of justice.<sup>123</sup>

Should the perpetrator of torture be tried for his/her crime by a Swiss court, the victim may demand compensation as *partie civile*.<sup>124</sup> Should a civil suit for damages for torture committed abroad be admissible, the law of the State where both parties have their habitual residence will be applicable.<sup>125</sup> Should the tortfeasor and the injured party not have their habitual residence in the same country, the law of the State where the torture was committed will be applicable.<sup>126</sup> If the resulting damage of the torture does not occur in the country where it was committed, the law of the State in which the damage results will be applicable on condition that the tortfeasor had to foresee that the damages would be resulting in that State.<sup>127</sup>

### 2.2. Legal Action against foreign states

Civil suits against foreign States are subject to the same rules as suits against individuals for cases with a foreign connection. As far as State immunity is concerned, if the sued State is a member of the European Convention on State Immunity, 1972, the provisions of that treaty to which Switzerland is a party are applicable. With regard to States not members of the Convention, Swiss domestic law is to be applied in light of the rules of customary international law.<sup>128</sup> There has not been any jurisprudence on this subject matter. Even if a Court were not to grant immunity in relation to the suit itself and award reparation against a State, the enforcement of such a judgment would pose difficulties as certain assets of States are not subject to enforcement.<sup>129</sup>

### 2.3. Alternative Avenues

A torture survivor may also obtain assistance for torture committed abroad pursuant to LAVI. According to the Federal Court, a victim of a crime has a right to assistance under the law if he/she requests such an assistance in Switzerland, the victim is in need of such assistance and if the victim had, at the time when the torture took

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<sup>122</sup> Article 3 *ibid.*

<sup>123</sup> Judgement of 22 March 2002, in *Blätter für Zürcherische Rechtsprechung* 2000, p.301.

<sup>124</sup> Article 8, 9 LAVI; Articles 163 and 164 Military Criminal Code.

<sup>125</sup> Article 133 (1) Federal Law on International Private Law.

<sup>126</sup> Article 133 (2), 1. Sentence, *ibid.*

<sup>127</sup> Article 133 (2), 2. Sentence, *ibid.*

<sup>128</sup> See *supra* I, 1.2. It therefore remains to be seen whether Swiss courts would follow the widely held distinction between acts of a public nature (*iure imperii*) and acts of a private nature (*iure gestionis*) or whether it would embrace the argument that acts that violate *jus cogens*, such as torture, fall outside the scope of the immunity accorded to acts *iure imperii*.

<sup>129</sup> Article 92 (11) of the Law on enforcement of debts and bankruptcy of 11 April 1889.

place, sufficient links with Switzerland.<sup>130</sup> While it is therefore not a necessary precondition that the act of torture has taken place in Switzerland, the victim will in principle have to have his domicile in Switzerland at the time when the torture took place or, alternatively, be a Swiss national in order to satisfy the criteria of sufficient links.<sup>131</sup>

The moral compensation available under Article 11 of LAVI may, in cases where the crime has been committed abroad, only be claimed by Swiss nationals and persons who have their domicile in Switzerland. Other victims who do not have any of these links are not entitled to any form of compensation and satisfaction under the Law.

## 2.4. The Practice

There has been one case relating to reparation for acts of torture committed abroad. In the Marcos litigation mentioned above the Swiss Federal Court was called upon to rule on the legality of the decision of the competent Swiss authorities to release the assets in the Marcos case from a Swiss bank (for the benefit of) to the State of the Philippines by way of legal assistance.<sup>132</sup> In so doing, it examined whether such measures would violate the Swiss law on legal assistance, which stipulates that legal assistance should not violate the minimum standards of the ECHR or ICCPR or the international *ordre public*. The Court explicitly referred to the obligation contained in Article 13 and 14 of the Convention against Torture according to which every contracting state has to ensure that victims obtain reparation and have an effective right to compensation. Against this background, it considered whether the administrative decision to provide the requested legal assistance, without a reassurance by the Philippines that the assets would be used to provide reparation for the victims of serious human rights violations of the Marcos regime who had obtained a favourable civil judgement in the United States, was unlawful. It held that the discretion exercised by the competent authority to grant legal assistance without such assurance was not wrongful given that the case did not directly relate to the subject of reparation for the victims of human rights violations and that the victims had remedies in the Philippines to claim reparation although the Court recognised existing difficulties in exercising such a right. However, the Court called upon the Federal Council to request the Philippines to provide it regularly with information about important developments relating to the provision of reparation of victims of human rights violations of the Marcos' regime, including procedures in line with Articles 12 to 16 of the Convention against Torture.

Swiss laws on extradition enable Swiss authorities to extradite alleged torturers while recognising the prohibition of non-refoulement.

The practice provides for some examples in which Switzerland showed its willingness to extradite perpetrators of torture and war criminals. However, the circumvention of extradition procedures by using the instrument of political expulsion or simply deporting a war crime suspect not only violate the right to due process but are also questionable with regard to the prohibition of non-refoulement.

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<sup>130</sup> BGE 122 II 312.

<sup>131</sup> BGE 126 II 228, cons.2 f.

<sup>132</sup> BGE 123 II 595, in particular pp.617-624.

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Swiss law allows torture survivors from abroad to claim reparation against the individual perpetrators. A state will however in most likelihood enjoy immunity from suit in Switzerland although this has not been put to a test before Swiss courts. Torture survivors from abroad do also not enjoy the benefits to which victims of crimes committed in Switzerland are entitled.

The Marcos case is a positive example of how torture survivors' right to reparation can be taken into account when deciding on requests of international legal assistance, particularly in cases where a State is asking for the release of funds