

**OHCHR: Questionnaire of the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

**Commentary by AsyLex regarding Switzerland**

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A. About the commenting organization**

AsyLex is an independent, Switzerland-based association providing legal assistance and representation to asylum seekers in Switzerland and beyond. Our work is performed primarily by volunteers, who provide legal counseling and court representation in cases involving Swiss asylum procedure and immigration detention.

We share the Special Rapporteur’s concern regarding challenges, impediments and obstacles standing in the way of effective accountability and justice for victims and survivors of crimes of torture.

Therefore, we are of the view that it is crucial to bring below’s issues to the Special Rapporteur’s attention.

**B. Responses to Special Rapporteur’s questions**

**1. Insufficient Regulatory Framework and the Challenges, Impediments and Obstacles to Effective National Investigations and Prosecutions of Acts of Torture resulting from it:**

*1.1. Lacking Anti-Torture Provision in Swiss Criminal Code*

Despite the fact that Switzerland has been a party to the UN Convention against Torture (hereinafter “**CAT**”, Appendix 1) since 1987, torture is only explicitly prohibited according to Swiss law in the context of crimes against humanity and war crimes. In other words, if not in the context of a widespread and systematic attack against the civilian population or an international armed conflict, no self-standing torture prohibition exists within Swiss criminal law. While Swiss authorities argue that existing provisions within the Swiss Criminal Code (hereinafter “**SCC**”, Appendix 2) prohibit torture, this appears to be insufficient: These isolated provisions[[1]](#footnote-0) do not prohibit torture consistently and effectively enough, since they do not contain all elements provided for in the detailed definition of torture in article 1 CAT. The resulting gaps in criminal law can be used to allow perpetrators and accomplices to escape appropriate punishment. Furthermore, the lack of a qualified provision containing all elements of torture provided for in the CAT severlely weakens Switzerland’s international commitment against torture.

Precicely because of the lacking provision on torture in the SCC, Switzerland was reprimanded on several occasions by relevant human rights actors, including the UN Committee against Torture. On December 18, 2020 a parliamentary initiative has been submitted to include torture as a separate criminal offense in the SCC. Currently, this initiative is in parliamentary consultation.

*1.2. Authorization from the Federal Department of Justice and Police required to prosecute Officials*

Since torture is, by definition, committed by public officials, the current regulatory framework places obstacles in the way of prosecuting torture and inhumane treatment. This will be illustrated by the following example: According to article 15 of the Swiss Federal Law on the Liability of the Federal Government and its Officials and Civil Servants[[2]](#footnote-1) (Appendix 3), the prosecution of public officials for criminal offenses they have carried out in the performance of their duties require authorization from the Federal Department of Justice and Police. The authorization can solely be requested by the public prosecutor.

In a case where *AsyLex* represented a victim of inhumane treatment, *AsyLex* filed criminal charges against the suspected security officer (acting in his role as a public official) in August 2021. The required authorization to conduct criminal proceedings was only requested by the prosecutor’s office in November 2021 and was only granted by the Federal Department of Justice and Police in February 2022. This example illustrates the time-consuming obstacles and significant delays that the regulatory framework implies already for the very first step of simply initiating a prosecution against a public official. Similar authorization requirements apply on the cantonal (“regional”) level. Especially given the often similar interests between the suspect and the government, including the prosecutor, the huge discretion given to the authorities in this regard is highly questionable.

**2. Mechanisms and Entities Involved in Prosecution: The Role of the National Commission for the Prevention of Torture:**

The National Commission for the Prevention of Torture (hereinafter “**NCPT**”*)* is a national commission, independent of the authorities and with a statutory mandate, which carries out regular monitoring visits to ensure that measures restricting freedom in detention facilities and other places of detention (such as the forced deportation of asylum seekers by aircraft) comply with human rights and that the fundamental rights of the persons concerned are respected. The NCPT writes reports on its monitoring visits, which can be consulted upon request. *AsyLex* welcomes the mandate of the NCPT and would appreciate if in future the institution became even more independent and more responsive to leads from the general public

An issue of concern in this context is the institutionalization of inhumane treatment during forced deportations: The decisions on the legal stay of a person based on the Asylum Act or the Foreigners and Integration Act are enforced by administrative law enforcement measures. One of these measures is forced deportation, which occurs when the person concerned, who has received a deportation order, does not leave the country voluntarily within a predefined time frame. Depending on how willing the person concerned is to cooperate with a forced deportation, the deportation is carried out according to different levels, level 4 being the most restrictive one. Level 4 deportations are applied if a person is considered so recalcitrant that they are unable to travel on an ordinary scheduled flight, even if handcuffed. In this case, a special flight with increased restraint is carried out for this person. It should be noted that the authorities define the term “recalcitrant” very broadly: Anyone who has refused to take a flight once can be considered recalcitrant. In the case of level 4 deportations, the person concerned is tied to a wheelchair with up to eight cable ties, where a helmet is put on their head[[3]](#footnote-2). Thereby, the dignity and personal integrity of the person concerned is systematically violated. Level 4 deportations systematically use methods that fall under the category of internationally condemned inhumane treatment. Even though level 4 deportations are always accompanied by NCPT, the information about the exact situation is limited due to significant redaction (blacking out) of their reports. Even more concerningly, also in cases of level 2 or 3 flights coercive measures are applied, namely against vulnerable people, and in these constellations no independent monitoring takes place at all, leaving the persons concerned fully exposed to the police and security staff involved.

**3. Victim participation and protection:**

In scope of the asylum procedure, it is pertinent to note that Swiss authorities regularly fail to examine alleged violations of torture or other cruel, inhuman or degrading treatment (hereinafter referred to by the generic term “**mistreatment**”) or sexual and gender-based violence (hereinafter "**SGBV**") sufficiently.

Although it is possible to invoke the Convention Against Tortrure (CAT) in asylum requests, the State Secretariat for Migration does not examine such claims sufficiently: Instead of assessing the allegations in a detailed and individual manner as well as taking the necessary measures such as initiating the often urgently needed psychological treatments for alleged victims of mistreatment or SGBV, Swiss authorities solely undertake generalized examinations, i.e. whether general torture practices are observable in the relevant country and whether relevant conventions have been ratified by the state in question. On the basis of this generalized examination, Swiss authorities frequently issue non-entry or negative asylum decisions, even where victims of mistreatment or SGBV are concerned. Often, Swiss authorities subsequently also order administrative detention in order to ensure enforcement of the deportation order. In administrative detention, however, alleged victims of mistreatment or SGBV are regularly denied the possibility of psychological treatment, which, for traumatized persons, amounts to inhumane treatment and regularly leads to suicidal attempts.

Subsequently, these persons are returned to countries where they face renewed exposure to mistreatment or SGBV, which amounts to a violation of article 3 CAT.

Such returns mostly occur in the context of returns under the Dublin III regulation (Appendix 4), the provisions of which Switzerland implemented through the Agreement between the Swiss Confederation and the European Community Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland (Appendix 5), where another State is responsible for the asylum application; in the context of so-called "safe third countries“[[4]](#footnote-3); or in the context of removal to home countries.

In the past, AsyLex has filed various complaints before the UN human rights treaty bodies, among which the Committee against Torture, to prevent such removals. In the vast majority of these cases, interim measures were granted, which consequently also implies that Switzerland has not sufficiently implemented the CAT and does, therefore, not sufficiently protect alleged victims of mistreatment or SGBV.

In this context, individuals who had experienced mistreatment in the past are often severely traumatized and in need of psychological support. Asylum seekers who have received a non-entry decision from Switzerland and are to be returned to another State within the Dublin System are regularly taken into Dublin-deportation detention before their return, where they are denied any possibility of psychological treatment. In case of suicidal attempts, the person concerned is regularly put into solitary confinement, even though this is clearly in violation of basic human rights, as several courts stated already.

 **4. Recommendations**

* Urge Sitzerland to include a qualified provision prohibiting torture in the Swiss Criminal Code;
* Call on Switzerland to refrain from burdensome authorization requirements before initiating criminal proceedings against suspects of torture or inhuman treatment;
* Urge Switzerland to completely cease level 4 deportations and ensure monitoring of level 2 and 3 deportations;
* Call on Switzerland to take all necessary measures to ensure a proper and individualized assessment of the potential risk of human rights violations rejected asylum seekers may face, particularly if vulnerable asylum seekers are concerned;
* Urge Switzerland to fully refrain from solitary confinement of suicidal persons in administrative detention.

1. Swiss Criminal Code of 21 December 1937 [SR 311.0] Articles 111 - 117, 122-128, 180-185 and 189-193. [↑](#footnote-ref-0)
2. Swiss Federal Law on the liability of the Confederation, its authorities and officials [SR 170.32], Article 15. [↑](#footnote-ref-1)
3. In 2011, a film of a reconstruction of a shackling and forced level 4 deportation from Switzerland was published. The film is based on statements of victims and the training documents of the police. Anyone who is living in Switzerland without valid residence papers and does not leave voluntarily can become a victim of such treatment. The persons concerned need not have been criminals or violent.: <https://www.youtube.com/watch?v=IlDAyZuvPuM> (visited on November 25, 2022), [↑](#footnote-ref-2)
4. For the definition as a safe third country, the Swiss authorities have to consider the political stability, compliance with human rights, the assessment of other EU/EFTA member states and UNHCR as well as other country specific criteria (Article 2 para. 1 Asylum Ordinance 1 [AsylO 1(Appendix 6)]). Based on a bi-annual assessment, the list of safe third countries is defined and amended in the ASylO 1, Annex 2 (available here: <https://www.fedlex.admin.ch/eli/cc/1999/359/de#annex_2/lvl_d4e130>, as well as in Appendix 7 ). This list currently contains about 45 countries, namely the member states of EU/EFTA as well as further countries such as Albania, North Macedonia, Bosnia and Herzegovina, Senegal, Georgia, Ghana, India, Kosovo, Moldova, Mongolia or Montenegro. [↑](#footnote-ref-3)