



# SWITZERLAND

## AMNESTY INTERNATIONAL SUBMISSION FOR THE UN UNIVERSAL PERIODIC REVIEW 28<sup>TH</sup> SESSION OF THE UPR WORKING GROUP, NOVEMBER 2017

### FOLLOW-UP TO THE PREVIOUS REVIEW

Switzerland accepted 99 of 140 recommendations made during its second UPR and rejected 40.<sup>1</sup> In setting out its position on the recommendations Switzerland noted that it had accepted those it expected to be able to implement and those it had already implemented.<sup>2</sup>

Since the last UPR, Switzerland has ratified the International Convention for the Protection of All Persons from Enforced Disappearance,<sup>3</sup> the Convention on the Rights of Persons with Disabilities,<sup>4</sup> ILO Convention N° 189,<sup>5</sup> and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.<sup>6</sup>

A bill allowing second-parent adoption for same-sex couples has been adopted, but has yet to come into force, while another bill, allowing marriage for homosexual couples, is under discussion in Parliament.<sup>7</sup> A strategy against trafficking has been adopted.<sup>8</sup>

Amnesty international notes that some accepted UPR recommendations, as well as other UN recommendations, have yet to be fully implemented. The government has not yet adopted a national plan of action against racism<sup>9</sup> and action is still needed to combat violence against women, including domestic violence.<sup>10</sup>

Despite progress towards the establishment of a national human rights institution, as recommended in the previous review,<sup>11</sup> Amnesty International is concerned that it may not fully comply with the Paris Principles.

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<sup>1</sup> A/HRC/22/11/Add.1 One of the recommendations, 123.75 (Slovakia), remain unanswered.

<sup>2</sup> A/HRC/22/11/Add.1

<sup>3</sup> A/HRC/ 22/11, recommendation 122.1 (Paraguay, Argentina).

<sup>4</sup> A/HRC/ 22/11, recommendations 122.2 (India, Greece, Slovakia, Iraq, Chile, Egypt, Mexico, Rwanda, Paraguay, China).

<sup>5</sup> A/HRC/ 22/11, recommendation 123.6 (Philippines).

<sup>6</sup> A/HRC/ 22/11, recommendation 123.4 (Lichtenstein).

<sup>7</sup> A/HRC/ 22/11, rejected recommendations 123.76 (Norway) and 123.77 (Ireland).

<sup>8</sup> A/HRC/22/11, recommendation 123.68 (Mexico).

<sup>9</sup> A/HRC/ 22/11, recommendations 123.32 (Costa Rica & Spain), 123.33 (South Africa), 123.34 (Jordan).

<sup>10</sup> A/HRC/ 22/11, recommendations. 123.70 (New Zealand), 123.71 (South Africa), 123.72 (Jordan).

<sup>11</sup> A/HRC/ 22/11, recommendations, 123.18 (New Zealand), 123.19 (Slovenia), 123.20 (Poland), 123.21 (Greece), 123.22 (Uruguay).

## THE NATIONAL HUMAN RIGHTS FRAMEWORK

Switzerland is a party to most international and regional human rights instruments. Following its second UPR, it ratified some human rights treaties in response to recommendations. It also started, in early 2017, the parliamentary process to ratify the Istanbul Convention;<sup>12</sup> however, it has yet to be fully ratified. A revised law on asylum, which provides better protection for asylum-seekers by granting them free legal assistance right from the start of the procedure, has also been adopted.

However, a proposed change to the Constitution may, if adopted by a referendum, severely undermine respect for international human rights standards and lead Switzerland to denounce several instruments to which they are currently a party, including the European Convention on Human Rights and Fundamental Freedoms. Under the Swiss Constitution, citizens or political parties may propose changes to the Constitution if they are able to collect 100,000 signatures within an 18 month timeframe. The proposal is then submitted to a popular referendum unless declared invalid by Parliament. However, the requirements for invalidation are extremely restrictive and incompatibility with international conventions alone is not sufficient. In 2012, Switzerland rejected two recommendations asking for institutional guarantees to ensure that its human rights commitments are protected against popular initiatives that may violate these commitments.<sup>13</sup> Since then, an initiative affirming the supremacy of the Federal Constitution over international standards, including human rights standards with the exception of “compulsory international law”, has been launched and will be submitted to a popular referendum in 2018. The Federal Council opposed the initiative.<sup>14</sup>

There are still some gaps in the protection of human rights in national legislation. A number of recommendations pertaining to these issues were made in the previous review; however, these recommendations were rejected by Switzerland.

- The Criminal Code lacks a provision expressly prohibiting torture despite repeated concluding observations and recommendations by the UN Committee against Torture.<sup>15</sup> Similarly, previous UPR recommendations on this issue were rejected<sup>16</sup> on the basis that acts of torture are already criminalized in the Swiss Penal Law.
- Despite previous UPR recommendations,<sup>17</sup> all systematically rejected, and recommendations by the Council of Europe<sup>18</sup> and Committee on Economic, Social and Cultural Rights,<sup>19</sup> Switzerland does not have a general anti-discrimination law. The principle of non-discrimination is enshrined in the Constitution and several laws prohibit discrimination based on gender, race, ethnicity, religion or disability. However, domestic legislation does not prohibit discrimination on grounds of age, sexual orientation, gender identity or migrant status.
- Switzerland is still lacking a law establishing a National Human Rights Institution (NHRI) consistent with the Paris Principles. The legislative process has been initiated; however, Amnesty International is concerned that the independence of the future NHRI might not be guaranteed and the resources allowed may not be sufficient.

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<sup>12</sup> The Council of Europe Convention on preventing and combatting violence against women and domestic violence.

<sup>13</sup> A/HRC/ 22/11, recommendations 123.59 (Egypt), 123.60 (Norway)

<sup>14</sup> <https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/abstimmungen/selbstbestimmungsinitiative.html>

<sup>15</sup> Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture, 14 May 2010, , CAT/C/CHE/CO/6 page 2 ; Concluding observations on the seventh periodic report of Switzerland, 7 September 2015 CAT/C/CHE/CO/7, page 2.

<sup>16</sup> A/HRC/ 22/11, recommendations 123.15 (South Africa) & 123.16 (New Zealand, Costa Rica) – both rejected.

<sup>17</sup> A/HRC/ 22/11, recommendations 123.27 (Canada, Brazil), 123.28 (France), 123.29 (Greece, India, Uzbekistan) – all rejected.

<sup>18</sup> European Commission against racism and intolerance, ECRI REPORT ON SWITZERLAND (fifth monitoring cycle), CRI 2014/39, chapter 12.

<sup>19</sup> E/C.12/CHE/CO/2-3.

# PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

## a) Refugees and asylum-seekers

### ***Non-refoulement***

Asylum procedures do not always provide sufficient protection and have sometimes led to Switzerland returning rejected asylum-seekers to their country of origin without sufficiently assessing the human rights situation there and any risks they could be facing. In at least one case,<sup>20</sup> Switzerland was considered to have violated Article 3 of the European Convention on Human Rights (prohibition of torture) and the principle of *non-refoulement*<sup>21</sup> when it returned a rejected asylum-seeker to Sri Lanka, where he was subsequently arrested and tortured. The European Court of Human Rights considered that “the assessment of the applicant’s asylum application had been carried out incorrectly by the Swiss authorities”.<sup>22</sup> This assessment was subsequently confirmed by an independent expert<sup>23</sup> and by UNHCR.<sup>24</sup> These shortcomings, which rendered the risk assessment inaccurate, have subsequently been accepted by the Swiss government who admitted having made mistakes in the risk assessments of these cases.

### **Accommodation facilities for asylum-seeker families**

The asylum law foresees that the Secretariat of State for Migrations manages reception centres. These Registration and Procedure Centres are supposed to each accommodate 200-300 persons. They are also equipped to collect personal data, including fingerprints and photographs of the asylum-seekers. They are not detention centers as such; however, Amnesty International is concerned that restrictions are imposed on the right to freedom of movement of the asylum-seekers, in particular during the first days, pending identification procedure and medical check-up.

The stay in the Centres can last up to 90 days. Once the registration process is completed, and if there are no grounds to immediately reject the asylum claim or if it is clear that the request does not fall within the responsibility of another country,<sup>25</sup> the asylum-seekers are then sent to the cantons where they are accommodated. In some cantons the available lodgings are inadequate to house asylum-seekers, for example military or civil protection underground facilities which are not appropriate for long-term stay.

Amnesty International is also concerned that the accommodation facilities provided to families and women travelling alone are inadequate in a number of cantons. Couples have been separated, or lodged in dormitories where privacy is severely restricted. Asylum-seekers, including families with children, sometimes have to sleep in underground dormitories without windows and fresh air. They have to vacate the dormitories during the day and have no shelter, no matter the weather.

### **Access to education**

Asylum-seeking children in the centres continue to be denied access to education even during stays for as long as 90 days. On 1 October 2016, a new law entered into force which imposes a duty on the cantonal authorities to ensure their right to education; however, no concrete action has been taken in the Federal centres where children are still not able to go to school (except in the canton of Zurich).

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<sup>20</sup> CASE OF X v. SWITZERLAND, Application no. [16744/14](http://hudoc.echr.coe.int/eng?i=001-170467) on <http://hudoc.echr.coe.int/eng?i=001-170467>.

<sup>21</sup> *Non-refoulement* is an international legal principle that prohibits the transfer of individuals to another country or jurisdiction where they would face a real risk of serious human rights violations or abuses.

<sup>22</sup> CASE OF X v. SWITZERLAND, Application no. [16744/14](http://hudoc.echr.coe.int/eng?i=001-170467), paragraph 26 and 27.

<sup>23</sup> Prof. Walter Kälin, Institut für öffentliches Recht, Universität Bern: Asylverfahren Sri Lanka: Dossiers XX und YY. Rechtsgutachten zuhanden des Bundesamtes für Migration (only available in German).

<sup>24</sup> Evaluation der Entscheidungsfindung des Bundesamtes für Migration (BFM) im Falle zweier Asylsuchender aus Sri Lanka, UNHCR-Büro für die Schweiz und Liechtenstein, November 2013 (only available in German).

<sup>25</sup> For instance in the context of the Dublin Convention.

### **Implementation of the Dublin Convention**

The Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities has two main aims: to establish a common framework for determining which country in the European Union determines an asylum-seeker's application and to ensure that only one member state process each asylum application. Switzerland has been a party to this Convention since 2008 through a special agreement with the European Union.<sup>26</sup>

Switzerland applies the Convention very strictly and rarely makes use of the exception clause whereby a State party is permitted to register applications in case of family reunification or unaccompanied minors. Asylum-seekers who have transited through another Schengen<sup>27</sup> country are quasi-systematically returned to that country. While awaiting return, the asylum-seekers are frequently detained. This very strict interpretation of the exception clause of the Convention has sometimes led to disproportionate measures.

In one such case, two brothers and their sister of Kurdish Syrian origin were returned to Croatia in September 2016 on the basis of Dublin rules although their parents were living as asylum-seekers in Geneva. A younger brother who was a minor had been permitted to stay with his parents.<sup>28</sup> Amnesty International is concerned that the separation of this family, leaving the parents and one son in Switzerland while the other three siblings were returned to Croatia might represent an illegal restriction to the right to family life as enshrined in Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights. The siblings been subsequently been re-admitted in Switzerland. The outcome of their asylum claim is still pending.

### **Detention of rejected asylum-seekers**

Under Swiss law rejected asylum-seekers can be detained for up to 18 months (12 months for minors) before their expulsion from Swiss territory, even if they have not committed a criminal offense.<sup>29</sup> The reason for the detention is ensure their return. The cantonal authorities frequently resort to this option, in particular when they consider there is a risk the concerned person might try to go into hiding in order to avoid being returned.

Amnesty International is concerned that the detention of rejected asylum-seekers in Switzerland is often inconsistent with the European Directive on return.<sup>30</sup> Amnesty International opposes the immigration detention of children, as it is never in their best interests.

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<sup>26</sup> Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, <http://bit.ly/2mHlmgc>.

<sup>27</sup> The Schengen Convention of 1999 introduced complete abolition of systematic internal border controls and a [common visa policy](http://www.schengenvisainfo.com/schengen-visa-countries-list/) for actually 26 European States, including non EU states. Complete list may be consulted on: <http://www.schengenvisainfo.com/schengen-visa-countries-list/>.

<sup>28</sup> Référénces cas famille de Genève renvoyée sur la Serbie.

<sup>29</sup> Foreign Nationals Act, FNA, art. 75 to 79, <http://bit.ly/2njBzzM>.

<sup>30</sup> European Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. This Directive is binding to Switzerland though not an EU member through the Schengen Convention to which it is party.

## b) Domestic violence

In February 2017, Switzerland initiated the ratification process for the Istanbul Convention (the Council of Europe Convention on preventing and combating violence against women and domestic violence).

The legal situation for victims of domestic violence has been strengthened through the amendment of Article 50 of the Foreign Nationals Act (FNA). The amendment seeks to protect more effectively foreign women married to Swiss citizens or foreigners with a permanent residence permit in Switzerland by including domestic violence in the list of reasons to justify the renewal of a residence permit despite divorce or separation.

In practice, however, migrant victims of domestic violence still have to credibly demonstrate the violence, including its intensity and systematic character, and to demonstrate that "social reintegration in the country of origin [would] be seriously prejudiced".<sup>31</sup> The cantonal authorities rarely make use in favor of the victims of the significant discretion they have under the FNA. Migrant women who are not able to provide a medical certificate or a police report attesting violence - because of fear of their husband or lack of knowledge of the Swiss judicial system – may not be able to get much protection from the state.

This demonstrates the need to introduce unified standards on the implementation of the FNA for all cantons and better training of those involved, in particular the police. The criteria in the federal directives on the implementation of the FNA are too restrictive and shift the burden to migrant victims of domestic violence to credibly demonstrate the systematic nature of the violence they have suffered. The legislators' intention to protect migrant victims is not being fulfilled, as many women do not dare to leave a violent husband for fear of being deported.

## c) Discrimination

### Ban on full face veil

The Swiss Italian-speaking Canton of Ticino has adopted a provision in its Constitution to prohibit covering the face in public places. In practice, this provision aims at banning the wearing of full-face veils by Muslim women. At the national level, a group of citizens has launched an initiative for a referendum to introduce a similar prohibition in the federal Constitution.<sup>32</sup> Amnesty International is concerned that a general ban on covering the face would indirectly discriminate against Muslim women who wear full face veils.

### Discrimination against LGBTI persons

Although persons in same-sex relationships should soon be allowed, like heterosexual couples, to adopt the children of their partners,<sup>33</sup> same-sex couples do not have access to adoption in general.

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<sup>31</sup> Foreign Nationals Act, Art. 50 Dissolution of the family household:

<sup>1</sup> After the dissolution of the marriage or of the family household, the right of a spouse and the children to be granted a residence permit and to have their residence permit extended in accordance with Articles 42 and 43 subsists if: a. the marriage lasted a minimum of three years and integration has been successful; or b. important personal reasons make an extended residency in Switzerland necessary.

<sup>2</sup> There are important personal reasons in terms of paragraph 1 letter b in particular if a spouse has been the victim of marital violence or did not marry of his or her own free will and social reintegration in the country of origin appears to be seriously prejudiced.

<sup>32</sup> "No one is allowed to cover up his or her face in public space, in places to which public access is granted, in places where ordinarily accessible benefits to anyone are provided; the prohibition does not apply to cult places".

<sup>33</sup> The federal parliament adopted in 2016 an amendment of the art. 28 of the registered partnership between persons of the same sex which now allows individuals in a same sex partnership to adopt the children of their partner. This amendment did not formally come into force at the time of writing this submission but this should be the case in the coming months.

### **LGBTI asylum-seekers**

Article 3 of the Asylum Act,<sup>34</sup> which defines the term “refugee”, makes reference to the 1951 Geneva Convention Relating to the Status of Refugees and does not expressly recognize persecution based on sexual orientation or gender identity as a valid ground for asylum. LGBTI persons are considered to be members “of a particular social group”. However, LGBTI refugees experience multiple barriers to demonstrate that they faced persecution in their country of origin on grounds of their sexual orientation or gender identity and therefore they qualify for international protection in Switzerland.

#### **d) Implementation of UPR and other UN recommendations**

As a federal state, where state power is shared between the federal government and the cantons, Switzerland faces some difficulties in implementing UN recommendations, including UPR recommendations, concluding observations from the UN Treaty Bodies and recommendations by the Special Procedures.

The federal government is responsible for Switzerland’s external relations and its defence, while the 26 cantons have a broader scope in deciding how to meet their responsibilities, including in the areas of education, healthcare and police matters. The federal government is not always in a position to efficiently transmit the relevant information to the cantons authorized to implement the recommendations. The situation is further complicated by the fact that not only the Federal Department of Foreign Affairs but also the Federal Department for Justice and Police and the Department of Interior are in charge of the different domains and for relaying recommendations to the cantons and there is little structured coordination between these departments.

Discussions have taken place around the creation of an inter-department platform to serve as an interface between the Confederation and the cantons; however, a concrete solution is yet to be found. Amnesty International is concerned that further complicated procedures and different partners for the cantons will make the implementation of human rights commitments more difficult.

## **RECOMMENDATIONS FOR ACTION BY THE STATE UNDER REVIEW**

**Amnesty International calls on the government of Switzerland to:**

### **THE NATIONAL HUMAN RIGHTS FRAMEWORK**

- Propose and support a bill extending the list of grounds on which a popular initiative could be invalidated to its incompatibility with international human rights law to which Switzerland is party, including the principle of non-discrimination;
- Introduce a provision specifically prohibiting torture in the Criminal Code and in the Military Criminal Code;
- Adopt a law on equality, prohibiting discrimination in all areas of life and on any grounds including, race, ethnic origin, nationality, religion, gender identity, sexual orientation, age, social origin, Indigenous status, disability, political opinion, language, or other status;
- Adopt a law establishing a National Human Rights Institution fully consistent with the Paris Principles and ensuring its independence and allocating sufficient resources to it.

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<sup>34</sup> °Refugees are persons who in their native country or in their country of last residence are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages for reasons of race, religion, nationality, membership of a particular social group or due to their political opinions.

<sup>2</sup> Serious disadvantages include a threat to life, physical integrity or freedom as well as measures that exert intolerable psychological pressure. Motives for seeking asylum specific to women must be taken into account.

## **REFUGEES AND ASYLUM-SEEKERS**

- Take all necessary procedural and technical measures to ensure an exhaustive analysis of the risk of human rights violations a rejected asylum-seeker could be exposed to before deciding to return them to their country of origin or to a third country from where they risk being returned to their country of origin;
- Guarantee that persecution based on sexual orientation or gender identity is recognized as a valid asylum ground;
- Provide adequate accommodation to asylum-seeker families and women travelling alone or with children, ensuring they do not stay in emergency premises longer than required for purposes of identification and medical controls;
- Grant systematic access to education to asylum-seeker children;
- Implement the Dublin Convention in a manner that takes into account the family situation of asylum-seekers;
- Refrain from returning vulnerable asylum-seekers, including the elderly, persons with disabilities, women travelling alone and unaccompanied minors, to third countries where they would face harsh social conditions;
- Guarantee that detention pending expulsion remains a measure of last resort and as short as possible, in particular where asylum-seeker children are concerned.

## **DOMESTIC VIOLENCE**

- Ratify promptly the Council of Europe Convention on preventing and combating violence against women and domestic violence and put in place national mechanisms for its implementation;
- Make broader use of provisions in the revised Article 50 of the Foreign Nationals Act, including by considering domestic violence as an “important personal reason” to be allowed a permanent residence permit;
- Issue guidelines, valid for all cantons, to better train relevant staff, in particular police officers, in the consistent application of the Foreign Nationals Act throughout the country.

## **DISCRIMINATION**

- Refrain from introducing a general ban on covering the face in the federal Constitution;
- Take the necessary steps to put an end to discrimination faced by same-sex couples, in particular, ensuring that they can marry and adopt children.

## **COOPERATION WITH HUMAN RIGHTS MECHANISMS**

- Facilitate effective coordination between the Confederation, the cantons and civil society in relation to the implementation of UPR recommendations and those of the treaty bodies and special procedures.