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Swiss Statement

presented by
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Permanent Mission of Switzerland
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Mr. Chairman,

Allow me to begin by thanking the President of the International Law Commission, Mr. Maurice Kamto, for his presentation of Chapters VI, VIII and IX of the Report. We also thank the Rapporteurs who worked on it, Mr. Lucius Caflisch, Mr. Eduardo Valencia-Ospina and Mr. Kamto himself.

Today my delegation will address two subjects in particular: the effects of armed conflicts on treaties, and the expulsion of aliens.

[Chapter VI – Effects of armed conflicts on treaties]

Mr. Chairman,

My delegation welcomes the adoption at the second reading of the entire draft of articles on the effects of armed conflicts on treaties. This draft is the result of skilful and painstaking efforts. Switzerland supports the Commission's recommendation to the General Assembly to

- a. take note of the draft in a resolution, annex it to the resolution, and
- b. consider elaborating a convention at a later stage

My delegation looks favorably on the articles proposed by the Commission and the principles adopted in the draft. A key aspect of the regulation is knowing whether or not, in general, treaties continue to be implemented in cases of armed conflict. In this regard, Switzerland is in favor of the principle adopted in Article 3 of the draft which appears to conform both to practice and most doctrinal opinion. It also supports, among other things, the decision to exclude from the draft's scope of application the conventional relations between international organizations, and between States and international organizations.

[Chapter VIII – Expulsion of aliens]

Mr. Chairman,

Concerning the expulsion of aliens, my delegation would above all like to offer some answers with regard to the questions the International Law Commission has addressed to the States¹.

The purpose of the **first question** is to find out about the internal practices of States with regard to the suspensive effect of an appeal against an expulsion decision.

In accordance with Article 112 of the Federal Aliens Act of 16 December 2005 (LEtr)², recourse to legal proceedings is governed by the general provisions of federal procedures. According to these general provisions the decision of the competent authority can only be executed

¹ A/66/10, par. 40-42.

² RS 142.20 (http://www.admin.ch/ch/f/rs/c142_20.html).

- a. when there is no longer any legal recourse against it
- b. when none of the legal recourses possible have a suspensive effect or
- c. when the suspensive effect attributed to a legal recourse has been withdrawn (Article 39 of the Federal Law on Administrative Procedures of 20 December 1968 [PA]³).

Federal procedure stipulates that appeals have a suspensive effect unless otherwise stipulated in the legislation (Article 55 PA). Thus an expulsion decision will not be executed if the person concerned appeals against it and the appeal has a suspensive effect. In such a case the alien subject to the expulsion order can remain on Swiss territory while awaiting the decision of the competent authority.

There are several types of expulsion or return in Swiss law. The provisions were adapted on 1 January 2011 to make them compatible with the relevant EU Directive⁴ which Switzerland has adopted as a development of the Schengen *acquis*. The law expressly states that for certain types of return an appeal does not have a suspensive effect, while for other types the law makes no mention of the question of suspensive effect. In the latter cases it is the general rules granting suspensive effect that apply. If the law states that the return is immediately enforceable the competent authority can proceed with the removal even if an appeal is pending. In other words, the appeal does not have a suspensive effect.

Generally speaking the fact that an alien is on Swiss territory legally or illegally has no influence on the question as to whether or not the appeal against the return decision does or does not have a suspensive effect.

My delegation does not wish to make an oral presentation of the details of Swiss rules governing return. The question whether or not, in each of the various types of return, an appeal has a suspensive effect is discussed in the written version of the present declaration.

*The first type of return is the **ordinary formal return**: in accordance with Article 64 par. 1 LEtr the competent authorities decide on an ordinary return concerning a) an alien who has no authorization despite this being required; b) an alien who does not meet or who no longer meets the requirements for entry to Switzerland; c) an alien who has been refused authorization or whose authorization, although required, has been revoked or has not been extended after an authorized stay. According to par. 3 of Article 64 LEtr, the decision referred to in par. 1, letters a and b, may be subject to appeal within five working days of notification. The appeal does not have a suspensive effect. The appeal authority decides within 10 days on reinstatement of the suspensive effect. On the other hand the decision referred to in Article 64 par. 1 letter c LEtr does in principle have a suspensive effect (as per the administrative law of the canton concerned).*

*The second type of return is return **without a formal decision**:*

³ RS 172.021 (http://www.admin.ch/ch/f/rs/c172_021.html).

⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0115:EN:HTML>).

- *Article 64 par. 2 LETr stipulates that an alien staying illegally in Switzerland who holds a valid residence permit from another State bound by a Schengen Association Agreement (Schengen State) shall be asked without a formal decision to proceed immediately to this State. If he or she fails to do so a decision will be rendered in accordance with par. 1. If for internal or external security reasons or in the name of security and public order immediate removal is justified, a decision is rendered without a preceding invitation. The decision to grant or not to grant the suspensive effect in an appeal against a decision rendered in application of Article 64 par. 2 LETr follows the rules applicable to decisions in accordance with Article 64 par. 1 LETr (see first type of return above).*
- *Article 64c LETr stipulates that an alien shall be returned by Switzerland without a formal decision if: a) one of the following countries again accepts responsibility on the basis of a readmission agreement – Germany, Austria, Belgium, Spain, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Norway, the Netherlands, Poland, Slovakia, Slovenia, or Sweden; b) entry has previously been refused on the basis of Art. 13 of the Schengen Borders Code. If immediately so requested by the person concerned the decision will be communicated by means of a standard form. The decision to grant or not to grant suspensive effect in an appeal against such a decision follows the rules applicable to decisions in accordance with Article 64 par. 1 LETr (see first type of return above).*
- *Article 64d stipulates that the return decision shall be accompanied by a reasonable departure deadline of between seven and 30 days. A delayed departure deadline or a prolongation may be granted when justified by special circumstances such as the family situation, health problems or the length of stay. The return may be immediately enforceable (in which case an eventual appeal has no suspensive effect), or the departure deadline may be set at less than seven days if: a) the person concerned represents a threat to security and public order or to internal or external security; b) there are serious grounds for believing that the person concerned will attempt to avoid expulsion; c) a request for authorization has been denied as manifestly unfounded or fraudulent; d) responsibility for the person concerned has again been accepted, on the basis of a readmission agreement, by one of the States listed under Article 64c, par. 1, letter a; e) the person concerned has been refused entry on the basis of Art. 13 of the Schengen Borders Code (Article 64c, par. 1, letter b; f) the person concerned has been expelled on the basis of the Dublin Association Agreements (Article 64a).*
- *Article 83a par. 1 of the Ordinance on Admission, Residence and Gainful Employment of 24 October 2007 (OASA)⁵, stipulates that aliens who have already been expelled by a State bound by the Schengen Association Agreements for failure to meet the entry re-*

⁵ RS 142.201 (http://www.admin.ch/ch/f/rs/c142_201.html).

quirements referred to in Article 5 par. 1 of the Schengen Borders Code shall be informally requested by the cantonal authorities competent in alien affairs to leave Switzerland and if necessary shall be expelled in accordance with Directive 2001/40/EC. In principle an appeal against such a decision has a suspensive effect (as per the administrative law of the canton concerned).

The third type of return is **return at the airport**: Article 65 LEtr stipulates that if a migrant is denied entry to Switzerland by the authorities at the airport he or she must leave Switzerland immediately. The authorities render the decision and the reasons for it by means of a form as per Annex V, part B of the Schengen Borders Code, within 48 hours. The decision is subject to appeal within 48 hours of notification. The appeal does not have a suspensive effect. The authority competent for the appeal must rule within 72 hours.

The fourth type of return is the return **in accordance with the Dublin Association Agreements**: Article 64a LEtr stipulates that when an other State bound by the Dublin Association Agreements is competent to carry out asylum procedure in accordance with the provisions of EC regulation 343/2003 the office shall make a return decision with regard to the alien staying illegally in Switzerland. The return decision can be subject to an appeal within five working days following notification. The appeal does not have a suspensive effect. The alien can ask for the granting of a suspensive effect pending the appeal. The Federal Administrative Tribunal shall rule within five days of the request being filed. If no suspensive effect is granted in this period the return is enforceable.

The fifth type of return is the **return of persons whose request for asylum has been denied**:

- If the competent office rejects the application for asylum or decides not to proceed, it shall normally order and enforce removal from Switzerland (Article 44 par. 1 of the Asylum Act of 26 June 1998 [LASi⁶]). In application of the general rules of federal administrative procedure (Article 55 PA) an appeal against such a decision has a suspensive effect.
- The removal order may be enforced immediately or a departure deadline of less than seven days may be set where the person concerned is being removed under the Dublin Association Agreement (Article 45 par. 3 LASi). An appeal against such a decision does not have a suspensive effect. The asylum seeker can ask for the granting of a suspensive effect pending the appeal. The Federal Administrative Tribunal decides on the matter within five days of receipt of the application. If the suspensive effect is not granted within this period, the removal order may be enforced (Article 107a LASi).

⁶ RS 142.31 (http://www.admin.ch/ch/f/rs/c142_31.html).

Finally, the sixth type of return is **expulsion in accordance with Article 68 LÉtr**: this Article stipulates that the Federal Office of Police has the power to expel an alien to maintain the internal or external security of Switzerland. A reasonable departure deadline must be given. In this case an eventual appeal has a suspensive effect. The expulsion is immediately enforceable if the alien seriously or repeatedly violates or endangers security and public order or represents a threat to internal or external security. In other words the appeal does not have a suspensive effect. The appellant is expelled before the result of his appeal is known. If the appeal authority decides that the expulsion measure has been taken irregularly it can annul the decision and make a new ruling. In such a case, in accordance with the decision of the appeal authority, the alien may be granted a right of return.

Mr. Chairman,

By its **second question** the International Law Commission wishes to know if the State with a suspensive effect practice considers this to be required by international law.

To the extent that the principle of non-refoulement imposes it, international law requires granting of the suspensive effect. This principle grants refugees the right, guaranteed by international law, to continue to remain beyond the reach of a persecuting State with no obligation to return against their will for as long as the danger of persecution persists. This principle is not only enshrined in refugee law but is also guaranteed in various human rights instruments (e.g. Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950⁷, Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984⁸). Furthermore, Article 25 par. 3 of the Federal Constitution of the Swiss Confederation of 18 April 1999⁹ stipulates: "No one may be deported to a state in which they face the threat of torture or any other form of cruel or inhumane treatment or punishment."

On the other hand if the principle of non-refoulement does not impose it, international law does not require a suspensive effect.

In its **third question**, Mr. Chairman, the International Law Commission asks the States for their views, on whether, as a matter of international law or otherwise, an appeal against an expulsion decision should have suspensive effect on the implementation of the decision.

In so far as my delegation is concerned, to the extent that the minimum guarantees of international law just mentioned (notably the principle of non-refoulement) are respected, international law should not grant a suspensive effect to appeals against expulsion decisions. The decision to grant or not to grant a residence permit is in fact a prerogative of the State.

⁷ RS 0.101 (http://www.admin.ch/ch/f/rs/c0_101.html).

⁸ RS 0.105 (http://www.admin.ch/ch/f/rs/c0_105.html).

⁹ RS 101 (<http://www.admin.ch/ch/f/rs/c101.html>).

Mr. Chairman,

Before concluding this statement, my delegation would like to shed further light on the popular initiative on return mentioned in the Seventh Report on the Expulsion of Aliens¹⁰ as well as in the Report of the Commission¹¹.

At the end of November 2010 the people and cantons of Switzerland accepted the **popular initiative “For the expulsion of foreign criminals”**. In doing so they amended the Swiss Constitution. This rule is not yet applicable, and will not become applicable until it has been made law by the legislature.

The text of this Constitutional provision calls in fact for the expulsion of foreigners who have committed certain crimes and been convicted. Switzerland thus joins those States which, according to the Sixth Report on the Expulsion of Aliens¹², recognize violation of the law or a sentence of imprisonment as a suitable reason for expulsion.

Switzerland is fully aware of the issues raised by the Special Rapporteur. We do however have a long and rich experience in implementing the decisions of the people, while respecting international law. In more than a century of history Swiss lawgivers have managed successfully to juggle the tensions which appear to arise with regard to the exigencies of a democratic system and those of the rule of law. In such circumstances the reserves formulated by the Special Rapporteur concerning the popular initiative “For the expulsion of foreign criminals” seem to us premature. My delegation has no doubts as to the ability of the Swiss legislator to do what is required to ensure that the Constitutional provision in question will be implemented in a manner that is in conformity with the practice of States and with international law.

Mr. Chairman, I thank you for your attention.

¹⁰ A/CN.4/642, par. 6-9.

¹¹ A/66/10, par. 226.

¹² A/CN.4/625, par. 123-142.