List of Issues for Switzerland Prior to Reporting
United Nations Human Rights Committee
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I. Authors

The Wrongful Conviction International Law Task Force (WCILTF) is a global coalition of law professors, attorneys and activists working together to fill the "Innocence Gap" in international law. The WCILTF is supported by a pro bono legal team at the international law firm Proskauer Rose (www.proskauer.com/) located in New York City.

In the past twenty-five years, wrongful conviction of the innocent has emerged as a major problem in criminal justice systems around the world. Research indicates that the problem has always existed but has only come to light in recent decades due to forensic advancements allowing for post-conviction DNA testing of crime scene evidence. Wrongful convictions occur because of human limitations in investigation and evidence collection, such as memory weaknesses and malleability (leading to misidentifications by eyewitnesses), unreliable or faulty forensic evidence, false confessions, confirmation bias or tunnel vision on behalf of investigators, inadequate defense lawyering, and many other human problems. Thus, wrongful convictions exist in all legal systems around the world, as all nations use the same types of evidence and investigation techniques regardless of the precise legal procedures employed in their courtrooms.

NGOs called "Innocence Projects" have sprung up around the globe to combat this problem, and now entire networks of innocence projects exist in Asia, Europe, North America and South America. Innocence Projects are often housed at law schools and are operated by law professors and law students. In one member state, for example, more than 3,000 innocent people have been released from prison in recent years due to the work of NGOs like Innocence Projects. Exonerations of the innocent have occurred across the globe in the past three decades.

For a brief video overview of the global problem of wrongful convictions, and the efforts of Innocence Projects to combat the problem, please view: https://youtu.be/jMATkuFaRU8

As the innocence movement has developed a global presence in recent years, it has become apparent to legal scholars that an "Innocence Gap" exists in international law. The WCILTF formed to combat this problem and help fill the Innocence Gap. The WCILTF is comprised of more than twenty-five law professors and Innocence Project leaders from across Asia, Europe, North America and South America.

II. Filling the Innocence Gap

Due to the relatively recent discovery of wrongful convictions, international law covenants and treaties predate awareness of this problem and thus do not speak directly to issue. In recent years, however, the United Nations Human Rights Committee (HRC) has identified key rights to the benefit of incarcerated person claiming innocence to be derived from the right to a fair trial and other existing rights. For example, in *Abdiev v. Kazakhstan*, 2023, the HRC stated that ***the right of incarcerated persons to re-open a criminal case in order to present new evidence of innocence after conviction and appeal have concluded, in order to achieve exoneration and freedom, is essential to the right to a fair trial under Article 14(1) of the ICCPR***. Similarly, on October 3, 2023, in Concluding Observations on the Fifth Periodic Report of the Republic of Korea, the HRC observed that South Korea should "provide adequate legal and financial assistance to enable individuals sentenced to death to ***re-examine convictions on the basis of newly discovered evidence, including new DNA evidence***." Likewise, on July 25, 2024, in Concluding Observations on the Second Periodic Report of Maldives, the HRC expressed concern "about the lack of information on the existence of a procedure enabling individuals sentenced to death to seek a review of their convictions and sentences based on newly discovered evidence of their innocence, including new DNA evidence, and, if wrongfully convicted, to provide them with compensation." The HRC recommended that Maldives take all necessary measures to ensure that "death sentence can be reviewed based on ***newly discovered evidence of their innocence,*** including new DNA evidence, adequate legal and financial assistance is provided to enable this review and, ***if wrongfully convicted, individuals have access to effective remedies***, including compensation" para. 28(e). *See* Brandon Garrett, Laurence Helfer and Jayne Huckerby, *Closing International Law's Innocence Gap*, S. Cal. L. Rev. 95 (2021), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803518#.

III. Rights of Innocent Incarcerated Persons in Switzerland

Preservation of evidence

Three main issues affect the current framework for preserving evidence (art. 192 of the Swiss Criminal Procedure Code, "**SCPC**"), which is part of the broader obligation to compile and maintain a criminal file (Art. 100 SCPC).

First, there is no clear legal rule on how to handle evidence that has already been reviewed by the police during an investigation. In the absence of uniform national guidelines, practices vary

between cantons and institutions (e.g. police departments, forensic laboratories, and institutes of forensic medicine). For example, the storage of biological samples may simply be subject to the rules of medical institutions; in practice, medical institutions usually provide for a storage period of only three years (extendable upon request), which is not long enough to complete a criminal proceeding. This leads to considerable uncertainty regarding whether such items should be retained or destroyed, granting authorities broad discretion in determining the fate of potential evidence. Yet these items are often of crucial importance when a convict seeks to obtain (new) facts/evidence of wrongful conviction.

Second, in principle, the case documents must be preserved at least until conclusion of the time limits for prosecution and for the execution of the sentence have expired (Art. 103 § 1 SCPC). This rule does not apply to original documents included in the case file, which must be returned to the persons entitled thereto as soon as the criminal case has been decided by a final judgment (§ 2). Once evidence has been disposed of or returned to their rightful owners, they are no longer available for re-examination or forensic testing. These rules, particularly the second one, reduce the possibility for a convicted person to request a complete case review.

Third, once some objects have formally been seized during the preliminary phase, the court must decide during the trial whether they should be returned to the rightful owner (Art. 267 §§ 1 and 3 SCPC), destroyed or rendered unusable (Art. 69 of the Swiss Criminal Code, "**SCC**"), returned to the injured party (Art. 70 § 1 *in fine* SCC) or forfeited to the state (Art. 70 SCC). The judge's decision aims to eliminate dangerous items, return stolen property to the injured party or deprive the author of the product of his offense. However, legal tension arises when the items concerned also holds evidentiary value. The rules on the preservation of evidence referred to above are then generally not taken into account. In some cases, the confiscated item could be critical for post-conviction review. Yet, as with the second point, once it is destroyed or disposed of under the forfeiture rules, it is typically no longer available for re-examination or forensic testing.

The concerns surrounding evidence preservation — highlighted as early as 2004 in a report on miscarriages of justice in Switzerland[1] — remain unresolved more than two decades later.

Investigative acts prior to the filing of a petition for review

There is no right for a convicted person to require investigative measures prior to the filing of a petition for review.

According to Art. 410 § 1 lit. a SCPC, any person who is adversely affected by a legally binding final judgment, a summary penalty order, a subsequent judicial decision or a decision in separate proceedings on measures may request a review of the case if new circumstances that arose

[1] KILLIAS M./ GILLIÉRON G./ DONGOIS N., Erreurs judiciaires en Suisse de 1995 à 2004 (Wrongful convictions in Switzerland from 1995 to 2004), Rapport au Fonds national suisse de la recherche scientifique, Lausanne and Zurich, 2007.

before the decision, or new evidence, have come to light that are likely to lead to an acquittal, a considerably reduced or more severe penalty for the convicted person or the conviction of an acquitted person.

In practical terms, the defendant that wishes to request a review can only do so if he or she already holds new evidence. However, obtaining such evidence often requires investigative acts — such as carrying out forensic tests or having witnesses interviewed — which the defendant cannot obtain without the collaboration of the criminal authorities and/or significant financial resources.

In light of the above, one of the main issues under Swiss law is that, while submitting a petition for review requires new evidence, gathering that evidence typically requires investigative acts that are only possible if there is already substantial new evidence to warrant the court's intervention (Art. 412 §§ 1 and 3 SCPC). This creates a significant procedural obstacle for individuals seeking a review.

To resolve this issue, Swiss law should incorporate an "intermediate" procedural mechanism into its legal framework that allows the convicted individual to ask for investigative acts either prior, or with the intent of, filing a petition for review. Such a mechanism would both fill the current procedural void and ensure the practical applicability of the review process.

Restrictive conditions to obtain the review of a conviction

Under Art. 410 § 1 lit. a SCPC, a request for review can be filed if there are new facts or new evidence which are of such a nature as to justify the acquittal or a significantly less severe or more severe sentence of the convicted person, or the conviction of the acquitted person.[2] Such a request can for example be granted if there is a new expert applying a new analytical method, demonstrating the erroneous nature of a previous expert opinion.

The review procedure comprises two phases: the rescinding and the rescissory (Art. 412 SCPC). At the rescinding stage, the reviewing court carries out a preliminary examination of the admissibility and merits of the request for review. If the request is admissible and not obviously unfounded, the procedure enters the rescissory phase (Art. 413 SCPC). The authority then has several options: if it finds that the grounds for review are unfounded, it rejects the request for review (Art. 413 § 1 SCPC); if it finds that the grounds for review are well-founded, it cancels the contested decision in whole or in part (Art. 413 § 2 SCPC) and may then either issue a new decision directly (Art. 413 § 2 let. b SCPC) or refers the case back for a new ruling (Art. 413 § 2 lit. a).

[2] Special grounds for review include a flagrant contradiction with a subsequent criminal decision concerning the same facts (Art. 410 § 1 let. b), the influence of an offence on the outcome of the proceedings (410 § 1 lit. c) and, under certain conditions, a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of November 4, 1950 (Art. 410 § 2).

Thus, a request for review can be rejected at two levels (rescinding and rescissory) on the basis of the unfounded nature of the grounds invoked.

Thus, the conditions under which a conviction can be reviewed are limited and the standard of proof required to open a review is very high. Federal jurisprudence on the re-analysis of items collected but not examined in the initial proceedings is very strict with regard to the requirements of novelty, even if the probative value is high. Besides, it must be demonstrated from the outset that the new fact or evidence plausibly puts into question the accuracy of the first verdict. The notion of plausibility, which arises at the stage of rescinding, should be defined more strictly to avoid significant disparities that currently occur depending on the judges' assessment; a common and uniform standard needs to be established in that regard. In addition, the nature of what the evidence must prove must be thoroughly re-examined: the convicted person should only have to demonstrate the existence of a doubt — and not prove that he or she should be acquitted — for a judge to review the case and to reinvestigate.

Furthermore, certain issues that arose during the initial trial cannot be invoked, such as bad lawyering/violation of due process. According to the Swiss Federal Tribunal, a review cannot be requested to compensate for a lawyer's oversight, to resubmit a hypothesis already assessed by the court, or to correct an arbitrary decision.[3]

Summary Penalty Order Procedure

The "Summary Penalty Order Procedure" (Art. 352-356 SCPC) is a simplified procedure designed to deal with the majority of criminal cases with reduced procedural costs; today, 90% of all criminal cases that are not dismissed are dealt with in this way.[4] The maximum penalty that can be imposed is a six-month prison sentence (Art. 352 § 1 SCPC). Summary penalty orders are therefore not limited to minor cases but also cover medium-level offenses.

The prosecutor's office is responsible for issuing summary penalty orders (Art. 352 § 1 SCPC). There is no indictment before an independent and impartial court and no public hearing; an evidentiary hearing is mandatory only if the public prosecutor expects that the order will result in a term of imprisonment to be served immediately (Art. 352*a* SCPC). The accused may request a judicial review by filing an objection within ten days (Art. 354 § 1 SCPC). The criminal procedure is thus based more on the accused's acceptance of the guilty verdict and not necessarily on proof of guilt.

A Swiss study conducted before the current national criminal procedure law entered into force suggested that the risk of a miscarriage of justice was highest in cantons that had a model of

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3 ATF 130 IV 72 consid. 2.2

4 THOMMEN M./KUHN A./ESCHLE D./WALSER S., Zahlen und Fakten zum Strafbefehlsverfahren (Facts and Figures on Penalty Order Proceedings), Schlussbericht zuhanden des Schweizerischen Nationalfonds, Zurich and Neuchâtel, 2020.

summary penalty order procedure similar to the current (federal) one,[5] in which a public prosecutor was the competent authority to issue summary orders.[6] A more recent study conducted under the current national criminal procedure law confirmed the risk of judicial error in the Summary Penalty Order Procedure.[7] This way of condemning is particularly likely to lead to miscarriages of justice given that the notification is most often sent by mail, that the deadline for appealing is 10 days, and that the conditions for having the deadline restored are excessively formal and inflexible (Art. 94 SCPC).

Court designated to rule on the request for review

Swiss criminal procedure law does not provide for a separate court to rule on applications for review. According to Art. 21 § 1 SCPC, the court of appeal shall rule on appeals against judgments handed down by courts of first instance (lit. a) and requests for review (lit. b). Members of the appeal authority may not rule on the same case as members of the court of appeal (§ 2). Members of the court of appeal may not rule on a review of the same case (§ 3).

This means that it is necessarily judges working together in the same court who rule on new evidence against a previous conviction. In other words, the judges that have to rule on the application for review must therefore judge the work of their direct colleagues. This situation could have an impact on the assessment of requests, possibly worsening the situation of the convicted person and lowering their chances of success. Instead, it would be preferable for a court in another jurisdiction to rule on the case, to ensure a certain degree of independence and avoid any (apparent) conflict of interest.

Conclusion

Based on the research of the WCILTF, Switzerland does provide a mechanism for bringing forward new facts and evidence after the judgment to prove innocence, but those seeking to to make use of the possibility face serious problems. There are in particular major obstacles making it difficult to exploit new technologies and scientific advances in the forensic field when seeking to overturn a criminal conviction.

Firstly, Swiss legislation is too permissive when it comes to destroying exhibits which could be re-analyzed to request a review. Secondly, even if this legislation were to be amended, access to exhibits and the possibility of analyzing them are very poorly regulated, so that their analysis depends purely on the discretion of a magistrate unaccustomed to new scientific developments. Thirdly, there is no right for the convicted person to obtain investigative measures prior to the

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5 Until the end of 2010, each canton has its own code of criminal procedure, with notable differences in regulation and practice between the various parts of Switzerland. The first federal law on criminal procedure entered into force on January 1, 2011.

6 KILLIAS/GILLIÉRON/DONGOIS (note 1), p. 64.

7 THOMMEN et al. (note 5).

pronouncement of a review. Fourthly, the case law established in the field of revision is very strict, making it very difficult to overturn a conviction that is final. Finally, certain procedural specificities in Switzerland entail a higher risk of erroneous convictions, such as the Summary Penalty Order Procedure.

Swiss law is therefore quite failing in key areas, particularly with regard to the evidence required to review a final conviction. The specific characteristics of the Swiss system, in which certain legal competences remain at cantonal level, also prevent the standardization of treatment for convicted persons.

The situation in Switzerland could therefore be improved from the point of view of respect for the fundamental rights of a wrongly convicted person.

IV. Questions to Switzerland

1. **Does Switzerland have a legal procedure for post-conviction revision or re-opening of convictions based on new evidence of innocence?**

2. **Have courts in Switzerland fairly and objectively applied existing legal procedure for post-conviction revision or re-opening of convictions based on new evidence of innocence?**

3. **If so, is there a deadline by which such a motion must be brought, or may an incarcerated person bring such a legal motion at any time?**

4. **If so, what is the legal standard that the incarcerated person must meet to re-open the case?**

5. **Have any post-conviction motions presenting new evidence of innocence been successfully granted by a court in Switzerland, resulting in the incarcerated person's exoneration and freedom? Have any such motions been denied by courts in Switzerland?**

6. **Does Switzerland have a law allowing incarcerated persons to petition for post-conviction DNA testing of crime scene evidence to prove innocence and seek relief?**

7. **Does Switzerland have a legal procedure requiring biological evidence collected from the crime scene to be preserved for future DNA testing?**

8. **If so, how long must the biological evidence be preserved?**

9. **Does Switzerland have a "sunshine law" or "public records law" granting defense attorneys, NGOs, journalists or incarcerated persons access to police files and documents of an incarcerated person's case post-conviction?**

10. **Does Switzerland have a legal standard requiring the police and prosecution to disclose to the defense pre-trial any exculpatory evidence or other information helpful to the defense or that might lead to new avenues of pre-trial investigation that might be conducted by the defense?**

11. **If so, what is the legal standard pertaining to this disclosure requirement?**

12. **Does Switzerland have a law providing compensation to the wrongfully convicted after exoneration and release from prison? If so, what do such laws provide?**

13. **Does Switzerland have laws or regulations requiring the recording of police interrogation of suspects? If so, please outline the requirements of such laws or regulations.**

14. **Does Switzerland have laws or regulations ensuring that police identification procedures for eyewitnesses adhere to best practices devised by the scientific community, such as the double-blind eyewitness identification requirement? *See* https://www.ojp.gov/ncjrs/virtual-library/abstracts/double-blind-sequential-police-lineup-procedures-toward-integrated**

15. **Does Switzerland have a independent court ruling on petitions for review?**

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