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International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances
Twentieth session

Summary record of the 340th meeting
Held via videoconference, on Wednesday, 14 April 2021, at 12.30 p.m. Central European Summer Time

Chair: Mr. Diop (Vice-Chair)
later: Mr. Ayat

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In the absence of Mr. Ayat, Mr. Diop (Vice-Chair) took the Chair.

The meeting was called to order at 12.35 p.m.

Consideration of reports of States parties to the Convention (*continued*)

Initial report of Switzerland (*continued*) (CED/C/CHE/1; CED/C/CHE/Q/1; and CED/C/CHE/RQ/1)

1. *At the invitation of the Chair, the delegation of Switzerland joined the meeting.*

2. **Mr. de Frouville** (Country Rapporteur) said that he wished to know what measures the State party was taking to ensure that investigations into reports of enforced disappearance were genuinely independent and impartial, in accordance with article 12 of the Convention and principle 15 of the Committee's guiding principles for the search for disappeared persons. In particular, he would welcome further information on the circumstances in which special military prosecutors might be asked to participate in an investigation into a case of enforced disappearance.

3. According to a report issued by the Swiss Centre of Expertise in Human Rights, the independence of the public prosecutor's offices of the cantons was undermined by the fact that their staff often maintained close relations with the police. In particular, there was a risk that such close relations could hinder the offices' ability to conduct an impartial investigation into allegations made against a police officer. In view of that situation, the Committee wished to know how the impartiality of the justice system was ensured in such cases. In particular, it would be interesting to learn about the approach that would be taken if a police officer or a cantonal prison officer subjected a person to enforced disappearance and the perpetrator's superior was the point of contact for the search procedure.

4. He understood that, under the procedure for searching for possible victims of enforced disappearance, the cantonal coordination services were required to respond to requests for information about possible victims within six working days. However, given that such persons faced a risk of being tortured or killed shortly after their disappearance, he wondered whether the State party might consider reducing the above-mentioned time limit to 24 hours or a slightly longer period if a reasoned extension request was submitted and accepted.

5. The State party had likewise indicated that the designated services and focal points forming part of the decentralized network established to facilitate the search for suspected victims of enforced disappearance had unrestricted access to places of detention and to any other place where there were reasonable grounds for believing that a disappeared person might be present (CED/C/CHE/RQ/1, para. 23). However, the Committee had noted that, under the Ordinance of 2 November 2016 accompanying the Federal Act of 18 December 2015 on the International Convention for the Protection of All Persons from Enforced Disappearance, searches were restricted to institutions where deprivation of liberty took place in a closed setting. In the light of that apparent contradiction, he wondered exactly what was meant by institutions where deprivation of liberty took place in a closed setting and whether such institutions included any place where there were reasonable grounds for believing that a disappeared person might be present, including unofficial places such as hotel rooms and offices.

6. **Mr. Baati** (Country Rapporteur), noting that the cantonal coordination services were permitted to provide information on a disappeared person who had been located only if that person gave his or her consent, said that he would be interested to know, in cases where the person did not give his or her consent, how the services would be able to determine whether the person had not done so for a valid reason or because he or she had been prevented from doing so as a consequence of being held in detention. Furthermore, it was unclear how, in such cases, the authorities would be able to reassure the person's family members that he or she was not being held in secret detention. It would be interesting to hear whether the designated services and focal points responsible for searching for suspected victims of enforced disappearance were able to visit all places of detention and all other places where a disappeared person might be present, including before the person concerned had responded to the request for his or her consent. In its response, the delegation might provide examples taken from the test exercise conducted in 2020 to assess the efficiency of the search network.

The Committee would likewise welcome examples of the "serious events" (CED/C/CHE/RQ/1, para. 24) that might justify the suspension of a federal official or a member of the armed forces if the proper performance of his or her duties was compromised.

7. The Committee against Torture, the Commissioner for Human Rights of the Council of Europe and Amnesty International had all drawn attention to the fact that the State party did not always adequately assess the risks faced by persons subject to deportation orders following the refusal of their applications for asylum. Furthermore, the Commissioner for Human Rights of the Council of Europe had reported that, in 2016, Swiss officials at the border with Italy had sometimes taken summary decisions to return migrants and that those decisions had no legal basis, had not been recorded in writing and had failed to take the best interests of child migrants into account. In the light of those reports, the Committee would be grateful to receive information on any legislative and practical measures taken to ensure that the principle of non-refoulement was upheld. The delegation might explain whether expulsion proceedings included a comprehensive, individual assessment of the risks that the person who was the subject of the proceedings might face on return to his or her country of origin, including in cases where that country was considered to be safe. It might also indicate whether such risks were considered by border and airport officials responsible for admitting persons to Switzerland.

8. Noting that the decisions of the Federal Office of Justice could be appealed before the Federal Criminal Court and, if the case was considered particularly important, before the Federal Supreme Court (CED/C/CHE/1, para. 87), and that such appeals had suspensive effect, he wondered which authority decided whether a case was "particularly important" and on what criteria such decisions were based. He wished to know whether the State party might consider taking steps to ensure that all appeals had suspensive effect, whether the State party accepted diplomatic guarantees from countries requesting extradition and, if so, what action it typically took if such guarantees were violated.

The meeting was suspended at 12.50 p.m. and resumed at 1.10 p.m.

9. *Mr. Ayat took the Chair*.

10. **Mr. Wehrenberg** (Switzerland) said that only cases in which the accused persons were members of the Swiss armed forces came under the jurisdiction of the military courts. In such cases, military justice proceedings were initiated and a suitably qualified judge was appointed to conduct an investigation.

11. **Mr. Péquignot** (Switzerland) said that, under the rules governing the right of challenge, parties to legal proceedings were entitled to raise an objection if there were any doubts surrounding the impartiality of the proceedings. The public prosecutor's offices of the cantons made a special point of not showing bias in favour of the police when charges were brought against a police officer.

12. **Mr. Frank** (Switzerland) said that, when the relevant draft legislation on the Convention was being considered, discussions had been held on the places that would be covered by any searches for suspected victims of enforced disappearance carried out by the designated members of the network. It had been decided that any such searches would be restricted to closed settings, as the risk of a person disappearing from an open or semi-open setting was low. While persons could, of course, disappear from any setting, including offices or hotels, to extend searches to such places would go beyond the purpose of the law, especially as those places could not be monitored. Such places could be investigated and included in the network's searches only when it was made aware of an abuse of power in that setting.

13. Family members of a suspected victim of enforced disappearance who were not satisfied with the network's findings, especially if it had concluded that the case in question did not involve enforced disappearance, could challenge those findings and any decision taken on that basis before the courts.

14. The acts for which disciplinary measures were routinely imposed included corruption and violations of official secrecy, personal rights and privacy.

15. **Mr. Gonin** (Switzerland) said that the possibility of enforced disappearance occurring in hotels and offices should indeed not be ruled out. He wished to reaffirm that the services and persons that formed part of the network had unrestricted access to any place where there were reasonable grounds for believing that a disappeared person might be present. Persons could apply directly to the courts whenever they had doubts over the proper functioning of the network or the conduct of the persons who ran it. Such cases were referred to prosecutors and, if appropriate, proceedings could be brought under the Code of Criminal Procedure. Furthermore, the courts had far greater means for conducting searches at their disposal than the network, and could take other coercive measures as required.

16. The rights of victims of enforced disappearance, which included not only the disappeared persons but also their family members, were guaranteed in criminal proceedings. The Code of Criminal Procedure allowed family members to take part in proceedings as claimants. As such, they were entitled to attend hearings, put questions to the parties appearing in court, consult the case file, request the submission of additional evidence, keep track of the progress of the case and participate actively in the efforts made to establish the facts.

17. **Ms. Mieli** (Switzerland), replying to the question posed about non-refoulement in extradition proceedings, said that claims of risk of enforced disappearance in the requesting State could be raised at any point during the proceedings. In general, when a person who was the subject of an international arrest warrant was detained, he or she was heard by a prosecutor, with whom that risk could be raised. The person could also submit written observations, usually drawn up by his or her lawyer, to the Federal Office of Justice within 14 days. If the person believed that he or she was at risk of enforced disappearance, that fact could be mentioned in the observations. The Office then examined the observations and the specific circumstances of the case. The Office's decisions were appealable before the Federal Criminal Court and, if appropriate, the Federal Supreme Court. The risk of enforced disappearance could also be cited at those stages, regardless of whether it had been mentioned previously.

18. In order to determine whether a claim of risk of enforced disappearance should be taken into account, a study of the situation in the requesting State was carried out based on various sources, including publicly available documents published by non-governmental organizations and civil society. The study also took into account information available to the federal authorities, including the Federal Department of Foreign Affairs, as well as local diplomatic and consular missions. The requesting State could also be asked to provide information on enforced disappearance and to offer diplomatic assurances that there was no risk of enforced disappearance occurring in its national territory.

19. Switzerland also made use of diplomatic assurances in its extradition procedures. The Federal Act on International Mutual Assistance in Criminal Matters was the legal basis for such assurances. The Federal Supreme Court had divided States into three categories: those for which no assurances were necessary; those with which cooperation could be authorized only if diplomatic assurances were obtained; and those with which no cooperation was possible. In the case of States for which diplomatic assurances were necessary, they must be given by an authority of the requesting State that had the capacity to engage the responsibility of that State. The wording of the diplomatic assurances must be the same as that formulated by Switzerland; otherwise they were refused. They required the requesting State to guarantee fundamental rights and to allow Switzerland to monitor the situation in the country. Switzerland had a long tradition of receiving diplomatic assurances and, to date, there had been only one violation of such guarantees. In that case, the violation was procedural and did not involve fundamental rights or the physical integrity of the person concerned. Thereafter, Switzerland had completely refused to cooperate with that State in such matters.

20. **Mr. Diener** (Switzerland) said that a person seeking asylum in Switzerland first attended a hearing at which he or she explained the harm to which he or she would or could be exposed in his or her State of origin on the grounds of race, nationality, religion or membership of a group. Since 2019, all applicants had enjoyed access to free legal aid from the very start of the procedure, including during the initial hearing. The State Secretariat for Migration gathered information on the State of origin of the person in question, drawing on reports of the United Nations, among others, and compiled a record, in which any risk of

enforced disappearance was cited. If necessary, additional information could be requested from the local diplomatic mission in the country concerned. The decisions of the State Secretariat for Migration were appealable before the Federal Administrative Court, which had two divisions that specialized in asylum matters.

21. With respect to the case involving Italy, the person in question, who was subject to the so-called Dublin procedure, could lodge an appeal with the Federal Administrative Court, even though such an appeal would not have suspensive effect. The person was, however, entitled to request a stay of his or her removal. Removals of families to Italy could not be carried out without guarantees that any children would be properly cared for and that the unity of the family would be preserved. In regular asylum procedures, appeals before the Federal Administrative Court, which was the court of final appeal in such cases, did have suspensive effect.

22. Unlike in extradition cases, Switzerland was extremely cautious about requesting diplomatic assurances in the context of asylum procedures, as the reliability of assurances received from States where asylum seekers had suffered or could suffer persecution could not be guaranteed. Furthermore, Swiss asylum law prohibited the transmission of personal information to States of origin, as such communications could put the family members of asylum seekers in danger. It was also prohibited to disclose information on applications for asylum. Switzerland applied the principle of *in dubio pro refugio*, under which applicants were accorded the benefit of the doubt if doubts were raised over their safety post removal. If an applicant was denied refugee status but the removal was not possible or could not reasonably be required, Switzerland admitted the foreign national to the country on a provisional basis.

23. **Mr. Cottier** (Switzerland) said that, in its capacity as the federal coordination service, the Federal Office of Police had overseen the implementation of the network established to search for suspected victims of enforced disappearance in the different cantons. To that end, the Office had collected the contact details of every cantonal coordination service. The statutory conditions for secure transmission of information in that context had been created in cooperation with the competent cantonal services. Information relating to the search for a suspected victim of enforced disappearance was exchanged by encrypted email. The members of the network could be contacted at any time regarding urgent cases.

24. **Mr. Baati** said that he would like to hear more about the reasoning behind the State party's policy on providing mutual assistance in criminal matters, particularly its decision to divide States into three categories. He would also appreciate further details on how the State party ensured that persons deprived of their liberty were not being held in secret detention. Lastly, he wished to know why appeals against deportation decisions did not have automatic suspensive effect.

25. **Mr. de Frouville** said that he would be grateful if the delegation could outline the circumstances in which a special military prosecutor might be asked to participate in an investigation into a case of enforced disappearance (CED/C/CHE/RQ/1, para. 22). Notwithstanding the explanations provided by the delegation, it was still unclear whether the designated services and focal points making up the network established to search for suspected victims of enforced disappearance would have access to places, other than places of deprivation of liberty, where a disappeared person might be present. It would also be useful to know whether focal points were able to take coercive measures on their own initiative. Lastly, he noted with concern that more than 400 unaccompanied minors had disappeared from Swiss reception centres in 2018 – a phenomenon that had already been referred to by the Committee against Torture in 2015 (CAT/C/CHE/CO/7, para. 18). The Committee was concerned that such disappearances could be linked to organized crime and human trafficking and would therefore welcome information on the measures taken by the State party to address the situation.

26. **Mr. Diop** said that he would appreciate a response to his question on whether provisions concerning the criminal responsibility of superiors existed in ordinary Swiss criminal law. It was important to ensure that civilian as well as military leaders could be held criminally responsible, including in respect of genocide and crimes against humanity.

27. **Mr. Péquignot** (Switzerland), replying to questions posed concerning the network established to search for suspected victims of enforced disappearance, said that focal points did not generally visit all places of deprivation of liberty themselves in view of the short time frame for providing the requested information. In the canton of Neuchâtel, for example, the focal point would seek information from the head of the prison service, who had access to all prison registers and could check whether the person sought was serving a sentence or being held as a pretrial detainee; liaise with police officers, who could search places on their behalf; and contact personnel at local hospitals, private clinics and other places as part of the search. If there was reason to believe that the individual was being held in a place other than a place of deprivation of liberty, the public prosecution service would be informed of a possible case of false imprisonment and the judicial machinery would be activated. Coercive measures, such as searches, could be taken in that situation.

28. **Mr. Diener** (Switzerland), providing an overview of the Dublin III Regulation, said that the criteria for determining the State responsible for examining an application for asylum included family links and whether the applicant had entered the State in a regular or irregular manner. Once the State responsible had been determined, it was the State's own domestic legislation that governed the examination of the asylum application. Regarding the specific case involving Italy, in the light of a decision issued by the European Court of Human Rights in November 2014, the State Secretariat for Migration had amended its practice to ensure that full account was taken of the situation of families and the situation in the State to which applicants were to be returned to have their asylum application examined.

29. **Ms. Cicéron Bühler** (Switzerland) said she wished to add that, while Switzerland was not a member State of the European Union, it was at the heart of Europe; in an effort to ensure a consistent approach to the examination of asylum applications, Switzerland had chosen to align itself with the Dublin III Regulation by means of the Dublin Association Agreement with the European Union.

30. **Ms. Mieli** (Switzerland) said that the use of diplomatic assurances had long been successful in cases of extradition because the requesting State had a clear interest in securing the return of the person concerned and knew that it had to respect the diplomatic assurances given in order to obtain the cooperation of Switzerland. Any violation of those assurances would jeopardize the ongoing or future cooperation between Switzerland and that State, including with regard to mutual assistance in criminal matters.

31. According to the Federal Supreme Court, States in the first category were considered "safe" countries, where the risk of human rights violations, including enforced disappearance, was extremely low. Safe countries were therefore not required to provide diplomatic assurances. Diplomatic guarantees were sought from countries in the second category, whereas extraditions to countries in the third category were not permitted, as there was a real risk of prohibited treatment (CED/C/CHE/1, para. 83). However, the three categories were by no means fixed; the relevant lists were regularly reviewed and States could be moved from one category to another or requested to provide additional guarantees if required. For example, although Italy was considered to be a "safe" country, diplomatic guarantees had been sought in recent years after the European Court of Human Rights had criticized the conditions of detention in the country.

32. **Mr. Frank** (Switzerland) said he wished to reiterate that there were no unofficial places of deprivation of liberty in Switzerland (CED/C/CHE/RQ/1 para. 23). However, if close friends or relatives of a disappeared person suspected that he or she was being held in such a location, they could pursue the legal avenues available to them under the Federal Act of 18 December 2015 on the International Convention for the Protection of All Persons from Enforced Disappearance. Lastly, he had attempted to draw a distinction between the terms "*endroits fermés*" (closed settings) and "*endroits non fermés*" (open settings), which, he wished to emphasize, were not synonymous with official and unofficial places of deprivation of liberty. Switzerland had not deemed it necessary for the Ordinance of 2 November 2016 accompanying the above-mentioned Act to cover open settings.

33. **Mr. Wehrenberg** (Switzerland) said that a special military prosecutor could be appointed in cases where a claimant had complained that the proceedings were being

mishandled. In addition, a general prosecutor could appoint a special prosecutor on his or her own initiative if he or she had justified concerns about the conduct of the proceedings.

34. **Mr. Gonin** (Switzerland) said that the Criminal Code contained specific provisions on the criminal responsibility of superiors with regard to genocide and crimes against humanity; the criminal responsibility of subordinates acting on orders from a superior was dealt with in article 264 (l) of the Code. Logically, the strictly hierarchical structure of the military necessitated the inclusion of specific provisions on the criminal responsibility of superiors in the Military Criminal Code. However, he wished to stress that, although civilian contexts were not strictly hierarchical in nature, there was no impunity for civilian leaders. Their criminal responsibility was governed by the general rules on participation in and realization of criminal acts. Swiss criminal law provided for concepts such as co-perpetrator, instigator, indirect perpetrator and accomplice, and established criminal responsibility for attempts to commit an offence, which covered the conduct specified in article 6 (1) (a) of the Convention. Article 11 of the Criminal Code, which dealt with commission by omission, could also apply in cases where a civilian leader's failure to perform supervisory duties or to take preventive action had led to the commission of an offence of enforced disappearance. In short, there were several avenues through which the criminal responsibility of a civilian leader could be established, depending on the specifics of the case in question.

35. **Ms. Cicéron Bühler** (Switzerland) said that, since the question raised by Mr. de Frouville concerning unaccompanied asylum-seeking minors fell outside the scope of the Convention, the delegation would provide the Committee with information in writing.

36. **Mr. Diener** (Switzerland) said that any appeal lodged against a decision of the State Secretariat for Migration in cases of asylum had suspensive effect, which lasted until the Federal Administrative Court had issued a final decision on the matter. Appeals lodged under the Dublin III Regulation did not have suspensive effect; however, the individual could request a stay of removal from the Federal Administrative Court, which had a maximum of five days in which to make a ruling.

The meeting rose at 2.10 p.m.