



International Convention for the Protection of All Persons from Enforced Disappearance

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Summary record of the 339th meeting*

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Chair: Mr. Ayat

Contents

Consideration of reports of States parties to the Convention

Initial report of Switzerland

* No summary record was issued for the 338th meeting.

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The meeting was called to order at 4 p.m.

Consideration of reports of States parties to the Convention

Initial report of Switzerland (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. **Ms. Cicéron Bühler** (Switzerland), introducing the initial report of Switzerland (CED/C/CHE/1), said that the protection of human rights was enshrined in the Federal Constitution of the Swiss Confederation, in national laws and in the constitutions and laws of the cantons. Her country's commitment to meeting its international obligations and to strengthening the authority of the treaty bodies was borne out by its recognition of the competence of the Committee to receive and consider individual and inter-State communications under articles 31 and 32 of the Convention, respectively. Moreover, Switzerland had demonstrated its commitment to protecting human rights during the coronavirus disease (COVID-19) pandemic by providing United Nations special procedures mandate holders with information on its COVID-19 response measures and, in that connection, had taken due note of the key guidelines on COVID-19 and enforced disappearance issued jointly by the Committee and the Working Group on Enforced or Involuntary Disappearances.
3. As Switzerland was a federal State with a monist legal system, upon its entry into force, the Convention had immediately become part of federal law and all Swiss authorities had become bound by it. Responsibility for the implementation of the Convention lay with the cantons at the domestic level and with the Confederation at the international level. Several legal measures had been taken to ensure that the provisions of the Convention were fully incorporated into the Swiss legal order. Those measures included the adoption of the Federal Act of 18 December 2015 on the International Convention for the Protection of All Persons from Enforced Disappearance, which contained a definition of enforced disappearance, and its accompanying Ordinance of 2 November 2016. The crime of enforced disappearance had also been added to the Criminal Code, which, in turn, had prompted amendments to the Code of Criminal Procedure, the Military Criminal Code and the Code of Military Criminal Procedure. The offence of enforced disappearance was subject to prosecution *ex officio*; however, the Swiss authorities had not yet been involved in any investigations or judicial proceedings relating to a case of enforced disappearance.
4. Administrative procedures had likewise been put in place to ensure the effective implementation of the Convention. For example, a decentralized network had been established by the Confederation and the cantons to facilitate the search for suspected victims of enforced disappearance. The network, which was composed of a federal coordination service and a coordination service in each canton, had been set up to ensure the efficient and reliable exchange of information between the country's various structures. The family members of a possible victim of enforced disappearance could submit a search request through the website of the Federal Office of Police. If the Federal Office of Police decided to launch a search, it contacted the network's cantonal coordination services, which were required to check all records and registers to determine whether the individual was located in a place of deprivation of liberty, a care institution or an administrative detention centre and to report back to the Federal Office of Police within a specified time frame – in most cases, six working days. Once the individual had been located, a substantiated and appealable decision was issued and the requesting party was informed; however, information on the individual's specific whereabouts could not be communicated without his or her consent. To date, seven requests concerning possible victims of enforced disappearance had been received, none of which had met the conditions for a search to be launched. In the absence of any real cases, in February 2020, a fictional case had been used to test the network and the response times of the cantons. Of the 26 cantons, 24 had reported back with the necessary information within the six-day deadline; the remaining two had provided their information within eight working days. The test had therefore proven that the network was operational and that the cantons would be able to follow the search procedures appropriately in the event of a real case of enforced disappearance. There were now plans to test the system on a yearly basis.

5. In Switzerland, there were two types of access to places of deprivation of liberty: access with prior authorization and access without prior authorization. The first was granted to persons visiting a detainee, such as close friends and family, lawyers, and consular officials; the purpose of the second was to allow certain national and international monitoring bodies, such as the National Commission for the Prevention of Torture and the Subcommittee on Prevention of Torture, to conduct unannounced visits to places of detention. Designated members of the network established to search for suspected victims of enforced disappearance had unrestricted access to places of detention and other places where there was reason to believe that the person concerned might be found. During the pandemic, various measures had been taken to safeguard the health of persons deprived of their liberty. For example, a number of administrative detainees had been released, and a new facility had been opened to care for detainees who had contracted the coronavirus disease.

6. Pursuant to the Criminal Code, close friends and relatives not only had the right to know the fate of a victim of enforced disappearance, but were themselves considered to be victims of that crime. As a result, they had certain procedural rights and were also entitled to assistance under the Federal Act on the Provision of Support to Victims of Crime in the form of immediate or long-term medical, legal or psychological support, to be administered by the cantons, and entitled to seek compensation and damages. Lastly, she wished to emphasize that Switzerland was committed to assisting victims of enforced disappearance both nationally and internationally and was in the process of launching a joint cooperation initiative with Mexico, aimed at strengthening the Mexican authorities' capacity to search for disappeared persons.

7. **Mr. Baati** (Country Rapporteur) said that, while the State party's efforts to publicize the Convention were commendable, further awareness-raising activities involving a wider variety of stakeholders were needed. He wished to know whether the new national human rights institution was now up and running, whether the pandemic had been treated as a force majeure event in law or in practice and, if so, how its treatment as such had influenced the measures taken to respond to it. It would also be useful to know how the legal basis and proportionality of any restrictions on fundamental rights (CED/C/CHE/1, para. 20) were determined and by whom.

8. Notwithstanding the explanations provided by the State party in respect of the phrase "with the intention of removing a person from the protection of the law for a prolonged period of time" (CED/C/CHE/1, para. 30 and CED/C/CHE/RQ/1, para. 2), the Committee was concerned that the definition of enforced disappearance contained in article 185 bis of the Criminal Code was still inconsistent with article 2 of the Convention. He would welcome further clarification in that respect, including examples of how the phrase had been interpreted by the State party. Regarding the punishment of perpetrators of acts of enforced disappearance, he would be grateful if the delegation could explain how a term of imprisonment of 1 year constituted a sentence that was commensurate with the gravity of that crime. Noting that the genuine repentance of the perpetrator of an offence of enforced disappearance and the offer to make reparation for the damage caused could justify a reduction in sentence (CED/C/CHE/RQ/1, para. 7), he wondered how the responsibility of the individual and that of the State would be delineated in such cases, since, pursuant to article 2 of the Convention, offences of enforced disappearance were imputable to agents of the State. He would be interested to hear about the specific measures taken to ensure that cases of enforced disappearance remained expressly outside the jurisdiction of the military courts and could be investigated and tried only by the competent civilian authorities. Lastly, he would like to know how the application of article 20 of the Military Criminal Code, which stipulated that a subordinate who committed an act on the orders of a superior was liable to punishment if he or she was aware at the time of the events that the act was punishable, could be assessed in the absence of any training programmes on the Convention, and how the State party was able to determine whether the person concerned truly lacked awareness or was simply denying responsibility.

9. **Mr. de Frouville** (Country Rapporteur), welcoming the news that the State party had launched a cooperation initiative with Mexico with a view to assisting the Mexican authorities in searching for victims of enforced disappearance, said that such mutual assistance was strongly encouraged under article 15 of the Convention and that the

Committee would therefore like to receive further information on that initiative. He wished to know the extent to which the measures taken during the pandemic had limited access to places of deprivation of liberty and the right of persons deprived of their liberty to communicate with family and friends, lawyers and consular officials, and whether the new national human rights institution would be competent to handle individual complaints and authorized to monitor State agencies in order to ensure their compliance with human rights standards.

10. He often wondered why the carefully worded definition of enforced disappearance contained in article 2 of the Convention underwent so many distortions and changes when it was incorporated into national law. In the case of Switzerland, he would welcome an explanation as to why the definitions of enforced disappearance contained in the Criminal Code and the Military Criminal Code were at variance with the definition contained in the Convention. In the light of the State party's explanations of how the concept of enforced disappearance was interpreted in Switzerland ([CED/C/CHE/1](#), para. 30 and [CED/C/CHE/RQ/1](#), para. 2), he wished to know whether those interpretations would be routinely considered by judges ruling on cases of enforced disappearance. If not, he wished to know whether the State party planned to bring the definition of enforced disappearance in its national law into line with that contained in the Convention.

11. According to the State party, the concept of consent used in article 185 bis of the Criminal Code was sufficiently broad to encompass authorization and acquiescence, as required by the Convention ([CED/C/CHE/1](#), para. 27). However, article 185 bis (a) of the Criminal Code referred to deprivation of liberty "on behalf of or with the consent of a State or political organization", whereas article 185 bis (b) referred to deprivation of liberty "on behalf of a State or political organization", without any mention of "consent". In view of the absence of the word "consent" from article 185 bis (b), he wished to know whether that legal provision could be said to encompass the terms "authorization and acquiescence", which were essential elements of the Convention definition of enforced disappearance. The Committee would also welcome further clarification of the intended meaning of the term "violation of a legal duty", which was used in article 185 bis (b) of the Criminal Code.

12. Lastly, he wished to know what measures the State party envisaged taking to address the fact that, under the Criminal Code, non-military superiors could not be held responsible for offences committed by subordinates when those offences were not crimes against humanity. It would also be interesting to know what steps the State party planned to take to ensure that perpetrators of enforced disappearance would always receive a penalty that was commensurate with the gravity of the offence, including in cases where the extenuating circumstances set out in the State party's written replies were applicable ([CED/C/CHE/RQ/1](#), para. 6).

The meeting was suspended at 4.45 p.m. and resumed at 4.55 p.m.

13. **Mr. Frank** (Switzerland) said that, on 13 December 2019, the Federal Council had approved a proposal to establish a national human rights institution and had extended the pilot project involving the Swiss Centre of Expertise in Human Rights until the end of 2022. The Swiss parliament was currently examining a bill on the establishment of a national human rights institution. That institution was expected to begin operating in 2022 or 2023 as a legally established public law corporation and would replace the Swiss Centre of Expertise in Human Rights.

14. The legal provisions governing the new institution would be incorporated into the Federal Act of 19 December 2003 on Measures Pertaining to Civil Peace Support and the Promotion of Human Rights. The institution would be independent and would receive financial support from the Confederation, although the cantons would cover infrastructural costs. Its mandate would be broad and its responsibilities would include providing information and documentation, conducting research, giving advice and promoting dialogue, cooperation, human rights education and exchanges at the international level. However, it would not be mandated to carry out monitoring activities, act as a mediator or examine individual complaints.

15. Although the Federal Council had classified the COVID-19 pandemic as an extraordinary situation, it did not consider it necessary to take any measures that would entail

derogations from human rights. Under the Constitution, restrictions on fundamental rights were required to have a legal basis, to be proportionate and to be justified in the public interest or necessary to protect the fundamental rights of others. The essential content of fundamental rights was inviolable.

16. **Mr. Gonin** (Switzerland) said that it was indeed the case that Swiss law contained different definitions of enforced disappearance. The administrative definition of enforced disappearance applied to persons who had been deprived of their liberty by a State authority. By contrast, the definitions contained in the Criminal Code and the Military Criminal Code were not limited to disappearances attributable to the Swiss authorities. Efforts had been made to ensure that the two definitions were coherent in order to avoid confusing judges.

17. Judges' interpretation of the definition of enforced disappearance in the Criminal Code would be informed by the relevant Federal Council dispatches, which were the key source for all jurists seeking to understand how to interpret a law. The explanations that had been provided to the Committee had been taken from such dispatches. The penalties handed down to perpetrators of an offence of enforced disappearance would reflect the seriousness of the offence, as they would be equivalent to the penalties imposed for hostage-taking or false imprisonment and abduction with aggravating circumstances.

18. The Swiss penalty regime provided for a relatively broad range of penalties. For historical reasons, Swiss judges were able to exercise greater discretion in establishing penalties than, for example, their counterparts in France. However, any court judgment had to contain a reasoned justification for any sentence handed down. Sentences could be appealed by the prosecution or by the accused person. If the perpetrator of an act of enforced disappearance was also found to be responsible for the death of the disappeared person, the death would be considered an aggravating circumstance and the penalty handed down would be stiffer. In such cases, the perpetrator would be liable to a minimum penalty of 10 years' imprisonment. Stiffer penalties would also be handed down for multiple acts of enforced disappearance.

19. Swiss law did not provide for any mitigating circumstances in cases of enforced disappearance, as such situations were covered by the general regulations on the establishment of penalties. The difference in the provisions governing the legal responsibility of superiors in the Criminal Code and the Military Criminal Code could be explained by the fact that, under the latter, superiors could be held legally responsible for all offences covered by the Code, including those that were not crimes against humanity.

20. **Mr. Wehrenberg** (Switzerland) said that all soldiers in the Swiss army were provided with training in criminal law, international law and human rights. Superior officers repeated such training in courses designed for that purpose. Therefore, all members of the armed forces were assumed to be aware of acts that constituted punishable offences.

21. **Mr. de Frouville**, noting that the new national human rights institution would not be mandated to monitor State agencies or receive individual complaints, said that he wished to know whether any other institutions were authorized to carry out those very important functions. It was still not clear whether, in order to convict a person of the offence of enforced disappearance under the Criminal Code, it was necessary for the court to establish that he or she intended to remove the victim from the protection of the law or whether such removal should be understood as a consequence of the enforced disappearance.

22. With respect to article 185 bis (b) of the Criminal Code, concerning liability of persons who, on behalf of the State or in violation of a legal duty, refused to give information as to the fate or whereabouts of a disappeared person, it was not clear what was meant by the phrases "on behalf of the State" and "in violation of a legal duty".

23. Turning to the issue of penalties for offenders who occupied junior positions in the chain of command with relatively limited involvement in the offence, he wished to point out that article 22 of the Convention would come into play in such cases. The State party should thus introduce a specific provision to cover such offences. Short-term disappearances could constitute very serious crimes even if the removal of the person concerned from the protection of the law occurred for only a short period. He was concerned that enforced disappearance could be punished by a prison term of only 1 year.

24. He failed to understand why the State party had decided to incorporate the offence of enforced disappearance into its Military Criminal Code and thus subject offenders to the jurisdiction of military courts. Most States parties did not do so or even explicitly ruled out military jurisdiction in cases of serious human rights violations such as enforced disappearance. He recalled the Committee's statement on enforced disappearance and military jurisdiction. There were many other instruments that excluded such jurisdiction, such as the Inter-American Convention on Forced Disappearance of Persons.

25. **Mr. Baati**, noting that the new national human rights institution would not be up and running until 2022 or 2023 and that the institution would not provide mediation services, said that it would be useful to know which bodies would be fulfilling that function and whether the State party had considered establishing an ombudsman's office. He was concerned that the discrepancies between the definition of enforced disappearance contained in the Convention and that contained in Swiss law would continue to be a matter for discussion with the State party in the future. He was particularly concerned about the inclusion in the definition of enforced disappearance contained in the Criminal Code and Military Criminal Code of the phrase "with the intention of removing a person from the protection of the law for a prolonged period of time", which was at variance with the Convention. The delegation had referred to the dispatches of the Federal Council. However, such dispatches did not provide for safeguards, as they constituted mere declarations. Lastly, with respect to the matter of human rights training for army personnel, it was not clear whether the Convention was included in the list of instruments that were covered in such training. The Committee would be grateful if the delegation could submit to it in writing the list of the instruments that were included.

26. **The Chair** said that the Committee had consistently maintained that the intention to remove a person from the protection of the law for a prolonged period of time should not be treated as a constituent element of the offence of enforced disappearance, as removal from the protection of the law was in fact a consequence of it. The language of article 185 bis of the Criminal Code was therefore not in keeping with article 2 of the Convention. Criminal law on enforced disappearance must be as specific as possible so as not to give the courts too wide a margin of interpretation. Criminal judges should not become legislators, especially when interpreting a treaty whose provisions were quite clear. Furthermore, adding to the definition of the offence only made the burden of proof on the prosecutor more onerous, which was not conducive to the protection of victims of enforced disappearance. Care should also be taken not to blur the distinction between enforced disappearance as a crime against humanity and enforced disappearance as an ordinary offence.

27. **Ms. Villa Quintana** said that she would appreciate an explanation as to why Swiss criminal law provided for disciplinary measures as a punishment for enforced disappearance when it was clear that such measures were not commensurate with the seriousness of the offence. The fact that the new national human rights institution would not serve as a mediation body contradicted the Paris Principles, which required national institutions to draw the Government's attention to situations in any part of the country where human rights were being violated. It would also be useful to receive information on how the human rights training provided to military staff was put into practice.

28. **Mr. Diop** said that he would be interested to learn whether there were provisions in ordinary Swiss criminal law concerning the criminal responsibility of superiors and subordinates acting under their orders similar to those contained in the Military Criminal Code.

29. **Mr. Frank** (Switzerland), replying to the questions about why the new national human rights institution would not act as a monitoring or complaints mechanism, said that such mechanisms were optional under the Paris Principles. However, that was not the only reason. In Switzerland, there were courts at the cantonal and federal levels with responsibility for addressing human rights violations. Persons in Switzerland could also petition the European Court of Human Rights and international human rights treaty bodies such as the Committee. Therefore, for Switzerland, it was not necessary to give the institution such a mandate. Law enforcement bodies also came under the political authority of the cantonal and federal parliaments.

30. Concerning mediation, he wished to clarify that, when the Federal Council had put forward its proposal to the parliament, the parliament had decided that a federal mediation body was not necessary as, to a large extent, the realization of human rights fell within the purview of the cantons. There were also several mediation offices in the country's communes and cities.

31. Turning to the question raised about disciplinary measures, he wished to clarify that enforced disappearance was considered a criminal offence and carried criminal penalties. However, that did not rule out the imposition of disciplinary measures, if appropriate.

32. **Ms. Cicéron Bühler** (Switzerland) said that her delegation could provide further information in writing on the human rights training offered to army personnel and how such training was put into practice.

33. **Mr. Gonin** (Switzerland) said that, like other States, Switzerland took a pragmatic approach to the definition of enforced disappearance in the light of the Rome Statute. It had thus made a legislative decision to maintain consistency between enforced disappearance when it constituted a crime against humanity and enforced disappearance when it constituted an offence under ordinary law. Such an approach, however, was not set in stone. The legislative process was an evolving one. Fortunately, to date, there had been no convictions for enforced disappearance, either as a crime against humanity or an ordinary offence.

34. The notion of consent referred to in article 185 bis of the Criminal Code was sufficiently broad to cover the idea of authorization, support or acquiescence. The dispatch of the Federal Council provided an explanation of what was meant by the notion of fate referred to in the article, which included not only the death of the disappeared person, but also key events, in particular his or her arrest and the circumstances of the arrest. In Switzerland, trust was placed in judges. The courts were relied on to uphold human rights and the rule of law. He wished to recall that Switzerland had ratified and implemented the Rome Statute well before the Convention.

35. The Government had carried out a detailed study of article 22 of the Convention and had listed, in its explanatory report, the various articles of the Criminal Code that made it possible to meet the requirements of that provision. Article 29 of the Federal Constitution provided for general procedural guarantees, which were given effect in various pieces of legislation and in article 312 of the Criminal Code, which punished the abuse of public office. That provision was sufficiently broad to enable the criminal prosecution of any member of an authority or a public official who had abused his or her official powers. Such abuse could also be committed by omission if the perpetrator, as a guarantor, was required to put a stop to a coercive measure and failed to do so.

36. Individual criminal responsibility was covered by the Criminal Code and other criminal law provisions, whereas the responsibility of the State was also governed by administrative and public law, among others.

The meeting rose at 6 p.m.