

EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



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United Nations
Committee on Enforced Disappearances
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Alternative Report

**to the additional information submitted by the
Federal Republic of Germany on 3 July 2020
under Article 29, paragraph 4 of the
Convention for the Protection of All Persons
from Enforced Disappearance
(CED/C/DEU/AI/1)**

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I. Introduction

The European Center for Constitutional and Human Rights (hereinafter “ECCHR”) respectfully submits this alternative report to the Committee on Enforced Disappearances for its consideration when reviewing the additional information submitted by the Federal Republic of Germany on 3 July 2020 (CED/C/DEU/AI/1).

As the Committee on Enforced Disappearances (hereinafter “the Committee”) already noted in its concluding observations on the report submitted by the Federal Republic of Germany (hereinafter “Germany”) under article 29, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter “the Convention”) on 14 March 2014 (CED/C/DEU/CO/1), “the criminal offences referred to by the State party, [...] are not sufficient to encompass adequately all the constituent elements and modalities of the crime of enforced disappearance, as defined in article 2 of the Convention, and thus comply with the obligation arising from article 4” (paragraph 7). Since Germany has not taken any legislative measures to remedy this situation, serious gaps in German criminal law remain that could prevent the punishment of perpetrators of enforced disappearance. To avoid duplication, ECCHR allows itself to refer to its analysis of the current gaps in the German Criminal Code (“Strafgesetzbuch”) that it submitted to the Committee on 20 September 2013, together with Amnesty International.¹

This alternative report focusses on the issue of a full implementation of the Convention in the German Code of Crimes against International Law (“Völkerstrafgesetzbuch”/ “VStGB”, hereinafter “CCAIL”) and the lack of prosecution of enforced disappearances amounting to crimes against humanity, which from ECCHR’s point of view have not been accurately addressed in Germany’s additional information of 3 July 2020.

II. Points requiring clarification

According to Article 4 and 5 of the Convention, state parties have to ensure that appropriate national legislation is in place to allow for the effective prosecution of both individual cases of enforced disappearances and those acts of enforced disappearances that are committed as part of a widespread or systematic attack against any civil population, thus amounting to a crime against humanity. Germany has not yet fulfilled this obligation.

1. No full implementation of the Convention in the German Code of Crimes against International Law

The German Code of Crimes against International Law (hereinafter: “CCAIL”) explicitly criminalizes enforced disappearance as one way of committing a crime against humanity under Section 7 (1) No. 7 CCAIL. The definition of enforced disappearance in the CCAIL, however, is not consistent with definition in Article 2 of the Convention. To be specific, Section 7 (1) No. 7 CCAIL requires three additional elements that are extremely challenging to prove. None of these additional elements is foreseen in Article 2 of the Convention.

First, the crime of enforced disappearance under Section 7 (1) No. 7 CCAIL requires a *severe* deprivation of liberty. According to the legislative materials provided by the German Federal Parliament, the element of severity serves to clarify that a deprivation of liberty of a short

¹ European Center for Constitutional and Human Rights and Amnesty International, Preliminary briefing on the Federal Republic of Germany: Submission in advance of the adoption of the list of issues for the review of the State Party Report pursuant to Article 29, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance (CED/C/DEU/1), September 2013, available online: https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/DEU/INT_CED_NGO_DEU_15462_E.pdf.

duration shall not constitute an enforced disappearance.² This stands in stark contrast to the fact that during the first hours of their detention, victims subjected to an enforced disappearance are most at risk of torture or extrajudicial killing. Already in its first contentious case under its communication procedure, “Yrusta v. Argentina”, the Committee recalled that “in order to constitute an enforced disappearance, the deprivation of liberty must be followed by a refusal to acknowledge such deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law, *regardless of the duration of the said deprivation of liberty or concealment*”.³

Second, the crime of enforced disappearance under Section 7 (1) No. 7 CCAIL requires the proof of an “inquiry” into the fate and whereabouts of the detained individual. Yet, in situations of conflict and oppression – especially when the disappearance of opponents is used to install fear into the civil society and repress the political opposition – family members often refrain from approaching state officials when searching for information. For instance, in the case of Syria, the Independent International Commission of Inquiry reported that “many of those interviewed were too frightened of reprisals to make official inquiries.”⁴ Therefore, relatives often pay bribes to state officials to obtain information.⁵ It is unclear whether such informal requests qualify as an “inquiry” under Section 7 (1) No 7 CCAIL. Furthermore, in cases when all relatives or friends have fled the country or have been killed, i. e. when there is no one left to search for a missing individual, the secret detention of that individual would not constitute an enforced disappearance under Section 7 (1) No. 7 CCAIL.

Third, the crime of enforced disappearance under Section 7 (1) No. 7 CCAIL requires the special “intention of removing the victim from the protection of the law for a prolonged period of time”. This provision is not consistent with the definition of enforced disappearance in Article 2 of the Convention that considers the “placement outside the protection of the law” as a mere consequence of the enforced disappearance itself. Enforced disappearance is a multi-dimensional crime that usually involves a high number of perpetrators on all hierarchical levels. As noted by Manfred Nowak in his 2002 report on the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances to the Commission on Human Rights, “[t]he subjective elements of guilt seem, however, to put an extremely heavy burden on the prosecution to prove that the individual perpetrator was aware from the very beginning of committing the crime that the deprivation of liberty would be followed by its denial and that he (she) intended to remove the victim from the protection of the law for a prolonged period of time. [...] The perpetrators usually only intend to abduct the victim without leaving any trace in order to bring him (her) to a secret place for the purpose of interrogation, intimidation, torture or instant but secret assassination. Often many perpetrators are involved in the abduction and not everybody knows what the final fate of the victim will be.”⁶

² German Federal Parliament, Legislative materials no. 14/8524, 13. March 2002, available online: <https://dserver.bundestag.de/btd/14/085/1408524.pdf>, p. 21.

³ Committee on Enforced Disappearances, Yrusta v. Argentina, Communication 1/2013, UN-Doc.: CED/C/10/D/1/2013 para. 10.3 [emphasis added].

⁴ UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: Without a trace: enforced disappearances in Syria (2014) Un-Doc.: A/HRC/25/65 Annex IV, available online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/ThematicPaperEDInSyria.pdf>, para. 4.

⁵ Amnesty International, Between Prison and the Grave: Enforced Disappearances In Syria, (2015), available online: <https://www.amnesty.org/en/documents/mde24/2579/2015/en/>, p. 8.

⁶ Commission on Human Rights, Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, UN-Doc.: E/CN.4/2002/71 p. 29 fn. 69, p. 31 fn. 74.

2. No effective prosecution of the crime of enforced disappearance before German courts

Following-up on paragraph 10 and 11 of the Committee's concluding observations, Germany, in its additional information, paragraph 7, referred to criminal proceedings against two former officials of the Syrian intelligence services before the Higher Regional Court of Koblenz (hereinafter "Al Khatib case"). Germany herewith argued that enforced disappearances are effectively prosecuted and charged before German courts. The reference to the Al Khatib case, however, is inadequate – if not incorrect – for two reasons.

First, Germany's reference to the Al Khatib case is deeply misleading because, in fact, *the accused have not been indicted for enforced disappearance* even though German law explicitly criminalizes enforced disappearance as one way of committing a crime against humanity under Section 7 (1) No. 7 CCAIL. The Al Khatib case concerns acts of detention in a prison run by the Syrian intelligence service in Damascus. Although the evidence presented by the Federal Public Prosecutor indicates that the detained persons' fate and whereabouts have been concealed,⁷ the Federal Public Prosecutor qualified the alleged acts as severe deprivation of liberty under Section 7 (1) No. 9 CCAIL instead of bringing charges of enforced disappearance under Section 7 (1) No. 7 CCAIL. One of the accused has already been sentenced for aiding and abetting in 30 cases of severe deprivation of liberty under Section 7 (1) No. 9 CCAIL.⁸ The trial of the main defendant is still pending. As ECCHR and Amnesty International have already pointed out in their alternative report of 2013, charging perpetrators with severe deprivation of liberty does not adequately capture the particular injustice of the crime of enforced disappearance which has found expression in the Convention's definition of the crime.

Second, even if one were to assume that the accused had been charged of enforced disappearance, the Al Khatib case cannot serve as an example that Germany effectively prosecutes *individual cases of enforced disappearances* that do not amount to crimes against humanity, as Germany claimed in paragraph 7 of its additional information. The reference to the Al Khatib case served as follow-up information to paragraph 10 and 11 of the Committee's concluding observations. In these paragraphs, the Committee recommended Germany to take necessary measures with a view to ensuring that the exercise of jurisdiction by German courts over offences of enforced disappearance, *in particular of those acts that do not amount to crimes against humanity* and thus, *do not fall under the principle of universal jurisdiction*, is fully guaranteed. The Al Khatib case, however, has been brought under said principle of universal jurisdiction because it concerns acts that allegedly have been committed as part of a widespread and systematic attack. When it comes to individual offences of enforced disappearances, Germany has not taken any legislative measures to ensure that those acts can effectively be prosecuted before German courts. As ECCHR and Amnesty International have already pointed out in their alternative report of 2013, significant challenges remain that prevent the effective punishment of perpetrators of enforced disappearances that do not amount to crimes against humanity and thus do not fall under the principle of universal jurisdiction.

⁷ Lina Schmitz-Buhl, Enforced disappearances in Syria and the Al Khatib trial in Germany: Qualifying the alleged acts as enforced disappearance as a distinct crime against humanity is imperative, *Völkerrechtsblog*, 27 January 2021, doi: 10.17176/20210127-191051-0, available online: <https://voelkerrechtsblog.org/de/enforced-disappearances-in-syria-and-the-al-khatib-trial-in-germany/>.

⁸ Higher Regional Court of Koblenz, Judgment of 24 February 2021, case no 1 StE 3/21. Press release available online: <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/>.

III. Conclusion / Recommendation

The analysis of German criminal law and practice regarding the prosecution of enforced disappearance as a crime against humanity shows that the full implementation of the Convention requires an amendment of Section 7 (1) No. 7 CCAIL – in addition to the introduction of an autonomous criminal offence of enforced disappearance for those cases that do not amount to crimes against humanity in the German Criminal Code. Therefore, ECCHR calls on the Committee to discuss these serious gaps in the implementation of the Convention when reviewing Germany's additional information and to issue a recommendation to Germany to fully implement the Convention by aligning the definition of enforced disappearance as a crime against humanity in Section 7 (1) No. 7 CCAIL to the definition in Article 2 of the Convention and by introducing an autonomous offence of enforced disappearance in the German Criminal Code to cover those cases that do not amount to crimes against humanity.



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