

EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



United Nations
Committee on Enforced Disappearances

via email to: ohchr-ced@un.org
subject: Contribution on Germany (art. 29(4))

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EUROPEAN CENTER FOR
CONSTITUTIONAL AND
HUMAN RIGHTS e.V.

—
ZOSSENER STR. 55-58
AUFGANG D
10961 BERLIN, GERMANY

—
PHONE +49.(030).40 04 85 90
FAX +49.(030).40 04 85 92
MAIL INFO@ECCHR.EU
WEB WWW.ECCHR.EU

Contribution

**to the report on 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)**

—
AMTSGERICHT
BERLIN-CHARLOTTENBURG
VR 26608

—
VORSTAND:
DIETER HUMMEL
LOTTE LEICHT
TOBIAS SINGELNSTEIN

—
GENERALSEKRETÄR:
WOLFGANG KALECK

ECCHR agrees that this contribution is made public.

I. Introduction

The European Center for Constitutional and Human Rights (hereinafter “ECCHR”) respectfully submits this contribution 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 legislative measures to remedy this situation, serious gaps in German criminal law remain that could prevent the punishment of perpetrators of enforced disappearance.

This contribution focuses on the full implementation of the Convention in the German Code of Crimes against International Law and the German Criminal Code, 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 Articles 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 (“Völkerstrafgesetzbuch”/“VStGB”, 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 the definition in Article 2 of the Convention. More specifically, Section 7 (1) No. 7 CCAIL requires three additional elements, which are not only extremely challenging to prove but, more importantly in this context, also not foreseen in Article 2 of the Convention.

First, the offence of enforced disappearance under Section 7 (1) No. 7 CCAIL requires a *severe* deprivation of liberty, while Article 2 of the Convention generally speaks of “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 duration shall not constitute an enforced disappearance.¹ This stands in stark contrast to the fact that victims of enforced disappearance are most at risk of torture or extrajudicial

¹ German Federal Parliament, Legislative materials no. 14/8524, 13 March 2002, available online: <https://dserver.bundestag.de/btd/14/085/1408524.pdf>, p. 21.

killing during the first hours of detention.² Already in the 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 offence 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. Even if one were to assume that the additional requirement of proof of an “inquiry” is in compliance with the Convention, the wording of Section 7 (1) No. 7 is not sufficiently certain, as it does not specify to whom the inquiry must be addressed, how it must be made - especially under circumstances that would pose a security risk to those inquiring - and who must refuse to provide the information.

Third, the offence 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,

² See e.g. Christopher Hall, Article 7 paragraph 1 (i) Enforced Disappearance of Persons, in: Otto Triffterer (eds.), *Commentary on the Rome Statute* (2nd Edition 2008), 271; Lisa Ott, *Enforced Disappearance in International Law* (2011), 187.

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.

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. No full implementation of the Convention in the German Criminal Code

The definition of enforced disappearance in Article 2 of the Convention and, correspondingly, the obligation to criminalize under Article 4 of the Convention are not limited to the context of a widespread or systematic attack directed against a civilian population as required by Section 7 (1) No. 7 CCAIL, but also cover isolated or random cases. However, in the absence of a general and autonomous crime of enforced disappearance in the German Criminal Code (“Strafgesetzbuch”/“StGB”, hereinafter CC), German law falls short of fully implementing the Convention in this respect. There are, in particular, two issues with the Government’s position that other, already existing ordinary offences in the CC, which may be linked with enforced disappearances such as unlawful imprisonment for more than one week, unlawful imprisonment causing serious injury or death to the victim, abandonment, abduction of minors from the care of their parents, etc., provide a sufficient basis to adequately investigate and punish these cases of enforced disappearance.⁷

First, the existing ordinary offences in the CC do not ensure the liability and sanctioning of principal offenders required by Articles 6 and 7 of the Convention.⁸ Defining enforced disappearance as a multidimensional crime, comprising different elements, Article 2 of the Convention not only refers to arrest, detention, abduction or deprivation of liberty but also the subsequent refusal to acknowledge the act or the concealment of the fate or whereabouts of the disappeared person that places such person outside the protection of the law. Article 6 of the Convention, which describes the possible forms of perpetration (direct perpetration, ordering, soliciting, inducing the commission of or attempting to commit), taken together with the definition contained in Article 2, shows that the Convention pursues a very broad range of perpetrators. Thus, direct perpetrators of enforced disappearance include not only those persons who are involved in the capture and subsequent treatment of the disappeared person but also those who knowingly withhold information from relatives of the disappeared and thus facilitate the actions of the previously mentioned offenders. Taking into account the extreme seriousness of the crime, Article 7 of the Convention then provides that these persons must face appropriate punishment. This conceptualization of liability and sanctioning distinguishes the crime of enforced disappearance from the criminal offences currently in place in the CC.

Under these existing offences, persons who, while not directly involved in the initial enforced disappearance, subsequently contributed to the commission of the crime by concealing the location of the disappeared person, may not be held liable and sanctioned as a principal but only as secondary offender. In the vast majority of cases, principal liability under German criminal law attaches only to certain forms of perpetration such as unlawful imprisonment or abduction abroad and not, for instance, to acts of knowingly withholding information or

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.

⁷ For more detailed discussion, see already ECCHR 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/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCED%2FNGO%2FDEU%2F15462&Lang=en.

⁸ For the Government’s position, see Report on additional information submitted by Germany under article 29 (4) of the Convention (CED/C/DEU/AI/1), para. 4 with reference to State Report of the Federal Republic of Germany (CED/C/DEU/1), paras. 9, 23, 28-42.

concealing the fate or whereabouts of the disappeared person. It is therefore questionable whether prosecution could be pursued against a person who, while not knowing the principal offenders, has knowledge of the whereabouts of a disappeared person that, if disclosed, could uncover the crime, and does not disclose the information. Even if this person could – and this would be doctrinally problematic – at least be held liable for ‘in turn’ aiding the principals, the sentence would have to be mitigated under Section 49 (1) CC. However, such outcome would be in breach of the Convention’s obligation to punish to the same extent as principals those persons with knowledge of the whereabouts of the disappeared person who are in a position to reveal the crime but omit to do so.

Even if one were to assume, like the German Government does, that the current criminal offences such as unlawful imprisonment or abduction abroad were sufficient to adequately punish the direct principal perpetrators of enforced disappearance, German criminal law, unlike the Convention, does not consider as principal offenders those persons whose only role in the disappearance is the withholding of information. However, since it is expressly stated that these persons must be appropriately punished, the above represents also a violation of Article 7 of the Convention. This aspect alone is sufficient to necessitate the introduction of a stand-alone criminal offence.

Second, the current legal regime in the CC does not fulfill the Convention’s obligations regarding statute of limitations.⁹ According to Article 8 of the Convention, States Parties are obliged to ensure that any term of limitation applied to enforced disappearance is of long duration and proportionate to the extreme seriousness of the offence. The multidimensional nature of the crime together with the common political implications and the often lengthy period of disappearance, during which it must often be assumed that the disappeared person is deceased, means that in determining a statute of limitation for enforced disappearance regard should be had to the rules for murder in the CC and for crimes contained in the CCAIL, neither of which are subject to the statute of limitations.¹⁰ Especially in politically sensitive cases, it often takes many years for sufficient will to gather to begin an investigation, causing long delays in the prosecutorial process. While, generally speaking, the passage of time may often result in significant pieces of evidence being lost, it is also sometimes the case that some evidence only emerges at a much later point in time.

Under the German CC, the applicable term of limitation is based on the category of criminal offence in question. The existing ordinary criminal offences that are proposed by the Government as sufficient to prosecute cases of enforced disappearance such as unlawful imprisonment, causing bodily harm and obstruction of justice are all subject to varying degrees of punishment and therefore to varying terms of limitation up to a maximum of twenty years. These offences can be applied to a host of other situations involving less serious injustices and lower level violations of legal interests, and it would therefore be highly undesirable to increase the statutory punishments for these offences. Yet – in the absence of a new, stand-alone offence – this would be the only way to provide for a longer term of limitation.

In addition, while in cases of continuing offences such as enforced disappearance or unlawful imprisonment, the statute of limitations does not generally begin to run until the offence has been completed,¹¹ this may not be the case for all offenders. In particular, for individual joint

⁹ For the Government’s position, see Report on additional information submitted by Germany under article 29 (4) of the Convention (CED/C/DEU/AI/1), para. 5 with reference to State Report of the Federal Republic of Germany (CED/C/DEU/1), paras. 48-55.

¹⁰ See Section 78 (2) CC; Section 5 CCAIL.

¹¹ See Section 78a CC. This was also expressly highlighted by the German Government in its Report (State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 52).

principal offenders, the statute of limitations begins to run as soon they have committed their final individual action in the context of the crime. This moment may occur years before the disappeared person is released. If a victim reappears, then the statute of limitations begins to run for all perpetrators. In the case of unlawful imprisonment, the term of limitation would be between five and ten years if the deprivation of freedom lasted more than one week or the offender caused serious injury to the victim. These limitation periods are too short to fulfill the requirements of the Convention. The establishment of a stand-alone criminal offence of enforced disappearance seems like the only reasonable way to extend the applicable term of limitation to reflect the extreme seriousness of enforced disappearance.

3. Relevant case law

As ECCHR has pointed out in its alternative report to this Committee on 12 July 2021, the so called al-Khatib case before the Higher Regional Court in Koblenz cannot serve as best practice. Although crimes against humanity charges were brought by the Federal Public Prosecutor against two Syrian defendants, the crime of enforced disappearance as a crime against humanity was not included. The motion filed by civil party lawyers in the course of the trial with the aim to include such charges, was ultimately rejected by the court. This example shows the discrepancies between the law and practice in German judicial proceedings and the obligations Germany has under the Convention.

Further, the fact that all investigations that have taken place in Germany in the past decades with regards to enforced disappearances, among other crimes, in the so called *Colonia Dignidad* in Chile, were closed, points to the fact that the past and current German criminal law system has been insufficient to address these crimes, especially when committed by German nationals outside German territory. Another case of interest, still under investigation by the Public Prosecutor General of Berlin, is the one of an Argentinean-German suspect of crimes committed under the Argentinean dictatorship in 1976 in Mar del Plata, including allegations of enforced disappearances. The investigation is pending, so that no conclusions can be drawn for the time being in terms of investigations, prosecution and state cooperation. However, it might become relevant in future sessions of the Committee.

III. Conclusion / Recommendation

As this analysis has shown, neither the German CCAIL nor the German CC fully implement the Convention. Therefore, ECCHR calls on the Committee to discuss the identified gaps when reviewing Germany's additional information and to issue a recommendation to Germany to fully implement the Convention by (i) aligning the definition of enforced disappearance as a crime against humanity in Section 7 (1) No. 7 CCAIL with the definition in Article 2 of the Convention and (ii) introducing an autonomous offence of enforced disappearance in the German Criminal Code for those cases that do not amount to crimes against humanity.



Andreas Schüller
Program Director
International Crimes and Accountability
ECCHR e.V.