



EUROPEAN CENTER FOR
CONSTITUTIONAL AND
HUMAN RIGHTS

Amnesty International¹

&

European Center for Constitutional and Human Rights

United Nations Committee on Enforced Disappearances:

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)

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I. Introduction

Amnesty International and the European Center for Constitutional and Human Rights respectfully submit this preliminary briefing on the State Report of the Federal Republic of Germany (hereafter referred to as Germany (CED/C/DEU/1)) to the Committee on Enforced Disappearances for consideration in advance of the adoption of the list of issues at its 5th session in November 2013.

Amnesty International and the European Center for Constitutional and Human Rights hereby present the organizations' analysis on the lack of full implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter "the Convention") by Germany. Both organizations note a number of serious gaps in German national law, especially the Criminal Code ("*Strafgesetzbuch*") which, from the organizations' point of view, are not accurately addressed by the State Party in its Report to the Committee.

On 24 September 2009, Germany ratified the Convention. According to Article 4 of the Convention, State Parties have the obligation to make enforced disappearance a criminal offence under national law; Germany has not yet fulfilled this obligation. The Federal Government claims in its State Report that existing criminal provisions in German law adequately provide for prosecution in any instance of a violation of the Convention.² Amnesty International and the European Center for Constitutional and Human Rights dispute this assertion. There are serious gaps in German criminal law that could prevent the investigation and prosecution of those suspected of criminal responsibility for enforced disappearance.

Amnesty International and the European Center for Constitutional and Human Rights have analyzed a number of cases that have been or could be significant for the German justice system. An analysis has also been carried out based on a fictional case scenario to determine whether existing German criminal provisions are sufficient to ensure that the appropriate investigation and prosecution proceedings can take place.³ The position of Amnesty International and the European Center for Constitutional and Human Rights is that the criminal provisions as they currently stand in the German Criminal Code do not adequately cover instances of the specific offence as defined in Article 2 of the Convention and fail to fulfill the Germany's obligation to criminalize the conduct.

The organizations welcome the express reference by the German Government in its Report to the aforementioned position of Amnesty International and the European Center for Constitutional and Human Rights, and that it promised to engage in a dialogue with civil society to examine "whether and to what extent an addition to German criminal law should be undertaken".⁴ The Report also makes clear, however, that: "the Federal Government does not consider it legal-

²State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 25.

³ The description and examination of the cases mentioned can be provided on request (in German only).

⁴State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 26.

ly necessary to create a new criminal offence of enforced disappearance⁵. Yet the Government's Report does not put forward a convincing case to support this assessment.

II. The obligation to make enforced disappearance criminal under national law

Article 4 of the Convention provides that: “[e]ach State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law”

Germany states in its Report that “[t]here is no specific criminal offence of “enforced disappearance” in German law which specifically covers the definition in article 2 of the Convention”⁶and also adds that “German criminal law ensures that the various forms of commission of enforced disappearance as defined by article 2 are sanctioned by the criminal law”.

Amnesty International and the European Center for Constitutional and Human Rights are of the view that the obligation contained in Article 4 requires that states parties must define enforced disappearance as a separate or independent crime. It is not enough and not in compliance with the Convention, as purported by Germany, to define offences that 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., – all of them ordinary offenses, which do not attract the consequences arising out of crimes under international law, as enforced disappearance. In sum, German courts are not in position to find a person guilty of ‘enforced disappearance’, but of related ordinary crimes.

The German justice system has had to deal with the disappearance of persons in a number of cases over the last decades. At present, at least two criminal investigations are ongoing into instances of disappearances.⁷ The absence of a specific criminal provision in the German Criminal Code has, in the past, made it difficult or impossible to investigate those suspected of criminal responsibility for enforced disappearance in Germany. In many cases, the lack of any prospect of successful legal proceedings has meant that crimes were not pursued by the relevant investigatory authorities or indeed not reported at all. In other cases of disappearance, the investigatory authorities attempted to address enforced disappearance by applying ordinary offenses linked to

⁵State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 25.

⁶State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 20.

⁷ Namely the case on the extraordinary rendition of K. E.-M. by the CIA (Prosecution Authorities Munich) and the case of H. H., former leader of the Colonia Dignidad in Chile, relating to the disappearance of oppositionists within the grounds of the Colonia Dignidad in 1976 (Prosecution Authorities Krefeld).

enforced disappearance, such as unlawful imprisonment, causing bodily harm, obstruction of justice and murder.⁸

Enforced disappearance is a multidimensional human rights violation and an offence comprising more than one act. Taken together, this collection of impingements of legal interests combine to form a new, additional crime which goes above and beyond these individual offences and which conveys the specific injustice of the crime of enforced disappearance. It is this particular injustice which has found expression in the Convention's definition of the crime.⁹ Along with the element of the arrest, detention, abduction or deprivation of liberty, enforced disappearance also involves a second act: refusing to acknowledge the act or the concealment of the fate or whereabouts of the disappeared person. This element of injustice is not adequately reflected in German criminal law as it currently stands. The establishment of a new criminal offence is particularly necessary in view of two distinct issues: the potential for liability as a principal offender for enforced disappearance and the statute of limitations. The German Code of Crimes against International Law ("Völkerstrafgesetzbuch") already criminalizes enforced disappearance, but only where the crime is committed as part of a systematic or widespread attack against a civilian population and, therefore, constituting a crime against humanity. Thus it has already been recognized under German law that enforced disappearance in all its complexity and as defined in the Convention represents a criminal offence. What is needed, however, is criminalization of enforced disappearance in random or isolated cases not amounting to a crime against humanity.

1) Some perpetrators of crimes set out in the Convention can only be tried under German law as secondary participants

⁸ As for example in the cases of K. E.-M. (investigation relating to unlawful imprisonment in addition to causing bodily harm by dangerous means in accordance with §§ 239 (1), (3 no.1), 224, 53 of the Criminal Code) and H. H. (investigation solely relating to murder in accordance with § 211 of the Criminal Code). Furthermore, cases of enforced disappearances in Argentina between 1976 and 1983 led to arrest warrants issued by German courts on charges of murder as long as the dead body had been found, however, in cases in which the whereabouts of the disappeared remain unknown or persons survived, investigations were ceased because of statute of limitations (file no. Prosecution Authorities Nuremberg-Fuerth: 407 Js 41063/98).

⁹ The legal scholars Grammer and Ambos/Böhm have also rightly determined that the specific injustice of this crime is based largely on the uncertainty it brings in relation to the whereabouts of the disappeared person. This uncertainty is fully intended by the perpetrator, since he/she aims to systematically obscure the fate of the disappeared as well as their own tracks. A further characteristic is thus the involvement of public authorities in the crime, not only in that a state-backed system itself assumes responsibility for the unlawful imprisonment, but also that it can withhold information from relatives or hinder them in their search for the disappeared person. See Grammer, *Der Tatbestand des Verschwindenlassenseiner Person, Transpositione in völkerrechtlichen Figur ins Strafrecht*, 2005, p. 130; Ambos, *Desaparición forzada de personas, Análisis comparado e internacional*, 2009, passim.

Article 2 of the Convention defines enforced disappearance and sets out the elements of the offence required to determine what acts should be punishable. Along with arrest, detention, abduction any other form of deprivation of liberty, these elements also include acts such as the refusal to acknowledge the deprivation of liberty and the concealment of the fate or whereabouts of the disappeared person, which place such a 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 concept of perpetrator. 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. This broadly conceived concept of the perpetrator is specifically designed to include actions of administrative, judicial and police apparatus which might impact on a case of enforced disappearance. This feature distinguishes the crime of enforced disappearance from other criminal offences and criminalizes actions that significantly contribute to facilitating the crime. Article 7 of the Convention clearly states that, taking into account the extreme seriousness of the crime, all of these persons must face punishment.

The State Report does not address the question of how German criminal law can guarantee to adequately punish persons who qualify as a principal perpetrator under the Convention, who were not, however, directly involved in the actual enforced disappearance itself but who subsequently contributed to the commission of the crime by concealing the location of the disappeared person. Instead, the report limits itself to listing out the various forms of criminal perpetration by secondary participants foreseen by German criminal law in accordance with §§ 25-27 of the Criminal Code and pointing to the possibility of prosecution of a superior under § 357 (1) of the Criminal Code and the responsibility of military commanders and civil superiors in the cases of systematic enforced disappearance as expressly regulated in §§ 4, 13 und 14 Code of Crimes against International Law.¹⁰

Based on the existence of the previously mentioned provisions, the German Government correctly determines that “committing, being complicit and participating” are all punishable under German law and that “[a]gainst this background, ordering, soliciting as well as inducing commission of a criminal offence is covered by German criminal law as secondary participation; in some instances, which depend on the specific case, it may even result in prosecution as a principal”.¹¹ The State Party’s conclusion that this then fulfills the requirements of the Convention cannot, however, be accepted. Providing an abstract list of the forms of perpetration under Ger-

¹⁰State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 28-42.

¹¹State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 33.

man criminal law sheds no light on whether in a particular case a person who, under the Convention, should be punished as a principal and not as a secondary offender, could be prosecuted and brought to justice as such on the basis of the German Criminal Code. Under the present laws, this is currently not the case.

In the vast majority of cases, liability as a principal offender under German criminal law, applies only to those forms of perpetration such as unlawful imprisonment or forcible transportation abroad (“*Verschleppung*”), and not for instance to acts of knowingly withholding information or concealing the fate or whereabouts of the disappeared person. Under the criminal laws currently in place, it is questionable whether prosecution could be pursued against a person who does not directly know the principal offenders but who has knowledge of the whereabouts of a disappeared person which, 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 § 49 (1) of the Criminal Code. This would be in breach of the obligation under the Convention 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,¹² that the current criminal offences such as unlawful imprisonment or forcible transport abroad would be sufficient to adequately punish the direct principal perpetrators of enforced disappearance,¹³ 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. Since, however, it is expressly stated that these persons must be appropriately punished, the above represents a violation of Article 7 of the Convention. This aspect alone is sufficient to necessitate the introduction of a stand-alone criminal offence.

2) Statute of Limitations

¹²State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 28 *et seq.*

¹³ It must be noted that even the existing criminal offences referred to in relation to enforced disappearance are subject to conditions that are too narrow, as with the criminal offence of forcible transportation abroad (*Verschleppung*), which requires a danger of political persecution, or the offence of qualified unlawful imprisonment, which provides specifically for deprivation of freedom lasting more than one week. Thus, both offences are more narrowly defined than stipulated by the Convention in relation to enforced disappearance. A similar problem arises with regard to the offence of murder, which has no term of limitation, but which does have a particularly high standard of proof; this standard is often impossible to attain in cases of enforced disappearance due for instance to the absence of a corpse as evidence. As such, this offence is only to a very limited degree suited to fulfilling the prosecutory requirements contained in the Convention.

Furthermore, under Article 8 of the Convention, States Parties are obliged to ensure that any term of limitations applied to enforced disappearance is of long duration and proportionate to the extreme seriousness of the offence. The multidimensional nature of the human rights violation together with the common political implications and the often lengthy period of disappearance, during which time 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 and for crimes under the Code of Crimes against International Law, neither of which are subject to the statute of limitations. In politically sensitive cases, it often takes many years for the necessary political action to be taken to begin investigate a case, causing long delays in the prosecutory process.¹⁴ While, generally speaking, the passage of time can often result in significant pieces of evidence being lost, it is also sometimes the case that some evidence only emerges after a long period of time has elapsed.

The German Government remains quite vague on the issue of the statute of limitations. Its Report limits itself to listing out the terms of limitation that currently apply to those offences relating to individual, non-systematic acts of enforced disappearance and, in connection with systematic enforced disappearance, to pointing to § 5 of the Code of Crimes against International Law, which sets out the non-applicability of any term of limitation to crimes contained in the Code of Crimes against International Law.¹⁵ While the latter provision fulfills the requirements of the Convention, a number of problems arise in connection with the term of limitation for non-systematic incidents of enforced disappearance since none of the listed terms of limitation in the Criminal Code can be adjusted to constitute an adequately lengthy term of limitation.

Under the German Criminal Code, the applicable term of limitation is based on the category of criminal offence in question. The criminal offences that have to date been relied on in order to prosecute cases of enforced disappearance such as unlawful imprisonment, causing bodily harm and the 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 for this reason 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.

On top of this is the fact that in cases of continuing offences such as enforced disappearance or unlawful imprisonment, the statute of limitations does not generally begin to run until the of-

¹⁴ See, e.g., the Report of the European Parliament from 2 August 2012 calling for increased prosecution for cases of enforced disappearances occurring in the context of the CIA rendition cases: Report on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)).

¹⁵State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 48-55.

fence has been completed.¹⁶ It must however be noted that for individual joint principal offenders, this will mean that the statute begins to run as soon they have committed their final individual action in the context of the crime.¹⁷ This point in time can therefore 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 is the only reasonable way to extend the applicable term of limitation.

3) Principle of universal jurisdiction does not apply to non-systematic forms of enforced disappearance

The Convention expressly puts individual acts of non-systematic enforced disappearance on an equal footing with systematic occurrences of the crime. Now, individual cases of ‘ordinary’ or non-systematic enforced disappearances are also punishable and must be prosecuted. This new development is particularly relevant to Germany, since cases such as the one relating to the abduction of *K. E.-M.* could become relevant as they may be qualified as instances of non-systematic enforced disappearance.¹⁸ The report of the German Government deals with both types of enforced disappearance and yet makes no mention of the existing differences (clearly evident from the report) in their potential for prosecution. This approach is not in keeping with the requirements of the Convention.

Under Article 9 (2) of the Convention, when an alleged offender is present in any territory under the jurisdiction of a state party, that state is obliged to either itself initiate criminal proceedings, or extradite the person to another state that is willing and able to prosecute or surrender the person to an international criminal tribunal whose jurisdiction it has recognized (*aut dedere aut iudicare*). This obligation, read correctly, also includes the obligation to exercise jurisdiction on the basis of universal jurisdiction where necessary.¹⁹

¹⁶ See § 78a of the Criminal Code. This was also expressly highlighted by the Federal Republic in its Report. See State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 52.

¹⁷ Fischer, *Strafgesetzbuch*, 59th ed., 2012, art. 78a, § 4.

¹⁸ This is also recognized by the Federal Government in its Report when it names the *K. E.-M.* case as an example of the exercise of jurisdiction pursuant to Art. 9 (1) of the Convention “to the extent that the circumstances of his detention may be classified as “enforced disappearance” within the meaning of the Convention”, State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 60.

¹⁹ See: Amnesty International, International Law Commission: The obligation to extradite or prosecute” (IOR 40/001/2009), p.8.

Systematic enforced disappearance under § 7 (1) no. 7 of the Code of Crimes against International Law is seen as a crime against humanity under German law, with the result that it is subject to the principle of unlimited universal jurisdiction under § 1 VStGB. In connection with non-systematic enforced disappearance, the German Government refers in its report to § 7 (2) No. 2 of the Criminal Code.²⁰ This provision, however, is based on the so-called ‘principle of representative criminal justice’ (“*Prinzip der stellvertretenden Strafrechtspflege*”) in accordance with which German courts exercise their jurisdiction merely as a representative of another state with the result that the process depends on the criminal law provisions on liability for the crime in that other state. This process brings with it a number of problems that would not arise when applying the principle of universal jurisdiction. An initial hurdle is that the state being represented must have criminal provisions that are similar to the German provision in terms of the scope of the legal interests they protect. The German judiciary might also have to take into account elements of the other state’s criminal law such as mitigating factors or exemptions from punishment. Considering that it is precisely those states in which the practice of enforced disappearance is widespread that frequently try to provide legal legitimacy for such practices, punishing offenders based on the principle of representative criminal justice is often problematic. This is particularly true for those states that have not ratified the International Convention for the Protection of All Persons from Enforced Disappearance.

Finally, the German Government made no reference in this context to § 6 No. 9 of the Criminal Code, which provides for prosecution under universal jurisdiction in cases in which – such as on the basis of the principle of *aut dedere aut iudicare*– the possibility of universal exercise of jurisdiction is provided for under international law.²¹ This would potentially be one way to provide for appropriate prosecution in cases of non-systematic enforced disappearance.

III. The right to reparations

Article 24(4) of the Convention provides that “[e]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation”.

Upon depositing the instrument of ratification Germany made unilateral statements with regard to five provisions contained in the Convention. Despite the clear and categorical wording of Article 24(4), the following unilateral statement was made by Germany: “It is clarified that the

²⁰State Report of the Federal Republic of Germany (CED/C/DEU/1), para. 61.

²¹ Particularly affirmative in connection with Article 9 (2) of the Convention against Enforced Disappearance: Ambos in: *Münchener Kommentar zum Strafgesetzbuch*, § 6.

envisaged provision on reparation and compensation does not abrogate the principle of state immunity.”

That unilateral statement made by Germany is not a declaration (a unilateral statement, however phrased or named, made by a state, whereby that state purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions²²), but is a reservation (a unilateral statement, however phrased or named, made by a state, whereby the state purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to it).²³

In addition, that reservation made by Germany may prevent victims and their relatives in Germany from obtaining reparation from a foreign state or from its officials or agents for enforced disappearance committed outside Germany. That restriction – which is not contained in the Convention – is inconsistent with international law and standards guaranteeing victims of human rights violations their right to a remedy.

In sum, Amnesty International and the European Center for Constitutional and Human Rights consider the unilateral statement made by Germany regarding Article 24(4) as a reservation which defeats the object and purpose of the Treaty and is, therefore, null and void.

Germany, as any other state party of the Convention, should eliminate any claim to immunity that would bar civil claims for reparation for enforced disappearances, whether in civil or criminal proceedings.

IV. Conclusion

An overview of German criminal law shows that the current provisions of the Criminal Code are not sufficient to address the specific injustice expressed in the definition contained in Article 2 of the Convention and fail to fulfill the Convention’s obligations related to the duty to investigate and prosecute. The full implementation of the Convention requires the introduction of a new, stand-alone criminal provision. As such, the German Government’s strategy of relying on existing criminal law is unconvincing. The establishment of a new criminal provision would also send a clear signal that the implementation of the Convention is being taken seriously and would allow the establishment of statutes of limitations of long duration, which are proportionate to the extreme seriousness of the offence. Germany should further make the necessary steps to apply the principle of *aut dedere aut iudicare*, including on the basis of universal jurisdiction where necessary, for non-systematic forms of enforced disappearances.

²² Article 1.2., Definition of Interpretative declarations, Guide to Practice on Reservations to Treaties, International Law Commission (ILC), 2011.

²³ “Article 1.1., Definition of reservations, ILC Guide to Practice on Reservations to Treaties.

This would be in line with the UN Working Group on Enforced or Involuntary Disappearances' long-standing calls to introduce criminal provisions on enforced disappearance outside the context of crimes against humanity. Furthermore, the introduction of a stand-alone criminal provision would conform with the commitment to international law laid down in the German Basic Law.