Deutsches Institut
für Menschenrechte

Submission

Review of Germany by the Committee on Enforced Disappearances

on the basis of the report submitted by Germany under Art. 29 (4) of the ICPPED

24th Session of the CED

February 2023

Contents

1 Preliminary Remarks

The German Institute for Human Rights (hereinafter: GIHR) is the independent National Human Rights Institution in Germany. It is accredited by GANHRI according to the Paris Principles of the United Nations (A-status) [1]. The GIHR's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organizations.

This submission is limited to particular aspects of the additional information submitted by Germany on 3 July 2020 (CED/C/DEU/AI/1) which have been raised by the Committee on Enforced Disappearances (hereinafter: the Committee), civil society organisations, academia, and the State Party since the ratification of the Convention for the Protection of All Persons from Enforced Disappearance (hereinafter: the Convention) but have not seen substantive progress yet. The GIHR considers these aspects as particularly relevant for a comprehensive and credible implementation of the Convention in the German Criminal Code as well as the German Code of Crimes against International Law.

2 Introduction

In its concluding observations on the report submitted by Germany under Article 29 (1) of the Convention on 14 March 2014, the Committee clearly noted that "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. As a rule, the Committee considers that reference to a range of existing offences is not enough to meet this obligation as the offence of enforced disappearance is *not a series of different crimes, but rather a complex and single offence*"[2].

Following the Committee's request to submit specific and updated information pursuant to Article 29 (4) of the Convention on the implementation of all its recommendations and any new information on the fulfilment of the obligations from the Convention, Germany provided this additional information on 3 July 2020.

The GIHR considers this information to be insufficient with regard to the above mentioned finding of the Committee. The Federal Government has not provided new arguments on how existing offences in the German Criminal Code (hereinafter: CC) would comprehensively meet the obligations arising from Article 4 and has not taken legislative measures to close significant gaps in German criminal law which could prevent the punishment of perpetrators of enforced disappearance.

Additionally, the Federal Government argues that the criminal proceedings at the Koblenz Higher Regional Court against two members of the Syrian intelligence service "demonstrate that the provisions of German law allow criminal prosecution in the

---

1 See OHCHR and GANHRI, *Accreditation status as of 13 July 2022*, available at: https://ganhri.org/wp-content/uploads/2022/08/StatusAccreditationChartNHRIs_July-2022.pdf.

2 CED/C/DEU/CO/1, para. 7 [emphasis added].

constellation described in article 9 paragraph 2 of the Convention"[3]. However, no charges on the offence of enforced disappearances were brought by the Federal Prosecutor because the provisions of German Code of Crimes against International Law (hereinafter: CCAIL) could not be met. This was directly related to the definition of enforced disappearances in the CCAIL under section 7 (1) No. 7 not being consistent with the definition in Article 2 of the Convention. Thus, contrary to the Federal Government's argumentation, the Koblenz trial cannot suffice as an example for effective punishment of perpetrators of enforced disappearances under the Convention.

3 Enforced disappearances in criminal law

The Convention obliges States Parties in Article 4 to take the necessary measures to ensure that enforced disappearance constitutes a criminal offence under their national criminal law. According to Article 5 of the Convention, the widespread or systematic practice of enforced disappearance constitutes a crime against humanity within the meaning of international law and entails the consequences provided for under that law. Article 2 defines enforced disappearance as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the 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". The definition thus covers two forms of enforced disappearance - the deprivation of liberty of a person with subsequent concealment of his or her whereabouts and the concealment of the whereabouts of a person previously deprived of his or her liberty.

The CC does not contain an autonomous criminal offence of enforced disappearance. The CCAIL standardises enforced disappearance as a crime against humanity, but imposes conditions that are more restrictive than those of the Convention.

3.1 Implementation of Article 4

In its additional information of 3 July 2020, Germany points out, as it did previously in its 2012 report[4], in its response to the Committee's List of Issues of February 2014[5], and in its information submitted in response to the concluding observations of April 2015[6], that existing German criminal offences and other laws were sufficient to adequately investigate and punish cases of enforced disappearance. A number of provisions of the CC are cited as justification, including offences against personal freedom, bodily harm and homicide, obstruction of justice, denial of justice and failure to render assistance. Of these offences, the unlawful imprisonment under section 239 of the CC, according to which a person who imprisons or otherwise subjects a person to deprivation of liberty is liable to prosecution, comes closest to the definition of enforced disappearance in Article 2 of the Convention. In any case, the disappearance of a person involves the deprivation of his or her liberty.

---

3 CED/C/DEU/AI/1, para. 7.
4 CED/C/DEU/1.
5 CED/C/DEU/Q/1/Add.1.
6 CED/C/DEU/CO/1/Add.1.

However, Germany's argumentation still fails to recognise the seriousness and complexity of the crime of enforced disappearance and the broad range of possible perpetrators. The specific unlawful content of enforced disappearance is not taken into account in section 239 of the CC as this offence is already fulfilled if a person's freedom of movement is temporarily suspended. The specific feature of enforced disappearance in the sense of the Convention, however, is that it is committed by state officials or with the support or authorisation of the state, deprives the victim of any protection under the rule of law, endangers his or her life and exposes him or her to the risk of torture. It not only violates the legal interest of the victim's personal freedom, but also public peace and public security. In addition, the offence impairs the legal interests of the victims, who according to Article 24 include the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance, and who are burdened by the uncertainty about the fate of the disappeared person. These aspects do not apply to section 239 of the CC, just as they do not apply to the other norms of the CC referred to by Germany. The enforced disappearance of a person is not a combination of different offences, but a single and multidimensional crime. Its content can only be properly covered by an autonomous offence of enforced disappearance.

There are justified doubts as to whether the criminal offences of the CC listed by Germany can cover all possible cases comprised by Article 2 of the Convention. This applies in particular to the second variant of the offence, the concealment of the fate of a disappeared person. If the arrest of a person is not unlawful - e.g. on the basis of an arrest warrant issued in accordance with national law - the person refusing to provide information cannot be considered to have participated in a deprivation of liberty under section 239 of the CC. However, even in the case of an unlawful deprivation of liberty, the person *concealing the whereabouts* can only be punished as a perpetrator of section 239 of the Criminal Code if he or she assisted in the *deprivation of liberty*. Even the person’s criminal liability for aiding the deprivation of liberty is excluded if at the time of the concealment the deprivation of liberty has already ended - for example due to the death of the victim. In this case, liability for participation in the offence under section 239 of the Criminal Code is no longer possible due to the lack of a principal offence. In all these cases, punishment on the basis of the offences listed in the additional information in addition to deprivation of liberty is also not guaranteed. The penal provisions of aiding after the fact (section 257 CC) and obstruction of prosecution or punishment (section 258 CC) require narrowly defined subjective elements of the offence. Moreover, just like the criminal provision of failure to render assistance (section 323c CC), they do not contain a threat of punishment adequate to the extraordinary seriousness of the act of enforced disappearance.

Not only with regard to their constituent elements, but also with regard to the threat of punishment, the listed penal provisions do not sufficiently fulfil the obligations under the Convention. Article 7 para. 1 of the Convention obliges the States Parties to punish the offence of enforced disappearance with penalties that take into account the extraordinary seriousness of the offence. The basic offence of deprivation of liberty under section 239 CC is a misdemeanour punishable by a term of imprisonment of up to five years or a fine. The same range of punishment applies to aiding and abetting and obstruction of prosecution or punishment; failure to render assistance under section 323c of the CC is only punishable by imprisonment of up to one year or a fine. Only for qualified forms of deprivation of liberty is a higher range of penalties provided,

namely from one year to ten years imprisonment if the offender deprives the victim of liberty for more than one week or causes serious damage to the victim's health by the act or by an act committed during the act, and not less than three years imprisonment if the offender causes the victim's death by the act or by an act committed during the act. It must still be taken into account that in the case of participation not as a perpetrator but as an aider and abettor, the sentence is to be mitigated compulsorily.

According to Article 8 of the Convention, the State Party must ensure that the term of limitation in criminal prosecutions is of long duration and proportionate to the exceptional seriousness of the offence. In German criminal law, the term of limitation is five years for offences punishable by a maximum term of imprisonment of more than one year and up to five years, and ten years for offences punishable by a maximum term of imprisonment of more than five years and up to ten years. Whether these time limits allow for such a prosecution of all cases of enforced disappearance that takes into account the extraordinary seriousness of the crime seems at least questionable.

A specific example to illustrate some of the difficulties described above is the case of the "abduction" of a Vietnamese national from Germany in 2017[7]. A judgement was handed down by the Berlin Court of Appeal on 30 January 2023, in which one of the parties involved was sentenced to five years' imprisonment for working as agent for intelligence service (section 99 CC) and aiding deprivation of liberty (sections 239, 27, 49 of the CC). The decision is not yet final.

According to the court's findings, the accused participated in the abduction as part of a Vietnamese intelligence operation by, among other things, driving the vehicle in which the victim was taken from the Vietnamese embassy in Berlin to Bratislava (Slovakia). This conduct is likely to meet the requirements of the definition of enforced disappearance in Article 2 of the Convention. However, the court did not consider a conviction for enforced disappearance, due to the lack of such an offence in the CC. If an offence corresponding to definition in the Convention had existed in the CC, the accused could probably have been convicted not only of aiding the deprivation of liberty, but as a perpetrator of the crime of enforced disappearance. This would have eliminated the mandatory mitigation for aiding and would have allowed the court to impose a sentence that took into account the extraordinary seriousness of the crime of enforced disappearance (Article 7 (1) of the Convention).

3.2 Implementation of Article 5

According to Article 5 of the Convention the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law. In implementation of the Rome Statute of the International Criminal Court, the CCAIL came into force in Germany in 2003. Section 7 (1) No. 7 standardises the enforced disappearance of a human being in the context of a widespread or systematic against any civilian population as a crime against humanity and as a rule punishes it with imprisonment for not less than five years. Section 7 (1) No. 7 CCAIL covers in its first alternative the deprivation of liberty with subsequent concealment and in its second alternative the refusal to provide information about the

---

7 The context and proceedings of the case are described in para. 8 of the additional information submitted by Germany on 3 July 2020 (CED/C/DEU/AI/1).

whereabouts and fate of the victim of a deprivation of liberty. However, the definition of enforced disappearance in Article 7 para. 2 i) of the Rome Statute does not fully correspond to the definition in Article 2 of the Convention. Accordingly, the definition of the offence in section 7 (1) No. 7 CCAIL is narrower in various respects than Article 2 of this Convention.

Section 7 (1) No. 7 CCAIL requires an explicit *inquiry* about the whereabouts of the disappeared person. In the situation of an extensive or systematic attack against the civilian population, however, even asking the authorities or the military about the whereabouts of a disappeared relative or acquaintance will often entail considerable risks for the person asking. This leads to inquiries not being made and the criminal offence of enforced disappearance according to section 7 (1) No. 7 CCAIL then not being fulfilled. The criminal proceedings before the Koblenz Higher Regional Court against members of the Syrian secret service clearly illustrated this problem. The trial did lead to the conviction of the main defendant for a crime against humanity. However, the crime of enforced disappearance was not even mentioned in the indictment of the Office of the Attorney General, although the requirements of Article 2 of the Convention were undoubtedly met. For the indictment of this variant of a crime against humanity, there was a lack of sufficient proof that the inquiry required by section 7 (1) no. 7 CCAIL had been made. This misses the reality on the ground and fails to meet the requirements of the Convention.

Also with regard to the subjective side of the offence, section 7 (1) No. 7 CCAIL imposes requirements that go beyond Article 2 of the Convention. In both alternatives, the provision requires the *intention* of the perpetrator to deprive the victim of the protection of the law for a longer period of time, with the perpetrator's intention precisely being this consequence of his or her actions. The crime of enforced disappearance, however, is regularly committed within the framework of an extended or systematic attack against the civilian population is regularly committed by a plurality of state-supported perpetrators whose motivation can be highly diverse. It will often not be possible to prove that the perpetrator of a single act of the complex offence is specifically concerned with depriving the victim of the protection of the law for a longer period of time. In this case, a conviction under section 7 (1) No. 7 CCAIL is not an option.

Finally, the requirement of a *longer period of time* with regard to the removal of the victim from the protection of the law is the third aspect of the definition under section 7 (1) No. 7 CCAIL that does not comply with Article 2 of the Convention, taking into consideration the Committee’s decision “Yrusta v. Argentina”[8].

---

[8] CED/C/10/D/1/2013, para. 10.3.

4 Conclusion

Neither the existing offences in the German CC nor the provisions in section 7 (1) No. 7 CCAIL allow for the punishment of perpetrators of enforced disappearances according to Articles 2, 4, and 5 of the Convention.

For Germany to fully implement its obligations under the Convention, the GIHR recommends that the legislature closes the gaps that could prevent holding perpetrators of enforced disappearances to account and include a separate criminal offence of enforced disappearance in the CC and amend the CCAIL accordingly.

As Germany in its additional information (para. 6) and previous documents refers to the "symbolic impact" of having a separate criminal offence of disappearances, the GIHR would like to recall that fully implementing obligations from international human rights convention has a benefit beyond a mere symbolic value. The following quote from the opening statement of the chair of the German delegation during the dialogue in March 2014 might underline this point: "Because Germany has become a stable democracy under the rule of law, enforced disappearances are not a matter of practical relevance in our country today. However, we are well aware that this has not always been the case … and that preserving the rule of law takes continuous effort. We have learnt from our past how quickly lawless regimes can take over a society, and *how important it therefore is to install structural legal safeguards against all possible kinds of human rights violations*."[9]

Imprint

German Institute for Human Rights
Zimmerstrasse 26/27, 10969 Berlin, Germany
Phone: +49 30 25 93 59-0
Fax: +49 30 25 93 59-59
info@institut-fuer-menschenrechte.de
www.institut-fuer-menschenrechte.de/en

CONTACT: Dr. Anna Würth

LICENSE: Creative Commons (CC BY-NC-ND 4.0)
https://creativecommons.org/licenses/by-nc-nd/4.0/deed.en
February 2023

German Institute for Human Rights

The German Institute for Human Rights is the independent National Human Rights Institution of Germany (§ 1 GIHR law). It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organizations. It is supported by the German Bundestag. The Institute is mandated to monitor the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and established Monitoring Bodies for these purposes.

---

9 Opening Statement to the presentation of the first State Party report of the Federal Republic of Germany pursuant to the International Convention for the Protection of all Persons against Enforced Disappearances on 17th and 18th March 2014 in Geneva [emphasis added]; https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCED%2FSTA%2FDEU%2F16809&Lang=en.