

Written Contribution
of the
German Institute for Human Rights
to the UN Special Rapporteur on contemporary forms of racism, racial discrimination,
xenophobia and related intolerance's report on "Glorification of Nazism"

I. Introduction

The German Institute for Human Rights, the A-status National Human Rights Institution of Germany, commends the Human Rights Council and the Special Rapporteur on their continual attention on the issue of glorification of Nazism. It submits the following contribution concentrating on the issue of penalizing the denial of the Holocaust in the light of international human rights norms.

As the German national human rights institution, the Institute's work against racism is based on the principle that the holocaust, which resulted in the murder of six million Jews, alongside half a million Sinti and Roma, must never be forgotten.

Germany was shocked about a series of right-wing terrorist murders of migrants exposed in 2011. These racist murders were committed by a group which in its name "national-socialist underground" (NSU) directly refers to the National-socialist regime.

Like several other states, Germany has penalized the approval, denial or belittlement of the holocaust in its domestic law (sect. 130 para 3 German penal code). The legitimacy of such penalizations in the light of the freedom of opinion and expression has been put in question by some. In the present contribution, therefore, the Institute presents some considerations on the justification of such laws in the lights of international human rights.

II. Penalizing the denial of the Holocaust/Shoah as racist hate speech

Article 4 International Convention on the Elimination of Racial Discrimination (ICERD) and Article 20 of the International Covenant on Civil and Political Rights (ICCPR) are exceptional for human rights treaty in that they oblige States Parties to penalize certain acts, including certain types of speech. These provisions are an emanation of the States' obligation to protect. They concretize this obligation and thus limit the States' freedom of choosing the appropriate means of protecting their population against racist discrimination or racist violence by private individuals. Conversely, there is a danger of States misusing Article 4 (a) so as to censor communication or to impose sanctions on individuals, in particular, on media and journalists.

A particular category of laws against racist hate speech are laws that penalize the denial of the existence of the Holocaust. Their justification is not and cannot the protection of a historical truth because, as the Human Rights Committee in its General Comment No. 34 stated,

"[I]aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for

freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.”

Read out of context, this statement can be misunderstood or misconstrued as expressing an absolute bar to laws penalizing the existence of the Holocaust. In fact, persons denying the Holocaust have started in Germany to make this argument.

Such laws are compatible with human rights if they are justified under Article 19 (3) or Article 20 ICCPR. This is why the Human Rights Committee, in its General Comment No. 34 cited above, continues by stating that “[r]estrictions on the right of freedom of opinion should (...) not go beyond what is permitted in paragraph 3 or required under article 20.” Applying this standard in a case concerning a law penalizing the denial of the Holocaust, the Human Rights Committee held that

“[s]ince the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author’s freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.”

The Human Rights Committee considered the law in question necessary because it had been enacted to combat racism and anti-semitism and because the Committee found no reason to contest the characterization of “the denial of the existence of the Holocaust as the principal vehicle for anti-semitism.” Thus, the Human Rights Committee saw the central justification of the law in the protection of the rights of individuals to be free from a type of racism, viz. anti-semitism, as an ideology that instills profound fear in the members of the group targeted.

Consequently, penalizing the denial of a genocide can be justified if the State shows that this denial transmits a racist ideology and hence constitutes hate speech under Article 4 (a) or a restriction of freedom of opinion under Article 19 (3) ICCPR.