



Submission in view of the upcoming Consideration of the List of issues on Germany regarding its Implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (CED/C/DEU/1)

by

TRIAL (Swiss Association against Impunity)

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TRIAL (*Swiss Association against Impunity*) appreciates the opportunity to bring to the attention of the Committee on Enforced Disappearances (“the CED”) the following list of questions related to the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (“the Convention”) by Germany.

Definition and criminalization of enforced disappearance (Arts. 1-5)

Art. 1:

- ▶ Insofar as the situation of “state of defence” (Art. 115a Basic Law) is concerned, the exceptional extension of the period of detention without any judicial supervision made possible by Art. 115c Section 2, number 2 restricts the fundamental right of personal liberty and might create conditions conducive to the violation of certain human rights, in particular the right not to be subjected to an enforced disappearance. How does German legislation guarantee an absolute prohibition of enforced disappearance that would be applicable even in the exceptional circumstances of a state of defence?

Art. 2:

- ▶ How can German law have incorporated the definition of enforced disappearance present in the Convention (§17) when there is no specific crime of enforced disappearance in its national law?
- ▶ What is the exact purpose and scope of the ratifying legislation of 30 July 2009 (§17)?

Art. 4:

- ▶ How is the German government’s point of view about the lack of necessity of a specific criminal offence of enforced disappearance under national law in accordance with Art. 4 of the Convention as interpreted so far by the CED?

- ▶ Does the German government not deem that providing for a specific crime of enforced disappearance with all the constitutive elements embodied in Art. 2 of the Convention under national law would rationalise and facilitate the criminal repression of the authors of enforced disappearances and further protect the absolute right not to be subjected to an enforced disappearance?
- ▶ Could the German government describe more extensively and with reference to a specific timeframe the dialogue engaged with civil-society groups concerning the possible introduction of the separate offence of “enforced disappearance” in German criminal law (§24)?

Art. 5:

- ▶ The crime against humanity of enforced disappearance as codified by Section 7(1), no. 7 of the Code of Crimes against International Law (VStGB) seems to require the proof of a double intent: “the intention of removing him or her from the protection of the law for a prolonged period of time”. How is this consistent with the definition of enforced disappearance contained in Art. 2 of the Convention and applicable international law that considers the “placement outside the protection of the law” as a mere consequence of the enforced disappearance itself?

Criminal repression and cooperation in criminal matters (Arts. 6-15)

Art. 6:

- ▶ One of the constitutive elements of the offence of enforced disappearance is the refusal to acknowledge the deprivation of liberty of the victim, or the concealment of his or her fate or whereabouts. In the absence of a specific offence of enforced disappearance, how does German legislation criminally prohibit the concealment of the fate and whereabouts of a detained persons or the refusal to acknowledge his/her deprivation of liberty?
- ▶ Is there a distinction in the nature of criminal responsibility of military commanders and civilian superiors regarding the specific crime of enforced disappearance when committed as a crime against humanity or when committed as an isolated crime?
- ▶ Is there a provision in German legislation explicitly setting out that orders or instructions prescribing, authorizing or encouraging acts of enforced disappearance are prohibited and ‘manifestly unlawful’?
- ▶ Could the German government elaborate on how the so-called “state of necessity” could be invoked as a defence in cases of enforced disappearance (§40)?

Art. 7:

- ▶ Does the notion of “basic criminal offences” mentioned in §41 comprise also abduction and manslaughter? If not, why are there different regimes for aggravating factors?
- ▶ The wide gap between the minimum and maximum penalties prescribed for the offences that could characterise an enforced disappearance under German law (from 1 year to life imprisonment) gives

courts a broad margin of discretion when imposing such penalties. Does the German government think that the minimum sentence provided in national legislation is in line with Art. 7 of the Convention and takes into account the extreme seriousness of the offence?

- ▶ Could the German government list all the aggravating factors which can be applied to enforced disappearance? (§44)
- ▶ What are the “other mitigating circumstances” mentioned in §45?
- ▶ Are the mitigating circumstances applicable for crimes against humanity valid also in case an offence of enforced disappearance is committed as an isolated act?

Art. 8:

- ▶ Are the statutes of limitations of 3, 5 and 10 years provided for all the enforced disappearance-related criminal offences (except when the enforced disappearance leads to the death of the person) (§48) in accordance with Art. 8 of the Convention, that prescribes statutes of limitations of long duration and proportionate to the extreme seriousness of the offence?
- ▶ Is there a distinction made between the statute of limitation for civil tort claims and criminal proceedings?
- ▶ Criminal prosecution is statute-barred when double the statutory limitation period has expired since the statute first began to run (§51). Is this rule absolute, even in cases in which the victim has no effective or available remedy?

Art. 9:

- ▶ Territorial jurisdiction is provided by Arts. 3 and 4 of StGB. Does that include only German territory or also other territories and situations subjected to German jurisdiction or effective control?
- ▶ According to Section 7(2) no. 2 of StGB one of the conditions for German tribunals to exercise universal jurisdiction is that the offender is “discovered in Germany” (§59). Does that mean that the offender must be present in Germany in order to open an investigation or, for that matter, is it sufficient that there are elements that indicate that the person is likely going to be present on German territory in the future?
- ▶ One of the conditions for German tribunals to exercise universal jurisdiction is that the act must be punishable at the place of the offence or the place of the offence must not be subject to any criminal law enforcement. Is the double jeopardy principle in accordance with the obligation under Art. 9 of the Convention?

Art. 10:

- ▶ Is there a maximum limit for the period of time a person can be held in remand detention under German legislation?

Art. 11:

- ▶ Do military courts have jurisdiction over the crimes related to enforced disappearance under German legislation?
- ▶ Are amnesties and pardons permissible for the crimes related to enforced disappearance under German legislation?

Art. 12:

- ▶ What measures are available for the protection of the complainant, witnesses, relatives, defence counsel or other persons participating in the investigation against ill-treatment or intimidation?
- ▶ Are there any restrictions (such as “state secrets privilege”) regarding access to the documentation and other information useful for the investigation by the authorities?
- ▶ Is there any automatic administrative disqualification in case an official is suspected of the criminal offence of enforced disappearance pending the investigation?

Art. 13:

- ▶ What is the legal basis for extradition with regard to those states with which there is no extradition treaty?
- ▶ Are there any other obstacles to extradition (such as “non extradition of nationals”, etc.) in German law?

Art. 15:

- ▶ What kind of cooperative assistance to victims is provided by Germany? (§88). Under which legal basis?

Measures preventing enforced disappearance (Arts. 16-23)

Art. 17:

- ▶ How is “secret detention” defined in German law?
- ▶ Is there an express provision under German legislation that guarantees that the persons deprived of their liberty are held in officially recognized and supervised places of detention? Do the same rules apply to the actions of intelligence services?
- ▶ What are the guarantees in place for detainees held *incommunicado*, such as for example pursuant to Section 114c (1) of StPO?
- ▶ Are the visits made by the mechanisms of inspection (National Agency for the Prevention of Torture, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, responsible ministries of the Länder) unannounced?

- ▶ Are statistics and the status of all pending investigations into allegations of ill-treatment and torture of detainees and deaths in custody available? Are they made public?
- ▶ In the official registers of persons deprived of liberty held at the detention facilities, is there any mention of the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty? Is there any mention, in case of death during the deprivation of liberty, of the circumstances and cause of death and the destination of the remains? Is there any mention of the date of the transfer to another place of detention and the destination and the authority responsible for the transfer?

Art. 18:

- ▶ Who can demonstrate a legitimate interest to have access to information on a person deprived of liberty pursuant to Section 475 (1) and (4) StPO?

Art. 20:

- ▶ Access to the investigation files of the accused held in remand detention or provisional arrest “is *usually* to be granted” to the defence counsel (§135). When exactly, according to the law, access can be denied?

Art. 22:

- ▶ Are the following conducts punished under German legislation:
 - Delaying or obstructing the right of any persons with a legitimate interest to take proceedings before a court?
 - Failure of the official responsible for the official register to record the deprivation of liberty or to modify well known inaccurate information?
 - Refusal to provide information on the deprivation of liberty of a person or provision of inaccurate information?

Measures of reparation and protection of the children (Arts. 24-25)

Art. 24:

- ▶ Is the definition of victim in civil law the same as in criminal law under German legislation (§154)?
- ▶ Who can be defined as an “aggrieved person” in cases of enforced disappearances? Is that the same if the criminal offence is one of the crimes related to enforced disappearances currently present under German legislation? Please provide examples of these instances.
- ▶ How is the right to know the truth (of the victims and of the society) regulated and implemented under German legislation?

- ▶ What kind of mechanisms can be put in place to locate and release disappeared persons and, if dead, to locate, exhume and return their remains?
- ▶ Concerning the right to full reparation, are the following measures of reparation foreseen under German legislation: restitution, rehabilitation, satisfaction (including restoration of dignity and reputation) and guarantees of non-repetition?
- ▶ As far as the legal situation of disappeared persons whose fate has not been clarified is concerned, is there a procedure to obtain a declaration of absence as a result of enforced disappearance? In which circumstances is a declaration of death required in order to assert pension claims (§162)?

Art. 25:

- ▶ Does German legislation provide for the criminalisation of the following conducts:

The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance?

The falsification, concealment or destruction of documents attesting to the true identity of children who were subjected to enforced disappearance, children whose father, mother or legal guardian was subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance?
- ▶ Does German legislation provide for specific procedures for the review and, where appropriate, the annulment of adoptions or placements of children that originated in an enforced disappearance?



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About TRIAL

TRIAL (*Swiss Association against Impunity*) is a Geneva-based NGO established in 2002 and in consultative status with the United Nations Economic and Social Council (ECOSOC). It is apolitical and non-confessional. Among its principal goals is the fight against impunity of perpetrators, accomplices and instigators of genocide, war crimes, crimes against humanity, enforced disappearances and acts of torture. TRIAL is a member of the International Coalition against Enforced Disappearances, as well as of the International Coalition for the International Criminal Court, serving as the secretariat of the Swiss Coalition for the International Criminal Court.

TRIAL supports victims of gross human rights violations and their families by filing complaints before international human rights bodies, with over 125 cases submitted by mid-2013. Currently, TRIAL works on cases of gross human rights violations perpetrated in Algeria, Bosnia and Herzegovina, Burundi, Kenya, Libya, Mexico, Nepal and Tunisia.

Moreover, TRIAL also submits reports assessing the respect of human rights in certain countries to United Nations Treaty Bodies and Special Procedures.

TRIAL further files criminal complaints before Swiss courts against individuals suspected of having committed crimes under international law who are present on Swiss territory. TRIAL has been involved before Swiss courts in a number of cases concerning alleged perpetrators of torture and crimes against humanity committed in Afghanistan, Algeria, Sri Lanka, Guatemala, Somalia and Tunisia, and investigates numerous other cases on the ground.

TRIAL has also set up "Trial Watch", an on-line database that provides information on numerous cases and procedures concerning crimes under international law before national or international tribunals. It contains more than 1,000 profiles, each one of them with a brief explanation of the facts, a summary of the legal procedure, and links to documents, including court decisions, NGOs' reports, bibliographies, and press articles.

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