United Nations CED/C/9/2

International Convention for the Protection of All Persons from Enforced Disappearance

Distr.: General
16 October 2015

Original: English

Committee on Enforced Disappearances

Report on follow-up to the concluding observations of the Committee on Enforced Disappearances*

I. Introduction

1. At its seventh session, held from 15 to 26 September 2014, the Committee discussed the modalities for processing information received under its follow-up procedure pursuant to rule 54 of its rules of procedure. The Committee decided that, in accordance with rule 54 (3) of its rules of procedure, the Rapporteurs on follow-up to concluding observations would prepare a report on their assessment of the information provided by States parties in follow-up to selected recommendations contained in the Committee's concluding observations, to be submitted to the Committee for consideration once a year. On the basis of that report, the Committee will assess the follow-up information concerning each selected recommendation and will communicate its assessment to the State party concerned through the follow-up Rapporteurs. Where appropriate, the Committee may request the State party concerned to provide additional information by a specific deadline, in accordance with article 29 (4) of the Convention.

2. The present report is submitted in accordance with rule 54 (3) of the Committee's rules of procedure, which reads: "the follow-up Rapporteur(s) shall assess the information provided by the State party in consultation with the country Rapporteurs, if any, and report at every session to the Committee on her/his activities".

3. The present report reflects the information received by the Committee between its seventh and ninth sessions in follow-up to its concluding observations on Argentina (CED/C/ARG/CO/1/Add.1), Spain (CED/C/ESP/CO/1/Add.1) and Germany (CED/C/DEU/CO/1/Add.1), and the evaluations and decisions it adopted at its ninth session. The Netherlands did not submit follow-up information to the selected recommendations in the Committee's concluding observations (CED/C/NLD/CO/1), therefore, the Committee decided to send a reminder to the State party.

* Adopted by the Committee at its ninth session (7-18 September 2015).

4. To carry out its assessment of the information provided by the States parties concerned, the Committee uses the criteria described below:

Assessment of replies
A. Reply/action satisfactory
- Reply largely satisfactory
B. Reply/action partially satisfactory
- Substantive action taken, but additional information required
- Initial action taken, but additional information and measures required
C. Reply/action not satisfactory
- Reply received but action taken does not implement the recommendation
- Reply received but not relevant to the recommendations
- No reply received concerning a specific matter in the recommendation
D. No cooperation with the Committee
- No reply received after reminder(s)
E. The measures taken are contrary to the Committee's recommendations
- The reply reveals that the measures taken are contrary to the Committee's recommendations

II. Assessment of follow-up information

A. Argentina

Fifth session (November 2013)

Argentina	
Concluding observations:	CED/C/ARG/CO/1 adopted 13 November 2013
Recommendations to be followed up:	Paragraphs 15, 25 and 27
Reply:	Due 15 November 2014; received 2 February 2015 (CED/C/ARG/CO/1/Add.1)

Paragraph 15: The Committee encourages the State party to adopt all the necessary measures and to intensify its efforts to root out these contemporary forms of enforced disappearance. In addition, the Committee recommends that the State party should promote institutional reform of the police forces so as to eradicate violence and ensure that police officers who commit such offences are duly investigated, prosecuted and punished.

Summary of State party's reply

The Ministry of Security initiated a process of curriculum modernization to improve the operational efficiency of the police and security forces. To this end, it instructed the most senior law enforcement authorities to focus basic professional training for junior staff on specific police practices, which included those involving the use of force by the police. In that connection, aspiring officers and

Argentina

new recruits are taught the professional skills necessary for self-defence, use of firearms and arrest and detention techniques, while becoming acquainted with the treatment of persons in police care or custody. The teaching/learning process is structured according to the normative framework laid down in international human rights standards and instruments.

The Ministry instructed the academic units of police training institutes, the educational management teams and the teachers and instructors to develop training practices so that human rights feature in the institutional life of students, in the theoretical and doctrinal syllabus and in procedural training programmes.

At the normative level, human rights became a compulsory component of training under Ministry of Security resolution No. 199/2011, approving the basic training documents for officers and beat personnel. Modules on the reasonable use of force were added to the basic training programme and encompassed training on how to exercise authority and police powers and use firearms in a manner respectful of international human rights principles and standards, the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms. This theoretical and procedural knowledge is incorporated into simulation exercises replicating everyday situations in which trainees must apply their knowledge and principles.

Retraining centres were established for the Federal Police Force, the Argentine Naval Prefecture and the National Gendarmerie, with a view to retraining serving officers in basic policing skills within the reasonable use of force policy framework.

Officers in those forces also attend monthly training sessions to update and supplement the content of their initial training, besides addressing problems that arise in their everyday work, in order to be able to share those experiences and offer practical tools for resolving the kind of incidents that are typical of the work in which the units are engaged.

The Ministry of Security closely monitors the training provided to the police and security forces to verify, in particular, that it abides by the principles of democracy, the rule of law and human rights.

Committee's evaluation

[B]: The Committee, while welcoming the information furnished by the State party on the steps taken to provide the police and security forces with training on, inter alia, the use of force and human rights, requests the State party, when submitting information in accordance with paragraph 45 of its concluding observations (CED/C/ARG/CO/1), to indicate whether, since the adoption of those concluding observations:

(a) Steps have been taken in other areas with a view to implementing its recommendation and, if so, to provide detailed information, including on the impact of those steps;

(b) Action has been taken to promote institutional reform of the police force so as to eradicate violence and, if so, to provide detailed information;

(c) The competent authorities have received complaints about acts that could be classified as enforced disappearances and, if so, to provide detailed information on the investigations conducted and their outcomes, including the penalties imposed on those responsible.

Argentina

Paragraph 25: The Committee recommends that the State party should adopt all the necessary measures, including legislative, to ensure that all persons detained in the national territory are immediately placed under judicial supervision.

Summary of State party's reply

The fundamental rights of all persons, including the right not to be detained in secret or unofficial facilities, are guaranteed under the Constitution. On the basis of these constitutional guarantees, the codes of procedure set out regulations to ensure they are duly respected. In addition, article 43 of the Constitution provides that any person may file a petition for prompt, expeditious *amparo* proceedings against any act or omission of the public authorities that impairs the guarantees recognized by the Constitution in a manifestly arbitrary or unlawful manner.

Committee's evaluation

[C]: The Committee, while taking note of the information provided by the State party, considers that it does not have sufficient information about any action taken to implement its recommendation since the adoption of its concluding observations (CED/C/ARG/CO/1). The Committee reiterates its recommendation and requests the State party, when submitting information in accordance with paragraph 45 of its concluding observations, to provide detailed information on the efforts made to implement the recommendation since the adoption of its concluding observations.

Paragraph 27: The Committee recommends that the State party should take all the necessary steps, including legislative, to ensure that all transfers are subject to judicial control and that they are only carried out with the knowledge of the detainee's counsel and family or other relatives. The Committee likewise calls on the State party to put in place the inspections and oversight necessary to prevent unlawful transfers and to ensure that such practices are appropriately punished.

Summary of State party's reply

Facilities run by the Federal Prison Service keep up-to-date records of persons deprived of their liberty that include, inter alia, the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Jurisprudence was also issued in that respect. In 2013, the Federal Chamber of Criminal Appeals referred to the express order required under Act No. 24,660 regulating the transfer of prisoners: "It is hereby ordered that this transfer from one facility to another … and the reasons therefor … shall be communicated immediately to the enforcement judge or competent judge".

A computerized register of persons who are being held in custody is currently in preparation. Alternatively, all the country's criminal courts are required to enter all orders for pretrial detention or for other equivalent arrangements as provided for in the (national and provincial) Codes of Criminal Procedure and all convictions and the corresponding sentences into the National Register of Repeat Offenders within five days of the definitive issuance of such rulings or convictions. Prisons are also required to enter all prisoner releases in the Register. The computerized system that will contain data on all persons deprived of their liberty in the Federal Prison Service is nearing completion. All persons are registered upon their admission to a prison, ensuring the availability of consistent data and facilitating oversight by the different Government authorities.

Argentina

Committee's evaluation

[B]: The Committee, while welcoming the information provided by the State party, requests the State party, when submitting information in accordance with paragraph 45 of its concluding observations (CED/C/ARG/CO/1), to:

(a) Provide detailed information on efforts made to ensure in practice that all transfers are indeed subject to judicial control and that they are only carried out with the knowledge of the detainee's counsel and family or other relatives;

(b) Provide detailed information on the inspections and oversight in place to prevent unlawful transfers;

(c) Indicate whether, since the adoption of the Committee's concluding observations, there have been any complaints of unlawful transfers and, if so, provide detailed information on the measures taken to prosecute and punish those responsible;

(d) Provide information on progress in launching the computerized register of persons held in custody.

Action to be taken

A letter should be sent to the State party reflecting the Committee's evaluation.

Follow-up information on the implementation of all the recommendations to be submitted by: 15 November 2019

B. Spain

Fifth session (November 2013)

Spain

Concluding observations:	CED/C/ESP/CO/1 adopted 13 November 2013
Recommendations to be followed up:	Paragraphs 12, 24 and 32
Reply:	Due 15 November 2014; received 16 January 2015 (CED/C/ESP/CO/1/Add.1)
NGO information:	TRIAL/FIBGAR, received 15 November 2014

Paragraph 12: The Committee, taking into consideration the statute of limitation applicable in Spain for continuing offences, urges the State party to ensure that the term of limitation actually commences at the moment when the enforced disappearance ends, i.e., when the person is found alive, his or her remains are found or their identity restored. It also urges the State party to ensure that all disappearances are investigated thoroughly and impartially, regardless of the time that has elapsed since they took place and even if there has been no formal complaint; the necessary legislative or judicial measures are adopted to remove any legal impediments to such investigations in domestic law, notably the interpretation given to the Amnesty Act; suspected perpetrators are prosecuted and, if found guilty, punished in accordance with the seriousness of their actions; and victims receive adequate reparation that includes the means for their rehabilitation and takes account of gender issues.

Spain

Summary of State party's reply

Article 131.4 of the Criminal Code of Spain states that the statute of limitations does not apply to any crime against humanity. Other cases of enforced disappearance are subject to the same general statutes of limitations as those set out in the Criminal Code.

The jurisprudence indicates that the action by which criminal responsibility for the commission of a crime arises commences at the time that a crime is consummated and is circumscribed by its effects; that is, when the agent ceases to act and ceases to do harm to the victim or to the general good.

The consummation of an offence takes place when an individual has committed all of the acts that fall within the legal definition of the crime in question and that produce the results or consequences pursued thereby. The crime comes to an end when the criminal action actually ceases.

In the case of an enforced disappearance, the type of act that encompasses criminal conduct must be determined in each case in order to establish when the act is completed, since, as a continuing offence, the consummation of the crime and the point in time at which its effects come to an end do not coincide.

Firstly, if the victim is found alive, is freed by his or her captors, is rescued by others or escapes, the criminal action, which is a continuing crime (the criminal action continues so long as the victim remains in the power of the persons committing the crime), ceases. The offence, which was consummated at the time of the abduction, has come to an end because the material action in which it consisted has ceased.

Similarly, if, following the disappearance, that is, during the period of confinement, the victim is subjected to ill-treatment, torture or sexual abuse and is later found alive, then the term of the statute of limitations (if death does not supervene) would be determined on the basis of the continuing offence and its aggravating circumstances or the continuing offence in combination with other offences, treated as one. The term of the statute of limitations applying to the continuing criminal action, along with the aggravating circumstances or the more serious crime, as appropriate, would then be deemed to commence at the time that the victim is freed.

Secondly, in cases where a victim is deprived of life by his or her captors, the crime, with its aggravating circumstances, or in conjunction with the crime of homicide or murder, is consummated and ceases at the time of the victim's death, at the point in time when the commission of the offence is deemed to have ceased. The time of the victim's death would therefore be the starting point, in accordance with article 132 of the Criminal Code, from which the term of limitation would be calculated.

With respect to the investigation of enforced disappearances, the jurisprudence established by the Supreme Court and by the European Court of Human Rights should be recalled. Firstly, in its judgement No. 101/2012, the Supreme Court dismissed a suit brought by a group of associations for the recovery of historical memory, indicating that Spanish criminal law did not provide for "so-called truth trials, that is, trials intended to give rise to a judicial investigation into what appears to have been criminal acts, with regard to which it is known that legal proceedings cannot lead to the establishment of a person's guilt because

prosecution is precluded on grounds of the extinction of criminal responsibility, death, prescription or amnesty." The amount of time that elapsed since the commission of acts that are the subject of a complaint is an important consideration in the Spanish legal order, not only because of the effect of the statute of limitations, but also because the purpose of criminal proceedings in Spain is not to investigate events but rather to identify and punish offenders. The impossibility of sanctioning guilty parties in certain cases is a factor that has been taken into account by judges and magistrates in Spain when determining that criminal proceedings cannot be employed to investigate events that took place in the 1930s and 1940s. This is not to say that it is impossible to carry out investigations in an effort to determine the whereabouts of persons who disappeared during the Spanish Civil War. Judgements No. 75/2014 and No. 478/2013 of the Provincial Court of Madrid both confirm that criminal proceedings are not the proper avenue for seeking satisfaction for the claims of complainants. However, those judgements did not simply order the cases closed nor impeded further investigation, but rather identified litigation in the administrative court system as the appropriate avenue to be taken in the Spanish legal system, as provided for in the Historical Memory Act of 2007.

The time elapsed since an act was committed has also been shown to be a decisive consideration in the jurisprudence of the European Court of Human Rights, which, in a decision of 27 March 2011, found that a complaint regarding the disappearance of socialist Member of Parliament, Luis Dorado Luque, whose whereabouts have remained unknown since his detention in 1936, was inadmissible. For the European Court, the fact that the complaint was submitted 25 years after the Spain had recognized the jurisdiction of the European Court and 70 years after the disappearance had taken place was a decisive factor.

Another of the "impediments" — though by no means the only one — to investigations to which the Committee refers is the Amnesty Act of 1977, which was not a law promulgated by the dictatorship in order to exonerate itself, but rather a law adopted by democratically elected parliamentarians who were fully aware of the different dimensions of the important step that they were taking. The law provides for the extinction of criminal responsibility both for those opposing the dictatorship and for those who supported it, and was underpinned by a broad consensus on the part of all political forces regarding both of those dimensions.

NGO information

Since the adoption of the Committee's concluding observations, other international human rights protection mechanisms have expressed deep concern about the failure to investigate cases of grave human rights violations, including enforced disappearances, committed during the Civil War and the Franco dictatorship and about Spanish courts' interpretation of the Amnesty Act (No. 46/1977), which formally precludes criminal proceedings of any kind in such cases.

The organizations submitting information to the Committee report that they are not aware of any investigation into cases of enforced disappearance being launched, continued or expanded between November 2013 and November 2014, notwithstanding the recommendations made by the Committee, the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. Moreover, no one has yet been convicted of an enforced disappearance committed during the Civil War or the Franco dictatorship.

Spain

Committee's evaluation

[C]: The Committee, while taking note of the detailed information provided by the State party, considers that it does not have sufficient information about any action taken to implement its recommendation since the adoption of its concluding observations (CED/C/ESP/CO/1). The Committee reiterates its recommendation and requests the State party, when submitting information in accordance with paragraph 40 of its concluding observations, to provide detailed information about action taken to implement the recommendation since the adoption of its concluding observations.

Paragraph 24: The Committee recommends that the State party should adopt the necessary legislative and other measures to ensure that all persons, regardless of the offence with which they are charged, enjoy all the safeguards provided for in the Convention, in particular in article 17, and in other relevant human rights instruments. It also urges it to ensure that the text that emerges from the reform of the Criminal Procedure Act does not include any restrictions on the rights of detained persons, even under a discretionary regime, that might violate the provisions of article 17, paragraph 2, of the Convention.

Summary of State party's reply

The system of incommunicado detention is used only in exceptional cases. In cases where the law provides for incommunicado detention, prisoners enjoy the same general rights as other prisoners. In addition, incommunicado detention is subject to judicial oversight. As such, incommunicado detention must be authorized with reasons by a judge or court of law for a limited period of time that is strictly necessary to carry out the requisite investigation as a matter of urgency. The law also stipulates that the judge may request information at any time concerning the situation of a person being held in incommunicado detention. Several of the courts in charge of investigating terrorism cases now employ additional safeguards, such as recordings of interrogations and additional medical supervision. Those measures were officially set out in a decision of December 2006 handed down by the National High Court and have been applied in numerous cases of incommunicado detention.

In addition, an amendment to the Criminal Procedure Act is under consideration, which will incorporate Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. The draft bill to amend the Criminal Procedure Act for the purpose of expediting legal proceedings, strengthening procedural safeguards and regulating technological investigative methods, which was approved by the Council of Ministers on 5 December 2014, will amend article 527 of the Criminal Procedure Act so that it expressly states that incommunicado detention is an exceptional regime which may be applied only pursuant to a reasoned decision by a judge and that the deprivation of certain rights is not automatic but "discretionary", that is, one or more of the following measures may be decided upon:

Spain

(a) The detainee's lawyer may be assigned to him or her on an ex officio basis;

(b) The detainee may not meet with his or her lawyer in private;

(c) The detainee may not be allowed to communicate with all or any of the persons with whom he or she would ordinarily be entitled to contact, with the exception of the judicial authorities, the prosecution service and the forensic medical examiner;

(d) The detainee may not be given access to records of proceedings.

Furthermore, the exceptional measures may be granted only under the circumstances provided for in Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013, which is to be incorporated into Spanish law by means of the bill. The circumstances under which the application of the regime of incommunicado detention is permitted are as follows:

(a) Where there is an urgent need to avert serious adverse consequences in terms of the life, liberty or physical integrity of a person;

(b) Where there is an urgent need for immediate action by the investigating authorities to avoid placing the criminal proceedings in substantial jeopardy.

The passage of legislative amendments of the scope of the above-mentioned bill or amendments such as those being introduced into the Criminal Code usually take longer to complete than the period of one year specified by the Committee for receipt of responses from Spain on these issues.

It was added that, as a preventive measure, a "national preventive mechanism for the prevention of torture" was established in accordance with the commitment made by Spain upon its ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Ombudsman has been designated as the institution responsible for this function.

All of these provisions will ensure that the measures applied during incommunicado detention is subject to closer oversight.

NGO information

The comprehensive reform of the Criminal Procedure Act has still not been adopted and Spain continues to apply incommunicado detention, notwithstanding the recommendations made by various international bodies. The incommunicado detention regime applicable to persons accused of terrorism and armed groups (as established under articles 509 and 520 bis of the Criminal Procedure Act) is contrary to the international obligations assumed by Spain, including those under articles 17 (2) (d) and 18 of the Convention, which set out fundamental safeguards that allow any person deprived of liberty to communicate with and be visited by his or her family, counsel or any other person of his or her choice.

The incompatibility with international human rights law of the incommunicado detention regime provided for in existing Spanish legislation was also recently noted by the European Court of Human Rights, which again found Spain to be in violation of its positive obligations under article 3 of the European Convention on Human Rights in two cases in which persons detained under the Criminal Procedure Act were held in incommunicado detention for 5 and 4 days,

Spain

respectively, and were unable to communicate with and be visited by their family, counsel or any other person of their choice, as required by, among others, article 17 (2) (d) of the Convention.

Committee's evaluation

[B]: The Committee, while noting the progress made with regard to the reform of the Criminal Procedure Act, reiterates its recommendation and requests the State party, when submitting information in accordance with paragraph 40 of its concluding observations (CED/C/ESP/CO/1), to provide information on the measures taken and the outcome thereof to ensure that the text that emerges from the reform of the Criminal Procedure Act does not include any restrictions on the rights of detained persons, even under a discretionary regime, that might violate the provisions of article 17 (2) of the Convention.

Paragraph 32: The Committee recalls that the search for persons who have been the victims of enforced disappearance and efforts to clarify their fate are obligations of the State even if no formal complaint has been laid, and that relatives are entitled, inter alia, to know the truth about the fate of their disappeared loved ones. In this connection, the Committee recommends that the State party should adopt all the necessary measures, including the allocation of sufficient human, technical and financial resources, to search for and clarify the fate of disappeared persons. In the same connection, the State party should consider the possibility of setting up an ad hoc body responsible for searching for persons who were the victims of enforced disappearance and endowed with sufficient powers and resources effectively to perform its role.

Summary of State party's reply

In 2012, the Department of Rights of Pardon and Other Rights assumed numerous functions in respect of the preservation of historical memory and it continues to keep interested parties abreast of developments and to investigate cases of disappearance by searching through archives and documentation in the various State institutions. This is also the focus of the work of the General Administration Agency, which supplements the work carried out by the Autonomous Communities. It should be noted that the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence identified some of the types of work being carried out in Spain by the Autonomous Communities as examples of best practice in this sphere.

Within the scope of the Historical Memory Act, the Department of Rights of Pardon and Other Rights carries out functions in relation to the mapping of grave sites, public services, financial assistance, declarations of redress and personal recognition, and manages a database on Spanish nationals who died in Nazi camps.

With regard to budget allocations for the implementation of the Historical Memory Act, in recent years more than EUR 25 million have been allocated to historical memory associations for numerous projects, including the exhumation of Civil War graves. At the present time, however, government spending constraints make it impossible to release these lines of financing.

Spain

This situation should not be interpreted as reflecting a lack of interest on the part of the Government. In September 2014, the then Minister of Justice stated to the Spanish Parliament: “neither the present Government, nor any other Government, will rest while even a single person lies buried in a ditch, regardless of what side the person was on, in that most uncivil of all wars that is civil war, and while family members are enquiring about the person’s remains and burial”.

NGO information

Notwithstanding the consistent recommendations made by various international human rights protection mechanisms, the Department of Rights of Pardon and Other Rights of the Ministry of Justice, which is responsible for implementing the Historical Memory Act at the national level, has still not been allocated a budget for that purpose. Spain thus continues to be in breach of its international obligations under article 24 (2) and (3) of the Convention and places on the families of disappeared persons the burden of taking the steps necessary for arranging exhumations, identifying remains and establishing the truth about the fate of their loved ones. No judges, prosecutors or police officers are present when exhumations take place and their absence constitutes a grave omission.

Since November 2013, despite all the recommendations made by international bodies in this connection, Spain has failed to establish a State body responsible for searching for disappeared persons and there is still no indication that any action has been taken to do so.

Committee’s evaluation

[C]: The Committee takes note of the information provided by the State party and, recalling its recommendation, requests the State party, when submitting information in accordance with paragraph 40 of its concluding observations (CED/C/ESP/CO/1), to provide additional and detailed information on measures taken, and the outcomes thereof, to implement the recommendation since the adoption of the concluding observations, including with regard to the allocation of human, technical and financial resources to search for and clarify the fate of disappeared persons. The Committee would also like to know whether the State party has considered the possibility of setting up an ad hoc body responsible for searching for persons who were the victims of enforced disappearance and endowing it with sufficient powers and resources to enable it to effectively perform its role, and/or whether any measures have been taken in that regard.

Action to be taken

A letter should be sent to the State party reflecting the Committee’s evaluation.

Follow-up information on the implementation of all the recommendations to be submitted by: 15 November 2019

C. Germany

Sixth session (March 2014)

Germany	
Concluding observations:	CED/C/DEU/CO/1 adopted 27 March 2014
Recommendations to be followed up:	Paragraphs 8, 9 and 29
Reply:	Due 28 March 2015; received 14 April 2015 (CED/C/DEU/CO/1/Add.1)

Paragraph 8: The Committee recommends that the State party adopt the necessary legislative measures to make enforced disappearance an autonomous offence in line with the definition contained in article 2 of the Convention; that the offence be punishable by appropriate penalties which take into account its extreme seriousness; and, in conformity with article 6, paragraph 1 (a), of the Convention, that the attempt to commit an enforced disappearance be punishable.

Summary of State party's reply

Article 4 of the Convention contains the obligation for States Parties to ensure that the different forms of enforced disappearance specified in article 2 of the Convention are sanctioned comprehensively under criminal law. This gives rise to a general obligation for States Parties to prosecute perpetrators of the conduct specified in article 2 under their system of criminal law. However, Germany does not see how article 4 can be interpreted as giving rise to an obligation to create a separate criminal offence of "enforced disappearance". The Federal Government considers the offences already defined in German criminal law, combined with the provisions of other acts, to be sufficient for the adequate investigation and punishment of cases of enforced disappearance. In particular, all aspects of the conduct criminalized in the Convention can essentially be subsumed under existing criminal law provisions.

Germany does not fail to recognize the symbolic effect of having a separate criminal offence of enforced disappearance in the Criminal Code, nor does it deny the possibility of considering improvements which go beyond the obligations entered into under the Convention. Talks have already been held at the Federal Ministry of Justice and Consumer Protection, including with Amnesty International, to discuss the various opinions that exist on these matters, as well as potential regulatory approaches. In November 2014, the Committee's concluding observations were discussed by the responsible body in Parliament (the Human Rights Committee of the German Bundestag). Members of Parliament were given an oral briefing by representatives of the Federal Government, which included a discussion of the legal situation and recommendations in the context of the German legal system. In particular, that pertains among other things to the need for a sufficient limitation period and the system of limitations provided for in German criminal law.

Committee's evaluation

[B]: The Committee takes note of the information provided by the State party and welcomes the fact that its concluding observations (CED/C/DEU/CO/1) were discussed in Parliament. The Committee recalls its position concerning the criminalization of enforced disappearance as a separate offence, as reflected in

Germany

paragraph 7 of its concluding observations, and reiterates its recommendation. The Committee requests the State party, when submitting information in accordance with paragraph 34 of its concluding observations, to provide information on the measures taken to implement the recommendation.

Paragraph 9: The Committee invites the State party, when criminalizing enforced disappearance as an autonomous offence, to establish the specific mitigating and aggravating circumstances provided for in article 7, paragraph 2, of the Convention. It also recommends the State party to ensure that mitigating circumstances will in no case lead to a lack of appropriate punishment. In addition, the Committee invites the State party to provide that, once criminalized, the offence of enforced disappearance is not subject to any statute of limitations or, if it is, it recommends that the State party ensure that, in line with article 8 of the Convention, the statute of limitations is of long duration and proportionate to the extreme seriousness of the offence and, taking into account the continuous nature of enforced disappearance, that it commence from the moment when the offence ceases.

Summary of State party's reply

The Federal Government believes that the aggravating and mitigating circumstances foreseen in German criminal law fully reflect the meaning of article 7 (2) of the Convention.

Aggravating circumstances

(a) Death of the disappeared person

In Germany, a range of criminal provisions relevant to enforced disappearance pertains to actions that are particularly likely to be accompanied by a risk of death. Causing death through an act fulfilling the elements of one of those criminal offences either constitutes a serious offence in itself or leads to a higher penalty (compared to the underlying offence) as an "aggravating factor". This regime exists independently of the applicable provisions on murder in sections 211 and 212 of the Criminal Code (*Strafgesetzbuch*), which pertain to intentional homicide.

(b) The disappeared person is a pregnant woman, a minor, a person with a disability or another particularly vulnerable person

The wrong inherent in subjecting a minor to enforced disappearance is, first of all, reflected through section 235 of the Criminal Code in particular (abduction of minors from the care of their parents, etc.). Furthermore, as foreseen in article 7 (2), the fact that a disappeared person is a minor, is pregnant, is disabled or is otherwise particularly vulnerable, would be taken into consideration pursuant to the sentencing provisions of section 46 (2) of the Criminal Code (if the victim's status as such is not already one of the elements of the offence, for example in section 235 with regard to minors). Within the framework of section 46 (2) of the Criminal Code, consideration is also given to the consequences of the offence for the victim, to the extent that the offender is to blame for them, if, for example, particularly serious consequences are foreseeable to the perpetrator in the case of a particularly vulnerable victim.

Mitigating circumstances

The mitigating circumstances, as listed in article 7 (2) (a) of the Convention can also be taken into account on the basis of already existing provisions.

Germany

Some of the definitions of offences in German criminal law that are relevant to enforced disappearance contain explicit rules on "less serious cases".

All provisions pertaining to less serious cases nevertheless guarantee adequate punishment. While those provisions foresee a downward shift in the applicable sentencing range as compared to the underlying offence/aggravated cases, this sentencing bracket lower down the scale does not mean that punishment is limited to the imposition of a fine.

In addition, section 46 (1), first sentence, of the Criminal Code must be taken into account when determining the exact sentence to be imposed within the applicable sentencing bracket, and specifies that the court shall take the offender's guilt as the basis for its sentencing decision, and pursuant to section 46 (2) of the Code, the court shall weigh the circumstances in favour of and against the perpetrator in doing so. Section 46 (2) of the Code refers to the perpetrator's conduct after the offence, particularly his or her efforts to make restitution for the harm caused, and efforts to achieve mediation with the aggrieved party, as circumstances to be taken into account. Efforts by the perpetrator to contribute towards the investigation of the offence can also be considered as mitigating circumstances. Mitigating circumstances may be taken into account within the context of section 46 of the Criminal Code, particularly if they have not already been considered in assuming a "less serious case" and thus in justifying a downward shift in the sentencing range (see above); if they have already been considered in shifting the sentencing range, they may still be taken into account during sentencing itself, but only to a lesser extent.

The system of provisions on aggravating factors and less serious cases, which is typical of the German legal system, will be part of the discussion on potential regulatory approaches to achieving criminal law improvements in the field of enforced disappearances.

Adequate statute of limitations

The applicable law, section 78 of the Criminal Code, already ensures that the statute of limitations for enforced disappearance is in line with article 8 of the Convention and, in particular, that it reflects the extreme seriousness of the offence. Section 78 of the Criminal Code provides that the length of the limitation period will depend on the seriousness of the offence as determined by the maximum term of imprisonment possible for the offence.

While the enforced disappearance of an individual also constitutes a crime against humanity, within the meaning of section 7 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*), section 5 of that Code provides that neither criminal prosecution of the offence nor enforcement of the penalty imposed for the offence is subject to a statute of limitations.

Furthermore, section 78 (a) of the Criminal Code already provides that the limitation period shall begin only once the act has been completed. If a result constituting an element of the offence occurs later, the limitation period will commence only from that time. In the case of continuous offences, where an illegal situation is not only established but also maintained, for example in the case of illegal imprisonment, the limitation period begins after the illegal situation has ended, that is, only once the victim has been released.

Germany

Committee's evaluation

[B]: The Committee welcomes the fact that its concluding observations (CED/C/DEU/CO/1) were discussed in Parliament and takes note of the detailed information provided by the State party with regard to existing legislation in relation to aggravating and mitigating circumstances and statute of limitations. Since this recommendation is linked to the recommendation made in paragraph 8 of its concluding observations, the Committee requests the State party, when submitting information in accordance with paragraph 34 of its concluding observations, to provide updated information concerning its implementation of this recommendation in connection with its implementation of the recommendation in paragraph 8.

Paragraph 29: The Committee recommends that the State party review its criminal legislation with a view to incorporating as specific offences the acts described in article 25, paragraph 1, of the Convention and provide appropriate penalties that take into account the extreme seriousness of the offences.

Summary of State party's reply

Regarding article 25 (1) (a) of the Convention

The Federal Government remarks that article 25 (1) (a) of the Convention does not itself establish any obligation for States Parties to create a specific criminal offence for the conduct referred to in this article. The article merely provides for a general duty to punish.

Independently of this, the German Criminal Code already contains a special offence which covers the conduct specified in article 25 (1)(a) of the Convention and provides for adequate penalty.

Section 235 of the Criminal Code already contains a specific criminal offence which covers the acts named in article 25 (1) (a) and the accompanying violation of the parent-child relationship, as well as of the child's right to unhindered development. Furthermore, specific acts consisting in the unlawful procurement of an adoption or taking a person under 18 years of age for an indefinite period, which may typically be an element of child abduction, are covered by the specific offence of child trafficking (section 236 of the Criminal Code).

Regarding article 25 (1) (b) of the Convention

The Convention contains only a general duty to punish. The conduct specified in article 25 (1) (b) of the Convention is already punishable under German law as forgery (section 267 of the Criminal Code), causing wrong entries to be made in public records (section 271 of the Criminal Code), tampering with official identity documents (section 273 of the Criminal Code), suppression of documents (section 274 of the Criminal Code) and falsification of personal status (section 169 of the Criminal Code). These provisions cover all imaginable actions, that is, the falsification, destruction and concealment (which corresponds to "suppression" under German criminal law) of identity documents. The offending items might include private records and documents, public documents, official identity documents, books, data storage media or registers, as well as technical recordings and data with evidentiary value.

Germany

Committee's evaluation

[B]: The Committee welcomes the fact that its concluding observations (CED/C/DEU/CO/1) were discussed in Parliament and takes note of the detailed information provided by the State party, including its position that there is no obligation for States parties to create specific criminal offences for the conduct referred to in article 25 (1) of the Convention. However, the Committee recalls paragraph 28 of its concluding observations and reiterates its recommendation. It requests the State party, when submitting information in accordance with paragraph 34 of its concluding observations, to provide information on the measures taken to implement the recommendation.

Action to be taken

A letter should be sent to the State party reflecting the Committee's evaluation.

Follow-up information on the implementation of all the recommendations to be submitted by: 28 March 2020