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# ADVANCE UNEDITED VERSION

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**Committee on Enforced Disappearances**

## **Consideration of reports of States parties under article 29 of the Convention**

**Report of States Parties in compliance with article 29,  
paragraph 1, of the Convention, which are due in 2012**

**Germany\* \*\***

[25 March 2013]

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\* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

\*\* The State Partie informed that the information included in the report are current as of 19 December 2012

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## Introduction

1. The German Federal Government is well aware of the relevance of the problem of enforced disappearances – both in the historical context and in its current dimensions.
2. During the era of the National Socialist reign of terror, a large number of enforced disappearances were perpetrated in Germany. They were among the first registered acts of this kind worldwide. The Federal Republic of Germany was constituted as a state characterised by freedom and the rule of law; this was a determined about-face from National Socialism to form a state in which the individual enjoys comprehensive protection against intrusion by state power. Against this background, no cases of enforced disappearance have become known in the Federal Republic of Germany since its establishment.
3. However, the topic continues to be relevant in large parts of the world. For that reason, and in the awareness of the significance of the phenomenon in its history, the Federal Republic of Germany has ratified the International Convention for the Protection of All Persons against Enforced Disappearance, and is advocating its implementation among the entire community of States.
4. The State Reports of the Federal Republic of Germany are compiled following extensive consultations with civil-society groups. For example, in preparation of this report a meeting took place in September 2012 with representatives from various non-governmental organisations. That meeting focused specifically on the question of the necessity of establishing a separate criminal offence.

### A. General legal framework

5. The Federal Republic of Germany is a free state under the rule of law, in which citizens enjoy comprehensive protection from arbitrary treatment and the use of force by the State. For more details on the structures of the German legal and judicial system, the Federal Government refers to the core report.

#### 1. National and International Legal Norms (not including the Convention)

6. At the national law level, the interplay of constitutional and criminal law norms prevents individuals from becoming victims of enforced disappearance.
7. Article 1 section 1 of the German Basic Law (*Grundgesetz*) protects human dignity as a paramount constitutional value. Article 2 section 2 of the Basic Law guarantees the right to life and physical integrity, and also declares that the freedom of the person is inviolable. Intrusions into human dignity are never permissible. As a general rule, substantial intrusions into basic rights are possible only on the basis of formal laws. With regard to interference with personal freedom (Article 2 section 2, third sentence Basic Law), the Constitution expressly requires the specific enactment of a statute, and links this inextricably with intensified formal and procedural guarantees in Article 104 of the Basic Law, which provides for the requirement of an express statute and judicial decision. Overall, these provisions guarantee comprehensive rights guarantees in the case of deprivation of liberty.
8. The cited provisions read as follows:
  - (a). **Article 1**
    - Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

**(b). Article 2**

- Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

**(c). Article 104**

- Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures described therein. Persons in custody may not be subjected to mental or physical mistreatment.
- Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.
- Any person provisionally detained on suspicion of having committed an offence shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting out the reasons therefor or order release.
- A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of freedom.”

9. A number of criminal-law provisions encompass enforced disappearance and/or elements thereof. Going beyond the basic offence of unlawful imprisonment (section 239 Criminal Code [*Strafgesetzbuch* – hereinafter StGB]), these could include, depending on the form of commission: Causing bodily harm (sections 223 et seq. StGB), murder/manslaughter (sections 211, 212 StGB), abandonment, (section 221 StGB), or omission to effect an easy rescue (section 323c StGB). Depending upon the circumstances of the specific case, enforced disappearance could also be subject to criminal liability pursuant to section 235 StGB (abduction of minors from the care of their parents) or, if the victim is brought to foreign territory, section 234a StGB (causing a danger of political persecution). Other possible offences include assistance after the fact (section 257 StGB), assistance in avoiding prosecution or punishment (section 258 StGB), perverting the course of justice (section 339 StGB), enforcing penal sanctions against innocent persons (section 345 StGB), and incitement of a subordinate to the commission of offences (section 357 StGB) (cf. also the comments on Article 4).

10. At the international level – beyond the scope of this Convention – the Federal Republic of Germany is a party to various conventions which, although they do not include the phenomenon of enforced disappearance as such, do include determinative partial aspects. Among these are the International Covenant of 19 December 1966 on Civil and Political Rights (specifically Article 6 – Right to life, Article 7 – Prohibition against torture, Article 9 – Right to personal freedom and security, Article 10 – Right to humane treatment upon deprivation of liberty) and the UN Anti-Torture Convention, which obligates its States Parties to prevent torture in any form and to criminally prosecute any instances of it. Furthermore, the European Convention on the Protection of Human Rights and Fundamental Freedoms includes a series of rules which are relevant in connection with enforced disappearance, such as Article 1 – Obligation to respect human rights, Article 2 – Right to life, Article 3 – Prohibition against torture, Article 5 – Right to liberty and security, Article 6 – Right to a fair trial, Article 13 – Right to an effective remedy, and Article 41 – Right to just satisfaction.

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## 2. Status and Application of the Convention

11. With the Act of 30 July 2009 on the International Convention for the Protection of All Persons from Enforced Disappearances of 20 December 2006 (ratifying legislation), the Federal Republic of Germany has created the federal-law preconditions pursuant to Article 59 section 2 of the Basic Law for ratification of the Convention. The ratifying legislation is federal law. Furthermore, the prohibition against enforced disappearance contained in the Convention has already attained the status of customary international law and is therefore a part of federal law pursuant to Article 25 of the Basic Law.

12. To the extent that the Convention is the basis for subjective rights and defines such rights sufficiently, it is to be directly applied by all authorities and courts. In every case, the Convention is to be taken into account in interpreting national law.

13. In practice, it is primarily the authorities at the *Land* level, including local and regional courts, that deal with cases in which the prohibition against enforced disappearance could become relevant. For example, the following might be affected: Public prosecutors and criminal judges dealing with issues of deprivation of liberty under criminal law, public prosecutors and criminal judges dealing with issues involving the prison system, as well as guardianship judges in cases involving placement issues. Article 20 section 3 of the Basic Law provides that the executive and the judiciary shall be bound by law and justice – and therefore by the prohibition against enforced disappearance. German criminal law does not foresee any “exceptional circumstances” within the meaning of Article 1 section 2 of the Convention, and particularly no “public emergency” which would provide justification for enforced disappearance. The general provisions (sections 32, 34 StGB: self-defence, necessity) as a general rule are applicable only to protect individual legal interests, but not to protect public order as such. The prohibition against enforced disappearance within the meaning of the Convention therefore has comprehensive application in German law.

14. There are no practical examples in Germany with regard to implementation of the Convention, nor are there any statistical data.

## B. Information regarding the specific rules of the Convention

### Article 1

15. The German Basic Law provides for detailed rules for situations of political or actual instability or threat. A differentiation is made between external states of emergency (state of defence, Article 115a Basic Law; preliminary step: state of tension, Article 80a Basic Law), and internal states of emergency (internal unrest and natural disasters, Article 91 Basic Law). The prohibition against enforced disappearance cannot be abrogated or restricted in any of these cases. Only Article 115c section 2, number 2 of the Basic Law allows for an extension of the period of detention to the effect that a federal law “[may] establish a time limit for deprivation of freedom different from that specified in the third sentence of paragraph (2) and the first sentence of paragraph (3) of Article 104, but not exceeding four days, for cases in which no judge has been able to act within the time limit that normally applies.

16. Consistent therewith, it is also not possible in the Federal Republic of Germany to relax the prohibition against enforced disappearance within the scope of the fight against terrorism or other preventive measures.

## Article 2

17. Due to the ratifying legislation of 30 July 2009, the definition of enforced disappearance in the Convention has become incorporated into domestic law (cf. above at A. II.). (See the comments on Article 4 with regard to the legal provisions applicable to the offence of enforced disappearance).

## Article 3

18. Criminal procedure law in Germany is guided by the so-called principle of mandatory prosecution (*Legalitätsprinzip*).<sup>1</sup> Pursuant thereto, the public prosecution offices are obliged to institute proceedings *ex officio* in relation to all prosecutable criminal offences, provided there are sufficient factual indications (section 152 (2) of the Code of Criminal Procedure (*Strafprozessordnung*, StPO)). Section 160 StPO provides that the public prosecution office shall investigate the facts to decide whether public charges are to be brought. In investigating the facts (section 160 (1) StPO), it must ascertain both incriminating and exonerating circumstances and shall ensure that evidence is taken (section 160 (2) StPO). This is done in cooperation with the police, who have the duty pursuant to section 163 StPO to investigate criminal offences.

19. In terms of the Convention, this means the following: If the public prosecution office becomes aware of circumstances that give rise to a suspicion of “enforced disappearance” without State involvement, it will commence a relevant investigation. If the suspicions are confirmed, a bill of indictment (section 170 StPO) for an offence defined by German criminal law (on this point, see comments on Article 4) is presented to the competent criminal court. Depending upon the type and severity of the concrete alleged offence, this would be the local court, the regional court, or the higher regional court.

## Article 4

20. There is no specific criminal offence of “enforced disappearance” in German law which specifically covers the definition in Article 2 of the Convention.

21. However, in the view of the Federal Government, this is not necessary in terms of implementing the obligations arising from Article 4. The chosen formulation of the Article 4 clause, which reads “take the necessary measures,” leaves it to the States Parties to decide whether they criminalise enforced disappearance as such or the attendant offences.

22. German criminal law ensures that the various forms of commission of enforced disappearance as defined by Article 2 are sanctioned by the criminal law.

Relevant criminal offences include:

- Section 239 (1) StGB (unlawful imprisonment) and/or section 239 (3) or (4) StGB (unlawful imprisonment for more than one week; unlawful imprisonment causing serious injury or death to the victim).
- Section 234a StGB (causing danger of political persecution through use of force, threats or deception),
- Section 235 StGB (abduction of minors from the care of their parents),
- Sections 223 et seq. StGB (offences causing bodily harm),
- Sections 212, 211 StGB (manslaughter, murder),

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<sup>1</sup> Exceptions to this principle apply only for offences requiring a motion to prosecute, which are not relevant in this context. For such offences, the law provides that they are not prosecuted *ex officio*, but rather only upon motion.

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- Section 221 StGB (abandonment),
  - Section 257 StGB (assistance after the fact),
  - Section 258 StGB (assistance in avoiding prosecution or punishment),
  - Section 323c StGB (omission to effect an easy rescue),
  - Section 339 StGB (perverting the course of justice),
  - Section 345 StGB (enforcing penal sanctions against innocent persons),
  - Section 357 StGB (incitement of a subordinate to the commission of offences).

The language of these provisions is enclosed in the Annex.

23. In view of the existing criminal statutes, the Federal Government does not consider it legally necessary to create a new criminal offence of enforced disappearance.

24. However, the Federal Government is aware that there are other positions on this issue, which hold that the particular injustice of enforced disappearance can be adequately expressed only by establishing a separate offence. The Federal Government is engaging in dialogue with civil-society groups and is currently assessing whether and to what extent an addition to German criminal law should be undertaken.

#### **Article 5**

25. The German legislature has criminalised enforced disappearance which has been classified as a crime against humanity by Article 7 (1) letter (i) of the Rome Statute of the International Criminal Court, by way of section 7 (1), no. 7 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch – VStGB*). The definition used in that provision is consistent with that of the ICC Rome Statute; the threatened penalty (“imprisonment for not less than five years”) is within the scope of punishment provided for in the ICC Rome Statute (Article 77 (1)). Pursuant to section 5 VStGB, there is no statute of limitations on the prosecution of crimes pursuant to the Code of Crimes against International Law or execution of the sanctions imposed under it.

#### **Article 6**

26. German criminal law covers the requirements imposed by the Convention by way of rules regarding principals and secondary participants as well as regarding attempts and failures to act as follows:

27. Section 25 (1) StGB provides that those who commit an offence themselves or through another are labelled as principals. Pursuant to section 25 (2) StGB, if more than one person commit the offence jointly, each is liable as a principal (joint principals). A joint principal is therefore a person who jointly commits the same offence with one or more persons. The joint principal must make a significant contribution to the offence based upon a joint plan to commit the offence.

28. As a result, committing, being complicit and participating as a principal in an offence are all punishable.

29. A secondary participant is someone who intentionally induces another to commit an unlawful act or provides assistance. According to section 26 StGB, whoever intentionally induces another to intentionally commit an unlawful act shall be liable to be sentenced as if he were a principal. Inducing the principal to commit the offence means that the inciter must, by causative action, cause the principal to decide to commit the offence. The co-causative nature of the inducement is

sufficient. Attempted inducement is punishable pursuant to section 30 (1) StGB if the act which is being induced is a felony. A person who agrees with another to commit or incite the commission of a felony also incurs criminal liability (section 30 (2) StGB). According to section 12 (1) StGB, felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment. Many of the offences relevant for defining the crime of enforced disappearance constitute felonies according to that definition.

30. Furthermore, those who intentionally assist another in that person's intentional commission of an unlawful act are convicted and sentenced as aiders (section 27 StGB). The case law states that the assistance must merely facilitate or promote the offence of the principal or the success of the act. Psychological assistance is possible in addition to physical assistance. This is a contribution to the offence performed by way of active conduct or failure to act in contradiction to an obligation, which in turn strengthens the principal in his decision to commit the offence.

31. Against 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.

32. Pursuant to section 22 StGB, a person attempts to commit an offence if he takes immediate steps to realise the offence as envisaged by him. It is necessary that the perpetrator act intentionally. The perpetrator can be deemed to be taking immediate steps if he carries out acts which, in accordance with the plan of the offence, directly precede realisation of an element of the offence and which, in the case of an uninterrupted sequence of events, are intended to immediately lead to the act constituting the offence, without further intermediary steps. Section 23 (1) StGB provides that any attempt to commit a felony incurs criminal liability, and that attempted misdemeanours are punishable only if expressly so provided by law. Because the relevant criminal offences potentially applicable to a case of enforced disappearance for the most part define either felonies or misdemeanours for which the law expressly provides for liability for attempts, the attempt to effect an enforced disappearance will be punishable as a general rule.

33. According to German law, a superior who incites or undertakes to incite a subordinate to commit an unlawful act in public office or allows such an unlawful act of his subordinate to occur is liable pursuant to section 357 (1) StGB. The elements of the offence of incitement of a subordinate to commit an unlawful act criminalised in that provision are also fulfilled if the superior does not take any action against the unlawful act. Section 357 StGB treats the participatory act of the superior as an independent offence, which carries the same penalty as the unlawful act of the subordinate. Furthermore, depending on the factual situation, there can be criminal liability for a superior's failure to act pursuant to section 323c StGB (omission to effect an easy rescue).

34. If an enforced disappearance fulfils the preconditions of section 7 (1), no. 7 of the Code of Crimes against International Law (VStGB) as a crime against humanity, sections 4, 13 and 14 VStGB expressly provide for responsibility on the part of military commanders or civilian superiors:

35. If these persons fail to prevent a subordinate from committing a criminal offence under the VStGB, pursuant to section 4 (1) VStGB they will be punished as if they themselves had committed the offence of the subordinate. Unlike section 13 (2) StGB, which allows mitigation of sentence under criminal law for general cases of failure to act, in such a case the sentence is not subject to mitigation.

36. Pursuant to section 13 (1) VStGB, a military commander who intentionally or negligently fails to properly supervise a subordinate subject to his orders or actual control is subject to penalties for violation of his supervisory duty if the subordinate

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commits an offence pursuant to the VStGB, the imminence of which was recognisable by the commander and which he could have prevented. Section 13 (2) VStGB provides that a civilian superior who intentionally or negligently fails to properly supervise a subordinate subject to his authority or actual control is subject to penalties for violation of his supervisory duty if the subordinate commits an offence pursuant to the VStGB, the imminence of which was easily recognisable to the superior and which he could have prevented.

37. Finally, military commanders or civilian superiors are subject to punishment under section 14 VStGB if they fail to report without delay a criminal offence under the VStGB committed by a subordinate to the office responsible for investigation or prosecution of such offences.

38. Pursuant to section 4 (2) VStGB, which is applicable to all of the above-mentioned provisions, a military commander is to be equated with a person who exercises actual command or leadership authority and control; and a civilian superior is to be equated with a person who effectively exercises command and control in a civil organisation or in an enterprise.

39. Article 6 (2) of the Convention provides that “no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.” This provision has been implemented into German criminal law. Although a lawful official instruction or military order may develop a justifying effect, an order or instruction is not binding on the subordinate and may not be carried out if the superior orders the official to engage in criminalised conduct. If the subordinate nonetheless follows the instruction, that conduct is unlawful; he acts lawfully if he refuses to carry out the action. This principle characterises German civil service law as a whole. Among others, this is shown by the following provisions: Section 63 of the Act on Federal Civil Servants, section 36 of the Civil Service Status Act, section 97 (2), first sentence of the Prison Act, section 7 (2), first sentence of the Act on the Use of Direct Force by Federal Enforcement Office Engaged in the Exercise of Public Authority, and section 11 of the Act on the Legal Status of Soldiers. Therefore, the subordinate does not suffer any disadvantages in terms of public service for refusing to carry out an instruction to engage in criminal conduct. The person affected has legal recourse against any potential disciplinary measures resulting from his refusal to carry out criminal conduct ordered by an official superior.

40. A subordinate who has carried out an unlawful instruction cannot successfully defend the conduct with the claim that he was in a dependent relationship to the superior who issued the instruction. Specifically, he cannot rely on excused duress within the meaning of section 35 StGB: Pursuant thereto, no guilt attaches to “a person who, faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or person close to him.” A so-called “state of necessity” upon a threat by the superior with official consequences in case of a failure to obey the unlawful instruction/order, however, may not qualify as excused duress for the simple reason that the threatened consequences would not result in a danger to life, limb or freedom. For that reason, the subordinate cannot successfully claim that, due to a relationship of dependence, he was forced to carry out an order to commit a criminal offence.

## **Article 7**

41. The criminal offences under German law which could apply to cases of enforced disappearance (see above at Article 4) provide for appropriate penalties which take into account the extreme seriousness of the offence. For example, abduction (section 234a StGB) carries a penalty of imprisonment from one to fifteen years. Manslaughter is punishable with imprisonment from five to fifteen years; manslaughter in particularly serious cases and murder are punishable with life in

prison. For the basic criminal offences mentioned in the response to Article 4, German law also provides for aggravating factors – generally relevant for cases of enforced disappearance – which reflect the particular seriousness of the offence. For example, the aggravated offence of unlawful imprisonment pursuant to section 239 (3) StGB (deprivation of freedom for more than one week / serious injury to the victim) carries a penalty of imprisonment from one to ten years; aggravated unlawful imprisonment pursuant to section 239 (4) (causing death of the victim) carries a penalty of three to fifteen years' imprisonment. The same penalties apply to the offence of infliction of bodily harm causing death, regulated in section 227 StGB.

42. If, by way of enforced disappearance, minors are abducted from the care of their parents or guardian, this is punishable pursuant to section 235 StGB by imprisonment not exceeding five years or a fine. If the victim is placed in danger of death or serious injury or a substantial impairment of physical or mental development, the offence is a felony and carries a term of imprisonment from one to ten years. If by the act the perpetrator causes the death of the minor victim, the penalty is imprisonment for between three and fifteen years.

43. All of the aforementioned offences may also be realised in connection with section 357 StGB (incitement of a subordinate to commission of offences), whereby the inciting superior is subject to the same penalty as the subordinate who carries out the offence.

44. Independently of the respective completed offence, the particular gravity of the specific offence of enforced disappearance may be relevant in terms of determining punishment pursuant to section 46 StGB. Pursuant thereto, the guilt of the perpetrator is the basis for determining the sentence. In determining the degree of guilt, the court weighs the circumstances which speak for and against the perpetrator. Among other things, for example, the provision names the motives and aims of the offender, the attitude reflected in the offence, and the degree of force of will involved in its commission. These balancing criteria allow extensive consideration of all aggravating factors – for example the particularly cruel or arbitrary means of commission of the offence, or attacks on pregnant women, persons with handicaps, or other particularly vulnerable persons (to the extent that they do not already fulfil a statutory element of the offence).

45. The mitigating circumstances mentioned in Article 7 (2) (a) of the Convention may be considered in determining punishment in the German criminal law under section 46b StGB. Pursuant to that provision, the Court may mitigate the sentence or may order a discharge if the offender voluntarily discloses his knowledge and thereby contributes significantly to having a case of enforced disappearance be discovered or prevented. Other mitigating circumstances are taken into account if there are grounds for mitigation in the respective statute or by way of the general provision on determining penalties, section 46 StGB.

## **Article 8**

46. In German criminal law, the length of the statute of limitations depends upon the severity of the abstract range of punishment foreseen for the respective offence. This results in an appropriate statute of limitations for enforced disappearance.

47. Section 78 (3) StGB provides that the statute of limitations for prosecution is thirty years in the case of offences punishable by imprisonment for life (no. 1), twenty years in the case of offences punishable by a maximum term of imprisonment of more than ten years (no. 2), ten years in the case of offences punishable by a maximum term of imprisonment of more than five years but no more than ten years (no. 3), five years in the case of offences punishable by a maximum term of imprisonment of more than one year but no more than five years, (no. 4), and three years in the case of other offences (no. 5).

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48. In terms of the criminal offences in German criminal law that are relevant to the offence of enforced disappearance of persons, this means: There is no statute of limitations at all for murder, as provided by section 78 (2) StGB. The statute of limitations is twenty years for unlawful imprisonment resulting in death (section 239 (4) StGB), abduction (section 234a StGB), abduction of minors from the care of their parents resulting in death (section 235 (5) StGB), abuse of position of trust resulting in a danger of<sup>2</sup> death or serious injury (section 225 (3) StGB) and infliction of bodily harm causing death (section 227 StGB). The statute of limitation expires after ten years in cases of unlawful imprisonment by depriving the victim of freedom for more than one week or causing serious injury to the victim (section 239 (3) StGB), abduction of minors from the care of their parents by placing the victim in danger of death or serious injury, or committing the offence for material gain (section 235 (4) StGB, abuse of position of trust (section 225 (1) StGB, and causing grievous bodily harm (section 226 StGB). There is a five-year statute of limitations on unlawful imprisonment (section 239 (1) StGB), abduction of minors from the care of their parents (section 235 (1) StGB), causing bodily harm (section 223 StGB), causing bodily harm by dangerous means (section 224 StGB), assistance after the fact (section 257 StGB), and assistance in avoiding prosecution or punishment (section 258 StGB). The statute of limitations expires after three years for omission to effect an easy rescue (section 323c StGB).

49. If the enforced disappearance of the individual also constitutes a crime against humanity within the meaning of section 7 of the Code of Crimes against International Law, 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.

50. The legal situation in Germany does not require any steps to be taken to ensure that it is not the onset of the disappearance that is determinative in terms of the statute beginning to run. German criminal law provides that as a general rule, the statute of limitations does not begin to run until the offence has been completed (section 78a StGB). In cases of enforced disappearance, this is not the case until the victim is no longer deprived of his liberty. If a result which constitutes an element of the offence occurs only at a later point in time – such as, e.g., the death of the victim – the period of limitation will commence as of that point.

51. The statute of limitations may be extended particularly in the case of conduct which serves to interrupt it, for example the first interrogation of the accused person pursuant to section 78c StGB. Section 78c StGB provides that after each interruption, the limitation period commences anew. At the latest, criminal prosecution is statute-barred when double the statutory limitation period has expired since the statute first began to run.

52. In the opinion of the Committee on Enforced Disappearance, the States Parties are to ensure that the statute of limitations does not apply to proceedings commenced by the victim. The Federal Republic of Germany understands this formulation to mean that the criminal offence of enforced disappearance is not subject to the statute of limitations as long as a proceeding initiated by the victim is pending. This is ensured by section 78c (1) in conjunction with section 78b (3) StGB, which provides that the statute of limitations does not expire before the point in time when a criminal proceeding has been completed with final and binding effect if a judgment in the first instance has been rendered before expiration of the statute of limitations.

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<sup>2</sup> In the German original version of the report, decided by the German Cabinet on 19 February 2013, the words a danger of have inadvertently been left out. This has been corrected in the present version.

53. Within the scope of the criminal proceeding, the victim may appeal against the decision by an authority or a court that the statute of limitations has expired. For example, a proceeding to compel public charges may be introduced if the public prosecutor discontinues the proceedings on the grounds that prosecution of the criminal offence is barred by the statute of limitations; or an appeal may be lodged if the offender is acquitted by the court on the grounds that the statute of limitations for the offence has expired.

#### **Article 9**

54. German law fulfils the requirements of Article 9 (1)(a) of the Convention with Articles 3 and 4 StGB. Pursuant thereto, German criminal law applies to offences committed in Germany as well as on ships and aircraft which are entitled to fly the federal flag or the nationality mark of the Federal Republic of Germany.

55. Section 7 (2) no. 1 StGB does justice to Article 9 (1) (b) of the Convention. Pursuant thereto, German criminal law applies to offences committed by a German national with the precondition that the offence is threatened with a penalty at the place of the offence, or if the place of the offence is not subject to criminal law enforcement.

56. Article 9 (1) (c) of the Convention is reflected in Section 7 (1) StGB. It provides that German criminal law applies to acts which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is not subject to criminal law enforcement.

57. The Federal Government is not aware of any concrete examples of the exercise of German jurisdiction pursuant to Article 9 (1) letters (a) and (b) of the Convention.

58. One concrete example of the exercise of German jurisdiction pursuant to Article 9 (1) (c) is the El Masri case - to the extent that the circumstances of his detention may be classified as "enforced disappearance" within the meaning of the Convention. Khaled El Masri is a German citizen of Lebanese descent of whom the Bavarian *Land* Office for Protection of the Constitution (*Bayerisches Landesamt für Verfassungsschutz*) had become aware as potentially suspicious. He was detained in Macedonia during a trip in December 2003 and was apparently brought to Afghanistan by the CIA in January 2004, where he was detained for several months. Thirteen individuals are strongly suspected of being involved in the abduction of Khaled El-Masri to Afghanistan. They are accused of having brought Khaled El-Masri to Kabul on 23/24 January 2004. They are alleged to have acted as a jointly operating group of agents whose tasks included the "extraordinary rendition" of terror suspects to third countries for the purpose of detention not complying with the rule of law. Munich I Public Prosecution Office obtained an international arrest warrant against the 13 persons concerned before Munich Local Court. An international investigation as to their whereabouts was commenced. However, the U.S.A. has declined to detain and extradite the persons sought. Munich I Public Prosecution Office has not yet terminated the investigative proceeding; the warrants of arrest continue their validity and the international search continues.

59. The Federal Republic of Germany fulfils the requirements of Article 9 (2) of the Convention with section 7 (2) no. 2 StGB. It provides that German criminal law applies to offences committed abroad when the offender was a foreigner at the time of the offence, is discovered in Germany and, although the extradition law would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or extradition cannot be executed. Further, 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.

60. The statistics on extradition maintained in Germany do not show whether any incoming and/or outgoing extradition requests have been based on a case of enforced disappearance. Likewise, there are no statistical data as to whether

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incoming and/or outgoing requests for other mutual legal assistance were based on a case of enforced disappearance.

#### **Article 10**

61. An individual who is suspected of being criminally liable for the involuntary disappearance of another individual may be placed in remand detention if the prerequisites of section 112 of the Code of Criminal Procedure (*Strafprozessordnung – StPO*) have been fulfilled. That section provides that remand detention may be ordered against an accused if he is strongly suspected of the offence, if there is a ground for arrest, and if the detention would not be disproportionate to the significance of the case or to the penalty likely to be imposed. Pursuant to section 112 (2) StPO, grounds for detention could include flight, the risk of flight, or the risk that evidentiary materials will be tampered with. In the case of certain particularly serious crimes, such as murder or genocide, section 112 (3) StPO allows remand detention to be ordered without grounds for arrest having to be positively determined. If the only ground for arrest is the risk of flight, the judge may suspend execution of the arrest warrant in favour of ordering certain other measures (section 116 (1) StPO). If the arrest warrant is based upon the risk of tampering with evidence, the judge can suspend the arrest warrant if it can be expected that the accused will follow the instruction of the court not to have contact with co-accused, witnesses or experts (section 116 (2) StPO).

62. In the case of arrest, foreign accused persons are to be advised that they may demand notification of the consular representation of their native country and have messages communicated to it (section 144b (2), third sentence StPO). If remand detention is ordered, foreign accused persons are allowed to communicate both orally and in writing with the consular representation of their native country unless the court orders otherwise (section 119 (4), second sentence, no. 19 letter b) StPO).

63. Pursuant to section 119 StPO, the court may order that communication by detained accused persons be restricted if this is necessary to avert the risk of flight, tampering with evidence, or re-offending. Examples of restrictions that may be ordered include that visits are subject to permission, that correspondence and telecommunications are monitored, or that the accused is accommodated separately from other detainees. Communication of a detained accused with his defence counsel is, as a general rule, not subject to monitoring. An exception to this is that written correspondence with defence counsel may be monitored if there is a suspicion that the accused is a member of a terrorist organisation whose goal or activities include, for example, crimes against humanity, or kidnapping for extortion, or hostage-taking (section 119 StPO in conjunction with section 148 (2) StPO).

64. The statutory prerequisites exist in German law to place criminal prosecution authorities in a position of complying with the reporting obligations provided for in Article 10 (2), second sentence of the Convention. Pursuant to section 14 of the act on the Federal Criminal Police Office (*Gesetz über das Bundeskriminalamt – BKAG*), that office may, if the preconditions named therein are met, transmit personal data without a request, primarily to police and justice authorities of other states or to an international or supra-national office. Furthermore, upon receiving a request for mutual judicial assistance from another state, Germany can generally transmit personal data. Finally, sections 61a and 92 of the Act on International Legal Assistance in Criminal Matters enable transmission of personal data to public authorities of other states even without a request if certain preconditions specifically named therein are met.

## Article 11

65. In Germany, prosecution of criminal offences associated with enforced disappearance as a crime against humanity (section 7 (1) no. 7 of the German Code of Crimes against International Law (*Völkerstrafgesetzbuch – VStGB*)) is assigned to the Prosecutor General at the Federal Court of Justice (section 120 (1) no. 8 in conjunction with section 142a (1) of the Courts Constitution Act (*Gerichtsverfassungsgesetz – GVG*)). In the case of sufficient suspicion that an offence has been committed, he will commence prosecution before one of the higher regional courts that, pursuant to section 120 (1), no. 8 GVG) have factual jurisdiction for hearings and decisions in criminal matters in the first instance under the VStGB. Section 1 VStGB provides that the unrestricted principle of universal jurisdiction applies to the crime of enforced disappearance, so that the jurisdiction of German criminal courts is given independently of the place of the offence, the nationality of the offender, or other connecting factors.

66. In other cases, the public prosecution office is competent for the prosecution of criminal offences associated with enforced disappearance (see also above at Articles 3 and 4). In the case of sufficient suspicion, that office will file a criminal charge either before the local court or the regional court. The regional courts are competent for decision when certain felonies listed in section 74 (2) GVG (among others, deprivation of liberty resulting in death, manslaughter and murder) are charged; otherwise, their jurisdiction is given in a specific case with a factual situation of enforced disappearance if the penalty to be expected exceeds four years in prison (cf. sections 24 (1) no. 2, 74 (1) GVG). Also, due to the particular need for protection on the part of an aggrieved person who may testify as a witness, due to the particular scope or the particular importance of the case, the public prosecution office may also prefer charges at the regional court (section 24 (1) no. 3 GVG). In all other cases, local courts have jurisdiction to make decisions (section 24 (1) no 1 GVG).

67. The procedural principles applicable to prosecution, trial and conviction of offences of enforced disappearance do not differentiate from those applicable in other proceedings; the same is true for the standards of taking and admitting evidence. Specifically, there are neither differences in terms of whether the proceeding is directed against a German or a foreign national, nor in terms of whether the offence in question was committed in Germany or abroad.

68. Criminal proceedings in Germany are dedicated to the principles of the presumption of innocence and fair trial. These principles are a part of the rule-of-law principles anchored in the Basic Law as well as in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The principle of the rule of law also includes the right on the part of the accused person to defend himself during every stage of the proceedings through trusted defence counsel, as well as the right to remain silent.

69. There are no concrete examples in Germany of the application of the principles described here to cases of enforced disappearance.

## Article 12

70. The procedures and mechanisms used by the relevant authorities to solve the factual situation underlying a criminal offence – such as enforced disappearance – and to investigate have already been described above in the comments to Article 3.

71. Every person who assumes that another person has disappeared involuntarily may file a criminal complaint with a police station, public prosecution office or local court (section 158 (1) StPO). The criminal complaint may be made orally or in writing (section 158 (1) StPO).

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72. All persons are treated equally by the law and have equal access to every police station, public prosecution office and local court in order to file a criminal complaint in the case of an involuntary disappearance. The Code of Criminal Procedure contains a series of provisions which serve to facilitate testimony by victims and to prevent intimidation of victims. Victims of criminal offences may have a lawyer represent them, including during the investigative proceeding (section 406f StPO). In making his statement to police, the victim may be accompanied by a lawyer or another person of his trust (section 406f StPO). Furthermore, the investigating judge has the possibility of excluding the accused from being present when the victim makes a statement, for example if it is to be feared that the victim would not tell the truth in the presence of the accused (section 168c (3) StPO)). Such an examination would then be simulcast with images and sound to the room where the accused person is located (section 168e StPO). If other persons should attempt to influence witnesses or victim-witnesses in the case of an involuntary disappearance, the public prosecution may commence an investigative proceeding against such persons for assistance in avoiding prosecution or punishment (section 258 StGB). In such an investigative proceeding, the public prosecutor is able to make use of a large range of investigative measures.

73. If a responsible public prosecution office refuses to investigate a case of involuntary disappearance, the person who has filed the complaint – if he is the aggrieved party as well – has the right to file an objection to the superior official at the public prosecution office within two weeks after notification of the decision to terminate the proceedings. If the superior official confirms the decision to terminate the investigation, the person who filed the complaint may make a motion for a court decision to the higher regional court (section 172 (2) and (4) StPO).

74. If the person filing the complaint is not the same person as the aggrieved, he can file a disciplinary objection against the conduct and the decision by the public prosecutor to terminate the investigation. The conduct and the decision of the public prosecutor are then reviewed by his superior. A person filing such an objection does not, however, have the right to move for judicial review of the decision.

75. Germany does not maintain separate statistics which include data on enforced disappearance. In the history of the Federal Republic of Germany, the problem of enforced disappearance was addressed solely recently in connection with specific investigative measures of the CIA in the course of the “war on terror” (see above at Article 9). Apart from these cases of suspicion/doubt, there have been no incidents in Germany that might fulfil the elements of the crime of enforced disappearance. The existing statistics refer solely to general cases of deprivation of liberty and therefore have no declarative force in this context.

76. There are no special divisions in the German police departments and public prosecution offices which are expressly competent for cases of involuntary disappearance.

77. In a theoretical case of an involuntary disappearance, the procedure would be the following: As already stated in the comments to Article 4, the criminal offence of an involuntary disappearance would be investigated as a general criminal offence (such as, for example, deprivation of liberty, manslaughter or murder) and would be processed by the police departments and public prosecution offices of the *Länder*. However, if involuntary disappearance has been committed within the scope of an extensive and systematic attack against a civilian population, and if a crime against humanity has therefore been committed, the Federal Prosecutor General at the Federal Court of Justice, which has a specialised division for prosecuting crimes against humanity, would be responsible for the investigation.

78. There are no restrictions for the police / public prosecution office which investigates cases of involuntary disappearance if they wish to enter locations where

they assume a disappeared person to be. However, this may require a search warrant, a motion for which may be made to the investigating judge of the competent court.

79. If an official is suspected of the criminal offence of enforced disappearance, the following civil-service rules are available: First of all, the employer has the possibility at any time of prohibiting a civil service official from exercising his position for compelling reasons relating to his office (cf. section 66, first sentence of the Act on Federal Civil Servants (*Bundesbeamtengesetz*), section 39, first sentence of the Civil Servant Status Act (*Beamtenstatusgesetz*). If no disciplinary proceeding is commenced against the person concerned, this measure is limited to three months. If there are indications, however, that lead to the suspicion of violation of official duties, section 17 (1) of the Federal Disciplinary Act (*Bundesdisziplinalgesetz*) provides that such a disciplinary proceeding is to be commenced; this could lead to removal from service and loss of the status as an official. Following commencement of the disciplinary proceeding, the possibility exists to temporarily suspend the official from service if it can be foreseen that the disciplinary proceeding will likely result in removal from civil service (section 38 (1), first sentence of the Federal Disciplinary Act (*Bundesdisziplinalgesetz*) and comparable rules in the disciplinary laws of the *Länder*). Section 41 (1) of the Act on Federal Civil Service, section 24 (1) of the Civil Service Status Act provides that the civil service relationship mandatorily ends if a civil servant is convicted in an ordinary criminal proceeding of an intentional offence by final and binding judgment of a German court and sentenced to imprisonment of at least one year. This is consistent with the minimum penalty provided for offences that might be associated with enforced disappearance (see Article 13).

### **Article 13**

80. Enforced disappearance is punishable in Germany under numerous provisions of criminal law, including those governing unlawful imprisonment (section 239 StGB), assistance after the fact (section 257 StGB), assistance in avoiding prosecution or punishment (section 258 StGB), omission to effect an easy rescue (section 323c StGB) and incitement of a subordinate to the commission of offences (section 357 StGB). (For further offences defined under German law, please see the list in the submissions on Article 4.) All of these offences are punishable by a maximum prison term of at least 12 months. The definitions of these offences are thus in conformity with all relevant multilateral conventions on extradition (above all the European Convention on Extradition of 13 December 1957) and all of Germany's bilateral extradition treaties, including with Australia, India, Canada and the United States of America. Finally, they also constitute extraditable offences for non-treaty-based extradition (see section 3 (2) IRG), and are covered by German legislation to implement Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedure between Member States of the European Union (section 81 IRG).

81. Because the crime of "enforced disappearance" does not exist as a separate offence under German criminal law, none of Germany's bilateral or multilateral extradition treaties makes explicit reference to enforced disappearance as an extraditable offence. However, all conduct that is subsumed under the crime of enforced disappearance in the Convention is covered by the above-mentioned treaties. Their implementation is not subject to any impediments relevant in this context. In particular, enforced disappearance is not subject to qualification as a political offence.

82. The Federal Government has not become aware of any cases to date in which the Convention has been used as the basis for an extradition.

83. Domestic procedure for extraditions is governed by the Act on International Cooperation in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*, IRG), in particular sections 2-42, 78 and 83i IRG. German extradition

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proceedings are divided into an admissibility hearing in court and a subsequent administrative granting procedure. Jurisdiction to decide on the admissibility of an extradition case lies with the higher regional courts (section 13 IRG). Pursuant to section 74 IRG, the power to grant extraditions generally lies with the Federal Ministry of Justice/Federal Office of Justice, which decide in consultation with the Federal Foreign Office and, if applicable, other affected ministries. Extraditions between Germany and other Member States of the European Union follow the provisions of Framework Decision 2002/584/JHA. In these cases, both admissibility and granting decisions are taken by the *Land* authorities (office of the relevant public prosecutor general/higher regional court).

84. For both admissibility and granting decisions, an examination is conducted of whether any specific indications exist in the target State of a violation of minimum rights as recognised under international law, or of any of the constitutional principles laid out in the German Basic Law. Pursuant to section 6 IRG, extradition requests for political offences are inadmissible. This also applies if there is serious cause to believe that, if extradited, the person sought would be persecuted or punished on account of his race, religion, nationality, association with a certain social group or political views, or if his situation would be worsened on any of those grounds. Furthermore, section 8 IRG precludes extradition to a State in which the death penalty may be enforced on the person sought. Finally, section 73 IRG prohibits extradition, above all, in cases where the person sought would face an unreasonably severe penalty or inhumane treatment during criminal proceedings or in prison in the target State.

#### **Article 14**

85. In Germany, the types of mutual legal assistance referred to in this provision fall under the category of “other assistance,” i.e. assistance that does not involve extradition into or out of Germany, transit or enforcement. In cases of enforced disappearance, Germany can provide “other assistance,” in particular, on the basis of the following treaties:

- European Convention on Mutual Assistance in Criminal Matters of 20 April 1959;
- Additional Protocol hereto of 17 March 1978;
- Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between Member States of the European Union.

86. In addition, Germany has concluded bilateral treaties with the United States of America, Canada, the Republic of Austria, Switzerland, the Netherlands and the Hong Kong Special Administrative Region, each of which contains provisions on “other assistance.” Furthermore, Germany can provide Japan with legal assistance on the basis of the Agreement of 30 November/15 December 2010 between the European Union and Japan on Mutual Legal Assistance in Criminal Matters.

87. Finally, Germany can provide other legal assistance to any State Party on a non-treaty basis pursuant to sections 59 et seqq. IRG.

#### **Article 15**

88. The above-mentioned provisions on “other assistance” (see submissions on Article 14) generally also allow the provision of legal assistance to other States Parties in case-specific criminal contexts for the purpose of assisting the victims of enforced disappearance.

89. However, the statistical tools available in Germany do not enable any specific examples of cooperation with other States in the area of victim assistance.

## Article 16

90. German residency law forbids a person from being expelled, deported, surrendered or extradited if there are valid reasons to believe that this person would be at risk of enforced disappearance in the target State. This follows from the provisions of section 60 (1), (2) and (7) of the Residence Act (*Aufenthaltsgesetz*, *AufenthG*), which forbid deportation under certain circumstances. These provisions serve to implement the Convention of 28 July 1951 Relating to the Status of Refugees. Subsection (2) provides that a foreigner may not be deported to a State where a specific danger exists of his being subjected to torture or inhumane or degrading treatment or punishment. Subsection (7) is a subsidiary provision; it generally forbids deportation where there is a risk of the foreigner in question being exposed to significant and specific danger to life, limb or liberty in the target State. The specific circumstances under which deportation is forbidden pursuant to these provisions include the typical elements of enforced disappearance, i.e. loss of personal liberty, torture or death. Since it will be more difficult, in cases of doubt, to anticipate “enforced disappearance” than the specific elements thereof, the creation an additional crime of enforced disappearance would be of no added value here.

91. Because of the above-mentioned provisions prohibiting extradition to other States if there is a danger of enforced disappearance, the Federal Criminal Police Office does not automatically take action on incoming INTERPOL alerts from other States in cases where the person sought is at risk of falling victim to a violation of the rule of law in the form of political persecution or enforced disappearance. Instead, these alerts are forwarded for decision to the responsible authorities (Federal Office of Justice, Federal Foreign Office; see section 15 (3) BKAG and no. 13 of the Guidelines on Relations with Foreign Countries in Criminal Law Matters [*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*, RiVAST]).

92. Germany has no laws governing areas such as terrorism, emergencies or national security which permit any exceptions to the aforementioned provisions prohibiting deportation or extradition. These provisions must be enforced even under such exceptional circumstances.

93. Deportations pursuant to the law governing aliens and asylum are the responsibility of the local foreigners authority. In Germany there are approximately 800 of these authorities. The foreigners authorities decide whether a particular deportation is prohibited after involving the Federal Office for Migration and Refugees (section 72 (2) of the Residence Act). The latter is also responsible for establishing whether a deportation is prohibited in asylum cases.

94. In cases where deportation is declared permissible pursuant to the law governing aliens/asylum, recourse may be taken to the courts. Decisions of the administrative courts may be appealed (available instances: appeal on fact and law, appeal on points of law only).

95. In the context of mutual legal assistance in criminal matters, any decision by a granting authority not to raise objections pursuant to section 83b IRG to a request for extradition submitted by an EU Member State may be subject to review by the relevant higher regional court (section 79 IRG). Furthermore, the higher regional courts may review all decisions on whether to grant requests pertaining to other EU Member States in order to ensure that there has been no abuse of discretion. Finally, all persons sought may appeal their extradition to the Federal Constitutional Court. Extradition proceedings are suspended while any of the above-mentioned legal remedies are pending.

96. Article 16 of the Convention requires no specialised knowledge or skills that are not already employed in applying existing provisions forbidding deportation and/or extradition under international, European and domestic law. In all courts and authorities, substantive decisions are taken by fully qualified lawyers who, as a rule,

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have many years of practical experience in international legal assistance. Additional training within the meaning of Article 23 of the Convention has therefore not become necessary.

#### **Article 17**

97. In Germany, the prohibition of secret/unofficial restrictions of liberty is set out in the Basic Law; Article 104 (cited above – see A. I.) explicitly stipulates the primacy of law and the duty of judicial review. Pursuant to this Article, a person's liberty may be restricted only pursuant to a formal law and only in compliance with the procedures described therein. Only a judge may rule upon the permissibility or continuation of deprivation of liberty.

98. Section 128 (2) of the Code of Criminal Procedure (*Strafprozessordnung*, StPO) provides that the investigating judge shall decide on the issuance of an arrest warrant. An arrest warrant may be issued if the accused is strongly suspected of the offence and if there are grounds for arrest (section 112 (1) StPO). Grounds for arrest are deemed to exist if, on the basis of certain facts,

- it is established that the accused has fled or is hiding;
- there is a danger of flight, or
- the accused's conduct gives rise to the strong suspicion that he will destroy, alter, remove, suppress or falsify evidence, or improperly influence the co-accused, witnesses or experts or cause others to do so (section 112 (2) StPO).

99. If the accused is strongly suspected of having committed a criminal offence of particular gravity, e.g. genocide, founding a terrorist organisation or murder, remand detention may be ordered even if none of the above-mentioned grounds for arrest can be established (section 112 (3) StPO). The Federal Constitutional Court has interpreted this provision to mean that, even in such cases, according to the circumstances, a risk of flight or tampering with evidence must exist.

100. Section 112a StPO provides that grounds for arrest also exist under the following circumstances: if the accused is strongly suspected of a sexual offence or having repeatedly or continually committed criminal offences which seriously undermine the legal order; if certain facts substantiate the risk that, prior to final conviction, the accused will commit further serious criminal offences of the same nature or will continue the criminal offence; or, if no sexual offence has been committed, a sentence exceeding one year is to be expected.

101. In certain emergency situations that are closely defined by law, any person is authorised to arrest another person provisionally if the person in question is caught in the act or is being pursued (section 127 (1) StPO). In exigent circumstances, public prosecutors and the police are also authorised to make a provisional arrest if the prerequisites for the issuance of an arrest warrant have been fulfilled (section 127 (2) StPO). In cases of provisional arrest, the arrested person must be brought before a judge at the latest on the day following his arrest. Otherwise he must be released (section 128 StPO).

102. Outside of the context of criminal law and the law on prisons, persons under adult guardianship and/or mentally ill persons may be deprived of their liberty in cases where the following conditions are met:

103. Section 1896 (1) of the Civil Code (*Bürgerliches Gesetzbuch*, BGB) provides that the responsible court shall appoint a guardian for any person of full age, who, by reason of a mental illness or a physical, mental or psychological handicap, cannot take care of his own affairs in whole or in part. The appointed guardian may place the person under his guardianship in a facility (with deprivation of liberty) if the person concerned poses a considerable danger to himself, or if there are compelling

medical grounds to do so in order to prevent him from potentially causing serious damage to his health (section 1906 (1) BGB).

104. Pursuant to section 1906 (2) BGB, the guardian requires judicial consent in order to do this. The guardian himself may decide whether to make use of this consent once granted. If the requirements of section 1906 (1) have not been met (or can no longer be met), he may not make use of this consent, or he must end the placement and demonstrate this to the court. Imposing a limit on the duration of its consent is the only form of direct control that the court exercises over the deprivation of liberty in these cases. Otherwise, placement is supervised by the guardian who, however, is continually supervised by the court, and is under obligation to provide information and submit written reports on his actions in this capacity (section 1908i (1), 1837, 1839, 1840 BGB). This allows the court to effectively supervise placement and the termination thereof.

105. The placement of mentally ill persons in facilities pursuant to public law is governed by *Land* legislation on mentally ill persons, including their placement and deprivation of liberty. Such placement requires judicial review, i.e. it must be ordered by a court. Such placement is permissible only if and, for as long as, the affected person, in his conduct as caused by the condition from which he suffers, poses a substantial ongoing danger to himself or to the significant legal interests of others, and if this danger cannot be averted by other means.

106. The court may order placement for a period ranging from several days to (depending on the *Land* concerned) 12 months or a maximum of two years. A decision on whether to continue the placement must be made at the latest before this period ends. If a judicial order to continue placement is not issued, the person must be released.

107. If, in exigent circumstances, immediate placement is required, the local public order agency may effect immediate placement without a prior decision by the court. In order to do this, it must have obtained certification by a physician, dated no earlier than the day before placement, containing the relevant findings. A subsequent judicial order must be obtained without delay, usually by the end of the day following the date of placement. If such order is not issued within this time, the hospital's chief physician must release the person concerned. The placement ends upon expiry of the period stipulated in the judicial order or by order of the court if placement is no longer necessary. The affected person may move for the placement order to be revoked at any time.

108. In the context of criminal proceedings, the accused, if arrested, is entitled to contact the defence counsel of his choice, demand an examination by a female or male physician of his choice and, if he is a foreign national, demand notification of the consular representation of his native country (section 114b (2) StPO). The accused may notify a relative or a person he trusts, provided that this does not endanger the purpose of the investigation (section 114c (1) StPO). If the court issues an order for the arrested accused to be placed in remand detention, the court must order the notification without delay of a relative of, or a person trusted by, the accused. Such notification is also required if remand detention is extended (section 114c (2) StPO). A foreign national must be advised upon arrest that he may demand notification of the consular representation of his native country and have messages communicated to the same (section 114b (2) StPO).

109. The arrested accused has the right to consult the defence counsel of his choice at any time (sections 114b and 148 StPO). The investigating judge who orders remand detention decides whether visits to the accused in prison are to be monitored (section 119 StPO). The accused is in principle entitled to communicate freely with his defence counsel, orally and in writing, with the exception that the court has the power to monitor written communications, and has ordered such monitoring in cases where the accused is strongly suspected of having committed a

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terrorist offence (section 148 StPO). While in remand detention, a foreign national may communicate orally and in writing with the consular representation of his native country, unless the court has ordered otherwise (section 119 (4) no. 4 b) StPO).

110. If a custodial sentence or a measure involving deprivation of liberty is imposed, the details are determined pursuant to the federal Prisons Act (*Strafvollzugsgesetz*, StVollzG) or the comparable provisions of those acts on the enforcement of prison sentences and measures of reform and prevention involving deprivation of liberty enacted at the *Land* level; where the latter exist, they replace the federal legislation. The execution of remand detention in accordance with the rules set out in section 119 StPO is governed by the *Land* acts on the execution of remand detention. The Act of 16 December 2011 on the Execution of Remand Detention in Schleswig-Holstein (*Untersuchungshaftvollzugsgesetz Schleswig-Holstein*, UVollzG-SH) is cited in the following paragraphs by way of example. The legislation of other *Länder* is similar.

111. Section 23 of the federal Prisons Act provides that each prisoner shall have the right to communicate with persons outside the institution, and that this communication shall be encouraged. This communication may take place in person, by telephone or in writing: Section 24 StVollzG provides that each prisoner shall be allowed to have visitors at regular intervals. The *Land* acts on the execution of remand detention also provide that remand detainees may have visitors. The federal Prisons Act and the *Land* acts on the execution of remand detention both provide that visitation rights may be restricted if they endanger the security of the facility (cf. section 25 (1) StVollzG and section 33 (4) UVollzG-SH). However, prisoners are in principle entitled to communicate without restrictions with their defence counsel and with the other bodies/persons specified in sections 119 (4) and 148 StPO. The right of visitation is not limited to a certain group of persons. However, section 25 no. 2 of the Prisons Act provides for the possibility of denying visits by non-family-members if it is to be feared that the persons concerned may exert detrimental influence on the prisoner or hamper his integration after release from prison.

112. Pursuant to section 28 StVollzG/section 36 UVollzG-SH, all prisoners have the right to send and receive letters. The prison is in principle obliged to dispatch and receive these letters, and to forward a prisoner's letters without delay (section 30 StVollzG/section 38 UVollzG-SH). Furthermore, there are no universal limitations which restrict the right of correspondence to certain persons. However, as is the case with visitation rights, correspondence with specific individuals may be forbidden, primarily if the security or order of the facility would otherwise be jeopardised (section 28 (2) no. 11 StVollzG/section 38 (2) UVollzG-SH). Furthermore, the Prisons Act and *Land* acts on the execution of remand detention contain provisions which allow for monitoring of correspondence and interception of certain letters (sections 29, 31 StVollzG/sections 37, 39 UVollzG-SH). However, as in other areas, restrictions on written correspondence with the persons specified in sections 119 (4) and 148 StPO are generally forbidden.

113. Aside from written correspondence, prisoners are also in principle permitted to send and receive packages within the scope provided by statute (sections 33 StVollzG/section 31 UVollzG-SH). Prisoners may also be granted permission to communicate via telephone (section 32 StVollzG/section 40 UVollzG-SH). The provisions of visitation rights described above apply *mutatis mutandis* (as does the aforementioned reference to sections 119 (4) and 148 StPO).

114. German law governing prisons and the execution of remand detention provides for the following mechanisms of inspection: Pursuant to section 162 StVollzG/section 87 UVollzG-SH, advisory councils must be established at prisons. These councils shall be composed, where possible, of members of associations and/or federations. However, they may not include members of the prison/facility staff (section 162 (2) StVollzG/section 87 (1), second sentence, UVollzG-SH).

Members of the advisory councils are independent. They have the right to obtain information on prisoners' accommodation, occupation, vocational training, meals, health care and treatment, and to personally visit the facilities (section 164 (1) StVollzG/section 87 (3) UVollzG-SH). They also have the right to visit prisoners in their cells and to speak to them unsupervised (section 164 (2) StVollzG/section 87 (3), third and fourth sentences, UVollzG-SH).

115. Prisons and corresponding facilities are also inspected by the National Agency for the Prevention of Torture. This agency was created as part of Germany's implementation of the Optional Protocol to the United Nations Convention of 18 December 2008 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which Germany has ratified. Because of Germany's federal structure, the National Agency comprises the Federal Agency for the Prevention of Torture and a corresponding Joint Commission of the *Länder*. The National Agency operates independently, i.e. it is not subject to any form of professional or legal oversight. The head of the Federal Agency and members of the Joint Commission are not subject to any instructions in exercising their office. The National Agency inspects places "where persons are or may be deprived of their liberty" within the meaning of Article 4 (1) OPCAT. These include prisons, the closed wards of psychiatric facilities, and detention centres for asylum seekers. In conformity with Article 19 OPCAT, the National Agency has the power to "regularly examine the treatment of persons deprived of their liberty," "make recommendations to the relevant authorities" and make proposals with regard to legislation. Pursuant to Article 20 OPCAT, the Federal Republic of Germany has a duty to provide access "to all [relevant] information" and "all places of detention," and to grant the National Agency "the liberty to choose the places they want to visit." Furthermore, the National Agency must be given the opportunity to have "private interviews with the persons deprived of their liberty without witnesses" and to enter into dialogue with the UN Subcommittee on Prevention of Torture. In accordance with Article 21 (1) OPCAT, any persons who submit information to the National Agency may not suffer any form of prejudice. Article 22 OPCAT obligates the supervisory authorities to "examine the recommendations" given by the National Agency and to "enter into a dialogue with it on possible implementation measures." The National Agency's first annual report has already been submitted to the United Nations. The Subcommittee on Prevention of Torture (SPT), set up by the United Nations on the basis of Article 2 OPCAT, will visit Germany on 8 April 2013 and will inspect places of detention together with the National Agency.

116. Germany has also ratified the Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment. This means that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is able to visit all places of detention in Germany and speak to detainees without witnesses. The CPT has made six official visits to Germany to date. The latest report is available in German on the website of the Federal Ministry of Justice, along with the corresponding response by the Federal Government.

117. A further control mechanism is provided for in the form of oversight by the responsible ministries of the *Länder*, which constitute the supervisory authorities for prisons in Germany. This supervision comprises legal and professional oversight. The *Land* ministries may therefore inspect the prisons within their remit at any time in order to ensure adherence to the law on the execution of remand detention and criminal sentences.

118. An accused person in remand detention has the right to move at any time for a court hearing as to whether his remand detention remains lawful (sections 117 and 118b StPO in conjunction with section 297 StPO). He may do this himself or through his defence counsel.

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119. The investigation file on a detained accused person contains information on the identity of the accused, the time, place and date of his arrest, the reasons for his remand detention, the name of the court that ordered the remand detention, as well as the prison where he is being held and the date of his release (to the extent that release has been ordered). The court communicates this information to the prison in which the accused is detained. The court additionally informs the prison of which public prosecution office is in charge of the proceedings and which court is responsible for reviewing the detention. It also informs the prison of which of the accused's relatives, or persons enjoying his trust, have been informed of his arrest. Furthermore, it communicates to the prison any restrictive court orders pertaining to the execution of the remand detention, e.g. on visitation monitoring, as well as any court decisions or judgments pertaining to the accused and other information about the accused as an individual that is required for the prison to perform its task (section 114d StPO). If the accused has been placed in remand detention, both the public prosecution office and the court that ordered the placement will monitor the duration of placement and ensure that the lawfulness of ongoing remand detention is reviewed at the intervals provided by statute (sections 118 and 121 StPO).

120. Prisons maintain prisoner files and medical records on each and every one of the inmates detained in their facilities. It is up to the *Länder* to draw up more detailed provisions governing these files. Such provisions can be found, *inter alia*, in the Prison Rules of Procedure (*Vollzugsgeschäftsordnung*, VGO), which the *Länder* have adopted on a joint basis. Furthermore, the *Länder* have their own administrative and implementation provisions. Prisoner files contain all key documents, e.g. the inmate's prison plan. Information on the medical condition of each prisoner can be found in the prisoners' medical records, which are kept separately from prisoner files.

121. Furthermore, a *detention file* exists within the INPOL police information system. This file covers persons who have been deprived of their liberty by judicial order as the result of unlawful conduct, and includes not only those who remain in official custody but also those who have since been released. This allows the police authorities of the Federation and the *Länder* to prevent search alerts from being issued for people who are already in custody. It also allows them to gather reference material for verifying alibis, as well as needed information for rapid apprehension of escaped prisoners, and information on placement in open facilities, prison-term suspension, imminent release and home address following release. The file is accessible not only to the police, but to the Main Customs Offices (*Hauptzollämter*) for performance of their border-police duties pursuant to section 68 of the Act on the Federal Police (*Gesetz über die Bundespolizei*, BPolG), the customs investigation authorities, the public prosecution offices for administering criminal justice, and to the police and security service of the German Bundestag (parliament).

### **Article 18**

122. The accused's defence counsel has the right to inspect the investigation files of the public prosecution office pertaining to his client. If the investigation is not yet complete, the defence counsel may be denied access to the files if this would endanger the purpose of the investigation. If the accused is in remand detention, or if – in the case of provisional arrest – a motion for remand detention has been made, information of relevance for assessing the lawfulness of such detention shall be made available to the defence counsel in suitable form; to this extent, access to the files is usually to be granted (section 147 StPO).

123. A private person who can demonstrate a legitimate interest in obtaining information from the files may do so (section 475 (1) and (4) StPO). Alternatively, he may retain an attorney to inspect the files if the provision of information would require disproportionate effort on the part of the public prosecution office (section 475 (2) StPO).

124. Anybody who intimidates or penalises persons who demand access to the information specified in Article 17 of the Convention may be convicted of coercion pursuant to section 240 StGB. If physical attacks take place, the general provisions of the Criminal Code for the protection of physical integrity will apply (in particular: sections 223 et seqq. governing bodily harm).

125. In terms of disciplinary consequences, civil servants are released from service by law if they are sentenced by a German court of ordinary jurisdiction with final and binding effect to a term of imprisonment of at least 12 months for an intentional offence (section 41 (1) of the Act on Federal Civil Servants (*Bundesbeamtengesetz*, BBG), section 24 (1) of the Civil Servant Status Act (*Beamtenstatusgesetz*, BeamStG)). Furthermore, a civil servant's superior is under obligation, pursuant to the section 17 (1) of the Federal Disciplinary Act (*Bundesdisziplinargesetz*), to institute disciplinary proceedings if there are reasons to suspect that a disciplinary offence has been committed. Such proceedings can lead to dismissal from the civil service.

126. (On access to information, see also the submissions on Article 20.)

### **Article 19**

127. In Germany, the Federal Data Protection Act (*Bundesdatenschutzgesetz*, BDSG) ensures that the individual does not suffer impairment of his right to privacy through the handling of his personal data. The provisions of this act are applicable in all contexts except where special federal legislation applies in a certain area (section 1 (3) BDSG).

128. The general enabling clause of section 13 (1) BDSG applies for the collection of personal data by public bodies. This provision stipulates that the collection of personal data is permissible only in cases where the competent body, e.g. a law enforcement agency, requires this data in order to perform its duties.

129. For the collection of certain types of personal data defined in section 3 (9) BDSG, including information about a person's health, special requirements are set out in section 13 (2) BDSG. Pursuant to this provision, the collection of these types of data is permissible only insofar as:

- such collection is stipulated in a legal provision or is essential on account of an important public interest;
- the data subject has consented pursuant to section 4a (3) of the Data Protection Act;
- such collection is necessary in order to protect vital interests of the data subject or a third party, insofar as the data subject is unable to give his consent for physical or legal reasons;
- such collection concerns data which the data subject has evidently made public;
- such collection is necessary in order to avert a substantial threat to public safety;
- such collection is necessary in order to avert substantial detriment to the common good or to protect substantial interests that are inherent to the common good;
- such collection is necessary for the purposes of preventive medicine, medical diagnosis, the provision of health care services or treatment, or the administration of health care services, and the processing of these data is carried out by medical personnel or other persons who are subject to a corresponding duty of confidentiality;

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- such collection is necessary for the conduct of scientific research, the scientific interest in carrying out the research project substantially outweighs the data subject's interest in forbidding collection, and the purpose of the research cannot be achieved in any other way, or would otherwise necessitate disproportionate effort; or
  - such collection is necessary for compelling reasons of defence or the discharge by a federal public body of its supranational or international duties in the field of crisis management or conflict prevention, or for humanitarian action.

130. Pursuant to section 14 (1) BDSG, the storage, processing or use of personal data by public bodies is permissible only in cases where this is necessary for the performance of duties within the remit of the responsible body, and if it serves the purposes for which the data were collected. If there has been no preceding collection, the data may be modified or used only for the purposes for which they were stored.

131. Section 14 (2) BDSG permits the storage, modification or use of data for other purposes under certain narrowly defined circumstances. Ultimately, however, this provision would probably not be held to apply in the present context, since – in the search for a “disappeared person” – the provisions of Article 19 (1) of the Convention prescribe a clear delimitation of purpose for use of data collected.

132. Sections 15 and 16 BDSG set forth rules for the transfer of personal data to public and private bodies and refer, *inter alia*, to the permissibility provisions of section 14 of the same Act (see above).

133. Data processing by public bodies at the *Land* level is governed by comparable provisions of data protection legislation enacted by the *Länder* (section 1 (2) BDSG).

#### **Article 20**

134. Pursuant to German law, information about a person's detention may be received by the accused himself, his defence counsel and any private persons who can demonstrate a legitimate interest in receiving such information. However, the following restrictions apply:

135. The accused's legal counsel is generally entitled to inspect all investigation files of the public prosecution office relating to the accused (section 147 (1) StPO). If the investigation is not yet complete, however, the accused's defence counsel may be denied access to the files, if such access would jeopardise the purpose of the investigation (section 147 (2) StPO). If the accused is being held in remand detention, or if – in the case of provisional arrest – remand detention has been moved for, any information of relevance for assessing the lawfulness of such detention shall be made available to the defence counsel in suitable form; to this extent, access to the files is usually to be granted (section 147 StPO). The accused's defence counsel may not be barred at any stage of the proceedings from inspecting expert reports or written records of his client's examination or of such judicial acts of investigation to which the defence counsel was or should have been admitted (section 147 (3) StPO). The defence counsel must be granted full access to the files at the latest upon conclusion of the investigation (section 147 (1) StPO). Prior to commencement of the court proceedings and after the issuance of a final and binding judgment, the public prosecution office must decide whether to grant access to the files. Otherwise the court makes this decision (section 147 (5) StPO). If the public prosecution office refuses access to the files in a case where the accused has been detained, this refusal can be challenged with a motion to the competent court (section 147 (5) StPO).

136. An accused who has no defence counsel may move to receive information and copies from the files, and his motion is to be granted provided that it is

necessary for an adequate defence (section 147 (7) StPO). This applies in particular if the accused is being detained (section 147 (7) in conjunction with section 147 (2) StPO). If the public prosecution office refuses to provide information from the files, the accused may move for a court decision (section 147 (7) in conjunction with section 147 (5) StPO). However, the participation of defence counsel is always mandatory in cases where the accused has been placed in remand detention (section 140 (1) no. 4 StPO).

137. A private person who can demonstrate a legitimate interest in obtaining information from the files may do so (section 475 (1) and (4) StPO). He may retain an attorney to inspect the files if the provision of information would require disproportionate effort on the part of the public prosecution office (section 475 (2) StPO).

138. Other persons who cannot demonstrate a legitimate interest in inspecting the files may not be provided with any information therefrom. This restriction protects the accused by preventing his data from being passed on to persons who desire to establish (potentially out of sheer curiosity) where and why the accused is being detained.

139. German domestic law does not contain any provisions which impermissibly restrict access to information regarding detained individuals.

140. If a private person who has demonstrated a legitimate interest in receiving information from the files is refused this information, he can move for a court decision (section 478 (3) StPO). Access to this legal remedy cannot be denied or restricted.

141. The participation of defence counsel is mandatory in the event of remand detention (section 140 (1) no. 4 StPO). If the public prosecution office refuses the defendant's defence counsel access to the files and the defendant is in remand detention, the defence counsel can move for a court decision (section 147 (5) StPO).

## **Article 21**

142. In criminal and corrections law, the following provisions ensure that a person's release from prison can be verified:

143. If remand detention is ordered against an accused person, a family member must be informed immediately about this order and about any extension of the remand detention (section 114a (2) StPO), and thus knows when to expect release. Section 16 of the federal Prisons Act provides that the prisoner must generally be released on the last day of his sentence; the prison acts of *Länder* contain comparable provisions. In addition, the *Land* acts on the execution of remand detention provide that the prisoner must be released from remand detention when the court or public prosecution office orders a release. The aforementioned Prison Rules of Procedure (*Vollzugsgeschäftsordnung*, VGO) also contain provisions on prisoner release. The release must be communicated, above all, to the authority responsible for the placement in detention, and, if applicable, to the appointed probation officer. Furthermore, the release of a prisoner must be ordered in writing. The release hearing shall be recorded in writing, and this record is to be signed by the prisoner. Finally, the prisoner must be given a certificate of release signed by the head of the prison's administrative office; a duplicate of this must be added to the prisoner's personal file.

144. The provisions of the Criminal Code which outlaw unlawful imprisonment (section 239 StGB), perverting the course of justice (section 339 StGB) and enforcement of penal sanctions against innocent persons (section 345 StGB) ensure that officials carry out orders to release an accused from prison by providing that the officials themselves would otherwise be liable to criminal prosecution.

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145. The prison where the accused is detained must ensure that the prisoner is released. In cases where release from prison is ordered during court proceedings or as a result of acquittal, the justice officials who supervise the accused in court must ensure that the order for release is implemented. If these justice officials act contrary to the order to release the accused, they risk being liable to criminal prosecution or disciplinary action themselves (see above).

146. On the release of mentally ill persons/persons under adult guardianship, please see the submissions on Article 17.

## **Article 22**

147. Every accused person in remand detention has the right to move for a court hearing as to whether the warrant of arrest is to be revoked or its execution suspended (sections 117 and 121 StPO). The accused's defence counsel or his statutory representative may file the corresponding motion on his behalf (section 118b StPO in conjunction with section 297/section 298 StPO).

148. The following measures generally suffice to ensure that the accused is not detained illegally: If an accused person is being held in remand detention, his family members must be informed immediately about the duration and any extension of his detention (section 114a (2) StPO). This means that they are aware of when to expect his release. The accused, his defence counsel or his statutory representative may move for a court hearing as to whether the warrant of arrest is to be revoked or its execution suspended (sections 117 and 121 StPO).

149. The provisions of the Criminal Code which outlaw unlawful imprisonment (section 239 StGB), perverting the course of justice (section 339 StGB) and the enforcement of penal sanctions against innocent persons (section 345 StGB) ensure that officials do not detain others illegally and that they carry out orders to release an accused from prison.

150. In terms of disciplinary consequences, corresponding proceedings must be instituted if there are sufficient reasons to believe that a disciplinary offence has been committed (pursuant to section 17 (1) of the Federal Disciplinary Act or the comparable provisions of the *Land* disciplinary acts). Disciplinary proceedings may lead to removal from civil service. Civil servants are released from service by law if they are sentenced by a German court of ordinary jurisdiction with final and binding effect to a custodial sentence of at least 12 months (section 41 (1) of the Act on Federal Civil Servants (*Bundesbeamtengesetz*, BBG), section 24 (1) of the Civil Servant Status Act *Beamtenstatusgesetz*, BeamtStG)).

## **Article 23**

151. In Germany, the groups of persons referred to in Article 23 receive intensive instruction in the legal provisions relevant to their respective fields as part of their professional training. As stated above (A. I.), the German Basic Law stipulates the primacy of law and the duty of judicial review for deprivation of liberty (Article 104 of the Basic Law – *Grundgesetz*, GG) and thus provides comprehensive legal guarantees. This guarantee is reflected in all provisions relevant in the present context and to the persons stipulated in Article 23. It ensures that the persons concerned are thoroughly informed about the ban on enforced disappearance and the impact that this ban has. This applies in particular to members of the civil service, who are bound under the constitution to law and justice (Article 20 (3) of the Basic Law).

152. On disciplinary implications please refer to the submissions on Article 6.

## Article 24

153. Both criminal and civil law in Germany reflect the definition of “victim” within the meaning of the Convention.

154. In criminal and criminal procedure law, the term “victim” (or more precisely: “aggrieved person”) is always defined consistent with the purpose of the relevant provision. While the direct violation of a legal interest through the criminal offence in question always constitutes a core element of this definition, the term is to be interpreted broadly. For the criminal offences associated with enforced disappearance, the term is therefore not limited to the disappeared person himself, but may also include other natural persons such as close relatives whose legal interests might have been directly violated as a result of the enforced disappearance. The only persons excluded by the terms “victim” and “aggrieved person” from the very outset are those affected merely as members of the general public protected by the provision.

155. Involuntary disappearances are investigated by police and the public prosecution offices *ex officio* (sections 160 (1), 163 StPO). The aim of the investigation is to locate the disappeared person and establish his fate.

156. Please find attached an information brochure published by the Federal Criminal Procedure Office for an overview of the general procedure followed in missing-persons cases.

157. Aggrieved persons in cases of involuntary disappearance may move to be notified of the outcome of any court proceedings concerning the offence in question (section 406d StPO). This ensures that the aggrieved person is not forgotten and that he is informed, if he so desires, of the penalties imposed upon the perpetrator of the involuntary disappearance. Aggrieved persons may inspect the files of the investigation into the perpetrator if they can demonstrate a legitimate interest in doing so (section 406e (1) StPO). In cases of unlawful imprisonment, manslaughter or murder, the aggrieved person or – in the event of homicide – his relatives may join the proceedings against the accused as private accessory prosecutors (section 395 StPO).

158. If the victim is deceased, the public prosecution office may order a post-mortem examination and an autopsy (section 87 StPO), as well as a molecular and genetic examination to identify the deceased (section 88 StPO). The seizure of the deceased’s body for the purposes of investigation and the termination of such seizure must be recorded in the files. The investigating authority may keep possession of the remains only for as long as this is necessary for the purposes of the investigation. After the seizure period has ended, the remains must be returned to the relatives.

159. Compensation law first grants disappeared persons themselves comprehensive rights to pecuniary and non-pecuniary damages. These rights are transferred to the disappeared person’s heirs upon death. Furthermore, any relatives who have suffered damage to their health as a result of the enforced disappearance (e.g. shock) may assert their own claims to compensation for pecuniary and non-pecuniary damage.

160. Pursuant to German law, the right to compensation for damage includes all pecuniary and non-pecuniary damage. This means that the aggrieved person is to be returned to the *status quo ante*, i.e. his situation had the damage not occurred. This includes treatment costs and any other pecuniary damage, as well as disadvantages suffered by the aggrieved person as a result of the conduct concerned in terms of earning capacity or development. Furthermore, the aggrieved person has the right to damages for pain and suffering.

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161. These claims can be made by filing a general civil action before the competent civil court (sections 253 et seqq. of the Code of Civil Procedure (*Zivilprozessordnung, ZPO*)).

162. Since there are no known cases of enforced disappearance in Germany, there are no special provisions governing the legal status of disappeared persons. General missing-persons law would therefore apply. This governs the criteria pursuant to which missing persons whose fate cannot be established can be declared dead. The declaration of death is issued in the form of a court order which can be used as proof in legal transactions that a person is deceased. It may be issued only if there is a high probability that the missing person is dead. Unless the person concerned went missing under circumstances which put his life in danger, the preceding application procedure can only be instituted at the earliest 10 years following the lapse of the year in which the missing person was last known to be alive. Those who may apply for a declaration of death include close relatives of the missing person. If no declaration of death is required for the assertion of certain rights, there is no need for missing-persons proceedings to be instituted. For example, a declaration of death is not always required in order to assert pension claims, since section 49 of the Social Code Book VI (*Sozialgesetzbuch Sechstes Buch, SGB VI*) contains a special provision pursuant to which, under certain circumstances, the assumption of death of a missing spouse or parent works in favour of the relative entitled to the pension.

163. In Germany, freedom of association is guaranteed by the Basic Law. Article 9 of the Basic Law provides that all Germans have the right to form corporations and other associations. A corresponding right for other nationals is ensured by the right guaranteed in Article 2 (1) of the Basic Law to personal freedom. Finally, Article 5 (1) of the Basic Law guarantees every person the right to express his opinion freely. The right of special interest groups to participate in organisations and other interest groups in Germany is therefore protected by comprehensive safeguards.

164. There are no known families in Germany whose members have been the victims of enforced disappearance. Accordingly, there is no need for measures that would ensure involvement in legislative processes. However, legislation in Germany in general is drafted with the involvement of civil society and relevant interest groups which, hypothetically, would enable such interest groups to become involved in legislation in this area as well.

#### **Article 25**

165. The highly specific issues raised in Article 25 have, to date, not resulted in any need for regulation in Germany.