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Human Rights Monitoring in Germany: A Rejoinder

Maryellen Fullerton*

Manfred Wiegandt concludes his critique of Human Rights Watch/Helsinki's 1995 Report "*Germany for Germans": Xenophobia and Racist Violence of Germany*"¹ by proffering six guidelines for future investigations into human rights abuses. His guidelines are eminently sensible and, indeed, already inform the Human Rights Watch/Helsinki fact-finding missions. Our disagreements with his critique lie not with the principles he states, but with Wiegandt's conclusion that these principles were ignored in Human Rights Watch/Helsinki's 1995 Report on violence directed against foreigners in Germany.

Wiegandt's first criticism is that the 1995 Report unfairly compared racist violence in Germany with the genocide in Rwanda and the former Yugoslavia. The very sentences he quotes² refute his point. They expressly refer to Germany as one of numerous Western European countries that are experiencing violent attacks on people who look foreign. They also acknowledge that more serious violence—of genocidal proportion—is occurring elsewhere, but they do not suggest it is taking place in Germany.

We chose to refer to the situations in Western Europe and those in Rwanda and the former Yugoslavia for separate but related reasons. We referred to Western Europe because the press in many countries gives greater coverage to incidents of racist violence that occur in Germany than they do to similar attacks occurring in other Western European nations. This results in an impression that violence against foreigners is a peculiarly

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1. HUMAN RIGHTS WATCH/HELSINKI, "GERMANY FOR THE GERMANS": XENOPHOBIA AND RACIST VIOLENCE IN GERMANY (1995).
2. Manfred H. Wiegandt, *The Pitfalls of International Human Rights Monitoring: Some Critical Remarks on the Human Rights Watch/Helsinki Report on Xenophobia in Germany* 18 HUM. RTS. Q. 833 (1996).

German problem. This impression is distinctly untrue, and we believe it is important to emphasize that fact by commenting on the broader Western European experience.

We referred to the genocide in Rwanda and the former Yugoslavia to set the context for human rights investigations of outbreaks of violence against foreigners. The violent xenophobia that Germany and other Western European countries have experienced in the last decade is extremely troubling. Left unchecked, this violence can lead to disastrous consequences for both the broader society and the individual victims. We do not suggest that Germany or any other Western European country will become another version of Rwanda or the former Yugoslavia. Nonetheless, it is important to remember that toleration of ethnic violence deforms societies and sometimes does result in genocide. A reference to societies experiencing genocide is neither out of place in a report on violent xenophobia nor a slight to the victims of genocide in those societies.

Wiegandt also criticizes the 1995 Report for praising governmental law enforcement and intelligence agencies that have devoted additional resources to combat racist violence in Germany. Although overzealous law enforcement/intelligence agents may lead to serious abuses of a suspect/defendant's rights, and therefore are always a concern, thus far in the 1990s the increased use of these arms of the state to prosecute perpetrators of racist violence has not had this consequence in Germany. In fact, as Wiegandt himself notes, the lack of zealotry has been the concern: "the German federal and state governments . . . had partly given the fatal impression of silently tolerating, ignoring or, at least, belittling the degree of violence against foreigners in the country."³ It seems fair to give credit to the federal and state governments in Germany when they take actions to grapple with the problem and to attempt to change the "fatal impression" of tolerance of this type of violence. Our decision not to add a footnote comparing and contrasting German law enforcement and legislative responses to the Baader-Meinhof gang with current responses to right-wing violence reflects the intended thrust of this particular Report: an investigation into the governmental response to attacks on foreigners, not a more general overview of civil rights and civil liberties issues concerning law enforcement in Germany.

Wiegandt implies that the lack of more extensive discussion of several relevant, though tangential, points stems from a deficient fact-finding approach rather than from an editorial decision about the scope of the 1995 Report. He would improve the situation by having human rights organizations involve knowledgeable local activists as authors rather than foreigners

3. *Id.* at 834.

who visit, interview, and then write reports that might be influenced by foreign legal training and experience.⁴ This criticism raises a number of related issues, most fundamentally, the value of obtaining the perspective of a "non-local" investigator. There are no doubt both costs and benefits to this approach, but some of the obvious positive attributes are the lack of political allegiances and professional entanglements, the emotional distance from the local debates, and the appearance of impartiality.

Impartiality alone is not a sufficient attribute to assure an accurate report. An investigator must be knowledgeable about the general legal culture as well as knowledgeable about the particular human rights topic under examination. In addition, to do a good job, the investigator must rely on many local contacts to gain a feel for the evolving dynamics of the human rights situation and the precise application of the relevant law. We will leave it to the readers to evaluate our efforts. We do note, though, that Human Rights Watch/Helsinki has been monitoring the issue of violence against foreigners in Germany for more than five years, and issued an earlier report on the same topic in 1992.⁵ In both reports Human Rights Watch/Helsinki extensively interviewed many local activists and experts during weeks and weeks of interviews in Germany. For the 1995 Report alone more than eighty people were interviewed. These included federal government officials, state government officials, lawyers, counselors, church workers, members of nongovernmental organizations, foreign students, migrants, asylum seekers, children of guest workers, contract workers, police officers, social workers, religious leaders, parliamentarians, human rights experts, and international officials. The interviews and investigations took place in the eastern part of the country, as well as in the west.

Wiegandt also accuses the Report of imposing US, rather than international, legal standards on Germany. He speaks of US "law and order" mentality⁶ that believes criminals should be punished swiftly after they are apprehended and a US perspective that views the German Juvenile Criminal Code as too lenient and focused on rehabilitation.⁷ Wiegandt neglects to mention, however, that the criticism referred to in the Report originated from Germany citizens who work with foreigners. Although no one we interviewed criticized the Juvenile Code itself and its emphasis on rehabilitation, many asserted that there had been serious misapplication of the Code. They commented that the ludicrously disproportionate sentences imposed on some juveniles had generated criticism erroneously directed at

4. *Id.* at 837-38.

5. HELSINKI WATCH, "FOREIGNERS OUT": XENOPHOBIA AND RIGHT-WING VIOLENCE IN GERMANY (1992).

6. Wiegandt, *supra* note 2, at 839.

7. *Id.* at 838.

the Juvenile Code rather than at unfortunate applications of the Code. They pointed out that the Code recognizes other factors, such as deterrence, that may be considered in addition to rehabilitation in sentencing decisions. They noted that the Code itself grants judges the discretion to try certain offenders between the ages of eighteen and twenty-one as adults. Identifying aspects of the Juvenile Code that had been overlooked and had resulted in scandalously light sentences is not imposing an American law and order perspective; it is "looking for solutions inherent in the German system,"⁸ the approach Wiegandt advocates.

Wiegandt also neglects to mention that it was a German federal government official, not Human Rights Watch/Helsinki, who said that "punishment should follow hard on the heels of the deed."⁹ Furthermore, he implies that this statement condones curtailing defendants' rights and accuses Human Rights Watch/Helsinki of targeting "liberal penal systems for the sake of short-term publicity and advantages."¹⁰ Like many of his other criticisms, here Wiegandt criticizes what he surmises the 1995 Report implies rather than what the Report actually said. Nothing in the 1995 Report suggests that criminal defendants in Germany have too many rights and that the exercise of these rights has prevented effective prosecution of perpetrators of xenophobic and racist violence. Instead, the Report identifies sloppy and inadequate police work as a major cause of ineffective prosecutions. The criticisms of this type of police work flow from international standards relating to police training and conduct.

Wiegandt's most fundamental disagreement with the 1995 Report concerns the issue of freedom of speech. He presents a forceful argument in favor of German legislation that criminalizes some abusive speech and allows the banning of associations that advocate racial hatred. He argues that abusive speech often leads to physical violence¹¹ and that it does not contribute to the public discourse.¹² He also emphasizes that hate speech creates an atmosphere of intimidation for the victims of the speech and leads to marginalization of minorities.¹³

Human Rights Watch/Helsinki recognizes that there are arguments on both sides of the debate concerning freedom of expression and noted this in the 1995 Report. Human Rights Watch/Helsinki has weighed the arguments both for and against the criminalization of hate speech and reached the conclusion that such measures seriously restrict the internationally pro-

8. *Id.* at 839.

9. *Id.*

10. *Id.*

11. *Id.* at 840.

12. *Id.*

13. *Id.*

tected right to freedom of expression, association, and assembly. As the 1995 Report indicates, those whose expressive activities constitute a direct and immediate incitement to violence should be prosecuted to the fullest extent of the law. But sweeping restrictions that affect entire parties, organizations, or philosophies inevitably cast too broad a net. Our experience has shown that there is considerable risk that such measures will be used to silence legitimate dissent, while there is little evidence that over the long run they are effective measures to counter bigotry. Human Rights Watch/Helsinki believes that there are other, more effective ways to counter expression that is hostile toward minorities—ways that do not jeopardize civil liberties. And certainly such restrictive legislation on expression, association, and assembly is no substitute for meaningful and persistent police and prosecutorial action against racist violence.