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Germany: Hamburg court violates international law by admitting evidence potentially obtained through torture

Amnesty International is deeply concerned that the Hamburg Supreme Court (Hanseatisches Oberlandesgericht) decided on 14 June 2005 to accept evidence which may have been obtained through torture or other cruel, inhuman or degrading treatment (ill-treatment) in flagrant violation of its obligations under international law to investigate complaints of torture and to exclude any statement made as the result of torture or other cruel, inhuman or degrading treatment.

The statements have been given by USA intelligence officials to German authorities in the form of summaries of interrogations of three persons suspected of "terrorist" activities held at unknown locations by USA authorities. These three individuals are reported to be Ramzi Binalshibh, Mohamed Ould Slahi and Khalid Sheikh Mohammed. The statements are to be used in a re-trial of Mounir al-Motassadeq. The prosecution accuses Mounir al-Motassadeq of belonging to a terrorist group and of having assisted the hijackers of the aeroplanes that crashed into the World Trade Center on 11 September 2001 and killed over 3,000 people.

If the statements used in the trial have been obtained through torture, they are not admissible as evidence in legal proceedings according to Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Germany is a party. Furthermore, Germany would be in breach of Article 7 of the International Covenant on Civil and Political Rights, as well as Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which both include the absolute prohibition on torture and other cruel, inhuman or degrading treatment or punishment.

The court has decided to accept the statements as evidence as it claims that it cannot be proven that they were obtained through torture or other ill-treatment. Although human rights organisations such as Amnesty International and Human Rights Watch, as well as journalists and almost all released detainees, have repeatedly reported on numerous allegations of torture and other ill-treatment reported from detention centres in Afghanistan, Iraq, Guantánamo and other locations where detainees suspected of belonging to terrorist networks are held by USA authorities, the court claims that it cannot be proven that the three individuals whose statements are at stake, Ramzi Binalshibh, Mohamed Ould Slahi and Khalid Sheikh Mohammed, have done so as a result of torture or other ill-treatment.

Despite requests by the Hamburg Supreme Court, the USA authorities have refused to allow cross-examination of the persons who have made the relevant statements. The USA authorities have refused to give any information about the whereabouts of these persons or the circumstances of the interrogations at hand. They have also refused to acknowledge whether one of the three persons was

indeed in the custody of the USA or not. Similarly, the German authorities have resisted requests by the court to make available the information handed to them by the USA authorities, on the basis that this would lead to the “disruption of international diplomatic and secret service relations”.

The court claimed, apparently without itself having conducted a prompt, thorough, impartial and independent investigation of the reports, including questioning the persons who made the statements, with defence counsel able to cross-examine the persons, to have evaluated the information publicly available on the treatment of detainees suspected to belong to terrorist networks by the USA authorities. The court considered that the statements seemed fairly balanced, i.e. contained both incriminating and exculpatory elements, and concluded that the allegations of torture and other ill-treatment contained in public reports, including those published, *inter alia*, by Amnesty International and Human Rights Watch, are not verifiable as the confidential sources of such information are not named. It concluded that it cannot be proven that the statements given of the said persons were extracted under torture or other ill-treatment.

Amnesty International is deeply concerned by this decision, which may result in admitting evidence which was extracted under torture or other ill-treatment, is in contravention of Germany's obligations under international law to investigate complaints of torture and other ill-treatment and to exclude such statements in court. The UN's Human Rights Committee has emphasized in General Comment No. 20 on Article 7 of the International Covenant on Civil and Political Rights that complaints of torture “must be investigated promptly and impartially by competent authorities” and Article 15 of the Convention against Torture requires that “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”.

Considering the numerous allegations of torture and other ill-treatment from detention centres in Afghanistan, Iraq, Guantánamo and other locations where detainees suspected of belonging to terrorist networks are held by USA authorities, as documented and reported by several news media and human rights organisations, including Amnesty International, it is not manifestly ill-founded to assume that these statements may have been obtained through torture or other ill-treatment.

In this regard, the Committee against Torture has declared on 10 December 2004 in its concluding observations on the fourth periodic report of the United Kingdom that “the State party should appropriately reflect in formal fashion, such as legislative incorporation or by undertaking to Parliament, the Government's intention as expressed by the delegation not to rely in any proceedings evidence where there is knowledge or belief that it has been obtained by torture.” UN Doc. CAT/C/CR/33/3, para. 5(d).

Since there is *prima facie* evidence that the statements were obtained under torture or other ill-treatment, it is incumbent on the prosecutor to prove and on the court itself to investigate and establish, as with all elements of a criminal prosecution, beyond reasonable doubt that the statements admitted in this case were not made as a result of torture or other ill-treatment. This obligation has particular force when the source which provided the statements has prevented the court from interviewing the authors of the statements. This is the case in this situation as the German authorities, who are prosecuting the case, have declined to answer the court's questions regarding the circumstances under which they were obtained. The United Nations Special Rapporteur on Torture has stated that “where allegations of torture or other forms of ill-treatment are raised by a defendant during a trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment.” UN Doc. E/CN.4/2003/68, para. 26(k). In line with this conclusion, the Human Rights Committee has stated that: “All allegations that statements of detainees have been obtained through coercion must lead to an investigation and such statements must never be used as evidence, except as evidence of torture, and the burden of proof, in such cases, should not be borne by the alleged victim.” UN Doc. CCPR/CO/79/PHL, para. 7.

The failure of the Hamburg Supreme Court to conduct a thorough, prompt, impartial and independent investigation, including interviewing the authors of the statements outside the presence of

the detaining authorities, with cross-examination of the suspects, to determine whether the statements were given voluntarily and not as the result of torture or other ill-treatment should render them inadmissible as evidence. The failure to do so also denies the suspects the right to challenge the evidence against him and to cross-examine the persons who have made statements against him.

Failure to carry out these procedures amounts to condoning practices of detention and interrogation which are in violation of international law. The court has further chosen to ignore the fact that at the time that the three persons were reportedly detained and interrogated, the prevailing legal position of the USA administration, as formulated in several Department of Justice and Department of Defence memoranda, was that international law prohibiting torture and other ill-treatment does not generally apply to "terrorists". In fact, the US administration claimed that the prohibition on torture, at any rate, covers only acts that result in "serious physical injury, such as organ failure, impairment of bodily function, or even death" Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, Office of the Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, August 1, 2002..The USA administration further claimed that torturers may be exempted from criminal liability through the pleas of 'defence of necessity' and 'self-defence,' and that, ultimately, the president is authorised under the US constitution to issue orders to torture during war.

The Hamburg Supreme Court acknowledged that it can be established that the three persons whose statements are at stake may have been held in prolonged incommunicado detention. However, the court seems to underestimate the seriousness of this fact. As stated on 19 April 2004 in a Commission on Human Rights resolution: "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture". Commission on Human Rights Resolution: 2004/41, 19 April 2004, para. 8." .The UN Special Rapporteur on torture, recognising that "torture is most frequently practised during incommunicado detention", has also called for such detention to be made illegal. UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

Moreover, the combination of incommunicado detention and the refusal of the detaining authorities to acknowledge the detainees' whereabouts, as is the situation in this case, raises serious concerns that the three persons whose statements are at stake were in fact "disappeared." The Rome Statute of the International Criminal Court, to which Germany has been a state party since 11 December 2001, defines the crime against humanity of "enforced disappearance of persons" as,

... "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." The Rome Statute of the International Criminal Court, Art. 7(2)(i). Article 7(1) provides that a crime against humanity under the Statute, means an act listed in that Article (including "enforced disappearances of persons", at Art. 7(1)(i)) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Such acts could also constitute war crimes under this Statute, for instance under Article 8(2)(a), vi and vii.

The Human Rights Committee has determined that "disappearances" may amount to torture, *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994). as has the Inter-American Court of Human Rights. In the Rafael Mojica case the Human Rights Committee determined, even when lacking information on the specific case that torture or other ill-treatment have taken place:

"[A]ware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7." *Rafael Mojica v. Dominican Republic*, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), para. 5.7.

Amnesty International is deeply concerned that when faced by a potentially criminal act by USA authorities, that of “disappearing” detainees, which is known to be closely associated with torture, the Hamburg Supreme Court chose to ignore it. This may encourage such “disappearances” and the use of statements obtained through torture and other ill-treatment in legal proceedings.

Amnesty International abhors all attacks directed at civilians and indiscriminate attacks, such as those that took place in the USA in September 2001, which the organization considered as crimes against humanity. Nothing can ever justify such attacks, and the organization has consistently called on armed groups to cease such attacks immediately, and on states to bring perpetrators to justice.

The manifest disregard for basic human rights and the rule of law that such attacks represent can only be countered by measures which adhere strictly to international law and standards and respect the human rights of all concerned. To admit as evidence statements which may have been obtained through torture or other ill-treatment by persons who have been held in prolonged incommunicado detention contravenes international law and the obligations of Germany under the human rights treaties to which it is party.

Background

Detention of persons suspected to be involved in terrorist activities

Hundreds, possibly thousands, of people of at least 35 different nationalities are held by USA authorities at various detention facilities in Afghanistan, Iraq, Guantánamo and several other undisclosed locations around the world. Many of them are without access to any court, legal counsel or family visits. Denied their rights under international law and held in conditions which may amount to cruel, inhuman or degrading treatment, the detainees suffer severe psychological distress. There have been numerous suicide attempts.

None of the detainees have been granted prisoner of war status or brought before a “competent tribunal” to determine their status, as required by Article 5 of the Third Geneva Convention. The USA government refuses to clarify their legal status, despite calls from the International Committee of the Red Cross (ICRC) to do so. Instead, the USA government labels them “enemy combatants” or “terrorists”, flouting their right to be presumed innocent and illegally presuming justification for the denial of many of their most basic human rights.

In the case of Muhammad, Binalsibh and Ould, not even the thin veneer of purported legality which the USA offers detainees held Guantánamo Bay, namely the determination of their alleged “status” as “enemy combatant,” coupled with ICRC visits and mail contact with families, appears to exist.

Mounir al-Motassadeq case

Mounir al-Motassadeq is the only person anywhere in the world to have been convicted in connection with the 11 September attacks. On 19 February 2003, Mounir al-Motassadeq was convicted of abetting the murder of more than 3,000 persons and of belonging to a domestic German terrorist group. It was pivotal to the prosecutor’s case that the terrorist group was domestic, as the accusations against Mounir al-Motassadeq referred to events prior to 11 September 2001, and Germany did not have any legislation relevant to non-domestic terrorist groups prior to 11 September 2001. As the court concluded that the Hamburg group planned the 11 September attacks while in Germany and being to all effects a group based in Germany, it considered that the group legally qualified as an domestic terror organisation in accordance with article 129a (1) of the German Penal Code.

However, Germany’s Supreme Court ordered a retrial a year after his conviction as he had been denied a fair trial. This was based on the fact that the USA refused his defence access to a person held by USA authorities on suspicion of terrorist activities whose statements had been used in that trial. The evidence provided by the prosecution was suspected not to fully reflect the statements made by that person, who was believed to have made explicitly exculpatory statements which were not accounted for. This would indicate that part of the detainee’s statement would be missing from the material provided by the prosecution. Germany’s Supreme Court considered that the equality of arms and presumption of innocence principles would require an acquittal in this circumstance.

Moroccan born Mounir al-Motassadeq attended Hamburg University. According to the prosecution in the original trial, he met Mohamed Atta - the man whom they believe piloted the first hijacked aircraft into the World Trade Center, in Hamburg. According to the prosecution, Mounir El-Motassadeq acted as “treasurer” for the Hamburg Al-Qaeda cell, handling funds for the living expenses of three of the hijackers - including Mohamed Atta - who took flight lessons in the US for the 11 September attacks.

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