

**GERMANY:
BRIEFING TO
COMMITTEE
AGAINST
TORTURE**

OCTOBER 2011

**AMNESTY
INTERNATIONAL**



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PART I

1. UNIVERSAL JURISDICTION

ARTICLES 1, 4, 5, 6

1.1 DEFINITION OF TORTURE

The German Criminal Code still contains no comprehensive definition of torture. Conduct amounting to torture can be punished as duress (Section 240), as bodily harm by an official (Section 340) and extraction of testimony by duress (Section 343). Additionally, in 2002 specific torture-related crimes against international law were codified with the implementation of the Rome Statute by means of the German Code of Crimes against International Law¹ (CCIL). These include torture in the context of genocide (Section 6 (1) no. 2 CCIL), torture as a war crime in the context of armed conflict (Section 8 (1) no. 3 CCIL) and torture as a crime against humanity in the context of or as part of a widespread or systematic attack on a civilian population (Section 7 (1) no. 5 CCIL). However, the CCIL does not address torture outside of these contexts and so in all other circumstances acts of torture could only be prosecuted as forms of duress or bodily harm, not as “torture” per se. Although the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (hereafter the Convention), does not explicitly require the inclusion of acts of torture in a single offence, practice shows it is difficult to cover all aspects of Article 1 without explicitly incorporating this definition.² The consistent practice of the Committee against Torture has been to recommend that all states adopt a specific offence of torture that covers at least all the conduct covered by the definition in Article 1 of the Convention. Amnesty International urges the Committee against Torture to recommend that Germany ensure that all conduct covered by Article 1 of the Convention is capable of being prosecuted as the crime of “torture” under German law.

1.2 GROUNDS OF JURISDICTION

In principle, all grounds of jurisdiction mentioned in Article 5 of the Convention are covered by national law. However, the German Criminal Code contains no specific clause which implements Article 5 (2) the Convention according to which the state party shall establish its jurisdiction where the alleged offender is present in any of its territory and it does not extradite him or her. This ground of jurisdiction is covered by the general clause of Section 6 no. 9 German Criminal Code. This rule provides that German Criminal Law shall apply to

1 German: Völkerstrafgesetzbuch.

2 Nowak/McArthur, UN-CAT commentary, Art. 4, par. 48.

offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad. This unspecific clause referring to any international agreement does not provide a clear statement of the jurisdiction rule set up in Article 5 (2) of the Convention. Therefore Amnesty International believes German implementation of the Convention would be strengthened by expressly and specifically implementing this ground of jurisdiction in the German Criminal Code in a manner that is without prejudice to the obligation or ability to exercise similar jurisdiction over other offences.

ALMATOV CASE

In November 2005 Zokirjon Almatov, Uzbekistan's then Minister of Interior, travelled to Germany on the basis of a humanitarian visa to receive medical treatment. With the help of several non-governmental organizations, four Uzbek survivors of torture and four survivors of the Andijan killings of 13 May 2005 who had fled to Germany filed a complaint against Almatov, requesting the German Federal Prosecutor to open a criminal investigation on three counts. Among these counts were individual crimes of torture under Article 1 of the Convention against Torture. Almatov was the highest ranking official with oversight of law enforcement agencies and prisons in Uzbekistan from 1991 until 2005, a period during which there was a well-documented systematic practice of torture in the country.³ Amnesty International Germany also sent a letter to the Office of the then Federal Prosecutor Kay Nehm requesting him to open investigations.⁴ However, in a decision of 30 March 2006, the Senior Prosecutor opted not to open an investigation into this case. He argued that a successful investigation was highly unlikely given that it would have to be carried out mainly in Uzbekistan and that the Uzbek government would not want to cooperate. He neglected the fact that hundreds of Uzbek survivors were available for the investigation outside of Uzbekistan and that several experts had offered to testify.⁵

The decision not to open investigations was contrary to the principle of universal jurisdiction enshrined in Articles 5 (2) and 6 of the Convention and was criticized by Amnesty International Germany.⁶

3 The pattern of systematic torture was confirmed by Manfred Nowak, UN Special Rapporteur on Torture, 19 September 2006, UN Press Release, <http://www.unhcr.ch/hurricane/hurricane.nsf/0/25A8D3BA1A0ADA6CC12571F00024568B?opendocument>. Amnesty International regularly highlights the still existent problem of widespread torture in Uzbekistan in its annual reports.

4 Letter of Amnesty International to Federal Prosecutor Kay Nehm of 5 December 2005, filed with Amnesty International.

5 Among those were Theo Van Boven, UN Special Rapporteur on Torture 2001-2004 who visited Uzbekistan in late 2002, and Manfred Nowak, the UN Special Rapporteur on Torture from 2004-2010.

6 Open letter by Amnesty International and Human Rights Watch from 8 May 2006 to the German Minister of Justice Brigitte Zypries, available at <http://www.kaleck.org/index.php?id=84,216,0,0,1,0>.

Recommendation

Amnesty International recommends that the Committee against Torture urge Germany to take its obligations under Articles 5 and 6 of the Convention seriously by exercising jurisdiction in practice and not just through legislation.

PROCEEDINGS AGAINST MURWANASHYAKA AND MUSONI

In May 2011 the trial against the Rwandan citizens Dr. Ignace Murwanashyaka and Straton Musoni was opened before the Higher Regional Court of Stuttgart. As the former president and vice president of the Democratic Forces for the Liberation of Rwanda (Forces Démocratiques de Libération du Rwanda, FDLR) they are accused of 26 crimes against humanity and 39 war crimes, including the crime of torture. According to the indictment those crimes were committed in 2008 and 2009 by their subordinates, mainly Rwandan militia, in the Democratic Republic of Congo.

This is the first trial in Germany based on the CCIL which came into force in 2002. According to the principle of universal jurisdiction which is codified by Section 1 of the CCIL the perpetrators of grave human rights violations such as genocide, crimes against humanity and war crimes can be prosecuted in Germany no matter where and against whom the crimes were committed. This comprises crimes committed by and against foreign citizens on foreign territory. Dr. Murwanashyaka and Straton Musoni are accused of having ordered the crimes listed in the indictment – among which are numerous allegations of torture – at least partly via telephone and internet from Germany.

The trial against Murwanashyaka and Musoni is one of the first trials in Germany to be based on the principle of universal jurisdiction as enshrined as an international obligation in the Convention, and as such is a significant step also with regard to its full implementation. (Among the charges in the case is a charge of torture as provided for by Section 8 (1) no. 3 CCIL).

PART II

2. ACCOUNTABILITY

ARTICLES 1, 2, 3, 9 TO 16

2.1 ALLEGED INVOLVEMENT IN THE US-LED RENDITION AND SECRET DETENTION PROGRAMMES

Amnesty International remains deeply concerned that there has been no accountability for German state actors' alleged involvement in the US Central Intelligence Agency (CIA)-led rendition and secret detention programmes. A three-year long parliamentary inquiry completed its work in June 2009, but did not find any German state actor responsible for involvement in the rendition, torture or other ill-treatment, or enforced disappearance of any person detained in the course of these programmes, which were in full operational mode from 2002-2006. However, also in June 2009, the German Constitutional Court ruled that the German government's failure to cooperate fully with the parliamentary inquiry violated the German Constitution.⁷ The profound lack of cooperation from the German authorities in the course of the inquiry -- particularly with respect to the failure to disclose relevant information on the invocation of "state secrets" -- coupled with the identification of Germany in several inter-governmental, non-governmental, and media reports as responsible in relation to some of the violations, urgently requires further action on the part of the German government.⁸

The parliamentary commission of inquiry set up to investigate Germany's secret co-operation with the USA and other states in countering international terrorism and Germany's involvement in the Iraq war began its work in 2006 and issued its final report in June 2009.⁹ The inquiry focused in part on alleged German knowledge of or involvement in the renditions

7 Judgment of Constitutional Court, 19 June 2009, 2 BvE 3/07

8 See for example, Parliamentary Assembly Council of Europe, Committee on Legal Affairs and Human Rights, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report ("Marty Report"), Doc. 11302 rev., 11 June 2007,

<http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> ;

European Parliament Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (TDIP), Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, A6-0020/2007 FINAL, http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf.

9 The parliamentary inquiry was referred to as "BND-Untersuchungsausschuss". For its report see: Deutscher Bundestag, Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes, Drucksache 16/13400, 18.06.2009 (hereinafter "Inquiry Report").

of German national Khaled el-Masri from Macedonia to Afghanistan in 2004; of German-Syrian national Muhammad Zammar, who was unlawfully transferred from Morocco to Syria in December 2001; and of permanent German resident Murat Kurnaz from Pakistan to Afghanistan in late 2001.¹⁰ Below are details of the individual cases. Following that is information about other interrogations carried out in foreign countries by German officials, not directly related to the US rendition and secret detention programmes. That is followed by a detailed critique of the German parliamentary inquiry.

RENDITION OF KHALED EL-MASRI

The Committee may be familiar with some of the facts of the case of Khaled el-Masri arising from its review of the report of Macedonia in 2008.¹¹ Khaled el-Masri, a 44-year-old German national of Lebanese origin, was seized by Macedonian officials on 31 December 2003 while on a trip to Macedonia. He was interrogated at the Serbian border, and then driven to the Macedonian capital Skopje by Macedonian security agents. He was held in a hotel room for 23 days by teams of armed men and interrogated. Neither his family nor a lawyer was informed about his whereabouts. Khaled el-Masri has said that he asked repeatedly for access to the German embassy, but this was not granted.

Khaled el-Masri currently has a case pending at the European Court of Human Rights (*al-Masri v Macedonia*) alleging that Macedonian state actors were directly responsible for his unlawful detention in Macedonia, his ill-treatment in detention in Macedonia, and handing him over to the CIA with the knowledge that he would be unlawfully transferred, detained, and at risk of torture and other ill-treatment in Afghanistan – all violations of Macedonia's obligations under the ECHR.¹²

While unlawfully detained in Macedonia Khaled el-Masri was forced to record a video saying that he had been treated well and was told that he was being flown back to Germany. He was then blindfolded and driven to an airport. There, according to his account, he was beaten severely and his clothes were cut off. He was beaten again and his underwear was forcibly removed. He was thrown to the floor and felt a firm object being forced into his anus. He was then dressed in absorbent underpants and a track suit, and placed in a belt with chains that attached to his wrists and ankles. The men put earmuffs and eye pads on him, blindfolded

10 For details of the individual cases, see Amnesty International, *State of Denial: Europe's Role in Rendition and Secret Detention* (AI Index EUR 01/003/2008), June 2008, <http://www.amnesty.org/en/library/asset/EUR01/003/2008/en/2ceda343-41da-11dd-81f0-01ab12260738/eur010032008eng.pdf> (see also the case sheets annexed to the report). The inquiry also investigated the September 2001 detention of Munich-based publisher Abdel Halim Khafagy at SFOR Eagle Base and his transfer from Bosnia and Herzegovina to Egypt; that case is discussed below in Part IV of the submission, in relation to Article 15 of the UN-CAT. See also Human Rights Watch, "No Questions Asked: Intelligence Cooperation with Countries that Torture", 29 June 2010, pp. 34-43, <http://www.hrw.org/en/reports/2010/06/28/no-questions-asked-0>.

11 CAT/C/MKD/CO/5 (15 May 2008).

12 European Court of Human Rights, *El-Masri v Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Statement of Facts and Questions to the Parties, 8 October 2010, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=el-masri%20%7C%20v%20%7C%20macedonia&sessionId=61179632&skin=hudoc-cc-en>.

him, and hooded him. He was then thrown onto the floor of the plane and strapped down.

Khaled el-Masri was handed over to the CIA who transported him first to Kabul, Afghanistan, then to a US-run prison near the airport. Khaled el-Masri says he was detained in a dark cell where he was beaten and interrogated. To protest, he went on hunger strike, and was subsequently force-fed. He says he was interrogated repeatedly by US agents.

On 28 May 2004, Khaled el-Masri was put on a plane and flown to Albania. On arrival, still blindfolded, he was “driven up and down the mountains for hours”. The car finally stopped, and his captors took off the blindfold, sliced off his handcuffs, handed him his passport and told him to walk down the deserted road without looking back. It was dark, he said, and “as I walked I feared that I was about to be shot in the back and left to die.” In fact, he was met by armed Albanian officials who drove him to an airport. A ticket was bought for him to Frankfurt, Germany, where he arrived on 29 May 2004.

GERMANY'S ROLE

Khaled el-Masri claimed after his release that, in Kabul, he was interrogated by a native German-speaker who identified himself only as “Sam”.¹³ The parliamentary inquiry came to the conclusion that there was no evidence of “Sam” being an agent of a German intelligence service or a German prosecution office.¹⁴ However, the government did not disclose all relevant documents in the el-Masri case to the parliamentary inquiry commission and some government officials did not receive adequate authorization to testify before the commission. Although the Constitutional Court ruled on 19 June 2009 that this was in breach of constitutional law, the commission did not resume its inquiry.

On 31 January 2007, a court in Munich issued arrest warrants for 13 US citizens, of whom at least 10 are thought to be CIA agents believed to be responsible for Khaled el-Masri's rendition. The German government forwarded the warrants to Interpol in February 2007, which reportedly prompted strong US protests. In June 2007, the public prosecutors formally asked the German Ministry of Justice to ask the US authorities for the agents' extraditions. A US Department of State spokesman indicated that the USA would not agree to any such request. In light of this, the German Ministry of Justice decided not to request extradition. Khaled el-Masri filed a complaint in Germany to an administrative court seeking to enforce the 13 arrest warrants against the US citizens who were allegedly involved in his abduction in Skopje and flight to Kabul, arguing that the German government's refusal to transmit the warrants denied Khaled el-Masri, as a torture victim, the right to an effective remedy. In December 2010, the lawsuit was rejected on the merits by the Cologne administrative court. The court concluded that the German government had not violated German law by refusing to pursue the extradition, and took the position that Germany's national security and foreign policy interests could be used as a basis for refusing the request.¹⁵ None of the

13 This allegation was included in a letter, dated 20 August 2004, sent by Amnesty International to the CIA and other US authorities following the organization's interview of Khaled el-Masri after his release. The organization never received any reply from the US authorities.

14 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, p. 353.

15 Judgment by Cologne Administrative Court, 07.12.2010, 5 K 7161/08.

individuals against whom there is evidence of involvement in Khaled el-Masri's abduction, enforced disappearance, unlawful detention and alleged torture and other ill-treatment have been held publicly accountable.

RENDITION OF MUHAMMAD HAYDAR ZAMMAR

Muhammad Haydar Zammar, a 47-year-old German-Syrian national, left Germany for Mauritania and Morocco on 27 October 2001. He was detained by Moroccan intelligence agents before he was able to board his return flight to Germany in early December 2001. He was suspected of involvement in the "Hamburg Cell", a group that included the presumed leaders of the 11 September 2001 attacks in the USA.

Muhammad Zammar was held without charge for several weeks in Morocco, and was reportedly interrogated for over two weeks. He alleged that he was ill-treated. He was then flown, reportedly in a CIA plane, to Syria, where he was held incommunicado and allegedly tortured or otherwise ill-treated.

Muhammad Zammar was reportedly held without charge in prolonged, solitary and incommunicado confinement in the Palestine Branch (Far' Falastin) of Military Intelligence near the Syrian capital of Damascus. To the extent that his conditions of detention are known, they amounted to cruel, inhuman and degrading treatment. He was allegedly tortured or otherwise ill-treated, practices frequently reported at Far' Falastin. His underground cell was said to be 1.85m long, less than 0.9m wide, and less than 2m high – dimensions that would not allow him to lie down or stand up comfortably. These cells are often referred to as "tombs" or "graves". Prisoners were not given a mattress, just a couple of dirty blankets. One plastic bottle was provided for drinking water, another for urine. Access to fresh air and sunlight in the yard was restricted to a maximum of 10 minutes a month, but could be as infrequent as 10 minutes every six to eight months. Amnesty International received information that Muhammad Zammar was taken out of solitary confinement in Far' Falastin and eventually moved to Sednaya prison, where conditions were poor but better than in Far' Falastin. Muhammad Zammar's family in Germany received its first direct communication from him in a brief letter, dated 8 June 2005, sent via the International Committee of the Red Cross (ICRC) in Damascus.

On 11 February 2007, more than six years after his arrest in Morocco, Muhammad Zammar was sentenced in Syria to 12 years in prison for four offences, including membership of the outlawed Syrian Muslim Brotherhood organization, a capital offence. In accordance with current practice, this sentence was immediately commuted to 12 years' imprisonment. No evidence of his membership in the outlawed organization was reportedly presented during the trial.

GERMANY'S ROLE

Muhammad Zammar had been under intermittent surveillance in Hamburg, Germany, for some years before his arrest. He had been questioned by German police after the 11 September 2001 attacks in the USA, and was brought before a court in Hamburg less than a week later. Not enough evidence was presented to provide grounds for detaining him, but the Federal Public Prosecutor initiated an investigation into allegations that he had "supported a

terrorist organization". Muhammad Zammar then left Germany for Morocco. Information about Muhammad Zammar's travel plans, supplied by Germany's Federal Investigation Office (Bundeskriminalamt, BKA) to US officials, may have been instrumental in his arrest in Morocco and subsequent rendition to Syria.

According to hearings held during the German parliamentary committee of inquiry, the BKA had provided a "detailed biography" of Muhammad Zammar, a "list of his relatives in Syria and Morocco", and his flight information in response to requests for information from US intelligence agencies. The parliamentary inquiry confirmed that information gathered by the BKA and the German intelligence services Federal Intelligence Service (Bundesnachrichtendienst, BND) and Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV) about Muhammad Zammar had been forwarded to the Syrian intelligence agency. It was also disclosed that the German agencies provided the Syrians with a list of questions to ask during interrogations. The Syrian intelligence agency in return provided the results of its interrogations. Moreover, the inquiry heard how five German intelligence and law enforcement officials went to Syria in November 2002 and interrogated Muhammad Zammar for three days.

Senior officials, among them the then-presidents of the BKA and BND and officials from the Chancellery, including the then head of the Chancellery, Frank-Walter Steinmeier, have conceded that they were aware that torture took place in Syria.¹⁶ They also conceded that they did not have detailed information about Muhammad Zammar's conditions of detention. All witnesses and senior officials stressed that the five officials sent to Damascus were told to break off the interrogation if there was any suggestion that Muhammad Zammar had been tortured or was under duress, but that the officials had been given no indication that this was the case.

The parliamentary inquiry was informed that the government had decided not to pursue consular access for a long period. Muhammad Zammar reportedly received his first visit from a German diplomat on 7 November 2006, a month after his first appearance in court and after nearly five years after he was first taken into detention.

German officials knew at a very early stage that Muhammad Zammar had been detained by the Syrians on charges that he was a member of the Muslim Brotherhood, an offence punishable by death. At least one senior BKA official said during the hearing that he had learned this from his Syrian counterparts as early as the middle of 2002.

It is unclear whether German intelligence and law enforcement agencies knew what use would be made of the information they provided to their US counterparts in 2001, but if it was reasonably foreseeable that it would be used to carry out Muhammad Zammar's detention in Morocco and rendition to Syria, this would have been at the very least inconsistent with Germany's obligations to prevent torture and other ill-treatment. Germany violated its human rights obligations by having its agents interrogate Muhammad Zammar in 2002 while German officials knew, or should have known, that he was being held in prolonged incommunicado detention in a prison infamous for the torture of security

¹⁶ Inquiry report, p.709, p. 717, p. 2133

detainees, and that there was a real risk that he would be tortured or otherwise ill-treated.

RENDITION OF MURAT KURNAZ

Murat Kurnaz¹⁷ was born in Bremen, Germany, and is a Turkish national. Murat Kurnaz travelled to Pakistan in October 2001 and was arrested by the Pakistani authorities sometime in late November 2001. Little else is known about his arrest, except that he was transferred to US custody not long afterwards. His mother received a postcard from her son stating that he was in a prison camp in Afghanistan. The next postcard she received was in January 2002, from Guantánamo Naval Base in Cuba. Murat Kurnaz had been designated an “enemy combatant” by the US authorities and was at the beginning of his indefinite detention without charge or trial in the US prison camp in Guantánamo, with limited contact with the outside world.

In August 2004 Thomas Röwekamp, the then Senator for Internal Affairs in Bremen declared that Murat Kurnaz’s indefinite residence visa had lapsed. This is because Murat Kurnaz had been out of Germany for over six months and had not reapplied. Thomas Röwekamp reiterated this legal opinion in a letter to Amnesty International and emphasised that the allegations of involvement in terrorism would be taken into consideration if he applied for a new entry visa.¹⁸ In addition, a new immigration law was due to be enacted in January 2005 in Germany which was to restrict access to Germany to those who are suspected of any involvement in “terrorism”. In May 2004 the Federal Ministry of Interior registered Murat Kurnaz with the Schengen Information System (SIS) and introduced an entry ban for Germany on the grounds of him being detained at Guantánamo Bay although the Bremen State Office for the Protection of the Constitution (Landesamt für Verfassungsschutz Bremen, LfV,) reportedly had no other evidence of him being involved in terrorism.¹⁹

Murat Kurnaz was released from Guantánamo Bay on 24 August 2006 where he had been held despite little evidence to link him to “terrorist” activities. Both US and German intelligence services had secretly acknowledged this as early as September 2002, yet it took years to secure his release.²⁰ In January 2005, a US federal judge cited his case as illustrative of the inherent unfairness and fundamental flaws of the administrative review

17 See also USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power”, May 2005, AI Index AMR 51/063/2005, pages 57-59, <http://www.amnesty.org/en/library/info/AMR51/063/2005> and USA: To be taken on trust? Extraditions and US assurances in the ‘war on terror’, March 2008, AI Index AMR 51/009/2008 pages 37-38, <http://www.amnesty.org/en/library/info/AMR51/009/2008/en..>

18 letter from Thomas Röwekamp to Amnesty International, 11 March 2005

19 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, pp. 548-551

20 The Washington Post published an internal German memo dated 26 September 2002 that includes the statement: “USA considers Murat Kuraz’s innocence to be proven. He is to be released in approximately six to eight weeks. The German authorities will be informed in advance, so that his release can be presented as having been effected by the Germans. It would also be possible to have him collected by the Germans.” Available at http://www.washingtonpost.com/wp-srv/nation/pdf/german_memos_120407.pdf <accessed 31 August 2011>.

process the military authorities were conducting in Guantánamo.²¹

GERMANY'S ROLE

Murat Kurnaz claims he was abused by German special forces soldiers (Kommando Spezialkräfte, KSK) in Kandahar, Afghanistan, following his transfer from Pakistan to US custody in December 2001.²² "I saw that they were Germans and I thought they might help me", he told Amnesty International, "but it wasn't so. They didn't ask me anything, one just told me they were KSK and threw me down and kicked me." Murat Kurnaz says that he had been tortured at the Kandahar camp by US forces, and that the KSK soldiers were aware of the conditions there. An investigation into the allegations of abuse against the soldiers was opened in December 2006 by the prosecution office in Tübingen, but closed in May 2007, after prosecutors determined that there was not enough evidence to charge the two soldiers Murat Kurnaz had identified. The investigation was reopened in August 2007, when new witnesses were found, but closed a second time in June 2008 for lack of evidence, although the Tübingen public prosecutor accepted Murat Kurnaz' testimony as credible. A request to hear US Army personnel as witnesses had been turned down by the US authorities. A special inquiry by the parliamentary committee for defence, which held closed sessions only, and declined to publicly issue its concluding report, investigated whether members of KSK ill-treated Murat Kurnaz in Afghanistan. The inquiry concluded that there was insufficient evidence to substantiate Murat Kurnaz' allegations.²³ However, members of opposition parties spoke of strong evidence supporting Murat Kurnaz' allegations against the German soldiers.

Murat Kurnaz was transferred from Afghanistan to Guantánamo in early 2002 where he was interrogated by German agents of the intelligence services. He later alleged having been interrogated again by German officials in 2004.²⁴ Despite widespread recognition that the detentions at Guantánamo were fundamentally inconsistent with respect for human rights,²⁵ the parliamentary inquiry claimed that the interrogation in 2002 was "right and necessary" to combat terrorism. Murat Kurnaz testified before the inquiry commission that he told the German officials that he had been tortured and described the prison conditions but that the officials had not indicated any interest in hearing about such matters.²⁶

21 *In re Guantanamo Detainee Cases*. Memorandum opinion denying in part and granting in part Respondents' motion to dismiss or for judgment as a matter of law. US District Court for the District of Columbia, 31 January 2005.

22 State of Denial, p. 20.

23 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, p. 1086-1087.

24 2007 TDIP report, paras. 83-88.

25 See, e.g., UN CAT, Concluding observations of the second periodoc report of the United States of America, No. 22, CAT/C/USA/CO/2, 25 July 2006.

26 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, pp. 1081-1090 and pp. 367-368.

THE GERMAN PARLIAMENTARY INQUIRY AND CONSTITUTIONAL COURT DECISION

The final report of the parliamentary commission of inquiry did not find any German state actor responsible for any unlawful involvement in the apprehensions, renditions, enforced disappearances, secret detention and torture and ill-treatment of German nationals and residents in the context of US-led global counter-terrorism operations in the aftermath of the 11 September 2001 attacks in the USA.²⁷ The report did propose reform of the oversight mechanisms for the German federal secret services and some reforms were implemented in 2009, including the addition of staff to assist the Bundestag Parliamentary Control Commission (Parlamentarisches Kontrollgremium); provision for the Commission to request that staff from the intelligence agencies testify at hearings; provision to make a dissenting statement public if the Commission grants permission; and the right to receive a direct and timely response from the government to Commission requests/queries.²⁸ The German government retains the right to decline to provide information in a broadly drawn set of circumstances: to protect sources, the privacy of third persons, or confidentiality with respect to the decision-making processes of the federal government.²⁹

During the inquiry proceedings, which, as noted above, began in 2006, dozens of witnesses gave testimony, including former ministers and the former leadership of the German secret services. Some members of German opposition parties, however, lodged a court challenge, arguing that the German government's lack of co-operation with the parliamentary inquiry – by its failure to disclose relevant information allegedly in order to protect the welfare of the state – breached the German Constitution. Members of the parliamentary committee of inquiry did not have access to certain classified documents on grounds of state secrecy, or were given highly redacted (censored) versions of documents. It also appeared to observers that witnesses withheld information from committee members on “sensitive” questions or did not receive authorization to testify extensively, and it was reported that government agencies failed to provide files to committee members in order that witnesses could be questioned about particular documents.

On 17 June 2009, the German Constitutional Court ruled that the government's failure to co-operate with the inquiry violated the German Constitution by impeding the parliament's right as an oversight body to investigate the government.³⁰ In particular, the Constitutional Court highlighted the government's failure to disclose some documents or parts of documents

27 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400.

28 Gesetz zur Änderung des Grundgesetzes, passed by Bundestag on 29 May 2009 and Bundesrat on 10 July 2009; and Gesetz zur Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes, passed by Bundestag on 29 May 2009 and Bundesrat on 10 July 2009.

29 Gesetz zur Änderung des Grundgesetzes, passed by Bundestag on 29 May 2009 and Bundesrat on 10 July 2009; and Gesetz zur Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes, passed by Bundestag on 29 May 2009 and Bundesrat on 10 July 2009.

30 Federal Constitutional Court press release, “Limited Grant of Permission to Testify and Refusal to Surrender Documents to BND Committee of Inquiry Partly Contrary to Constitutional Law”, No. 84/2009, 23 July 2009, <http://www.bundesverfassungsgericht.de/en/press/bvg09-084en.html>. The full decision (in German) can be accessed here: http://www.bundesverfassungsgericht.de/entscheidungen/es20090617_2bve000307.html.

requested by the inquiry in the cases of Khaled el-Masri and Murat Kurnaz, and the extremely limited authorization granted by the government to some witnesses to give testimony.³¹

Amnesty International has expressed deep concern that in light of this judicial decision – ruling that the government's actions restricting the information available to the inquiry were unconstitutional – the legitimacy of the inquiry and its conclusions have been fatally undermined.³²

UN SECRET DETENTION REPORT

Most recently, concerns about German complicity arose again in the context of the February 2010 UN Joint Study on Secret Detention.³³ The UN joint study specifically identified Germany as a government complicit in secret detention in terms of “knowingly... taking advantage of the situation of secret detention by sending questions to the State which detains the person or by soliciting or receiving information from persons who are being kept in secret detention” referring to the case of Muhammad Zammar, who was interrogated by German agents while being held in secret detention in Syria in November 2002.³⁴ Evidence before the German parliamentary inquiry confirmed that the interrogation took place, and also revealed that German agents had additionally sent questions to the Syrians for use by Syrian agents in their interrogations of Muhammad Zammar.³⁵

As noted above, during the parliamentary inquiry, many witnesses, among them the then-presidents of the BKA and BND, and officials from the Chancellery, including the then head of the Chancellery, Frank-Walter Steinmeier, said that they were aware of the use of torture in Syrian prisons and during interrogations.³⁶ According to one inquiry witness who was part of the German delegation that conducted the interrogation in Syria, Muhammad Zammar told the

31 Federal Constitutional Court press release, “Limited Grant of Permission to Testify and Refusal to Surrender Documents to BND Committee of Inquiry Partly Contrary to Constitutional Law”, No. 84/2009, 23 July 2009.

32 Amnesty International press release, “BND-Untersuchungsausschuss: Staatsgeheimnisse statt Geheimdienst-Kontrolle? (“Parliamentary Inquiry: State Secrets Instead of Control of Intelligence Services?”), 19 June 2009.

33 United Nations Human Rights Council, Joint study on global practises in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced and Involuntary Disappearances (UN Joint Study on Secret Detention), A/HRC/13/42, 19 February 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>. An advanced unedited version was originally published on 26 January 2010.

34 UN Joint Study on Secret Detention, para. 159.

35 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, p. 382.

36 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, p. 709, p. 717, p. 2133.

German intelligence agents who interrogated him that he had been ill-treated by the Syrians, indicating that the German government took advantage of his detention to question him and failed to act upon the knowledge of Muhammad Zammar's alleged ill-treatment at the hands of the Syrians.³⁷

The UN joint study also contains information of conflicting accounts by the German government during the course of the inquiry regarding when the German authorities became aware of the renditions and/or detentions of Murat Kurnaz and Khaled el-Masri.³⁸ It is important to note that the UN Joint Study on Secret Detention, issued in February 2010, named Germany as a country of concern despite the fact that the UN experts had access to the German parliamentary inquiry report, which, as noted above, did not find any German actor responsible for involvement in renditions and secret detention just the year before.

In a February 2010 letter, Amnesty International called for the reopening of the German inquiry – or the initiation of some other human rights compliant accountability process – with the full support and co-operation of the German government. The then Interior Minister Thomas de Maizière responded by letter in April 2010 stating that Germany did not consider the rendition and secret detention programmes as legitimate tools in the fight against terrorism, and claiming that German state actors acted lawfully in the context of all the counter-terrorism operations under review by the inquiry. With respect to the June 2009 German Constitutional Court decision, the Interior Minister stated that it had prospective application only; that is, it applied only to future instances where there might be a request for government information in the context of a parliamentary inquiry. He also noted that certain reforms aimed at greater control over the federal secret services had been introduced.

Recommendation

Amnesty International urges the UN Committee against Torture to recommend that the German government establish a human rights compliant accountability process that will effectively address its alleged involvement in the US-led rendition and secret detention programmes. The unconstitutional actions of the German authorities in the course of the German parliamentary inquiry, in combination with outstanding valid questions about the actions of its state agents such as those detailed in the UN Joint Study on Secret Detention, are strong indicators that the accountability process in Germany did not meet Germany's international obligations to investigate alleged responsibility in relation to acts of torture and other cruel, inhuman and degrading treatment or punishment; holding state actors involved in such violations accountable; and providing effective redress for victims of such violations.

37 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, pp. 447, 448, 931.

38 UN Joint Study on Secret Detention, para. 159.

2.2 ACCOUNTABILITY FOR OTHER INTERROGATIONS CONDUCTED IN FOREIGN COUNTRIES

INTERROGATIONS IN UZBEKISTAN

Amnesty International also has concerns about accountability in at least one case of interrogation by German agents abroad that was not directly related to US-led counter-terrorism operations. In June 2008 two BKA officers travelled to Uzbekistan to question S.A., detained at the time in a Tashkent prison on allegations of terrorism-related crimes. S.A. was alleged to have information about the so-called "Sauerland-group"-suspects who were arrested in 2007 in Germany and who were accused of preparing to attack US military installations in Germany.³⁹ The proceedings against the four suspects were opened before the Higher Regional Court of Düsseldorf in April 2009 and eventually ended with the conviction of the suspects due to confessions made by all four.

In September 2008 a German Federal prosecutor and three BKA officers again went to Tashkent to question S.A. for a second time. Both interrogations by the German officials took place in the presence of Uzbek National Security Service (SNB) officers. The interrogations of S.A. in 2008 were carried out despite public findings by successive UN Special Rapporteurs on torture that torture is systematic in Uzbek prisons.⁴⁰ The interviewers pointed out in their notes of the interrogation of 30 September 2008 that S.A. showed obvious fear when the deputy director of the SNB entered the room.⁴¹ The information gained at the interrogations was not admitted into evidence in the German court proceedings but was used in the investigation of the cell in Germany.

In April 2011 a German newspaper reported that on 5 November 2010 S.A. had died in prison.⁴² According to the Uzbek National Security Service he had suffered a heart attack. The newspaper reported, however, that his family had visited S.A. only one month before his death and said they had found him in good health.

Recommendation

Amnesty International urges the UN Committee against Torture to ask the German delegation to explain why German agents proceeded with the interrogations in the face of the recognised risk of torture (both systematically in Uzbekistan and specifically in the individual case),

39 AI report 2009, Germany, p. 142.

40 Theo Van Boven, UN Special Rapporteur on Torture, Report on Visit to Uzbekistan, UN Doc E/CN.4/2003/68/Add.2 (3 February 2003); Manfred Nowak, UN Special Rapporteur on Torture, 19 September 2006, UN Press Release, <http://www.unhcr.ch/hurricane/hurricane.nsf/0/25A8D3BA1A0ADA6CC12571F00024568B?opendocument>. See also Amnesty International annual reports.

41 See BKA notes of the two interrogations ST 32-094114/08-01, „assessment of the witness“, filed with Amnesty International.

42 Marcus Bensmann in TAZ, 16.4.2011, "Zeuge der Bundesanwaltschaft stirbt in Haft", <http://www.taz.de/1/archiv/digitaz/artikel/?ressort=au&dig=2011%2F04%2F16%2Fa0160&cHash=bfa045a9ae>.

what steps have been taken to investigate the matter, and to recommend that as part of any such investigations it would be relevant to ascertain as much as possible as can be learned about the circumstances surrounding S.A.'s death.

CASE OF ABDEL HALIM KHAFAGY

Abdel Halim Khafagy was 69 years old and a German resident when he was arrested by the Stabilisation Force (SFOR) forces in Sarajevo, Bosnia-Herzegovina, in September 2001. He was subsequently transferred to a US military base – “Eagle Base” -- in Tuzla.⁴³ Khafagy claimed that he was detained in a container and interrogated regularly by US forces, often during the night. On 2 October 2001 German BKA officers arrived in Tuzla with the intention of questioning Khafagy about some suspects of the “Hamburg Cell” he was alleged to have known. However, when the BKA officers realized the conditions under which Khafagy was being detained and interrogated they declined to question him. Back in Germany they reported to their seniors on their impressions that detainees were deprived of sleep and subjected to inhuman treatment at Eagle Base.⁴⁴ Abdel Halim Khafagy was released without charge after almost two weeks of detention and deported to Egypt, his country of nationality.

Abdel Halim Khafagy was one of the cases considered by the 2007-2009 German parliamentary inquiry into Germany's role in global counter-terrorism operations after the 11 September 2001 attacks in the USA.

As with the other cases examined by the parliamentary inquiry the final report found no German state actor to have been involved in any illegal act in the context of the Khafagy case.⁴⁵ While by declining to conduct interrogations in the circumstances the BKA officers correctly avoided putting Germany in violation of its international human rights obligations, Amnesty International remains concerned that, after the German government had been informed about the detention conditions at Eagle Base, it is not clear that it took any further steps to seek to have the US cease the human rights abuses that seemed to be taking place.

43 Amnesty International, Concerns in Europe, July - December 2001, Bosnia-Herzegovina, EUR 01/002/2002; Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, p. 389.

44 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, p. 393.

45 Abschlussbericht des 1. Untersuchungsausschusses der 16. Wahlperiode (final report of the 1st parliamentary inquiry in the 16th legislative period) Bundestagsdrucksache (Bundestag printed paper) BT16/13400, p. 389.

PART III

3. EXCLUSIONARY RULE

ARTICLES 2, 15, 16

3.1 USE OF INFORMATION EXTRACTED UNDER TORTURE AND OTHER ILL-TREATMENT IN CRIMINAL PROCEEDINGS AGAINST PERSONS CHARGED WITH TERRORISM-RELATED OFFENCES

Amnesty International is concerned that the German government has sought to have information potentially extracted under torture or other cruel, inhuman or degrading treatment admitted into evidence in criminal trials of persons suspected of terrorism-related crimes. The receipt and use of such information by the German law enforcement agencies and intelligence services in the course of their investigations into alleged terrorism-related activities also raises concerns that by accepting and relying upon information potentially tainted by torture and other ill-treatment, Germany implicitly encourages abusive interrogation techniques in violation of the absolute prohibition on torture and other cruel, inhuman or degrading treatment.

Article 15 of the UN Convention against Torture states that “Each 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.” Section 136(a) of the German Criminal Procedure Code explicitly prohibits the admission in criminal trials of evidence extracted by illegal means by the national authorities. At least one German court has ruled that this exclusionary rule also applies to evidence extracted under torture by the agents of another state (see the Motassadeq case below).

However, during the period since Germany last appeared before the Committee against Torture, high-level government officials have publicly stated their support for the use of information reasonably alleged to have been extracted under torture and other ill-treatment, for intelligence purposes. Former Minister of Interior, Wolfgang Schäuble, stated in 2005 “If we said that, under any circumstances, we should not use information where we cannot be sure that it was attained under conditions completely in line with the rule of law, then this would be absolutely irresponsible...We must use such information.”⁴⁶ In an appearance before the Association of German Jurists in September 2008, German Deputy Federal Prosecutor Rainer Griesbaum invoked the necessity of using information from foreign

⁴⁶ “Schäuble: Facts Obtained Through Torture Should be Used,” Deutsche Welle, 16 December 2005, <http://www.dw-world.de/dw/article/0,,1822384,00.html>.

intelligence services in terrorism investigations if Germany wanted to avoid isolating itself internationally. He required a proportionality test to be applied when deciding if evidence of a dubious provenance should be considered.⁴⁷

The German government, when asked by parliamentarians in December 2008 if it agreed with Griesbaum's legal opinion, evaded the question by simply quoting Griesbaum's proportionality test: "[I]t is ultimately a question of proportionality to what extent such evidence could justify interventional investigative acts...[R]elevant factors are the weight of the infringement of judiciary proceedings on the one hand and the severity of the unsolved crime, especially...an imminent attack, on the other hand."⁴⁸

Amnesty International is concerned that, implicit in the responses above, is an assertion by German authorities that they could in some circumstances use information obtained by torture or other ill-treatment, whether in formal proceedings or otherwise.

CASE OF MOUNIR AL-MOTASSADEQ

In August 2005, Mounir al-Motassadeq was convicted in Germany of belonging to a terrorist group and having assisted the hijackers of the planes that crashed into the World Trade Center on 11 September 2001.⁴⁹

The Hamburg Supreme Court (Hanseatisches Oberlandesgericht) decided in June 2005 to admit into evidence at trial statements from US intelligence officials to German authorities in the form of summaries of interrogations of three persons suspected of terrorist activities and then held at unknown locations by US authorities. The US authorities refused to disclose the location of the three individuals -- Ramzi Binalshibh, Mohamed Ould Slahi and Khalid Sheikh Mohammed -- or to offer any information about the conditions under which the men had been interrogated.

The Court accepted the statements as evidence on the basis that it could not be established that they had been obtained through torture or other ill-treatment. Human rights organizations, including Amnesty International, as well as journalists and individuals formerly in US custody, had repeatedly reported numerous allegations of torture and other ill-treatment in detention centres in Afghanistan, Iraq, Guantánamo Bay and other locations where persons suspected of terrorist activity were held by US authorities. The Hamburg Court, however, concluded that the allegations of torture and other ill-treatment contained in public reports were not verifiable because the confidential sources of such information were

47 Thesen zum Referat von Bundesanwalt beim Bundesgerichtshof Rainer Griesbaum, p. 46, II, no. 2, http://djtweb_2008.formcast.de/files/djt/67/djt_67_thesen_strafrecht.pdf; Human Rights Watch, "No Questions Asked", p. 41.

48 Bundestagsdrucksache (Bundestag printed paper) 16/11333, 10.12.2008, <http://dipbt.bundestag.de/dip21/btd/16/113/1611333.pdf>.

49 Amnesty International, "Germany: Hamburg Court Violates International Law by Admitting Evidence Potentially Obtained through Torture", (AI Index: EUR 23/001/2005), 18 August 2005. This was a retrial.

not named. It concluded that it could not be proven that the statements given by the three individuals were extracted under torture or other ill-treatment. (The US government has since released information indicating that Khalid Sheikh Mohammed was subjected to waterboarding 183 times in March 2003 while held in secret detention.)⁵⁰

This case raises serious concerns regarding the burden of proof. Under domestic criminal law and international human rights law, the burden of proof should rest with the prosecution to prove that statements it seeks to admit into evidence have not been extracted under torture.⁵¹ In the *al-Motassadeq* case, the Court, while recognizing that the state had the initial burden of proof, concluded that if it could not establish how the statements had been obtained then they had to be admissible, notwithstanding the credible allegations of abuse. Thus the Court in effect shifted the burden of proof to the defendant. The Hamburg Court was roundly criticized for the admission of the statements.⁵²

Though as described above the Hamburg Court's reasoning and ruling on the impugned evidence was as a whole disappointingly at odds with Germany's international obligations, including under Article 15 of the Convention, the Court did at least interpret Section 136(a) of the German Code of Criminal Procedure, which contains the rule that unlawfully obtained

50 Special Review of counterterrorism detention and interrogation activities (September 2001 – October 2003). Office of Inspector General, Central Intelligence Agency, 7 May 2004, para. 100, (redacted version released 24 August 2009).

51 Human Rights Committee, General Comment no 32 Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) para 41, citing Communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 253/1987, *Kelly v. Jamaica*, para. 7.4. See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc A/61/259 (14 August 2006, para 63 summarizing the approach of the Committee against Torture approach as follows "the applicant is only required to demonstrate that his or her allegations of torture are well founded. This means that the burden of proof to ascertain whether or not statements invoked as evidence in any proceedings, including extradition proceedings, have been made as a result of torture shifts to the State."

52 The UN special rapporteur on torture, Manfred Nowak, and the Council of Europe Commissioner for Human Rights, Thomas Hammarberg publicly criticized the Hamburg Court for assigning the burden of proof to the defendant as opposed to the state. See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc A/61/259 (14 August 2006), paras. 63-65; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008) pp 522-526; Report of the Commissioner for Human Rights Thomas Hammarberg on his visit to Germany, 9-11 and 15-20 October 2006, CommDH (2007)14,11 July 2007, <https://wcd.coe.int/ViewDoc.jsp?id=1162763&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>, para. 174. See also Kai Ambos, "The Transnational Use of Torture Evidence" (2009) 42 *Israel Law Review* 362, at 394-395: "The burden rests on the party that adduces the alleged torture evidence, normally the state, to prove that no torture was applied...This is in conformity with the UN Committee Against Torture's interpretation of Article 15 CAT according to which the provision entails a positive duty on the state to examine whether statements brought before its courts were made under torture. In an inquisitorial system, the same solution could be reached by the analogous application of the principle *in dubio pro reo*, usually only applicable with regard to facts concerning the defendant's guilt, to the case of evidence procured by torture or comparable methods. If, as in *El-Motassadeq*, the use of torture cannot be proved, the existence of doubt would operate in favor of the defendant and it would be assumed that the controversial evidence was produced under torture and therefore could not be admitted. It could, in turn, only be admitted if the use of torture could be definitely disproved."

evidence should be excluded, as applying not only to testimony taken by national authorities but to statements obtained by foreign authorities.⁵³

CASE OF A GERMAN NATIONAL OF PAKISTANI ORIGIN INTERROGATED IN PAKISTAN

A.N., a German citizen originally from Pakistan, was arrested by the Pakistani secret service - Inter Service Intelligence (ISI) -- at Lahore Airport on 18 June 2007. He was interrogated for eight weeks in Pakistani detention. In August 2007, the Pakistani Supreme Court ordered A.N.'s release without charge. Upon return to Germany, he was arrested on suspicion of providing support to a terrorist organization. He was convicted and sentenced in July 2009 to eight years in prison.⁵⁴

A.N. claimed at trial that the testimony he gave in Pakistan had been obtained under torture.⁵⁵ During the first two weeks of his imprisonment in Pakistan, A.N. alleged that he had been interrogated on a daily basis, including at night. According to A.N., he was beaten on his back and his shoulders with a bat made of rubber. His prison cell was underground and did not have any windows. It was cold and well-lit day and night, so that he was deprived of sleep. A.N. then was transferred to another prison where he claimed that he also was beaten and otherwise ill-treated. While in ISI custody, A.N. was visited by a German consular official and asked general questions by him on 18 July 2007.⁵⁶ Later a transcript of their conversation that included statements on A.N.'s alleged involvement with Al-Qaida was used as evidence in the preliminary proceedings.

The ISI had handed over three reports to a representative of the German Federal Investigation Office (BKA) – of interrogations carried out on 19, 27 and 29 June 2007 – summarizing the information obtained from A.N.⁵⁷ In early August 2007, while A.N. was still in ISI custody, a German court authorized a search of A.N.'s house, apparently based on the information from the ISI.⁵⁸ Although the three reports eventually were excluded as evidence at trial due to the systematic use of torture by the ISI and with reference to Article 15 of the UN Convention against Torture, the final judgment stated that the ISI reports triggered the initial investigation and arrest of A.N. in Germany after his return from Pakistan.⁵⁹ Moreover,

53 Ambos, *ibid.*, p. 378, fn 89: "Verbot der gerichtlichen Verwertung von durch Folter herbeigeführten Aussagen, das ... auch bei im Ausland durch Organe anderer Staaten mittels Einsatzes von Folter herbeigeführten Aussagen eingreift." [Furthermore, in its third guiding principle, the OLG held that § 136a StPO is also applicable, by analogy, if such prohibited methods of interrogation are practiced by foreign authorities and constitute a blatant violation of human dignity]. Oberlandesgericht (OLG) [German Higher Regional Court] Hamburg, Decision, June 14, 2005, reprinted in *Neue Juristische Wochenzeitschrift (NJW)* 2005, 2326.

54 OLG Koblenz, 13 July 2009, 2 StE 6/08-8.

55 All information taken from final judgment, OLG Koblenz, 13 July 2009, 2 StE 6/08-8, pp. 126-127.

56 OLG Koblenz, 13 July 2009, 2 StE 6/08-8, pp. 114, 115.

57 OLG Koblenz, 13th July 2009, 2 StE 6/08-8, pp. 110-112.

58 OLG Koblenz, 13th July 2009, 2 StE 6/08-8, p. 116; Michael Moss and Souad Mekhennet, "Glimpses of a Shadowy World in Pakistan", *New York Times*, 24 September 2007, <http://www.nytimes.com/2007/09/24/world/asia/24terror.html?pagewanted=1>.

59 OLG Koblenz, 13th July 2009, 2 StE 6/08-8, p. 118. Regarding exclusion of the ISI reports as evidence, see pp. 170-178.

testimony from the German consular official who had visited A.N. in ISI custody was admitted into evidence.⁶⁰

In the case of A.N., the German authorities appear then to have used information tainted by torture for purposes of intelligence and/or to initiate criminal investigations and proceedings, and possibly also in the course of a formal judicial proceeding to authorise the house search that in turn secured evidence that was eventually admitted into evidence at trial.

Recommendation

Amnesty International urges the UN Committee against Torture to ask for clarification from the German delegation as to whether at any time information in respect of which there was reason to believe it had been obtained by torture has been used in any proceedings, including any type of formal decision-making process about an individual, including in the search warrant proceedings in the A.N. case. The Committee should also request a clear and unequivocal commitment from the German government to refrain from seeking to admit into evidence in criminal trials and any form of proceedings, including any form of administrative or other formal decision-making process about an individual, any information that has been alleged to have been obtained through the use of torture and other ill-treatment. Germany should be asked to ensure that the burden of proof is always on the state party to prove that information, about which well-founded questions are raised, was not in fact obtained through torture and other ill-treatment. The German authorities, law enforcement and intelligence agencies should refrain from soliciting or providing information to states wherever there is reason to believe the information may have been obtained as a result of or will be used in relation to torture or other ill-treatment. Such cooperation lends implicit support and encouragement of foreign governments' use of torture and other cruel, inhuman or degrading treatment or punishment.

60 OLG Koblenz, 13th July 2009, 2 StE 6/08-8, pp. 114-117.

PART IV

4. NON-REFOULEMENT

ARTICLES: 2, 3, 16

4.1 THE USE OF DIPLOMATIC ASSURANCES

The German government has sought diplomatic assurances against torture in deportation and extradition cases on a case-by-case basis in the past but in July 2009 administrative regulations providing for the use of diplomatic assurances in cases of “international terrorism” were formally adopted by the government.⁶¹ Amnesty International and other human rights organizations campaigned against the adoption of these regulations and called on the German government to refrain from legitimizing the use of diplomatic assurances against torture, but to no avail.⁶²

The administrative regulations implement the Residence Act (Aufenthaltsgesetz), which controls the entry, residence, and employment of foreigners in Germany. The Federal Council (Bundesrat) approved the regulations in September 2009 and they were published by the Ministry of Interior in October in 2009.⁶³ Provision for the use of diplomatic assurances in national security deportations carried out by the Federal Ministry of the Interior are now enshrined in the regulations governing this aspect of German administrative law.

The Residence Act prohibits the deportation of persons to countries where they are at risk of torture, the death penalty, danger to life and limb or of deprivation of liberty, or when the deportation would be prohibited under Germany’s obligations under the ECHR.⁶⁴ According to the administrative regulations, the Federal Ministry of the Interior can seek diplomatic assurances as guarantees against these violations in returns cases dealing with international terrorism but “must ensure that the competent authorities of the target state [receiving state]

61 See Amnesty International, *Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ Against Torture*, (AI Index EUR 01/01/2010), April 2010, <http://www.amnesty.org/en/library/asset/EUR01/012/2010/en/608f128b-9eac-4e2f-b73b-6d747a8cbaed/eur010122010en.pdf> (pp. 22-24).

62 Amnesty International, *Germany -- Submission to the UN Universal Periodic Review*, 8 September 2009; Amnesty International, *Comment on the draft administrative regulations of the Residence Act*, 12 November 2008; Amnesty International, *Letter to Interior Minister Schäuble*, 19 March 2007. See also, Human Rights Watch, “*Letter to the German Government regarding Diplomatic Assurances*”, 21 July 2009.

63 *Gemeinsames Ministerialblatt*, 30 October 2009 (GMBI 42-61, S. 877ff.).

64 Residence Act, Sections 60 (2), (3), (5) and (7), respectively.

comply with the assurances".⁶⁵ According to the administrative regulations, if the German authorities can verify that the receiving country is able to comply with the assurances, the original grounds to believe that a risk of torture or other ill-treatment on return exist can be rebutted for the purposes of German law.

Cases in German courts prior to and after the adoption of the regulations indicate that the judiciary may have the potential to provide a bulwark against the government's apparent plan to institutionalize the use of diplomatic assurances against torture, at least in certain cases. In January 2009, the Administrative Court in Düsseldorf, North Rhine-Westphalia, halted the deportation of a Jordanian man who the government claimed was a threat to national security based on the risk of torture and ill-treatment he would face on return. Although the German government had not sought diplomatic assurances from the Jordanian authorities, the Court stated that even if diplomatic assurances had been proffered, they would not have sufficed to permit the man's deportation.⁶⁶ The same Administrative Court in Düsseldorf ruled in March 2009 that a Tunisian man, labelled a national security threat by the German government, could not be deported to Tunisia despite diplomatic assurances from the Tunisian authorities.⁶⁷ The court concluded that assurances from Tunisia that were "not legally binding...and by nature hardly trustworthy or verifiable" would not protect against torture or other ill-treatment on return.⁶⁸ This judgement was confirmed by the Higher Administrative Court of North Rhine-Westphalia in May 2010.⁶⁹

Another pending case involving diplomatic assurances against torture, in which Amnesty International opposed attempts to rely on such assurances, is the case of Hasan Atmaca. In May 2006, the Frankfurt am Main Court of Appeal requested that the Turkish government provide diplomatic assurances as a prerequisite to the Court's ordering the extradition of Hasan Atmaca, a Turkish national. In a verbal note, the Turkish authorities stated that he would be placed in a high security F-type prison, that requests from German Embassy staff to visit him would be "looked on favourably", despite the fact that such visits were not normally permitted, and that embassy staff would be able to gather information about his situation in detention.⁷⁰ The Darmstadt Administrative Court ruled in May 2007 that Hasan Atmaca, allegedly associated with the Kurdistan Workers' Party (PKK), should be granted refugee status and should not be extradited to Turkey.⁷¹ An appeal lodged by the Federal Office for Migration and Refugees against that decision is still pending before the Hessian Administrative Court of Appeal. German authorities have said they will not approve the extradition until the asylum procedure is concluded. German asylum law does not prohibit the extradition of refugees, in contravention of international law.⁷² When Hasan Atmaca

65 Administrative Regulations on the Residence Act no. 60.0.4.8 and 60.2.3.

66 Administrative Court Düsseldorf, 21 K 3263/07.A, 16 January 2009.

67 Administrative Court Düsseldorf, 11 K 4716/07.A, 4 March 2009.

68 Ibid., p. 18.

69 Higher Administrative Court North Rhine-Westphalia, 17 May 2010, 11 A 960/09 A.

70 Note verbale on file with Amnesty International. See also, Amnesty International, Germany -- Submission to the UN Universal Periodic Review, 8 September 2009.

71 Administrative Court Darmstadt, 7 E 1844/05, 31 May 2007.

72 Amnesty International, Germany -- Submission to the UN Universal Periodic Review, 8 September

requested interim measures against his extradition, claiming he would be ill-treated in Turkish prisons when extradited, the European Court of Human Rights issued interim measures pursuant to Rule 39 of the Rules of Court in October 2007.⁷³ His case is currently pending before the European Court.⁷⁴

As described below, Amnesty International opposes any use of diplomatic assurances as a purported means of addressing the risks of torture that a person would face as a result of transfer to another state. As such, Amnesty International believes the adoption by Germany of regulations under the Residence Act that explicitly permit the use of diplomatic assurances against torture and other ill-treatment is inconsistent with full respect for the fundamental and absolute prohibition of and obligation to prevent such human rights violations under international law. Moreover, such a step both may cause even more routine reliance on assurances against torture to justify transfers in other national security-related deportation cases in Germany, and may give other governments the impetus to take similar actions.

OPPOSITION TO THE USE OF DIPLOMATIC ASSURANCES AGAINST TORTURE

Amnesty International's principled and pragmatic opposition to diplomatic assurances against torture has appeared in a number of campaign documents, and also in joint statements in partnership with other human rights organizations.⁷⁵ In brief, that opposition is two-pronged: first it is based in principle on the need to maintain respect for the existing legally-binding international machinery of human rights protection; second, on a more practical level, it is based on inherent deficiencies with respect to the reliability, efficacy, sufficiency and enforceability of diplomatic assurances against torture and other ill-treatment. Taken together, these concerns comprise a critique of the use of diplomatic assurances based on the clear threat they pose to the international mechanisms created to eradicate torture and returns to risk of torture, and the more specific ways in which governments claim that these promises can be trusted to work, when the research strongly indicates that they cannot.

First, the absolute ban on torture and other cruel, inhuman and degrading treatment or punishment requires that all governments take positive steps toward the global eradication of

2009.

73 Application no. 45293/06, ECHR, Annual Activity Report 2007, Fifth Section, p. 46, http://www.echr.coe.int/NR/rdonlyres/96443711-4133-4043-8FB6-331AEC510FCA/0/2007_section_activity_reports.pdf.

74 ECHR, Application no. 45293/06, Hasan Atmaca against Germany, lodged on 29 October 2006.

75 See, e.g., the following documents by Amnesty International: Campaign Factsheet, "Diplomatic Assurances' – No Protection Against Torture and Ill-Treatment," (AI Index: ACT 40/021/2005), 1 December 2005. <http://www.amnesty.org/en/library/info/ACT40/021/2005>, accessed 31 March 2010; "Reject Rather than Regulate: Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment," (AI Index: IOR 61/025/2005), 2 December 2005 (with Human Rights Watch and the International Commission of Jurists); Amnesty International, Human Rights Watch, International Commission of Jurists, Redress Trust, "Open Letter to Danish Minister of Justice Regarding Denmark and Diplomatic Assurances against Grave Violations of Human Rights", (AI Index: EUR 18/004/2008), 17 June 2008. <http://www.amnesty.org/en/library/info/EUR18/004/2008/en>, accessed 31 March 2010.

such abuses.⁷⁶ The prohibition of torture and other ill-treatment remains in full force at all times and places in respect of all persons: no exception is permitted even in situations of armed conflict or any other emergency that “threatens the life of the nation.”⁷⁷ Under customary and treaty law, all states have a legal interest, both jointly and individually, in ensuring that torture and ill-treatment practised by other states are prevented and prohibited, and that all persons are protected from such treatment, anywhere and in all places.⁷⁸ Implicit in such a legal interest is a general obligation to cooperate in and utilize the machinery of international enforcement and remedy in good faith towards these ends.⁷⁹ This obligation is given further force by the fact that the prohibition of torture is also a *jus cogens* peremptory norm of international law.⁸⁰

In a case where diplomatic assurances against torture and other ill-treatment are procured, the sending state prioritizes its perceived national interest in “doing a deal” to allow it to “rid” itself of an individual, over respect for its existing absolute legal obligation of *non-refoulement*, owed to the individual concerned and to other states, not to expose anyone to torture or other ill-treatment.⁸¹ The sending state also fails to engage the established legal

76 See, e.g., Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Human Rights Committee General Comment no 20; UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention Against Torture) and Committee Against Torture (CAT), General Comment No. 2 – Implementation of Article 2 by States Parties, UN Doc CAT/C/GC/2, 24 January 2008.

77 See, e.g., Article 4 of the ICCPR and Human Rights Committee General Comments Nos. 20 (1992) and 29 (2001); Convention against Torture, Article 4 and CAT General Comment No. 2, paras 3-6.

78 Per the *erga omnes* nature (an obligation to the international community as a whole) of the prohibition against torture and other ill-treatment. See, e.g., Prosecutor v Furundžija, International Criminal Tribunal for the former Yugoslavia, Case IT-95-17/1-T, Trial Judgment of 10 December 1998 2002, paras. 151-152.

79 See Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 2; and Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN General Assembly A/Res/60/147 (16 December 2005), para. 4. See also the rule “*pacta sunt servanda*” as codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”) and Articles 55 and 56 of the Charter of the United Nations. Article 55 of the UN Charter is also referenced in the Preamble to the UN Convention against Torture and the Preamble to the International Covenant on Civil and Political Rights.

80 See Articles 40 and 41 on the Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (Annex) (12 December 2001): under 41(1) “States shall cooperate to bring to an end through lawful means any serious breach” which is defined by Article 40 to include “a gross or systematic failure by the responsible State to fulfil” an “obligation arising under a peremptory norm of general international law.” Article 41 also provides that “No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.” See also Prosecutor v Furundžija, International Criminal Tribunal for the former Yugoslavia, Case IT-95-17/1-T, Trial Judgment of 10 December 1998, paras. 144, 147, 153-157 and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, 2004, ICJ Rep 136, paras. 154-160.

81 The obligation of non-refoulement arises from, among other sources, the UN Convention against Torture, Article 3; the ICCPR Article 7 (see Human Rights Committee General Comment no 20, para 9 and General Comment no 31, para 12; regional treaties such as the European Convention on Human Rights, Article 3 [see the judgment of the European Court of Human Rights in Soering v UK, judgment of 7 July 1989, and other cases cited below]; customary international law [see E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-refoulement’ in E. Feller, V. Türk, and F.

machinery to seek fulfillment of the legal obligations already owed to it by the receiving state vis-à-vis the ongoing general situation of torture and other ill-treatment in the receiving country. By so doing, the sending state implicitly tolerates, and may even in effect encourage, the continuation of the broader pattern of torture violations in the receiving state. As the Eminent Jurists Panel assembled by the International Commission of Jurists to conduct an extensive study of the issue of human rights and counter-terrorism worldwide has stated, “reliance on diplomatic assurances is wrongly being used as a way of ‘delegating’ responsibility for the absolute prohibition on torture to the receiving country alone. That undermines the truly *international* nature of the duty to prevent and prohibit torture.”⁸²

The second prong of Amnesty International’s opposition to diplomatic assurances arises from inherent deficiencies in diplomatic assurances that militate against them providing a reliable “safeguard” against torture and other ill-treatment. Among these concerns, examples of which are described in sections below, are the following:

Given the absolute and non-derogable nature of the prohibition of torture under international law, its status as a crime under international law, and the stigma associated with its use, governments that practise torture routinely deny it;⁸³

Deniability is made plausible by the routine failure of the state to investigate allegations of torture and bring those responsible to account, creating an environment of impunity for perpetrators; and by the fact that torture is usually practised in secret, with the collusion of law enforcement and other government personnel, including medical staff in some cases, and with the understanding that no one will be held accountable for the abuse;

Persons subject to torture and other ill-treatment are often afraid to recount their abuse to their lawyers, family members, and monitors for fear of reprisals against them or their families;

In the event a breach is alleged, bilateral diplomatic assurances are not legally binding and lack an enforcement mechanism, leaving it to the two governments involved to voluntarily assume responsibility for investigating breaches of the assurances and holding perpetrators accountable;

Nicholson (eds) 'Refugee Protection in International Law' UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003), 78-177], and, in a slightly different form, in international refugee law.

82 EJP Report, p. 105. In his 2006 report to the UN Commission on Human Rights, the UN Special Rapporteur on torture stated at para. 31(c): “It is often the case that the requesting and the requested States are parties to CAT, ICCPR and other treaties absolutely prohibiting torture. Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an exception from the practice of torture for a few individuals, which leads to double standards vis-à-vis other detainees in those countries”. UN Doc E/CN.4/2006/6, 23 December 2005.

83 As many commentators have noticed, this characteristic significantly distinguishes diplomatic assurances against torture and other ill-treatment, from the more widely-accepted use of diplomatic assurances that the death penalty will not be sought or applied in the case of a particular returnee.

Governments have no incentive to acknowledge a breach of diplomatic assurances, and indeed have strong incentives to remain ignorant of or to ignore potential breaches; such an acknowledgement would not only amount to an admission that the governments had violated the absolute ban on torture and sending people to places where they were at risk of torture, but would likely complicate efforts to rely on assurances in the future;

Even when breaches are detected by the sending government, there is no evidence to support the notion that serious diplomatic consequences will result, and it will have no means of ensuring a cessation of the breaches or effective protection of the individual;

Attempts to forcibly return people in reliance on a bilaterally-negotiated diplomatic assurance covering transfers based on “security” or “terrorism” grounds may lead to some individuals being labelled as “terrorists” who may not have been so –labelled by the receiving country in the past; the assurances themselves thus may put people at further risk of ill-treatment on return.

POST-RETURN MONITORING

In recent years, some governments have asserted that post-return monitoring can render the use of diplomatic assurances against torture and other ill-treatment compatible with international human rights obligations. Amnesty International’s long experience in monitoring patterns of human rights violations worldwide strongly indicates that no system of post-return monitoring of individuals will render assurances as an acceptable alternative to rigorous respect for the absolute prohibition of transfers to risk of torture or other ill-treatment. Such *ad hoc* monitoring schemes necessarily omit the broader institutional, legal, and political elements that can make certain forms of system-wide monitoring of all places of detention (and therefore all detainees) in a country one way, in combination with other measures, of potentially reducing the country-wide incidence of ill-treatment over the long-term.

As the European Court of Human Rights has acknowledged, however, system-wide monitoring also cannot guarantee the humane treatment of particular individuals. In a series of cases dealing with the return of alleged national security suspects from Italy to Tunisia, the Court highlighted the research of human rights organizations, including Amnesty International, documenting the serious torture and ill-treatment of such detainees in Tunisia and “concluded that international reports mentioned numerous and regular cases of torture and ill-treatment meted out in Tunisia to persons suspected or found guilty of terrorism and that visits by the International Committee of the Red Cross to Tunisian prisons could not exclude the risk of subjection to treatment contrary to Article 3 [the ban on *refoulement*].”⁸⁴

On the other hand, a series of post-return visits to a particular individual or just a few people would also put the detainee in an untenable position: the person is forced to choose between staying silent or reporting abuse in a situation where he or she will be clearly identifiable as the source of the report. As noted above, and borne out by Amnesty International’s research,

⁸⁴ Ben Khemais v Italy, Application No. 246/07, 24 February 2009, para. 64.
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=246/07%20%7C%20246/07&sessionid=49366331&skin=hudoc-en> (in French), accessed 21 March 2010.

even if the individual decided to take the risk of reporting the abuse while he or she is still at the mercy of the abusers, it is unlikely that either the sending or the receiving state would be willing to acknowledge that torture or ill-treatment had occurred after return, since to do so would be to admit a breach of a core obligation under international human rights law, and to concede the failure of the assurance, possibly frustrating efforts to rely on such agreements in the future.

The realities of any post-return monitoring of particular returnees under diplomatic assurances are in stark contrast to a key prerequisite of proper system-wide monitoring, i.e. ensuring that a large number of detainees are visited in sufficiently private conditions to ensure that the authorities do not know which individuals provided which information – thereby helping to protect detainees against reprisal and better reassure detainees that they can safely provide critical information. The absence of any enforcement or remedial mechanism in the event of a breach of the assurances only further underscores the ineffectiveness of an assurance to prevent harm that is, in any event, never truly reparable.⁸⁵

Recommendation

Amnesty International urges the UN Committee against Torture to recommend that the German authorities renounce and prohibit in national law any invocation of diplomatic assurances against torture or other cruel, inhuman or degrading treatment as a purported means of addressing the risk of such abuse that a person would face if transferred to another state, and that Germany amend the administrative regulations under the Residence Act accordingly.

⁸⁵ Indeed, by the wording of the UN Convention against Torture, stating that all victims of torture have a right to “redress ... including the means for as full rehabilitation as possible” (Article 14(1) CAT) states themselves acknowledge the reality that “full rehabilitation” for torture is simply not achievable – the nature of torture itself means that the most one can hope for is “as full rehabilitation as possible”. Once it has occurred, nothing can truly fully erase the consequences of torture for the victim. It was the very recognition of the irreparable nature of the harm caused by torture (and other similar human rights violations) that gave rise to the non-refoulement obligation in the first place (See Human Rights Committee, General Comment No. 31, para 12).

Nothing in any post-return monitoring mechanism, no matter how rigorous, can possibly change the irreparable nature of the harm caused by torture. Further, monitoring mechanisms that are not part of an established framework with a proven track record not only in detecting cases of abuse, but in consistently and seriously bringing all perpetrators fully to justice and immediately stopping all further abuse, and in actually reducing the incidence of torture, cannot seriously be considered as having any significant preventive deterrent effect. Thus, “post-return monitoring” of any kind simply fails to address the fundamental incompatibility of “diplomatic assurances” on torture and other ill-treatment, with international human rights obligations. As the Council of Europe Commissioner for Human Rights Thomas Hammarberg has concluded, “it is absolutely wrong to put individuals at risk through testing such dubious assurances.”

4.2 FORCIBLE RETURN

CASES OF YONAS MEHARI AND PETROS MULUGETA

The UN High Commissioner for Refugees (UNHCR) issued guidelines in January 2004 recommending that states “refrain from all forced returns of rejected asylum-seekers to Eritrea and grant them complementary forms of protection instead, until further notice” on the grounds of the record of serious human rights violations in Eritrea. These guidelines remained in force in 2007 and 2008 and the UN Refugee Agency’s advice against all forcible returns to Eritrea was only updated in April 2011.

On 22 November 2007, two men, Yonas Mehari and Petros Mulugeta, arrived in Germany and applied for asylum at Frankfurt am Main airport, claiming that they feared persecution if returned to Eritrea because they were draft evaders/deserters. The Federal Office for Migration and Refugees rejected their applications for international protection as manifestly unfounded on all grounds and denied them authorization for “entry” to Germany. They appealed the rejection to the Frankfurt Administrative Court, seeking an interim order to be allowed “entry”, but their appeals were dismissed.

On 14 January 2008, the German police tried to forcibly return the two men on a scheduled flight to Asmara, the Eritrean capital. However, the pilot refused to let them board the plane because of the resistance they offered to their enforced removal. On 4 February, another attempt to forcibly return the men was abandoned for the same reason. Eventually, the German authorities booked a private plane. Accompanied by four policemen and constrained into their seats, the two men were deported to Asmara on 14 May 2008. In the run-up to the deportation the authorities disregarded a large number of protests against their forcible return, including public ones.

Both men were detained at the airport upon their arrival in Asmara. They were questioned repeatedly about their asylum application, accused of treason and told they would receive significant punishment. Though they continued to be held, they were not charged with any offence. In June 2008 the two men were transferred to Singa prison in Wi’a.

Yonas Mehari told Amnesty International that he was held in an underground cell measuring 150m by 150m with 400 other detainees in extremely high temperatures. The floor was so hot that detainees could not sit or lie down without blistering their skin. Yonas Mehari reported many deaths in custody and deteriorating mental health of other detainees. Petros Mulugeta told Amnesty International he was held in a zinc shipping container. It measured approximately 4m by 4m and contained around 40 male detainees.

Both men recounted that food was of poor quality and scarce, and illness and disease were common. Detainees did not receive medical treatment. Yonas Mehari and Petros Mulugeta told Amnesty International that during their time in detention they saw many detainees shot dead while attempting to escape.

During 2009 both men were separately referred to military hospitals for treatment for wounds and injuries resulting from conditions in detention. Both men fled from the military hospitals and left the country for a second time on different dates in late 2009. Yonas Mehari left for

Ethiopia where he went to a refugee camp. Petros Mulugeta went to Sudan, where he contacted the German embassy. Both men also contacted their asylum lawyer in Germany. Both were granted asylum by the German authorities in 2010, and returned to Germany.

ACCELERATED ASYLUM PROCEDURE

The applications for asylum of Yonas Maheri and Petros Mulugeta were subject to an accelerated asylum claim adjudication procedure (hereafter referred to as “the Airport Procedure”) provided for in Section 18a of the Asylum Procedure Act. It was introduced in 1993 and is operated mostly at Frankfurt am Main airport.

The Airport Procedure applies to asylum-seekers who come from a country deemed by the German authorities to be a “safe country of origin”, and to asylum-seekers who do not possess a valid passport or equivalent papers. Asylum applicants subject to the Airport Procedure are stopped in a transit area. German authorities consider this to mean that the individuals have not yet “entered German territory” for the purposes of residence law. They are held in a transit area near the airport and have their claims heard in an adjudication process that does not follow the procedures of the ordinary Germany asylum process. The European Court of Human Rights has made clear that holding a person in a transit area of this nature amounts to a deprivation of liberty.⁸⁶

Asylum-seekers subject to the Airport Procedure are interviewed by the branch office of the Federal Office for Migration and Refugees (BAMF) at the airport. The law provides that the interview shall take place without delay after the application for asylum has been made. If the BAMF advises the border authority that it needs more than two days to decide the application, or it does not in fact decide upon the application within two days, the asylum-seeker is released from detention and allowed to leave the transit area. If the applications are refused as manifestly unfounded, the asylum-seekers are refused permission to “enter”, their detention is continued, and they are notified that they will be deported.

An asylum-seeker who has been notified that his or her application has been refused as manifestly unfounded can apply to the Administrative court, within three days after being served with the notification, seeking an interim order to be allowed to “enter”. The court then has two weeks to decide on the application. Section 18a of the Asylum Procedure Act provides that, if an application is filed on time, the refusal of entry shall not be enforced by forcible deportation, prior to the court decision. The law states that the court shall decide the application on the basis of the files alone, i.e. without holding an oral hearing in which the asylum seeker might be heard (the court however can hold an oral hearing if it deems this appropriate). The Court may find in favour of the asylum-seeker only if it finds that “there are serious doubts as to the legality of the administrative act against which a complaint has been filed”. If the court decision rejects the application and confirms the BAMF’s conclusion that the application was manifestly unfounded, no further legal remedy is provided by the Asylum Procedure Act, and the asylum-seeker can be deported immediately. Reasons for the decision of the administrative court need not be given immediately and German law permits the individual to be removed from Germany before the written reasons are given. Though a person

⁸⁶ *Amuur v France* (no. 17/1995/523/609, 20 May 1996); *Nolan and K v Russia* (no. 2512/04, 12 February 2009); *Riad adn Idiab v Belgium* (nos. 29787/03 & 29810/03, 24 January 2008).

may in theory have the right to further challenge the administration court's decision before the Federal Constitutional Court, then, it may be difficult for the person to exercise those rights in practice.

Amnesty International is concerned that the reduced procedural safeguards within the Airport Procedure, and the potential impact on quality of decisions, may lead to a breach of *non-refoulement* obligations. Speeding up the decision-making process is beneficial only if it is not at the expense of fairness and quality of the actual decision-making. Amnesty International believes that the use of fast-track procedures, where there is pressure to meet such short time limits, is not conducive to fair decisions, and that under such procedures asylum-seekers are often detained for administrative convenience rather than on substantive grounds for concerns of absconding or safety to others in relation to the evidence in their individual case. The German Airport Procedure does not appear to operate a presumption against detention of individual asylum-seekers subject to its provisions—to the contrary, the procedure appears to involve a presumption *in favour* of detention for persons whose situations happen to fall within its scope—nor does it appear to incorporate any examination of the necessity of deprivation of liberty in each individual case. In addition, Amnesty International is concerned that due to the short time limits imposed by the Airport Procedure, asylum-seekers may not be able to receive access to a lawyer prior to the BAMF interview and to exercise their right to have a lawyer present during the interview.⁸⁷

In its 2009 report on Germany, the European Commission against Racism and Intolerance (ECRI) noted that, while “significant improvements” had been introduced to asylum application procedures in Germany more generally, “some concerns remain with respect to expedited airport procedures.”⁸⁸ Amongst other things, the ECRI referred to the fact that vulnerable groups such as unaccompanied children may still be subject to these procedures.⁸⁹ Amnesty International is not aware of any distinction in the application of the German Airport Procedure to vulnerable groups, including victims of torture. For various reasons, torture victims may be particularly affected by accelerated procedures, as it is recognized that the trauma of torture can have effects on the ability or willingness of the individual to provide a fulsome and coherent account in an initial interview or in an otherwise time-limited environment.⁹⁰ According the *Guidelines on human rights protection in the*

⁸⁷ Asylum seekers subject to the airport procedure have the possibility to contact a lawyer prior to the interview, and the right to have him or her present during the interview, pursuant to Section 14 para. 4 of the Administrative Procedure Act. It may however be difficult to exercise this right in practice. Section 18a para. 1 of the Asylum Procedure Act provides that asylum seekers not yet represented by a lawyer must be given the opportunity to contact a lawyer, but only after the interview has taken place. In its decision on the constitutionality of the Airport procedure, the Federal Constitutional Court did not deem it necessary that asylum seekers subject to this procedure be given the opportunity to contact a lawyer prior to the interview, that they be informed about this opportunity, and that the interview be conducted only after the asylum seeker could avail himself of this opportunity. However, asylum seekers not represented by a lawyer had to receive free legal advice and assistance if their application had been rejected as manifestly unfounded. This advice is provided by a pool of lawyers, pursuant to an agreement between the Federal Ministry of the Interior and the Frankfurt Lawyers' Association. Federal Constitutional Court, BvR 1516/93 of 14 May 1996, para. 131

⁸⁸ ECRI Report on Germany (fourth monitoring cycle), CRI(2009)19, p. 9.

⁸⁹ Ibid, p. 36, para. 115.

⁹⁰ See, e.g., the 1999 Istanbul Protocol: Manual on the Effective Investigation and Documentation of

context of accelerated asylum procedures, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009, the vulnerability of certain categories of persons, including unaccompanied children and victims of torture, must be taken into account when deciding whether to apply accelerated asylum procedures.⁹¹ Resolution 1471 (2005) of the Parliamentary Assembly of the Council of Europe on “accelerated asylum procedures in Council of Europe member states” indicates that such categories of persons should be entirely excluded from any accelerated procedures.⁹²

PART V

5. RIGHT TO REMEDY AND DUTY TO INVESTIGATE COMPLAINTS

ARTICLES 12, 13 AND 16

POLICE ILL-TREATMENT

In its July 2010 report *Unknown assailant: Insufficient investigation into alleged ill-treatment by police in Germany* (AI Index EUR 23/002/2010) Amnesty International has noted with concern that complaints against police officers because of excessive use of force are not always adequately investigated.

In cases of alleged ill-treatment or excessive use of force by a police officer or any unnatural death, under the Criminal Procedure Code (CPC) the Public Prosecution Office (PPO) and the police are obliged to start a criminal investigation on their own initiative if there is an initial suspicion that a criminal offence might have been committed (Section 152 and Section 163 respectively). In addition, any person can file a criminal complaint with the PPO, the police or a court (Section 158).⁹³ The PPO holds overall responsibility for pre-trial criminal

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc HR/P/PT/8/Rev.1 (2004), para 142.

91 Guidelines on human rights protection in the context of accelerated asylum procedures, adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies, III. 1.

92 Parliamentary Assembly of the Council of Europe, Resolution 1471 (2005), adopted by the Assembly on 7 October 2005 (32nd Sitting), para. 8.11.

93 Within the terms of the CPC, unnatural death means death caused by some externally inflicted

investigations, but it works in close cooperation with the police when carrying out an investigation.

The police unit responsible for carrying out the investigation varies among the laender (states within the federal structure of Germany). While the majority of laender have not established specialized units within the police to investigate allegations of police misconduct, some have.⁹⁴ In Hamburg there is a centralized specialist police unit which investigates criminal matters involving police officers. This unit, which is referred to as the Dienstinterne Ermittlungseinheit⁹⁵, is located in the premises of the Departmental Authority for the Interior of Hamburg, and is under the responsibility of the State Investigation Office (Landeskriminalamt) of the land of Hamburg. Bremen informed Amnesty International that since March 2009, the Authority for the Interior of Bremen has been responsible for investigations against police officers in Bremen. Lower Saxony stated that there are units within the police authorities for investigating alleged criminal conduct by police officers (so-called departments for internal investigations). In Berlin and Thuringia, criminal investigations against police officers are generally conducted by the State Office of Criminal Investigations; Hesse refers allegations of serious misconduct to the State Office of Criminal Investigations of the land of Hesse. In the land of North Rhine-Westphalia, it is always the police authority of the neighbouring city that investigates such allegations.

If the PPO considers that the investigation has revealed sufficient evidence to be able to prefer public charges, it will submit a bill of indictment to the competent court, which then decides whether proceedings before the court will be opened. If the PPO considers that the investigation has not revealed sufficient reason for pressing public charges it will terminate the investigation. If the person who has filed the criminal complaint is also the victim of the alleged offence, he or she has a privileged status during the criminal investigation. He or she can lodge a complaint against the PPO's decision to terminate an investigation with the Public Prosecutor General (Section 172 para. 1). If rejected by this higher body, the victim may apply for a judicial decision (Section 172 para. 2). This also applies to members of the immediate family if the victim has died.

Article 12 of the Convention against Torture requires that Germany "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction", not only where a formal complaint is made (which is addressed in Article 13). In Germany, even though in cases of alleged ill-treatment or excessive use of force the police and the PPO are obliged by national law to start criminal investigations on their own initiative⁹⁶, Amnesty International has received information that investigations are generally

event, (not age, illness etc). This means a death such as suicide, or the result of an accident or of a criminal offence. Following an unnatural death the public authorities and police have to give notice to the Public Prosecution Office (Section 159). If the prosecutor has an initial suspicion that a criminal offence could have been committed he or she is obliged to initiate criminal investigations (Section 152 para. 2, 160 para. 1). But this is not automatic with unnatural deaths.

94 The Laender with specialised units are Baden-Württemberg, Bavaria, Mecklenburg-Western Pomerania, Northrhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony and Saxony-Anhalt.

95 See the official presentation of the DIE, <http://www.hamburg.de/die/wir-ueber-uns/>.

96 As in all other cases of criminal offenses. Strafprozessordnung, § 152, 2.

only started once a person has filed a criminal complaint against the police. Furthermore, Amnesty International has received information about cases in which there were credible allegations of ill-treatment but the victims declined to file a complaint against the police. During the course of its research, Amnesty International was repeatedly told by those claiming to be victims, as well as by lawyers, that although they felt they had legitimate grievances against police officers they did not intend to make a complaint as they felt that any such complaint would be unsuccessful. Some of the alleged victims did not lodge a complaint because they feared counter-complaints by the police. As well as not trusting the system, some alleged victims said they were too afraid of reprisals to file a criminal complaint.

Amnesty International notes with concern that information about how to file criminal complaints is not always easily accessible for persons who want to file a complaint. Few laender provide information on their police-websites about the possibility of lodging complaints. Furthermore, to Amnesty International's knowledge, information about how to lodge a complaint is not made readily available at police stations.

Even though the PPO and the police – under the supervision of the PPO – are obliged under German and international law⁹⁷ to carry out comprehensive investigations once a criminal complaint is lodged, Amnesty International is concerned that these investigations are not always in accordance with Articles 12 and 13 of the Convention.

In its recommendations in 2004, the Committee called on Germany to “*take all appropriate measures to ensure that criminal complaints lodged against its law enforcement authorities are resolved expeditiously, in order to resolve such allegations promptly and avoid any possible inference of impunity, including in cases where counter-charges are alleged*”.⁹⁸ According to international law, investigations can be considered effective, when they are carried out promptly, in an impartial, independent, adequate, and thorough manner and under sufficient public scrutiny and with involvement of the alleged victim.

One obstacle for effective investigations is that police officers cannot be individually identified. In several cases that Amnesty International has researched, allegations of ill-treatment, including some involving excessive use of force in the context of policing demonstrations, could not be clarified because it was not possible to identify the alleged perpetrator. This is partly due to the fact that police officers in Germany in 15 laender are not obliged to wear identity badges showing their name or number. Only Berlin has introduced individual identification for police officers as of 1 January 2011. The internal regulation that requires police officers to carry identity badges has not been fully put in practice yet. However, members of special deployment commands in Berlin have been

97 In German Law the obligation is based on the “principle of legality” (Legalitätsprinzip) which requires the PPO and the police to investigate comprehensively whenever a criminal complaint or an “initial suspicion” (Anfangsverdacht) is given. The principle of legality underlies the German Code of Criminal Procedure and is codified in Section 152 (2). In international law the following judgements of the ECHR underline the obligation to investigate: *Anguelova v. Bulgaria*, 13 June 2002, para. 139; *Ramsahai and others v. The Netherlands*, 15 May 2007, para. 324.

98 Conclusions and recommendations of the Committee against Torture: Germany 11/06/2004, CAT/C/CR/32/7.

carrying identity badges since June 2008. For the Federal Police, the German government has declared that it does not consider it necessary to introduce individual identification.⁹⁹

Amnesty International is concerned that the lack of a requirement for officers to visibly display some form of identity badge has led to impunity for perpetrators of ill-treatment, particularly in the context of demonstrations or when the police have deployed special deployment commands.¹⁰⁰ The uniforms worn in these situations have markings showing which unit or group the police officer belongs to, but such identifying marks do not allow for an identification of the individual police officer.

Even if the respective police officer can be identified, Amnesty International has noted with concern that the investigations are in some cases not expeditious, and not comprehensive. In various cases, investigations into the misconduct of police officers were only started after a case against the alleged victim for resisting law enforcement officers had been closed.¹⁰¹ Other cases revealed that only after the alleged victim had appealed against the PPO's decision to terminate the case, were any investigations carried out that might be thorough and diligent enough to meet the standards required by international law.¹⁰² In two cases, the lack of prompt investigations resulted in a situation in which the alleged victims had already been forcibly removed from Germany.¹⁰³

The main reason for investigations failing to meet the requirement of comprehensiveness or thoroughness appeared to be lack of impartiality and independence at the police and prosecution level. Amnesty International has researched cases in which insufficient efforts were made to clarify inconsistencies in the evidence that was gathered.¹⁰⁴ The organisation has also documented that alleged victims as well as suspected police officers were summoned for questioning by police officers from the same unit at which the suspected police officers were deployed.¹⁰⁵ A lack of impartiality of prosecutors can result from the fact that due to the lack of independent police oversight bodies the PPO has to rely on the same police officers for investigating regular cases against which the PPO would have to file criminal complaints in case of excessive use of force. In one case of a death in police custody, the PPO announced to the media and the superintendent of the police that the police officers in question had probably acted lawfully, before he had actually carried out any investigations.¹⁰⁶

99 Bundestagsdrucksache 17/6736, page 4.

100 Special Deployment Commands exist in all Länder as well as within the federal police. They are deployed for operations requiring special training and/or equipment.

101 See for example the case of JM in Unknown Assailant, p. 40.

102 See the cases of ER and JE in Unknown Assailant., p. 44 and p. 49 respectively.

103 See the cases of AD and AR in Unknown Assailant, p. 40/41 and p. 41/42 respectively.

104 See for example the cases of ER and JM, Unknown Assailant, p. 40 and p. 45 respectively.

105 See the case of JM and AD in: Unknown Assailant, p. 42.

106 See the case of Adem Özdamar in: Unknown Assailant, p. 43.

Recommendation

To ensure full compliance with the required standards of prompt, impartial, independent, adequate, and thorough investigations, Amnesty International urges the Committee to recommend that Germany establishes an independent police complaints' mechanism that carries out all investigations in case of serious allegations of ill-treatment by police officers. These mechanisms would have to be both fully independent of existing police structures as well as being endowed with a sufficient mandate and powers, sufficient resources and investigating teams with the capacity and competencies to carry out their functions effectively. Amnesty International regrets that the German government has, in the past, explicitly declined to create independent complaints mechanisms of this nature.¹⁰⁷

107 See Bundestagsdrucksache 17/6736, page 12.

PART VI

6. OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

THE NATIONAL PREVENTION MECHANISM UNDER THE OPCAT

Germany ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in 2008. It has established a national preventive mechanism which came into operation in July 2009.¹⁰⁸ The National Prevention Mechanism consists of an honorary director, who works on a voluntary basis, and three paid research assistants; they are in charge of monitoring all places of detention at the federal level. At the laender level, a laender commission consisting of four honorary members is responsible for conducting the monitoring. The laender commission is assisted by one paid research assistant. The laender commission has taken up its function in September 2010.

Given this situation, the UN Special Rapporteur on torture stated that:

*"This mechanism is evidently unable to ensure complete geographic coverage of all places of detention. Such approach to the implementation of OPCAT is counter-productive since it does not take the problem of torture and ill-treatment in detention seriously and sets a bad example for other States."*¹⁰⁹

Recommendation

Amnesty International is also concerned that this mechanism is not adequately resourced to carry out its tasks effectively.¹¹⁰ Amnesty International recommends the German government ensures that the National Prevention Mechanism has the resources necessary for it effectively to monitor all places of detention, at both the federal and laender level.

¹⁰⁸ Germany ratified the Optional Protocol to the Convention against Torture in August 2008, Bundesgesetzblatt II 2008, Nr. 32. The national preventive mechanism was established by an organizational decree of the Federal Ministry of Justice, Bundesanzeiger Nr. 182, S. 4277.

¹⁰⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/13/39/Add. 5, 5 February 2010, para. 164.

¹¹⁰ In its annual report 2009/2010, the director of the National Prevention Mechanism Klaus Lange-Lehngut also underlined that the Prevention Mechanism is inadequately equipped to fulfil its function. Federal Agency for the Prevention of Torture, Annual Report 2009/2010, p. 7. See also his essay "Aufgaben und Arbeitsweisen der Bundesstelle zur Verhütung von Folter im nationalen Präventionsmechanismus Deutschlands", in "Folterprävention im völkerrechtlichen Mehrebenensystem" 2011, p. 116.

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