

HUMAN RIGHTS WATCH

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October 14, 2011

Members of the United Nations Committee against Torture
Attn: Joao Nataf
UNOG-OHCHR
CH 1211 Geneva 10
Switzerland

Re: Review of Germany

Dear Committee Members,

We write in advance of the Committee against Torture’s upcoming review of Germany. Enclosed to this end please find the Background and Germany sections of our June 2010 report, *No Questions Asked: Intelligence Cooperation with Countries that Torture* (<http://www.hrw.org/reports/2010/06/28/no-questions-asked>), along with the corresponding recommendations for steps the German government should take to address the problems identified.

The enclosed materials detail the ways in which Germany undermines the global ban on torture in the context of the fight against terrorism through intelligence cooperation with countries with well-known records of torture, such as Uzbekistan, and public statements affirming the legitimacy of using such torture information to prevent a terrorist attack. No specific guidelines exist governing appropriate handling of intelligence from countries where torture is a systematic practice (Convention Article 10).

Human Rights Watch has serious concerns about the use of torture material as evidence in Germany, where the burden of proof is placed on the individual against whom the evidence is invoked, and the exclusionary rule is not extended to the so-called fruits of the poisoned tree (Convention Article 15).



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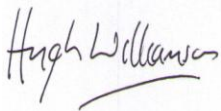
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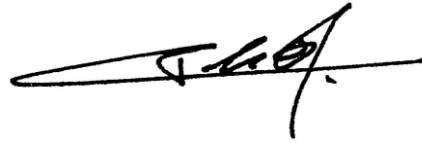
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We hope you will find our analysis useful and would welcome an opportunity to discuss our findings with you. Thank for your attention to our concerns, and with best wishes for a productive session.



Hugh Williamson
Director
Europe and Central Asia Division
Human Rights Watch



Philippe Dam
Acting Geneva Director
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Excerpts from Human Rights Watch’s 2010 Report “No Questions Asked: Intelligence Cooperation with Countries that Torture”

I. Background

2009 marked the twenty-fifth anniversary of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention, adopted in 1984 and ratified by 146 countries, is the clearest and most detailed expression of the international community’s repudiation of such inhumane acts. Torture not only scars the body and afflicts the psyche; it is a brutal assault on human dignity, the value at the heart of every human rights principle. And international law is unequivocal: torture and ill-treatment are prohibited absolutely, in all situations and at all times, and can never be justified. Indeed, states are under a strict duty to prosecute anyone who tortures or who is complicit in it.

Global counterterrorism efforts have done incalculable damage to this most basic principle. The public account is still incomplete but what is already known about the scale of US abuses is staggering. In the years following the September 11, 2001 attacks, the US officially sanctioned the use of torture and ill-treatment (including waterboarding or simulated drowning, painful stress positions, and exposure to cold); held and abused terrorism suspects in secret CIA detention; and “rendered” dozens of terrorism suspects to torture in other countries.¹ Although European governments eventually distanced

¹ See Human Rights Watch reports, *Ghost Prisoner: Two Years in Secret CIA Detention*, vol. 19, no.1(G), February 2007, <http://www.hrw.org/en/reports/2007/02/26/ghost-prisoner>; *Double Jeopardy: CIA Renditions to Jordan*, 1-56432-300-5, April 2008, www.hrw.org/en/reports/2008/04/07/double-jeopardy-o; *The Road to Abu Ghraib*, June 2004, <http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib-o>; *Off the Record: U.S. Responsibility for Enforced Disappearances in the “War on Terror,”* June 2007, www.hrw.org/en/reports/2007/06/07/record.

themselves publicly from the US-led “war on terrorism,” there is credible evidence of European complicity in serious abuses.

The Council of Europe’s Parliamentary Assembly concluded in June 2006 that some member states were responsible for hosting secret prisons, handing over suspects to the United States for illegal detention, and facilitating renditions by providing information and allowing use of national territory and airspace, among other abuses.² The European Parliament of the European Union adopted a damning report in February 2007 after its own inquiry criticizing many EU countries, including Germany and the United Kingdom, for allowing their airspace to be used for CIA rendition flights.³

European abuses in the context of the fight against terrorism are not limited, however, to a supporting or passive role. Leading European governments are protagonists in counterterrorism policies that undermine the absolute prohibition on torture. The United Kingdom has led efforts to weaken European standards on returns to torture and ill-treatment through interventions in cases before the European Court of Human Rights and through its promotion of unreliable diplomatic assurances from receiving countries against such abuse. Various countries, including the UK, Germany, Austria, the Netherlands, Italy and Sweden have used or attempted to use such assurances to return terrorism suspects to countries where they face a real risk of torture or ill-treatment, while France has expelled or deported dozens following procedures that do not adequately protect against this risk.

There is evidence that Intelligence services and law enforcement personnel in the UK and Germany facilitated or participated in interrogations of terrorism suspects involving torture or ill-treatment. France engages in judicial cooperation with countries with poor records on torture. The UK has openly asserted the right to rely on torture evidence in court. And the UK, Germany and France all engage in intelligence cooperation with countries that torture, as documented in this report.

These national approaches, pursued by leading EU member states, undermine the European Union’s authority and role in the eradication of torture worldwide. The EU Guidelines on Torture, adopted in 2001 and updated in 2008, establish as an objective of EU foreign policy “to influence third countries to take effective measures against torture

² Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, June 12, 2006, http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf (accessed November 11, 2009).

³European Parliament, “Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,” January 30, 2007, http://www.europarl.europa.edu/comparl/tempcom/tdip/final_report_en.pdf (accessed November 11, 2009).

and ill-treatment and to ensure that the prohibition against torture and ill-treatment is enforced.”⁴ A 2008 assessment of the Guidelines by the Council of European Union identified the EU’s diminished credibility as a challenge to implementation, and recommended that “coherence needs to be ensured between external action against torture in third countries and the EU’s own performance e.g....ensuring full respect for human rights when adopting measures to fight terrorism.”⁵

This finding is echoed in the conclusions of the European Parliament’s 2008 resolution on EU respect for fundamental rights, which emphasized “how important it is for the European Union’s credibility in the world that it should not apply double standards in external and internal policy.”⁶

International Law on Torture

There is perhaps no more basic prohibition in international law than the ban on torture. In the aftermath of the horrors of World War II, the community of nations unequivocally repudiated torture. The 1948 Universal Declaration on Human Rights and the 1950 European Convention on Human Rights share the injunction that “No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.”⁷ The 1949 Geneva Conventions setting out the laws of war prohibit torture and ill-treatment of all combatants, prisoners of war and civilians, in all circumstances of international and non-international armed conflict.⁸ Article 3, common to all of the Geneva Conventions, prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel

⁴Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (An up-date of the Guidelines), www.consilium.europa.eu/uedocs/cmsUpload/8590.eno8.pdf (accessed March 15, 2010), p. 4.

⁵Council of the European Union, “Implementation of the EU Guidelines on torture and other cruel, inhuman or degrading treatment or punishment – Stock taking and new implementation measures,” April 18, 2008, 8407/1/08 REV 1, www.consilium.europa.eu/uedocs/cms_Data/docs/hr/news129.pdf (accessed March 15, 2010), p. 13.

⁶European Parliament Resolution, Situation of fundamental rights in the European Union 2004-2008, January 14, 2009, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0019&language=EN&ring=A6-2008-0479> (accessed March 17, 2010), para.22.

⁷Universal Declaration on Human Rights, article 5; European Convention on Human Rights (ECHR), article 3. The International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976, uses the same language in its article 7.

⁸ The Third Geneva Convention states that “Prisoners of war must at all times be treated humanely. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and shall be regarded as a serious breach of the present Convention” (Article 13) and provides that “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever” (Article 17). Convention (III) relative to the Treatment of Prisoners of War, Geneva, August 12, 1949.

treatment and torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁹

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), the most detailed expression of the international community’s censure, defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁰

The Convention against Torture clarifies the absolute nature of the prohibition:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for torture.¹¹

The prohibition against torture and ill-treatment has risen to the level of *jus cogens*, that is, a peremptory norm of international law. As such it is considered part of the body of customary international law that binds all states, whether or not they have ratified the treaties in which the prohibition against torture is enshrined. The *jus cogens* character of the prohibition applies to torture committed on a widespread and systematic basis—a crime against humanity—and to torture committed against a single victim. Peremptory norms, such as the prohibition against torture, apply in peacetime as well as during war, conflict or state of emergency, and are, in the words of the International Court of Justice, “intransgressible.”¹²

⁹ Geneva Conventions, common article 3.

¹⁰Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, article 1.

¹¹Ibid., article 2(2).

¹² Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, <http://www.icj-cij.org/docket/files/131/1671.pdf> (accessed July 14, 2009), para. 157.

Article 15 of the Convention against Torture imposes on all states the obligation to 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.” The drafters of the Convention made it clear that the exclusionary rule, as the ban on torture evidence is called, was designed as a disincentive to torture by eliminating the possibility of using its fruits in decision-making processes.¹³ It is therefore inextricably linked to the goal of preventing and eradicating torture.

The obligation to prevent and punish torture

Specific obligations to prevent and suppress torture derive from both international treaty law and customary international law. States Parties must make torture, attempts to torture, and complicity and participation in torture, criminal offenses under national law.¹⁴ States must ensure that no statement established to have been made as a result of torture is invoked as evidence in any proceedings.¹⁵ And States may not expel, return or extradite any person to a country where there are substantial grounds for believing he or she would be in danger of being tortured.¹⁶

The Convention against Torture requires States to take proactive steps to prevent torture through appropriate training of all personnel involved in the custody, interrogation or

¹³ H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, 1988), p. 148.

¹⁴ Convention against Torture, article 4; International Covenant on Civil and Political Rights (ICCPR), article 7 (as interpreted by the UN Human Rights Committee: “States parties should indicate...the provisions of their criminal law which penalize torture and cruel, inhuman, and degrading treatment or punishment... Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.” UN Human Rights Committee, General Comment No. 20, 10 March 1992, UN Doc. HRI/GEN/1/Rev.1 at 30, para. 13.

¹⁵ Convention against Torture, article 15; ICCPR, article 7 (as interpreted by the UN Human Rights Committee, General Comment No. 20, para. 12); ECHR, article 3 (in conjunction with article 6 on the right to a fair trial, as established in the jurisprudence of the European Court of Human Rights, which has taken the view that “The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim’s guilt, irrespective of its probative value.” European Court of Human Rights, *Harutyunyan v. Armenia*, Application No. 36549/03, 28 June 2007, available at <http://www.coe.int>, para. 63.

¹⁶ Convention against Torture, article 3; ICCPR, article 7 (as interpreted by the UN Human Rights Committee, General Comment No. 20, para. 9); ECHR, article 3 (as established in European Court of Human Rights jurisprudence).

treatment of detained persons and to conduct a “systematic review [of] interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of prisoners subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction.”¹⁷

Torture is a crime of universal jurisdiction – national courts have the power to try alleged perpetrators of torture even if neither the suspect nor the victim are nationals of the country where the court is located, and the crime took place outside that country. The Convention against Torture imposes the obligation on all states parties to prosecute suspected torturers present in their territory, or extradite them for the purposes of prosecution.¹⁸

The prohibition on torture gives rise to the obligation *erga omnes* – an obligation toward the international community as a whole owing to the fundamental and universal nature of the norm – to take steps to eradicate torture worldwide.¹⁹ This includes the obligation of all States to prevent and suppress torture and other forms of ill-treatment in territories under their jurisdiction, but also to refrain from encouraging, assisting or recognizing such abuses.

Torture material as evidence

International law prohibits in absolute terms the use of evidence obtained through torture in any proceedings. This exclusionary rule, contained in Article 15 of the Convention against Torture, applies to “any proceedings” and has been interpreted to include civil, criminal and administrative court proceedings as well as a broad range of decision-making processes by state officials.²⁰

¹⁷ Convention against Torture, articles 10 and 11, respectively.

¹⁸Ibid., article 5(2) states: “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 [concerning extradition] to any of the States mentioned in paragraph 1 of this article.” Article 7(1) stipulates that “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [torture, attempt to torture, or complicity or participation in torture] is found shall...if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

¹⁹ See for example, International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija*, Judgment of 10 December, 1998, para. 151.

²⁰ Coalition of International Non-Governmental Organizations Against Torture (CINAT), Recommendations for a Torture Resolution, Explanatory Note, February 2005, www.fiacat.org/en/spip.php?article344 (accessed November 25, 2009). CINAT is composed of Amnesty International, Association for the Prevention of Torture, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Rehabilitation Council for Torture Victims, World Organization against Torture, and the Redress Trust.

The UN Committee Against Torture, tasked with monitoring compliance with the Convention against Torture, has interpreted the exclusionary rule as applicable to extradition proceedings.²¹

The principle rationale behind the exclusionary rule is to remove any incentive to engage in torture by making it impossible to use statements extracted through such abuse.²² It is therefore linked inextricably to the goal of preventing torture.

In practice, however, it can be difficult to exclude evidence, at any stage of the process, on the grounds that it was obtained through torture. In some jurisdictions, the burden is explicitly on the defendant (or applicant in civil cases) to show that the material was obtained under torture. In others, the standard of proof is set so high that in practice the evidence can only be excluded if the affected person is able to provide the court with information demonstrating that it was so obtained. When the torture took place in a third country, this can be an arduous task even if a defendant or applicant suffered the torture themselves. When the information was obtained from a third person in circumstances that are secret, it is likely to be extremely difficult or impossible.

It is for that reason that UN Special Rapporteur on torture Manfred Nowak and Council of Europe Commissioner for Human Rights Thomas Hammarberg both argue that the burden should be shouldered by the prosecutor to establish convincingly that contested evidence was *not* obtained through torture.²³

A related problem is the use of so-called fruit of the poisoned tree: corroborating evidence collected as a result of investigations prompted by statements obtained under torture. The Convention against Torture is silent on whether the exclusionary rule applies to this kind of evidence. The ban on the use at trial of secondary evidence that was derived from

²¹ UN Committee Against Torture, Decision: *P.E. v. France*, CAT/C/29/D/193/2001, December 19, 2002, <http://www1.umn.edu/humanrts/cat/decisions/193-2001.html> (accessed September 15, 2009).

²² M. Nowak and E. MacArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008), Chapter 15, para. 2; J.H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, 1988), p. 148.

²³ Manfred Nowak, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/61/259, August 14, 2006, <http://www.icj.org/IMG/NowakGARReport2006.pdf> (accessed September 18, 2009), para. 64; Thomas Hammarberg, Report of the Commissioner for Human Rights Thomas Hammarberg on his visit to Germany, 9-11 and 15-20 October 2006, CommDH(2007)14, July 11, 2007, <https://wcd.coe.int/ViewDoc.jsp?id=1162763&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65&BackColorLogged=FFC679> (accessed September 18, 2009), para. 174.

coercive interrogation is, however, a well-established principle in US jurisprudence. The European Court of Human Rights has also suggested that the exclusionary rule with respect to torture is applicable to the fruit of the poisoned tree. In its *Jalloh v. Germany* judgment, the European Court affirmed that “incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture—should never be relied on as proof of the victim’s guilt, irrespective of its probative value.”²⁴

In a June 2010 judgment in the case of *Gäfgen v. Germany*, the Grand Chamber of the Court elaborated on its interpretation of the scope of the exclusionary rule:

[T]he admission of evidence obtained by conduct absolutely prohibited by Article 3 [torture and ill-treatment] might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition. The repression of, and effective protection of individuals from, the use of investigative methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair.²⁵

The Grand Chamber concluded that the fairness of a trial and the effective protection of the absolute prohibition on torture and ill-treatment are compromised when the tainted evidence has an impact on the conviction or sentencing of a defendant.

Torture material as intelligence

The Convention against Torture, while explicit in its prohibition on the use of torture evidence in any proceedings, is silent on the use of torture evidence as the basis for decisions by the executive branch and its agencies. This lacuna in international law has created space for arguments by governments that intelligence services and law enforcement authorities may use foreign torture information for operational purposes—for example, to conduct a search of someone’s house or make arrests—without violating the exclusionary rule.

²⁴ European Court of Human Rights [Grand Chamber], *Jalloh v. Germany*, No. 54810/00, ECHR 2006-, available at www.echr.coe.int, para. 105.

²⁵ European Court of Human Rights [GC], *Gäfgen v. Germany*, no. 22978/05, 1 June 2010, available at www.echr.coe.int, para. 178.

Human Rights Watch believes this narrow reading of Article 15 misrepresents the letter and spirit of the Convention against Torture. It also leads inevitably to a conflict with obligations *erga omnes* with respect to the eradication of torture. Article 15 of the Convention against Torture prohibits the use of evidence obtained through torture in “any proceedings.” This broad formulation suggests that the Convention drafters intended to cover a broad range of decision-making processes, including, in our view, judicially-authorized preliminary investigations and investigative steps.²⁶

Beyond the specific language of the Convention, obligations *erga omnes* arising from the absolute prohibition of torture requires authorities to refrain from actions that recognize or encourage torture. The regular or repeated receipt and use of foreign torture information as the basis for any kind of operational decisions by the executive branch implicitly validates the use of unlawful methods to acquire information. Furthermore, the practice of using such information, and any public statements affirming the legitimacy of doing so, may create a demand for torture intelligence.²⁷

In practical terms, a distinction between “legal” and “operational” use of torture information is difficult to sustain. If information obtained in a third country through torture is used to launch a criminal investigation leading to arrests and indictments, it has in essence been introduced into the judicial process.

Complicity in torture

In certain circumstances, the use of foreign torture information may give rise to state responsibility for complicity in the breach of the prohibition on torture. Under the principles of state responsibility in international law, a state commits an internationally wrongful act when it knowingly provides aid or assistance to another state in the commission of an internationally wrongful act.²⁸ Martin Scheinin, the UN Special Rapporteur on human rights while countering terrorism, takes the view that:

reliance on information from torture in another country, even if the information is obtained only for operational purposes, inevitably implies the “recognition of lawfulness” of such practices and therefore triggers the

²⁶ M. Nowak and E. MacArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008), p. 503.

²⁷ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, Geneva, 2009, p. 85.

²⁸ Responsibility of States for Internationally Wrongful Acts, United Nations General Assembly resolution 56/83, adopted December 12, 2001.

application of principles of State responsibility. Hence, States that receive information obtained through torture or inhuman and degrading treatment are *complicit* in the commission of internationally wrongful acts. Such involvement is also irreconcilable with the obligation erga omnes of States to cooperate in the eradication of torture [emphasis added].²⁹

In its examination of the concept of complicity in torture abroad, the UK Parliament's Joint Human Rights Committee (JCHR) took the view that "[s]ystematic, regular receipt of information obtained under torture is...capable of amounting to 'aid or assistance' in maintaining the situation created by other States' serious breaches of the peremptory norm prohibiting torture...[T]he practice creates a market for the information produced by torture. As such, it encourages States which systematically torture to continue to do so."³⁰ The parliamentary committee concluded that a proven "general practice of passively receiving intelligence information which has or may have been obtained under torture" is likely to give rise to state responsibility for complicity in torture.³¹

Certain behavior by officials in the state receiving torture information may give rise to individual criminal responsibility. In these cases, the state has the duty to investigate and prosecute. National jurisdictions may have differing definitions of complicity in the commission of a crime. Under international criminal law, the three essential elements of complicity are: 1) the commission of a crime; 2) a material contribution to the commission of that crime; and 3) an intention that the crime be committed or reckless disregard for the potential that the crime be committed.³² The Committee Against Torture has stated that:

States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise

²⁹ Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/10/3, February 4, 2009, <http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.HRC.10.3.pdf> (accessed February 23, 2010), para. 55.

³⁰ Joint Committee on Human Rights, "Allegations of UK Complicity in Torture," Twenty-third report of Session 2008-09, August 4, 2009, <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm> (accessed November 11, 2009), para. 42.

³¹ *ibid.*

³² Daniel M. Greenfield, "The crime of complicity in genocide: how the international criminal tribunals for Rwanda and Yugoslavia got it wrong, and why it matters," *Journal of Criminal Law and Criminology*, March 22, 2008, <http://www.accessmylibrary.com/article-1G1-189742041/crime-complicity-genocide-international-html> (accessed February 24, 2010).

participating or being complicit in acts of torture as defined in the Convention. Thus, States parties should adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture.³³

Torture and Counterterrorism Policy

The willingness of Western countries since September 11, 2001 to turn a blind eye to abuse in the name of counterterrorism cooperation poses a significant challenge to efforts to eradicate torture. This is particularly true in the context of cooperation with security and intelligence services known for abuse. It is all too easy for information obtained by torture to be used by European authorities to guide operational decisions by the police and security services. In some cases it may also be introduced into the judicial process, either during the investigative phase or even at trial. Far from shying away from such use, some European governments have openly questioned whether the ban should cover intelligence cooperation with governments that torture.

“Ticking bomb” scenario

Arguments in favor of executive use of foreign torture information frequently refer to variations on the so-called ticking bomb scenario. In the usual version of this hypothetical scenario, an alleged perpetrator of an imminent terrorist attack is in custody and will reveal information critical to preventing the attack if tortured.

Experts in the fields of intelligence-gathering, law enforcement and human psychology have forcefully discredited the use of this hypothetical situation to justify torture. It rests on the impossible combination of perfect timing (the information will be obtained in time to defuse the bomb), perfect information (the person in custody definitely knows the location of the bomb and it could not have been moved and those conducting the torture are certain the person knows) and absolute certainty over the outcome (the person in custody will definitely provide the correct information once tortured and the bomb will subsequently be defused).³⁴

³³ Committee Against Torture, General Comment No. 2, CAT/C/GC/2, January 24, 2008. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go8/402/62/PDF/Go840262.pdf?OpenElement> (accessed March 10, 2010).

³⁴ For a detailed criticism of the ticking bomb scenario, see also Association for the Prevention of Torture, “Defusing the Ticking Bomb Scenario: Why we must always say No to torture, always,” 2007; David Luban, “Liberalism, Torture and the Ticking Bomb,” *Virginia Law Review*, Vol. 91, 2005, pp. 1425-1461; and Michel Terestchenko, “De l’utilité de la torture? Les sociétés démocratiques peuvent-elles rester des sociétés décentes?,” *Revue du MAUSS*, No. 28, 2006, pp. 337-366.

Given the rarity of perfect timing, perfect information and absolute certainty in real life situations, reliance as a matter of policy on the ticking bomb hypothesis creates a significant risk that human beings will be brutalized on the basis of mere possibility or assumptions. In the words of historian Alfred W. McCoy, “[o]nce we agree to torture the one terrorist with his hypothetical ticking bomb, then we admit the possibility, even an imperative, for torturing hundreds who might have ticking bombs or thousands who just might have some knowledge about those bombs.”³⁵ McCoy’s conclusion, also based on studies of the use of torture by the CIA in Vietnam and by the French in Algeria: “Major success from limited, surgical torture is a fable, a fiction. But mass torture of thousands of suspects, some guilty, most innocent, can produce some useful intelligence...Useful intelligence, but at what cost?”³⁶

Several of the best known claims that torture produced information that has helped disrupt or prevent terrorist attacks have proven on closer examination to be false. The torture of Abdul Hakim Murad in the Philippines in 1995, cited by advocates of the ticking bomb scenario, is one example. Murad was subjected to torture at the hands of the Philippine police, but the vital information that led to preventing a plan to blow up trans-Pacific airliners was in fact obtained within minutes of his arrest – his laptop computer contained details of the plot. A Philippine police officer later testified in court that most of the details Murad provided under torture were in fact fabrications fed to him by his torturers.³⁷

Similarly, all of the useful information obtained from Abu Zubaida, the CIA’s first “high-level” captive, was obtained *before* he was subjected to waterboarding and other torture. Information Abu Zubaida provided under torture did not, according to former senior US government officials, thwart any significant plots and in fact included false leads.³⁸

The experience of Israel demonstrates the dangers of enacting policies based on the hypothetical ticking bomb. In 1987 the Israeli government introduced guidelines permitting “moderate physical pressure” as well as psychological pressure during interrogations to supposedly prevent imminent terrorist attacks. The guidelines were based on the recommendations of a Commission of Inquiry, headed by former Supreme

³⁵Alfred W. McCoy, “The Myth of the Ticking time Bomb,” *The Progressive*, October 2006, http://www.progressive.org/mag_mccoy1006 (accessed February 24, 2010). McCoy is the author of the book *A Question of Torture: CIA interrogation, from the Cold War to the War on Terror* (2006).

³⁶*ibid.*

³⁷*ibid.* See also Terestchenko, “De l’utilité de la torture,” for a discussion of this case.

³⁸Peter Finn and Joby Warrick, “Detainee’s harsh treatment foiled no plots,” *Washington Post*, March 29, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/28/AR2009032802066.html> (accessed February 24, 2010).

Court president Moshe Landau, which concluded that some degree of coercion was permissible in order to prevent terrorist acts, provided it was subject to supervision and clear limits.

Over the next twelve years, until the Supreme Court banned the policy in 1999, the General Security Services (commonly known as Shin Bet) institutionalized the use of coercive interrogation methods, including violent shaking, prolonged sleep deprivation, hooding with a sack whilst seated with hands behind the back in a low chair tilted forward (the “Shabach position”), the “frog” crouch, and exposure to loud noises and extreme temperatures. What was intended as an exceptional measure became the norm, leading to widespread torture and ill-treatment of detainees far beyond the limits of what had been initially authorized.³⁹

The Supreme Court ruled in 1999 that these physical means of interrogation were unlawful insofar as they were not part of a reasonable interrogation and violate human dignity. Sleep deprivation, the Court said, was lawful if a “side effect” of the interrogation but would be unlawful if employed with the intention of tiring or “breaking” the detainee.⁴⁰ The Court rejected the Israeli government’s argument that the “necessity” defense—a provision in Israeli criminal law that absolves a person of liability if the crime was committed to prevent serious imminent harm—serves as a basis for advance authorization to use physical coercion. It did, however, leave open the possibility that Shin Bet interrogators could avail themselves of the necessity defense if criminally indicted.⁴¹

A tragic case involving the kidnapping and murder of an 11-year-old boy in Germany in 2002 illustrates the willingness in Europe to accept, even advocate, police threats of torture and torture itself in seemingly exceptional circumstances. Believing the boy to be

³⁹ See Eitan Felner, “Torture and Terrorism: Painful Lessons from Israel,” in Roth and Worden, eds., *Torture: does it make us safer?* (The New Press, 2005), pp. 28-43.

⁴⁰H.C. 5100/94 Public Committee Against Torture in Israel v. The State of Israel and the General Security Service
H.C. 4054/95The Association for Civil Rights in Israel v. The Prime Minister of Israel, the Minister of Justice, the Minister of Police, the Minister of the Environment and the Head of the General Security Service.

H.C. 6536/95Hat’m Abu Zayda v. The General Security Service.

H.C. 5188/96 Wa’al Al Kaaqua, Ibrahim Abd’allah Ganimat and the Center for the Defence of the Individual v.The General Security Service and the Prison Commander – Jerusalem.

H.C. 7563/97 Abd Al Rahman Ismail Ganimat and the Public Committee Against Torture in Israel v. The Minister of Defence and the General Security Service.

H.C. 7628/97 Fouad Awad Quran and the Public Committee Against Torture in Israel v. The Minister of Defense and the General Security Service.

H.C. 1043/99 Issa Ali Batat v.The General Security Service.

⁴¹*Ibid.*, paras. 33-38.

alive, Frankfurt deputy police chief Wolfgang Daschner ordered a subordinate to threaten the kidnapper, who had been arrested after he collected the ransom, with severe pain if he did not reveal the child's whereabouts. After having been so threatened, Magnus Gäfgen confessed to kidnapping the boy and told police where to find him.

At Gäfgen's trial, the Frankfurt Am Main Regional Court excluded the statements he made following the threat, and while they allowed evidence obtained as a result of those statements, based his 2003 conviction and life sentence on his admission of guilt at trial. In December 2004, the same court convicted Daschner of incitement to commit coercion and the subordinate who carried out the threat of coercion, and sentenced them to suspended fines. Daschner was subsequently promoted.

At the same time, public figures in Germany sought to justify Daschner's actions with very much the same arguments as those adopted by the Landau Commission. The chairman of the German Association of Judges, Geert Mackenroth said there were cases "in which the use of torture and the threatening of torture may be allowed, namely if one hurts a legally protected interest only to protect a higher valued legally protected interest."⁴² His view was echoed by then Federal Justice Minister Brigitte Zypries.⁴³ Jörg Schönbohm, then interior minister for Brandenburg, made the direct link to terrorism, arguing that "if a large number of people is threatened by terrorists, one would also have to consider torture."⁴⁴

The European Court of Human Rights, called upon to examine whether Germany had violated Gäfgen's rights under articles 3 (torture prohibition) and 6 (right to a fair trial) of the European Convention on Human Rights, firmly rejected this logic. In its June 2008 judgment, the Court underscored that "the prohibition on ill-treatment of a person in order to extract information from him applies irrespective of the reasons for which the authorities wish to extract a statement, be it to save a person's life or to further criminal investigations."⁴⁵ The Court found in that ruling that there had been no violation of the article 3 or article 6 of the Convention. However, the Grand Chamber of the Court, in a June

⁴²"Greift nach heissen Eisen auch ohne Handschuh: Geert Mackenroth," *Die Welt*, February 21, 2003, http://www.welt.de/print-welt/article405837/Greift_nach_heissen_Eisen_auch_ohne_Handschuh_Geert_Mackenroth.html (accessed November 10, 2009).

⁴³"Police Threat Fuels Debate on Torture," Deutsche Welle, February 24, 2003, <http://www.dw-world.de/dw/article/0,,785751,00.html> (accessed November 10, 2009).

⁴⁴"Schönbohm: Folter bei Terrorgefahr vorstellbar," *Berliner Zeitung*, February 26, 2003, <http://www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2003/0226/brandenburg/0129/index.html> (accessed November 10, 2009).

⁴⁵European Court of Human Rights, *Gäfgen v. Germany*, no. 22978/05, 30 June, 2008, available at www.echr.coe.int, para. 69.

1, 2010, judgment, found there had indeed been a violation of article 3 because the “almost token fines,” then suspended, imposed on Daschner and his subordinate constituted a “manifestly disproportionate” punishment without the “necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.”⁴⁶ The Grand Chamber also considered that Daschner’s subsequent promotion “raised serious doubts as to whether the authorities’ reaction reflected, adequately, the seriousness involved in a breach of article 3.”⁴⁷

The modified version of the ticking bomb scenario, which, as discussed below, has been cited by German and UK authorities to justify intelligence cooperation with countries that torture invents a situation in which authorities receive urgent information, obtained in a foreign country through torture, alleging a bomb in a public place that will explode shortly. It differs from the classic ticking bomb in that the torture has already taken place, and at the hands of a foreign government.

Human Rights Watch agrees that in the hypothetical example the duty to prevent terrorist attacks would indeed impose an obligation on the police or security services to act upon such information, still recognizing the inherent unreliability of evidence obtained by torture.

But there is no evidence that British, German or French authorities have faced such a situation. Rather, the ticking bomb scenario serves as a distraction from what actually happens: the ongoing flow of information in the context of established relations with countries where torture is an organized practice. When they invoke the ticking bomb, European policymakers are sending a dangerous message that torture can help save lives and hence is morally defensible.

“No questions asked”

European intelligence services have argued that they do not know the methods employed to acquire information they receive through intelligence cooperation. They have argued further that intrusive inquiry into sources and methods with the sending state would endanger the relationship and the flow of information. As discussed in the country sections below, officials in the UK, Germany and France have all cited these reasons when defending the need to collaborate with the intelligence services in countries with poor human rights records.

⁴⁶European Court of Human Rights [GC], *Gäfgen v. Germany*, no. 22978/05, 1 June 2010, available at www.echr.coe.int, para.124. The Grand Chamber agreed with the lower chamber that there had been no violation of article 6.

⁴⁷*Ibid*, para. 125.

This “no questions asked” policy is at sharp odds with the responsibility of all states to work towards the eradication of torture. Failure to ascertain the circumstances under which information was obtained, where there are sufficient grounds for suspecting that abuses were committed, sends the message that torture and mistreatment in the name of fighting terrorism are legitimate. Authorities have not demonstrated that appropriate inquiries effectively jeopardize intelligence cooperation.

Not only is this “no questions asked” policy morally and legally flawed, it is also an operational and strategic mistake. Information obtained under torture is notoriously unreliable, since individuals suffering extreme pain and anxiety will say anything to stop the abuse. A U.S. military agency that trains military personnel to resist abusive questioning warned in July 2002 against the use of extreme duress—even in situations involving an imminent threat—because the information obtained is likely to be unreliable:

The requirement to obtain information from an uncooperative source as quickly as possible—in time to prevent, for example, an impending terrorist attack that could result in loss of life—has been forwarded as a compelling argument for the use of torture. In essence, physical and/or psychological duress are viewed as an alternative to the more time-consuming conventional interrogation process. The error inherent in this line of thinking is the assumption that, through torture, the interrogator can extract reliable and accurate information. History and a consideration of human behavior would appear to refute this assumption.⁴⁸

Studies included in a 2006 comprehensive scientific report published by the US National Defense Intelligence College underscore the lack of scientific evidence that coercive interrogation is an effective way to obtain reliable, actionable information. Dr. Randy Borum, a behavioral science consultant on counterintelligence and national security issues, concludes that “the preponderance of reports seems to weigh against [the] effectiveness” of coercive techniques or torture: “The effects of common stress and duress techniques are known to impair various aspects of a person’s cognitive functioning, including those functions necessary to retrieve and produce accurate, useful information.”⁴⁹

⁴⁸Joint Personnel Recovery Agency, “Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation,” July 2002, quoted in Peter Finn and Joby Warrick, “In 2002, Military Agency Warned Against Torture,” Washington Post, April 25, 2009.

⁴⁹Randy Borum, Psy.D, “Approaching Truth: Behavioral Science Lessons on Educing Information from Human Sources,” Educing Information: Interrogation: Science and Art: Intelligence Science Board Study Report on

In strategic terms, a policy that turns a blind eye to torture is counterproductive in the long-term, by deepening the grievances and sense of injustice that fuel radicalization and recruitment to terrorism. Considerable expert consensus exists that anger over abuses committed in the name of fighting terrorism or insurgency, including torture, plays a role in the radicalization process.⁵⁰

Human Rights Watch believes the absolute prohibition on torture imposes on states the duty to repudiate publicly the use of torture information, take reasonable steps to ensure they never knowingly send or receive torture information, and take steps to influence governments where torture occurs to eradicate the practice.

A policy governing the receipt of information from countries with questionable human rights practices should require the routine assessment of the human rights situation, the treatment of detainees and the practices of national intelligence services. This should involve, at a minimum, consultation of all available sources of information, such as reports by nongovernmental organizations and United Nations bodies, as well as consultation with relevant governmental entities in their own countries, such as foreign ministries. It should also include whether the country has ratified the key torture treaties (including the Convention against Torture and its Optional Protocol) and has complied with the recommendations of the UN and other specialist bodies on torture. A general pattern of torture and ill-treatment should prompt further inquiries with the sending country as to the specific sources and methods used to obtain information. Intelligence agencies should be required to terminate cooperation in a particular case when evidence exists of the use of torture or ill-treatment and to signal clearly their abhorrence of such methods.

Educing Information, Phase 1 (Washington DC: National Defense Intelligence College Press, September 2006), p. 35. In another study included in this report, Colonel Steven M. Kleinman, a Reserve Senior Intelligence Officer and Mobilization Augmentee to the Director, Intelligence, Surveillance, and Reconnaissance, HQ Air Force Special Operations Command, argues “there seems to be an unsubstantiated assumption that ‘compliance’ carries the same connotation as ‘meaningful cooperation’ (i.e. a source induced to provide accurate, relevant information of potential intelligence value)” and that “Claims from some members of the operational community as to the alleged effectiveness of coercive methods in educing meaningful information from resistant sources are, at best, anecdotal in nature and would be, in the author’s view, unlikely to withstand the rigors of scientific inquiry.” Steven M. Kleinman, “KUBARK Counterintelligence Interrogation Review: Observations of an Interrogator,” in *Educing Information*, p. 130 and footnote 91.

⁵⁰ See for example, Change Institute for the Directorate General Justice, Freedom and Security, European Commission, “Studies into violent radicalization; Lot 2. The beliefs ideologies and narratives,” http://ec.europa.eu/justice_home/fsj/terrorism/prevention/fsj_terrorism_prevent_en, accessed May 7, 2010); Todd C. Helmus, “Why and How Some People Become Terrorists,” in *Social Science for Counterterrorism: Putting the Pieces Together*, Rand National Defense Research Institute, www.rand.org/pubs/monographs/2009/RAND_MG849.pdf (accessed May 7, 2010).

II. Germany

The protection of human rights in the fight against terrorism will continue to have our special attention. Precisely because we unreservedly condemn terrorism, we must ensure that we respect human rights and principles of due process in our efforts to combat it. In this context, eradicating torture remains a key concern.

—Frank-Walter Steinmeier, then German Federal Foreign Minister, June 2006⁵¹

To calmly lean back...and to say ‘From among the 190 member states of the United Nations we exclude [counterterrorism cooperation with] 150 because they do not dispose of a system in accordance with the rule of law in accordance with ours, and work with the remaining 40’...would not have been quite appropriate.

—Frank-Walter Steinmeier, March 13, 2008⁵²

Germany is a party to major human rights instruments imposing clear obligations with respect to the prevention, prosecution and eradication of torture.⁵³ National law authorizes universal jurisdiction over torture.⁵⁴

In its most recent human rights report, published in July 2008, the German Federal Foreign Office reaffirms the absolute prohibition of torture and cruel, inhuman and degrading treatment and asserts that the government is “consistently and continually engaged in the fight against torture and ill-treatment.”⁵⁵ The federal government supports anti-torture initiatives in a variety of countries around the world. Germany ratified the Optional

⁵¹ Speech to the UN Human Rights Council, June 19, 2006, www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Reden/2006/060619-MRR-konstSitzg.html (accessed September 9, 2009).

⁵² Steinmeier testimony to the Bundestag Committee of Inquiry into the Activities of the Federal Intelligence Service in Iraq, Final Recommendations and Report of the First Committee of Inquiry under Article 44 of the Basic Law (BND Inquiry), p. 401. .

⁵³ ICCPR, ratified by Germany December 17, 1973; Convention against Torture, ratified by Germany November 1, 1990; ECHR, ratified by Germany December 5, 1952.

⁵⁴ Paragraph 6(9) of the German Criminal Code.

⁵⁵ Achter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen, July 2008, <http://www.auswaertiges-amt.de/diplo/de/Infoservice/Broschueren/MRB8.pdf> (accessed November 11, 2009), p. 45.

Protocol to the Convention against Torture in December 2008 and created a Federal Office for the Prevention of Torture as the national prevention mechanism in November 2008.

Germany's counterterrorism policies and practices bring these commitments into question. A series of scandals have brought to light credible allegations of complicity in torture and ill-treatment by German intelligence, security and law enforcement personnel. Khaled el-Masri, a German citizen arrested on the Serbia-Macedonia border in December 2003, transferred to US custody and held for four months in secret CIA detention in Afghanistan before being released without charge, alleges he was visited during his detention in Afghanistan by an official with the Federal Criminal Police Office (Bundeskriminalamt, BKA). The German government denies this allegation.

German citizen Mohammad Zammar, detained and tortured in Morocco in 2001 then transferred by the US to Syria, was interrogated by a group of German intelligence and law enforcement personnel while he was detained in the notorious Palestine Branch (Far'Falestin prison) in Damascus.⁵⁶ In a joint report published in March 2010, the special rapporteur on human rights while countering terrorism, Martin Scheinin, and the special rapporteur on torture, Manfred Nowak, concluded that the German government was complicit in Zammar's secret detention in Syria because it knowingly took advantage of the situation to obtain information.⁵⁷ According to the European Parliament's inquiry into European complicity in the US extraordinary renditions program, the BKA provided information to the US Federal Bureau of Investigation that facilitated Zammar's arrest.⁵⁸

Finally, Federal Intelligence Service (Bundesnachrichtendienst, BND) agents interrogated German resident Murat Kurnaz in Guantanamo Bay in 2002 and 2004 while failing to assist in his release until 2006.⁵⁹ Kurnaz alleges he was mistreated by members of the German Special Forces Commando (KommandoSpezialkräfte, part of the German Army) while in US

⁵⁶ Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, June 12, 2006, http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf (accessed November 11, 2009), para. 191.

⁵⁷ UN 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 or Involuntary Disappearances, "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism," UN Doc. A/HRC/13/42, 19 February 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>, para.159 (b).

⁵⁸ European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, "Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners," A6-0020/2007, January 30, 2007, para. 90.

⁵⁹ *ibid.*, para. 85.

custody in Afghanistan prior to his transfer to Guantanamo Bay. Two German soldiers, Kurnaz maintains, forced him to lie on the ground with his hands tied behind his back, while one pulled him up by the hair and then hit his head on the ground. German intelligence services engage in counterterrorism cooperation with countries with known records for torture, such as Uzbekistan, while government officials have, like their UK counterparts, publicly endorsed the use of foreign torture intelligence for operational purposes. As mentioned above, Jörg Schönbohm, at the time interior minister for the state of Brandenburg, went so far as to contemplate the direct use of torture in response to a terrorist threat. While the government insists on its commitment to the absolute prohibition on the use of torture evidence in legal proceedings, there are worrying signs that torture material has in fact been introduced in the judicial process. German jurisprudence on the exclusion of torture evidence places an impossibly stringent burden of proof on the person against whom the evidence is invoked.

Intelligence Cooperation

The external Federal Intelligence Service (BND)—under the Chancellor's Office—and the domestic Federal Bureau for Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV)—under the Interior Ministry—are responsible for counterterrorism intelligence gathering. As the cases discussed below demonstrate, Germany partners in countering terrorism with countries like Uzbekistan and Pakistan. It cooperates with Uzbekistan, an authoritarian state with an appalling record on torture, partly motivated by concerns over alleged activities in Germany of the Islamic Jihad Union (IJU), an Uzbek group that has claimed responsibility for several attacks in Uzbekistan (including on the US and Israeli embassies in July 2004).

The German government has close diplomatic and security ties with Uzbekistan. It worked actively to ease EU sanctions imposed in the wake of the May 2005 massacre in Andijan, in eastern Uzbekistan, and the ensuing government crackdown on civil society.⁶⁰ Just days after the EU lifted a travel ban on eight Uzbek officials, including Rustam Inoyatov, the head of the notorious Uzbek National Security Service, in October 2008, the Federal Intelligence Service (Bundesnachrichtendienst, BND) hosted security talks with Uzbek officials in Berlin. The Uzbek delegation included Inoyatov, a man whom many consider responsible for gross human rights abuses.⁶¹

⁶⁰ For more information on the Andijan massacre, see Human Rights Watch reports *Burying the Truth: Uzbekistan Rewrites the Story of the Andijan Massacre*, September 2005, <http://www.hrw.org/en/reports/2005/09/18/burying-truth-o> and *Saving its Secrets: Government Repression in Andijan*, May 2008, <http://www.hrw.org/en/reports/2008/05/11/savings-its-secrets-o>.

⁶¹ Germany also engaged in security training for Uzbek officers while the sanctions were in place, despite the fact that the sanctions explicitly covered technical assistance, and hosted Zokirjon Almatov, then-Minister of

Torture is an endemic, serious problem in Uzbekistan. The UN Committee against Torture has repeatedly—most recently following its November 2007 review of Uzbekistan—expressed concern about “particularly numerous, ongoing and consistent allegations” of “routine use of torture” in Uzbekistan.⁶² The UN Special Rapporteur on torture, who conducted a country visit to Uzbekistan in late 2002 and concluded that torture was “systematic” in the country, has likewise continued to regularly voice concern about the persistent use of torture in Uzbekistan and the impunity with which it occurs.⁶³ Human Rights Watch has documented the cycle of abuse that starts at the time of arrest and continues through conviction and beyond. Common methods of torture and ill-treatment include beatings with truncheons and bottles filled with water, electric shock, asphyxiation with plastic bags and gas masks, sexual humiliation, and threats of physical harm to relatives. Those arrested and convicted on charges related to religious “extremism” are particularly vulnerable to torture and ill-treatment.⁶⁴ The German federal government’s 2008 human rights report describes the human rights situation in Uzbekistan as “worrying” but fails to mention widespread use of torture as a matter of concern.⁶⁵

Counterterrorism cooperation with Uzbekistan has involved German law enforcement questioning of at least one detainee in Uzbek custody. In September 2008, officers from the Federal Criminal Police Office (Bundeskriminalamt, BKA) interrogated Sherali A. in a prison in Tashkent, Uzbekistan with a view of gathering information on the Islamic Jihad

Interior of Uzbekistan and number one on the EU’s visa ban list, when he traveled to Germany for medical treatment in November 2005.

⁶²Committee Against Torture, Conclusions and Recommendations: Uzbekistan, February 26, 2008, CAT/C/UZB/CO/3, <http://daccessdds.un.org/doc/UNDOC/GEN/Go8/406/89/PDF/GO840689.pdf?OpenElement> (accessed September 10, 2009), para. 6; Committee Against Torture, Conclusions and Recommendations: Uzbekistan, April 6, 2002, CAT/C/CR/28/7, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.28.7.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.28.7.En?Opendocument) (accessed September 10, 2009), para. 5.

⁶³Report of the Special Rapporteur on the question of torture, Mission to Uzbekistan, February 3, 2003, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go3/107/66/PDF/Go310766.pdf?OpenElement> (accessed April 14, 2010). See also the Special Rapporteur’s annual reports on “Follow-up to the recommendations made by the Special Rapporteur,” including the most recent report, published on February 26 2010 and available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/116/20/PDF/G1011620.pdf?OpenElement> (accessed on April 14, 2010).

⁶⁴ See Human Rights Watch, *Creating Enemies of the State*, March 2004, <http://www.hrw.org/en/reports/2004/03/29/creating-enemies-state-o>.

⁶⁵ German Federal Foreign Office Human Rights Report, pp. 266-267.

Union. German investigators also interrogated another Uzbek citizen, in prison in Astana, Kazakhstan, in July 2008. These interviews are discussed further below.

Guidelines

As in the UK, allegations of German complicity in torture or abusive detention abroad have attracted media and political scrutiny. The focus in Germany has been on German collusion in the extraordinary rendition of terrorism suspects, the participation of German agents in interrogations abroad, and the failure of German authorities to provide appropriate assistance to detainees held unlawfully or in abusive conditions. As a result, federal intelligence agencies now have broad instructions with respect to interrogations of detainees abroad. In March 2006, the German Chancellor's office ordered federal intelligence agencies—the BND and the BfV—to observe the following principles:

- Interrogations should not take place with the goal of using the information in criminal procedures, and law enforcement personnel should not participate;
- Interrogations are to take place in close coordination with competent authorities in the country concerned;
- The detainee must voluntarily agree to the interrogation;
- The interrogation should not take place, or should be terminated, if there is concrete evidence that the person concerned is subject to torture; and
- The parliamentary oversight committee must be informed after any such interrogation takes place.⁶⁶

Human Rights Watch is unaware of any specific guidelines or instructions in Germany on the handling of information provided by a foreign intelligence service where there are serious grounds for believing the information may have been obtained through torture or ill-treatment.

Use of Torture Material as Intelligence

During the previous Christian Democrat—Social Democrat coalition government, German officials made it clear that they will use foreign torture intelligence as necessary. Then Federal Interior Minister Wolfgang Schäuble said in 2005,

⁶⁶Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes. Deutscher Bundestag, 16. Wahlperiode, Drucksache 16/13400, June 18, 2009, p. 630.

If we were to say, that we would never use, under any circumstances, information of which we cannot be sure that it was obtained under perfect rule-of-law conditions – that would be totally irresponsible. We must use such information.⁶⁷

Heinz Fromm, the chief of Germany’s Federal Bureau for the Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV)—the domestic intelligence service—also clarified that,

All indications of threats that we receive are pursued...One cannot tell...from the look of the information where they originated from and how they were produced. The possibility that they might not have been obtained according to our rule of law principles must not lead us to ignore them. After all, the point is to prevent terrorist attacks.⁶⁸

A few days after Fromm made these statements, a spokesperson for Schäuble confirmed that information obtained under torture in a third country would be used to exclude threats of terrorist attacks. The “active fetching” of such information, however, was not acceptable.⁶⁹

Public statements affirming the legitimacy of using torture intelligence bring into question Germany’s commitment to the prevention and eradication of torture worldwide. As previously noted, the risk is that such statements can create demand for intelligence obtained under abuse.

Use of Torture Material as Evidence

The willingness to partner with unsavory regimes is accompanied by troubling signs of erosion of the absolute prohibition on the use of torture evidence in judicial proceedings. The trial of Aleem Nasir is illustrative. A naturalized German citizen originally from Pakistan, Nasir was sentenced in July 2009 to eight years in prison for providing support to a terrorist organization, in a case that began with intelligence received from Pakistan. Nasir

⁶⁷“Schäuble will Foltergeständnisse nutzen,” *Spiegel Online*, December 12, 2005, www.spiegel.de/politik/deutschland/0,1518,390709,00.html (accessed November 25, 2009).

⁶⁸Yassin Mussarbash, “Fromm defends the use of torture information,” *Spiegel Online*, December 4, 2006, www.spiegel.de/politik/deutschland/0,1518,452411,00.html (accessed September 3, 2009). Human Rights Watch translation.

⁶⁹AFP, “Schäuble shares Fromm’s opinion on torture evidence,” *Berliner Zeitung*, December 7, 2006, www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2006/1207/politik/0136/index.html (accessed September 11, 2009).

was arrested in Lahore, Pakistan, in June 2007 and held in ISI custody for two months. Nasir claims he was beaten with a hard rubber paddle and a bamboo stick into making a false confession. Nasir was visited and questioned by a German consular official while in ISI custody (he claims he was also questioned by British and American intelligence officers), and Nasir told journalists his interrogators had been “fully briefed” by German authorities.⁷⁰Nasir was repeatedly shown pictures of Fritz Gelowicz, one of the accused in the Sauerland trial discussed below.⁷¹

Though the Pakistani Supreme Court ordered Nasir released without charge, he was arrested upon return to Germany in August 2007. The ISI had sent German authorities three reports—on grainy, loose-leaf paper, with no letterhead or signature—on Nasir in June. Each report states at the top “From: Friends, To: Friends” and is tagged at the end: “We assure you our fullest support, with best regards.”⁷² The German court order in early August authorizing a police search of Nasir’s house, while he was still in unlawful ISI detention, appears to have been based on information from the ISI and the report of the consular official who visited Nasir in detention.⁷³ The trial court correctly excluded the ISI reports as evidence against Nasir, citing article 15 of the Convention against Torture, but allowed evidence obtained through the August 2007 house search as well as the testimony of the consular official.⁷⁴

Torture evidence may also have been used in the administrative naturalization hearings for Abdel-HalimKhafagy, a long-term German resident originally from Egypt. Khafagy was arrested in 2001 in Bosnia-Herzegovina and detained at a US military base in Tuzla called “Eagle base.” Two BKA officers traveled to BiH to question Khafagy, but ultimately refused to do so in light of concerns about the conditions and treatment at Eagle base. Khafagy was released and eventually returned to Germany. At administrative hearings in Munich in 2004 to examine his application for German citizenship, German authorities referenced

⁷⁰Holger Stark, John Goetz, and MattiasGebauer, “Germanys Relying on Pakistani Interrogation Methods,” *Der Spiegel*, October 1, 2007, <http://www.spiegel.de/international/germany/o,1518,508931,00.html> (accessed September 17, 2009).

⁷¹Michael Moss and SouadMekhennet, “Glimpses of a Shadowy World in Pakistan,” *The New York Times*, September 24, 2007, http://www.nytimes.com/2007/09/24/world/asia/24terror.html?_r=1&pagewanted=all (accessed September 17, 2009); “Germans Relying on Pakistani Interrogation Methods,” *Der Spiegel*, October 1, 2007.

⁷² Christoph Scheuermann and Holger Stark, “Unter Freunden,” *Der Spiegel*, April 6, 2009, <http://wissen.spiegel.de/wissen/dokument/dokument.html?id=64949397&top=SPIEGEL> (accessed September 17, 2009).

⁷³“Glimpses of a Shadowy World in Pakistan”, *The New York Times*, September 24, 2007.

⁷⁴OLG Koblenz, Urteilvom 13.07.2009 - 2 StE 6/08 - 8.On file with Human Rights Watch.

information Khafagy was alleged to have provided while detained at Eagle base which suggested he had links with terrorism.⁷⁵

The information from interviews conducted by German law enforcement personnel in Uzbekistan and Kazakhstan, referenced above, was introduced in the preliminary hearings in the case against four men—three German citizens (one of Turkish origin) and one Turkish national who grew up in Germany—accused in Germany of membership in the IJU and of plotting terrorist attacks on US targets in Germany. The trial of the so-called Sauerland cell (named after the region in which they lived), which began in April 2009, took a dramatic turn in June when the four men pleaded guilty to all charges. According to one of the defense lawyers, the presiding trial judge agreed to exclude the statements from those interviews in his mandatory review of the evidence against the accused following their confessions, though this was not the subject of a formal decision.⁷⁶ All four men were convicted in March 2010 to prison sentences ranging from five to twelve years.

Federal Prosecutor Rainer Griesbaum told the German Legal Association's annual meeting in September 2008 that "information provided by foreign intelligence services are nowadays very common, if not prevailing" in terrorism investigations, and Germany must react to "new, complex requirements" if it does not want to "isolate itself internationally."⁷⁷ In his view, any information, even if tainted by torture, can be used by the police for investigative purposes. In response to a parliamentary query, the German federal government clarified its position in December 2008:

[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.⁷⁸

⁷⁵ Florian Geyer, "Fruit of the Poisonous Tree: Member States' Indirect Use of Extraordinary Rendition and the EU Counterterrorism Strategy," CEPS Working Document No. 263/April 2007, <http://www.ceps.be/files/book/1487.pdf> (accessed February 25, 2010), p. 6.

⁷⁶ Email correspondence with Ricarda Lang, December 4, 2009. On file with Human Rights Watch.

⁷⁷ Scheuermann and Stark, "Unter Freunden," *Der Spiegel*, April 6, 2009.

⁷⁸ Federal government answer to the question from representatives Ulla Jelpke, Wolfgang Neskovic and the DIE LINKE bloc (Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Wolfgang Neskovic under der Fraktion DIE LINKE), German Bundestag, December 10, 2008. On file with Human Rights Watch.

Burden of proof

A permissive approach to the use of foreign intelligence in judicial proceedings is all the more troubling in light of German jurisprudence on the burden of proof in relation to excluding torture evidence at trial. While German authorities stress their attachment to the absolute prohibition on the use of torture evidence in legal proceedings, the interpretation by German courts of Article 15 of the Convention against Torture places an undue burden on the individual against whom the evidence is invoked to demonstrate that the statements were in fact obtained under torture.

The leading case in this regard is the trial of Mounir el Motassadeq for complicity in the September 11, 2001, terrorist attacks in the United States. The Higher Regional Court in Hamburg allowed as evidence the summaries of interrogations of three men—Ramzi Binalshibh, Khalid Sheikh Mohammed and Mohamed Ould Slahi—in US custody, even though the United States refused to disclose the whereabouts of the detainees or anything about the circumstances under which the interrogations were conducted. The United States government has since acknowledged that Khalid Sheikh Mohammed was waterboarded 183 times.⁷⁹

The Hamburg court based its decision to allow the evidence on a narrow reading of article 15 of the Convention against Torture, which rules out the use of any statements “established” to have been obtained under torture. In the el Motassadeq case, the court concluded that it was impossible to establish that torture had been used, despite the acknowledgement that the three men were held in secret, incommunicado detention, and despite significant information presented to the court about the torture of terrorism suspects in US custody. The court sentenced el Motassadeq in August 2005 to seven years in prison for membership in a terrorist organization.⁸⁰

Both the UN Special Rapporteur on Torture, Manfred Nowak, and the Council of Europe’s Commissioner for Human Rights, Thomas Hammarberg, have criticized this approach to the burden of proof in relation to torture evidence. Recalling that the UN Committee Against Torture requires applicants to demonstrate only that their allegations of torture are well-founded, Nowak argues that:

⁷⁹Scott Shane, “Waterboarding Used 266 Times on 2 Suspects,” *The New York Times*, April 19, 2009, www.nytimes.com/2009/04/20/world/20detain.html (accessed December 9, 2009).

⁸⁰This was a retrial. The Higher Regional Court in Hamburg had sentenced el Motassadeq in February 2003 to 15 years in prison for 3,066 counts of accessory to murder and membership in a terrorist organization. The German Supreme Court overturned this ruling in March 2004 and sent the case back to the Higher Regional Court for a retrial.

the Hamburg Court failed to shift the burden of proof to those Government authorities who actually invoked the contested evidence. In light of well-founded allegations of the torture and enforced disappearances of the witnesses in United States custody, it was the responsibility of the Prosecutor (or the Court) to prove beyond reasonable doubt that the testimonies were *not* extracted by torture, rather than to prove that they were actually obtained by torture (emphasis added).⁸¹

Thomas Hammarberg has also expressed his opinion that “the burden to prove beyond a reasonable doubt that evidence has not been obtained under...unlawful conditions should be shifted to the public prosecutor and not rest upon the defendant.”⁸² Human Rights Watch agrees with this interpretation of the burden of proof, particularly in light of the practical difficulties of establishing the use of torture or prohibited ill-treatment on individuals whose statements or testimony are cited but who are not defendants themselves.

Oversight and Accountability

The Bundestag Parliamentary Control Commission (Parlamentarisches Kontrollgremium) has a relatively robust mandate to oversee the activities of the BfV, the BND, as well as the Military Counterintelligence Service (Militärischer Abschirmdienst). The committee is empowered to access documentation and files, question staff of the three services, and launch ad hoc investigations into specific cases. Despite its strong mandate, it is notable that the most far-reaching inquiry into German complicity in counterterrorism abuses was undertaken by a special parliamentary inquiry.

A three-year special parliamentary inquiry into, among other issues, alleged German complicity in the renditions and mistreatment of German citizens Khaled el-Masri and Mohammed Zammar and German resident Murat Kurnaz, concluded in June 2009 there was no evidence to substantiate allegations of complicity or negligence by German authorities or intelligence services. Political parties in the opposition alleged that the government and intelligence services failed to cooperate with the inquiry and withheld relevant documents. In July 2009, the Constitutional Court ruled that the government had

⁸¹ Manfred Nowak, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/61/259, August 14, 2006, <http://www.icj.org/IMG/NowakGARReport2006.pdf> (accessed September 18, 2009), para. 64.

⁸² Thomas Hammarberg, Report of the Commissioner for Human Rights Thomas Hammarberg on his visit to Germany, 9-11 and 15-20 October, 2006, CommDH(2007)14, July 11, 2007, <https://wcd.coe.int/ViewDoc.jsp?id=1162763&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65&BackColorLogged=FFC679> (accessed September 18, 2009), para. 174.

breached the constitution in restricting the evidence it provided without giving sufficient justifications.⁸³

Reforms in 2009 strengthened the Kontrollgremium by explicitly defining the committee's powers to request any document in its original version, invite members of the intelligence agencies to testify at hearings, and to receive an immediate response from the government to its requests.⁸⁴ The government can, however, refuse to provide information in order to protect sources or the privacy rights of third persons, or when the information touches on decision-making processes within the federal government. This broadly crafted power gives the government considerable discretion to withhold information.

⁸³ The Constitutional Court affirmed this principle in a separate ruling in the same month. Matt Glenn, "Germany high court rules intelligence may not be withheld from parliament," *Jurist*, July 31, 2009, <http://jurist.law.pitt.edu/paperchase/2009/07/germany-high-court-rules-intelligence.php> (accessed September 11, 2009).

⁸⁴ Gesetz zur Änderung des Grundgesetzes, passed by Bundestag on May 29, 2009 and Bundesrat on July 10, 2009; and Gesetz zur Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes, passed by Bundestag on May 29, 2009 and Bundesrat on July 10, 2009.

III. Human Rights Watch's Recommendations to the German Government

- Publicly repudiate reliance on intelligence material obtained from third countries through the use of torture or cruel, inhuman or degrading treatment.
- Reaffirm the absolute prohibition on torture, including the use of torture evidence at any stage of the judicial process.
- Support a reinterpretation of the standing jurisprudence on the burden of proof to clarify in both criminal and civil proceedings that where an allegation that a statement was made under torture is raised, the burden of proof is on the state to show that it was not made under torture.
- Review current guidelines governing interrogation by intelligence agents of suspects abroad and submit them to parliamentary oversight.
- Ensure that intelligence cooperation arrangements with foreign countries include clear human rights stipulations, including a firm repudiation of the use of torture or cruel, inhuman or degrading treatment in the gathering of intelligence. These arrangements should also include mechanisms for follow-up and accountability in case of breach of the arrangement.
- Ensure that all intelligence officers are provided with clear, written guidelines governing the interrogation of detainees in third countries.
- Ensure that all intelligence officers are provided with clear, written guidelines that set out the policy for the receipt of information from countries with questionable human rights records. The process of assessing such information should include, at a minimum:
 - Consultation with other relevant government agencies, including the Federal Foreign Office, and reliable public reports about human rights record of sending country; and
 - Analysis of general patterns of abuse and the conditions of confinement, treatment and interrogation of detainees.

- Require that cooperation discontinue in any case where there is evidence of ill-treatment or torture and ensure that opposition to such treatment is clearly communicated to the sending country.
- Ensure that all allegations of individual complicity in the torture or ill-treatment of individuals in third countries are subject to criminal investigation and, where the evidence warrants, prosecution.