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“No Questions Asked”

Intelligence Cooperation with Countries that Torture

HUMAN
RIGHTS
WATCH



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Executive Summary

Torture is a barbaric act. I believe that no state whose regime conducts or condones torture can consider itself civilized.

– Navi Pillay, UN High Commissioner for Human Rights, June 26, 2009

International efforts to combat terrorism since the 9/11 attacks in the United States have done incalculable damage to the absolute prohibition on torture. The global ban on torture is a cornerstone of international law, binding on all nations in peace and at war, and no exceptions or justifications are permitted. The attack on the torture prohibition by the US government under President George W. Bush has rightly received widespread international condemnation, and has been formally repudiated by the Obama administration.

Far less attention has been paid to the other side of the Atlantic, where leading European governments continue to flout their obligations to prevent and eradicate torture worldwide—and betray their declared values—through intelligence cooperation with countries that torture.

France, Germany and the United Kingdom—pillars of the European Union and important allies in the fight against terrorism—demonstrate, through policy statements and practice, a willingness (even eagerness) to cooperate with foreign intelligence services in countries like Uzbekistan and Pakistan—notorious for abusive practices, both in general and against terrorism suspects in particular. They then use foreign torture information for intelligence and policing purposes.

Regular receipt of, and reliance on, foreign torture information as the basis for operational decisions by the executive branch implicitly validates the use of unlawful methods to acquire information and is a breach of the positive obligation under international law to prevent and punish torture. Both the practice of using such information, and the issuing of public statements affirming the legitimacy of doing so, risks creating a market for torture intelligence.

Foreign torture intelligence is used to identify terrorism suspects on national territory, launch police and surveillance operations and, in some cases, to initiate judicial investigations leading to arrests and prosecution. Information tainted by torture abroad can end up as part of legal proceedings, both in the form of evidence collected as a result of statements made

under torture and through the use of such statements themselves. In the case of France and Germany such information has been used in judicially-authorized investigations and proceedings. In the UK, ambiguous rules make the use of torture evidence in court a real possibility.

Cross-border intelligence cooperation is a necessity in the fight against international terrorism. Governments have a compelling interest, indeed duty, to protect their civilian populations from terrorist violence, including investigating any tip about an imminent attack. Yet government officials in the UK and Germany have gone further to argue that fundamental rules prohibiting torture can and must be broken to save lives. In particular, the hypothetical scenario of the “ticking bomb,” in which it is claimed information extracted under torture in a third country could help locate a bomb primed to explode in a crowded place, is often used to justify the use of foreign torture intelligence.

Some of the best known claims that torture has produced information that have led to the disruption or prevention of terrorist attacks have proven to be false, and the “ticking bomb” scenario is unlikely ever to actually transpire. Arguments raising this mythical scenario are a distraction from the reality of ongoing intelligence cooperation in the context of established relations with countries where torture is an organized practice.

Statements from UK and German government officials calling into question the absolute nature of the prohibition on torture run counter to international law and are unethical.

The global ban on torture imposes obligations on states not only to refrain themselves from committing such abuse, but also to working towards the prevention and eradication of torture worldwide. States must not only prosecute torturers in their territory, but also promote accountability for crimes of torture everywhere in the world. And states must not only repudiate torture in their own territories, but also never encourage or condone torture anywhere in the world. Indeed, complicity in torture should be treated as a criminal offense under domestic law.

Authorities receiving intelligence which may have been obtained by torture are under an obligation to make genuine inquiries with the sending country to determine whether torture was used to obtain it and what steps the authorities have taken to hold those responsible to account for that abuse.

In the absence of proper inquiries with the sending state, appropriate oversight over the security services in the receiving state, and diplomatic follow-up where there are reasonable

grounds to believe torture was employed to procure the information, a stated or demonstrated willingness to use torture information can legitimize and encourage reprehensible abuse. At a minimum, this violates states' responsibilities under international law to work towards the prevention and eradication of torture. In some instances, it may amount to complicity in torture.

Information originating as intelligence from untrustworthy partners has been used in criminal and other proceedings in France and Germany in clear violation of national and international law prohibiting the use of torture evidence in "any proceedings." In those countries and the United Kingdom, judicial interpretations on the proof required to determine if evidence was obtained under torture in effect mean that the suspects carry the burden of proof, instead of making it the duty of a prosecutor or court to establish that contested evidence was *not* obtained through torture.

States bear full responsibility for ensuring that intelligence activities comport with fundamental human rights. Yet intelligence officers in France, Germany and the United Kingdom do not receive adequate and transparent guidance with respect to engagement with similar services in countries with poor records on torture. It is not clear whether bilateral arrangements for cooperation and information-sharing include human rights considerations. In each of the three countries, mechanisms for democratic oversight of intelligence services, and in particular, of international cooperation among intelligence services, are inadequate.

Questioning the prohibition on torture is counterproductive. Over the long-term, abuses in the name of countering terrorism nurture the grievances and sense of injustice that fuel radicalization and recruitment to terrorism. And efforts to prevent and eradicate torture lose their credibility if accompanied by a wink and a nod from European security services condoning torture in certain countries.

As the recent Lisbon treaty and entry into force of the Charter of Fundamental Rights have affirmed, the European Union is founded on respect for human rights and the rule of law. The policies pursued by London, Berlin and Paris documented in this report run counter to those values. They damage the credibility of the European Union, creating a double standard between the EU's stated commitment to eradicate torture and ill-treatment around the world and the record of its leading member states.

Europe has been forced to confront its complicity in US counterterrorism abuses, including hosting secret detention sites and facilitating extraordinary renditions. With a new

administration in Washington that has publicly renounced the torture policies of the Bush years, it is time for France, Germany and the UK to take responsibility for ongoing violations of the absolute prohibition on torture in the context of their national strategies to counter terrorism, and to reaffirm the basic principle that torture is always wrong whoever commits it and for whatever purpose it is committed.

Human Rights Watch calls on the governments of France, Germany and the United Kingdom to:

- 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 the use of torture evidence in any kind of proceeding, including judicial decision-making with respect to measures that affect fundamental rights;
- Clarify procedure rules on admissibility of torture evidence in criminal and civil proceedings to make clear 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;
- Ensure that national intelligence services have clear guidance on appropriate engagement with partner services with known records of torture, and that intelligence cooperation arrangements with third countries include clear human rights stipulations, including the duty to discontinue cooperation in an individual case if credible allegations of torture come to light;
- Strengthen parliamentary oversight over national intelligence services; and
- Ensure any form of complicity in torture is a criminal offense in domestic law, and that state agents who are complicit in torture anywhere in the world are prosecuted, including those who systematically receive information from countries and agencies known to practice torture.

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 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

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.

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).

³ European 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).

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 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

⁴ Guidelines 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.

⁵ Council 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.

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 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

⁶ European 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.

⁷ Universal 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.

⁹ Geneva Conventions, common article 3.

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

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.

¹⁰ Convention 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.

¹¹ *Ibid.*, 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.

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.

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 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

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).

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

¹⁸ *Ibid.*, 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.”

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

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

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.

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.

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 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

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=FEC65B&BackColorLogged=FFC679> (accessed September 18, 2009), para. 174.

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

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.

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

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

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.

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 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

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

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.

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 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.

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).

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).

“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

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

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.

³⁵ Alfred 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.*

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 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

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

³⁸ Peter 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).

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.

⁴⁰ H.C. 5100/94 Public Committee Against Torture in Israel v. The State of Israel and the General Security Service
H.C. 4054/95 The 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. 6536/95 Hat’m Abu Zayda v. The General Security Service.

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 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

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.

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).

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 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.

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).

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

⁴⁶ European 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.

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.

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

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.

⁴⁸ Joint 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.

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

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.

United Kingdom

We abhor torture; we will not co-operate or collude with it; and, in line with our international commitments, we are honour-bound not just to avoid wrongdoing ourselves but to try to reduce, and if possible eliminate, the use of cruel or inhuman treatment or torture around the world.

—David Miliband, then UK Foreign Secretary, June 2009⁵¹

The UN Convention Against Torture and the European Convention on Human Rights...do not impose a positive obligation to report on or seek to prevent acts of torture carried out by other states abroad.

—David Miliband, July 2009⁵²

The United Kingdom 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

The United Kingdom has long maintained that the eradication of torture constitutes a vital dimension of its foreign policy. Each year, the Foreign and Commonwealth Office (FCO) publishes a human rights report describing its work to promote human rights, and in particular to prevent torture, worldwide. Since 1998, when it launched an anti-torture initiative, the UK has supported regional organizations and local projects, produced a series of handbooks on the prevention of torture, and lobbied for wider ratification of the Convention against Torture. The UK was among the first countries to ratify the Optional Protocol to the Convention against Torture, in December 2003, which creates an international system to monitor places of detention worldwide, and a parallel domestic monitoring system in each country that ratifies it.⁵⁵ The UK has since engaged in an active campaign to encourage worldwide ratification and implementation. In June 2009, the UK government designated sets of existing statutory bodies in England and Wales, Scotland and

⁵¹ Oral evidence to FAC, June 16, 2009, Q92, FAC report on annual human rights report.

⁵² Further submission from the Secretary of State for Foreign and Commonwealth Affairs, Foreign and Commonwealth Office, Ev51, FAC report on annual human rights report.

⁵³ ICCPR, ratified by the UK August 20, 1976; Convention against Torture, ratified by the UK January 7, 1989; ECHR March 8, 1951.

⁵⁴ Section 134 of the United Kingdom Criminal Justice Act 1988.

⁵⁵ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199, adopted on December 18, 2002, entered into force on June 22, 2006.

Northern Ireland to fulfill the role of “national preventive mechanism” envisioned in the Optional Protocol.

At the same time, however, since 2001 the UK has pursued a series of counterterrorism policies that undermine the absolute prohibition on torture and ill-treatment. In order to deport terrorism suspects, the UK government has concluded agreements, called Memoranda of Understanding, with countries with known records for torture containing no-torture assurances. It has attempted to change European human rights jurisprudence banning returns to the risk of torture and ill-treatment by introducing a balancing test between the alleged threat to national security posed by an individual and the risk of ill-treatment upon return.⁵⁶

British intelligence services cooperate closely with countries known for widespread use of torture, notably Pakistan, and credible allegations have surfaced over the past few years of collusion or complicity by UK agents in abuse of detainees held abroad. The UK government staunchly defends the use of information that may have been obtained through torture or ill-treatment in the name of preventing terrorist attacks and has argued for the right to use torture evidence in legal proceedings, although it claimed not to have done so in practice. In its legal arguments and practices, the UK government has championed a minimalist, and ultimately mistaken interpretation of the Convention against Torture to attempt to escape its obligations. In its last review of the UK, the Committee Against Torture criticized the UK for its “limited acceptance of the applicability of the Convention to the actions of its forces abroad.”⁵⁷

Intelligence Cooperation

Both the Security Service (commonly known as MI5), the agency for domestic intelligence gathering overseen by the Home Secretary, and the Secret Intelligence Service (SIS, commonly known as MI6), the agency for international intelligence gathering overseen by the Foreign Secretary, engage in counterterrorism cooperation with similar agencies around the world. Cooperation with countries such as Pakistan and Uzbekistan raises serious concerns about the use of torture intelligence.

⁵⁶ See Human Rights Watch, *Not the Way Forward: The UK's Dangerous Reliance on Diplomatic Assurances*, October 2008, <http://www.hrw.org/en/reports/2008/10/22/not-way-forward-o>; Letter to British Foreign Secretary Miliband on Diplomatic Assurances with Ethiopia, September 17, 2009, <http://www.hrw.org/en/news/2009/09/17/letter-british-foreign-secretary-ethiopian-deportation-cases>.

⁵⁷ Committee Against Torture, Concluding Observations/Comments, United Kingdom, CAT/C/CR/33/3, 10 December 2004, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.33.3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.3.En?OpenDocument) (accessed March 10, 2010), para 4(b).

Eliza Manningham-Buller, then head of the UK domestic intelligence service MI5, admitted in 2005 that the UK government was reluctant to ask too many questions about the provenance of intelligence material coming from third countries. To do so, she asserted, “would be likely to damage co-operation and the future flow of intelligence from the originating service.”⁵⁸

The consequences of this approach are illustrated by UK cooperation with Pakistan, one of the UK’s principal partners. UK Prime Minister Gordon Brown has asserted that 75 percent of the most serious terrorism plots in the UK can be traced back to Pakistan.⁵⁹

Pakistan has a well-documented history of torture, arbitrary arrests and detention, enforced disappearances, and other human rights abuses by government security forces and intelligence agencies. These practices are systematic and routine, whether used in ordinary criminal matters to obtain confessions or information, against political and ideological opponents or in more sensitive intelligence and counterterrorism cases.

The military-controlled Inter-Services Intelligence (ISI) is notorious for routinely resorting to illegal detentions and torture to extract confessions and to punish and intimidate terrorism suspects. Pakistani and international nongovernmental organizations, including Human Rights Watch, have documented the illegal detention and severe mistreatment of detainees over the course of many years. Our report, *Cruel Britannia: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan*, includes harrowing details about the brutal abuse of Pakistani and British citizens in ISI custody and UK complicity in that abuse.⁶⁰

In its 2008 human rights country report on Pakistan, the US State Department described a dire situation:

“[S]ecurity forces, including intelligence services, tortured and abused individuals in custody. Under provisions of the Anti-Terrorism Act, coerced confessions are admissible in antiterrorism courts...Alleged torture occasionally resulted in death or serious injury. Human rights organizations reported methods including beating with batons and whips, burning with cigarettes, whipping soles of the feet, prolonged isolation, electric shock,

⁵⁸ Witness statement of September 20, 2005, submitted in support of the case for Secretary of State for the Home Department in the case of *A and others v. Secretary of State for the Home Department* before the House of Lords.

⁵⁹ “Brown: Pakistan linked to most UK terror plots,” CNN.com, December 14, 2008, <http://www.cnn.com/WORLD/asiapcf/12/14/india.mumbia.suspect/index.html> (accessed November 2, 2009).

⁶⁰ Human Rights Watch, *Cruel Britannia: British Complicity in Torture and Ill-treatment of Terrorism Suspects in Pakistan*, November 2009, www.hrw.org/en/reports/2009/11/24/cruel-britannia-o.

denial of food or sleep, hanging upside down, and forced spreading of the legs with bar fetters. Security force personnel reportedly raped women during interrogations. The government rarely took action against those responsible.”⁶¹

The UK places a high premium on counterterrorism cooperation with Pakistan. During a November 2006 visit to the country, then Prime Minister Tony Blair praised the “tremendous co-operation” of Pakistan in the “global struggle” against Islamic extremism.⁶² The 2007 FCO human rights report states unequivocally that Pakistan is “one of our most important partners in our counter-terrorism efforts. Pakistan and the UK work closely together at all levels, including through regular political contact and operational co-operation.”⁶³ This language was only slightly tempered in the 2008 report, published in March 2009.⁶⁴

The FCO 2009 human rights report, published in March 2010, does little to dispel concerns about the UK’s willingness to water down its anti-torture position when it comes to fighting terrorism. It states:

Whether sharing information [with foreign intelligence and security agencies], which might lead to the detention of people who could pose a threat to our national security, passing questions to be put to detainees, or participating in interviews of them, we do all we can to minimize, and where possible, avoid the risk that the people in question are mistreated by those holding them. However, there are times when we cannot reduce the risk to zero...Ultimately it is for Ministers to balance the risk of mistreatment against the national security needs and make a judgment.⁶⁵

As such, the report outlines a policy that appears to authorize active seeking of intelligence as well as direct participation by UK security agents in interrogations of detained terrorism

⁶¹ US State Department, Bureau of Democracy, Human Rights, and Labor, “Country Reports on Human Rights Practices – 2008: Pakistan,” February 25, 2009, <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119139.htm> (accessed September 10, 2009).

⁶² UK Prime Minister’s Office, “Joint Declaration with President Pervez Musharraf (19 November 2006),” <http://www.number10.gov.uk/Page10475> (accessed September 16, 2009).

⁶³ UK Foreign and Commonwealth Office (FCO), 2007 Annual Human Rights Report, <http://www.fco.gov.uk/resources/en/pdf/human-rights-report-2007> (accessed September 16, 2009), p. 16.

⁶⁴ The 2008 FCO annual report on human rights states: “Pakistan is an important partner in our efforts to counter terrorism and we work closely at all levels.” UK FCO 2008 Annual Human Rights Report, <http://www.fco.gov.uk/resources/en/pdf/pdf15/human-rights-2008> (accessed September 16, 2009), p. 154.

⁶⁵ UK Foreign and Commonwealth Office (FCO), Annual Report on Human Rights 2009, <http://centralcontent.fco.gov.uk/resources/en/pdf/human-rights-reports/human-rights-report-2009> (accessed March 18, 2010), p. 48.

suspects by foreign intelligence services, even where there is a risk that those detained are being tortured.

According to FCO reports, UK counterterrorism assistance to Pakistan stresses the importance of human rights compliance based on internationally agreed human rights standards. Senior ministers have given rhetorical support to this view. In an August 2009 statement, then Home Secretary Alan Johnson and then Foreign Secretary David Miliband said this was “not just about legal obligations. It is about our values as a nation, and about what we do, not just what we say.”⁶⁶

But in reality, UK counterterrorism cooperation fundamentally undermines that effort. The complicity of UK agents in individual cases of abuse sends a damaging message to Pakistan that torture is acceptable in the context of interrogating terrorism suspects. Moreover, the regular pattern of cooperation in the absence of any serious efforts by London either to condition cooperation on humane treatment, or to make genuine enquiries about the circumstances in which detainees are interrogated, sends a clear message to the authorities in Pakistan that the UK is indifferent about the torture of terrorism suspects in its custody.

Guidelines

Extensive intelligence cooperation with countries known to torture is all the more troubling given that the guidelines governing such work are not as of yet subject to public scrutiny. In March 2009, then Prime Minister Gordon Brown made a statement indicating that the UK government would publish the current guidance given to MI5 and MI6 officers on overseas interrogation once it had been “consolidated and reviewed” by the Intelligence and Security Committee (a government appointed group of parliamentarians reporting to the Prime Minister who oversee the intelligence services; not a proper parliamentary committee).⁶⁷

Then Foreign Secretary David Miliband told the Parliamentary Foreign Affairs Committee in July 2009 that contrary to earlier indications by the government, he would not allow the publication of previous versions of the guidance because doing so could “give succour to our enemies.”⁶⁸

⁶⁶ “David Miliband and Alan Johnson: We firmly oppose torture – but it is impossible to eradicate all risk,” August 8, 2009, *The Telegraph*, <http://www.telegraph.co.uk/comment/5996382/David-Miliband-and-Alan-Johnson-We-firmly-oppose-torture--but-it-is-impossible-to-eradicate-all-risk.html> (accessed November 10, 2009).

⁶⁷ Prime Minister Gordon Brown, Written Ministerial Statement on Detainees, March 18, 2009, reported by the Intelligence and Security Committee, www.cabinetoffice.gov.uk/intelligence.aspx (accessed November 25, 2009).

⁶⁸ Foreign Secretary David Miliband, quoted in House of Commons Foreign Affairs Committee, Human Rights Annual Report 2008, Seventh Report of Session 2008-09, July 2009,

The decision of the Foreign Secretary may be due to the embarrassing and possibly illegal contents of the previous instructions. Allegations published in *The Guardian* in June 2009 stated that written instructions issued in 2002, with the knowledge of Tony Blair, to MI5 and MI6 agents on the questioning of detainees in US custody in Afghanistan explicitly suggested turning a blind eye to torture and mistreatment. *The Guardian* said the 2002 instructions, although telling agents that they should not “be seen to condone” torture nor should they “engage in any activity yourself that involves inhumane or degrading treatment of prisoners,” but also instructed agents that they were under no obligation to intervene or prevent detainees from being mistreated: “Given that they are not within our custody or control, the law does not require you to intervene to prevent this.”⁶⁹ According to the same report in *The Guardian*, the current guidance instructs MI5 officers never to return to question someone who reports having been tortured.

Despite the Prime Minister’s undertaking in March 2009 the “consolidated” guidance had still not been published at this writing. After a delay of eight months, the government provided the Intelligence and Security Committee in late November 2009 with the current guidance; the Committee completed its review and sent its conclusions to Gordon Brown in early March 2010, saying publication was a “matter for the Prime Minister.”⁷⁰ The government declined to publish the ISC report and the guidelines themselves. In February 2010 the parliamentary Joint Committee on Human Rights had renewed its call on the government to publish the guidance that was in effect at the time of alleged torture of UK citizens abroad.⁷¹ The new coalition government that came into office in May 2010 has yet to make its position known.

Use of Torture Material as Intelligence

The UK government’s approach to foreign torture intelligence is in direct contradiction with its stated commitment to the prevention and eradication of torture. It is a matter of official policy that UK authorities will accept and use intelligence coming from a third country even if

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcaff/557/557.pdf> (accessed September 22, 2009), para. 66.

⁶⁹ “Tony Blair knew of secret policy on terror interrogations,” Ian Cobain, *The Guardian*, June 18, 2009, <http://www.guardian.co.uk/politics/2009/jun/18/tony-blair-secret-torture-policy> (accessed June 23, 2009).

⁷⁰ Richard Norton-Taylor, “Government refuses to publish criticism of new guidelines on overseas torture,” *The Guardian*, March 18, 2010, <http://www.guardian.co.uk/world/2010/mar/18/overseas-torture-government-refuses-publish> (accessed June 17, 2010)

⁷¹ Nina Lakhani, “MPs want to see interrogation guidance for security services,” *The Independent*, February 21, 2010, <http://www.independent.co.uk/news/uk/home-news/mps-want-to-see-interrogation-guidance-for-security-services-1905788.html> (accessed February 24, 2010).

they know it was obtained under torture or ill-treatment. The UK counterterrorism strategy CONTEST II explicitly states:

Intelligence from the security and intelligence services of other states is vital to our own security and has repeatedly enabled us to disrupt attacks planned against the UK or UK interests. In most cases the source or sources of this intelligence will not be disclosed to the UK. If it is clear that the intelligence has come from a detainee the service providing it will rarely volunteer the circumstances in which the detainee is being held. If it is established that material has been obtained from a detainee by torture, it would not be admissible in criminal or civil legal proceedings in the UK as part of the case against an individual, regardless of where it was obtained. But... any intelligence which has been received may still be used to investigate and to stop terrorist attacks.⁷²

The 2008 FCO annual report on human rights, which otherwise stresses the importance of the prevention and eradication of torture, shockingly reprises this language, stating:

All intelligence received, whatever its source, is carefully evaluated, particularly where it is clear that it has been obtained from individuals in detention. The use of intelligence possibly derived through torture presents a very real dilemma, given our unreserved condemnation of torture and our efforts to eradicate it. *Where there is intelligence that bears on threats to life, we cannot reject it out of hand* (emphasis added).⁷³

The government finds unfortunate comfort in the 2005 House of Lords Judicial Committee (commonly known as the “Law Lords”)⁷⁴ ruling in the “torture evidence” case (*A and Others vs. Secretary of State for the Home Department*), described in more detail below, in which the Lords erroneously concluded that international law does not prohibit executive use of torture information for operational purposes.

⁷² Her Majesty’s Government, “Pursue Protect Prevent Prepare: The United Kingdom’s Strategy for Countering International Terrorism,” March 2009, http://security.homeoffice.gov.uk/news-publications/publication-search/general/HO_Contest_strategy.pdf?view=Binary (accessed November 11, 2009), p. 78.

⁷³ FCO, 2008 Annual report on human rights, p. 15.

⁷⁴ The House of Lords Judicial Committee was replaced in October 2009 by The Supreme Court as the highest court in the United Kingdom.

Indeed, the majority of the Lords deciding the case took the view that it was lawful, justified, and indeed, in some cases, obligatory, for the executive to act on information even with the knowledge that it has been obtained through torture. The judgment refers to the ticking bomb scenario.⁷⁵

In reaching this conclusion, the Law Lords drew a worrisome distinction between executive and judicial use of torture material. In the words of Lord Nicholls of Birkenhead:

The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest...It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence. In the latter case repugnance to torture demands that proof of facts should be found in more acceptable sources than information extracted by torture.⁷⁶

This distinction rests on a narrow, and ultimately mistaken, reading of the purpose of the exclusionary rule. In stressing the exclusion of torture evidence in order to ensure fair trials, the Lords ignored the predominant rationale for the rule: the prevention of torture. While the ruling in *A and Others* offers a strong defense of fair trial rights, it does not protect people from torture.

Parliamentary examination of allegations of direct UK complicity in torture abroad have considered the passive receipt and use of intelligence from countries with poor records on torture. The Joint Committee on Human Rights (JCHR), composed of members of both houses of Parliament, conducted a special review of allegations of UK complicity in torture and the House of Commons Foreign Affairs Committee (FAC) addressed the issue in their inquiry into human rights based on the Foreign and Commonwealth Office's Annual Report on Human Rights 2008. Their conclusions, both published in August 2009, have helped to shed light on what would constitute state complicity in torture.

⁷⁵ In the words of Lord Nicholls, "it would be ludicrous for [the police] to disregard this information if it had been procured by torture...[I]n cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this." *A and Others vs. Secretary of State for the Home Department* [2005] UKHL 71, paras. 68-69.

⁷⁶ *A and Others*, House of Lords, para. 70.

Both Committees discussed the claims of former UK ambassador to Uzbekistan Craig Murray (2002-2004) that the UK routinely and knowingly accepted information obtained under torture by Uzbek security services. In response to Murray's objections at the time, the chief legal advisor in the Foreign and Commonwealth Office assured him that the Convention against Torture did not prohibit the receipt of information obtained under torture.⁷⁷

The JCHR reached a different conclusion, finding that the "systematic receipt of information known or thought likely to have been obtained from detainees subject to torture" is tantamount to complicity in torture and creates a market for torture.⁷⁸ The FAC adopted a similar position, stating that "there is a risk that use of evidence which may have been obtained under torture on a regular basis, especially where it is not clear that protestations about mistreatment have elicited any change in behaviour by foreign intelligence services, could be construed as complicity in such behaviour."⁷⁹

In its response to the JCHR report, the UK government said its position was that "the receipt of intelligence should not occur where it is known or believed that receipt would amount to encouragement to the intelligence services of other States to commit torture."⁸⁰ Yet the previous government refused to acknowledge even the possibility that its continuing and close intelligence cooperation with Pakistan, a country whose security services have a well-established record of torture, might have that effect.

Human Rights Watch considers that uncritical use of such material breaches the UK's duty to take positive steps to prevent torture wherever and by whomever committed. We further consider that it may amount to complicity in torture. And as a policy matter, it undoubtedly undermines UK efforts to eradicate torture around the world.

Torture Evidence and the Burden of Proof

Despite its problematic treatment of torture intelligence referred to above, *A and Others* definitively affirmed the prohibition on the use of torture evidence in British judicial proceedings. The case arose because of allegations that the UK government was using

⁷⁷ 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. 14 and Ev. 55-56.

⁷⁸ *Ibid.*, paras. 4243.

⁷⁹ House of Commons Foreign Affairs Committee (FAC), Human Rights Annual Report 2008, Seventh Report of Session 2008-09, August 9, 2009, para. 83.

⁸⁰ The Government Reply to the Twenty-Third Report from the Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*, October 2009, <http://www.official-documents.gov.uk/document/cm77/7714/7714.pdf> (accessed February 24, 2010), p. 4

torture evidence in proceedings in the Special Immigration Appeals Commission (SIAC), a special tribunal for appeals against Home Office deportation orders on national security grounds. The government denied the allegations, but asserted its right to use such evidence as a matter of law. The Lords ruled unanimously that no British court or tribunal can ever consider torture evidence even in terrorism cases, overturning a 2004 Court of Appeals decision that such evidence could be used provided that the UK had “neither procured nor connived at” the torture.

Unfortunately, the ruling established a problematic approach to the burden of proof in cases where evidence is alleged to have been obtained under torture. The majority (four out of the seven Lords deciding the case) took the view that SIAC was obliged to exclude evidence when it is established “by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities” that it was in fact obtained under torture. This test in effect places the burden of proof on the appellant to put forward evidence that would satisfy the court that is more likely than not that it was obtained under torture. It sets what may be an impossible standard to meet given the difficulties in ascertaining the precise circumstances in which intelligence information was obtained. It is compounded by the fact that “sensitive” evidence is likely to be heard in closed session from which the deportee and his lawyer of choice are excluded.

As Lord Bingham, writing a dissenting opinion, noted, “it is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet.”⁸¹ He and two other Lords proposed that evidence should be excluded where SIAC determined there was a “real risk” that it had been obtained under torture.⁸² Such an approach correlates with the test adopted by the European Court of Human Rights when considering whether an expulsion or deportation would violate the nonrefoulement obligation. The European Court assesses whether “substantial grounds are shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country.”⁸³

⁸¹ *Ibid.*, para. 59.

⁸² *Ibid.*, paras. 54-62, 80 and 98.

⁸³ European Court of Human Rights, *N v. Finland*, Application No. 38885/02, Judgment of 26 July 2005, para. 158.

Oversight and Accountability

The debate in the UK about counterterrorism intelligence cooperation has focused largely on allegations of UK complicity in the illegal detention and abuse of detainees in third countries. Over the past year, numerous cases have come to light involving interrogations conducted by UK intelligence services of UK nationals or dual nationals detained and tortured in Pakistan, Egypt, Bangladesh, and the United Arab Emirates.

Allegations of UK complicity in torture have led to significant parliamentary scrutiny. Both the Commons Foreign Affairs Committee and the Joint Committee on Human Rights have held hearings and published conclusions and recommendations. The foreign minister, the home office minister, as well as the director of MI5 declined to give evidence to the JCHR, and the previous government rejected the Joint Committee's recommendations.

The response of the Labour government to the JCHR underscored its unwillingness to submit itself to proper parliamentary scrutiny of its counterterrorism policies. It also underscores the need for greater permanent democratic oversight of intelligence services, on the other hand.

As noted above, oversight of the security services in the UK is carried out by the Intelligence and Security Committee (ISC). Tasked with examining the budget, administration and policy of the MI5 and the MI6, the ISC mandate is handicapped in several ways.⁸⁴ First, the body is not a parliamentary committee, despite being composed of members of parliament. Second, the security services and the responsible ministers (the Foreign Secretary in the case of MI6 and Home Secretary in the case of MI5) can refuse to provide to the ISC sensitive information, defined as information that could reveal sources, methods or other assistance; information about particular operations; and information supplied by another government if that government does not consent. Third, the committee's annual report is submitted first to the Prime Minister, and only a redacted version is shared with both houses of parliament.

The Joint Committee on Human Rights has criticized the ISC's lack of independence and called for the creation of a proper parliamentary select committee.⁸⁵ The House of Commons Foreign Affairs Committee, calling the ISC a "creature of the Government," has also expressed concerns recently over what it considers a "deficit in parliamentary scrutiny of intelligence and security matters" in the UK.⁸⁶

⁸⁴ The ISC's mandate includes also the Government Communications Headquarters, the agency devoted to signals intelligence and protecting government communication and information systems.

⁸⁵ JCHR, *Allegations of UK Complicity in Torture*, paras. 57-66.

⁸⁶ House of Commons FAC, *Human Rights Annual Report 2008*, para. 63.

The limitations on the ISC's mandate and the unwillingness of the government to submit itself to effective parliamentary scrutiny, underscore the need for an independent, public judicial inquiry into all cases in which there are allegations of British government complicity, participation or knowledge of torture or cruel, inhuman or degrading treatment of detainees. Two criminal investigations were initiated in 2009. The Conservative-Liberal Democrat coalition government announced within weeks of taking power in May 2010 that it would order such an inquiry.⁸⁷

⁸⁷ In March 2009, the Attorney General for England and Wales ordered a criminal investigation into alleged collusion by MI5 agents in the torture and ill-treatment of Binyam Mohamed. A UK resident with Ethiopian nationality, Mohamed was arrested in Pakistan in 2002 and subsequently transferred first to Morocco, then to Afghanistan and finally to the US detention facility at Guantanamo Bay. He claims that he was abused in all four places of detention. British intelligence officers interrogated Mohamed while he was detained in Pakistan, and later gave the CIA information about Mohamed as well as questions to ask him. Mohamed was released from Guantanamo and returned to the UK in early 2009. In September 2009, then Foreign Secretary David Miliband revealed that the MI6 had referred one of its officers to the Attorney General in relation to allegations of complicity in the torture of a non-British national. No further details of the case have been disclosed.

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 2006⁸⁸

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, 2008⁸⁹

Germany is a party to major human rights instruments imposing clear obligations with respect to the prevention, prosecution and eradication of torture.⁹⁰ National law authorizes universal jurisdiction over torture.⁹¹

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.”⁹² The federal government supports anti-torture initiatives in a variety of countries around the world. Germany ratified the Optional 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.

⁸⁸ 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).

⁸⁹ 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.

⁹⁰ ICCPR, ratified by Germany December 17, 1973; Convention against Torture, ratified by Germany November 1, 1990; ECHR, ratified by Germany December 5, 1952.

⁹¹ Paragraph 6(9) of the German Criminal Code.

⁹² 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.

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.⁹³ 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.⁹⁴ 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.⁹⁵

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 2006.⁹⁶ Kurnaz alleges he was mistreated by members of the German Special Forces Commando (Kommando Spezialkräfte, part of the German Army) while in US 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.

⁹³ 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.

⁹⁴ 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).

⁹⁵ 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.

⁹⁶ *Ibid.*, para. 85.

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.⁹⁷ 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.⁹⁸

⁹⁷ 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>.

⁹⁸ 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 Interior of Uzbekistan and number one on the EU's visa ban list, when he traveled to Germany for medical treatment in November 2005.

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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

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 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

⁹⁹ Committee 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.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.28.7.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.28.7.En?Opendocument) (accessed September 10, 2009), para. 5.

¹⁰⁰ Report 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).

¹⁰¹ See Human Rights Watch, *Creating Enemies of the State*, March 2004, <http://www.hrw.org/en/reports/2004/03/29/creating-enemies-state-o>.

¹⁰² German Federal Foreign Office Human Rights Report, pp. 266-267.

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.¹⁰³

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,

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.¹⁰⁴

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,

¹⁰³ Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes. Deutscher Bundestag, 16 Wahlperiode, Drucksache 16/13400, June 18, 2009, p. 630.

¹⁰⁴“Schauble will Foltergestaendnisse nutzen,” *Spiegel Online*, December 12, 2005, www.spiegel.de/politik/deutschland/o,1518,390709,00.html (accessed November 25, 2009).

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.¹⁰⁵

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.¹⁰⁶

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 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.¹⁰⁷ Nasir was repeatedly shown pictures of Fritz Gelowicz, one of the accused in the Sauerland trial discussed below.¹⁰⁸

¹⁰⁵ Yassin 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.

¹⁰⁶ AFP, “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).

¹⁰⁷ Holger Stark, John Goetz, and Mattias Gebauer, “Germany’s Relying on Pakistani Interrogation Methods,” *Der Spiegel*, October 1, 2007, <http://www.spiegel.de/international/germany/0,1518,508931,00.html> (accessed September 17, 2009).

¹⁰⁸ Michael Moss and Souad Mekhennet, “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); “Germany’s Relying on Pakistani Interrogation Methods,” *Der Spiegel*, October 1, 2007.

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.”¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

Torture evidence may also have been used in the administrative naturalization hearings for Abdel-Halim Khafagy, 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 information Khafagy was alleged to have provided while detained at Eagle base which suggested he had links with terrorism.¹¹²

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,

¹⁰⁹ 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).

¹¹⁰ “Glimpses of a Shadowy World in Pakistan”, *The New York Times*, September 24, 2007.

¹¹¹ OLG Koblenz, Urteil vom 13.07.2009 - 2 StE 6/o8 - 8. On file with Human Rights Watch.

¹¹² 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.

though this was not the subject of a formal decision.¹¹³ 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."¹¹⁴ 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.¹¹⁵

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

¹¹³ Email correspondence with Ricarda Lang, December 4, 2009. On file with Human Rights Watch.

¹¹⁴ Scheuermann and Stark, "Unter Freunden," *Der Spiegel*, April 6, 2009.

¹¹⁵ 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 unter der Fraktion DIE LINKE), German Bundestag, December 10, 2008. On file with Human Rights Watch.

government has since acknowledged that Khalid Sheikh Mohammed was waterboarded 183 times.¹¹⁶

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.¹¹⁷

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:

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).¹¹⁸

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.”¹¹⁹ Human Rights

¹¹⁶ Scott 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).

¹¹⁷ This 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.

¹¹⁸ 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.

¹¹⁹ 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,

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 (Parlamentärisches 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 breached the constitution in restricting the evidence it provided without giving sufficient justifications.¹²⁰

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.¹²¹ 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.

<https://wcd.coe.int/ViewDoc.jsp?id=1162763&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65&BackColorLogged=FFC679> (accessed September 18, 2009), para. 174.

¹²⁰ 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).

¹²¹ 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.

France

Torture is always unjustifiable for a simple reason...we can't fight terrorism using the rules of terrorism. The day that democracy strays by using methods that are undemocratic, the terrorists have won. So torture is never justified, justifiable, explicable, tolerable.

—Nicolas Sarkozy, President of France (then Interior Minister), February 2006¹²²

We work enormously with partner intelligence services, it has become our daily bread, absolutely necessary.

—Pierre de Bousquet de Florian, former head of a French intelligence service¹²³

France is a party to major human rights instruments imposing clear obligations with respect to the prevention, prosecution and eradication of torture.¹²⁴ National law authorizes universal jurisdiction over torture.¹²⁵

Priding itself on being the cradle of human rights and the birthplace of modern humanitarianism, France has been at the forefront of efforts to advance respect for international human rights law, as well as expand its boundaries, worldwide. France played a critical role in the drafting and adoption of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, an important instrument in the struggle to prevent torture. France also contributes to the UN Voluntary Fund for Victims of Torture.

France ratified the Optional Protocol to the Convention against Torture in November 2008, having created in July of the same year the institution of the Controller-general for places of deprivation of liberty (Contrôleur général des lieux de privation de liberté) as the national

¹²² Nicolas Sarkozy, then interior minister, interview on RCM radio, February 16, 2006, <http://sarkozyblog.free.fr/index.php?2006/02/13/243-quand-nicolas-sarkozy-donne-la-parole-aux-francais> (accessed September 7, 2009).

¹²³ “La menace terroriste très élevée en France,” *Le Figaro*, November 9, 2006, http://www.lefigaro.fr/france/20060911.WWW00000426_la_menace_terroriste_tres_elevee_en_france.html (accessed September 22, 2009).

¹²⁴ ICCPR, ratified by France November 4, 1980, Convention against Torture, ratified by France February 18, 1986; ECHR, ratified by France May 3, 1974.

¹²⁵ Article 689 (1) and (2) of the French Criminal Code of Procedure.

prevention mechanism. In June 2009, on the occasion of the international day of solidarity with victims of torture, the Foreign Ministry reaffirmed France's "firm condemnation of torture and other cruel, inhuman or degrading treatment or punishment. This resolute opposition applies whatever the circumstances; international law does not authorize any exceptions."¹²⁶

In practice, however, France appears all too willing to set aside this principled approach. The French preemptive approach to countering terrorism rests on continuous intelligence gathering, including through cooperation with countries with poor records on torture, and aggressive prosecution of alleged terrorism networks before specific acts are committed or even attempted. The highly centralized and specialized counterterrorism machinery within the justice system allows for a continuous and close collaboration between investigating judges, prosecutors, and intelligence officers. Insufficient verification by judicial authorities of information coming from the intelligence services leads to the use by the judiciary of foreign torture material, both in the investigative phase and at trial.

Intelligence Cooperation

Bernard Squarcini, the head of the Central Agency for Domestic Intelligence (Direction central du renseignement intérieur, DCRI) has said that French services maintain intelligence liaisons with 170 foreign services.¹²⁷ The DCRI was created in July 2008 with the fusion of two separate domestic intelligence services: the Directorate for Territorial Surveillance (Direction de la Surveillance du Territoire, DST) and General Intelligence (Renseignement Généraux, RG).

For historic and strategic reasons, France has special relations with its former colonies, in particular Algeria, Tunisia and Morocco. Concerns about terrorism-related activities in France of returnees from combat or training in countries such as Iraq, Chechnya, Afghanistan and Pakistan have deepened France's interest in close intelligence and judicial cooperation with countries in the Middle East, and Central and South Asia. Squarcini has explained, "We need to have closer relations with all foreign intelligence services because we are not looking any more just for networks or groups, but also lone individuals, capable of kamikaze

¹²⁶ "12ème journée de soutien aux victimes de la torture," French Ministry of Foreign Affairs statement, June 26, 2009, http://www.diplomatie.gouv.fr/fr/actions-france_830/droits-homme_1048/torture-detentions-arbitraires_15659/12eme-journee-soutien-aux-victimes-torture-26.06.09_74328.html (accessed November 10, 2009).

¹²⁷ Romain Luongo, "Les nouveaux agents secrets qui préservent la France du terrorisme," *LaProvence.com*, October 22, 2008, <http://www.spyworld-actu.com/spip.php?articles9051> (accessed September 18, 2009).

acts.”¹²⁸ He has characterized intelligence services in Yemen, Turkey and Syria as “friends” from whom the DCRI receives valuable information.¹²⁹

France has not experienced the same public debate or media scrutiny of contemporary counterterrorism intelligence cooperation and torture as have Germany and the UK. However, the 2007 trial of five French former Guantanamo Bay detainees trained the public spotlight on the interrogations conducted in the US detention facility by French intelligence officers. The presiding judge in the trial adjourned the case after revelations that DST officers had interrogated French detainees at Guantanamo Bay in 2002 and 2004, but had not shared the results of those interrogations with the defense according to the rules of disclosure. The lower court’s conviction of the five accused was overturned on appeal. As discussed in more detail below, that appeal was later reversed by a higher court and a fresh appeal ordered.

The government’s 2006 White Paper on Domestic Security against Terrorism, which lays out France’s counterterrorism strategy, devotes only a small section to international cooperation focusing on multilateral fora for information-sharing. There is no mention of torture at all, and human rights and the rule of law are referred to only in the conclusion:

The challenge is to ensure the effectiveness of counter-terrorism methods while complying with the rule of law. To deviate from this course would in fact be to play into the hands of global terrorism...By respecting the rule of law, the fight against terrorism gains legitimacy. It therefore gains effectiveness, from a long-term strategic perspective. Our country will continue to travel down this narrow path.¹³⁰

Guidelines

Human Rights Watch was unable to ascertain whether French intelligence services have written or oral guidelines regarding information-sharing arrangements with services with records for torture, appropriate evaluation of information where there are reasonable grounds for believing it may have been obtained under torture, or participation in

¹²⁸ Patricia Tourancheau, “Un risque de récidive terroriste par rapport à 1995,” *Libération*, October 8, 2007, http://www.algeria-watch.org/fr/article/mil/groupe_armes/recidive_terroriste.htm (accessed September 18, 2009).

¹²⁹ Herve Gattegno, “Comment on traque les terroristes,” *Le Point.fr*, March 12, 2009, <http://www.lepoint.fr/actualites-societe/2009-03-12/comment-on-traque-les-terroristes/920/0/324944> (accessed September 18, 2009).

¹³⁰ White Paper on Domestic Security against Terrorism, official English translation, La Documentation Française, March 2006, <http://www.ladocumentationfrancaise.fr/rapports-publics/064000275/index.shtml> (accessed September 18, 2009), pp. 123-124.

interrogations abroad. Our request for an interview, sent August 19, 2009, to discuss this matter with DCRI director Bernard Squarcini was never answered.

A French counterterrorism official told Human Rights Watch that French services normally receive a “refined product,” in the form of a summary or simply a tip-off, from a foreign intelligence service, rather than the raw intelligence.¹³¹ They then evaluate the reliability of the information taking into account the known methods and efficiency of the foreign service involved and attempt to cross-reference the information. The official stressed that information obtained illegally, including through torture or ill-treatment, is unacceptable because the information is not reliable and it will ultimately be ruled inadmissible in court.¹³² Human Rights Watch was unable to learn what methods French intelligence services use to assess whether information was obtained unlawfully. In practice however, as detailed below, such material has been admissible as evidence in French courts.

As members of the police force, DCRI agents are ostensibly held to respect the National Police Code of Ethics, which prohibits “violence or inhuman or degrading treatment” against individuals in custody by police officers or third parties. It obligates any officer who witnesses prohibited behavior to intervene to stop it and to report the incident to the competent authorities.¹³³ Nonetheless, national and international nongovernmental organizations and UN bodies have criticized the lack of effective and impartial investigations of allegations of abuse involving the French police, raising concerns that these guidelines are not adequately upheld or enforced.¹³⁴

¹³¹ Human Rights Watch interview with two French counterterrorism officials who requested anonymity, Paris, December 12, 2007.

¹³² *Ibid.*

¹³³ National Police Code of Ethics, http://www.legifrance.gouv.fr/affichCode.do;jsessionid=6C166BF16ACBC883581304E3C6E844BB.tpdjo12v_3?cidTexte=LEGI TEXT000006071071&dateTexte=20090921 (accessed September 21, 2009), article 10.

¹³⁴ UN Committee Against Torture, *Consideration of reports submitted by State Parties under article 19 of the Convention: conclusions and recommendations of the Committee Against Torture: France*, 3 April, 2006, CAT/C/FRA/CO/3, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.FRA.CO.3.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.FRA.CO.3.En?Opendocument) (accessed December 10, 2009); UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: France*, 31 July 2008, CCPR/C/FRA/CO/4, available at: <http://www.unhcr.org/refworld/docid/48c50eb2.html> (accessed 11 December 2009); UN Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: France*, 18 April 2005, CERD/C/FRA/CO/16, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.FRA.CO.16.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.FRA.CO.16.En?Opendocument) (accessed December 10, 2009); European Committee for the Prevention of Torture, *Rapport au Gouvernement de la République française relatif à la visite effectuée en France par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 septembre au 9 octobre 2006*, 10 December 2007, CPT/Inf (2007) 44, available at: <http://www.unhcr.org/refworld/docid/475d51af2.html> (accessed 11 December 2009); Council of Europe Commissioner for Human Rights, Report of Alvaro Gil-Robles on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005, 15 February 2006, CommDH(2006)2, available at: <http://www.unhcr.org/refworld/docid/4402c3c94.html> (accessed December 11, 2009).

Use of Torture Material by the Judiciary

If the activities and international information-sharing arrangements of French intelligence services remain relatively opaque, the role of intelligence material in the judicial process is clear and troubling. Most if not all terrorism investigations are launched by judges on the basis of information collected by intelligence services, including through relations with similar services in foreign countries. The lack of effective judicial control over intelligence information received from security services, the operational use of such information to open official investigations and detain people, and the use of torture evidence at trial all undermine the rule of law and the absolute prohibition on torture.

France's preemptive criminal justice approach to countering terrorism is characterized by close cooperation between specialized investigating judges, on the one hand, and the police and intelligence services on the other. The DCRI is both an intelligence-gathering agency and a judicial police force, which means DCRI agents can be assigned to assist investigating judges in criminal inquiries.

In practice this translates into a continuous exchange of information and joint strategizing between the investigative judges and security service agents. In its 2006 White Paper, the government stressed that the dual nature of the security service "makes possible the use of information acquired through intelligence during judicial procedures, whereas in the other direction, the information gathered in the context of judicial procedures is used to guide the security police work."¹³⁵

Human Rights Watch is unaware of any written instructions or other guidance (whether from the Ministry of Justice or otherwise) to investigating judges concerning their duty to ascertain whether intelligence material was obtained under torture or ill-treatment. A senior Justice Ministry official told Human Rights Watch that investigating judges have an obligation to ensure information was obtained lawfully and that they discharge that obligation.¹³⁶

One counterterrorism investigating judge explained, however, that where the French intelligence services do the "interfacing" with foreign services, it is impossible to have any

¹³⁵ White Paper on Domestic Security against Terrorism, p. 53. The report refers to the Direction de la Surveillance du Territoire, DST, which was fused with another domestic intelligence service in 2008 to create the DCRI. One counterterrorism official told Human Rights Watch, "That's the French distinctiveness: judges and police officers working together every day. There's a kind of trust there. The passage between intelligence operation and judicial investigation is very easy. The judge is an ally, not an adversary, and that is a big help." Human Rights Watch interview with counterterrorism official who requested anonymity, Paris, December 12, 2007. The DCRI is situated within the National Police, under the Interior Ministry.

¹³⁶ Human Rights Watch interview with Delphine Dewailly, Direction des affaires criminelles et des grâces, Ministry of Justice, May 19, 2009.

information about sources and methods. “They don’t tell us where they got the information...We don’t know whether the methods used were human or technical, or [even whether] the information comes from a third country.”¹³⁷

The trial of the five former Guantanamo Bay detainees raised critical questions about the DCRI’s “two-hat” (*double casquette*) mandate (at the time, the agency involved was called the DST) – the fact that agents can perform both intelligence-gathering for operational purposes as well as judicially-authorized investigations with a view to producing evidence. The defense argued that the interrogations conducted at Guantanamo Bay were illegal because the agents had acted in their capacity as judicial police, collecting information later used to justify and substantiate the judicial investigation against the men, but without disclosing the material to the defense as required. The Correctional Court ultimately accepted the prosecution’s argument that the DST agents had acted in their capacity as intelligence officers and there had been no breach of the rules of procedure with respect to disclosure of evidence. In February 2009, the Appeals Court overturned the convictions, taking the view that the DST had violated the rules of criminal procedure and principles of international law by confusing its two roles.¹³⁸ In February 2010, the Court of Cassation annulled this ruling, arguing that the Appeals Court had failed to substantiate sufficiently its conclusions that the right to defense of the accused had been prejudiced. Following the Court of Cassation judgment, a fresh appeal against the conviction will be heard by a different chamber of the Appeals Court.¹³⁹

Use of the fruit of the poisoned tree

The ease with which sensitive intelligence material is put to use in judicial proceedings is a source of pride to French counterterrorism officials and specialized investigating judges.¹⁴⁰ The specialized investigating judge may authorize any number of investigative steps, including arrests, on the basis of intelligence information alone. In doing so, the judge will normally not know—or take any particular interest in—the sources or methods used to acquire the information. The goal is to acquire corroborating evidence through judicially-authorized acts. French counterterrorism prosecutor Philippe Maitre has said, “There is no

¹³⁷ Human Rights Watch interview with Jean-Louis Bruguière, February 26, 2008.

¹³⁸ Cour d’Appel de Paris, 10eme Chambre, Section A, Arrêt du 24 fevrier 2009, Dossier no. 08/00786. On file with Human Rights Watch.

¹³⁹ Cour de Cassation, Chambre Criminelle, Arrêt du 17 février 2010, No. 842. On file with Human Rights Watch.

¹⁴⁰ Human Rights Watch interview, Jean-Louis Bruguière, former investigating judge, Paris, February 26, 2008; Human Rights Watch interview with counterterrorism official who request anonymity, Paris, December 12, 2007

judicial control over the intelligence services. It's the judicial procedure that verifies the information that begins as intelligence...The origin of the intelligence is not important."¹⁴¹

This approach, in which intelligence material is uncritically used for operational purposes in order to collect other kinds of evidence, embraces the possibility and legitimacy of using the fruits of the poisoned tree: information collected as a result of investigations prompted by statements obtained under torture.

The October 2005 arrests of two individuals allegedly plotting terrorist attacks in Paris are illustrative. These arrests appear to have been based largely, if not entirely, on statements allegedly made by a man named M'hamed Benyamina while in the custody of the Algerian secret service, the Department for Information and Security (Departement du Renseignement et de la Securite, DRS). Emmanuel Nieto and Stéphane Hadoux spent one year in pretrial detention before being released on bail after Benyamina retracted his statements once brought before an Algerian judge. Nieto and Hadoux were convicted on terrorism-related charges in October 2008 after a trial that included seven other defendants and relied heavily on Benyamina's statements.

Benyamina, an Algerian residing in France, had been arrested in Algeria in September 2005 and held in illegal, arbitrary DRS detention for at least five months before being handed over to a judge.¹⁴² Benyamina reported later that Algerian security officers told him French authorities had requested his arrest. A February 2006 article in the French daily newspaper *Le Figaro* raising concerns that France had "delivered" Benyamina to Algeria to make him talk under torture, cited two anonymous police sources acknowledging this French connection, while another source close to the case insisted that Algiers had its own reasons for being interested in Benyamina.¹⁴³

Benyamina told Amnesty International that he did not want to talk about treatment in DRS detention as long as he remained in Algeria, for fear of reprisals. There is evidence, based on dozens of cases of torture and ill-treatment collected by Amnesty International between 2002 and 2006, to suggest that the DRS routinely arrests and holds terrorism suspects in incommunicado detention, with no access to a lawyer, where they are at particular risk of

¹⁴¹ Human Rights Watch interview with Philippe Maitre, prosecutor, February 27, 2008.

¹⁴² The United Nations Working Group on Arbitrary Detention has classified Benyamina's five months in DRS custody as illegal, arbitrary detention. UN Working Group on Arbitrary Detention, Opinion No.38/2006 (Algeria), adopted November 21, 2006, A/HRC/7/4/Add.1, January 16, 2008.

¹⁴³ Jean Chichizola, "France-Algerie: Paris soupconnee d'avoir livre un islamiste a Alger," *Le Figaro*, February 13, 2006, http://www.algeria-watch.org/fr/article/pol/france/benyamina_livre.htm (accessed September 21, 2009).

torture and ill-treatment.¹⁴⁴ In May 2008, the UN Committee Against Torture expressed its concern about DRS counterterrorism activities, including numerous reports of torture and ill-treatment.¹⁴⁵ The use of Benyamina’s statement—made under conditions French authorities were likely fully aware of—first in the investigative phase and subsequently at trial illustrates a systemic failure to challenge information from countries with known records for unlawful practices.

Use of torture evidence at trial against the victims of the abuse

Insufficient judicial verification of intelligence material in terrorism investigations also heightens the risk that statements obtained in third countries under torture or ill-treatment may be introduced as evidence at trial. French criminal law is founded on the principle of “free proof” – any kind of evidence may be admissible as long as it was obtained lawfully. Though the criminal code of procedure does not explicitly prohibit the use of torture evidence, France has argued before the UN Committee Against Torture that it is nonetheless excluded by virtue of France’s international obligations:

The judge must evaluate the evidence in the course of the trial taking into consideration jurisprudence and the international instruments France has ratified, including the Convention against Torture. According to French jurisprudence, evidence which the judge establishes to have an unfair or illegal character are inadmissible. Consequently, all evidence obtained through torture is rejected.¹⁴⁶

In practice, however, torture evidence from third countries has been introduced and deemed admissible in French courts. Djamel Beghal, an Algerian, was convicted in March 2004 of membership in a terrorist organization, based in part on statements he made under torture and ill-treatment in the United Arab Emirates, where he was arrested in September 2001.¹⁴⁷ These statements were not excluded at trial. Beghal credibly asserted he was subjected to harrowing treatment while in UAE custody, including freezing temperatures, beatings on the

¹⁴⁴ Amnesty International, “Unrestrained Powers: Torture by Algeria’s Military Security,” AI Index: MDE 28/004/2006, July 10, 2006, <http://web.amnesty.org/library/index/ENGMDE280042006> (accessed September 1, 2006).

¹⁴⁵ UN Committee Against Torture, Concluding Observations: Algeria, CAT/C/DZA/CO/3, May 26, 2008, <http://www.unhcr.org/refworld/publisher,CAT,,DZA,48c637982,o.html> (accessed September 18, 2009), para. 4.

¹⁴⁶ UN Committee Against Torture, Thirty-fifth Session, Partial analytical summary record of the first part (public) of the 684th sitting held at Palais des Nations, Geneva, Friday November 18, 2005, [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7215c82a0f292e07c12570c7002f2dba/\\$FILE/Go545061.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7215c82a0f292e07c12570c7002f2dba/$FILE/Go545061.pdf) (accessed February 22, 2010), para. 18. Human Rights Watch translation.

¹⁴⁷ Beghal’s acquired French nationality was rescinded in December 2006, after his conviction.

soles of his feet, the pulling out of toe nails and teeth, sleep deprivation, and deafening noises. Under torture, he confessed alleged plans to attack US interests in France.

Once extradited to France, in October 2001, Beghal denied many of the statements he had made in the UAE and told the investigating judge about the conditions and treatment during detention in the UAE. The forensic examination ordered by the judge immediately after the interrogation revealed some traces of the kind of treatment Beghal reported, and the doctor noted a “post-traumatic effect of the alleged events.”¹⁴⁸

The French court nevertheless allowed all of Beghal’s statements made in the UAE as evidence at trial. The court’s logic in doing so reveals the prevailing view that statements made under coercion have value insofar as corroborated by other elements, including statements made to the French investigating judge: “Even if Djamel Beghal would progressively retract, and then definitively do so at the court hearing, the statements he made in the United Arab Emirates, it must be acknowledged that the essence of these, manifestly confirmed during his first hearing with the investigating judge [in France], would be in any event confirmed by numerous investigations.”¹⁴⁹ The Paris Appeals Court would later exclude the testimony from the UAE because it was obtained “under conditions not compatible with the respect for the rights of the defense,” but confirm Beghal’s conviction nonetheless.¹⁵⁰

Use of torture evidence at trial against third persons

As the case of Beghal and other cases demonstrate, individuals subjected to abuse in a third country and then prosecuted in France have the opportunity to contest the use of evidence emanating from that abuse, sometimes successfully. It is, however, very difficult for defendants in French courts to challenge information and statements by third parties obtained overseas and invoked against them, even where there are well-founded reasons to suspect they were obtained in abusive conditions. Indeed, courts have allowed as evidence in some cases statements allegedly made under torture by third persons, without taking steps to evaluate the circumstances in which they were obtained.

Part of the evidence in the 2006 trial of the so-called Chechen Network—27 people accused of undergoing paramilitary training in camps in Georgia with a view to committing terrorist

¹⁴⁸ Tribunal de Grande Instance de Paris, 10ème Chambre, Jugement du 15 mars 2005, No. D’affaire : 0125339022, Ministère Public c/Daoudi, Beghal, Bounour et autres (Beghal judgment), p. 142.

¹⁴⁹ Tribunal de Grande Instance de Paris, 10ème Chambre, Jugement du mars 15, 2005, No. D’affaire : 0125339022, p. 29.

¹⁵⁰ Cour d’Appel de Paris, 10ème chambre, section A, Arrêt du 14 décembre 2005, Dossier No. 05/02518, p. 17.

attacks in Europe—came from statements made by a Jordanian man known as Abu Attiya while detained in Amman. Abu Attiya was not a defendant in the case.

A French intelligence report dated November 6, 2002, at the outset of the judicial investigation, stated that Abu Attiya was in charge of preparations in Georgia for chemical attacks in Europe.¹⁵¹

There are references to Abu Attiya in the 305-page first instance verdict from June 2006 and the Appeals Court decision from May 2007. Indeed, the higher court lists Abu Attiya's statements while in custody in Jordan as one of the principal elements of proof of a plot to commit a chemical attack in France.¹⁵² The lawyer for one of the defendants in the Chechen Network trial argued before the Appeals Court that Abu Attiya's testimony should be excluded given the conditions under which it was obtained and "the absence of details about the sources of the information of the DST [initials of the former French intelligence service]."¹⁵³

Abu Attiya told Human Rights Watch about the mistreatment he suffered during the four years he spent in the custody of the Jordanian General Intelligence Department (GID), before being released without charge in December 2007. He said was subject to sleep deprivation and was given pills and injections that made him nervous and shaky. Abu Attiya claims he never confessed to a plot to commit attacks in Europe; he was not allowed to read his "confession" before he was forced to sign it.¹⁵⁴

The GID has a record of arbitrary arrest and abusive treatment of prisoners. Human Rights Watch, among others, has documented the routine use of abusive treatment and torture in GID facilities, including beatings on the soles of the feet (sometimes followed by the "salt and vinegar walk," where detainees are forced to walk in puddles of this mixture in their bare, bleeding feet), beatings with electrical cables, and being forced to stand or sit in uncomfortable positions for hours on end.¹⁵⁵ In research on torture in Jordan's prisons,

¹⁵¹ "Menace terroriste émanant d'un group de moudjahidin ayant combattu en Tchétchénie, susceptible de constituer l'infraction d'association de malfaiteurs ayant pour objet de préparer des actes de terrorisme," DST report from Louis Caprioli, deputy director of the DST, November 6, 2002, p. 12. On file with Human Rights Watch. French court documents refer to him as Abou Attiya.

¹⁵² Cour d'Appel de Paris, Arrêt du 22 mai 2007, Dossier No. 06/05712, p. 100. On file with Human Rights Watch.

¹⁵³ *Ibid.*, p. 81.

¹⁵⁴ Human Rights Watch interview with Adnan Muhammad Sadiq Abu Najila (Abu Attiya), Swaqa, Jordan, August 21, 2007.

¹⁵⁵ See Human Rights Watch, *Suspicious Sweeps: the General Intelligence Department and Jordan's Rule of Law Problem*, vol. 18, no. 6(E), September 2006, <http://www.hrw.org/reports/2006/jordan0906/jordan0906web.pdf>; and Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan*, ISBN: 1-56432-300-5, April 2008, <http://hrw.org/reports/2008/jordano408>.

Human Rights Watch found that Islamists accused or convicted of crimes against national security face greater abuse than ordinary prisoners.¹⁵⁶

Judicial cooperation with countries that torture

The Chechen network investigation illustrates another cause for concern: judicial cooperation with countries with poor records on torture in order to gather information useful to criminal investigations in France. Information gathered by French investigative judges through “international inquiry commissions” enjoys considerable legitimacy in French courts. A French investigating judge traveled to Amman and submitted questions for Abu Attiya to Jordanian authorities. When told that Abu Attiya has alleged ill-treatment in Jordanian custody, the investigating judge told Human Rights Watch, “I don’t know anything about that.”¹⁵⁷

The same French judge also traveled to Syria with a list of questions for a man named Said Arif, who would become one of the main figures in the Chechen Network trial. These questions were presented at the trial accompanied by “answers” in parenthesis.¹⁵⁸ All of the evidence emanating from Arif’s detention in Syria was eventually excluded from trial because the court accepted Arif’s claims that he was tortured throughout the year he spent in the custody of the Syrian secret service. Arif described inhuman conditions, isolation, beatings, and torture with a television cable and a tire. He told French officials, “I was forced to admit facts I didn’t know, ignoring, up until the last day of my detention, that there was an international inquiry commission and without the assistance of a lawyer.”¹⁵⁹ Arif was convicted in June 2006 of membership in a terrorist organization and sentenced to nine years in prison.

Torture is a serious, well-documented problem in Syria, especially during interrogations. Methods reported by former prisoners, detainees and human rights organizations include electrical shocks, pulling out of fingernails, burning genitalia, forcing objects into the rectum,

¹⁵⁶ See Human Rights Watch, *Torture and Impunity in Jordan’s Prisons*, October 2008, <http://www.hrw.org/en/reports/2008/10/08/torture-and-impunity-jordan-s-prisons-o>.

¹⁵⁷ Human Rights Watch telephone interview with former investigating judge, April 15, 2008.

¹⁵⁸ Document 3685, evidence submitted at trial, cited in the written conclusions of Said Arif’s defense lawyer, Sébastien Bono, p. 71. On file with Human Rights Watch.

¹⁵⁹ Procès-Verbal d’Interrogatoire, Septembre 13, 2004, Tribunal de Grande Instance de Paris, Ref. Gen : 02.312.3909/5, Ref. Cab. : 1449. On file with Human Rights Watch.

beating, freezing temperatures, and bending people into the frame of a wheel and whipping exposed body parts.¹⁶⁰

Judicial cooperation, while an important tool in efforts to prosecute terrorism offenses, cannot turn a blind eye to torture and ill-treatment without running afoul of France's international obligations under the global ban on torture. Investigating judges must make every effort to ensure that this kind of cooperation does not encourage or benefit from such abuse.

Oversight and Accountability

Until just three years ago France lacked any kind of parliamentary oversight of intelligence services. An October 2007 law created a special parliamentary "delegation" composed of four representatives from each chamber of parliament. The delegation has a weak mandate: it can evaluate the general activities, budget and the organization of French intelligence services, but it does not have powers to examine operational activities, executive instructions to the services, or cooperation with foreign intelligence services or international organizations.

The delegation may not have access to any information which the authorities believe could endanger the anonymity, safety or life of a person, whether connected to one of the intelligence services or not, or the methods used to acquire information. Finally, the delegation can only summon the heads of the service, not staff.¹⁶¹ The delegation, which officially began its work in December 2007, produced its first report in December 2009, despite its obligation to publish a report on its activities every year.¹⁶² According to the report, the delegation held monthly internal meetings, and eleven meetings with senior intelligence officials, including directors of intelligence services and President Sarkozy's national intelligence coordinator, Bernard Bajolet. The report does not contain information on the dates, locations and content of these meetings, and provides little detail about the issues addressed by the delegation or its conclusions. The delegation's weak mandate and the lack of transparency to date with respect to its endeavors raise serious doubts about the role it can play in providing proper democratic oversight.

¹⁶⁰ US Department of State, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices – 2008: Syria," February 29, 2009, <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119127.htm> (accessed September 21, 2009). See also Human Rights Watch, *World Report 2008*, chapter on Syria, <http://hrw.org/englishwr2k8/docs/2008/01/31/syria17619.htm>.

¹⁶¹ Law 2007-1443 of 9 October 2007 creating a parliamentary delegation on intelligence, article 1.

¹⁶² The report is available at www.assemblee-nationale.fr/13/rap-off/i2170.asp. For a brief explanation of the delegation's mandate, see www.assemblee-nationale.fr/connaissance/delegation_renseignement.asp.

Detailed Recommendations

To the Government of the United Kingdom

- 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.
- Clarify procedure rules on admissibility of torture evidence in criminal and civil proceedings to make clear 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.
- Publicly accept that the UN Convention against Torture applies fully to the UK, including all UK officials, with both criminal and civil law consequences, anywhere in the world.
- Submit its overdue fifth periodic report to the UN Committee against Torture.
- Ensure that the inquiry into allegations of complicity by British security services in torture and ill-treatment of detainees abroad is transparent and comprehensive, and includes assessment of:
 - the degree to which UK government policy, and decisions by UK ministers and officials, contributed to such abuse;
 - whether the guidance provided to the members of the security services in the interrogation of suspects overseas and on cooperation with foreign intelligence agencies was adequate to prevent complicity; and
 - the adequacy of mechanisms of oversight of the security services, including that provided by the Intelligence and Security Committee.
- 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.
- Publish without delay current and historic guidance to the intelligence services on interrogation of suspects overseas.
- Establish a permanent select committee of parliament on intelligence and security, with a strong mandate to examine both policy and operations of UK intelligence services.
- 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 departments, including the Foreign and Commonwealth Office, and reliable public reports about human rights record of the country providing the information; 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 country providing the information.

To the Government of Germany

- 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.

To the Government of France

- 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.
- Amend the codes governing criminal and civil proceedings to state explicitly that evidence extracted under torture or ill-treatment, regardless of its provenance, is not admissible at any stage of legal proceedings and investigations by judges and prosecutors, and to make clear 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.
- Impose a statutory obligation on investigating judges or any other competent judicial or law enforcement authority tasked with terrorism investigations to assess whether intelligence material was obtained under torture or ill-treatment.
- Ensure that investigating judges or any other competent judicial or law enforcement officers who submit questions to authorities in third countries for interrogation purposes are required to inquire about the conditions and treatment of the detainee.
- Reform the current parliamentary delegation on intelligence matters to create a permanent committee with a robust mandate to examine both the policy and operations of French intelligence services, including cooperation arrangements with third countries.

- Impose a strict separation between law enforcement/judicial activities and intelligence gathering activities in the Central Agency for Domestic Intelligence (Direction central du renseignement intérieur, DCRI).
- 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 Ministry of Foreign Affairs, 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.

To the European Union

- The EU High Representative for Foreign Affairs and Security Policy should unequivocally assert the EU's repudiation of reliance on intelligence obtained from third countries through torture or ill-treatment.
- The European Commissioner on Fundamental Rights should ensure that the next periodic assessment of implementation of EU Guidelines on Torture and Other Cruel, Inhuman or Degrading Treatment include intensive scrutiny of counterintelligence cooperation between EU member countries and third countries, with a view to updating the operational part of the Guidelines to ensure that:
 - The EU communicates clearly in political dialogue with third countries its repudiation of torture intelligence; and

- The EU urges third countries to take effective measures to ensure that information obtained under torture or ill-treatment is not shared with intelligence services in EU member states.
- The European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) should be seized of the issue of member states’ reliance on intelligence obtained from third countries through torture and ill-treatment, and consider the appointment of a rapporteur to look into the matter. The Committee should also request the Commission and the Council to report to it on measures taken to address the problem.

To the Council of Europe

- The Commissioner for Human Rights and the Committee for the Prevention of Torture should, in their future communications with and visits to France, Germany and the United Kingdom, inquire about:
 - steps to create appropriate legal frameworks and accountability mechanisms for intelligence cooperation with third countries;
 - internal guidelines for national intelligence services with respect to the receipt and use of information from partner services with poor records on torture; and
 - national law and jurisprudence on the use of torture evidence in any proceedings, including judicially authorized investigations, as well as on the burden of proof.
- The Parliamentary Assembly’s Committee on Legal Affairs and Human Rights should be seized of the issue of member states’ reliance on intelligence obtained from third countries through torture and ill-treatment, and consider the appointment of a rapporteur with a view to establishing the extent of such practices throughout the Council of Europe region and formulating recommendations for steps to bring such practices to an end.

To the UN Committee against Torture

- Develop an authoritative general comment on article 15 of the Convention against Torture prohibiting the use of statements made under torture in any proceedings. This general comment should address outstanding questions in international law with respect to:
 - scope of “any proceedings”

- the burden and standard of proof where it is alleged that evidence was extracted under torture; and
- the use of evidence obtained as a result of investigations prompted by statements extracted under torture (fruit of the poisoned tree).
- Develop an authoritative general comment on extraterritorial application of the Convention and clarify, among other issues, the elements of individual and state complicity.
- Ensure that future reviews of France, Germany and the United Kingdom include attention to counterterrorism intelligence cooperation with countries known for torture, guidelines for interrogations of detainees in third countries, and jurisprudence on the use of torture evidence in legal proceedings.

To the Special Rapporteur on human rights while countering terrorism and the Special Rapporteur on torture

- Continue to draw attention to the issues discussed in this report and contribute to the development of clear guidelines for intelligence agencies with respect to cooperation with countries known for torture.

To the UN Human Rights Committee

- Ensure that future reviews of France, Germany and the United Kingdom include attention to counterterrorism intelligence cooperation with countries known for torture, guidelines for interrogations of detainees in third countries, and jurisprudence on the use of torture evidence in legal proceedings.

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“No Questions Asked”

Intelligence Cooperation with Countries that Torture

Torture is prohibited under international law. No exceptions are allowed. Yet the governments of France, Germany and the United Kingdom are engaged in ongoing cooperation with foreign intelligence services in countries that routinely use torture. These European governments use foreign torture information for intelligence and policing purposes. And weak rules on the use of such material as evidence mean that it can end up as part of legal proceedings.

Intelligence cooperation is important to countering terrorism. But regular receipt of, and reliance on, foreign torture information implicitly validates the use of unlawful methods to acquire information. The practice of using such information and public statements affirming the legitimacy of doing so risks creating a market for torture intelligence. It violates the positive obligation under international law to prevent and punish torture and can amount to complicity in such abuse. And using torture as evidence is a clear breach of the global torture ban.

France, Germany and the UK can engage in necessary intelligence cooperation without undermining the global torture ban. To do so, they must make genuine inquiries with sending countries to determine whether torture was used to obtain it and what steps the authorities have taken to hold to account those responsible for that abuse. Cooperation should be suspended in particular cases where there are grounds to believe torture or ill-treatment were used to obtain shared information. There is also a need for tighter parliamentary oversight of intelligence cooperation, and stronger rules to prevent torture material from entering the judicial process.

Europe has been forced to confront its complicity in US counterterrorism abuses, including hosting secret detention sites and facilitating extraordinary renditions. It is time for France, Germany and the UK to take responsibility for their role in overseas abuse, and to ensure that their intelligence cooperation does not perpetuate it.