

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



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## ECCHR Alternative Report

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**to the fifth periodic report of the Federal Republic of Germany**

**to the Committee against Torture (CAT/C/DEU/5)**

**Berlin, October 2011**

## Introduction

The European Center for Constitutional and Human Rights (hereinafter: ECCHR) welcomes the invitation to non-governmental organizations to submit alternative reports to the Committee against Torture (hereinafter: the Committee) and takes the opportunity to address parts of the state report submitted by the Federal Republic of Germany on 15 December 2009 in light of the 47<sup>th</sup> session of the Committee in November 2011. ECCHR represents through its lawyers and cooperating attorneys two of the individual cases mentioned in the state report before German and other domestic courts, Murat Kurnaz<sup>1</sup> and Khaled El-Masri.<sup>2</sup> ECCHR likewise closely followed the German parliamentary inquiry regarding the three individual cases mentioned in the state report (paras. 80-88) and published an alternative report on the inquiry.<sup>3</sup> ECCHR provided the Committee with written information for the list of issues regarding Germany in March 2011.

ECCHR focuses in its alternative report to the Committee on the following issues: The use of evidence allegedly obtained under torture or other cruel, inhuman or degrading treatment by German criminal courts (A.), the intelligence agencies' use of evidence obtained under torture or other cruel, inhuman or degrading treatment (B.), information sharing (C.), interrogation of prisoners in suspected torture centres (D.), requesting extradition to ensure prosecution (E.), the national preventive mechanism (F.), and presents possible recommendations by the Committee to Germany on each issue addressed.

The individual cases referred to in this alternative report are only exemplary ones and not comprehensive as to their number and their facts.

In its report to the Committee, the German Federal Government considers the “gathering and utilization of information” as one of four key issues. The issue of information sharing with foreign authorities possibly resulting in torture and ill-treatment of individuals is, however, not addressed in the report. In its written replies to the list of issues, the Government of Germany shortly comments on the latter issue (para. 220).

### **A. The use of evidence allegedly obtained under torture or other cruel, inhuman or degrading treatment by German criminal courts**

German criminal courts did not strictly exclude evidence allegedly obtained under torture and thus generally allowed the use of witness statements despite well-founded allegations of torture.

In the case of Mounir El-Motassadeq<sup>4</sup>, the Hanseatic Higher Regional Court in Hamburg convicted El-Motassadeq in connection with the 11 September 2001 attacks in New York and Washington.<sup>5</sup> Its judgment dealt, *inter alia*, with the question whether witness testimonies allegedly extracted by torture or other cruel, inhuman or degrading treatment by U.S. authorities could be used in the trial to support

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<sup>1</sup> For more information see ECCHR's Spanish Guantánamo case: [www.ecchr.de/index.php/us\\_accountability.html](http://www.ecchr.de/index.php/us_accountability.html).

<sup>2</sup> For more information see [www.ecchr.de/index.php/el\\_masri\\_case.html](http://www.ecchr.de/index.php/el_masri_case.html).

<sup>3</sup> The alternative report is available (in German only) under [www.ecchr.eu/?file=tl\\_files/Dokumente/Publikationen/Folter%20und%20die%20Verwertung.pdf](http://www.ecchr.eu/?file=tl_files/Dokumente/Publikationen/Folter%20und%20die%20Verwertung.pdf).

<sup>4</sup> Oberlandesgericht Hamburg, Judgment of 19 August 2005, case no. IV-1/04.

<sup>5</sup> For the facts of the case, see Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, paras. 26-362.

the charges against the accused.<sup>6</sup> The U.S. authorities had refused to supply information concerning the circumstances of the interrogations of the witnesses Ramzi Binalshibh, Khalid Sheikh Mohammed and Mohamed Ould Slahi. While recognising that Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: CAT) was generally applicable,<sup>7</sup> the Court concluded in its final judgment that this article should not be read so as to preclude interrogation summaries when the veracity of the alleged use of torture for the purpose or in the process of obtaining these statements could not be fully established.<sup>8</sup> The judgment has been criticized by various actors.<sup>9</sup>

The position by the Higher Regional Court has been upheld by the German Government in its Fifth Periodic Report<sup>10</sup> and in its written replies to the list of issues.<sup>11</sup> In this context, such a reading of the wording of Article 15 of the CAT ("[...] any statement which is *established* to have been made as a result of torture [...]", emphasis added) is, however, in our view flawed for several reasons and in violation of the CAT:

In view of the burden of proof, the Committee against Torture has found that the State bears the burden of proving whether or not testimonies resulted from the use of torture.<sup>12</sup> The general view taken by German courts is, in contrast, that whoever relies on the preclusion of evidence due to the use of unlawful means bears the burden of proof as regards the circumstances in which the disputed evidence was obtained.<sup>13</sup> At the same time, the German courts have, however, also implied that *indications* suggesting that a testimony has been obtained through force or deception applied by interrogating officials can be sufficient to preclude under procedural law the taking into account of resulting statements.<sup>14</sup>

The Committee against Torture has emphasised that Article 15 of the CAT "[...] implies, consequently, an obligation for each *State party* to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction [...] have been made as a result of torture."<sup>15</sup> For this reason it is noted in academic literature that "[a] state would clearly not comply with this positive duty if it were to impose the burden of proof for the requirements of Article 15 UNCAT on a private person."<sup>16</sup> The burden of proof shifts to the State as long and as soon as the torture allegations are generally well-

<sup>6</sup> It should be noted, however, that the court emphasised that, despite finding that it would not preclude the disputed evidence, it explained it did not base its decision on the witness testimonies (Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, para. 829).

<sup>7</sup> Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, para. 810.

<sup>8</sup> Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, para. 811.

<sup>9</sup> See, e.g., Amnesty International, Statement of 19 August 2005 to the UN Special Rapporteur on Torture, UN 292/2005; Minority Opinion of the House of Lords: Lord Bingham in *A and others v. Secretary of State for the Home Department* [2005] UKHL 71, [60]; Manfred Nowak/Elizabeth McArthur, The United Nations Convention Against Torture - A Commentary, Art. 15 CAT, para. 59f.

<sup>10</sup> Fifth Periodic Report - Germany, CAT/C/DEU/5, para. 68.

<sup>11</sup> Written replies by the Government of Germany to the list of issues, 30 August 2011, CAT/C/DEU/Q/5/Add.1, para. 179.

<sup>12</sup> See CAT, *G.K. v. Switzerland*, No. 219/2002, para. 6.11; see also CAT, *P.E. v. France*, No. 193/2001, para. 6.3; Manfred Nowak/Elizabeth McArthur, The United Nations Convention Against Torture - A Commentary, Art. 15 CAT, para. 82.

<sup>13</sup> See BGHSt 16, 164.

<sup>14</sup> BGHSt 42, 170.

<sup>15</sup> See CAT, *G.K. v. Switzerland*, No. 219/2002, para. 6.10., emphasis added.

<sup>16</sup> Tobias Thienel, The Admissibility of Evidence Obtained by Torture under International Law, *The European Journal of International Law*, Vol. 17, No. 2, 2006, p. 355.

founded.<sup>17</sup> Provided that the allegations are, in general, plausible, the Committee noted that "[...] the State party must use the means at its disposal to ascertain the veracity of such allegations."<sup>18</sup> In the case of El-Motassadeq, the torture allegations were perfectly plausible as there was sufficient and well-founded information pointing to the - later verified<sup>19</sup> - use of, for example, waterboarding against Khalid Sheikh Mohammed by U.S. authorities. At the time of the judgment, this information was also available to the Hamburg court<sup>20</sup> which nevertheless came to the conclusion that the information was not sufficiently unambiguous.<sup>21</sup> In this respect, however, the "letter and spirit of Article 15 CAT"<sup>22</sup> suggests that the test applied in the British case of *A. v. Others* by Lord Bingham is preferable: "If [the Special Immigration Appeals Commission] is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence."<sup>23</sup> In view of the court's decision in the El-Motassadeq case, Lord Bingham (House of Lords) for this reason concluded: "This is not a precedent which I would wish to follow."

ECCHR takes the view that evidence should be precluded when there are indications that the evidence at issue resulted from the use of torture. Equally, we share the opinion expressed by Manfred Nowak, then UN Special Rapporteur on Torture, in view of the Hanseatic Higher Regional Court's judgment in the El-Motassadeq case who stated 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 about the torture and enforced disappearance 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."<sup>24</sup> A similar statement was given by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, who, in light of the El-Motassadeq decision, also supported shifting the burden of proof to the State.<sup>25</sup> For that reason, ECCHR also supports the Committee against Torture's request raised in the List of Issues that Germany should comment on whether it "intends to shift the burden of proof from the defendant to the prosecution to prove, beyond reasonable doubt, that a confession *was not* obtained by unlawful means."<sup>26</sup> So far, Germany has not sufficiently answered this question in its written replies.<sup>27</sup> In our view, Germany must preclude evidence as soon as there are indications that it was obtained by torture. Such an approach is in line with the general view taken by courts, e.g. the European Court of Human Rights, on the question of whether or not a person may be extradited to a

<sup>17</sup> CAT, *G.K. v. Switzerland*, No. 219/2002, para. 6.11; see also CAT, *P.E. v. France*, No. 193/2001, para. 6.6.

<sup>18</sup> CAT, *P.E. v. France*, No. 193/2001, para. 5.3.

<sup>19</sup> See the Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Office of the Principal Deputy Assistant Attorney General, May 30, 2005, page 6f.

<sup>20</sup> Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, para. 816.

<sup>21</sup> Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, para. 825.

<sup>22</sup> Manfred Nowak/Elizabeth McArthur, *The United Nations Convention Against Torture - A Commentary*, Art. 15 CAT, para. 84.

<sup>23</sup> House of Lords, Session 2005-06, [2005] UKHL 71, Judgments - *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004) A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)* (Conjoined Appeals), para. 56.

<sup>24</sup> Report by the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. No. A/61/259, page 17.

<sup>25</sup> Report by the Commissioner for Human Rights Mr. Thomas Hammarberg, CommDH (2007) 14, para. 174.

<sup>26</sup> Committee against Torture, List of issues to be considered during the examination of the fifth periodic report of GERMANY (CAT/C/DEU/5), para. 49 (emphasis added).

<sup>27</sup> Written replies to the list of issues by the Government of Germany, CAT/C/DEU/Q/5/Add.1, para. 179.

different state when there is a real risk and substantial grounds to believe that the person will subsequently be subjected to torture.<sup>28</sup>

In view of German procedural law, the Hamburg Court found in *El-Motassadeq* that the circumstances of the case did not lead to a preclusion of the disputed evidence under Article 136a of the German Code of Criminal Procedure<sup>29</sup> (hereinafter: StPO) on Prohibited Methods of Examination. Article 136a of the StPO concerns the examination of suspects but applies accordingly to witness statements.<sup>30</sup> The Court noted that Article 136a of the StPO applies primarily to prohibited methods of examination used by German authorities but can, however, also apply analogously to private persons from a different state where the evidence was obtained through an extremely grave breach of human rights.<sup>31</sup> The Court then came to the conclusion that a period of three years during which the witnesses Ramzi Binalshibh and Khalid Sheikh Mohammed were, according to available information, undoubtedly held *incommunicado* and denied a fair trial, freedom and personal contacts was not sufficient to establish a grave breach of human rights precluding summaries of their interrogations according to Article 136a of the StPO.<sup>32</sup> The Court argued by pointing out that such a treatment of terrorist suspects is assumed to be permitted under U.S. laws.<sup>33</sup> With this ruling, the Court, however, failed to acknowledge the graveness of the perpetrated human rights violations. The Human Rights Committee has found that an *incommunicado* detention for a period of three years amounts to torture<sup>34</sup> and that forced disappearance of persons constitutes treatment prohibited by Article 7 of the International Covenant on Civil and Political Rights (hereinafter: ICCPR).<sup>35</sup> These human rights violations are also covered by Article 15 of the CAT. For that reason, the disputed evidence should have been precluded according to an analogous application of Article 136a of the StPO.

Finally, another crucial case must be mentioned in the context of Article 15 of the CAT and the use of evidence benefitting from torture and coercive circumstances – the case of Aleem Nasir. Nasir was born in Pakistan and obtained German citizenship in 1992. In 2009, he was sentenced by a German court to eight years in prison for his membership in a foreign terrorist group. Before the trial, Nasir had been detained in Islamabad, Pakistan, where he was tortured by the Pakistani intelligence agency ISI during the interrogations about his terrorist activities.<sup>36</sup> As a result of the interrogations and the ill-treatment, Nasir provided the Pakistani intelligence agency with information on Al-Qaeda and testified on his own activities. During his detention in the prison in Islamabad, he was visited by a member of

<sup>28</sup> See, for example, ECtHR, *Soering v. The United Kingdom*, Judgment of 7 July 1989, Application Number 14038/88, para. 88.

<sup>29</sup> Section 136a of the German Code of Criminal Procedure [Prohibited Methods of Examination]: "(1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited. (2) Measures which impair the accused's memory or his ability to understand shall not be permitted. (3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use."

<sup>30</sup> According to Article 69 para. 3 of the StPO.

<sup>31</sup> Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, para. 826.

<sup>32</sup> Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, para. 826.

<sup>33</sup> Oberlandesgericht Hamburg, Judgment, case no. IV-1/04, para. 826.

<sup>34</sup> See Human Rights Committee, *El-Megreisi v. Libyan Arab Jamahiriya*, No. 440/1990, para. 5.4. See also UN Commission on Human Rights, Comm. Res. 2004/41, para. 8.

<sup>35</sup> See Human Rights Committee, *Rafael Mojica v. Dominican Republic*, No. 449/1991, para. 5.7. See also Manfred Nowak/Elizabeth McArthur, *The United Nations Convention Against Torture - A Commentary*, Art. 15 CAT, para. 65.

<sup>36</sup> See German Federal Court of Justice (BGH), Order of 14 September 2010, 3 StR 573/09.

the German embassy whom Nasir told about the treatment he had received from the Pakistani intelligence agency. To this point, Nasir had not had the chance to consult a lawyer; moreover, it was part of this meeting to assess whether he wishes to consult one.<sup>37</sup> In addition, Nasir told the embassy member about his activities. After two months in prison, Nasir was released and returned to Germany in 2008. After his return to Germany, he was arrested again and charges were brought against him before the Higher Regional Court Koblenz. The indictment was based to a great extent on information provided by the Pakistani intelligence agency. Before the Higher Regional Court Koblenz Nasir revoked his confession as it had been obtained and made as a result of torture. While the Higher Regional Court Koblenz did not base its final judgment on the statements given to the Pakistani intelligence agency, the judgment was nevertheless based to a large extent on the confession made in presence of the German embassy member.<sup>38</sup> The German Federal Court of Justice (Bundesgerichtshof) reviewed the case and found that the conversation the embassy member and Nasir had had did not resemble the type of formal interrogations Article 136a of the StPO addresses. For that reason the Federal Court of Justice did not find it necessary to preclude the given testimony. Other relevant breaches of law were not challenged in the appeal to the Federal Court of Justice.

By using the evidence obtained by diplomatic/consular staff of the embassy when visiting a tortured suspect in the foreign detention centre and place of torture, German courts violated the principle of fair trial and Article 15 of the CAT. The court abused the difficult situation of the tortured suspect, who talked with the embassy staff to improve his own situation. The special circumstances of the situation and the consular assistance to a German citizen differ from the situation in which German law enforcement or intelligence officials interrogate a person in a foreign detention centre. Nevertheless, these circumstances should not lead to a deteriorating outcome for the detained, especially given the role of consular staff to support German citizens abroad. German courts thus misused the position of the consular official and profited from the serious situation of the detained, which has been caused by torture in the detention centre.

## **Recommendation**

Evidence should be precluded in proceedings when there are indications that the evidence at issue resulted from the use of torture. In addition, Germany should shift the burden of proof from the defendant to the prosecution and the court to prove, beyond reasonable doubt, that a confession *was not* obtained by unlawful means. Furthermore, Germany should refrain from using evidence obtained by diplomatic personal when visiting a tortured suspect in a foreign detention facility.

## **B. The intelligence agencies' use of evidence obtained under torture or other cruel, inhuman or degrading treatment**

German officials such as the former Federal Minister of Justice or the former Federal Minister of the Interior have held that intelligence services in particular will continue to rely on statements obtained through the use of torture for the purpose of averting future harms (*Gefahrenabwehr*).<sup>39</sup> These

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<sup>37</sup> German Federal Court of Justice (BGH), Order of 14 September 2010, 3 StR 573/09, para. 5.

<sup>38</sup> See Oberlandesgericht Koblenz, Judgment of 13 July 2009, case no. 2 StE 6/08-8.

<sup>39</sup> Then Minister of Justice Brigitte Zypries, Interview with weekly magazine Die Zeit, „Zypries: Absolutes Folterverbot gilt in Deutschland und weltweit“, 26 January 2006, available at REGIERUNGonline: [www.bundesregierung.de/Content/DE/Archiv16/Interview/2006/01/2006-01-26-zypries-absolutes-folterverbot-gilt-in-deutschland-und-weltweit.html](http://www.bundesregierung.de/Content/DE/Archiv16/Interview/2006/01/2006-01-26-zypries-absolutes-folterverbot-gilt-in-deutschland-und-weltweit.html); then Minister of the Interior Wolfgang Schäuble, Spiegel online, 1

statements were not explicitly revoked by the respective current Ministers. In its Fifth Periodic Report, Germany has merely noted that official bodies will take into account the "questionable value of the testimony" when relying on the evidence to avert future harms.<sup>40</sup>

The Committee against Torture has held that States Parties are obliged by Article 4 of the CAT to prosecute complicity in acts of torture.<sup>41</sup> Furthermore, Article 7 of the ICCPR, for example, is interpreted by the Human Rights Committee so as to encompass an obligation to hold those "[...] tolerating or perpetrating prohibited acts [...]" responsible for a violation of Article 7 of the ICCPR.<sup>42</sup>

In a Joint Study presented by several UN Special Rapporteurs and Working Groups it is held "[...] that a country is complicit in the secret detention of a person [...] [w]hen a State knowingly takes advantage of the situation of secret detention by sending questions to the State detaining the person or by soliciting or receiving information from persons who are being kept in secret detention."<sup>43</sup> Martin

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January 2006, „Schäuble beharrt auf Nutzung von Folter-Geständnissen“, available at: [www.spiegel.de/politik/deutschland/0,1518,393047,00.html](http://www.spiegel.de/politik/deutschland/0,1518,393047,00.html).

<sup>40</sup> Fifth Periodic Report, CAT/C/DEU/5, para. 69.

<sup>41</sup> Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention - Tajikistan, Conclusions and Recommendations of the Committee against Torture, 7 December 2006, CAT/C/TJK/CO/1, para. 5: "The State party should ... ensure that acts of torture by State agents, including the acts of attempting to torture or complicity in it, ordering or participating in torture, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed."

<sup>42</sup> UN Human Rights Committee, General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, UN Doc. HRI/GEN/1/Rev.1, <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?OpenDocument>, para. 13.

<sup>43</sup> Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development – Joint Study on Global Practices in Relation to Secret Detention in the Contest of Countering Terrorism of the Special Rapporteur in the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; And The Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, A/HRC/13/42, 19 February 2010, para. 159: "[...] For the purposes of the present study, the experts state that a country is complicit in the secret detention of a person in the following cases: [...] When a State knowingly takes advantage of the situation of secret detention by sending questions to the State detaining the person or by soliciting or receiving information from persons who are being kept in secret detention. This includes at least the following States: [...] Germany, in the case of Muhammad Haydar Zammar, who was reportedly interrogated on at least one occasion, on 20 November 2002, by agents of German security agencies while he was secretly held in the Syrian Arab Republic. The Government reported having been informed about four cases of renditions or enforced disappearances concerning the Federal Republic of Germany: the cases of Khaled El-Masri, Murat Kurnaz, Muhammad Haydar Zammar and Abdel Halim Khafagy, which occurred between September 2001 and the end of 2005. However, the German authorities did not directly or indirectly participate in arresting these persons or in rendering them for imprisonment. In the cases of El-Masri and Khafagy, the German missions responsible for consular assistance had no knowledge of their imprisonment and were therefore unable to ensure that their rights were observed or guarantee consular protection; in the cases of Zammar and Kurnaz, the German authorities worked intensively to guarantee consular protection. However, they were denied access to the detainees and were thereby prevented from effectively exercising consular protection. In a letter dated 9 December 2009, the German Federal Ministry of Justice further reported that it had become aware of the case of Mr. Kurnaz on 26 February 2002, when the Chief Federal Prosecutor informed the Ministry that it would not take over a preliminary investigation pending before the Prosecution of the Land of Bremen. The Office of the Chief Federal Prosecutor had received a report from the Federal Criminal Police Office on 31 January 2002 that, according to information by the Federal Intelligence Service, Mr. Kurnaz had been arrested by United States officials in Afghanistan or Pakistan. In the case of Mr. el-Masri, on 8 June 2004, the Federal Chancellery and the Federal Foreign Office received a letter from his lawyer that Mr. el-Masri had been abducted in the former Yugoslav Republic of Macedonia on 31 December 2003, presumably transferred to Afghanistan and kept there against his will until his return to Germany on 29 May 2004. The Federal Ministry of Justice was informed about these facts on 18 June 2004. The experts note, however, that according to the final report of a Parliamentary Commission of Inquiry, the

Scheinin, the then Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, has emphasised that "[...] States which know or ought to know that they are receiving intelligence from torture or other inhuman treatment, or arbitrary detention, and are either creating a demand for such information or elevating its operational use to a policy, are complicit in the human rights violations in question."<sup>44</sup> Furthermore, the Special Rapporteur on Counterterrorism notes 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"<sup>45</sup> and adds that "[s]uch involvement is also irreconcilable with the obligation erga omnes of States to cooperate in the eradication of torture."<sup>46</sup>

In view of the use of evidence to avert future harms even where the evidence has been obtained through torture, Germany, however, continues to rely on such evidence: "The same applies to the use of evidence to avert a threat. Here, too, clues indicating that torture has been used already point to the questionable value of the testimony. The security authorities take account of this fact in their preventive measures. The evaluation of clues, taking account of the quality of the source, is one of the core competences of the security authorities and indispensable for its practical work."<sup>47</sup>

ECCHR assumes that taking advantage of the prior use of torture constitutes a breach of Germany's obligations under Article 4 (1) of the CAT. While the relevant wording of Article 4 of the CAT ("[...] complicity or participation in torture [...]") is, in this respect, not entirely clear, there can still be no doubt as to the content of this provision which covers also the tacit consent to torture. The Committee against Torture has held in its General Comment No. 2 that "[...] States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity [...] 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. The Committee has concluded that States parties are in violation of the Convention when they fail to fulfil these obligations." In our opinion, making use of evidence obtained through torture implicitly legitimises its use and constitutes complicity in acts of torture.

## Recommendation

Germany should actively ensure that all official bodies, including intelligence agencies, refrain from making use of intelligence resulting from torture and sanction those who do not. Under Article 4 of the

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Government became aware of the case of Mr. el-Masri on 31 May 2004, when the Ambassador of the United States informed the Federal Minister for the Interior of Germany [...]."

<sup>44</sup> Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. A/HRC/10/3, 4 February 2009, para. 55.

<sup>45</sup> Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. A/HRC/10/3, 4 February 2009, para. 55; the report also refers to General Assembly Resolution 56/83, annex, International Law Commission draft articles on responsibility of States for internationally wrongful acts, arts. 40-41.

<sup>46</sup> Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. A/HRC/10/3, 4 February 2009, para. 55.

<sup>47</sup> Fifth Periodic Report, CAT/C/DEU/5, para. 69.

CAT, Germany should adopt domestic legislation to ensure that an act, including acquiescence, by any person which constituted complicity or participation in torture constitutes an offence under German criminal law. In case Germany is of the view that its domestic legislation is sufficient in the latter regard, it should assure the prosecution of those complicit in torture through acquiescence.

### C. Information sharing

Germany's State Report fails to address how national authorities ensure that sensitive personal data shared with foreign intelligence agencies does not ultimately result in the ill-treatment or torture of terrorist suspects. It fails equally to explain how Germany ensures that parliamentary bodies can exercise control over intelligence sharing. ECCHR is concerned that Germany continues to cooperate and share sensitive information with States known to be involved in gross human rights violations, including torture and ill-treatment, and thus facilitates ill-treatment in individual cases.

Then UN Special Rapporteur on Counterterrorism Martin Scheinin has pointed out that he is "[...] concerned about the supply of information to foreign intelligence services, when there are no adequate safeguards attached to the further distribution of such information among other governmental agencies in the receiving State, such as law enforcement and immigration agencies which have the power to arrest and detain a person."<sup>48</sup>

We take the position that the sharing of information with authoritarian regimes can, under certain circumstances, amount to complicity in acts of torture or ill-treatment and thus an internationally wrongful act by Germany. It constitutes a breach of Article 16 of the Draft articles on Responsibility of States for Internationally Wrongful Acts which states that "[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."<sup>49</sup> Thus it is required, firstly, that there is a causal link between the act of a State and the commission of an internationally wrongful act by another State. Secondly the first State must be aware of the other State's unlawful act it is thereby facilitating.

Depending on the foreseeability of subsequent actions by local officials, information sharing can also invoke individual criminal responsibility of the acting officials for complicity in torture, punishable under German and international law.

The case of Mohammed Haydar Zammar demonstrates how Germany contributed to the detention and ill-treatment of terrorist suspects by information sharing. Zammar, a German and Syrian national, was arrested in Morocco in December 2001, handed to the CIA and subsequently detained in the notorious Syrian prison Far Falestin near Damascus. He was sentenced to death by a Syrian court in February 2007 for his membership in the Muslim Brotherhood. Later, this sentence was changed to twelve years imprisonment. Zammar had already been under observation by German intelligence and law enforcement authorities before he left Germany in October 2001 because he was considered to be a

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<sup>48</sup> Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. A/HRC/10/3, 4 February 2009, para. 57.

<sup>49</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001.

supporter of Osama bin Laden. At this stage of the investigations there had, however, not been enough evidence regarding his involvement in terrorist activities.<sup>50</sup> For that reason, the German authorities did not have sufficient grounds to arrest and indict him.<sup>51</sup> The federal criminal police office (Bundeskriminalamt/BKA), however, shared information about Zammar's flight details and further background information with, *inter alia*, members of the FBI and intelligence agencies in the Netherlands and Morocco.<sup>52</sup> This information sharing facilitated Zammar's arrest and detention in Far Falestin.<sup>53</sup> Subsequently, Syrian authorities transferred interrogation results to the German intelligence service BND which were then passed on to several other German authorities. In the following months, German and Syrian authorities continued to exchange information and German officials from intelligence and law enforcement authorities interrogated him in Far Falestin prison.

Other cases following the one of Zammar and the findings of the German parliamentary inquiry as well as several reports by European organizations and the UN are reported in which German authorities allegedly shared information with Afghan, Pakistani or U.S. authorities, resulting in arrests, detention, interrogation and ill-treatments.<sup>54</sup>

In its written replies to the list of issues, the Government of Germany stated in view of establishing whether there is any risk of abuse of shared information that "the Federal Office of Justice will request a diplomatic assurance regarding the treatment or punishment of any persons involved."<sup>55</sup> Diplomatic assurances constitute an established administrative instrument under German law<sup>56</sup> and are considered by governmental bodies to constitute a suitable means to prevent the ill-treatment of an extradited individual.<sup>57</sup> German courts have, however, found that diplomatic assurances are generally not sufficient to guarantee that a person will not be tortured or ill-treated by states with an alarming human rights record.<sup>58</sup> The Federal Constitutional Court emphasised that an extradition would be illegal when the prison conditions in the receiving state fail to meet international standards.<sup>59</sup> An administrative court pointed out that diplomatic assurances are not legally binding, not enforceable and hardly trustworthy.<sup>60</sup> Citing the United Nations High Commissioner for Refugees, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Court of Human Rights, a German court noted that diplomatic assurances can be used for the purpose of evading the international prohibition of torture.<sup>61</sup>

<sup>50</sup> Report by the parliamentary inquiry, Deutscher Bundestag, no. 16/13400, 18 June 2009, available at <http://dipbt.bundestag.de/dip21/btd/16/134/1613400.pdf>, p. 218/219.

<sup>51</sup> Report by the parliamentary inquiry, no. 16/13400, p. 221/222.

<sup>52</sup> Report by the parliamentary inquiry, no. 16/13400, p. 222-225.

<sup>53</sup> 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, 30 January 2007, para. 90.

<sup>54</sup> See, e.g., the case of Rami M., Spiegel Online, „Skorpione und Schlangen“, 28 June 2010, available at: [www.spiegel.de/spiegel/print/d-71123398.html](http://www.spiegel.de/spiegel/print/d-71123398.html), or of Haddid N., Frankfurter Rundschau, „Frankfurter Student in Bagram freigelassen“, 30 January 2011, available at: [www.fr-online.de/politik/frankfurter-student-in-bagram-freigelassen,1472596,7137532.html](http://www.fr-online.de/politik/frankfurter-student-in-bagram-freigelassen,1472596,7137532.html)

<sup>55</sup> Written replies to the list of issues by the Government of Germany, CAT/C/DEU/Q/5/Add.1, para. 220.

<sup>56</sup> See, e.g., in view of the death penalty Article 8 Gesetz über die internationale Rechtshilfe in Strafsachen.

<sup>57</sup> Ministry of the Interior, Administrative rules on the German residence act (Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz), 26 October 2009, para. 60.2.3.

<sup>58</sup> See, e.g., Administrative Court Duesseldorf, 4 March 2009, case no. 11 K 4716/07.A, para. 3; Higher Regional Court Zweibrücken, Order of 29 April 2008, case no. 1. Ausl. 30/07.

<sup>59</sup> Federal Constitutional Court, Judgment of 8 April 2004, case no. 2 BvR 253/04, para. 19.

<sup>60</sup> See, e.g., Administrative Court Duesseldorf, case no. 11 K 4716/07.A, paras. 73-75.

<sup>61</sup> Administrative Court Duesseldorf, order of 16 January 2009, case no. 21 K 3263/07.A, paras. 158-168.

In addition, it is recognised that "extraordinary renditions" constitute a breach of the non-refoulement principle in Article 3 of the CAT.<sup>62</sup> Facilitating a person's detention when it is probable that this will lead to torture and ill-treatment of the person in the respective State strongly resembles the extradition of "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (Article 3 of the CAT). Furthermore, while activities of national intelligence agencies are subject to a limited degree of control by parliamentary institutions, we are of the opinion that relevant policies are not sufficiently transparent. Some of the crucial cases were addressed by the 2009 German Parliamentary Inquiry. According to the Federal Constitutional Court, this inquiry was, however, unconstitutional in terms of parliamentary rights because "the Federal Government breached the right of the German *Bundestag* to obtain information and investigate pursuant to Article 44 of the Basic Law (*Grundgesetz*)."<sup>63</sup>

## Recommendation

Germany must ensure that its intelligence and law enforcement agencies refrain from information sharing with foreign States when there is a real risk that this information leads to detention with subsequent torture or ill-treatment of the person concerned. In particular, Germany should not rely on diplomatic assurances given by States known for the systematic ill-treatment and torture of detainees. Those responsible for information sharing that subsequently led to torture must be sanctioned.

## D. Interrogation of prisoners in suspected torture centres

In view of the interrogation of prisoners in suspected torture centres run by third states, we take the view that such interrogations violate the absolute prohibition of torture and legitimise and encourage the ill-treatment the prisoners receive from local authorities. Such interrogations constitute an internationally wrongful act under the Draft articles on Responsibility of States for Internationally Wrongful Acts.<sup>64</sup> This view is shared by international bodies such as the Special Rapporteur on Counterterrorism.<sup>65</sup>

In its written replies, Germany has held that investigating officials must refrain from continuing the examination whenever they have reason to believe that questioning in violation of rules on prohibited methods of examination has taken place.<sup>66</sup> Similarly, Germany pointed out in its Fifth Periodic Report,

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<sup>62</sup> Venice Commission Opinion, "Opinion of the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners adopted by the Venice Commission at its 66th Plenary Session" (17-18 March 2006); Manfred Nowak/Elizabeth McArthur, The United Nations Convention Against Torture - A Commentary, Art. 3 CAT, para. 174.

<sup>63</sup> Federal Constitutional Court - Press office - Press release no. 84/2009 of 23 July 2009, Order of 17 June 2009 – 2 BvE 3/07.

<sup>64</sup> Article 16 Draft articles on Responsibility of States for Internationally Wrongful Acts (Aid or assistance in the commission of an internationally wrongful act): "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

<sup>65</sup> Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. A/HRC/10/3, 4 February 2009, para. 54.

<sup>66</sup> Written replies to the list of issues by the Government of Germany, CAT/C/DEU/Q/5/Add.1, para. 74.

that "[q]uestioning is not carried out, where, in individual cases, there are concrete indications to suggest that the person concerned has been subjected to torture in the country they were in."<sup>67</sup>

We are, however, concerned because Germany has been involved in interrogations where concrete indications suggested that the person concerned had been subjected to torture in the country they were in. Sherali Asisow, for example, was interrogated by German officials in a prison in Uzbekistan. According to media reports, he died later under dubious circumstances, officially phrased by Uzbek authorities as "heart attack". There are several reports confirming the widespread use of torture in Uzbekistan.<sup>68</sup> With the knowledge about the general treatment of terrorism suspects in Uzbek prisons, Germany should have refrained from interrogating Asisow. By interrogating him, German officials send a signal to Uzbek officials that they in general agree to the methods used by Uzbek officials against terrorism suspects.

For that reason we consider it important to emphasise Germany's obligations under the CAT, namely the obligation under Article 10 of the CAT to provide law enforcement officials with specific training on how to identify signs of torture and cruel, inhuman or degrading treatment. The German authorities held that Asisow was, as far as they could tell, in a good state and had not been subjected to ill-treatment. Asisow was wearing a long-sleeved shirt and long trousers.<sup>69</sup> It does not seem likely that these circumstances allowed a sufficient consideration of the treatment he had most likely been subjected to. There were indications that Asisow had been subjected to torture, considering various reports about systematic torture of terrorist suspects in Uzbek prisons. The same applies to the above mentioned case of Mohammed Haydar Zammar. Zammar was visited and directly interrogated by German officials of the Federal Information Service, the Federal Office for the Protection of the Constitution and the Federal Criminal Police Office in Far Falestin (Syria) in the presence of members of the Syrian security services. Furthermore, Zammar received no diplomatic support from Germany.

## Recommendation

We consider it necessary that Germany fulfils its obligations under Article 10 of the CAT by ensuring that education and training of all law enforcement officials, including civil and criminal judges and prosecutors, are conducted on a regular basis. This should include training on how to identify signs of torture and cruel, inhuman or degrading treatment, as well as analysing a state's record on torture prior to interrogations in the respective country. German officials should refrain from interrogating suspects when there are indications that they were or are subjected to torture, especially in detention facilities of countries with a bad human rights record regarding torture and ill-treatment.

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<sup>67</sup> Fifth Periodic Report, CAT/C/DEU/5, paras. 33-34.

<sup>68</sup> See Amnesty International's comment on the human rights situation in Uzbekistan: Menschenrechtslage in Usbekistan weiter schlecht – EU muss handeln, 10 May 2007, [www.amnesty.de/umleitung/2007/deu01/028?lang=de%26mimetype%3dtext%2fhtml](http://www.amnesty.de/umleitung/2007/deu01/028?lang=de%26mimetype%3dtext%2fhtml); Amnesty Annual Report 2011, Uzbekistan, [www.amnesty.de/jahresbericht/2011/usbekistan](http://www.amnesty.de/jahresbericht/2011/usbekistan); see also Reports by Human Rights Watch: Human Rights Watch Concerns on Uzbekistan, Submitted to the UN Human Rights Committee on the occasion of its March 2010 Review of Uzbekistan, February 2010, [www2.ohchr.org/english/bodies/hrc/docs/ngos/HRW\\_Uzbekistan\\_98.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HRW_Uzbekistan_98.pdf), Uzbekistan: Government Shuts Down Human Rights Watch Office, 15 March 2011, [www.hrw.org/news/2011/03/15/uzbekistan-government-shuts-down-human-rights-watch-office](http://www.hrw.org/news/2011/03/15/uzbekistan-government-shuts-down-human-rights-watch-office); ECtHR, Garayev v. Azerbaijan, Application No. 53688/08, Judgment of 10 June 2010, paras. 57-62 and 71.

<sup>69</sup> Die Zeit, Christian Denso, Vom verbotenen Baum, 12 April 2009, <http://www.zeit.de/2009/16/Sauerland>.

## E. Requesting Extradition to Ensure Prosecution

In the case of Khaled El-Masri, who was the first German citizen subjected to an extraordinary rendition by the CIA, Germany refused to request the extradition of thirteen alleged CIA-officials. The District Court of Munich had issued thirteen arrest warrants because of the rendition of El-Masri in 2003. With the refusal by the German Government to request extradition, Germany violates its obligations under the CAT to prosecute individuals for their acts of torture. ECCHR cooperating attorneys challenged the refusal by the German Government before the administrative court of Cologne. In its decision of 7 December 2010, the administrative court rejected the complaint on the merits by granting the Government a wide discretion on questions of foreign policy. ECCHR is of the view that the German Government as well as the administrative court in Cologne did not sufficiently take into account its obligations under the CAT.

## Recommendation

Germany must request extradition of persons wanted by arrest warrants on charges related to torture and ill-treatment.

## F. The German National Preventive Mechanism

In its written replies to the list of issues, the Government of Germany describes the mandate and composition of the National Preventive Mechanism (hereinafter: NPM).<sup>70</sup> In its very first annual report 2009/2010, the Federal Agency of the NPM reports that it is only in a very limited manner able to perform its mandate because of its limited number of staff, consisting of the honorary director, one researcher and one part-time staff. The Federal Agency concludes that thus it is illusionary to visit all German detention facilities as foreseen in the mandate.<sup>71</sup> All visits by the Federal Agency have been announced 24 to 48 hours in advance.<sup>72</sup> The Joint Commission of the *Länder* of the NPM includes four honorary members and, according to the written replies, together with the Federal Agency three research assistants and one administrative assistant.

According to the „Paris Principles“ of 20 December 1993, the UN General Assembly stated in its resolution A/RES/48/134 regarding the composition of NPM and the *“significant role that institutions at the national level can play in promoting and protecting human rights and fundamental freedoms and in developing and enhancing public awareness of those rights and freedoms”*:<sup>73</sup>

*1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:*

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<sup>70</sup> Written replies to the list of issues by the Government of Germany, CAT/C/DEU/Q/5/Add.1, paras. 15-23.

<sup>71</sup> Federal Agency, NPM, Annual Report 2009/2010, p. 7.

<sup>72</sup> Federal Agency, NPM, Annual Report 2009/2010, p. 16.

<sup>73</sup> UN General Assembly, Resolution of 20 December 1993, UN-Doc. A/RES/48/134.

*(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;*

*(b) Trends in philosophical or religious thought;*

*(c) Universities and qualified experts;*

*(d) Parliament;*

*(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).*

*2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.*

*3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured."<sup>74</sup>*

The German NPM falls short of the requirements set in the Paris Principles. In comparison with the number of staff of the NPM in countries smaller than Germany, e.g. Switzerland with twelve NPM-members or Liechtenstein with five members,<sup>75</sup> the German NPM is inadequately staffed. As regards the mandate of the German NPM, the violations of the CAT by German intelligence and law enforcement agencies as well as by courts described in this alternative report are not under the scrutiny of the NPM. ECCHR is concerned about the limited and narrow mandate as well as the totally insufficient composition of the NPM, especially only including honorary members and three research assistants.

## **Recommendation**

Germany should extend the mandate of the NPM to review and comment about acts by German authorities which might be in breach of the CAT. Germany should appoint at least one permanent, fully employed chair of each part of the NPM, the Federal Agency and the Joint Commission of the *Länder*. The total number of members of both NPM as well as their assistants should be raised, so that the NPM can conduct its activities in full scale, reflecting the pluralistic requirement set in the Paris Principles, including civil society actors. An adequate funding of the NPM is therefore required.

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<sup>74</sup> UN General Assembly, Resolution of 20 December 1993, UN-Doc. A/RES/48/134.

<sup>75</sup> Association for the Prevention of Torture, OPCAT Database, available at: [www.ap.t.ch/opcat](http://www.ap.t.ch/opcat).