
**INTERNATIONAL
HELSINKI
FEDERATION FOR
HUMAN RIGHTS**

*Intervention to the 2006 OSCE Human Dimension Implementation Meeting
by the IHF and the following member committees: the Albanian Helsinki Committee; the
Helsinki Committee of Armenia, the Bulgarian Helsinki Committee, the Canadian Helsinki
Watch Group, the Kyrgyz Committee for Human Rights, the Netherlands Helsinki Committee,
and the Swedish Helsinki Committee¹*

WORKING SESSION 8, RULE OF LAW I:

Prevention of Torture and Protection of Human Rights and Fighting Terrorism

Friday, 6 October 2006

Erosion of the Absolute Prohibition against Torture in the Campaign against Terrorism

The prohibition on torture and other cruel, inhuman or degrading treatment is a fundamental human rights principle and a core element of the international human rights protection system established in the aftermath of World War II. During the post-September 11 period, this principle has come under growing attack and has been openly challenged in ways previously unseen. Most disturbing, in a number of western democratic countries, attempts have been made to question the absolute nature of the ban on torture and ill-treatment, redefine the limits of what constitutes proscribed treatment and justify practices amounting to torture and ill-treatment in the name of enhancing national security.

At the end of 2005 it was disclosed that **German** security and intelligence officers had interrogated German citizen Mohammed H. Zammar in a Syrian prison and German resident Murat Kurnaz in US custody at Guantánamo Bay.² There are serious allegations that both men, who were arrested on terrorist suspicions in late 2001, have been subjected to torture and ill-treatment in detention. Zammar reportedly remains detained without charge in Syria, while Kurnaz was released in August 2006 after more than four years of detention without charge at Guantánamo Bay.³ Pointing out that Syria has a well-established record of torture and that the

¹ These committees are all members of a team working together with the IHF Secretariat to implement an IHF-wide campaign devoted to the topic of counter-terrorism measures and the ban on torture in 2006.

² Amnesty International Germany, "Bundesregierung schaute weg, stellte sich taub und schwieg," 15 December 2005, <http://www2.amnesty.de/internet/deall.nsf/50144ae16ca25cecc12567df002695c7/.63f9932278adcafbc12570d80056a853?OpenDocument>; *Frankfurter Allgemeine Zeitung*, "Schäuble: Deutsche an Verhören in Guantánamo und Syrien beteiligt," 15 December 2005; *Deutsche Pressagentur (DPA)*, "Streit über Anti-Terror-Kurs in Deutschland," December 2006.

³ Zammar was reportedly arrested in Morocco in late 2001 and transferred to Syria with US assistance a few weeks later. He has since been held in detention in Syria. Kurnaz was arrested in Pakistan at the end of 2001 and subsequently handed over to US authorities, who brought him to Guantánamo Bay. He remained detained at Guantánamo Bay until August 2006, when he was released and transferred to Germany. The German authorities have been criticized for failing to take adequate measures to ensure an earlier release of

inhumane detention conditions at Guantánamo Bay are well-known, opposition politicians and civil society groups criticized the German government for colluding in abusive treatment by conducting interviews at these locations and for thereby contributing to watering down the global ban on torture and ill-treatment.⁴ The German interior minister, however, argued that it was justified to interrogate detainees for the purpose of obtaining terrorism-related intelligence even if it could not be excluded that they had been tortured or ill-treated.⁵ He received backing by several prominent politicians.⁶

In another worrisome development, the Hamburg Court of Appeals admitted evidence possibly obtained through torture in a 2005 trial related to the September 11 events. The information had been provided by the US and consisted of statements made by three terrorist suspects held at unknown locations.⁷ Given the numerous and credible reports of torture and ill-treatment faced by terrorist suspects in US custody, it would have been incumbent on the court to conduct an impartial and thorough investigation to ensure that the statements in question had not been obtained through coercion prior to admitting them as evidence. However, as the US refused to allow the court access to the suspects or provide details about the circumstances of their interrogations, the court sufficed to conclude that publicly available information did not provide proof that the statements had been extracted under duress. According to Amnesty International, this decision was in flagrant violation of Germany's obligations under international law to investigate complaints of torture and ill-treatment and to exclude such statements in court.⁸

The **Swedish** government has been widely criticized for its actions in the case of Ahmed Agiza and Muhammad El-Zary, two terrorist suspects who were expelled from Sweden to Egypt in December 2001 with active involvement of US security agents. Both men have alleged that they have been ill-treated and tortured upon return to Egypt and they remain at risk of abuse. El-Zary was released in 2003 but remains under surveillance, while Agiza is serving a 15-years prison sentence handed down in a trial conducted in gross violation of international standards. In an important precedent-setting decision, the UN Committee against Torture (CAT) found in May 2005 that the Swedish government had violated the absolute ban on torture when forcibly returning Agiza to Egypt, despite the assurances for his and El-Zary's safety it claimed to have obtained from the Egyptian government. The committee noted that the Swedish authorities should

Kurnaz. For more information about the two cases, see Amnesty International Germany, "Murat Kurnaz aus Bremen" (2006),

<http://www2.amnesty.de/internet/deall.nsf/AlleDok/E9E2E2601F60A86BC1256FC10048DADB?Open>;

and "amnesty international begrüßt Freilassung von Murat Kurnaz," 24 August 2006,

<http://www2.amnesty.de/internet/deall.nsf/50144ae16ca25cecc12567df002695c7/4554e89574727893c12571d40046a376?OpenDocument>; and Amnesty International, "Appeal Case Update – 'Disappearance' of Muhammad Haydar Zammar" (2005), <http://web.amnesty.org/library/Index/ENGMDE240162005>.

⁴ *Stern*, "Kritik an Schäubles Alleingang," 16 December 2005,

<http://www.stern.de/politik/deutschland/:Streit-Informationen-Kritik-Sch%E4ubles-Alleingang/551642.html>;

Amnesty International Germany, "Bundesregierung schaute weg, stellte sich taub und schwieg," 15 December 2005; *Focus*, "Merkwürdige Äußerungen – Schäuble und die Foltergeständnisse, 16 December 2005, http://focus.msn.de/politik/deutschland/wolfgang-schaeuble_nid_22648.html.

⁵ *Focus*, "Merkwürdige Äußerungen – Schäuble und die Foltergeständnisse, 16 December 2005.

⁶ *DPA*, "Streit über Anti-Terror-Kurs in Deutschland," December 2006.

⁷ Amnesty International, "Germany: Hamburg court violates international law by admitting evidence potentially obtained through torture," 18 August 2005,

<http://web.amnesty.org/library/print/ENGEUR230012005>; *Frankfurter Allgemeine Zeitung*, "Nehm kritisiert Strafjustiz," 21 May 2005 and "Warten bis Blut fließt?" 27 May 2005.

⁸ Amnesty International, "Germany: Hamburg court violates international law by admitting evidence potentially obtained through torture," 18 August 2005.

have known that the use of torture is “consistent and widespread” in Egypt and that detainees held for political and security reasons are at particular risk of such treatment and concluded that the procurement of diplomatic assurances “did not suffice to protect against this manifest risk.”⁹ The case of *El Zary v. Sweden* is currently pending before the UN Human Rights Committee.¹⁰

The Swedish government has not taken any effective measures in response to the CAT decision, thereby displaying a lack of commitment to the UN Convention against Torture, and has not ruled out the possibility of using diplomatic assurances again in future. Among others, in late 2005, the Swedish government supported the establishment of a working group within the Council of Europe to consider elaborating guidelines for the use of diplomatic assurances in cases where people are sent back to countries where they risk being subjected to torture or ill-treatment. In a development welcomed by human rights groups, this working group decided against elaborating such guidelines in March 2006. It is the position of the IHF and the Swedish Helsinki Committee (SHC) that diplomatic assurances should never be used in *refoulement* cases since they do not provide adequate protection against torture or ill-treatment.¹¹

The government of the **United Kingdom** has vowed to ensure that “public safety takes primacy over human rights” when it comes to deporting foreign terrorist and other criminal suspects to countries where they risk being tortured.¹² During a parliamentary debate on the issue in May 2006, Prime Minister Tony Blair said, “Those people in my view should be deported irrespective of any claim that they have that the country to which they are going back to may not be safe.”¹³ Reflecting this problematic approach, the government has invited countries with well-established records of torture to sign so-called memoranda of understanding, which formally guarantee that those deported to these countries will be treated humanely. Such agreements have already been entered into with Jordan, Lebanon and Libya, while negotiations reportedly are under way with Algeria, Morocco and Egypt.¹⁴ Human rights NGOs have strongly criticized the memoranda for failing to provide effective protection against torture and ill-treatment and, in a recent report, the UK joint parliamentary committee on human rights concluded that, if relied on in practice, the diplomatic assurances foreseen under the memoranda “present a substantial risk of individuals actually being tortured.”¹⁵ In another troubling development, the Special Immigration Appeals Commission (SIAC) ruled in August 2006 that an Algerian terror suspect may be deported despite credible information that he would be at risk of torture and ill-treatment if returned to Algeria.¹⁶

Along with the governments of Lithuania, Portugal and Slovakia, the UK government has also intervened in a case currently pending before the European Court of Human Rights (ECtHR),

⁹ UN Committee against Torture, *Communication No. 233/2003: Sweden*, 24 May 2005.

¹⁰ Information from SHC to the IHF, September 2006.

¹¹ For more information about the case of Agiza and El-Zary, see the chapters on Sweden in IHF Human Rights Developments in the OSCE Region from different years, at, as well as the website of the SHC, http://www.ihf-hr.org/cms/cms.php?sec_id=46; and <http://shc.mediaonweb.org/sv/1/30/358/>.

¹² DPA, “British tinkering with human rights is viewed with suspicion,” 19 May 2006.

¹³ UPI, “Britain may reform human rights law to enable deportations,” 18 May 2006.

¹⁴ House of Lords and House of Commons, *Joint Committee on Human Rights – Nineteenth Report* (Session 2005-06), par. 105, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm>

¹⁵ House of Lords and House of Commons, *Joint Committee on Human Rights – Nineteenth Report* (Session 2005-06), par. 131.

¹⁶ See IHF, “UK: Terror Suspect May Be Deported to Algeria despite Risk of Torture,” 27 August 2006, http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4290. The defendant was granted time to appeal the decision until 29 September 2006.

urging the court to reconsider its jurisprudence in *Chahal v. UK*.¹⁷ In this case, the ECtHR affirmed the absolute nature of the prohibition on torture and inhuman or degrading treatment by holding that individuals may not be deported to a country where they would face a real risk of such treatment even if they are considered to pose a threat to national security.¹⁸ The UK joint parliamentary committee on human rights has expressed concern that the arguments advanced by the UK government in its intervention before the ECtHR "may send a signal that the absolute prohibition on torture may in some circumstances be overruled by national security considerations."¹⁹

The government of the **United States** has argued that its international obligations relating to torture and cruel, inhuman or degrading treatment do not apply to persons apprehended abroad,²⁰ and has sought to ensure that US officials involved in overseas counter-terrorism operations cannot be prosecuted for abusive treatment that it considers to be less than torture.²¹ A series of now notorious memos drafted by the US government in 2001-2002 defined torture in an excessively narrow fashion – as the pain associated with organ failure, impairment of bodily function or death – and authorized a number of abusive interrogation techniques.²² Some problematic practices have subsequently been repudiated, but there are concerns that others may remain in use in counter-terrorism contexts. A set of revised army interrogation rules adopted in September this year explicitly prohibited a number of previously approved interrogation techniques, including forced nudity or sexual acts and simulated drowning known as "waterboarding." However, these rules do not apply to intelligence services, and in a recent

¹⁷ Press release issued by the Registrar of the European Court of Human Rights, "Application lodged with the Court – *Ramzy v. the Netherlands*," 20 October 2005.

¹⁸ *Chahal v. UK* (22414/93), 15 November 1996.

¹⁹ House of Lords and House of Commons, *Joint Committee on Human Rights – Nineteenth Report* (Session 2005-06), par. 26.

²⁰ This approach has been criticized by UN human rights mechanisms. See UN Committee against Torture, *United States: Conclusions and Recommendations (CAT/C/USA/CO/2)*, 18 May 2006, par. 15, 20, <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>; and UN Human Rights Committee, *United States of America: Concluding Observations (CCPR/C/USA/Q/3/CRP4)*, July 2006, par. 16, <http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf>.

²¹ In late 2005, the US Congress passed legislation that explicitly prohibited the use of ill-treatment by US officials anywhere in the world (the so-called Mc Cain amendment included in the Detainee Treatment Act). When signing this legislation, the president attached a statement indicating that he intended to reserve the right to waive the provision if he considers it necessary to prevent further terrorist attacks. Moreover, after the US Supreme Court ruled in June 2006 that everyone captured in the "war on terror" has the right to enjoy humane treatment as protected by common article 3 of the Geneva Conventions, the government proposed restricting the scope of a 1996 US law - the War Crimes Act - that criminalizes violations of this article. An agreement reached between the Bush administration and Republican lawmakers on 21 September 2006 would, if passed into law, reportedly introduce into the War Crimes Act a list of "serious" acts of cruelty not rising to the level of torture that constitute crimes under the law, while grant the president the authority to interpret the "meaning and application" of the common article 3 of the Geneva Conventions with respect to abuses that are considered to be of lesser gravity. See Charlie Savage, *Boston Globe*, "Bush could bypass new torture ban," 4 January 2006, <http://www.boston.com/>; R. Jeffrey Smith, *Washington Post*, "War Crimes Act Changes Would Reduce Threat of Prosecution," 9 August 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801276.html>; John Sifton, *Slate*, "Criminal, Immunize Thyself," 11 August 2006, <http://www.slate.com/id/2147585/>; *Washington Post*, "White House, Senators Near Pact on Interrogation Rules," 22 September 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/09/21/AR2006092100298.html?nav=rss_politics; *International Herald Tribune*, "Senators Reach Deal with Bush on Suspects," 22 September 2006, <http://www.ihf.com/articles/2006/09/22/news/detain.php>.

²² See Karen J. Greenberg, *The Nation*, "Secrets and Lies," 26 December 2005, <http://www.thenation.com>.

speech President Bush defended the use of “alternative procedures” by the CIA in the interrogation of terrorist suspects.²³

Moreover, credible and well-reputed international NGOs have reported widespread and systematic abuse against detainees held in US custody at overseas locations and have shown that officially approved procedures and policies have contributed to facilitating such abuse. These reports starkly contrast with claims by the US government that torture and ill-treatment have been limited to a few, exceptional cases and have not been the result of deliberate policy.²⁴ Aggravating the situation, many cases of abuse have not been effectively investigated, virtually only lower-ranking officials have been prosecuted and those found guilty have typically been given lenient sentences, such as administrative penalties.²⁵ Both the UN Human Rights Committee and CAT have criticized the apparent shortcomings in the measures taken by the US to investigate and punish acts of torture and ill-treatment.²⁶ These committees have also expressed concern at reports that the US is holding terrorist suspects in secret detention facilities around the world, a practice that in itself contravenes the prohibition on torture and ill-treatment.²⁷ In September 2006, President Bush acknowledged the existence of such facilities for the first time, without disclosing any locations.²⁸

In its counter-terrorism campaign, the US government has also repeatedly transferred terrorist suspects to countries with serious records of torture and ill-treatment for the purpose of detention and interrogation.²⁹ The US has claimed that it does not send persons to countries where it is “more likely than not” that they will be subjected to torture (as it construes this term) and, when deemed appropriate, it seeks “assurances” from receiving countries that those transferred will not

²³ Brian Knowlton, *International Herald Tribune*, “Bush acknowledges CIA prisons exist,” 7 September 2006; John Hendren, *National Public Radio*, “Manual Defines Limits of Prisoner Interrogation,” 6 September 2006, <http://www.npr.org/templates/story/story.php?storyId=5776992>; Human Rights Watch, “U.S.: Bush Justifies CIA Detainee Abuse,” 8 September 2006, <http://www.hrw.org/english/docs/2006/09/06/usdom14139.htm>; American Civil Liberties Union (ACLU), “Bush Guts Geneva Conventions Enforcement and Undermines Due Process,” 6 September 2006, <http://www.aclu.org/safefree/detention/26666prs20060906.html>

²⁴ See, for example, Amnesty International, *USA - Supplementary Briefing to the UN Committee against Torture*, May 2006, <http://web.amnesty.org/library/Index/ENGAMR510612006?open&of=ENG-USA>; Human Rights Watch, “No Blood, No Foul” - *Soldiers’ Accounts of Detainee Abuse in Iraq*, July 2006, <http://www.hrw.org/reports/2006/us0706/>.

²⁵ New York University’s Center for Human Rights and Global Justice, Human Rights Watch and Human Rights First, *By the Numbers - Findings of the Detainee Abuse and Accountability Project*, April 2006, <http://hrw.org/reports/2006/ct0406/>.

²⁶ Committee against Torture, *United States: Conclusions and Recommendations (CAT/C/USA/CO/2)*, 18 May 2006, par. 25-26; UN Human Rights Committee, *United States of America: Concluding Observations (CCPR/C/USA/Q/3/CRP4)*, July 2006, par. 14.

²⁷ Committee against Torture, *United States: Conclusions and Recommendations (CAT/C/USA/CO/2)*, 18 May 2006, par. 17; UN Human Rights Committee, *United States of America: Concluding Observations (CCPR/C/USA/Q/3/CRP4)*, July 2006, par. 12.

²⁸ Brian Knowlton, *International Herald Tribune*, “Bush acknowledges CIA prisons exist,” 7 September 2006. For comments see Human Rights Watch, “U.S.: Bush Justifies CIA Detainee Abuse,” 8 September 2006; Human Rights First, “Human Rights First Says Administration Announcements on Detainee Interrogation and Detention Send Mixed Message,” 7 September 2006, <http://www.humanrightsfirst.org/media/etn/2006/statement/256/>.

²⁹ See, for example, Amnesty International, *Below the Radar – Secret Flights to Torture and ‘Disappearance.’* 5 April 2006, <http://web.amnesty.org/library/index/ENGAMR510512006>; and Human Rights Watch, *Still at Risk – Diplomatic Assurances No Safeguard against Torture*, 12 May 2005, at <http://www.hrw.org/reports/2005/eca0405/>.

be tortured.³⁰ However, those subject to transfer do not have any effective opportunities to challenge such assurances and, as noted by the UN Human Rights Committee, there are numerous and well-documented allegations that persons sent to third countries by the US have received treatment “grossly violating” the ban on torture and ill-treatment.³¹ Most disturbing, investigations by the Council of Europe and the European Parliament have shown that a number of other OSCE governments have – actively or passively – cooperated with the US in the transfer of terrorist suspects to countries with known records of torture or to clandestine detention facilities, thereby facilitating abuse.³²

Taken together, the developments discussed above are deeply troubling. These and other attempts by democratic governments to circumvent the ban on torture and ill-treatment with reference to national security concerns undermine the rule of law, democratic values and respect for human dignity and threaten to erode the very integrity of the international human rights protection system. Any admission of torture or ill-treatment, even if only in exceptional circumstances, amounts to a fundamental denial of human rights and is the beginning of a slippery slope toward the uncontrollable and systematic use of abusive treatment. The developments discussed above also establish a highly problematic example for less democratic societies by suggesting that torture and ill-treatment are justified when fighting terrorism and that basic human rights principles are an obstacle to achieving security, although ultimately there can be no real security in a society without scrupulous respect for the fundamental rights of everyone.

Recommendations

1. To the government of **Germany**:

- Call on the US authorities to thoroughly investigate the allegations that Murat Kurnaz was subjected to torture and ill-treatment while detained at Guantánamo Bay with a view to bringing to justice those guilty of such abuse and repeat previous calls to the US government to close its detention facility at Guantánamo Bay and promptly release those detained there unless they can be prosecuted with recognizable offences and granted trials consistent with international due process standards;
- Make representations to the Syrian government to treat Mohammed H. Zammar fully in accordance with international standards and charge him with recognizable offences and grant him a prompt and fair trial or, else, release him.

³⁰ See second state report submitted by the United States to the UN Committee against Torture, 6 May 2006, <http://www.ohchr.org/english/bodies/cat/cats36.htm>.

³¹ UN Human Rights Committee, *United States of America: Concluding Observations* (CCPR/C/USA/Q/3/CRP4), July 2006, par. 16.

³² See Dick Marty, Rapporteur for the Committee on Legal Affairs and Human Rights of the Council of Europe, *Alleged secret detentions and inter-state transfers involving Council of Europe member states*, June 2006, http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf; and interim report the Temporary European Parliament Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm.

2. To the government of **Sweden**:

- Call on the Egyptian authorities to protect Ahmed Agiza and Muhammad El-Zary from any further human rights violations, including by granting Agiza a new, fair trial in a civil tribunal or allowing him to be heard by a Swedish court;
- Lift the prohibition on returning to Sweden imposed on the two men and actively press the Egyptian government to allow the men to leave Egypt;
- Grant Ahmed Agiza and Muhammad El-Zary just compensation for the human rights violations they have suffered as a result of the decision by the Swedish government to expel them to Egypt.

3. To the government of the **United Kingdom**:

- Revoke the so-called memoranda of understanding that have been agreed with the governments of Jordan, Lebanon and Libya and halt any ongoing negotiations about similar agreements with other countries that have well-established records of torture and ill-treatment;
- Refrain from deporting the Algerian terrorist suspect known as “Y” on grounds that he would be at risk of torture and ill-treatment if returned to Algeria.

4. To the government of the **United States**:

- Ensure that all agencies of government, including the intelligence services, are strictly bound by rules consistent with international standards prohibiting torture and other forms of ill-treatment in the interrogation and treatment of detainees at all locations under US control;
- Make sure that all US officials or other persons acting on behalf of the government can be prosecuted before national courts for any treatment violating the international ban on torture and cruel, inhuman or degrading treatment, irrespective of where such acts have been perpetrated;
- Investigate all allegations that individuals held in US custody have been subjected to treatment proscribed under international law in a prompt, thorough and impartial manner, and ensure that the perpetrators – irrespective of their rank – are brought to justice and punished in accordance with the seriousness of the crimes they have committed;
- Discontinue the program of secret detention facilities operated by the intelligence services and grant everyone apprehended in the “war on terror” prompt access to courts, lawyers and family members as well as the right to visits by independent monitoring bodies.

5. To the **OSCE participating States**:

- Reaffirm the absolute character of the prohibition on torture and other cruel, inhuman or degrading treatment and recognize that they are strictly bound by this prohibition, as established by international law, in the implementation of all their counter-terrorism activities;
- Ensure that no foreign intelligence information allegedly obtained through torture or ill-treatment is admitted as evidence by courts unless it can be proven beyond reasonable doubt that it was not extracted through coercion;
- Never send anyone to a country where torture and ill-treatment are routinely used, even if they have obtained so-called diplomatic assurances for their safety;
- Refrain from participating in any joint counter-terrorism activities where there are grounds to believe that these activities, in direct or indirect ways, may promote, facilitate, contribute to or serve to condone the use of torture or other forms of ill-treatment prohibited by international law;
- Investigate, in an effective, open and transparent manner, any alleged cases of past counter-terrorism cooperation undermining the prohibition on torture and ill-treatment with a view to holding accountable any officials guilty of complicity or participation in acts of torture or ill-treatment and to preventing such illegal cooperation from re-occurring in future;
- Promptly ratify/accede to the Optional Protocol to the UN Convention against Torture if they have not yet done so.