Bundesministerium
der Justiz

Reply by the German Federal Government to the four recommendations as formulated in Paragraph 39 of the concluding observations to be taken up in connection with the consideration of the fifth periodic report of Germany (CAT/C/DEU/5) adopted by the Committee against Torture at its 1046th and 1047th meetings, held on 18 November 2011

Berlin, 14 November 2012

The Committee adopted its concluding observations on the fifth periodic report on 18 November 2011 and called on Germany to submit follow-up information on four recommendations as formulated in Paragraph 39 of the concluding observations by 25 November 2012 (Paragraphs 16, 24, 28 and 30):

> 39. "The Committee requests the State party to provide, by 25 November 2012, follow-up information in response to the Committee's recommendations related to (a) regulating and restricting the use of physical restraints in all establishments, (b) limiting the number of detained asylum-seekers including the "Dublin cases" and ensuring mandatory medical checks of detained asylum-seekers, (c) exercising jurisdiction in accordance with article 5 of the Convention and providing information about the remedies including compensation provided to Khaled El-Masri, and (d) ensuring that members of the police in all the Länder can be effectively identified and held accountable when implicated in ill-treatment, as contained in paragraphs 16, 24, 28 and 30 of the present document."

The details:

a) In response to the Committee's recommendations related to regulating and restricting the use of physical restraints in all establishments

Physical restraints (*Fixierung*)

16. The Committee welcomes the information provided by the State party that, since the 2005 visit to the State party by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Federal Police have refrained from utilizing physical restraints (*Fixierung*) and at the Länder level the practice of *Fixierung* has been applied as a measure of last resort. However, the Committee remains concerned by the assertion by the State party that it will not be possible in the long term to abandon the practice of *Fixierung* in all non-medical settings at the Länder level, as recommended by CPT, and the lack of information on the uniform application of CPT principles and minimum standards in relation to *Fixierung* (Articles 2, 11 and 16).

The Committee urges the State party to strictly regulate the use of physical restraints in prisons, psychiatric hospitals, juvenile prisons and detention centres for foreigners with a view to further minimizing their use in all establishments and ultimately abandoning their use in all non-medical settings. The State party should further ensure adequate training for law enforcement and other personnel on the use of physical restraints, harmonization of the permissible means of physical restraints in all the Länder and the observance in all establishments of the principles and minimum standards in relation to *Fixierung* drawn up by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

In many of the Länder, the practice of "Fixierung", in other words using restraints to completely deprive detainees of the ability to move such that they cannot change the position in which they are sitting or lying down without help, has been completely abolished in a police context. Insofar as this practice continues to exist, its application is tied to stringent prerequisites and is used only in rare, exceptional cases, with the principle of proportionality being strictly adhered to. Such means of restraint are used only in situations in which the parties affected pose a hazard to themselves or others.

By contrast, it is a fundamentally permissible practice in all of the Länder to shackle

detainees. However, this is applied only in limited, exceptional situations, in keeping with the principle of proportionality.

It remains, however, a fact that situations may arise in day-to-day life at detention facilities and prisons in which all attempts at de-escalation have failed and no less invasive means are available of averting the acute risk of self-harm or harm to others.

In all Länder, this means of restraint is used only as a security measure and never as a disciplinary sanction.

In this context, all of the Länder observe the requirements stipulated by the CPT. Accordingly, the means of restraint in application in nearly all of the Länder consists predominantly of strap systems. As a matter of principle, a physician is consulted and continuous and direct monitoring is applied. Moreover, the matter is documented in all detail.

b) In response to the Committee's recommendations related to limiting the number of detained asylum-seekers including the "Dublin cases" and ensuring mandatory medical checks of detained asylum seekers

Detention pending deportation

24. The Committee notes a decrease in numbers and duration of detention of foreign nationals. However, it is concerned at the information that several thousand asylum-seekers whose requests have been rejected and a vast majority of those who are the subject in so-called "Dublin cases" continue to be accommodated in Länder detention facilities immediately upon arrival, sometimes for protracted periods of time. This practice contravenes Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals which regulates detention pending deportation as a means of last resort. The Committee is particularly concerned at the lack of procedure in a number of Länder for identification of vulnerable asylum-seekers, such as traumatized refugees or unaccompanied minors, given the absence of mandatory medical checks on arrival in detention, with the exception of checks on tuberculosis, and systematic checks for mental illnesses or traumatization. The Committee is further concerned by the lack of adequate accommodation for detained asylum-seekers separate from remand prisoners, especially for women awaiting deportation (Articles 11 and 16).

The Committee urges the State party to:

(a) Limit the number of detained asylum-seekers, including those who are the subject in "Dublin cases", and the duration of their detention pending return, while observing the European Union Directive 2008/115/EC;

(b) Ensure mandatory medical checks and systematic examination of mental illnesses or traumatization of all asylum-seekers including the "Dublin cases" by independent and qualified health professionals upon arrival in all Länder detention facilities;

(c) Provide a medical and psychological examination and report by a specially trained independent health expert when signs of torture or traumatization have been detected during the personal interviews by asylum authorities; and

(d) Provide adequate accommodation for detained asylum-seekers separate from remand prisoners in all detention facilities, particularly for women awaiting

deportation.

24 a)

When an asylum-seeker is detained pending deportation, fast-track procedures are carried out in Germany under the Dublin system, as provided for in the Dublin Regulation. Applications for detention pending deportation by the competent authorities are made and the issue of court orders for detention pending deportation are issued in strict application of the statutory provisions, particularly of Section 62 (3) (1) and (5) of the Residence Act (Aufenthaltsgesetz). This is not in breach of Directive 2008/115, which, in the Federal Government's view, is not applicable to transfers within the context of the Dublin Regulation in any case. The duration of detention pending deportation is also subject to the strict application of the principle of proportionality; it, too, is limited by the courts to the shortest possible period.

In applying Section 34a (2) of the Asylum Procedure Act (Asylverfahrensgesetz – AsylVfg), the Federal Constitutional Court's decision of 14 May 1996 is to be taken into account. According to that decision, the exclusion of interim measures in the case of transfers to safe third countries and EU Member States and other European States party to the so-called Dublin Regulation (Council Regulation (EC) No 343/2003 of 18 February 2003) is permissible in principle.

Interim measures are to be adopted, however, when the person to be transferred demonstrates that there is the danger in his or her individual case in the so-called safe third country or in the state competent under the Dublin Regulation. That may be the case, for example, when there is specific evidence that there is a threat of degrading or inhuman treatment or punishment in breach of Article 3 of the European Convention on Human Rights (ECHR) in the country concerned. According to the judgment of the European Court of Human Rights on the right to an effective remedy under Article 13 ECHR (ruling M.S.S. v. Belgium and Greece of 21 January 2011), a well-substantiated appeal claiming that deportation to another country would mean exposure to treatment in breach of Article 3 ECHR has to be thoroughly examined.

In addition, it is pointed out that under Article 19 (2) sentence 4 of Council Regulation (EC) No 343/2003 (of 18 February 2003, known as the Dublin Regulation), an appeal against transfer shall not suspend the implementation of the transfer unless the national legislation of the respective Member State allows for this. The ongoing negotiations on a new version of the Dublin Regulation include provisions concerning the interim measures against transfers under the Dublin Regulation.

The number of cases of detention pending deportation in the years 2008 to 2011, broken down according to the Federal Länder, can be seen in the table provided in Annex 1. The total numbers show a significant and continuous decrease in the number of detentions, from 8,805 in 2008 to 6,466 in 2011.

24 b)
It is recognised that there is a need for special attention to be given to vulnerable people within the context of the initial medical check and initial interview and in subsequent interviews with law enforcement personnel. Initial medical consultations take place as quickly as possible. If need be, external (specialist) physicians are called in. As a rule, there is no free choice of physician. In Berlin, Bremen, North Rhine-Westphalia and Thuringia, however, there is the opportunity to be examined by an additional advisory physician at one’s own cost with the agreement of the head of the institution or the competent official physician.

24 c)
The Federal Office for Migration and Refugees has employed, "sonderbeauftragte Entscheider" (specially commissioned decision-makers) since 1996 for victims of torture and traumatised asylum applicants. These decision-makers are made acquainted with the special needs of the specified target groups in special training sessions. The staff of the Federal Office are sensitised to signs that asylum-seekers are particularly vulnerable at every stage in the asylum proceedings.
At the Federal Office, there are currently approximately 80 special officers for unaccompanied minors, approximately 40 for traumatised asylum-seekers and victims of torture and another 40 for people persecuted on account of their gender.

This task requires a high level of sensitivity and psychological skill and awareness. At the same time, these members of staff also need special support.

Basic training has been provided in the past by the psychosocial centres for victims of torture in cooperation with the Federal Office for Migration and Refugees. This was supplemented by coaching measures carried out by the Federal Office. All events are carried out by internal practitioners and external experts based on case studies, and focus on specific problems encountered in this field of work. The special officers are required to take on particularly sensitive cases themselves. Their tasks also involve being a contact point for colleagues and superiors. They advise these colleagues about difficult cases and pass on relevant information from the training sessions.

A comprehensive programme is available to all asylum officers to help them maintain their standards of performance. In addition there is also the opportunity to further develop professionally and personally in terms of their methodological and social skills and their subject area.

In addition, a special training session for the special asylum officers for “victims of torture and traumatised asylum-seekers” has been held as of 2012 within the context of the new asylum training in accordance with the Istanbul Protocol.
The Berlin Centre for Torture Victims (Behandlungszentrum für Folteropfer Berlin – bzfo) also offers relevant training for medical staff in a number of modules on its website.

24 d)
The concern that the enforcement of detention pending deportation be provided for by special regulations “reflecting the particular status of immigration detainees” has already been met by the transposition into national law of the residence directives of the European Union. Section 62 a of the Residence Act implements Articles 16 and 17 of the EU Return Directive. It sets authoritative minimum standards in German law that also govern the enforcement of detention pending deportation, such as the mandatory separation of immigration detainees from sentenced prisoners; the right to contact legal representatives, family members and the competent consular authorities; the obligation of the institutions to notify the persons affected of their rights and obligations as well as of the rules applying in the respective institutions, as well as the participation of minors in detention pending deportation in education programmes and recreation opportunities.

It has been ensured in nearly all of the Länder that immigration detainees are kept separate from other prisoners, both in terms of the spaces to which they are allocated and of the organisational structures. In some of the Länder, such as Berlin, Brandenburg, Bremen, Rhineland-Palatinate and North Rhine-Westphalia, detention pending deportation is enforced in entirely separate detention facilities. Moreover, the number of people actually in detention pending deportation is declining. In the prisons, the parties affected have access to various care services such as physicians, psychologists, social welfare staff and pastoral caregivers. They have the opportunity to use recreational facilities such as sports facilities and libraries. Juvenile immigration detainees in particular also have the possibility of participating in education programmes provided by the facilities’ pedagogical staff. Finally, where detention pending deportation is enforced in prisons, the immigration detainees generally can be placed in relative proximity to their previous place of abode, meaning that visits by relatives who have not been detained are significantly easier.

c) In response to the Committee’s recommendations related to exercising jurisdiction in accordance with article 5 of the Convention and providing information about the remedies including compensation provided to Khaled El-Masri

Exercise of jurisdiction

28. The Committee is seriously concerned at the reported reluctance on part of the State party to exercise jurisdiction over allegations of torture and ill-treatment of persons rendered abroad, including the case of Khaled El-Masri, in violation of article 5 of the Convention. In addition, the Committee is concerned at the absence of information from the State party whether Khaled El-Masri has received any remedies, including compensation, in accordance with article 14 of the Convention (Articles 5 and 14).

The State party is urged to observe Article 5 of the Convention which requires that the criteria for exercise of jurisdiction are not limited to nationals of the State party. The State party should also inform the Committee about the remedies, including adequate compensation provided, to Khaled El-Masri, in accordance with Article 14 of the Convention.

There has been no breach of Article 5 of the Convention. As already noted in the statement on the list of issues, 13 people are under strong suspicion of having been involved in the abduction of Khaled El-Masri. They are imputed to have operated jointly as a group of agents whose tasks included the “extraordinary rendition” of terrorist suspects to third countries for the purpose of unconstitutional imprisonment and of having taken Khaled El-Masri to Kabul on 23/24 January 2004. The Munich I state attorney’s office has submitted an international arrest warrant for these thirteen people to the Regional Court Munich. The personal details of the suspects in the arrest warrants may be false identities of the agents. The arrest and extradition of the wanted individuals was refused by the USA, however. The investigation proceedings of the Munich I state attorney’s office have not yet been completed; the arrest warrants continue to apply. That demonstrates unmistakably that Germany is fully exercising its jurisdiction. It does not lie within the responsibility of the German authorities that extradition of the wanted individuals is not currently possible.

The Federal Government is not aware of any claims for compensation made by Khaled El-Masri against the Free State of Bavaria or against the Federal Republic of Germany.

On 20 July 2009, Mr El-Masri submitted an appeal to the European Court of Human Rights against the former Yugoslav Republic of Macedonia (appeal number 39630/09). Inter alia, he refers to Articles 3 (Prohibition of torture) and 5 (Right to liberty and security) of the European Convention on Human Rights. A hearing was held by the Grand Chamber of the European Court of Human Rights on 16 May 2012 in these proceedings.

d) In response to the Committee’s recommendations related to ensuring that members of the police in all the Länder can be effectively identified and held accountable

when implicated in ill-treatment, as contained in paragraphs 16, 24, 28 and 30 of the present document.

Identification of police officers

30. The Committee is concerned by the State party's information that police officers, except in Brandenburg and Berlin, are not obliged to wear identification badges showing their number or name during the exercise of their functions and that even in those two Länder the wearing of badges might be withdrawn in order to protect the safety and interests of the police officers, according to the State party. This practice has reportedly hindered in many cases the investigation and holding to account of the police officers allegedly implicated in ill-treatment, including incidents involving the excessive use of force in the context of demonstrations. According to a study commissioned by the Berlin Police, some 10 per cent of cases of alleged ill-treatment by the police could not be elucidated or prosecuted because of lack of identification (Articles 12, 13 and 14).

The Committee recommends that the State party:

(a) Weigh up the interests of both police officers and potential victims of ill-treatment and ensure that members of the police in all the Länder can be effectively identified at all times when carrying out their law enforcement function and held accountable when implicated in ill-treatment; and

(b) Assess the cases of lack of investigation raised during the dialogue with the State party and report thereon to the Committee.

First of all, the Federal Government would like to underline that police officers are under an obligation under the legislation of the respective Länder to identify themselves upon request. In Berlin, Rhineland-Palatinate, Hesse, Saxony-Anhalt and Thuringia, police officers are required to wear badges indicating their name or identification number on their uniforms when carrying out their duties (excluding situations where operative reasons do not allow this, e.g. covert operations). In future, police officers in Brandenburg will wear badges indicating their name or number when carrying out their duties in accordance with Section 9 (2) of the Brandenburg Police Act (BbgPolG). This provision shall enter into force on 1 January 2013.

The police in Land *Lower Saxony* do not have a duty in principle to wear name badges as a means of individual identification. At the same time, provision is made in an administrative regulation that the employer explicitly wishes name badges to be worn as a means of individual identification. The background of this provision is the objective of strengthening trust in the police as an institution through openness, transparency and identification, especially at local level. In most standard situations of everyday service, name badges are worn by police officers in Land Lower Saxony as a means of individual identification.

In *North Rhine-Westphalia*, the Land's governing parties agreed in their coalition agreement for 2012 - 2017 to introduce individual, anonymous identification for riot police, upholding the personal rights of police officers. Its specific implementation is under preparation**.**

In *Rhineland-Palatinate,* the previously exempted members of closed units (with the exception of the German Special Police Force - *Sondereinheitskommando - SEK*) are in future to wear identification in the form of a five-digit number. The implementation of this agreement, particularly the co-determination procedure under police staff council legislation, is not yet complete.

Staff on patrol duty in *Schleswig-Holstein* are recommended to wear a name badge. When police officers are on duty at demonstrations, the numbers currently worn allow them to be identified as belonging to a particular group within a closed unit. In cases when complete units are on duty, police officers in Schleswig-Holstein are to wear individual numbers by the end of the year under a supplement to a general order currently being prepared.

A written response has already been made with regard to the cases referred to by the Committee under b) above.

The Federal Government would also like to take the opportunity to point out the following:

In Paragraph 13 of the concluding observations, the Committee recommends the State party, inter alia, "to ensure its (i.e. of the National Agency for the Prevention of Torture) regular and timely access to all places of detention at the federal and Länder levels, without the requirement of a prior consent to the visit by the respective authorities."

The German Federal Government would like to underline that the Joint Commission of the Länder and the Federal Agency for the Prevention of Torture are not required to announce their visits or to obtain the prior consent of the respective authorities for the visit. The rights and powers of the National Agency for the Prevention of Torture are regulated in the following Administrative Order and State Treaty:

Administrative Order of the Federal Ministry of Justice of 20 November 2008
3. The Federal Agency shall have the rights and powers designated in Articles 19 and 20 of the Optional Protocol.

State Treaty of 25 June 2009 on the establishment of a national mechanism of all *Länder* in accordance with Article 3 of the Optional Protocol of 18 December 2002 to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Article 2 Tasks and powers

(2) The members of the Commission, individually or together, shall have the powers named in Article 19 of the Optional Protocol. The *Länder* shall grant to them the rights and powers named in Article 20 of the Optional Protocol.

Article 7 Modus operandi and rules of procedure
The Commission shall issue rules of procedure. It shall be free in determining its strategies and modi operandi.

In addition, the Commission of the Länder for the Prevention of Torture has issued rules of procedure, in which Section 8 (1) on the implementation of inspection visits states, “Visits may take place both announced and unannounced.”

In Paragraph 40 of the concluding observations, the State party is invited to submit its next report, which will be the sixth periodic report, by 25 November 2015. To that purpose, the Committee invites the State party to accept, by 25 November 2012, to report under its optional reporting procedure, consisting in the transmittal, by the Committee to the State party, of a list of issues prior to the submission of the periodic report. The State party’s response to this list of issues will constitute, under article 19 of the Convention, its next periodic report to the Committee.

The Federal Government welcomes the invitation of the Committee to take part in the optional reporting procedure and declares its willingness to submit the sixth periodic report by 25 November 2015 under its optional reporting procedure.