

**THE HAMBURG 9/11 TERRORISM TRIALS:
PROSPECTS FOR GERMAN LEGAL REFORM
AND INTELLIGENCE SHARING**

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INTRODUCTION

Disputes over classified information played a pivotal role in the outcome of Germany’s 9/11 trials. On security grounds, U.S. and German authorities withheld witnesses and transcripts from the defense. The German courts ultimately acquitted one defendant and overturned the conviction of another—not for reasons of innocence, but for lack of evidence. The rulings prompted outcry

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from certain observers, who lamented that the German legal system was too inflexible to accommodate national security concerns regarding the disclosure of classified information at trial.

This article examines that claim, comparing German law to the U.S. law that governs disclosures of classified information at trial—the Classified Information Procedures Act (“CIPA”). Part A summarizes the German criminal procedures relating to the protection of classified information. Part B examines how such procedures were used, to the detriment of the prosecution, in the German 9/11 trials. Part C outlines the important provisions of CIPA, which has been touted as a template for German procedural reform. Part D finds that most of CIPA would conform to German due process rights. Accordingly, the German legal system could feasibly accommodate a CIPA statute, with most of its key provisions intact. Part E offers closing remarks about the challenges Germany faces in its efforts to accommodate both due process rights and national security interests.

I. GERMAN CRIMINAL PROCEDURES RELATING TO CLASSIFIED INFORMATION AT TRIAL

Various provisions of German law govern the use of classified information at trial. This article focuses on the major provisions, especially those that played a role and caused such controversy in the German 9/11 terrorism trials. This subsection of the article summarizes the provisions, so as to prepare the reader for a discussion of the terrorism trials. An in-depth analysis of the provisions themselves and comparisons with the United States’ CIPA model will appear later in the article.

Most of the provisions governing the use of classified information in German trials are found in the Code of Criminal Procedure

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(*Strafprozessordnung*).¹ First, section 54, in connection with the German statutes on public officials, obligates judges and other public officials to refuse to testify if such testimony conflicts with an “official obligation of secrecy.”² Second, section 68(3) allows the court to conceal the identity of a witness for reasons of safety.³ Third, section 96 allows the government to withhold official documents if disclosure would harm the state:

Submission or delivery of files or of other documents officially impounded by authorities or public officials shall not be requested if their superior authority declares that the publication of these files or documents would be detrimental to the welfare of the Federation or of a German *Land*.⁴

Fourth, section 110b(3) allows the identity of an undercover investigator to remain secret.⁵ Fifth, section 244(3) permits the non-disclosure of evidence under certain conditions, if the evidence is unobtainable, for instance:

An application to take evidence shall be rejected if the taking of such evidence is inadmissible. In all other cases, an application to take evidence may be rejected only if the taking of such evidence is superfluous because the matter is common knowledge, if the fact to be proved is irrelevant to the decision or has already been proved, if the evidence is wholly inappropriate or unobtainable, if the application is made to protract the proceedings, or if an important allegation which is intended to offer proof in

¹ Strafprozessordnung [StPO] [Code of Criminal Procedure], Feb. 1, 1877, Reichsgesetzblatt [RGBl.] 253, available at <http://www.iuscomp.org/gla/statutes/StPO.htm> (last visited Nov. 15, 2004).

² § 54 StPO.

³ *Id.* § 68(3) StPO.

⁴ *Id.* § 96 StPO.

⁵ *Id.* § 110b(3) StPO.

exoneration of the defendant can be treated as if the alleged fact were true.⁶

As an aside, deeming evidence “unobtainable” simply because of the government’s unwillingness to disclose classified information is a questionable practice, one which will be explored later in this article. Sixth, in the event of a conviction, section 267 requires the court to disclose the facts that were deemed proven at trial.⁷

Section 174 of the Court organizational statute⁸ (*Gerichtsverfassungsgesetz*) allows the judge to seal the court proceedings and require parties to keep the evidence secret:

The decision to close the proceedings to the public is to be held in private upon motion of a party or when the court deems it appropriate. The decision to close the proceedings to the public must be announced publicly. It can be announced in a non-public proceeding when there is reason to fear that its public announcement would produce a substantial disturbance of order in the session To the extent the public is excluded based on a danger to state security, the press, radio, and television cannot publish any accounts of the session or the content of the relevant document If the public is excluded based on a danger to state security . . . then the court can obligate the parties present to keep secret facts, which they would discover through the court

⁶ *Id.* § 244(3) StPO.

⁷ *Id.* § 267 StPO.

⁸ Gerichtsverfassungsgesetz [GVG] [Court organizational statute], Jan. 27, 1877, Reichsgesetzblatt [RGBl.] 41.

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proceeding or the relevant document. The decision must be recorded in the court records and can be challenged.⁹

As will be shown, several of the provisions that govern the use of classified information played a significant role in the outcome of the German 9/11 terrorism trials.

II. THE GERMAN 9/11 TERRORISM TRIALS¹⁰

In the aftermath of the September 11th terrorist attacks, German authorities arrested two Moroccans, Mounir el Motassadeq and Abdelghani Mzoudi, on the grounds that they assisted certain hijackers of the airplanes used in the attacks, a group otherwise known as the “Hamburg Cell.” In the trials that followed, the primary issue that the court faced was whether Mzoudi and Motassadeq’s management of the affairs of the hijackers in their absence proved beyond a reasonable doubt that the two men were co-conspirators in the attacks.

This article will explore the situations in which the German courts faced a clash between due process rights and the state’s interest in protecting classified

⁹ § 174 GVG.

¹⁰ Specific information, such as the courts’ reasoning, is cited on an individual basis. In contrast, the general facts and background of the cases are cited all at once below: Loammi Blaauw-Wolf, *The Hamburg Terror Trials—American Political Poker and German Legal Procedure: An Unlikely Combination To Fight International Terrorism*, 5 GERMAN L.J. 791 (2004), available at <http://www.germanlawjournal.com> (last visited Nov. 15, 2004); Christoph J.M. Safferling, *Terror and Law—Is the German Legal System Able To Deal with Terrorism? - The Bundesgerichtshof (Federal Court of Justice) Decision in the Case Against El Motassadeq-*, 5 GERMAN L.J. 515 (2004), available at <http://www.germanlawjournal.com> (last visited Nov. 15, 2004); Hugh Williamson, *Germany Sure US Data Will Aid 9/11 Retrial*, FIN. TIMES, Oct. 7, 2004, at 3; Edward Alden et al., *Legal Cases in Germany and the US Show How Authorities with Interests that Often Diverge Are Inching Towards Greater Co-Operation in Prosecuting Suspects*, FIN. TIMES, Oct. 7, 2004, at 19.

information. As will be shown, this conflict between disclosure and secrecy affected the outcomes of the two trials.

A. *The Trial of Motassadeq*¹¹

In February 2003, the Higher Regional Court of Hamburg sentenced Motassadeq to fifteen years in prison for abetting the hijackers in the murder of 3066 people, and for being a member of a terrorist organization. The guilty verdict was the first verdict reached anywhere against anyone involved in the September 11th terrorist plot.

The clash between secrecy and disclosure arose when Motassadeq's defense counsel sought to subpoena Ramzi Binalshibh, a member of the Hamburg cell who failed to secure a visa to the United States. The defense claimed that Binalshibh could present evidence that the hijackers did not inform Motassadeq of the terrorist plot, despite his connections to the Hamburg cell. Binalshibh was arrested in Pakistan in September 2002, and reputedly placed in the custody of U.S. authorities, who refused to produce him as a witness. In his place, "Agent W," who served with the Federal Bureau of Investigation, supplied evidence about the September 11th attacks. However, Agent W was not allowed to discuss Binalshibh or the interrogation transcripts. Instead, excerpts from the transcripts were made available to the German Federal Office for the Protection of the Constitution (*Bundesverfassungsschutz*) and the Federal Criminal Investigation Office (*Bundeskriminalamt*), on the condition that they could not be used in a prosecution. To obtain the transcripts, German authorities had to agree to

¹¹ Trial court for selected criminal matters and court of appeals [OLG] Hamburg, No. 2 StE 4/02-5, Feb. 19, 2003 (F.R.G.), *available at* <http://www.jurawelt.de/gerichtsurteile/8919> (last visited Nov. 15, 2004); Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 4, 2004, 57 *Neue Juristische Wochenschrift* [NJW] 1259 (2004) (F.R.G.).

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impound them, pursuant to sections 54 and 96 of the Code of Criminal Procedure.¹²

After the guilty verdict was reached in the lower court, Motassadeq's attorney filed an appeal to the Federal Court of Justice (*Bundesgerichtshof*). In March 2004, the Federal Court of Justice quashed the guilty verdict, ruling that the lower court had failed to consider the effect of the missing and potentially exculpatory evidence from Binalshibh. The state's national security interest in maintaining the secrecy of such evidence may not disadvantage the accused's right to a fair trial. Because the defense did not have an opportunity to present evidence from Binalshibh, Motassadeq's right to a fair trial could have been unduly impinged. In light of this, the lower court should have considered whether the non-disclosure of evidence had any bearing on the degree of fault required for criminal liability.

The Federal Court of Justice acknowledged that German criminal procedure, namely section 244(3) of the Code of Criminal Procedure, does permit the non-disclosure of evidence under certain conditions.¹³ The conditions did not apply to this case, even though a literal interpretation might indicate otherwise. Of section 244(3)'s several conditions that permit non-disclosure, the defense's request for evidence from Binalshibh could have hypothetically been rejected on the grounds that the evidence was "unobtainable."¹⁴ However, the evidence was only "unobtainable" because the German government, pursuant to its agreement with the United States, prohibited a witness from testifying. This was an unacceptable interpretation of the "unobtainable evidence" condition. The Federal Court of Justice noted this and advised the lower court to consider it in the retrial of Motassadeq.

¹² §§ 54, 96 StPO.

¹³ § 244(3) StPO.

¹⁴ *Id.*

When the retrial began in August 2004, the U.S. Department of Justice announced its intention to comply, for the first time, with the German court's 27-page request for evidence from Binalshibh. It sent a 6-page fax with detailed summaries of the interrogations of Binalshibh. In October 2004, as the trial continued, Kay Nehm, Germany's chief federal prosecutor, said that the Justice Department expressed a willingness to send additional information as it became available.

B. *The Trial of Mzoudi*¹⁵

Abdelghani Mzoudi, whose trial commenced in August 2003, faced the same charges as Motassadeq: being an accessory to murder in 3066 cases and being a member of a terrorist group. The Higher Regional Court of Hamburg acquitted him in February 2004 because evidence obtained from the United States indicated that he was not involved in planning the September 11th attacks. The prosecution filed an appeal.

Once again, the clash between secrecy and disclosure arose when the defense sought to subpoena Ramzi Binalshibh or access his interrogation transcripts. The United States refused to produce Binalshibh for trial. German authorities continued to impound the transcripts, pursuant to sections 54 and 96 of the Code of Criminal Procedure, at the behest of the United States.

Both sides disclosed certain pieces of classified information at trial, but they did so on a piecemeal basis, which created sudden shifts in the direction of the case, and prompted warnings from the judge. First, the President of the German Secret Service, Heinz Fromm, provided testimony that exonerated Mzoudi. By his account, high-level Al Qaeda leaders, not the Hamburg cell,

¹⁵ For additional information, see Roland Meyer & Thomas Schroeter, *The Hamburg Terror Trial – Part I*, <http://www.jurawelt.com/anwaelte/8812> (last visited Nov. 15, 2004).

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planned the September 11th attacks. Second, disclosures of classified information by the media further agitated the court. *Der Spiegel*, a German news magazine, published a leaked copy of the interrogation transcript of Binalshibh, along with other classified details of the terrorist plot, much of which cast doubt on the prosecution's case. Third, just hours before the hearing of evidence finished, the court received an anonymous 3-page fax from the Federal Criminal Investigation Office. The fax claimed that an "unidentified informant," which the court assumed was Binalshibh, had exonerated Mzoudi.

After receiving the anonymous fax, the judge lifted the arrest warrant against Mzoudi, which the prosecution appealed, to no avail. The court then acquitted Mzoudi for lack of evidence. It had decided that the United States would not change its stance on disclosing classified evidence relating to Binalshibh, who could have tested the credibility of other evidence introduced by prosecutors. In closing, the court rebuked the German secret service and the Federal Criminal Investigation Office for withholding information that appeared in press leaks.

III. THE U.S. MODEL: CIPA

As discussed earlier, the proceedings and outcomes of the German 9/11 trials hinged upon the criminal procedures relating to the disclosure and protection of classified information. Two competing rights and interests were involved: 1) due process rights; and 2) the government's national security interest in protecting classified information.

The German 9/11 trials demonstrated that the clash of those rights and interests could result in tumultuous court proceedings and ultimately undermine the government's case against the defendants. As such, the trials present an opportunity to examine an alternative approach toward the disclosure of classified

information. In this article, the alternative legal approach is a U.S. statute, the Classified Information Procedures Act (“CIPA”).

As will be discussed in the next sub-section, CIPA represents the United States’ attempt to balance the competing interests of disclosure and protection of classified information. CIPA surfaced briefly in the German 9/11 trials, when an attorney representing American families argued that the United States would have been more willing to produce classified information if the court adopted procedures in line with CIPA. The court did not do so, likely because Germany possesses no statute as comprehensive as CIPA.

However, at a meeting of the justice ministers of the G8 in May 2004, Germany, along with the other member states, pledged to enact statutes protecting classified information at trial.¹⁶ They envisioned that the statutes would encourage international intelligence sharing to “disrupt and preempt terrorist

¹⁶ U.S. DEP’T OF JUSTICE, MEETING OF G8 JUSTICE AND HOME AFFAIRS MINISTERS (2004), http://www.usdoj.gov/ag/events/g82004/G8_Recs_Information_Sharing.pdf (last visited Nov. 15, 2004). The relevant provisions are as follows:

States should, to the extent they have not already done so:

1. adopt legislation and/or establish operational mechanisms and procedural safeguards which permit information sharing among and between their intelligence community, their law enforcement community and their prosecutors, to the fullest degree possible, in order to prevent, disrupt and preempt terrorist activities, and to assist in the investigation and/or prosecution of terrorists and those who commit associated offenses;
2. adopt legislation and/or establish operational mechanisms and procedural safeguards which will permit national security intelligence information to be used in the prosecution of terrorists and those who commit associated offenses, while protecting such information, including the sources and methods by which such information has been acquired; to the extent consistent with a fair trial, such mechanisms may, for example, include the use of summaries, substitutions or stipulations;
3. adopt legislation and/or establish operational mechanisms and procedural safeguards, in accord with domestic law, which ensure that national security intelligence information received from the competent authorities in another State is used in a criminal proceeding in accord with the conditions, if any, agreed upon between the competent authorities in the originating State and those in the receiving State.

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activities and prosecute the perpetrators.”¹⁷ The German government has not announced the substance of its planned statute. Nonetheless, when German authorities draft a statute, they likely will refer to CIPA for guidance, since it serves as the benchmark statute governing the disclosure of classified information at trial. Moreover, the G8 pledge borrows language from CIPA when it discusses which procedures the proposed statutes will adopt.¹⁸

Accordingly, this article will first outline the key provisions of CIPA. While outlining CIPA, it will shed light on the difficult decisions that the United States must make in balancing due process rights and national security interests. To some extent, the summary of CIPA also foreshadows the challenges that German authorities will face when they draft and implement their own statute. They, too, will have to wrestle with the tensions between due process and national security.

A. Summary of CIPA and the “Due Process vs. Secrecy” Dilemmas that Face Prosecutors

In 1980, the U.S. Congress enacted CIPA.¹⁹ Before then, defendants in national security cases had reputedly engaged in “graymail” to force the government to decide between dropping its case or risking the disclosure of classified information at trial.²⁰ CIPA formalizes a system for evaluating and weighing such disclosure risks before trials begin. It provides a set of procedures to safeguard classified information, including classified sources, without

¹⁷ *Id.*

¹⁸ *Id.*; 18 U.S.C.A. App. 3 § 6. Both the G8 statement and CIPA discuss the use of summaries and stipulations in lieu of presenting the classified information in original form.

¹⁹ 18 U.S.C.A. App. 3.

²⁰ *See United States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir.) (explaining the practice of “graymail”).

foregoing a defendant's due process rights.²¹ The statute's protections also extend to intelligence information of other countries that is shared with the United States.

Below are summaries of the sections of CIPA that factor prominently in this article. Section 1 of CIPA defines "classified information" and "national security." For the purposes of CIPA, "classified information" is:

any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.²²

"National security" is categorized as "the national defense and foreign relations of the United States."²³

Section 4 authorizes court orders to protect against disclosures of classified information.²⁴ Upon an "ex parte" showing, the court may permit the prosecution to: (1) redact classified information from documents that are then provided to the defense during discovery; (2) substitute a summary of the classified information in lieu of the original documents; or (3) substitute a statement admitting the relevant facts that the original documents would tend to prove.²⁵

Section 5 provides a notice requirement for defendants.²⁶ Under section 5(a), the defendant must provide pretrial written notice to the court and the government if he or she reasonably expects to disclose, or cause the disclosure of,

²¹ See *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983); *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (balancing the defendant's due process rights with national security interests).

²² 18 U.S.C.A. App. 3 § 1.

²³ *Id.* § 2.

²⁴ *Id.* § 4.

²⁵ *Id.* See *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989) (explaining section 4 of CIPA); *United States v. Pringle*, 751 F.2d 419, 427-28 (1st Cir. 1984).

²⁶ 18 U.S.C.A. App. 3 § 5.

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classified information.²⁷ If the defendant does not provide written notice, section 5(b) authorizes the court to prevent the defendant from disclosing the classified information or examining a witness with respect to the classified information.²⁸

Section 6 authorizes the court to hold a pretrial hearing to “make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during trial.”²⁹ The hearing will be held in camera, upon certification by the Attorney General that a public proceeding might result in the disclosure of classified information.³⁰ If the court rules that classified information is admissible, section 6(c) authorizes the government to (1) propose a summary of the classified information in lieu of the original documents; or (2) substitute a statement admitting the relevant facts that the original documents would tend to prove.³¹

The government may provide the court with an affidavit from the Attorney General that certifies that disclosure of classified information would harm national security. The affidavit must explain the government’s grounds for classifying such information.³² The court is required to grant the government’s motion for substitution if the “statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information.”³³

If the court finds that the classified information is indeed admissible, yet denies the government’s motion to substitute or summarize the information, the

²⁷ *Id.* § 5(a).

²⁸ *Id.* § 5(b). *See* United States v. Badia, 827 F.2d 1458, 1465 (11th Cir. 1987) (explaining section 5(b) of CIPA).

²⁹ 18 U.S.C.A. App. 3 § 6.

³⁰ *Id.*

³¹ *Id.* § 6(c). *See* United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (en banc) (explaining section 6(c) of CIPA).

³² 18 U.S.C.A. App. 3 § 6.

³³ *See* United States v. North, 910 F.2d 843, 899 (D.C. Cir. 1990) (explaining section 6(c) of CIPA).

government may file an affidavit from the Attorney General objecting to the disclosure of the information.³⁴ Once the government files the affidavit, the court must order the defendant not to divulge the classified information or cause its disclosure.³⁵ In response to the affidavit, however, the court may penalize the government's case, so as to offset the defendant's inability to use the classified information at trial.³⁶ The penalties, among others, include: (1) striking the testimony of a witness; (2) ruling against the government on issues pertaining to the classified information; and (3) dismissal of the indictment.³⁷

Section 8 safeguards classified information that arises during the testimony of a witness.³⁸ Section 8(c) authorizes the government to object to questions that could prompt a witness to disclose classified information that was not previously found to be admissible.³⁹ If the government files an objection under section 8(c), the court must decide if the testimony is admissible and then take measures to "safeguard against the compromise of any classified information."⁴⁰

IV. THE PROSPECTS FOR A CIPA STATUTE IN GERMANY

As shown, CIPA attempts to balance the due process rights of the defendant with the state's interests in protecting classified information. The successful implementation of a CIPA statute in Germany likewise depends on its ability to balance those rights and interests. The wrangling over the disclosure of

³⁴ 18 U.S.C.A. App. 3 § 6(e). *See* Smith, 780 F.2d at 1105-06 (explaining section 6(e) of CIPA).

³⁵ 18 U.S.C.A. App. 3 § 6(e).

³⁶ *Id.*

³⁷ *Id.* *See* United States v. Fernandez, 913 F.2d 148, 150 (4th Cir. 1990) (holding that the trial court did not abuse its discretion when it dismissed the indictment after the Attorney General prevented disclosure of classified information under section 6(e)(1) of CIPA).

³⁸ 18 U.S.C.A. App. 3 § 8.

³⁹ *Id.* § 8(c).

⁴⁰ *Id.*

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classified information in the Hamburg 9/11 trials offered a glimpse of that balancing and the outcomes that can result.

In the case of Germany, due process rights are enumerated in the federal constitution and European Union treaty provisions, and are enforced by the courts. Accordingly, this article will first outline the constitutional and treaty provisions that bear upon the use of classified information in German trials. Second, it will determine if CIPA conforms to them.

Ultimately, a comprehensive adoption of CIPA is not feasible, since it would run afoul of certain German constitutional and EU treaty provisions. However, a partial adoption of CIPA would not conflict with these provisions.

A. Constitutional and Treaty Provisions Bearing on the Use of Classified Information at Trial

Both the German federal constitution (*Grundgesetz*)⁴¹ and the European Convention on Human Rights (“EU Convention”)⁴² enumerate due process rights. This section discusses the due process rights that bear on the use of classified information at trial. The first right is the defendant’s right to a “fair trial.” The second right is the public’s right to information about a trial, otherwise known as “the interest of the public.”

Both due process rights deal with classified information in a broad sense, however, since the constitution and the EU Convention do not specifically address them, German courts have expounded upon the two rights to keep pace with new legal issues, so they now incorporate rights that American observers might instead categorize as individual, discrete rights.

⁴¹ Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law], May 23, 1949, Bundesgesetzblatt [BGBl.] 1, available at <http://www.iuscomp.org/gla/statutes/GG.htm> (last visited Nov. 15, 2004).

⁴² European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 224 (entered into force Sep. 3, 1953).

1. The defendant's right to a fair trial

Under the federal constitution, defendants have the right to a “fair trial” (*fairen Verfahren*).⁴³ Notably, the constitution does not specifically guarantee such a right.⁴⁴ Nonetheless, courts have partly derived the right from the constitution.⁴⁵ Various articles of the constitution have been construed, in the aggregate, to guarantee a fair trial. Article 103 is one of the four articles (art. 101-104) that govern the rights and obligations of the courts towards individuals (*Justizgrundrechte*). Article 103(1) provides that “[i]n the courts everyone is entitled to a hearing in accordance with the law,”⁴⁶ which one commentator categorizes as the “right of audience.”⁴⁷ Article 2(1) provides that “[e]veryone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral

⁴³ Thomas Swenson, *The German “Plea Bargaining” Debate*, 7 PACE INT’L L. REV. 373, 412 (1995).

⁴⁴ Susanna Fischer, *German Judicial System*, Mar. 1, 2002, <http://faculty.cua.edu/fischer/ComparativeLaw2002/Comparative%20Law%20Class%202022.ppt> (last visited Nov. 15, 2004).

⁴⁵ Christoph J.M. Safferling wrote of the concept of a fair trial from a German law perspective: Why is all of this important for a criminal trial? The accused has a right to defend himself. This is an undeniable essential feature of fairness and can be found in all of the human rights treaties. If the evidence that the accused wants to rely on in order to exonerate himself is withheld by executive authorities, the accused is trapped. The prosecutorial authorities are in an advanced position anyway. They have a powerful police and intelligence machinery at their service, whereas the defendant can rely only on a defence team. The inequalities as regards information can be dramatic. The more complex and international the case is, the more serious this slant can be. By virtue of the principle of “equality of arms” both parties are to be brought on the same or at least a similar footing. If then the accused is confronted with a charge by the authorities and the same executive power refrains to disclose exonerating evidence, the accused is left with nothing but his own word.

Safferling, *supra* note 10, at 522.

⁴⁶ Art. 103(1) GG. German criminal procedure is partially regulated by the Constitution (*Grundgesetz*), particularly the four articles, art. 101-104, that govern the rights and obligations of the courts towards individuals (*Justizgrundrechte*).

⁴⁷ Fischer, *supra* note 44.

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code.”⁴⁸ Article 20(3) provides that “[l]egislation is subject to the constitutional order; the executive and the judiciary are bound by the law.”⁴⁹

Individually, some of the constitutional articles may seem insufficient, but in the aggregate, they provide for the right to a fair trial, according to the Federal Constitutional Court.⁵⁰ Given the vagueness of each of the articles, the right to a fair trial is not articulated in detail and has very little content on its own. However, treaty provisions and the German courts⁵¹ have elaborated upon this right, as will be discussed in the subsequent paragraphs.

Under the EU Convention, as well, defendants have the right to a fair trial. German courts are required to implement the convention. In contrast to the federal constitution, the convention specifically guarantees the right to a fair trial. Article 6(1) provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁵² Other articles elaborate upon the right to a fair trial.⁵³ For the purposes of this article, articles 6(3)(a) and 6(3)(d) are the relevant provisions. They provide that “[e]veryone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; . . . [and] (d)

⁴⁸ Art. 2(1) GG; Blaauw-Wolf, *supra* note 10, at 808; Erich Samson, *The Right to a Fair Criminal Trial in German Criminal Proceedings Law*, in *THE RIGHT TO A FAIR TRIAL* 513, 527 (David Weissbrodt & Rüdiger Wolfrum eds., 1997).

⁴⁹ Art. 20(3) GG; Blaauw-Wolf, *supra* note 10, at 808.

⁵⁰ Blaauw-Wolf, *supra* note 10, at 808; Samson, *supra* note 48.

⁵¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 21, 1976, 41 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 246 (249) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 3, 1969, 26 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 66 (71) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 8, 1959, 9 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 89 (95) (F.R.G.).

⁵² Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 42, art. 6(1).

⁵³ For a summary of the protections that constitute the right to a fair trial, see article 6 of the European Convention of Human Rights.

to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”⁵⁴

As stated earlier, the right to a fair trial is a vague right under German law, even after the EU Convention gives some substance to it. Nevertheless, the German Federal Court of Justice ruled, in the Motassadeq appeal, that the defendant’s right to a fair trial was violated when a significant and potentially exculpatory witness was not available.⁵⁵ Pursuant to sections 54 and 96 of the Code of Criminal Procedure, the German government had agreed, at the behest of the U.S. government, to withhold access to the witness and transcripts. For all practical purposes, the witness’ statements were classified.

The Federal Court of Justice cited articles 6(1)⁵⁶ and 6(3)(d)⁵⁷ of the EU Convention as controlling authority.⁵⁸ Because the defendant had no opportunity to present evidence from the barred witness (art. 6(3)(d)), his right to a fair trial (art. 6(1)) was violated. In sum, the right to a fair trial requires that a defendant be given access to witness testimony, even if it is withheld as classified information.

However, it has only been established that the potentially exculpatory witness must be available—*how* he is made available is not clear. German criminal procedure and the EU Convention seem to conflict in this regard. Section 250 of the Code of Criminal Procedure requires that a witness be examined at trial if evidence of a fact is based on witness testimony.⁵⁹ The examination may not be replaced by reading a record of an earlier examination or

⁵⁴ *Id.* art. 6(3)(a), 6(3)(d).

⁵⁵ Blaauw-Wolf, *supra* note 10, at 807-09.

⁵⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 42, art. 6(1).

⁵⁷ *Id.* art. 6(3)(d).

⁵⁸ Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 4, 2004, 57 *Neue Juristische Wochenschrift* [NJW] 1259 (1261) (2004) (F.R.G.).

⁵⁹ § 250 StPO.

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by reading a written statement.⁶⁰ This provision codifies the German orality principle (*Mündlichkeitsprinzip*). The principle is vaguely articulated in the federal constitution as Article 103(1).⁶¹ However, the orality principle has not prevented the German Federal Court of Justice from generally upholding a conviction that is mainly supported by evidence from a police informant whose testimony is indirectly introduced.⁶²

Article 6(3)(d) of the EU Convention, which rises to the constitutional level, is more accommodating than German criminal procedure.⁶³ Moreover, as a treaty, it arguably preempts the criminal procedure. It allows the examination of a witness “under the same conditions” as a witness who testified against the defendant. This flexible standard plausibly authorizes the use of witness transcripts or summaries against a defendant, provided that the defendant could examine the witness “under the same conditions” (however cumbersome that might be).

2. The interest of the public

The second due process right to be examined is the public’s right to information about a trial, otherwise known as “the interest of the public” (*Öffentlichkeitsprinzip* or *Grundsatz der Öffentlichkeit*).⁶⁴ Section 169 of the Court organizational statute (*Gerichtsverfassungsgesetz*) requires that the trial,

⁶⁰ *Id.*

⁶¹ Art. 103(1) GG.

⁶² Safferling, *supra* note 10, at 519. Bundesgerichtshof [BGH] [Federal Court of Justice], Dec. 20, 2000, 54 *Neue Juristische Wochenschrift* [NJW] 2245 (2001) (F.R.G.); Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 12, 1996, 42 *Entscheidungen des Bundesgerichtshofes in Strafsachen* [BGHSt] 15 (25) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 26, 1981, 57 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 250 (292) (F.R.G.).

⁶³ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 42, art. 6(3)(d).

⁶⁴ Fischer, *supra* note 44.

including pronouncement of the verdict and rulings, be public.⁶⁵ This may be attributed to the public's "right to transparency," the idea that all trial information has to be disclosed so that the public may see that the government is operating fairly. Some of this sentiment stems from abuses of power by the judiciary (and the government, in general) during the Nazi era. Also, German courts do not produce verbatim trial transcripts. As a result, the only way to obtain the substance of evidence or a witness' testimony is to be present and take notes.

The "interest of the public" may be trumped on national security grounds, however. For instance, article 6(1) of the EU Convention allows the judge to close the proceedings for national security reasons.⁶⁶ Likewise, for reasons of "state security," section 174 of the Court organizational statute allows the judge to seal the court proceedings and to require parties to keep the evidence secret.⁶⁷ Although the Motassadeq and Mzoudi courts apparently did not rule on this issue, "state security" and "national security reasons" arguably could include the "reason" of preventing *public* disclosure of classified information at trial. Disclosure of classified information, which is based on sensitive sources, inherently raises national security concerns. The information would not be classified if it did not raise national security concerns.

This section of the article has discussed two due process rights which bear upon the use of classified information at trial: 1) the defendant's right to a fair trial; and 2) the public's right to information about a trial. With respect to national security issues, namely the use of classified information at trial, German law deals with the two rights differently. Whereas the national security interests against disclosing classified information might trump the public's interests, they might not trump the defendant's right to a fair trial. For instance, in the Federal

⁶⁵ § 169 GVG.

⁶⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 42, art. 6(1).

⁶⁷ § 174 GVG.

Court of Justice ruling, Motassadeq's right to examine a witness trumped the government's national security embargo of the witness and his statements.

B. *Would CIPA Run Afoul of German Due Process Rights?*

This section examines the interaction of German due process rights, discussed above, with a CIPA statute. For the sake of brevity, CIPA will be distilled into four general components: 1) pretrial notice by a defendant who expects to disclose classified information;⁶⁸ 2) closed proceedings;⁶⁹ 3) court orders authorizing deletion of classified evidence from discovery;⁷⁰ and 4) court orders authorizing summaries and stipulations of evidence during discovery and at trial.⁷¹ Although the statute possesses other significant provisions, these four components would form the heart of a CIPA statute. They also epitomize the tensions between due process rights and the state's national security interests.

Accordingly, this section analyzes the four CIPA components to determine if they run afoul of the German due process rights discussed above: the defendant's right to a fair trial and the public's right to information about a trial. The article previously analyzed how those due process rights bear upon the use of classified information at trial. Much of what is argued below draws upon that analysis.

The first CIPA component, pretrial notice by a defendant who expects to disclose classified information, likely will not run afoul of German due process rights. Neither the federal constitution nor the EU Convention enumerate a right that would nullify the pretrial notice requirement. The defendant's right to a fair trial and the interests of the public are not impinged by the notice requirement.

⁶⁸ 18 U.S.C.A. App. 3 § 5.

⁶⁹ *Id.* § 6(a).

⁷⁰ *Id.* § 4.

⁷¹ *Id.* §§ 4, 6.

The pretrial notice requirement is merely an issue of timing. It is directed against the surprise use of evidence, not at the defendant's substantive right itself to use evidence in his defense.

Similarly, the second CIPA component, closed proceedings, likely will not run afoul of German due process rights. German law and the EU Convention already allow proceedings to be closed for national security reasons. As was argued earlier, acceptable national security reasons to close the proceedings could include the need to prevent the public disclosure of classified information at trial.⁷² Accordingly, a CIPA provision permitting closed proceedings would likely be permitted in Germany.

On the other hand, the third CIPA component, deletion of classified evidence from discovery, will likely run afoul of German due process rights. The deletion of evidence under CIPA may be analogized to the withholding of a potentially exculpatory witness and his statements in the Motassadeq trial. The German Federal Court of Justice ruled that the government's withholding of the witness and his statements violated the defendant's right to a fair trial.⁷³ Accordingly, the deletion of evidence under CIPA likely would conflict with German law.

The fourth CIPA component, summaries or stipulations of classified evidence, might pass constitutional muster. In Motassadeq's ongoing retrial, the U.S. government provided German prosecutors with summaries of witness statements.⁷⁴ The court has not yet decided if those statements are fair substitutions for live testimony. Nonetheless, a number of factors support the use of summaries and stipulations.

⁷² *Id.*; Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 42, art. 6(1).

⁷³ Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 4, 2004, 57 Neue Juristische Wochenschrift [NJW] 1259 (1262) (2004) (F.R.G.).

⁷⁴ Williamson, *supra* note 10.

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When the government uses a summary or a stipulation of classified evidence, it does not withhold the evidence entirely. This may be contrasted with the Motassadeq trial, where the witness and his transcripts were withheld entirely—a practice that the court rebuked when it ruled against the state. In the Motassadeq trial, the defendant had no opportunity to review the witness' evidence against him. Summaries and stipulations, on the other hand, would still provide an opportunity, albeit a restricted opportunity, for the defendant to review the evidence against him. This restricted opportunity to review evidence represents a compromise between the defendant's due process rights and the state's interests in protecting classified information.

The EU Convention and court precedent also seem to support the use of summaries and stipulations. Article 6(3)(d) of the Convention, which supersedes the criminal procedure's orality principle, allows a defendant to examine a witness under the "same conditions" as the witness who testified against him.⁷⁵ Accordingly, the testimony need not be in person, and could take the form of indirect testimony, such as summaries or stipulations, provided that the defendant has the opportunity to examine the witness "under the same conditions." Moreover, the German Federal Court of Justice and the Federal Constitutional Court generally uphold a conviction that is mainly supported by evidence from a police informant whose testimony is indirectly introduced.⁷⁶ This practice of indirectly introducing evidence may be analogized to the German prosecution's attempt to introduce summaries of witness statements in lieu of live testimony.

⁷⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 42, art. 6(3)(d).

⁷⁶ Safferling, *supra* note 10, at 519. Bundesgerichtshof, [BGH] [Federal Court of Justice], Dec. 20, 2000, 54 *Neue Juristische Wochenschrift* [NJW] 2245 (2001) (F.R.G.); Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 12, 1996, 42 *Entscheidungen des Bundesgerichtshofes in Strafsachen* [BGHSt] 15 (25) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 26, 1981, 57 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 250 (292) (F.R.G.).

For the reasons stated above, the use of summaries and stipulations likely would not violate a defendant's right to a fair trial. Furthermore, their use would also not violate the public's right to know information about a trial, since German law and the EU Convention already authorize limits, on national security grounds, upon the public's access to trial information.

CONCLUSIONS

Of the four main CIPA components that this article examines, only the provision authorizing the deletion of evidence clearly conflicts with German due process rights. The other three CIPA components conform to the federal constitution and the EU Convention. In Motassadeq's retrial, the German Federal Court of Justice might rule against the use of summaries and stipulations. For the time being, however, summaries and stipulations, arguably the crux of CIPA, draw support from persuasive court rulings and the EU Convention.

As this article demonstrated, German law can accommodate a CIPA-like statute without compromising due process rights. Whether German authorities are willing to enact such a statute, however, is another matter altogether. Germany has not faced a terrorist incident on the scale of 9/11, so the need to adopt a CIPA statute is not as pressing. Partly due to Nazi-era experiences, Germans remain wary of expansions in government power and the potential for abuse.

Despite these hurdles, the government pledged to enact a CIPA statute. Now, Germany faces the more difficult task of deciding what the statute will look like. The Hamburg 9/11 trials generated chaos and rancor, but they may have done Germany a service in the long run. By calling attention to anachronisms in

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German law, the trials provoked a long overdue discussion about the balance of due process rights and national security interests in the courtroom.