



## **DOSSIER**

### **THE US TORTURE PROGRAM – APPROVED AT THE HIGHEST LEVELS**

<b>1 Introduction .....</b>	<b>1</b>
<b>1.1 Note from Manfred Nowak, former UN Special Rapporteur on Torture .....</b>	<b>2</b>
<b>2 The “architects” of the US torture program: Criminal complaints in Europe.....</b>	<b>2</b>
<b>3 “Bush Six”: Investigations in Spain.....</b>	<b>3</b>
<b>4 Guantánamo: Investigations in France .....</b>	<b>4</b>
<b>5 The El Masri case .....</b>	<b>4</b>
<b>6 The case of Maher Arar .....</b>	<b>5</b>
<b>7 Guantánamo: Complaint in Belgium .....</b>	<b>5</b>
<b>8 CIA torture: Why Germany should investigate Gina Haspel and others.....</b>	<b>6</b>
<b>9 Next steps .....</b>	<b>7</b>
<b>10 Glossary .....</b>	<b>8</b>
<b>11 Publications (Selection).....</b>	<b>9</b>

## 1 INTRODUCTION

Guantánamo, Abu Ghraib, Bagram, European blacksites; waterboarding, sleep deprivation and electric shocks: all of these are parts of the system of US torture introduced in the months and years after September 11<sup>th</sup> 2001.

Article 5 of the Universal Declaration of Human Rights states that nobody shall be subject to torture or to cruel, inhuman or degrading treatment. This principle is also reflected in international law – e.g. in the **UN Convention against Torture (CAT)** – and in domestic laws in many states. Yet all over the world people are tortured. This occurs not only in dictatorships and repressive regimes but also in partially democratic states and in democracies like the United States.

In response to the 9/11 attacks in 2001, the CIA and US military – with approval at the highest levels – kidnapped, unlawfully detained and tortured hundreds of people.

On 11 January 2002 the first detainees were brought to the US military base at

Guantánamo in Cuba. Over the following years the US government, as part of its “war on terror”, subjected detainees to various forms of torture and abuse by CIA and US military officials. Many other countries condoned or quietly tolerated this system.

The US torture program, initiated under then President George W. Bush and members of his administration, violates international as well as human rights law. To date no one has been held criminally liable for these policies. ECCHR takes legal action seeking justice for survivors and to act as a deterrent and thus help prevent torture in the future.

Since 2004 ECCHR has been working together with former Guantánamo detainees as well as the Center for Constitutional Rights ([CCR](#)) in New York and partner lawyers from Europe (Gonzalo Boye, William Bourdon, Apolline Cagnat, Walter van Steenbrugge and Christophe Marchand). The legal work focus mainly on the “architects” of the system – high-ranking politicians, officials, intelligence agents and military personnel.

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## 1.1 NOTE FROM MANFRED NOWAK, FORMER UN SPECIAL RAPPORTEUR ON TORTURE

In their so-called “war on terror” the US government under George W. Bush violated binding international law standards – international humanitarian law, human rights and the international rule of law – in a manner that was unprecedented for a democratic state that purports to uphold the rule of law. Individuals suspected of involvement in terrorism were arbitrarily detained, interned and tortured over several years at CIA secret prisons and military prisons like Guantánamo Bay, and transported around the globe by means of secret rendition flights in inhumane and degrading conditions. Prisons were specially set up outside US territory in an effort to evade guarantees for prisoners in the US constitution and under international law. Using the fiction of the “war on terror”, the Bush administration tried to convince the rest of the world that in the fight against terrorism, criminal law standards and fundamental human rights standards do not apply, that only the exceptional provisions of international humanitarian law apply. By creating a new category of “illegal enemy combatants”, the Bush administration sought to get around even those bare minimum standards under humanitarian law, leaving them free to see terrorism suspects as being beyond any legal protection. Finally, they tried to sidestep the absolute prohibition on torture through adventurous “legal memos” and unlawful considerations of national security interests on the basis of the “ticking time bomb” scenario.

This text was first published in German in *Folter und die Verwertung von Informationen bei der Terrorismusbekämpfung (Torture and the Use of Information in Countering Terrorism)*, published by ECCHR in 2011.

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## 2 THE “ARCHITECTS” OF THE US TORTURE PROGRAM: CRIMINAL COMPLAINTS IN EUROPE

On 29 November 2004, ECCHR founder General Secretary Wolfgang Kaleck filed a [criminal complaint](#) in Germany on behalf of four Iraqi survivors and the Center for Constitutional Rights (CCR) concerning the US torture program.

The complaint was directed against, among others, former Secretary of Defense

Donald Rumsfeld, former CIA Director George Tenet and a number of high ranking military personnel in relation to breaches of the UN Convention against Torture and the German Code of Crimes against International Law.

The crimes alleged were: **war crimes**, torture and other crimes committed in the US military detention facilities at Guantánamo and Abu Ghraib. The complaints were based on the **principle of universal jurisdiction** which is enshrined

in German law. Under this principle it is possible to pursue legal action in national courts in cases of so called “core crimes,” such as war crimes or crimes against humanity, even if the criminal acts in question took place in another country.

Further legal interventions directed against the “architects” of US torture followed in Germany (2006) and France (2007). In all cases, however, the relevant court authorities refused to initiate investigations and rejected appeals against these decisions.

The [criminal complaint](#) which ECCHR prepared in 2011 in Geneva was directed against George W. Bush himself. In it, Bush is accused of a number of crimes, including violations of the UN Convention against Torture. The possibility of immunity for former heads of state does

not apply in the case of torture. The Convention against Torture obliges member states to investigate suspected instances of torture, even if allegations relate to former presidents or members of the government, secret services, the army or police forces.

The comprehensive complaints were supported by more than 50 organizations from around the world as well as from Nobel Peace Prize winners Shirin Ebadi and Pérez Esquivel and former UN Special Rapporteurs Theo van Boven and Leandro Despouy.

Following the announcement of the criminal complaint, George W. Bush cancelled a planned trip to Geneva.

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### **3 “BUSH SIX”: INVESTIGATIONS IN SPAIN**

In March 2009, a [criminal complaint](#) was filed in Spain against six former US officials concerning their responsibility for violations of international law, including war crimes and torture. The six US officials became known as the “Bush Six.” The Bush Six are accused of having aided and abetted crimes of torture, cruel, inhuman or degrading treatment and grave breaches of the **Geneva Conventions** of 1949. The crimes in question were committed at US detention facilities at Guantánamo and at other locations. The investigation was later extended to include Guantánamo as a whole.

ECCHR initiated the proceedings together with partner lawyers from Madrid and New York and represents the German citizen Murat Kurnaz who was detained – and tortured – in Guantánamo between January 2002 and August 2006.

When these proceedings were due to be closed after a change in universal jurisdiction laws in Spain, ECCHR and CCR submitted a constitutional complaint to challenge the decision. In May 2017, the Spanish Constitutional Court (*Tribunal Constitucional*) received arguments from ECCHR and CCR against the decision to close the investigations. A decision is currently pending.

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#### 4 GUANTÁNAMO: INVESTIGATIONS IN FRANCE

For nearly three years, French citizens Mourad Benchellali and Nizar Sassi were detained and tortured at Guantánamo. Since 2002, Benchellali and Sassi together with their families and ECCHR partner lawyers are fighting to ensure those responsible are held accountable. The French judiciary has since then been [investigating](#) the US torture program.

In March 2016, retired US General Geoffrey Miller, the former Guantánamo prison chief, was a no-show in a French court. Miller had been summoned as an “accused witness” to answer questions stemming from accusations that he oversaw the torture of three French nationals at Guantánamo prison.

ECCHR and CCR made submissions to the court in 2015 arguing that the cruel treatment in Guantánamo constitutes torture under international law and detailed the criminal responsibility of the US Commander.

Miller – as was expected – did not appear in court. For Benchellali and Sassi, however, the summons was an important step.

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#### 5 THE EL MASRI CASE

German citizen Khaled El Masri was abducted by CIA officials at the Serbian-Macedonian border on 31 December 2003. Khaled El Masri spent nearly four months

In October 2016, ECCHR and CCR requested on behalf of Sassi and Benchellali that the Investigative Judge of the High Court of Paris (*Cour d’Appel de Paris – Tribunal de Grande Instance de Paris*) also question William “Jim” Haynes on his role in the torture. Haynes was General Counsel (chief legal advisor) in the US Department of Defense from 2001-2008 and worked closely with former Secretary of Defense Donald Rumsfeld between 2001 and 2006.

In a 26-page dossier submitted to the French authorities, CCR and ECCHR detail Haynes’ involvement in the policies of torture and war crimes. The information presented in the submission shows that Haynes was one of the primary architects of the Bush administration’s interrogation and detention policies. It sets out the role Haynes played in e.g. formulating and approving the list of interrogation techniques that led directly to torture and abuse at Guantánamo and in allowing the torture and abuse to continue by silencing objections to the interrogation techniques from the military and other government departments.

in a secret CIA prison in Afghanistan. During this time he was regularly subjected to physical abuse and degradation. Eventually, the CIA released him on a roadside in Albania. He arrived back in Germany on 29 May 2004.

The case of El Masri is one of the most well-documented CIA rendition operations. Several inquiry commissions examined this case and legal actions were brought before various national and regional courts.

ECCHR filed a [complaint](#) in Germany to the administrative court in Cologne

seeking to enforce thirteen arrest warrants against former CIA officials who were involved in El Masri's abduction in Skopje and rendition to Kabul. The German government, however, refused to officially ask the US for extradition of the indicted persons. The lawsuit was rejected on the merits by the Cologne administrative court.

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## 6 THE CASE OF MAHER ARAR

Maher Arar, a Canadian citizen, was arrested and abducted by US officials in 2002 and brought to Syria. During his one-year detention in Syria he was subjected to torture and was imprisoned under inhumane and degrading conditions. After his return to Canada a commission of inquiry, established by the Canadian government, brought the circumstances of his case to light.

Arar sought compensation for his rendition to Syria before US courts. The lower courts dismissed the claim on the basis that

it concerned state secrecy issues, arguing the case posed a risk to foreign relations and national security.

In association with the Human Rights Committee of the Bar of England and Wales, ECCHR filed an **amicus curiae brief** on 5 March 2010 supporting the petition of the Center for Constitutional Rights in the [civil action](#) brought by Maher Arar.

In June 2010, the US Supreme Court, issued a decision refusing to review the case.

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## 7 GUANTÁNAMO: COMPLAINT IN BELGIUM

Belgian citizen Mosa Zemmouri was detained at the US military base in Guantánamo Bay from 2002 to 2005, where he was subjected to brutal beatings as well as sensory deprivation, exposure to extreme temperatures and other severe forms of physical and psychological abuse.

In March 2017, the UN Committee against Torture in Geneva accepted a [complaint](#)

(**individual communication**) against Belgium filed by Zemmouri. The complaint on behalf of Zemmouri had been submitted by ECCHR and its cooperating lawyers in Belgium – Walter van Steenbrugge and Christophe Marchand – on 11 January 2017.

In their submission to the UN Committee, Zemmouri, his lawyers and ECCHR argue that Belgian officials were complicit in the abuse, that Belgium knew about the torture but failed to prevent it, and that Belgian

authorities subsequently failed to carry out adequate investigations into the crimes. Belgium was obliged under the UN Convention against Torture to do so.

The complaint was filed on the 15th anniversary of the arrival of the first detainees to Guantánamo Bay.

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## **8 CIA TORTURE: WHY GERMANY SHOULD INVESTIGATE GINA HASPEL AND OTHERS**

In February 2017, US President Donald Trump appointed Gina Haspel as CIA Deputy Director. In May the following year she was promoted to lead the CIA as Director.

Gina Haspel has held various positions since joining the CIA in 1985. From 2002 to 2005 she was involved in the CIA's rendition and torture program, including as head of a "blacksite" (secret prison) in Thailand.

Prior to 2017, Gina Haspel's work at the CIA was undercover, and it was only on her appointment as Deputy Director that her name, previous posts and areas of work became known.

In June 2017, ECCHR submitted a criminal [complaint](#) on Haspel, ECCHR's

first such legal action against a serving CIA official. The complaint, which was filed with the **German Federal Public Prosecutor** (*Generalbundesanwalt* – *GBA*), is aimed at securing an arrest warrant for Haspel. This submission is a follow-up to a criminal complaint on the US torture program submitted by ECCHR to German prosecutors in December 2014.

ECCHR is calling for an investigation into the US torture program as a whole and the members of the government, CIA and military who bear responsibility for the program. In its submissions ECCHR accuses Tenet, Rumsfeld and other named suspects of the war crime of torture under Article 8 § 1(3) of the German Code of Crimes under International Law. That acts of torture occurred as part of the US program was confirmed in the US Senate Intelligence Committee Report on the CIA Detention and Interrogation Program.

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## 9 NEXT STEPS

By appointing Gina Haspel as CIA Director, President Trump showed his support for a woman who approved of and supervised torture. Former President Barack Obama, while he at least planned to close the prison at Guantánamo, failed to ensure that those responsible for the unlawful policies faced legal consequences. Trump shows no hesitation in keeping Guantánamo open and running and has voiced his support for torture, including waterboarding.

Those responsible for the US torture program, including former Defense Secretary Donald Rumsfeld, former President George W. Bush and other high-ranking politicians and military officials enjoy total impunity for their role in torture. Some of the responsible face restrictions when travelling overseas, thanks to criminal complaints, open letters and the efforts of civil society organizations. None of them, however, has ever sat in the defendants' bench of a court.

ECCHR will keep challenging those responsible for torture, war crimes and crimes against humanity. This includes the [cases of British soldiers](#) who abused prisoners in Iraq.

Several hundred Iraqis who were detained by British forces brought allegations to ECCHR's former partner organization Public Interest Lawyers (PIL) of grave mistreatment from 2003 to 2008. Together, ECCHR and PIL chose 85 representative cases for analysis in a communication to the [International Criminal Court](#) in The

Hague. That submission details how techniques including physical assault, hooding, electric shocks, stress positions, deprivation of food, water and sleep, and sexual humiliation were used against detainees.

In December 2017, the Court's Office of the Prosecutor (OTP) announced that it sees a reasonable basis to believe that members of the UK armed forces committed war crimes against detainees in Iraq. Prosecutors in The Hague will now move to what it refers to as Phase 3 of the proceedings, examining issues of gravity and complementarity. The complementarity assessment will consider whether genuine investigations and prosecutions are being conducted in the UK.

In so many cases, powerful decision-makers evade prosecution for the crimes they commit. ECCHR works with an international network of activists and lawyers in an effort to end this impunity.

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## 10 GLOSSARY

**Amicus curiae brief:** An amicus curiae brief is a written submission to a court in which an amicus curiae (literally a “friend of the court”: a person or organization who/which is not party to the proceedings) can set out legal arguments and recommendations in a given case.

**Geneva Conventions:** The four Geneva Conventions of 1949 form the basis of International Humanitarian Law. These laws protect persons who are not or no longer involved in hostilities. This includes civilians, prisoners of war and wounded and sick soldiers. 196 states have signed up to the Geneva Conventions to date.

**German Federal Public Prosecutor:** The Office of the German Federal Public Prosecutor (*Generalbundesanwaltschaft*, GBA) is Germany's highest prosecutory authority. The GBA is responsible for prosecutions in serious cases relating to crimes against international law and crimes concerning state security.

**Individual complaint:** An individual complaint mechanism allows individuals, groups and in some cases NGOs to seek enforcement of rights. Various individual complaint mechanisms exist for the enforcement of rights guaranteed under international law. Individual complaints can be brought before certain regional courts, such as the European Court of Human Rights, when all domestic remedies have been exhausted.

**International criminal law:** International criminal law is a body of rules prohibiting grave human rights violations such as genocide, war crimes, crimes against humanity

and the crime of aggression. These are crimes which are so serious they are seen as concerning the international community as a whole. This body of law allows the perpetrators of these crimes to be held criminally liable for their actions. Prosecutions for these crimes can – depending on the case – be carried out on a national level or at an international tribunal such as the International Criminal Court.

**UN Convention against Torture:** The UN Convention against Torture aims to prevent torture and other cruel, inhuman or degrading treatment or punishment. It was adopted in 1984 and supplements the Universal Declaration on Human Rights and the Geneva Conventions. Under the Convention states are obliged to prevent and punish acts of torture.

**Universal jurisdiction:** The principle of universal jurisdiction provides for a state's jurisdiction over crimes against international law even when the crimes did not occur on that state's territory, and neither the victim nor perpetrator is a national of that state. The principle allows national courts in third countries to address international crimes occurring abroad, to hold perpetrators criminally liable, and to prevent impunity.

**War crimes:** War crimes are serious violations of international humanitarian law provisions applicable in international and non-international armed conflict. War crimes are part of the core crimes of international criminal law and are subject to universal jurisdiction. War crimes can include e.g. torture, intentional attacks on the civilian population or civilian objects such as hospitals and the use of chemical weapons.

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## 11 PUBLICATIONS (SELECTION)

**Wolfgang Kaleck:** “Justice and Accountability in Europe – Discussing Strategies”, in: ECCHR (ed.), *CIA-‘Extraordinary Rendition’ Flights, Torture and Accountability – A European Approach*, Berlin 2009, pp. 6-17

**Andreas Schüller / Morenike Fajana:** [“Piecing together the puzzle: making US torturers in Europe accountable”](#), in: [Statewatch](#), September 2014

**Christian Fuchs:** [“Trump’s Darling](#) – Gina Haspel, the new No. 2 at the CIA, played a leading role in the torture of terror suspects following 9/11. Now German lawyers are seeking criminal action against her.” *ZEITOnline*, 10 June 2017

**Wolfgang Kaleck:** [“Obamas Trippelschritte gegen die Folter”](#), in: *Recht Subversiv*, *DIE ZEIT*, 9 December 2015

**Wolfgang Kaleck:** “Litigating ‘Extraordinary Rendition’ Cases: Overview and Challenges”, in: Manfred Nowak / Roland Schmidt (eds.), *Extraordinary Renditions and the Protection of Human Rights*, series from the Ludwig Boltzmann Institut für

Menschenrechte 20, Vienna / Graz 2010, pp. 13-30

**Wolfgang Kaleck:** [Double Standards: International Criminal Law and the West](#), Torkel Opsahl Academic, 2015

**Wolfgang Kaleck:** „Ein bitterer Sieg. Europäischer Gerichtshof für Menschenrechte urteilt: Menschenrechte von El Masri wurden verletzt“, in: T. Müller-Heidelberg et. al. (eds.), *Grundrechte-Report 2013. Zur Lage der Bürger- und Menschenrechte in Deutschland*, in: Fischer Taschenbuch Verlag 2013, pp. 22-25

**Andreas Schüller et. al.:** [Folter und die Verwertung von Informationen bei der Terrorismusbekämpfung](#). ECCHR (ed.), Berlin 2011

*For more information and the documents related to ECCHR’s cases, see <https://www.ecchr.eu/en/topic/us-torture/> as well as the [special publication](#) reflecting on the first 10 years of ECCHR.*

**“Those who commit, order or allow torture should be brought before a court – this is especially true for senior officials from powerful nations.”**

– Wolfgang Kaleck, ECCHR General Secretary

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