



Analysis

Piecing together the puzzle: making US torturers in Europe accountable

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September 2014

In response to the terrorist attacks of September 11 2001, the United States (US) has developed an aggressive international counter-terrorism regime. Under the guise of national security, the US has systematically abducted, arbitrarily detained, tortured, and infringed the constitutional and human rights of hundreds of terrorist suspects. The detention facilities at Guantánamo Bay, Cuba and Abu Ghraib in Iraq are emblematic features of this regime. Torture and abuse were widespread at these facilities, and at clandestine detention facilities around the world that have often been referred to as CIA “black sites”. The incidences of torture and abuse at these facilities have decreased in recent years, as more information about these practices has come to light. [1] In addition, the practice of extraordinary rendition – the kidnapping of individuals and their forced transfer to another country without a formal extradition request or other legal authority – was a central component of this regime. Through this practice, many counterterrorism suspects were abducted, taken to another country and arbitrarily detained and tortured. [2]

The United States did not act alone. Many unlawful activities carried out as part of their counter-terrorism regime depended on the cooperation of countries across the world – including in Europe. These countries provided intelligence, housed secret detention facilities, and colluded in extraordinary rendition. With this European involvement in mind, this article attempts to summarise the legal initiatives directed at securing accountability for illegal US counter-terrorism practices in Europe. Some initiatives use criminal law to challenge those US officials directly responsible for such activities, while others target European states and their officials for facilitating or participating in the US’ counter-terrorism regime. Accountability has also been pursued through fact-finding missions by national and European parliaments, investigations by law enforcement authorities, and prosecutions in national and European courts.

Across Europe, the exhaustion of available legal remedies continues today, more than a decade after the torture and renditions began. To uphold and re-establish the absolute prohibition of torture, victims, their representatives, and activist groups continue to seek justice before courts worldwide. The majority of victims have not received reparations, either by securing a conviction against the relevant perpetrators in court, receiving financial compensation, or being given official apologies by the state actors involved in the crimes. This has led to the re-traumatisation of the victims and made it enormously difficult for them

to rebuild their lives, and is one of a number of compelling reasons for states to pursue investigations and prosecutions in order to help the victims secure justice.

In recent years, initiatives by prosecutors, members of parliaments, human rights activists, journalists and other actors have helped to shed light on the crimes committed by the US in countering global terrorism and to identify some of the individuals responsible. Successful litigation has resulted in former high-ranking members of the Bush administration and hundreds of former or current CIA officers avoiding travelling to Europe for fear of prosecution. Prosecutions in Italy, arrest warrants in Germany and investigations in Poland and Spain against CIA officials for their involvement in rendition and torture, as well as the European Court of Human Rights' decision against Macedonia in the El-Masri rendition case, have all contributed to, and continue to frame, the legal response to the commission of crimes as part of post 9-11 US counter-terrorism policy.

Litigation has taken several forms over the past decade. Ground-breaking criminal charges were filed soon after the Abu Ghraib scandal in 2004 which established the individual criminal responsibility of high-ranking US officials, including former President George W. Bush and former Secretary of Defense Donald Rumsfeld. This brought international criminal law into the debate around detainee mistreatment and 'enhanced interrogation' techniques. At the same time, from a more victim-centred approach, investigations were launched on behalf of European citizens detained in Guantánamo Bay. These investigations sought to gather evidence and build cases, without naming specific suspects against whom criminal charges could be filed.

The European Court of Human Rights has also played an important role in safeguarding fundamental human rights by challenging the complicity of European countries in US counter-terrorism policy, even if it does take years before relevant cases can be heard because all national remedies must first be exhausted. Parliamentary inquiries at the national and continental levels have contributed important revelations and exerted significant pressure on state actors, and have been complimented by continuing investigations and new reports about US counter-terrorism operations by journalists and human rights groups. Recently, the International Criminal Court decided to re-open its preliminary examination into allegations of war crimes and torture by British military forces in Iraq between 2003 and 2008 and to monitor the situation in Afghanistan, presumably focusing on US conduct. [3]

High-profile actions to trigger investigations, name responsible persons and reveal the underlying criminal system

As early as 2004, after the *Washington Post* revealed the widespread mistreatment of detainees in Abu Ghraib, [4] criminal complaints were filed in various European states against high-level US officials for their role in the torture programme. [5] These complaints not only detailed single incidents, but also analysed the comprehensive system of enhanced interrogation techniques which led to torture in Guantánamo Bay, Abu Ghraib and other US detention facilities. By doing so they paved the way for international debate over the criminal liability of high-ranking US administration officials for torture and other crimes. The central figure in the first three complaints made between 2004 and 2007 in Germany and France was then-US Secretary of Defense Donald Rumsfeld. [6] The complaints named many Bush administration personnel including CIA Director George Tenet and the White House lawyers who authored the infamous torture memos, which provided misleading legal justifications for permitting torture techniques in interrogations.

Complaints filed in Germany in 2004 and 2006 were dismissed by the Federal Prosecutor on the grounds that the US was competent to prosecute its own officials. When it became obvious that the US had no interest in pursuing prosecutions, the German Federal Prosecutor still refused to investigate, arguing that none of the named suspects were likely

to visit Germany in the near future. Although German criminal law does not require a suspect to be in Germany to pursue prosecution, the Prosecutor used his discretion, taking account of diplomatic pressure, to dismiss the complaint. A complaint filed in France in October 2007 against Donald Rumsfeld while he was on a private visit also failed to result in an arrest or an investigation. [7] In February 2008, the French Public Prosecutor based his decision not to initiate an investigation— in disregard of current international law – on Rumsfeld's supposed immunity as a former Secretary of Defense.

In Spain, a criminal complaint was filed in March 2009 against six former Bush administration lawyers, known as the “Bush Six”. The complaint alleged that they participated in, or aided and abetted, torture and other international crimes at US-run facilities at Guantánamo Bay and other overseas locations. Soon afterwards, the Public Prosecutor filed a discontinuation request on the basis that adequate investigations were ongoing in the US. On 13 April 2011, a Spanish investigative judge temporarily stayed the case and transferred it to the US Department of Justice “for it to be continued, urging it to indicate...the measures finally taken by virtue of this transfer of procedure.” [8] Appeals were made to the stay order by a coalition of 25 human rights organisations and experts. This appeal rested on, in part, diplomatic cables released by WikiLeaks indicating that the US had made substantial efforts to influence the Spanish judiciary's decision-making. After these complaints were dismissed, a formal complaint was submitted seeking the reopening of the investigations and is currently pending before the Spanish Constitutional Court. [9]

In February 2011, George W. Bush cancelled a planned public appearance at a charity event in Geneva, Switzerland. Newspaper reports suggest the trip was called off amid fears of protests and the threat of criminal proceedings being brought against him. [10] The model indictment by two human rights organisations details how former President Bush bears individual and command responsibility for the actions of his subordinates because they were acting on his orders, and because he failed to prevent or punish the human rights violations they committed which included cruel, inhumane and degrading treatment, and torture. The indictment serves as the basis for further investigations and prosecutions by other countries, because all parties to the United Nations Convention against Torture are obliged to prosecute the perpetrators of torture.

Although legal actions against high-level US officials have yet to lead to prosecutions, they have succeeded in shifting focus onto the responsibilities of those at the top of the chain of command, including Bush, Donald Rumsfeld, George Tenet, and the Bush administration's lawyers. These high-level cases have paved the way for debate over legal responses to the US torture programme, including future investigations against lower-level perpetrators.

Building cases from the ground – investigations on behalf of European citizens

In addition to complaints against high-ranking members of the Bush administration, cases were opened in France and Spain on behalf of European citizens detained in Guantánamo Bay. In both countries, witnesses gave formal testimony on conditions in Guantánamo Bay and were admitted as victims to the proceedings. In Spain, an expert witness was heard and documents were translated and included in the case file. Both countries requested information from the US by rogatory letters, which went unanswered. By contrast, German prosecutors successfully investigated the extraordinary rendition of German citizen Khaled El-Masri and issued arrest warrants against 13 CIA officials.

In 2001, three French citizens were kidnapped in Afghanistan where they were detained and abused in secret prisons before being transferred to Guantánamo Bay. [11] All three brought a criminal complaint in the French courts, challenging their detention and abuse, in November 2002 and March 2009 respectively. In January 2012, the investigating magistrate submitted a formal request for the US to provide access to the detention camp at

Guantánamo Bay and produce all documents relevant to the detention of the three complainants including information on everyone who had contact with them during their detention. To date, the United States has not provided any relevant information to the investigating magistrate. An expert opinion by the European Center for Constitutional and Human Rights (ECCHR) and the Center for Constitutional Rights (CCR) detailed the criminal responsibility of former Guantánamo Bay Commander, Major General Geoffrey D. Miller, [12] and urged the magistrate to subpoena him to give testimony, but this request was rejected by the court.

In 2009, a criminal complaint was filed to the Spanish National Court on behalf of four former Guantánamo Bay detainees who had been abused and tortured by US officials. The Investigative Judge opened a preliminary investigation after finding evidence that several national and international laws had been violated, including the Spanish Penal Code, Geneva Conventions III, IV, and the UN Convention against Torture. The investigation focused on whether there existed in Guantánamo Bay “an authorized and systematic plan of torture and ill-treatment on persons deprived of their freedom without any charge and without the basic rights of any detainee, set out and required by applicable international conventions.” Formal requests were sent to the US and the UK for information regarding any pending investigations that would render the Spanish case superfluous. Neither country responded so the investigation continued.

In January 2011, ECCHR and CCR submitted a dossier on Major General Miller, providing evidence of his role in the torture of detainees at Guantánamo Bay and in Iraq. Based on information in the dossier, both groups requested that a subpoena be issued for Miller to testify. [13] On 10 January 2013, the groups were formally admitted to the case as representatives of two additional detainees. To date, testimony has been heard from two witnesses and one expert witness, and various documents have been submitted to the court. In February 2014, a law was introduced that included an extensive and complex set of requirements that must be met before any investigation into international crimes can begin. For torture claims, the law now requires the suspect to be a Spanish national present in Spain and the victim to have been a Spanish national at the time the crime was committed. Where these conditions are not met, the proposal allows Spanish courts to prosecute torture claims only where the suspect is a foreigner on Spanish soil and when Spain has received and denied an extradition request. Despite this legal reform, Judge Pablo Ruz decided to continue the investigation in the case, arguing that to do otherwise would violate Spanish obligations under international law. [14]

In 2007, the Public Prosecutor in Munich, Germany, issued arrest warrants for 13 CIA officials in connection with German national Khalid El-Masri’s rendition from Macedonia. [15] In December 2003, El-Masri was arrested by Macedonian border police as he attempted to travel from Germany to Skopje. [16] Macedonian security forces then transferred him to the custody of the CIA custody, which sent him – by extraordinary rendition – to a CIA black site in Afghanistan. [17] After issuing the arrest warrants, no extradition requests were made by the German government, nor were any further actions taken by the German Public Prosecutor to try to hold these CIA officials accountable. Diplomatic cables published by WikiLeaks in 2010 showed that US officials put pressure on the German government not to pursue the matter further. [18] Despite this, none of the CIA officials named in the arrest warrants can now travel outside the US without risk of being arrested and extradited. This particularly influences their prospects of being posted abroad as CIA agents.

All these investigations face the difficulty of accessing evidence outside the country and especially within the US. However, as the investigation in the German rendition case (as well as in other European countries described below) has shown, sufficient evidence to render arrest warrants can also be gathered without the cooperation of the US. Expert witnesses on the US torture programme at Guantánamo Bay, and from within the military, are ready to

provide evidence and to strengthen the investigations. The first commander of Guantánamo Bay, Geoffrey Miller, would be someone to summon before European prosecutors for his role in the torture of European citizens, as suggested in the detailed dossier on his functions and responsibilities submitted in the Spanish and French cases.

Investigating European complicity: secret prisons in Europe, cooperation and assistance in rendition, interrogations and data sharing

US torture and rendition programmes could not have operated without the collaboration of a number of European countries. This took the form of providing facilities for secret detentions, the use of airbases and airspace for rendition flights, data sharing in order to arrest and torture suspects, and interrogation in US detention facilities by European security personnel whose countries profited from the information they were able to extort.

The presence of secret detention facilities have been confirmed in Poland, Lithuania and Romania. In all three countries, investigations into the centres have faced severe delays. As a consequence, all three states currently face European Court of Human Rights procedures regarding their failure to conduct effective investigations. The case of Abu Zubaydah against Poland was heard in December 2013 is currently awaiting judgment. [19] *[Editor's note: the Court made non-final judgments in favour of the applicants in both Al Nashiri v. Poland and Husayn (Abu Zubaydah) v. Poland on 24 July 2014]* [20] Zubaydah's case against Lithuania is still pending. [21] Al-Nashiri's application against Romania is also currently pending before the ECtHR. [22]

The interplay between information gathered by journalists and private researchers, legal actions by human rights organisations, as well as inquiries, reports and statements by parliaments, keeps the focus on the allegations and places unrelenting pressure on Poland, Lithuania and Romania to fully investigate their cooperation with the US. [23]

In Italy, investigations led to one of the first successful prosecutions of US and Italian officials for cooperating in a programme of extraordinary rendition. In 2009, 22 CIA agents and one US Air Force officer were sentenced in absentia by a Milanese court for their involvement in Abu Omar's abduction and transfer to Egypt. [24] In 2003, Omar was seized while walking down a street in Milan and secretly flown to Egypt for interrogation and detention. He was subjected to torture and mistreatment until his eventual release in 2007. [25] The court sentenced each defendant to between seven and nine years in jail, although one defendant has since been pardoned by the Italian President. [26] Several Italian intelligence officers were also convicted in a related trial for facilitating Omar's abduction and transfer. The Italian appeals court upheld the sentences against the US intelligence officers and ordered a retrial for five Italian intelligence agency officials. [27]

German citizen Khaled El-Masri, who was abducted in Macedonia, attempted to use the Macedonian legal system to challenge his rendition. His complaints were met with inaction and he subsequently applied to the European Court of Human Rights in September 2009. In December 2012, the Grand Chamber of the ECtHR ruled that Macedonia had violated El-Masri's rights under the European Convention on Human Rights by subjecting him to torture by the CIA and arbitrary detention by Macedonian officials. The court also found El-Masri's right to truth had been infringed due to the secrecy of the extraordinary rendition programme and Macedonia's failure to meaningfully investigate his claims. [28] Macedonia was thus ordered to pay El-Masri €60,000 in compensation.

The El-Masri case is one of the best illustrations of the different roles various European states and courts can play in an investigation. In addition to the German investigation and arrest warrants, Spanish authorities helped gather evidence, in particular on the use of an airport in Spanish territory for rendition flights. In May 2010, a Spanish prosecutor asked a

judge to authorise the arrests of 13 CIA agents allegedly involved in the extraordinary rendition of El-Masri. In autumn 2012, a Spanish investigating judge asked the United Kingdom and Germany to interview two journalists to verify the identities of four of the 13 CIA agents involved in El-Masri's transfer from Skopje to Kabul. [29] At the same time, the case was presented in Macedonia, leading to the ECtHR decision to qualify El-Masri's treatment by the CIA as torture. Various parliamentary inquiries dealt with the case, gathering further information and putting pressure on state authorities to continue their investigations. [30] However, the decade-long battle for justice re-traumatised El-Masri, who gave up hope of ever getting an official apology from the states involved in his rendition and torture.

In Sweden, a parliamentary inquiry led to compensation for two persons transferred from Swedish to US authorities, and subsequently to Egypt where they were interrogated and tortured for months. [31] Ahmed Agiza and Muhammad al-Zery submitted complaints to the United Nations Committee against Torture and the Human Rights Council which determined that Sweden was responsible for the abuses they had suffered in Egypt. Both international committees found Sweden had failed to protect Agiza and al-Zery by agreeing to transfer them to Egypt, a country known to abuse and torture terrorist suspects. [32] In 2005 the Swedish Parliament initiated its own investigation into Agiza and al-Zery's mistreatment. [33] The investigation concluded that Swedish security police had violated their rights under the European Convention by handing them to US security personnel, and that Agiza and al-Zery had been subjected to inhumane treatment and torture in Egypt. [34] However, the Parliamentary report did not recommend further action or prosecution. As an admission of their responsibility for the abuses Agiza and al-Zery suffered in Egypt, and of their innocence, the Swedish government awarded both men three million kronor (about \$450,000) each in compensation. [35]

In November 2010, the British government awarded compensation to several UK citizens and residents who had been held and abused in Guantánamo Bay [36] after they filed a civil complaint challenging the collusion between UK and US officials in their detention and mistreatment. [37] Among them is Binyam Mohamed, who spent nearly seven years in different detention facilities in Pakistan, Morocco, Afghanistan and Guantánamo Bay before his release in 2009. Mohamed successfully challenged his detention in the UK High Court which determined that he had been subjected to torture and ill-treatment. Mohamed was able to demonstrate the collusion between UK and foreign security officials by explaining how security personnel in Morocco interrogated him using information that only UK officials could have known. [38] Through this litigation, Mohamed was also able to compel the UK to disclose secret intelligence documents relating to his extradition and abusive techniques used on him at several detention facilities. [39]

Investigative reports by the European Parliament and the Council of Europe, along with litigation brought by NGOs, have also shed light on the UK's involvement in the CIA's counter-terrorism activities. As a result, Prime Minister David Cameron announced in 2010 [40] that a judicial inquiry was warranted into the scope of UK participation in CIA abuses. Retired Judge Sir Peter Gibson began 'The Detainee Inquiry', reviewing over 20,000 classified documents relating to misconduct by MI5 and MI6 officers. [41]

In June 2012, Gibson presented a preliminary report to Parliament [42] which concluded that there was no direct evidence that intelligence officers engaged in torture or rendition of detainees, but that further investigations would be necessary to confirm evidence of complicity. [43] The report described how UK intelligence officials were reluctant to report incidents of abuse committed by US officials, and continued to work with them after knowledge of detainee mistreatment became widespread. [44] Part of Gibson's preliminary report was made public 18 months later, in December 2013. [45] Upon publication it was announced that subsequent investigations related to detainee treatment would be conducted

by Parliament's Intelligence and Security Committee (ISC). [46] This transfer of power received sharp criticism from human rights advocates over the ISC's poor record of investigating government abuses. [47] Moreover, as the ISC is made up of MPs, their forthcoming work on the inquiry may well fall short of Cameron's promise to conduct a truly independent investigation.

Authorities in Belgium also have a case before them challenging the actions of Belgian interrogators who visited and questioned a Belgian national being detained at Guantánamo Bay on four separate occasions. [48] A case was filed in 2011 against a Belgian investigator and one unknown defendant on behalf of the Belgian former detainee alleging that instead of working to secure the return of the detained Belgian national, the investigating agents made use of the situation - particularly the degrading treatment and torture he suffered - to carry out their own questioning and support US interrogation practices.

Conclusion

Ten years after the publication of photographs detailing US abuse of Abu Ghraib prisoners and the first legal challenges in Europe of systematic, policy-guided fundamental human rights violations by the US, the puzzle continues to grow. Parliamentary and criminal investigations have helped add a few pieces to the jigsaw; to create a fuller picture of what happened in response to the 9/11 attacks. A wide range of actors played and continue to play a role in shaping the legal reaction and debate, including human rights organisations, journalists, members of parliament, courageous prosecutors and judges, as well as some of the survivors of the US torture programme. Investigations in one country have helped bring cases forward in others, and parliamentary initiatives at the European level and the European Court of Human Rights have framed a common European response to the crimes and serve as acknowledgment of European complicity. But there is still a long way to go to complete the puzzle. Much more work must be done in Europe and, most significantly, in the US in order to achieve redress for the criminal acts of the past.

Endnotes

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