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## UNITED STATES OF AMERICA

### Slippery slopes and the politics of torture

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It is a disturbing spectacle to witness US officialdom tying itself in knots over torture. On the one hand the President claims that his country is leading the global struggle against torture. On the other, he authorizes a secret detention program in which detainees can be held for years entirely incommunicado and subjected to “enhanced” interrogation techniques. Meanwhile, other officials are quick to promote “American values”, yet slow to recognize torture when it is described to them or to condemn torture as a matter of principle. The moral high ground, it seems, is surrounded by particularly slippery slopes these days.

It should be straightforward. Torture and other cruel, inhuman or degrading treatment are prohibited, full stop. There are no circumstances – war or threat of war, emergency or threat of emergency – that can be used to justify violating this ban. Every human being has the right to be free from torture or other ill-treatment – whether citizen or alien, whether suspected of a crime or not, whether labelled as “the enemy” or not. Torture is wrong, whatever motivates it and whoever authorizes it. The “ticking bomb” scenario – the hypothesis put forward to seek to justify one-off torture to extract information about an imminent attack – is a crude device improvised to manipulate public fears. There is no such thing as one-off torture; torture all too easily seeps across the moral and legal landscape. If used to obtain information, rather than purely to humiliate the individual or spread fear in the community, that information cannot be trusted, let alone used in a fair trial. Torture is an injustice, not a route to justice. It is a threat to long-term security, not a means to win hearts and minds.

The latest furore about US torture has again centred on the technique of “waterboarding”, simulated drowning. In his recent confirmation hearings following his nomination by President Bush to the job of US Attorney General – a position to which he was confirmed by the Senate on 8 November 2007 – Michael Mukasey was unwilling to give an unequivocal answer to the Senate Judiciary Committee as to whether waterboarding constitutes torture and is unlawful. Two and a half years ago, the then nominee for Attorney General, Alberto Gonzales, had been similarly unwilling to characterize waterboarding as torture.<sup>1</sup> Such reticence on the part of prospective chief law enforcement officers of the USA is indicative of a deeper systemic malady.

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<sup>1</sup> *Open letter to US Senators as they prepare to vote on the nomination of Alberto Gonzales for Attorney General*, AI Index: AMR 51/031/2005, 1 February 2005, [http://web.amnesty.org/library/pdf/AMR510312005ENGLISH/\\$File/AMR5103105.pdf](http://web.amnesty.org/library/pdf/AMR510312005ENGLISH/$File/AMR5103105.pdf).

While it is to be welcomed that some politicians have publicly denounced waterboarding and other unlawful techniques and conditions of detention, the condemnation is far from universal. Asked at a meeting in Iowa whether waterboarding was torture, for example, presidential candidate Rudolph Giuliani replied that “It depends on how it’s done. It depends on the circumstances. It depends on who does it”.<sup>2</sup> Two other candidates, Mitt Romney and Fred Thompson, are also reported to have refused to condemn waterboarding.<sup>3</sup>

While this focus on waterboarding should not be allowed to obscure questions about other interrogation techniques and detention conditions that violate international law, there should at the same time be no doubt in any official’s mind that waterboarding is torture. Indeed, the USA considers “near-drowning” to constitute torture when it happens in other countries.<sup>4</sup> Instructive in this regard is a recent article by a former military lawyer and current US judge, who notes that waterboarding can take several forms:

“The victim may be immersed in water, have water forced into the nose and mouth, or have water poured onto material placed over the face so that the liquid is inhaled or swallowed... [T]he victim experiences the sensations of drowning: struggle, panic, breath-holding, swallowing, vomiting, taking water into the lungs and, eventually, the same feeling of not being able to breathe that one experiences after being punched in the gut... According to those who have studied waterboarding’s effects, it can cause severe psychological trauma, such as panic attacks, for years”.<sup>5</sup>

On 8 November 2007, a former US Navy survival instructor and counter-terrorism intelligence specialist testified to members of Congress that waterboarding is torture and an ineffective tool for intelligence gathering, as people subjected to it will say anything to have the torture stop. Having been subjected to the technique himself as part of his training, Malcolm W. Nance recalled:

“In my case, the technique was so fast and so professional that I didn’t know what was happening until the water entered my nose and throat. It then pushes down into the trachea and starts the process of respiratory degradation. It is an overwhelming experience that induces horror and triggers frantic survival instincts. As the event unfolded, I was fully conscious of what was happening: I was being tortured.”<sup>6</sup>

Although the revised US Army Field Manual on interrogations issued in September 2006 expressly prohibits waterboarding by the military or by other agency personnel in Pentagon-controlled facilities, earlier in the “war on terror” the Department of Defense considered the

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<sup>2</sup> *Giuliani questioned on torture*. New York Times, 25 October 2007.

<sup>3</sup> *3 top Republican candidates take a hard line on the interrogation of detainees*. New York Times, 3 November 2007.

<sup>4</sup> See, for example, entry on Sri Lanka in Country Reports on Human Rights Practices – 2006, US State Department, March 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78875.htm>.

<sup>5</sup> *Waterboarding used to be a crime*. By Evan Wallach, Washington Post, 4 November 2007. Evan Wallach is a judge on the US Court of International Trade in New York.

<sup>6</sup> Quoted in *Waterboarding is torture, says ex-Navy Instructor*, Washington Post, 9 November 2007.

technique “legally available”.<sup>7</sup> A military document also indicated that waterboarding – specifically the “use of a wet towel and dripping water to induce the misperception of suffocation” was one of a number of interrogation techniques used by “other US government agencies”, a term usually used to mean the Central Intelligence Agency (CIA).<sup>8</sup> It seems clear from evidence that has emerged since then that waterboarding has been used, even if only against a handful of detainees, in the secret detention program authorized by President Bush and operated by the CIA in the “war on terror”.

A letter dated 30 October 2007 to members of the Senate Judiciary Committee from Attorney General nominee Michael Mukasey implicitly recognizes the distinction between military and other agencies in this regard. He noted that the US military could no longer use waterboarding “because its use *by the military* would be a clear violation of the Detainee Treatment Act (DTA) (emphasis added)” However, his carefully-worded letter did not say that waterboarding was prohibited *per se* under this 2005 legislation prohibiting cruel, inhuman or degrading treatment against any detainee held in US custody anywhere. Instead, he explained that “Congress specifically legislated in the DTA” that no person held by the Department of Defense or in a Department of Defense facility may be subject to any interrogation technique not “authorized and listed” in the Army Field Manual (DTA §1002a). “In the absence of legislation expressly banning certain interrogation techniques in all circumstances”, the letter continued, “one must consider whether a particular technique complies with relevant legal standards”. Under this analysis, whether waterboarding “would constitute torture, cruel, inhuman or degrading treatment” *in all circumstances* – for example, if used by the CIA in non-Pentagon facilities – remains open to question.

This represents substantial slippage. Six decades ago, the USA viewed waterboarding as a war crime.<sup>9</sup> Today, not only has it apparently been part of the CIA’s toolkit, Congress and the administration have collaborated to facilitate impunity for those who have authorized or employed this or other techniques that violate international law, whether on their own or in combination. Section 1004 of the DTA, for example, provides a type of ‘good faith’ defence against criminal and civil liability for US personnel who had engaged in torture or other ill-treatment using officially sanctioned interrogation methods or detention conditions. Signing the DTA into law, President Bush emphasized that the legislation “provides additional liability protection for those engaged in properly authorized detention or interrogation of terrorists.”<sup>10</sup> In his letter to the Senate Judiciary Committee, Michael Mukasey said he was reluctant to discuss “coercive interrogation techniques” because, among other things, he was

<sup>7</sup> Counter-resistance techniques. Action memo from William J. Haynes, General Counsel of the Department of Defense, 27 November 2002.

<sup>8</sup> Request for approval of counter-resistance strategies. From Jerald Phifer, LTC, USA, Director J2. Memorandum for Commander, Joint Task Force 170, Guantánamo Bay, Cuba, 11 October 2002.

<sup>9</sup> *Waterboarding historically controversial*. Washington Post, 5 October 2006 (“[I]n 1947, the United States charged a Japanese officer, Yukio Asano, with war crimes for carrying out another form of waterboarding on a US civilian. The subject was strapped on a stretcher that was tilted so that his feet were in the air and head near the floor, and small amounts of water were poured over his face, leaving him gasping for air until he agreed to talk”).

<sup>10</sup> Statement, 30 December 2005, <http://www.whitehouse.gov/news/releases/2005/12/20051230-9.html>.

not party to classified details – the CIA’s “enhanced” interrogation techniques remain classified at the highest level of secrecy – and he did not want any “uninformed statement of mine” to be interpreted by interrogators as a threat that they could face criminal liability for past or present conduct authorized by the Department of Justice.

The Justice Department’s advice to the CIA on interrogations has come in the form of a series of legal memorandums, some of which themselves remain classified.<sup>11</sup> In a statement in 2005 asserting that its agents “do not torture” (while remaining silent on whether or not they engage in cruel, inhuman or degrading treatment), the CIA noted that the agency’s interrogation policies “have always followed legal guidance from the Department of Justice. If an individual violates the policy, then he or she will be held accountable”.<sup>12</sup> The absence of prosecutions of CIA personnel despite evidence of criminal wrongdoing suggests that the USA’s interpretation of its legal obligations falls far short of international law or that US policy goes hand in hand with one of immunity from prosecution for human rights violators.

The next US Attorney General will thus face a choice: maintain the *status quo* or ensure that all Justice Department advice on detentions and interrogations complies with international law and that all alleged violators are brought to justice. Michael Mukasey’s letter to the Senate Judiciary Committee promised that if confirmed he would “review any coercive interrogation techniques currently used by the United States Government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique”.

This is a welcome commitment as far as it goes, although it makes no mention of the question of accountability for past abuses, including the international crimes of torture and enforced disappearance. Moreover, optimism about the prospects for future progress must be tempered by the USA’s past interpretation of its legal obligations. Secret detention, for example, is clearly prohibited in international law, yet the USA maintains that its secret detention program is lawful, cleared by CIA and Justice Department lawyers. Moreover, the administration’s policies in the “war on terror” did not spring from nowhere. The policy of “renditions”, for instance, was built on past practice and a 1995 presidential order. The choice of Guantánamo as a location for “war on terror” detentions kept from meaningful independent judicial oversight was built on the Justice Department’s interpretation of existing US jurisprudence. Declassified CIA interrogation training manuals from the 1960s and 1980s describe “coercive techniques” that mirror “stress and duress” methods sanctioned in the “war on terror”. And the USA took a pick-and-choose approach to international law long before 11 September 2001. The administration’s relationship to international law in the “war on terror”, including its selective interpretation and application of the Geneva Conventions, has been

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<sup>11</sup> See *USA: Law and executive disorder: President gives green light to secret detention program*, August 2007, [http://web.amnesty.org/library/pdf/AMR511352007ENGLISH/\\$File/AMR5113507.pdf](http://web.amnesty.org/library/pdf/AMR511352007ENGLISH/$File/AMR5113507.pdf).

<sup>12</sup> Statement by CIA Director of Public Affairs, 18 March 2005 <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2005/pr03182005.html>.

built on an existing US reluctance to apply the same rules to itself that it so often says it expects of others.

There has, rightly, been deep concern expressed by Senators about Michael Mukasey's equivocation on the subject of waterboarding. Following their 53-40 vote on 8 November 2007 to confirm him as the USA's 81<sup>st</sup> Attorney General, however, all Senators must now recognize that the Senate has a responsibility in where the USA finds itself on the question of torture and other ill-treatment. When the USA, with the advice and consent of the Senate, ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) in October 1994, and the International Covenant on Civil and Political Rights two years earlier, it did so on the condition that the prohibition in these treaties on cruel, inhuman or degrading treatment only meant what was already banned under the US Constitution.<sup>13</sup> As Michael Mukasey's letter to the Judiciary Committee pointed out, under US jurisprudence, conduct is banned that "shocks the conscience". However, conduct "that shocks in one environment may not be so patently egregious in another", thereby requiring an "exact analysis of circumstances before any abuse of power is condemned as conscience-shocking".<sup>14</sup>

The door has thus been opened to a sliding scale of legality in relation to acts that amount to torture or other ill-treatment against detainees viewed by their US captors first and foremost as potential sources of intelligence. The higher the value that is placed on the information a detainee is claimed to possess, the more "enhanced" can be the interrogation techniques used against that individual, and the less "conscience-shocking" the treatment will be held to be. As the Chairman of the House Homeland Security Committee, Representative Peter King, was quoted as saying in 2006, "If we capture bin Laden tomorrow and we have to hold his head under water to find out when the next attack is going to happen, we ought to be able to do that".<sup>15</sup> The following month Vice-President Cheney appeared to endorse waterboarding for use against "high-value" detainees.<sup>16</sup> Detainees in Guantánamo considered to have "high

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<sup>13</sup> The UN bodies tasked with overseeing implementation of these treaties – the Committee Against Torture and the Human Rights Committee – have called on the USA to withdraw these reservations (reservations that are incompatible with the object and purpose of a treaty violate international law, Article 19, Vienna Convention on the Law of Treaties). The US government continues to rely on the reservations, however. For example, in its recent response to the Committee Against Torture on the question of the USA's use of life imprisonment without the possibility of parole for offenders under 18 years old, rejecting the Committee's concern that such sentencing of young offenders could amount to ill-treatment, the government pointed to the US reservation to article 16 of the Convention against Torture. Because US courts have "ruled that juvenile life imprisonment does not violate the United States Constitution", the government asserted, "such sentences do not violate US obligations under the Convention with respect to cruel, inhuman or degrading treatment or punishment". UN Doc.: CAT/C/USA/CO/2/Add. 1, 6 November 2007.

<sup>14</sup> *Rochin v. California* 342 U.S. 165 (1952) and *Sacramento v. Lewis*, 523 U.S. 833 (1998). For further discussion, see *Law and executive disorder*, *ibid*.

<sup>15</sup> *An unexpected collision over detainees*, New York Times, 15 September 2006.

<sup>16</sup> Interviewer: "And I've had people call and say, please, let the Vice President know that if it takes dunking a terrorist in water, we're all for it, if it saves American lives. Again, this debate seems a little

value” were singled out for “special interrogation plans” authorized by former Secretary of Defense Rumsfeld under which they were subjected to torture and other ill-treatment. Yet the Pentagon continued to endorse the interrogations even after details of them emerged, emphasizing claims of the value of intelligence obtained.<sup>17</sup>

On 8 November 2007, US Air Force Colonel Steven Kleinman, a senior intelligence officer and military interrogator, submitted a statement to members of Congress at an oversight hearing on the “effectiveness and consequences of ‘enhanced’ interrogation” in which he said:

“[M]any Americans, understandably angry and seeking some manner of revenge after the vicious attacks of 9/11, have fallen prey to the proposition that excessive physical, psychological, and emotional pressures are necessary to compel terrorists or insurgents to answer an interrogator’s questions. Further, this form of interrogation is too often viewed as an inevitable and appropriate means of punishment the detainees deserve for their malicious acts. Such beliefs are equally untrue... [C]oercion is decidedly ineffective. Coercive interrogation methods are wholly counterproductive in winning the hearts and minds of detainees and, I might add, the populations from which they emerge. Instead, coercive methods are almost certain to create what is perhaps the most callous form of degradation one human can inflict upon another: humiliation. Humiliation is an inevitable product of any form of torture”.<sup>18</sup>

The Convention against Torture, which entered into force 20 years ago this year, was developed because the international community wanted “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”.<sup>19</sup> Recent years have seen the USA undermine this struggle and show itself to be far from the global anti-torture champion it claims to be. A new approach is needed, one in which respect for human rights transcends party politics, one that incorporates a constant vigilance against the erosion of protections against torture and other ill-treatment, one that commits to full accountability for violations, and one that has at its heart full and ongoing adherence to the USA’s international legal obligations. Such an approach should be embraced by all officials in all branches of government.

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silly given the threat we face, would you agree?” Vice President: “I do agree...” Interviewer: “Would you agree a dunk in water is a no-brainer if it can save lives? Vice President: “It’s a no-brainer for me...” Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House, 24 October 2006, <http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html>.

<sup>17</sup> See, e.g., USA: *Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, AMR 51/149/2006, September 2006, <http://web.amnesty.org/library/Index/ENGAMR511492006>. See also *Guantanamo provides valuable intelligence information*. Department of Defense news release, 12 June 2005, <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=8583>.

<sup>18</sup> USAFR Colonel Steven M. Kleinman, Statement before the House of Representatives Committee on the Judiciary, Subcommittee on Constitution, Civil Rights and Civil Liberties. 8 November 2007, <http://judiciary.house.gov/media/pdfs/Kleinman071108.pdf>.

<sup>19</sup> Preamble, Convention against Torture (the treaty entered into force on 26 June 1987, 30 days after the 20<sup>th</sup> country became a state party). Today, 145 countries are party to the Convention.