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USA: Former President's defence of torture highlights need for criminal investigations

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In the story of the United States, the arc of history has bent toward justice
US Delegation, United Nations, Geneva, 5 November 2010¹

Former President George W. Bush's confirmation that he authorized the use of "enhanced interrogation techniques" against detainees held in secret US custody serves to highlight once again the absence of accountability for the crimes under international law of torture and enforced disappearance committed by the USA during what the previous administration called the "war on terror".

It has long been known that six days after the attacks of 11 September 2001, President Bush authorized the Central Intelligence Agency (CIA), among other things, to set up secret detention facilities outside the USA. Multiple human rights violations were committed against detainees held in the CIA's secret program. Those who authorized and carried out these abuses have not been brought to justice.

In his memoirs, leaked to the media in advance of publication, and in an interview on NBC News broadcast on 8 November 2010, the former President confirmed his personal involvement in the interrogation techniques used in the CIA program when he said that he had authorized the use of "water boarding" and other "enhanced interrogation techniques" against so-called "high-value detainees".

Water-boarding, in which the perception of drowning is induced in the detainee, is torture – as both the current President and Attorney General of the USA have acknowledged. Torture is a crime under international law. Under international law, anyone involved in torture must be brought to justice. This obligation does not end with a change in government.

Under international law, the former President's admission to having authorized acts that amount to torture are enough to trigger the USA's obligations to investigate his admissions and if substantiated, to prosecute him. Failure to investigate and prosecute in circumstances where the requisite criteria are met is itself a violation of international law.²

In the NBC interview, former President Bush focussed on the case of Khalid Sheikh Mohammed, who was arrested on 1 March 2003 in Pakistan and transferred to secret CIA custody. That same month, Khalid Sheikh Mohammed was "water-boarded" 183 times, according to a report by the CIA Inspector General. After three and a half years being held incommunicado in solitary confinement in secret locations, Khalid Sheikh Mohammed was transferred to military custody in Guantánamo, where he remains without trial.

Water-boarding was far from the only technique alleged to have been used against Khalid Sheikh Mohammed and others held in the secret program that violated the international prohibition of torture and other cruel, inhuman or degrading treatment. Other techniques included prolonged nudity, threats, exposure to cold temperatures, stress positions, physical assaults, prolonged use of shackles, and sleep deprivation.

The USA ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1994. Under UNCAT, in every case where there is evidence against a person of their having committed or attempted to commit torture, or of having committed acts which constitute

complicity or participation in torture, the case must be submitted to its competent authorities for the purpose of prosecution, if the individual is not extradited for prosecution. The authorities must take their decision whether to prosecute in the same manner as in the case of any ordinary offence of a serious nature under the law of the state.

Failing to proceed with a prosecution on the basis that the accused held public office of any rank, or citing justifications based in "exceptional circumstances", whether states of war or other public emergencies, is not permitted by UNCAT. Torture is also defined as a grave breach of the 1949 Geneva Conventions, meaning that investigation and submission for prosecution of all cases of torture in situations of international armed conflict is an express obligation under those treaties.

In the NBC interview, former President Bush said that he authorized the interrogation techniques in question because government lawyers had cleared them as legal under US law, and he asserted that using them had "saved lives". Asked whether he would make the same decision today, the former President responded that "Yeah, I would".

Under international law, torture and other cruel, inhuman or degrading treatment are never legal. No lawyer can render them lawful; no politician, legislator, judge, soldier, police officer, prison guard, medical professional or interrogator can override this prohibition. Even in a time of war or threat of war, even in a state of emergency which threatens the life of the nation, there can be no exemption from this obligation.³ The same is true of enforced disappearance.

Whether torture is effective or not in obtaining useful information is irrelevant to the question of whether it is lawful – it never is – or whether an individual responsible for torture is to be investigated or prosecuted.

In August 2009 US Attorney General Eric Holder ordered a "preliminary review" into some aspects of some interrogations of some detainees held in the CIA's secret detention program. However this review has been narrowly framed and has been set against a promise of immunity from prosecution for anyone who acted in good faith on legal advice in conducting interrogations. This falls far short of the scope of investigations and prosecutions required by binding legal obligations to which the USA is subject under international law, including under the explicit provisions of treaties the USA has entered into such as the Geneva Conventions and UNCAT.

Many people were involved in the USA's authorization and use of torture and other cruel, inhuman or degrading treatment against detainees held in the CIA program. It is long overdue for the USA to conduct a full investigation into the crimes under international law committed in this program and to bring anyone against whom there is evidence of involvement in such crimes to justice.

Other governments, not least those which may have themselves been involved in facilitating the USA's secret detention program, should call on the USA to meet its international obligations on accountability. Under Article 9 of UNCAT, "State Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings" brought against anyone accused of involvement in torture. In addition, any State Party in whose territory a person believed to have been involved in torture is present must take the necessary investigative, prosecutorial or extradition measures against that person. There must be no safe haven for anyone responsible for torture.

At the UN Human Rights Council in Geneva last week, the USA said that "advancement and enforcement of human rights must be pursued persistently over time, with accountability, follow through, continuing effort, and constant improvement".⁴ The USA's failure to account for the crimes under international law committed in the CIA's secret detention program suggests that the USA is promoting double standards, not international standards. On this question, its "arc of history" is currently bent towards injustice. This must change.

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See also:

USA: Shadow over justice: Absence of accountability and remedy casts shadow over opening of trial of former secret detainee accused in embassy bombings, 30 September 2010, <http://www.amnesty.org/en/library/info/AMR51/094/2010/en>

USA: Secrecy blocks accountability, again: Federal court dismisses 'rendition' lawsuit; points to avenues for non-judicial remedy, 8 September 2010, <http://www.amnesty.org/en/library/info/AMR51/081/2010/en>

USA: Normalizing delay, perpetuating injustice, undermining the 'rules of the road', 22 June 2010, <http://www.amnesty.org/en/library/info/AMR51/053/2010/en>

USA: Impunity for crimes in CIA secret detention program continues, 29 January 2010, <http://www.amnesty.org/en/library/info/AMR51/008/2010/en>

USA: Missing from the US 'human rights agenda': Accountability and remedy for 'war on terror' abuses, 20 January 2010, <http://www.amnesty.org/en/library/info/AMR51/005/2010/en>

USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, <http://www.amnesty.org/en/library/info/AMR51/120/2009/en>

USA: Attorney General orders 'preliminary review' into CIA detention cases – full investigation long overdue, 25 August 2009, <http://www.amnesty.org/en/library/info/AMR51/094/2009/en>

USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, 16 April 2009, <http://www.amnesty.org/en/library/info/AMR51/055/2009/en>

USA: Torture acknowledged, question of accountability remains, 14 January 2009, <http://www.amnesty.org/en/library/info/AMR51/003/2009/en>

USA: Vice President seeks to justify torture, secret detention and Guantánamo, 23 December 2008, <http://www.amnesty.org/en/library/info/AMR51/157/2008/en>

USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', 4 December 2008, <http://www.amnesty.org/en/library/info/AMR51/151/2008/en>

USA: Human dignity denied: Torture and accountability in the 'war on terror', 25 October 2004, <http://www.amnesty.org/en/library/info/AMR51/145/2004/en>

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¹ Interactive dialogue on the US Universal Periodic Review: Opening statement by the US delegation. Michael H. Posner, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, US Department of State, Geneva, Switzerland, 5 November 2010, <http://www.state.gov/p/io/rm/2010/150485.htm>

² See, for example, UN Human Rights Committee General Comment 31 (2004), on the nature of the legal obligations imposed on States Parties to the International Covenant on Civil and Political Rights ("As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6)... Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be

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accused of responsibility for such violations being held immune from legal responsibility.") The Human Rights Committee has also stressed that everyone who violates article 7 of the ICCPR "whether by encouraging, ordering, tolerating or perpetrating prohibited acts" must be held responsible: General Comment 20 (1992).

³ See also, for example, UN Human Rights Committee General Comment 20 (1992) on article 7 of the International Covenant on Civil and Political Rights which prohibits the use of torture or other cruel, inhuman or degrading treatment or punishment ("The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.")

⁴ Interactive dialogue on the US Universal Periodic Review: Opening statement by the US delegation, *op. cit.* Esther Brimmer, Assistant Secretary, Bureau of International Organization Affairs, US Department of State.