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USA: Impunity for crimes in CIA secret detention program continues

New UN report on secret detention calls for accountability

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Secret detention is irreconcilable with international human rights law and international humanitarian law. It amounts to a manifold human rights violation that cannot be justified under any circumstances, including during states of emergency.
UN expert report on secret detention, 26 January 2010

A man is taken into custody and transferred to a secret location. He is subjected to repeated acts of torture and other cruel, inhuman and degrading treatment authorized at high levels of the detaining government. For month after month, turning into years, he is held incommunicado in solitary confinement at various undisclosed locations, he and his family subjected to the daily cruelty of his enforced disappearance. After four and a half years, he is flown to a military detention camp, his whereabouts now acknowledged but his treatment still harsh. He has little contact with the outside world and he is held alone in a cell designed to prevent contact with other detainees. Now, nearly eight years after he was first deprived of his liberty, his health continues to give cause for serious concern, his right to the presumption of innocence lies in tatters, he has been thoroughly demonized and his name linked indelibly with terrorism in public statements by the detaining government. He has never been charged with any crime, and still waits for the opportunity to challenge the lawfulness of his detention before a court more than 18 months after the country's Supreme Court ruled definitively that he and others in the military prison camp were entitled to a "prompt" hearing on such challenges. Those who authorized and carried out crimes under international law against him and others continue to enjoy impunity.

It is no secret that Abu Zubaydah was held in secret detention and tortured by the USA. He was apparently the first detainee to come into the custody of the Central Intelligence Agency (CIA) after the attacks of 11 September 2001 whom the CIA's Counterterrorist Center considered to be a so-called "high value" detainee. Nevertheless, although President Barack Obama in 2009 ordered an end to the CIA's use of long-term secret detention and its use of "enhanced interrogation techniques", the US administration continues to fight public disclosure of what happened to Abu Zubaydah and others held in the CIA program. It seems that the USA's recent promise to the United Nations not to look the other way when confronted with evidence of human rights violations does not apply when confronted with the compelling evidence of its own wrongdoing in this context.

The failure to fully investigate and bring to justice those responsible for human rights violations is itself a violation of the USA's international legal obligations. Although in August 2009 Attorney General Eric Holder ordered a "preliminary review" into some aspects of some interrogations of some detainees held in the CIA program, 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.

Among other things, the Bush administration had asserted that the test employed by US courts under the US Constitution (whether particular government conduct "shocks the conscience") was the standard that should be applied to determine what detainee treatment was unlawful under US law, and that official conduct which may shock the conscience in one context may not shock it in another. Under this test, it asserted, interrogation techniques and detention conditions that would be unlawful in the context of

ordinary law enforcement efforts were legitimate in the context of a global "war" and the pursuit of "actionable intelligence" against the threat of terrorism. According to this theory, a secret detention program employing such conditions and techniques was not the sort of government conduct that would rise to the "conscience-shocking level", given that they implicated "a compelling governmental interest of the highest order", that is, national security. Today, the claim that national security would be threatened by disclosing where detainees like Abu Zubaydah were held in secret custody and how they were treated is made by the Obama administration when arguing in federal court that such operational details of the CIA program should never see the light of day.

The prohibitions of enforced disappearance and of torture and other cruel, inhuman or degrading treatment under international law, however, have clear definitions that do not shrink or expand depending on speculation by government officials or lawyers about what would "shock the conscience". The prohibitions are subject to no exception whatsoever, including even a state of emergency that genuinely threatens the life of the nation. Neither can such circumstances be used to justify a failure to investigate and prosecute those responsible for these human rights violations.

Yet a tendency among officials, even now, effectively to excuse human rights violations on the basis of their historical context seems to be going hand in hand with the USA's failure to take the necessary steps towards ending the current state of impunity. The CIA Director, for example, in August 2009 described the revelations about the secret detention program as "an old story… The use of enhanced interrogation techniques, begun when our country was responding to the horrors of September 11th, ended in January [2009]." "For the CIA now", Leon Panetta continued, "the challenge is not the battles of yesterday, but those of today and tomorrow." In a public statement three months earlier, he had followed this same line, so at odds with US obligations and the most rudimentary notions of human rights:

> "[I]t is important to understand the context in which these operations occurred. In the wake of September 11th, the President turned to CIA – as Presidents have done so often in our history – and entrusted our officers with the most critical of tasks: to disrupt the terrorist network that struck our country and prevent further attacks… Although this Administration has now put into place new policies that CIA is implementing, the fact remains that CIA's detention and interrogation effort was authorized and approved by our government. For that reason, as I have continued to make clear, I will strongly oppose any effort to investigate or punish those who followed the guidance of the Department of Justice. The President and the Attorney General have also made clear that there will be no investigation or prosecution of CIA personnel who operated within the legal system."

In similar vein, the Director of National Intelligence, Dennis C. Blair, said in April 2009:

> "It is important to remember the context of these past events. All of us remember the horror of 9/11. For months afterwards we did not have a clear understanding of the enemy we were dealing with, and our every effort was focused on preventing further attacks that would kill more Americans. It was during these months that the CIA was struggling to obtain critical information from captured al Qa'ida leaders, and requested permission to use harsher interrogation methods. The [Justice Department Office of Legal Counsel] OLC memos make clear that senior legal officials judged the harsher methods to be legal. Those methods, read on a bright, sunny, safe day in April 2009, appear graphic and disturbing. As the President has made clear, and as both CIA Director Panetta and I have stated, we will not use those techniques in the future. But we will absolutely defend those who relied on these memos and those guidelines."

The claim that historical context provides justification for past human rights violations can also be seen in the Obama administration's litigation stance. For example, in a legal brief filed in US District Court in

New York in December 2009 in the case of Ahmed Khalfan Ghailani, who was held for two years in the CIA secret program and almost three years in military detention in Guantánamo before being transferred in 2009 to New York for federal trial, the Department of Justice wrote that "the defendant was captured during a war" and he was believed to have "actionable intelligence about al Qaeda". In light of "these extraordinary circumstances," the brief argued, "the United States justifiably opted to initially treat the defendant as an intelligence asset – to obtain from him whatever information it could concerning terrorists and terrorist plots". After subjecting him to secret custody and enforced disappearance, during which time Ahmed Ghailani was subjected to "enhanced" interrogation techniques, "the United States made the entirely reasonable decision to continue holding him as an alien enemy combatant", the government's brief asserted.

It is difficult to see how the USA will meet its international legal obligation to bring to account those responsible so long as it continues to so blatantly ignore in litigation the true character of its past human rights violations. Yet when the USA assumed its seat on the UN Human Rights Council in 2009, it said: "Make no mistake; the United States will not look the other way in the face of serious human rights abuses. The truth must be told, the facts brought to light and the consequences faced". It must now choose truth over secrecy.

In a new study on secret detention conducted by experts of the UN Human Rights Council, the USA's resort to such detentions during what the Bush administration called the "war on terror" comes in for particular attention. The experts call for accountability, namely that "institutions strictly independent" from those alleged to have been involved in secret detention "should promptly investigate" any allegations of secret detention. Anyone found to have participated in such detention and the associated human rights violations, "including their superiors if they ordered, encouraged or consented to secret detentions", should be "prosecuted and where found guilty given sentences commensurate with the gravity of the acts perpetrated."[1]

The formal framing of this language as a recommendation by the UN experts should not divert attention from the fact that, as they concluded, these measures constitute specific legal *obligations* of the USA. Many officials were complicit in the enforced disappearance and the torture and other ill-treatment to which Abu Zubaydah and others were subjected, with potential criminal liability under international law reaching up to the highest levels of office in the US government.

The USA must no longer look away. Accountability is long overdue. Meanwhile Abu Zubaydah and the others still held in Guantánamo should be promptly charged and brought to trial in proceedings that fully comply with international fair trial standards, or released immediately. The injustice must end.

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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: 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

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[1] The victims of secret detention, the UN experts continued, "should be provided with judicial remedies and reparation in accordance with international norms", and as "families of disappeared persons have been recognized as victims under international law, they should also benefit from rehabilitation and compensation". The UN report is available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9777&LangID=E.
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