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CIA ‘waterboarding’: Admission of a crime, now there must be a criminal investigation

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Yesterday’s confirmation by the Director of the Central Intelligence Agency (CIA), General Michael Hayden, that the CIA has used “waterboarding” against detainees must result in a full, independent and prompt criminal investigation.

Waterboarding – an interrogation technique under which detainees are subjected to simulated drowning – is torture. Torture is a crime under international law. No one has been held accountable for the authorization and use of waterboarding by US personnel.

At the same time, the revelation by the Director of National Intelligence, Mike McConnell, that waterboarding remains in the CIA’s armoury, must be met with legislative and other measures to reflect the absolute illegality of this practice and all other forms of torture and other cruel, inhuman or degrading treatment or punishment.

The investigation must go beyond that initiated by the US Attorney General on 2 January 2008 into the destruction by the CIA of videotapes of interrogations. In addition, both the investigation and the prohibition must be truly and fully consistent with international standards and definitions. It has become clear over recent years that the US administration has interpreted US and international law in ways that have sought to avoid the absolute prohibition against torture and other ill-treatment and that have facilitated impunity for human rights violations.

The testimony of the two senior intelligence officials came at a hearing of the US Senate Select Committee on Intelligence in Washington, DC, on 5 February 2008. General Hayden said that waterboarding had been used against three detainees – Khalid Sheikh Mohammed, Abu Zubaydah and Abd al-Rahim al-Nashiri – who had been taken into US custody in 2002 and 2003. The three men were held at secret locations for more than three years before being transferred to the US Naval Base at Guantánamo Bay in Cuba in September 2006, where they remain in indefinite military detention without charge or trial.

Prior to their transfer to Guantánamo, these and other detainees had become the victim of enforced disappearance – also a crime under international law. This must similarly be investigated and those responsible brought to account.

These individuals and other detainees have also made allegations of torture using techniques other than waterboarding. Independent investigations must comprehensively examine these allegations. Waterboarding is not the full story.

The definition of torture under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment includes any act by which “severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession ...”. The CIA Director’s statement placed the agency’s use of waterboarding squarely within this definition. He justified waterboarding as a means to obtaining information from detainees at a time of threat to public safety in the wake of the 11 September 2001 attacks: “We used it against these three detainees because of the circumstances at the time. There was the belief that additional catastrophic attacks against the homeland were inevitable. And we had limited knowledge about al-Qa’ida and its workings.”

This attempt to justify these admitted acts of waterboarding flies in the face of the USA’s treaty obligations. The UN Convention against Torture, ratified by the USA in 1994, states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

The USA must act to ensure that no information obtained under torture or other ill-treatment, including waterboarding, is admitted in any proceedings, except against the alleged perpetrator of the abuse. Concern about this issue is heightened given the US administration’s continuing pursuit of military commission trials in Guantánamo. The rules of these military commissions allow them to admit information obtained under coercion, one aspect of their procedures that flout international law.

The USA must also examine and reveal whether information obtained under torture or other ill-treatment has been used to justify the indefinite detention of detainees. The rules under which the Combatant Status Review Tribunals operate at Guantánamo do not prohibit these bodies from relying on coerced information to affirm an individual’s “enemy combatant” status and therefore, according to the US authorities, justify continued detention. Any such use of such information would be a violation of international law.

The testimony by the two officials suggests that US authorities must already know the identity of the individuals responsible for inflicting these specific acts of torture. In such circumstances, the UN Convention against Torture requires States Parties either to submit the case to its own authorities for the purpose of prosecution, or to extradite the individual to another country who wishes to prosecute. A failure to do one or the other would be a serious violation of the UN Convention against Torture.

Furthermore, under international law any state may exercise universal jurisdiction over anyone suspected of torture no matter when or where it occurred. In particular, each of the other 145 States Parties to the Convention against Torture are under a similar obligation to extradite or submit the case for prosecution.

Finally, it is time for the USA to mean what it says. The government has repeatedly said that it does not countenance torture, but rather champions the struggle against it. In June 2003, for example, President George W. Bush said:

“The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual

punishment. I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy.”

This statement was made a matter of weeks after Khalid Sheikh Mohammed was taken into US custody. As has long been reported and now by the USA’s own admission, he was subsequently subjected to waterboarding.

The USA must end enforced disappearances, secret and indefinite detention. All detainees must be held in strict conformity with international law and standards. Access to due process must be guaranteed. All torture and other cruel, inhuman or degrading treatment must be prevented. Accountability for human rights violations must be guaranteed.

See also:

USA: Law and executive disorder: President gives green light to secret detention program, AI Index: AMR 51/135/2007, August 2007, <http://www.amnesty.org/en/report/info/AMR51/135/2007>.

USA: Slippery slopes and the politics of torture, AI Index: AMR 51/177/2007, 9 November 2007, <http://www.amnesty.org/en/report/info/AMR51/177/2007>.

USA: Destruction of CIA interrogation tapes may conceal government crimes, 7 December 2007, <http://www.amnesty.org/en/for-media/press-releases/usa-destruction-cia-interrogation-tapes-may-conceal-crimes-20071207>.

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