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USA: Another door closes on accountability. US Justice Department says no prosecutions for CIA destruction of interrogation tapes

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...the heat from destroying [the videotapes of Abu Zubaydah's interrogation] is nothing compared to what it would be if the tapes ever got into public domain...out of context, they would make us look terrible; it would be 'devastating' to us

Internal email to CIA Executive Director Kyle Foggo, 10 November 2005

On 6 December 2007, after learning that the media had got hold of the story, the then Director of the Central Agency (CIA), General Mike Hayden, confirmed that the agency had destroyed videotapes of interrogations of detainees held in secret CIA custody. According to official information since released into the public domain, the nearly 100 tapes depicted evidence of the use of so-called "enhanced interrogation" techniques, including "waterboarding", against two detainees – in other words, direct evidence of specific acts of torture and other cruel, inhuman or degrading treatment.

On 9 November 2010, the US Department of Justice announced, without further explanation, that no one will face criminal charges in relation to the destruction of the tapes. The tapes were destroyed on 9 November 2005, the day after the CIA's Deputy Director of Operations Jose A. Rodriguez approved a request to do so. Their destruction occurred more than a year *after* US non-governmental organizations filed a request under the Freedom of Information Act (FOIA) seeking information on the treatment of detainees in US custody in what was then being called the "war on terror" by the USA.

According to a report by the CIA Inspector General in 2004, 92 videotapes of CIA interrogations of Abu Zubaydah (90) and 'Abd al-Nashiri (2) recorded between April and December 2002 were destroyed. The report said that 12 of the tapes depicted use of "enhanced interrogation techniques", including "waterboarding", a torture technique in which water is used to begin the process of drowning the detainee. Abu Zubaydah was subjected to more than 80 applications of water-boarding in August 2002. 'Abd al-Nashiri was subjected to water-boarding in late November 2002.

At the time of these interrogations – and for another four years afterwards – these two men were subjected to enforced disappearance. They were held at various undisclosed locations by the CIA, reportedly including secret facilities in Thailand, Afghanistan and Poland, and held incommunicado and in solitary confinement for their entire time in CIA custody. Both are now held without criminal trial in military detention in the US Naval Base in Guantánamo Bay in Cuba, to where they were transferred in September 2006.

Torture and enforced disappearance are crimes under international law. As such, the destruction of the tapes may have concealed government crimes. Concealing evidence of a crime constitutes criminal complicity. Complicity in torture is expressly recognised as a crime under international law by the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

In a brief statement released on 9 November 2010, the Department of Justice announced that after an “exhaustive investigation” into the matter Assistant US Attorney John Durham had concluded that he would “not pursue criminal charges for the destruction of the interrogation tapes”.

The investigation had begun after the Department of Justice announced on 8 December 2007 that its National Security Division was initiating a preliminary inquiry in relation to the destruction of the videotapes announced by General Hayden. On 2 January 2008, Attorney General Michael Mukasey announced that this preliminary inquiry had been concluded and that there was a basis for conducting a full criminal investigation into the destruction of the tapes. He appointed federal prosecutor John Durham to supervise the investigation. Specifically, the investigation team was to look at whether anyone obstructed justice, made false statements or acted in contempt of court or Congress in relation to the destruction of the tapes. It does not appear that Assistant US Attorney Durham was instructed to consider whether destruction of the tapes constituted complicity in the crime of torture.

In August 2009 Attorney General Eric Holder expanded Assistant US Attorney Durham’s mandate to include a “preliminary review” into some aspects of some interrogations of some detainees held in the secret detention program. That part of the investigation is ongoing. It followed the Attorney General’s review of evidence of the use of “unauthorized” interrogation techniques used against detainees, including ‘Abd al-Nashiri. According to the CIA Inspector General’s 2004 report, these included “potentially injurious stress positions”, the use “of a stiff brush [used in bathing] that was intended to induce pain on Al-Nashiri”, and “standing on al-Nashiri’s shackles, which resulted in cuts and bruises”. In addition, in late December 2002 or early January 2003, an interrogator (“debriefing”) allegedly “used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information... [T]he debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri’s head. On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri... [T]he debriefer entered the detainee’s cell and revved the drill while the detainee stood naked and hooded... During another incident... the same Headquarters debriefer... threatened Al-Nashiri by saying that if he did not talk, ‘We could get your mother in here’, and ‘We can bring your family in here’.”

The “preliminary review” ordered by the Attorney General has been narrowly framed and has been set against a promise of immunity from prosecution for anyone who acted in “good faith” on official 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.

The absence of accountability and remedy for the gross and systematic violations of human rights perpetrated in the CIA secret detention program is being perpetuated by the government’s continuing refusal to disclose further information. The administration is claiming that national security would be threatened by disclosing where detainees were held in secret custody and how they were treated during this time.

The Justice Department’s announcement that there will be no prosecutions in relation to the destruction of the CIA interrogation tapes came on the same day that the memoirs of former President George W. Bush were published. In his book, and in a pre-publication interview, the former President confirmed that he personally authorized the CIA’s use of “water-boarding” and other “enhanced interrogation techniques” in the secret detention program. It was already known that, within a week of the attacks of 11 September 2001, he had authorized the CIA to set up secret detention facilities outside the USA.

Since 2004, Amnesty International has been calling for a full independent commission of inquiry into all aspects of the USA’s detention policies in the counter terrorism context. In the wake of former President Bush’s newly published admissions, the organization has reiterated its call for criminal investigations into

anyone against whom there is evidence of involvement in torture and enforced disappearance, which by his own admission includes the former President.¹

On 9 November 2010, at the UN Human Rights Council in Geneva, the US delegation responded to recommendations made by other governments relating to the USA's human rights record. In the context of accountability for US human rights violations in the context of counter terrorism and armed conflict, the Department of State's Legal Advisor said: "Allegations of past abuse of detainees by US forces in Afghanistan, Iraq and Guantánamo have been investigated and appropriate corrective action taken."² While this brief comment glosses over the degree of impunity and leniency that has been the hallmark of the USA's response to abuses in these locations, it is notable that the statement completely ignores the question of accountability for the crimes under international law committed in the CIA secret detention program.

Amnesty International has stressed that in the absence of the USA conducting the criminal investigations it is obliged to undertake into the torture and enforced disappearance committed in the CIA program, other states should step in and carry out such investigations themselves. Indeed, should former President George W. Bush or any other US official similarly accused of responsibility for torture, including complicity or participation in torture, travel to any one of the 146 other states that are party to the UN Convention against Torture, that country would be legally obliged to arrest or otherwise secure his or her presence, to launch a criminal investigation and to either submit the case for prosecution or extradite the suspect to a state willing to do so.

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¹ See USA: Former President's defence of torture highlights need for criminal investigations, 9 November 2010, <http://www.amnesty.org/en/library/info/AMR51/103/2010/en>, and US must begin criminal investigation of torture following Bush admission, 10 November 2010, <http://tinyurl.com/35vula9>

² Response of the United States of America to Recommendations of the United Nations Human Rights Council, Harold Hongju Koh, Legal Advisor U.S. Department of State, Geneva, Switzerland, 9 November 2010, <http://www.state.gov/s/l/releases/remarks/150677.htm>