



NEVER AGAIN?

LACK OF ACCOUNTABILITY FOR TORTURE INCREASES RISK OF RECURRENCE AND LEAVES USA IN SERIOUS VIOLATION OF INTERNATIONAL LAW

The four hijacked planes may have come out of the blue on that fateful day, but was the USA's descent into torture and enforced disappearance in response to the crime against humanity committed on 11 September 2001 as unpredictable, or as "un-American", as some would have us believe?

This question is important because we are being asked by the US government to trust that these crimes under international law will never happen again. And while, for example, the UN Human Rights Committee has pointed out that in its experience "the problem of impunity" for such violations can "be an important contributing element" to their recurrence, the USA effectively asks us to accept that it is a special case, that its guarantee of non-recurrence does not require accountability – no charges, no prosecutions, no trials, no punishment, and no redress. What happened, we are told, can be put down to fear and an error of judgment in the wake of an unprecedented and traumatic attack that resulted in conduct inconsistent with "American values". But those values endure and will ensure there is no repetition, we are assured.

If nothing else, the lack of accountability and remedy for US crimes under international law is a case of double standards. When Secretary of State John Kerry launched the USA's critique of the human rights records of other countries last year with the words, "Accountability for security force abuses is essential to the realization of the promise of the Universal Declaration of Human Rights", it was as if he had his fingers crossed behind his back. For the USA continues to reserve the right to be the exception that proves that particular rule.

It is now more than four months since the US Senate Select Committee on Intelligence published the summary of its report on the secret detention programme operated by the Central Intelligence Agency (CIA) after the 9/11 attacks. The 500-page document added new detail and confirmed some of the information that was already in the public domain about the systematic human rights violations committed in that programme between 2002 and 2008. Among other things, the summary reveals that in 2003, then CIA Director George Tenet said that "if the general public were to find out about this program, many would believe we are torturers". A dozen years later, many do. And yet they still do not know even the half of it. Among other things, the full 6,700 page Senate Committee report remains classified Top Secret.

Yes, "we tortured some folks", said President Barack Obama four months before the Senate Committee summary was published. And yes, "CIA detainees were tortured", concluded the Committee's Chair in her foreword to the summary. Yet the Committee's work has been met with a resounding silence from the Obama administration in terms of any commitment to ensuring accountability and remedy for these crimes under international law.

National values are part of the narrative, as they have been throughout the post-9/11 period. In a proclamation on international day against torture in June 2004, two months after the Abu Ghraib photos were published, for example, President George W. Bush said that what the photos depicted was "inconsistent with our policies and our values as a Nation." Ten years later, and two months after the Senate Committee summary was published, the Obama administration said much the same thing, telling the United Nations: "Harsh interrogation techniques highlighted in that Report are not representative of how the United States deals with the threat of terrorism today, and are not consistent with our values."

Yet for many years and for many officials and others, the secret detention and interrogation programme was consistent with national values, and is widely defended still, raising the spectre of a return to such activities in an easily imaginable future scenario. “Damn right”, I approved “water-boarding” and other “enhanced” interrogation techniques, George W. Bush wrote in his 2010 memoirs. Yes, “my fingerprints” were “all over” the secret detention programme from its outset”, admitted former CIA chief lawyer John Rizzo in 2014. Yes, “I was responsible” for helping develop and implement the programme of “enhanced” interrogation, added the former head of the CIA’s Counterterrorist Center, José Rodríguez. As for former Vice President Dick Cheney, responding to the Senate Committee’s findings, “I would do it again in a minute”. No apologies there then (public apology is one form of reparation for victims under international law).

In a speech in May 2009, in which he defended the use of mock execution by interrupted drowning (“water-boarding”), the former Vice President addressed the question of domestic values: “Critics of our policies are given to lecturing on the theme of being consistent with American values”, he said, “But no moral value held dear by the American people obliges public servants ever to sacrifice innocent lives to spare a captured terrorist from unpleasant things.” He returned to this in his 2011 memoirs reiterating that he had “challenged the whole assumption that American values were abandoned, or even compromised, in the fight against terrorists. For all that we’ve lost in this conflict, the United States has never lost its moral bearings”. His beliefs – and there is no reason to think they are not held by many others in the USA – illustrate how malleable and subjective the concept of “American values” can be.

Of course many countries will reference national values in their public and political discourse about human rights and security, but when coupled with a reluctance or refusal to apply international law to their own conduct, there can be cause for concern if national and international “values” diverge. The USA is such a country. For example, the now infamous Department of Justice torture memorandums among other things exploited the “reservation” to article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which the USA filed with its 1994 ratification of that treaty. With that reservation, the USA said it only saw itself bound by the international ban on cruel, inhuman or degrading treatment to the extent that it matched its own constitutional bar. This was one of the chickens that came home to roost in the CIA’s “black sites”, after Justice Department lawyers decided that the Constitution (“national values”) allowed water-boarding, stripping, stress positions, sleep deprivation and other “enhanced” techniques against foreign detainees held incommunicado and in solitary confinement in secret CIA facilities. The Obama administration has already told UN treaty monitoring bodies that it has no plans to withdraw this reservation or other limiting conditions to UNCAT or other treaties.

There were many involved in setting the CIA programme up and running it, or turning a blind eye to it as evidence of abuses emerged – from politicians and intelligence officials, to legislators and lawyers, to doctors and psychologists, to interrogators and guards, in the USA and elsewhere. Presumably they believed the programme was consistent with national values. But there is clearly a profound human rights deficit at the heart of government when even senior law officers such as the Attorney General and Solicitor General actively support their country’s systematic use of secret detention, as the Senate Intelligence Committee’s summary shows they did. It might be added, however, that there are echoes of this deficit in the Committee’s own failure even to mention the fact that most if not all of those held in the CIA programme were subjected to enforced disappearance, like torture a crime under international law.

On the day the Senate Committee issued its summary, President Obama expressed “hope” that this limited disclosure “can help us leave these techniques where they belong – in the past”. This had echoes of what he had written to CIA employees in April 2009, namely that they could rest assured that anyone who followed Department of Justice advice in using “enhanced” interrogation techniques would not face prosecution: “Nothing will be gained”, he wrote, “by spending our time and energy laying blame for the past”. Attorney General Eric Holder subsequently added that he shared “the President’s conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these.” No recognition of the fact that international law requires accountability or, as the UN Human Rights Committee has said in relation to obligations under the International Covenant on Civil and Political Rights, which the USA ratified in 1992, albeit with the same reservation it attached to UNCAT’s ban on ill-treatment, “States Parties must ensure that those responsible are brought to justice. 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.” In other words, accountability is a legal requirement, not a policy choice.

In Amnesty International’s view, the US administration is effectively granting a de facto amnesty for crimes under international law, in violation of international law, and is engaging in an executive encroachment on judicial power, in contravention of basic principles guaranteeing independence of the judiciary. This arrogation of judicial function

by the Obama administration can be seen as a continuation of the Bush administration's deliberate and calculated removal of the judiciary from any oversight over the secret detentions in question, during the course of which multiple crimes under international law were committed, crimes which the Obama administration is now effectively insulating from judicial determination of individual criminal responsibility. The USA is squarely on the wrong side of its international obligations and will remain so for as long as it maintains this position.

On truth, the USA fares better, albeit with much room for improvement. When the summary was published, a familiar note of US exceptionalism was in the air. President Obama greeted the report by saying that "one of the strengths that makes America exceptional is our willingness to openly confront our past, face our imperfections..." Senior administration officials added that "as Americans, we are committed to sending a clear message to the world that we support transparency". Yet, the vast bulk of what the Senate Committee found about how detainees were treated remains buried in secrecy in the full report. The White House had itself withheld some 9,400 CIA documents (*documents* not pages) from the Committee relating to the detention programme. But that crimes under international law were committed in that programme is already indisputable. The absence of full truth is facilitating impunity.

In May 2009, President Obama reiterated his opposition to an independent commission of inquiry into detainee abuses on the grounds that "our existing democratic institutions are strong enough to deliver accountability," adding that "Congress can review abuses of our values" and "the Department of Justice and our courts can work through and punish any violations of our laws." The limited investigations the Justice Department has conducted into CIA interrogations were shut down in 2012 without any charges being laid against anyone. Today, the Senate Intelligence Committee's still classified full report of "abuses of our values" is gathering dust in secure facilities, with even the Department of Justice failing apparently to read it, let alone act upon it. The official record of what happened in the "black sites" is still being kept in the dark. Amnesty International will call on the new US Attorney General, when he or she is in post, to rectify this and to prove that the USA is serious when it talks about accountability for human rights violations.

Something else the Senate Committee summary reveals is that in 2005 a proposal from Senator Carl Levin to establish an independent commission of inquiry was gaining support and making the CIA nervous, including about how such an inquiry might unearth its torture tapes. The videotapes in question were destroyed by the CIA in November 2005, the day after the effort to establish a commission failed in Congress. The CIA was not going to get caught out by those tapes again. To date, no one has been brought to account for destroying evidence of crimes under international law – including film of detainees subjected to enforced disappearance being tortured by waterboarding.

Just hoping for non-recurrence of human rights violations is not enough. What happens the next time a President decides that torture and enforced disappearances are necessary in the name of national security? In this regard, President Obama's hope that publication of the summary will prevent the sort of abuses that occurred in the CIA programme from happening again should perhaps be placed alongside what then US Supreme Court Justice William Brennan said more than a decade before the 9/11 attacks:

"[A]s adamant as my country has been about civil liberties during peacetime, it has a long history of failing to preserve civil liberties when it perceived its national security threatened... After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along."

When President Obama admitted last year that "we tortured some folks" in the CIA programme, he at the same time appealed for understanding, suggesting that what had happened could be put down to the fear generated by the 9/11 attacks and the pressure on "patriots" working hard to prevent further attacks. Of course, understanding why human rights violations happen is important in ensuring they do not recur. But in the USA, "understanding" has become part of an official narrative that is interwoven with impunity. As such, it effectively becomes justification. And, coupled with a reluctance to apply international law to its own conduct, it is part of the USA's continuing refusal to slam the door on torture and enforced disappearances and to bolt it shut.

For more information see Amnesty International report, **USA: CRIMES AND IMPUNITY. FULL SENATE COMMITTEE REPORT ON CIA SECRET DETENTIONS MUST BE RELEASED, AND ACCOUNTABILITY FOR CRIMES UNDER INTERNATIONAL LAW ENSURED**, 21 April 2015, <https://www.amnesty.org/en/documents/amr51/1432/2015/en>

APPENDIX: AUTOMATIC WHITE HOUSE RESPONSE

As things currently stand, any member of the public writing to President Obama to call for an end to the impunity and injustice associated with the human rights violations committed in the now-terminated secret detention programme operated by the CIA can expect a reply based around notions of US exceptionalism, national values, and a defence of the hardworking intelligence community, and at the same time should expect no acknowledgment that crimes under international law were committed in the secret detention programme or that international law requires the USA to ensure accountability and redress.

The following is an auto-response from the White House to such an appeal. It was transmitted on 17 April 2015:

"Thank you for writing. Throughout our history, the United States has done more than any other nation to stand up for freedom, democracy, and the inherent dignity and human rights of people around the world. As Americans, we owe a profound debt of gratitude to our fellow citizens who serve to keep us safe, including those in the Central Intelligence Agency (CIA) and others in the intelligence community. Since the horrific attacks of 9/11, these public servants have worked tirelessly to devastate the core of al-Qa'ida, deliver justice to Osama bin Laden, disrupt terrorist operations, and thwart terrorist attacks. Solemn rows of stars on the Memorial Wall at the CIA honor those who have given their lives to protect ours. Our intelligence professionals are patriots, and we are safer because of their heroic service and sacrifices.

In the years after 9/11, with legitimate fears of further attacks and with the responsibility to prevent more catastrophic loss of life, the previous administration faced agonizing choices about how to pursue al-Qa'ida and prevent additional terrorist attacks. Our Nation did many things right in those difficult years, but at the same time, some of the actions that were taken were contrary to our values. That is why I unequivocally banned torture when I took Office, because one of our most effective tools in fighting terrorism and keeping Americans safe is staying true to our ideals at home and abroad.

The report released by the Senate Select Committee on Intelligence details one element of our Nation's response to 9/11 – the CIA's detention and interrogation program, which I formally ended on one of my first days in Office. The report documents a troubling program involving enhanced interrogation techniques on terrorism suspects in secret facilities outside the United States, and it reinforces my long-held view that those harsh methods were not only inconsistent with our values as a Nation, but they also did not serve our broader counterterrorism efforts or our national security interests. Moreover, these techniques did significant damage to America's standing in the world and made it harder to pursue our interests with allies and partners. That is why I will continue to use my authority as President to make sure we never resort to those methods again.

As Commander in Chief, I have no greater responsibility than the safety and security of the American people. We will therefore continue to be relentless in our fight against al-Qa'ida, its affiliates, and other violent extremists. We will rely on all elements of our national power, including the power and example of our founding ideals. That is why I have consistently supported the declassification of the Senate's report. No nation is perfect. But one of the strengths that makes America exceptional is our willingness to openly confront our past, face our imperfections, make changes, and do better.

Rather than provide another reason to refight old arguments, I hope the report can help us leave those techniques where they belong—in the past. Upholding the values we profess doesn't make us weaker, it makes us stronger. The United States must and will remain the greatest force for freedom and human dignity the world has ever known. Again, thank you for sharing your thoughts.

Sincerely,

Barack Obama