

# amnesty international

## UNITED STATES OF AMERICA

### Impunity and injustice in the 'war on terror' From torture in secret detention to execution after unfair trial?

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*As the two men held me down, one on each side, someone began pouring water onto the blindfold, and suddenly I was drowning. The water streamed into my nose and then into my mouth when I gasped for breath. I couldn't stop it. All I could breathe was water, and it was terrifying. I think I began to lose consciousness. I felt my lungs begin to fill with burning liquid. Pulling out my fingernails or even cutting off a finger would have been preferable...Even though I knew that I was in a military facility and that my 'captors' would not kill me, no matter what they threatened, my body sensed and reacted to the danger it was in... Back then, we didn't call it waterboarding – we called it 'water torture'.*

Former US Navy officer, recalling survival training in 1963<sup>1</sup>

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"Yes, torture is illegal. We don't torture": seven words to which all states must adhere. Torture is indeed illegal, and a government's commitment not to use it is surely to be welcomed.

When these words were spoken by the White House spokesman at a press briefing on 6 February 2008, however, they rang hollow. He was responding to questions after official confirmation that the CIA had used "waterboarding" – a form of torture that simulates drowning – against three detainees held in secret custody in 2002 and 2003, and to the revelation that while the technique was not currently authorized, it remained in the CIA's armoury for when "circumstances" required it again. The following day, he said that it was "clear" that even though the law had changed since 2003, it had not changed enough to rule out "waterboarding".

Similarly "on message" in a speech on 7 February, Vice President Dick Cheney said that "the United States is a country that takes human rights seriously.

***Clearly there is a gulf between the rhetoric and the reality. The reality is that, in direct contradiction to its claims to be the global anti-torture champion, the US government has now admitted to being a state that condones torture – one that has used torture and reserves the right to do so again in the future. Hand in hand with this position comes a de facto or deliberate policy of immunity from prosecution for the international crime of torture...***

<sup>1</sup> *Why it was called 'water torture'.* Richard E. Mezo, Washington Post, 10 February 2008.

We do not torture – it's against our laws and against our values".<sup>2</sup> He asserted that the CIA's "tougher program, for tougher customers" complies fully "with the nation's laws and treaty obligations". Not so. Even without water torture and other "enhanced" interrogation techniques that have been used in this program, secret detention flouts the USA's treaty obligations, as two UN treaty monitoring bodies told the US government in no uncertain terms in 2006.

Torture is a crime, full stop. No loopholes. As the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the USA in 1994, states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency may be invoked as a justification of torture". Yet US officials continue to offer such justifications. Khalid Sheikh Mohammed was one of those subjected to water torture in CIA custody. "He and others were questioned at a time when another attack on this country was believed to be imminent", Vice President Cheney said; "It's a good thing we found out what they knew". In a media interview in October 2006, the Vice President had appeared to endorse the use of water torture "if it can save lives".

In 1947, the USA prosecuted such water torture as a war crime.<sup>3</sup> Six decades later, in testimony to the US Senate Select Committee on Intelligence, the National Director of Intelligence, Mike McConnell, said that "waterboarding taken to its extreme could be death. It could drown someone". He nevertheless testified that "it is a legal technique used in a specific set of circumstances". At the same hearing on 5 February 2008, the CIA Director, General Michael Hayden, said that the technique had been used against Khalid Sheikh Mohammed and two other "high value" detainees, Abu Zubaydah and Abd al-Rahim al-Nashiri, "because of the circumstances at the time".

***The administration's resort to torture to fill its intelligence gap leaves it today with a credibility gap, as well as raising questions about criminal liability...***

***In March 2005, the CIA issued a statement asserting that "The truth is...We don't do torture." The truth, like the law, has proved to be an elastic concept in the USA's "war on terror".***

Since the crime against humanity that was committed in the USA on 11 September 2001, Amnesty International has consistently called on the USA to pursue justice and security within a framework of respect for human rights and the rule of law. The US government has instead treated detainees as individuals from whom information could be extracted rather than to whom process was due. Torture and other ill-treatment have been one consequence.

The definition of torture under the Convention against Torture 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...." In his testimony to the Senate Intelligence Committee on 5 February, the CIA Director tried to justify

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<sup>2</sup> Vice President's remarks at the Conservative Political Action Conference, Washington, DC, 7 February 2008, <http://www.whitehouse.gov/news/releases/2008/02/20080207-11.html>.

<sup>3</sup> See, e.g., *Waterboarding historically controversial*. Washington Post, 5 October 2006 ("[I]n 1947, the United States charged a Japanese officer, Yukio Asano, with war crimes for carrying out another form of waterboarding on a US civilian. The subject was strapped on a stretcher that was tilted so that his feet were in the air and head near the floor, and small amounts of water were poured over his face, leaving him gasping for air until he agreed to talk").

water torture as a means to obtain information from detainees at a time of perceived threat to public safety in the wake of the 11 September 2001 attacks, and because the intelligence community "had limited knowledge about al-Qa'ida and its workings." The administration's resort to torture to fill its intelligence gap leaves it today with a credibility gap, as well as raising questions about criminal liability.

Clearly there is a gulf between the rhetoric and the reality. The reality is that, in direct contradiction to its claims to be the global anti-torture champion, the US government has now admitted to being a state that condones torture – one that has used torture and reserves the right to do so again in the future.

Hand in hand with this position comes a *de facto* or deliberate policy of immunity from prosecution for the international crime of torture in relation to the CIA program. At a hearing in front of the US House of Representatives Committee on the Judiciary on 7 February 2008, Attorney General Michael Mukasey was asked whether he was "ready to start a criminal investigation into whether this confirmed used of waterboarding by United States agents was illegal". The Attorney General replied: "No, I am not". He suggested that, because the Justice Department had authorized this water torture technique as part of the CIA program, it "cannot possibly be the subject of a criminal – of a Justice Department investigation, because that would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice".

The Attorney General and the rest of the government must reconsider this position, which flies in the face of the USA's international obligations. Under international law, torture cannot be authorized, condoned or carried out by anyone anywhere. Any government official, employee or contractor who violates this principle – whether lawyer or politician or soldier or interrogator – must be investigated, and where there is evidence of criminal wrongdoing, prosecuted.<sup>4</sup>

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While the US authorities have said that "waterboarding" is not currently authorized as part of the CIA secret detention program, they have said that the technique could again be used if the Attorney General approved its legality and the President authorized it. "Were waterboarding to be brought back into the program", Attorney General Mukasey testified to the House Judiciary Committee on 7 February, the proposal to do so "would have to come initially from the Director of the Central Intelligence Agency and, I believe, the Director of National Intelligence to the Justice Department. And I would have to analyze that question..." Then, in the words of the White House spokesman on 6 February, "the proposal would go to the President, the President would listen to the determinations of his advisors, and make a decision".

<sup>4</sup> In his testimony to the Senate Select Committee on Intelligence on 5 February 2008, the CIA Director said that the CIA's detention and interrogation program "is a governmental activity under governmental direction and control, in which the participants may be both government employees and contractors, but it's not outsourced".

In other words, despite all the assurances that have been given to the contrary, it appears that the President is considered by the administration to have the power to authorize torture. What this means is that the spirit of the now infamous Justice Department memorandum [the Bybee memorandum] of 1 August 2002 lives on, despite that document having been withdrawn after it was leaked in the wake of the Abu Ghraib torture revelations. This memorandum, reportedly produced to give legal cover to CIA interrogators following concern about the methods that had been used against Abu Zubaydah – one of the detainees the CIA Director has now admitted was subjected to water torture – concluded that “under the current circumstances”, necessity or self-defence could justify interrogation methods amounting to torture. It also stated that interrogators could cause a great deal of pain before crossing the threshold to torture; that there was a wide array of interrogation techniques that while qualifying as cruel, inhuman or degrading treatment would not rise to the level of torture and thus not qualify for prosecution under the USA’s anti-torture law; and that in any case the President’s authority as Commander-in-Chief could override the prohibition on torture.

An 18-page Justice Department memorandum of the same date advised the CIA on the legality of “alternative interrogation methods”. This memorandum remains classified. Apparently referring to this document at the House Judiciary Committee hearing on 7 February, Attorney General Mukasey rejected the committee chairman’s request to see it, on the grounds that it “discusses particular techniques that were part of what remains a classified program”. Amnesty International believes that this and all other government documents purporting to provide authorization or legal clearance for secret detention and “enhanced” interrogation by the CIA or other agencies must be declassified, and the circumstances of their preparation made subject to criminal investigation. The government cannot at once try to publicly rely on this legal advice as a form of defence or immunity, while also insisting on keeping the advice secret.

On 30 December 2004, the Office of Legal Counsel of the Justice Department issued an unclassified replacement to the Bybee memorandum. In a footnote, it stated that “While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.” The new document did not repudiate its predecessor’s position that the President could override the prohibition on torture, merely stating that discussion of that issue was “unnecessary” as the President had made it clear that the USA would not engage in torture.

***Other governments have been involved in the CIA’s secret rendition and detention program. Such involvement must not now be compounded by a failure to challenge in the most robust terms the USA’s use and justification of torture.***

The memorandum pointed out that, for example, in June 2004 President Bush had proclaimed that “Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law”, and that a year earlier he had said: “The United States is committed to the world-wide elimination of torture and we are leading this fight by example.” This latter statement was issued only a matter of weeks after Khalid Sheikh Mohammed was taken into US custody. Now by the USA’s own

admission, he was subsequently subjected to a form of torture which the US government continues to condone and for which no one has been held to account.

In March 2005, the CIA issued a statement asserting that "All approved interrogation techniques, both past and present, are lawful and do not constitute torture. The truth is exactly what [then CIA] Director [Porter] Goss said it was: 'We don't do torture.' CIA policies on interrogation have always followed legal guidance from the Department of Justice." Like the Justice Department's December 2004 memorandum, the CIA's statement made no reference to cruel, inhuman or degrading treatment, which is equally and absolutely prohibited by international law.

The "truth", like the law, has proved to be an elastic concept in the USA's "war on terror". As we now know, the CIA has carried out water torture and employed other interrogation techniques or conditions of detention that amount to torture or other cruel, inhuman or degrading treatment. As part of its program of secret detention and transfers – "renditions" – the agency has subjected individuals to enforced disappearance, another crime under international law for which there has been no accountability.

In his address to the Conservative Political Action Conference on 7 February 2008, Vice President Cheney said that President Bush had made "the right decisions" following the attacks of 11 September 2001: "I've been proud to stand by him and by the decisions he's made... [W]ould I support those same decisions again today? You're damn right I would". Those decisions include President Bush putting his signature to a still-classified memorandum to the then CIA Director George Tenet on 17 September 2001. The government has said that this document "pertains to the CIA's authorization to set up detention facilities outside the United States", and "contains specific information relating to the intelligence sources and methods by which the CIA was to implement the clandestine intelligence activity". In December 2007, former CIA agent John Kiriakou indicated that "waterboarding" and other "enhanced" interrogation techniques were approved by the Justice Department and National Security Council in 2002, and he was quoted as adding that "It was a policy decision that came down from the White House."

***Again, other governments must act if the USA refuses to. Even if a torturer believes they can escape justice at home, they should not presume such sanctuary exists for them abroad. There is no international statute of limitations for the crimes of torture or enforced disappearance. Geography must not be a bar either.***

Other governments have been involved in the CIA's secret rendition and detention program. Such involvement must not be compounded by a failure to challenge in the most robust terms the USA's use and justification of torture. It is crucial that other countries press the USA to reject all forms of torture, including waterboarding. As President Bush proclaimed on 26 June 2003, "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." Other governments should take up his call. In the meantime, they must end any cooperation with the USA's secret detention program, and must not transfer any person to US custody where there are substantial grounds for believing he or she would be in danger of being subjected to secret detention or enforced disappearance, torture or other cruel, inhuman or degrading treatment or punishment, or other serious human rights violations.

In his June 2003 statement, President Bush also said: "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." Again, other governments must act if the USA refuses to. Even if a torturer believes they can escape justice at home, they should not presume such sanctuary exists for them abroad. There is no international statute of limitations for the crimes of torture or enforced disappearance. Geography must not be a bar to justice either.

Under international law any state may exercise universal jurisdiction over anyone suspected of torture no matter when or where it occurred. Article 6 of the UN Convention against Torture places obligations on State Parties in the event that someone suspected of torture, attempted torture, complicity or participation in torture, is found to be on their territory. After examining available information, if the circumstances are deemed to warrant it, the authorities must take the alleged perpetrator into custody or otherwise prevent them from absconding, pending criminal or extradition proceedings. On 8 February 2008, the UN High Commissioner for Human Rights, Louise Arbour, told a press conference in Mexico City that in her opinion the practice of "waterboarding" falls squarely under the prohibition of torture. She also noted that "there are several precedents worldwide of states exercising their universal jurisdiction" to enforce the Convention against Torture, "and we can only hope that we will see more and more of these avenues of redress".<sup>5</sup>

***While impunity for human rights violations committed as a part of the CIA program remains a hallmark of the USA's conduct in the "war on terror", the "justice" the United States has in store for a selection of those it has branded as "enemy combatants" threatens to be another. Guantánamo, already a symbol of disregard for international law, may yet be the location for executions after unfair trials. The international community must act to prevent such an outcome.***

While impunity for human rights violations committed as a part of the CIA program remains a hallmark of the USA's conduct in the "war on terror", the "justice" the United States has in store for a selection of those it has branded as "enemy combatants" threatens to be another. Guantánamo, already a symbol of disregard for international law, may yet be the location for executions after unfair trials. The international community must act to prevent such an outcome, and more generally to call for a halt to trials by military commission and an end to detentions at Guantánamo.

The three men whom the CIA has admitted were subjected to water torture – the detainees have made other allegations of torture, but the details remain censored from the record on the grounds of national security – and others subjected to enforced disappearance, torture or other ill-treatment, are themselves accused by the USA of very serious crimes, including involvement in the 9/11 attacks. The USA's failure to bring them to judicial proceedings and its treatment of them during the years in secret and incommunicado detention without charge or trial has nevertheless transformed them from suspects with allegedly high intelligence value to potential witnesses to government crimes.

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<sup>5</sup> UN says waterboarding should be prosecuted as torture. Reuters, 8 February 2008.

On 11 February 2008, the Pentagon announced that charges had been sworn against six of the detainees for their alleged involvement in the 9/11 attacks. It is intending to try all six jointly. A matter of weeks after the UN General Assembly voted for a global moratorium on executions, the US government is once again showing its disregard for the global abolitionist trend by seeking the death penalty against all six men. Amnesty International opposes the death penalty in all cases. While international instruments recognize the fact that some countries still retain the death penalty, they emphasise the heightened importance of any capital trial ensuring strict adherence to fair trial standards. The military commission procedures flout such safeguards.

Five of the six men were held in secret CIA custody for more than three years, becoming the victims of enforced disappearance, before being transferred with nine others in September 2006 to Guantánamo, where they remain virtually incommunicado in the as yet unrevealed conditions of Camp 7. They are 'Ali 'Abd al-'Aziz 'Ali, Mustafa Ahmad al-Hawsawi, Ramzi bin al-Shibh, Walid bin Attash and Khalid Sheikh Mohammed. The sixth is Mohamed al-Qahtani, who has been in Guantánamo for more than five years. He was the subject of a "special interrogation plan" approved by the then US Secretary of Defense Donald Rumsfeld. According to leaked official documents, Mohamed al-Qahtani was interrogated for 18 to 20 hours per day for 48 out of 54 consecutive days in late 2002. He was subjected to intimidation by the use of a dog, to sexual and other humiliation, stripping, hooding, loud music, white noise, sleep deprivation and to extremes of heat and cold through manipulation of air conditioning. A military investigation in 2005 concluded that his treatment "did not rise to the level of prohibited inhumane treatment". Also in 2005, the Pentagon described Mohamed al-Qahtani's interrogation as having been guided by the "strict" and "unequivocal" standard of "humane treatment for all detainees" in military custody. The Pentagon is the department which, along with the President, has overarching authority over the military commission that Mohamed al-Qahtani may now face.

The timing of the charges levelled against these detainees is notable, coming as it does just as the USA's use of water torture is now officially out in the open along with the revelation that videotapes of CIA interrogations have been destroyed, which may have contained clear evidence of such crimes. Amnesty International recalls a previously secret 2003 Pentagon report on interrogations which stated that "the timing of prosecutions" by military commission as well as the openness of any such proceedings would have to be weighed against the need not to publicize interrogation techniques, including the "more coercive" methods. The decision to air the use of water torture – the most notorious of the CIA's interrogation techniques – and to go on the

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public relations offensive justifying it as having “saved lives” after 9/11, could be seen as part of a government attempt to reduce the impact of any such revelations at the time of the trials.<sup>6</sup>

Any such manipulation would form part of a pattern of the US administration’s exploitation of detainee cases to avoid independent judicial scrutiny, whether of trial proceedings, transfers or treatment of detainees, or conditions and lawfulness of detentions. The requirement on the USA to avoid even the semblance of such manipulation – justice must not only be done, but be seen to be done – is one reason why the lack of independence of the military commissions from an executive branch which has authorized and condoned human rights violations makes trials before them so problematic.

The commission system has been established to facilitate convictions on lower standards of evidence than apply in the ordinary courts, and to US citizens accused of similar crimes. For instance, while the commission rules prohibit information known to have been extracted under torture from being used as evidence, they do not prohibit the commissions from relying on information the commission finds to have been obtained by other forms of cruel, inhuman or degrading treatment. Given that the US administration asserts that “waterboarding” is not torture, it is clear that they may try to rely on statements obtained under this technique in the military commissions. If the government’s argument is accepted by the commissions, statements obtained through what is clearly a form of torture may well form part of the evidence at the trials, and may even lead to the imposition of the death penalty against those to whom the torture was applied, even as the perpetrators of that torture enjoy impunity.

We must not let a tendency towards euphemism blind us to reality. Just as “rendition” must not obscure the illegality of the detainee transfers that have criss-crossed the globe as part of the CIA’s secret detention program, or “ghost detainees” be allowed to divert attention from the crime of enforced disappearance, “waterboarding” must be recognized for what it is and always has been: water torture, a crime under international law.

Announcing the charges against the six detainees at a Pentagon press briefing on 11 February 2008, the legal advisor to the convening authority in the Department of Defense Office of Military Commissions, Brigadier General Thomas Hartmann, asserted that every defendant would receive a fair trial, “consistent with American standards of justice”. Over the years, it has become clear that all too often the US government’s use of the term “consistent” drains it of its ordinary meaning. After all, six years ago, in February 2002, President Bush signed a memorandum stating that detainees would be treated “in a manner consistent with” the Geneva Conventions (while omitting any mention of international human rights law entirely). The USA’s treatment of detainees since then has been one of systematic violations of their rights.

President Bush’s first system of military commissions was struck down by the US Supreme Court in 2006 as unlawful under US law and the Geneva Conventions. The revised system authorized under the Military Commissions Act must also be rejected and replaced with proper criminal trials before ordinary courts, where the admission of any information obtained

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<sup>6</sup> *6 Guantánamo detainees are said to face trial over 9/11*, New York Times, 9 February 2008 (“The official added that the military prosecutors had decided to focus on the Sept. 11 attacks in part as an effort to try to establish credibility for the military commission system before a new administration takes the White House next January”).



in violation of the international prohibition of torture and other cruel, inhuman or degrading treatment against anyone other than the torturers themselves, must be absolutely prohibited.

If these substandard military tribunals go ahead, and if they turn a blind eye to the systematic human rights violations that have been committed against detainees, the search for justice for the crimes of 11 September 2001 will be dealt another very serious blow.

### **Recommendations**

Amnesty International makes the following recommendations, reiterating or in addition to those already laid out in the organization's previous reports and communications to the US government. It calls on the authorities to:

- publicly repudiate once and for all "waterboarding" and all other techniques that constitute torture or other cruel, inhuman or degrading treatment under international law; ensure that US law fully reflects the absolute international prohibition on such treatment;
- open a criminal investigation of the CIA's admitted use of "waterboarding", an interrogation technique that clearly violates the international prohibition on torture, and any other instances of internationally prohibited techniques; anyone having authorized, condoned, committed or participated in torture must be brought to justice;
- declassify all government documents purporting to provide authorization or "legal clearance" for secret detention and "enhanced" interrogation by the CIA or other agencies, and to make the circumstances of their preparation also subject to criminal investigation;
- end the use of secret detention immediately and prohibit the use of secret detention by the CIA or any other agency;
- ensure full investigations into all cases of enforced disappearance, as defined under international law, and ensure that anyone against whom there is evidence of involvement in this practice is held to account;
- terminate proceedings by military commission, and charge any detainees who are not to be released and bring them to trial in federal court in full accordance with international standards, without resort to the death penalty.

Amnesty International also calls upon other governments to:

- formally object to the now-admitted use of techniques amounting to torture by the USA, as well as the refusal by the US authorities to rule out resort to torture again in the future, and condemn the refusal of the USA to investigate and prosecute these and other similar acts of torture or cruel, inhuman or degrading treatment;
- exercise universal criminal jurisdiction in the event that any US personnel against whom they determine there is evidence of having authorized, condoned, committed or participated in torture is present on their territory including, in the case of State Parties to the UN Convention Against Torture, taking the measures required by articles 6 and 7 of that treaty.

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