
amnesty international

USA: Accountability for 'war on terror' abuses must be high on new government's agenda

4 December 2008

AI Index: AMR 51/153/2008

US Attorney General Michael Mukasey yesterday indicated that President George W. Bush would not be issuing pre-emptive pardons in the case of officials implicated in torture or other abuses in the "war on terror". If so, this is welcome news. Amnesty International was among a number of organizations that sent a joint letter to President Bush on 3 December opposing resort to any such pardons.¹

Welcome though such news would be, the Attorney General's reasoning gives cause for concern. There is "absolutely no evidence", he said, that "anybody who rendered a legal opinion" on interrogation policies "did so for any reason other than to protect the security in the country and in the belief that he or she was doing something lawful. In those circumstances, there is no occasion to consider prosecution and there is no occasion to consider pardon."

Given what we now know about US conduct in the "war on terror", and the previously secret legal opinions, to accept the Attorney General's reasoning would be to allow the government to perpetrate human rights violations with impunity, so long as they are carried out in the name of national security and the perpetrators claim they did not realise what they were doing was unlawful. Arguments excusing gross human rights violations in the name of national security are historically familiar. Indeed, the inclusion in various treaties of the obligation to bring all perpetrators of torture and similar violations to justice was intended to reject such arguments categorically.

Further, ignorance of the law is generally no excuse or defence for criminal charges. After the incidents of torture and other detainee abuses became widely known, however, the administration and congress enacted a special statutory 'ignorance of the law' defence, seeking to immunize US personnel from the criminal responsibility they otherwise would have faced, to which the Attorney General was likely referring. Yet to the extent this defence further contributes to impunity for crimes under international law such as torture and certain other acts of ill-treatment of detainees, it constitutes a further violation of the USA's international obligations and must be immediately reversed.

In his roundtable discussion yesterday with journalists, the Attorney General declined to give a straight 'yes' or 'no' to the question 'is water-boarding torture?' He said he would not comment because this particular technique "is not part of any program that is currently in existence".

¹ Letter available at <http://www.hrw.org/en/news/2008/12/01/letter-president-bush?print>.

The question is easy to answer, however. Water-boarding – simulated drowning – is torture. Torture can never be justified – by war, threat of war or an emergency of any kind – and is a crime under international law. No loopholes. No euphemisms. No torture.

Yet water-boarding is one of the “enhanced” interrogation techniques that has been used in the USA's secret detention program. Its use was approved by the Justice Department, as was the secret detention program itself, a program in which people have been subjected to enforced disappearance, again a crime under international law.

Since 11 September 2001, the human rights violations committed by US personnel in Iraq, Afghanistan, Guantánamo and elsewhere have been many and varied. Official reviews of detention policies have been piecemeal, have generally lacked independence or the mandate to reach up the chain of command or outside the military, failed to interview victims, failed to apply international standards, and many of their findings remain classified as secret. Much is still un-investigated. Much is still obscured from public view. Accountability remains largely absent, as does remedy for the victims.

The USA is required by international law to respect and ensure human rights, to thoroughly investigate every violation of those rights, and to bring perpetrators to justice, no matter their level of office or former level of office. Victims of human rights violations have the right under international law to effective access to remedy and reparation.

If the USA is to demonstrate that it is genuinely committed to human rights and the rule of law, the new administration and Congress must ensure that truth and accountability are no longer buried under laws or policies that exploit or facilitate secrecy or impunity. The authorities must:

- initiate effective independent criminal investigations, including into crimes under international law such as torture and enforced disappearance, committed by individuals acting for or on behalf of the USA;
- remove potential obstacles in existing US law to successful investigation and prosecution of all such cases;
- establish a comprehensive independent commission of inquiry into the USA's detention policies and practices since 11 September 2001. If and when the inquiry concludes that particular conduct may have amounted to crimes under national or international law not known to be already under investigation, the information gathered should be referred to the appropriate federal authorities with a view to possible prosecution of the individual or individuals concerned;
- ensure redress and remedy for victims of human rights violations.

There is not a single fix that will bring the USA's actions on counterterrorism into compliance with international law. A holistic approach is necessary.

Ending unlawful detentions, including by terminating the secret detention program and closing the Guantánamo detention facility; bringing all interrogation techniques and detention

conditions into full compliance with international law and standards; ensuring access by detainees to lawyers and the courts; and ending the use of diplomatic assurances to facilitate the transfer of detainees to situations of real risk of serious violations of human rights, are among the steps that must be taken to ensure present and future compliance with international law. Such steps must accompany the measures necessary to ensure full accountability for past violations.

For further information, please see: *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>.

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM
