

U.S. Accountability: The Difficult But Necessary Task

Recently disclosed Justice Department memorandums and a Senate Armed Services Committee report make it clear that torture and cruel, inhuman or degrading treatment were part of U.S. policy and practice for interrogation of terrorism suspects. While former government officials are now forced to shift from denial to justification of such policies, two questions come to the fore: “What is to be done about what is known?” and “What is still hidden from public view?” The first 100 days of the Obama administration marked a turn away from past policy but did not resolve these questions. They can best be answered by appointing a special prosecutor and establishing an independent commission of inquiry.

Despite the revelation of new, detailed information about U.S. policy sanctioning abusive treatment of detainees, some officials oppose the appointment of either an independent commission or a prosecutor. Political interests are overshadowing the seriousness of the acts involved and the moral and legal principles breached. Turning a blind eye always has an enormous appeal to elected officials, especially when a nation’s agenda is crowded with urgent priorities—including economic growth and opportunity. However, ICTJ’s global experience in efforts to deal with the legacy of serious human rights abuses establishes that the better course is to take on this difficult but necessary task. Even the most sincere efforts to focus forward will find that the legacy of the past casts a long shadow into the future, affecting credibility, trust and the rule of law both domestically and internationally. “Closing the door” on serious crimes such as torture is an illusion at best.

Countries such as Chile, Peru, and South Africa have dealt with torture and other serious crimes while solidifying, rather than sacrificing, a commitment to democratic and human rights values. Those countries initially faced arguments against accountability similar to claims now made in the United States: that the facts are known, that actions were justified, that looking into abuses is politically divisive, and that the priority is moving forward. Yet, transformative leaders in these countries understood that change was not possible without looking back and taking steps toward accountability. In so doing, those societies learned that the dimension of crimes was in fact not fully known, that political justifications had to cede to legal standards, and that divisions were pre-existing and could not be overcome without the full facts and a commitment to justice.

The U.S. Department of Justice now has sufficient information to warrant a criminal investigation of those who drafted the memos and those who commissioned and approved the underlying policies. Attorney General Holder has stated that, “We are going to follow the evidence, follow the law and take that where it leads.” It is time to take those steps to uphold the rule of law

ICTJ RECOMMENDS:

- **Appointment of a Special Prosecutor** to investigate specific crimes, with an emphasis on those most responsible for systematic abuses.
- **Creation of an independent, nonpartisan commission of inquiry**, preferably outside of Congress, to pull together all of the threads of investigations to date, focusing not only the use of torture and cruel, inhuman and degrading treatment but other detention-related policies and actions that run afoul of U.S. commitments under domestic law and international treaties.
- **Continued declassification of information to promote accountability** and full documentation of abuses, particularly with regard to detention-related policies and practices.
- **Other accountability efforts**, including action by professional and governmental ethics committees, institutional reforms, and reparative justice.

and to acknowledge the seriousness of criminal acts exacerbated precisely because of their origins in a stated and systematically implemented policy. To avoid any implication of conflict of interest, justice would be best served by appointing a special prosecutor.

While the Obama Administration's transparency in disclosing documents is welcome, the information now available gives a false impression that all the facts are known, at least on the limited subject of detainee treatment. But we do not know how these decisions were taken, how lawyers interacted with civilian leaders, or how information was conveyed up and down the relevant chains of command in the military and CIA or across agencies. We do not know the specifics of the role of contractors and proxy agents in carrying out detentions, renditions and interrogations. We do not know the dimension of the crimes that could be revealed through disclosure of individual interrogation plans for hundreds of captured detainees in Guantanamo, Afghanistan, Iraq and other detention sites. We do not know all the facts about the effects of the use of torture and cruel and inhuman treatment on detainees. We do not know how the detainees—many of them cleared of being terror suspects—have fared; in fact, their voices, with rare exception, have not been heard by a U.S. audience. Only with a complete picture can appropriate reforms be made to address the abuses that have occurred and ensure prevention and accountability in the future.

Contemplating accountability in terms of a single choice is not helpful. Both criminal prosecutions and a commission of inquiry are important. Prosecutions reinforce legal standards and credibility in the rule of law, and can establish individual accountability of those with the greatest responsibility for serious crimes. Inquiries provide a comprehensive picture of the system behind abuses and the connections involved across institutions, as well as the human and political consequences of policy and actions.

Facts indicating that serious crimes have been committed require unflinching action; statutes of limitation demand that this occur without further delay. An overarching examination by a respected and independent panel will be necessary to piece together the fragments of information that have come to light and to find out what remains unknown about policies and actions that violated domestic and international laws applicable to the U.S. Both of these avenues of accountability are necessary to ensure that the nation can look forward with clarity and move forward with credibility. Such a course not only serves the United States and its place in the world; it moves the debate away from partisan politics to focus on the seriousness and illegality of torture and other abuses that can no longer be denied.

2009

*"Contemplating accountability
in terms of a single choice
is not helpful. Both criminal
prosecutions and a commission of
inquiry are important."*