

HUMAN RIGHTS WATCH

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July 20, 2009

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Attorney General Holder:

I am writing to express Human Rights Watch's strong support for opening a criminal investigation into abusive interrogation practices by the US government since the attacks of September 11, 2001.

The possibility that the Justice Department might investigate the use of torture and other ill-treatment of detainees is encouraging and important. The United States cannot truly claim to have repudiated these egregious human rights violations unless it returns to the day when it treated them as crimes rather than as policy options. A criminal investigation would send the strongest possible signal that the US government is committed to foreclosing any future reliance on these abusive practices.

We would urge you, in defining the scope of such an investigation, to ensure that it reaches the officials most responsible for serious abuses. In particular, we would encourage you not to limit the investigation to low-level personnel who may have employed unauthorized interrogation techniques, but rather to look to the senior officials who planned, authorized, and facilitated the use of abusive methods that were in violation of US and international law. Any investigation that failed to reach those at the center of the policy, while pinning responsibility on line officers, would lack credibility both domestically and internationally.

The Urgent Need for a Criminal Investigation

During the years that followed the September 11 attacks, the US government's consistent disregard for human rights in fighting terrorism diminished America's moral authority, set a negative example for other governments, and increased anti-American militancy around the world. In particular, the CIA's use of torture and other ill-treatment, enforced disappearance, and secret prisons, among other abusive practices, was

illegal, morally wrong, and counterproductive. These practices tainted the reputation and standing of the US government, hampered foreign intelligence cooperation, and sparked anger and resentment among communities whose assistance is crucial to the success of future intelligence activities.

By abolishing secret CIA prisons and banning the use of torture, President Barack Obama has already taken important steps toward setting a new course. But this effort to renew America's commitment to democratic values and human rights requires his administration to confront the past as well. Only by dealing appropriately with past abuses will the US government be understood as having surmounted them.

As you know, torture and other cruel, inhuman or degrading treatment are serious crimes under both US and international law. In the past, individuals who employed interrogation techniques identical to those employed by the Bush administration were prosecuted in US civilian and military courts. Given the abundant and compelling evidence that US officials authorized treatment that is widely considered to be torture, a criminal investigation is clearly required. Such an investigation should be fair, thorough, and untainted by political considerations.

It is true that in the United States today, as in countries that have come to grips with torture and other serious human rights violations by government officials, there are countervailing political pressures. Some commentators claim that any effort to address past abuses would be politically divisive, and might hinder the administration's ability to achieve pressing policy objectives.

This position ignores the high cost of inaction. Any failure to carry out an investigation into torture and other ill-treatment will be widely understood as purposeful toleration of illegal activity—and as a way of leaving the door open to future abuses. It will demonstrate to the nation and to the world that, despite promises of institutional reform, the Justice Department is unable to insulate itself from political influence. It will also be understood as an indication that the communities whose members were subjected to these abuses—Muslim, Arab, and South Asian populations—do not enjoy the equal protection of the criminal justice system.

In contrast, the benefits of carrying out a fair and objective criminal investigation are numerous. Such an investigation would send the clearest possible signal that the US government is committed to repudiating the use of torture. It would restore US moral authority in a far more concrete and persuasive way than any initiative to date. It would demonstrate a commitment to upholding US legal obligations under international law, thereby setting a compelling example for foreign governments that the United States criticizes for tolerating or encouraging human rights violations. It might reveal legal and institutional failings that led to the use of abusive methods, pointing to ways to improve the government's effectiveness in fighting terrorism. Finally, it would sharply reduce the likelihood of foreign prosecutions of US officials based on the principle of universal

jurisdiction, since those prosecutions are generally predicated on the US government's failure to act.

The Scope of the Investigation

It is important to consider carefully the scope of an investigation into interrogation abuses. Given limited prosecutorial resources, it is understandable that the Justice Department would seek to focus on alleged perpetrators who bear the greatest legal responsibility for abuses, and whose legal liability is clearest.

We are concerned, however, that a mistaken understanding of these considerations may lead the Justice Department down the wrong path. According to media reports, the proposed investigation would focus only on persons who employed so-called "unauthorized" interrogation techniques, that is, practices that went beyond what was allowed under legal advice provided by the Justice Department at the time.

The problem is that the legal advice in question—contained in memoranda drafted by the Justice Department's Office of Legal Counsel (OLC)—itself authorized torture and other ill-treatment long recognized and prosecuted as such by the US government. It purported to give legal sanction to practices like "waterboarding," in which prisoners were put through the agony of near-drowning, as well as long-term sleep deprivation, violent slamming into walls, prolonged exposure to heat and cold, and confinement in small, dark boxes.

A prosecution strategy may take into account that under US law, officials who acted in good faith reliance upon official statements of the law generally enjoy qualified immunity from prosecution before US courts. However, the Justice Department should not embrace the sweeping view that officials implicated in torture and other ill-treatment explicitly contemplated under OLC memoranda are thereby protected from criminal prosecution. This is especially true with respect to senior officials who were responsible for planning, authorizing and implementing the interrogation program.

For the Justice Department to take such a position would risk validating the previous administration's cynical legal strategy, which sought to negate criminal liability for wrongdoing by preemptively constructing an elaborate set of legal defenses. These now-discredited memoranda were corrosive of public confidence in the law, suggesting that those with political power are free to reinterpret settled law to exonerate themselves from responsibility for criminal acts. Such a Justice Department position would also risk validating the bizarre definition of torture put forward in the OLC memoranda—leaving unchallenged the notion that waterboarding someone 12 minutes a day is acceptable, but doing so for 13 minutes is a crime. It would also be contrary to US legal obligations under international human rights and humanitarian law.

Eventual decisions to prosecute are of course subject to prosecutorial discretion. In assessing whether those who claimed to rely on OLC guidance in devising and

implementing manifestly unlawful policies acted in “good faith,” the Justice Department will need to inquire critically into whether a reasonable person at the time these decisions were made would be convinced that such practices were lawful. It is doubtful that cases involving the most serious abuses will pass this test. It is especially unlikely that senior officials who were responsible for authorizing torture will be protected under this calculus, particularly if they were instrumental in pressing for legal cover from the OLC, or if they influenced the drafting of the memoranda that they now claim protect them.

This issue highlights our main concern with the proposed investigation as reported in the media. For the Justice Department to focus primarily on investigating the actions of low-level interrogators would be a mistake: it would reflect a fundamental misunderstanding of how and why abuses took place. The CIA interrogation program, in particular, was a top-down enterprise: it involved senior US officials who were responsible for formulating, authorizing, and supervising the use of torture and other ill-treatment.

To go after low-level operatives—to try to pin the blame on a few “bad apples” as the Bush administration did following Abu Ghraib—would be seen both as unfair and as a vindication of the abusive interrogation program. The net result of such an investigation would not be a victory for the rule of law, but rather painful new questions and demands for further action.

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As you know, several treaties ratified by the United States, including the 1949 Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, require that all states investigate and, if appropriate, prosecute those responsible for serious international crimes such as torture and cruel, inhuman or degrading treatment. By opening an investigation into the grave abuses carried out since September 11, you would begin the process of bringing the United States into line with its international obligations, and remedying the harm done to the US reputation abroad by its use of torture.

Thank you for your attention to these important issues.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Kenneth Roth". The signature is written in a cursive, somewhat stylized font.

Kenneth Roth
Executive Director