

Dismantling the Legal Architecture of Impunity: A Necessary Step Towards Torture Accountability in the United States

Today, the prospect of prosecuting senior officials for torture is considered politically unimaginable in the United States. *Our job is to make it imaginable.* The Committee Against Torture, in its role as treaty monitor, is uniquely placed to help in this effort by making clear that torture-authorizing leaders cannot declare themselves to be above the law.

A Head of State Authorized Torture.

U.S. civilian and military leaders, including former head of state, President George W. Bush, created a program of torture breathtaking in scope, drawing in the people and governments of at least 54 other nations—including Denmark, Georgia, Italy, and Morocco.

The Program Relied on Legal Architecture to Shield Torturers from Liability.

The fear of prosecution was pervasive among both senior-level officials and those responsible for implementing the torture program. To address this, political leaders worked with lawyers and doctors to create a sophisticated system of legal cover aimed at shielding people at all levels from criminal responsibility for authorizing or committing acts of torture.

The Golden Shield: Lawyers and Doctors in Collusion

Government lawyers authored legal opinions that distorted beyond recognition the laws against torture to produce the result desired by those at the top: a legal stamp of approval on waterboarding, prolonged sleep deprivation, forced nudity, and other techniques clearly prohibited by the Convention Against Torture.

Medical professionals were brought in to calibrate the suffering of prisoners, and more importantly, to inoculate the torture program authors and actors from liability. The lawyers argued that the doctors' mere presence would prove the lack of intent required to constitute torture. The system in turn would then allow the doctors to invoke the lawyers' guidance in their own defense.

According to a former Justice Department attorney, the CIA called these memos the *Golden Shield*.

Retroactive Immunity: Congress

The executive branch worked with Congress to erect the second pillar of this legal architecture of impunity: the Military Commissions Act of 2006, which retroactively redefined war crimes so as to impede the prosecution of those responsible for them.

The United States Continues to Legitimize Impunity.

Although President Obama withdrew the Bush-era legal advice in 2009, his administration has legitimized this legal architecture of impunity:

- by declining to prosecute anyone who acted within the confines of what the lawyers purportedly authorized—despite President Obama’s recent admission that these constituted techniques that “any fair-minded person would believe were torture” and
- by failing to prosecute and thereby effectively immunizing those responsible for authorizing and enabling manifestly illegal acts of torture.

The result is impunity for torture on a global scale and a massive derogation from the absolute prohibition on torture. It was recognized as early as Nuremberg that such legal maneuvering cannot excuse torture and other war crimes.

SUGGESTED RECOMMENDATIONS:

The Committee is concerned that despite significant evidence that senior civilian and military officials authorized torture, the State party appears not to have impartially investigated those acts. The Committee is further concerned that the State party is setting a dangerous precedent by shielding from investigation and prosecution officials who authorized torture and officials who issued legal advice that justified torture. In the Committee’s view, this amounts to the State party recognizing a defense to torture that is inconsistent with the absolute prohibition in Article 2. The Committee is also concerned that the State party has shielded officials from liability through jurisdiction-stripping mechanisms such as the Military Commissions Act of 2006.

The State party should promptly and impartially investigate senior officials for their authorization of acts amounting to torture without regard to whether those acts fell within the scope of legal advice, consistent with the absolute prohibition on torture. The State party should also investigate the responsibility of lawyers who gave legal pretexts for manifestly illegal conduct. Finally, the State party should stop using mechanisms to actively shield liability for these crimes, and revoke any statutes, such as the MCA, that prevent torture victims and survivors from obtaining redress.

POSSIBLE QUESTIONS:

1. Does the State party rely on Justice Department legal advice as a basis for not investigating the criminal responsibility of the senior-level officials who authorized acts of torture, including waterboarding? If so, how does the State party reconcile this position with the absolute nature of the prohibition against torture in Article 2 of the Convention?
2. Does the State party rely on the Military Commissions Act of 2006 as a basis for not investigating the criminal responsibility of the senior-level officials who authorized acts of torture, including waterboarding? If so, how does the State party reconcile this position with the absolute nature of the prohibition against torture in Article 2 of the Convention?
3. Does the United States consider there to be obstacles under U.S. law to prosecuting a former president under the federal extraterritorial torture statute (18 USC § 2430A)?

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FULL SHADOW REPORT: <http://hrp.law.harvard.edu/wp-content/uploads/2014/10/CAT-Shadow-Report-Advocates-for-US-Torture-Prosecutions.pdf>